Consumer Federation of America

Mark Calabria, Director
Federal Housing Finance Agency
400 Seventh Street, SW
Washington, DC. 20219

January 8, 2021

Re: Prior Approval for Enterprise Products Proposed Rule
RIN 2590-AA17, 85 FR 71276 (Nov. 9, 2020)

Dear Director Calabria,

On behalf of the Consumer Federation of America and our members, thank you for providing the opportunity to comment on the Federal Housing Finance Agency's (FHFA) proposed rulemaking, RIN 2590-AA17, Prior Approval for Enterprise Products. The Consumer Federation of America (CFA) is a nonprofit association comprised of more than 300 national, state, and local organizations who actively represent pro-consumer interests in the financial markets through research, advocacy, and education; CFA, and our members, have been fulfilling that mission since our founding in 1968. For the reasons explained in this letter, we write to express our concerns with the Agency's proposal. Specifically, our comment recognizes three key concerns with proposed rulemaking, as currently drafted:

(1) We are concerned that the proposed rule, as written, errs by making public notice and comment requirements subject to the FHFA Director's discretion when the statute makes those same requirements mandatory;

(2) We are concerned that the proposed rule, as written, appears to expand the timeframe for the FHFA to decide whether to approve a "New Product" beyond the period established by statute, while delaying the start of the timeframe applicable to the statute's sunshine requirements of public notice and comment; and

(3) We believe that the final rule should include a time limitation on the FHFA's determination that a "Notice of New Activity" is complete and, as a Result, is deemed to be received under 12 U.S.C. §4541(e)(2(A).

While each of these concerns presents a significant obstacle to finalizing the proposed rule as currently written, we also acknowledge that the proposed rule gets some things right—namely, by recognizing that modifications to underwriting terms and conditions and, as a result, pilot programs that include modifications to underwriting terms and conditions should not be subject to the FHFA prior approval process contemplated by 12 U.S.C. §4541. This exclusion represents a critical mechanism for allowing the Enterprises the flexibility and adaptability needed to pursue their public missions.

I. Statutory Background

In enacting 12 U.S.C. §4541, Congress sought to increase both regulatory oversight over the Enterprises' new product offerings along with public transparency and feedback on those offerings. At the same time, the statutory provision implicitly recognizes the need to ensure that the prior approval process does not work to impede the facilitation of the Enterprises' business offerings and activities through prolonged regulatory-approval delays and unnecessary regulatory micromanagement. Thus, the framework created by the statute seeks to strike a balance between these concerns by distinguishing between the prior approval required of initial offerings of a product,[1] an advance notice requirement for any "new activity," [2] and the blanket exclusion from prior approval or notice requirements for the enterprises' automated loan underwriting system,[3] modifications to the mortgage terms and conditions or mortgage underwriting criteria,[4] and "substantially similar" activities.[5]

In response to Congress's passage of 12 U.S.C. § 4541 as part of the Housing and Economic Recovery Act of 2008,[6] the FHFA enacted an interim final rule in 2009 implementing the prior approval requirements.[7] The current proposal, if finalized, would replace that interim rule.

II. As Written, the Proposed Rule Errs By Making Public Notice and Comment Requirements Subject to the Director's Discretion When the Statute Makes Those Same Requirements Mandatory.

Under 12 U.S.C. §4541, the Director of the FHFA is required to publish notice of the Enterprises Request for Approval of an initially offered product, solicit public input, and establish the period for public comment.[8] In contrast, the proposed regulation states that "[a] New Product is any New Activity ***that the Director determines merits public notice and comment***...." [9] Specifically, by defining the term "New Product" to include a grant of discretionary authority for the Director to decide when Public Notice and Comment will apply, the proposed rule appears to circumvent Congress's requirement that all enterprise offerings classified as new products be subject to public notice and comment requirements. This effort is inconsistent with the statute's language and, as a result, exceeds the FHFA's legal authority.

12 U.S.C. § 4541(c)(2) states the following:

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[1] See 12 U.S.C. § 4541(a) ("The Director shall require each enterprise to obtain the approval of the Director for any product of the enterprise before initially offering the product.").
[2] 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....."
[3] See 12 U.S.C. § 4541(e)(1)(A).
[4] See 12 U.S.C. § 4541(e)(1)(B).
[5] See 12 U.S.C. § 4541(e)(1)(C).
[6] (Pub. L. 110–289, 122 Stat. 2654).
[7] *See* Interim Final Rule, at 74 FR 31602 (July 2, 2009), 12 CFR § 1253.
[8] 12 U.S.C. §4541(c)(2).
[9] Notice for Proposed Rulemaking, §1253.4(a). *Id*. at p.33 of the proposal. (Emphasis added).

