



MORTGAGE BANKERS ASSOCIATION

January 8, 2021

The Honorable Mark Calabria
Director
Federal Housing Finance Agency
400 7th Street, SW
Washington, DC 20219

RE: Prior Approval for Enterprise Products

Dear Director Calabria:

The Mortgage Bankers Association (MBA)¹ thanks the Federal Housing Finance Agency (FHFA) for the opportunity to comment on its proposed rule regarding prior notice and approval for new activities and products in which Fannie Mae and Freddie Mac (the Enterprises) engage.² MBA appreciates FHFA's efforts to clarify the process by which potential new single-family and multifamily Enterprise products are evaluated, as well as to ensure valuable opportunities for public input on these potential new Enterprise products.

As the Enterprises continue to partner with other market participants to develop innovative new activities and products, it is important that the processes by which these measures are undertaken are fair, transparent, and supportive of the overall market. MBA considers adoption of this approach to be one of many much-needed market conduct reforms essential to a healthy, post-conservatorship secondary market. These views were expressed recently in MBA's response to the FHFA Strategic Plan for Fiscal Years 2021-2024.³

As discussed in the proposed rule, FHFA enhances its ability to exercise its statutory authority to address the opportunities and risks associated with new Enterprise activities and products by implementing a more robust review process for these offerings, including more transparent evaluation criteria and pilot design parameters. Together, these steps can appropriately balance the need to allow for Enterprise innovation with the need for the Enterprises to support the broader market, while remaining faithful to the limitations set forth in their public charters.

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, DC, the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,100 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, credit unions, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

² FHFA, "Prior Approval for Enterprise Products" 85 Fed Reg. 71276 (Nov. 9, 2020). Available at: <https://www.federalregister.gov/documents/2020/11/09/2020-23452/prior-approval-for-enterprise-products>.

³ MBA, "RE: FHFA Strategic Plan: Fiscal Years 2021-2024," October 5, 2020. Available at: [https://www.mba.org/Documents/MBA_FHFA_Strategic_Plan_2021_FINAL\(0\).pdf](https://www.mba.org/Documents/MBA_FHFA_Strategic_Plan_2021_FINAL(0).pdf).

Defining New Activities and Products

MBA supports the use of a more objective approach to identifying new Enterprise activities. The proposed rule appropriately provides more information on what constitutes a new activity – outlining factors that could affect whether an activity is “new” – rather than relying solely on exclusions. To maintain balance between the benefits of innovation and the need for safeguards, however, the rule should incorporate some recognition of materiality in the application of those factors (*e.g.*, so that an immaterial increase in credit, market, or operational risk or a modest change in borrowers, investors, counterparties, or collateral would not necessarily trigger the new activity process).

MBA believes the exclusions provided in the proposed rule generally are appropriate and are consistent with the need for a rigorous review process that is not unduly time-consuming or stifling. It is not necessary to require a full review and public comment period for certain changes to the Automated Underwriting Systems (AUS), activities substantially similar to those already approved, and certain Enterprise internal affairs such as those related to Human Resources, as reviews of these activities would be either impractical or unrelated to the public interest (or both).

Consistent with the interim final rule issued by FHFA in 2009,⁴ the proposed rule identifies factors that FHFA will consider when determining whether a new product is in the public interest, including “the degree to which the New Product is being or could be supplied by other market participants.” This factor presents a concern from a multifamily perspective, as it could be interpreted to bar any change in a multifamily offering that is deemed to be a new product if it also could be offered by any other market participants. A core function of the Enterprises is to respond appropriately to the capital markets. The proposed rule, therefore, should clarify that FHFA’s intent is not to reject changes or adjustments to multifamily offerings as contrary to the public interest solely because they could be offered by other market participants.⁵

In addition, while FHFA retains the discretion to consider other factors deemed appropriate, it should include language in the proposed rule to ensure certain determining factors, such as new products that aid natural disaster response, promote housing affordability, and increase taxpayer protections, are acceptable. MBA also suggests that FHFA periodically review the utility of the proposed criteria for new activities, products, and factors that determine public interest, and supplement these criteria as appropriate, as new examples of inclusions and exclusions may arise with changes in the housing finance industry.

Pilot Programs

MBA appreciates that the proposed rule includes guidance related to pilot programs that will set clearer parameters for their consideration in the new activity and product framework, while not broadly hindering or discouraging their use. Pilots are critical elements of the activity and

⁴ FHFA, “Prior Approval for Enterprise Products” 74 Fed Reg. 31602 (Jul. 2, 2009). Available at:

<https://www.federalregister.gov/documents/2009/07/02/E9-15304/prior-approval-for-enterprise-products>.

⁵ While we note that a similar factor has been present in the interim final rule since 2009 without any issues, it has not to our knowledge ever been applied to a multifamily new product. See 12 CFR 1253.4(b)(3)(iii) (includes the factor: “The degree to which the new product is being supplied or could be supplied by non-government-sponsored-enterprise firms”).

product development process and serve as a tool for the Enterprises to innovate and fulfill their missions in a constantly changing market. By providing clear parameters outlining the process by which the Enterprises develop and offer pilot programs or other “early-to-market” opportunities, and any resulting new activities and products, FHFA can maximize the effectiveness of these programs and conduct the analysis needed to ensure they do not encroach on primary market activities. The proposed rule appropriately extends its requirements to activities that effectively serve as pilots even if they are given other names or referred to in a different manner by the Enterprises.

The proposed rule provides that certain parameters that would dictate the conclusion of a pilot program, such as “duration, volume of activity, and performance,” be included in the Enterprises’