> Immediately upon receipt of a request for approval of a product, as required under paragraph (1), the Director ***shall*** publish notice of such request and of the period of public comment pursuant to paragraph (3) regarding the product, and a description of the product proposed by the request. The Director ***shall*** give interested parties the opportunity to respond in writing to the proposed product.[10]

A statute's terms should be given their plain and ordinary meaning.[11] By definition, the word "shall" is "used in laws, regulations, or directives to express what is mandatory."[12] This plain language interpretation of the term used in 12 U.S.C. § 4541(c)(2) is contextually supported by the FHFA's own previous interpretation of the provision that accompanies the current, interim final rule. Specifically, the FHFA has previously noted that, while the statute grants the FHFA discretion in determining whether new activities—in fact—constitute initial product offerings, the Agency's previous interpretation does not similarly grant the Director discretion to determine whether public comment is warranted once the Agency's determination is made. Instead, FHFA's commentary accompanying the current interim rule implementing section 1123 of the Housing and Economic Recovery Act of 2008 (HERA) notes that:

> ***[O]nce FHFA determines that a new activity is a new product, FHFA will publish notice along with a description of the new product for a 30- day public comment period***, unless the Director determines that delay associated with first seeking public comment is contrary to public interest. Where the Director determines that exigent circumstances exist such that delay associated with seeking public comment is contrary to public interest, the Director may consider and temporarily approve the new product without providing an advance public comment period. In such circumstances, the Director will provide for a public comment period after granting the Temporary Approval.[13]

Unlike the interim final rule, the current proposal fails to provide for mandatory advance public notice and comment unless the Director determines that the statutory exceptions justifying a temporary approval apply. As a result, the current proposed rule significantly weakens the public notice and comment mandates that Congress included in 12 U.S.C. § 4541(c)(2) without:

> (1) any specific explanation from the FHFA acknowledging the change,

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[10] Emphasis added.

[11] *See, e.g.*, Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607 (1980) (plurality opinion) (applying plain meaning cannon to interpret the term "feasible").

[12] "Shall." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/shall. Accessed 21 Dec. 2020.

[13] **Federal Register**/Vol. 74, No. 126/Thursday, July 2, 2009/Rules and Regulations , **FEDERAL HOUSING FINANCE AGENCY, 12 CFR Part 1253 RIN 2590–AA17, Prior Approval for Enterprise Products (emphasis added).** (fix cite)

(2) identifying the legal authority permitting the change from mandatory public notice and comment to public notice and comment in the Director's discretion, or

(3) explaining the rationale behind the Agency's decision to change its implementation of the requirement from the existing approach established by the interim final rule that adopted a mandatory public notice and comment requirement for all "new products."

Given the absence of this information from the current proposal, we strongly believe that it would be inappropriate for the Agency to proceed with adopting its currently proposed definition of a "New Product" in section 1253.4, which includes the language "[a] new Product is any New Activity that the Director determines merits public notice and comment…."[14] Accordingly, we urge the FHFA to remove this language from the final proposal to ensure that the regulations implementing 12 U.S.C. §4541 are consistent with the spirit of the law and Congress's intent to ensure increased public transparency and opportunity to comment on the Enterprises' product offerings.

III. As Written, the Proposed Rule Appears to Expand the Timeframe for the FHFA to Decide Whether to Approve a New Product Beyond the Period Established by Statute, While Delaying the Timeframe Applicable to the Statute's Sunshine Requirements of Public Notice and Comment.

By defining the term "New Product" to be "any New Activity that the Director determines merits public notice and comment," the proposed rule also invites confusion about the statutory distinction between the commencement of approval timeframes for initial product offerings and new activities. Specifically, 12 U.S.C. 4541(c)(2) and (3), note that a 30-day public comment period should occur "[i]mmediately upon receipt of the request for approval of a product." The proposed rule, however, would impose a potential 15-day delay on the public notice and comment requirement by granting the Agency, rather than the Enterprises, the ability to make the initial classification of whether its proposal constitutes a new product or a new activity. In explaining its rationale, the FHFA states the following:

> The Act has separate provisions for a request for prior approval of a new product and for a notice of a new activity that the Enterprise does not believe to be a new product. However, FHFA does not believe that it is practical to require an Enterprise to identify a new product in advance—as distinct from a new activity that is not a new product—for purposes of determining which type of submission to make to the Agency. For that reason, the proposed rule provides for a unified notice process which requires an Enterprise to make a single form of submission—a Notice of New Activity. A single submission will also streamline the review conducted by the FHFA.[15]

[14] Notice of Proposed Rulemaking at § 1253.4 (a).
[15] Notice of Proposed Rulemaking at 9. (Need FR citation).

While there may be validity to the Agency's rationale that a single submission will streamline its review, it is clear that the consequences of the agency's proposal will be to establish a 45-day review period for its assessment of product offerings under a statute where Congress has explicitly granted the Agency only 30 days to complete that analysis, while simultaneously delaying the statute's sunshine requirements by precluding the "immediate" publication of public notice and commencement of the public comment period by as much as 15 days. None of these consequences are addressed by the Agency's discussion of its proposal in the Notice of Proposed Rulemaking. As a result, it is unclear whether FHFA has properly considered these consequences or determined that it, in fact, has the legal authority to deviate from the statutory requirements that 12 U.S.C. § 4541 imposes on each of these matters. Accordingly, the Agency's analysis of the proposed rulemaking appears to be incomplete and suggests that the FHFA's effort to finalize its rule on the Prior Approval of Enterprise Products may be premature.

IV. The Final Rule Should Include a Time Limitation on the FHFA's Determination that a Notice of New Activity Is Complete and, As a Result, Is Deemed to Be Received Under 12 U.S.C. §4541(e)(2(A).

Under the authorizing statute, the current interim final rule, and the proposed rulemaking, there is no set timeframe for how many days FHFA may take to determine whether a notice of new activity is complete and, as a result, is deemed to have been received for the purposes of triggering the statutory timelines for the Agency's determination of whether an activity is properly classified as a product and the public notice and comment requirements for new product offerings. We believe that the spirit of the statute, however, supports the idea that the FHFA should impose a time limitation on its review of the completeness of any required notice.

As noted by another commentator, the National Association of Homebuilders, "[a]llowing FHFA unlimited time to notify the Enterprises that a submission is complete and received practically renders moot the expedited 15[-]day review of a complete package to make a determination about the need for prior approval."[16] Moreover, we agree that,"[r]eviewing a submission to determine if it is complete, also requires a certain degree of review of the activity itself."[17] Accordingly, the failure to impose a timeframe on the FHFA's determination of the completion of a notice of new activity, under the currently envisioned process, has the added consequence of delaying and depriving the Agency of the public input and transparency requirements that the underlying statute sought to include as a core component of the Agency's deliberative process for new products. Therefore, we believe that it is essential that any final rule implementing the Agency's prior approval of products include an abbreviated timeframe for certifying the receipt of a complete package. In making this recommendation, we are mindful of the fact

[16] National Association of Homebuilders, Notice of Proposed Rulemaking: Request for Comments, Prior Approval for Enterprise Products. (submitted December 23, 2020) at p. 5.
[17] *Id*.

that the FHFA inherently possesses the authority to decline to approve a new product or classify an enterprise notice as pertaining to either a new activity or product on the basis that submission of information provided by an Enterprises' notice fails to provide the Agency with an adequate basis for making its determination.[18]

V. Conclusion

Like the FHFA, we recognize the importance of increasing both regulatory oversight and public feedback on the Enterprises' product offerings. As government-sponsored entities with public statutory missions, the need for both the public and the Enterprises' regulator to have an advance opportunity to weigh in on new offerings that the entities seek to undertake represents a necessary check designed to ensure the enterprises' accountability. Accordingly, we applaud FHFA's efforts to establish specific and transparent guidelines for the Enterprises to submit a notice of new activity and request for prior approval of new products as required by the Safety and Soundness Act. However, to the extent that the proposed rule seeks to render public notice and comment requirements discretionary or circumvent the timelines imposed by the statute, we urge the Agency to rethink its proposal. Mandatory public notice and comment in a timely fashion is an essential component of the increased transparency and oversight established by Section 1123 of the Housing and Economic Recovery Act of 2008. FHFA has provided no rationale or legal basis for interpreting any of Congress's mandates, in these respects, to be discretionary.

Thank you again for providing us with the opportunity to express our views on the FHFA's proposed rulemaking.

Sincerely,

Mitria Spotser

Mitria Spotser,
Director of Housing Policy

[18] *See* 12 U.S.C. § 4541(c)(1) (granting the Director of the FHFA authority to require "a written request for approval of a product that describes the product in such form as prescribed by order or regulation of the Director); *see also* 12 U.S.C. § 4541(e)(2)(A) (granting the Director of the FHFA authority to establish, by regulation, the form and content of" a written notice of a new activity.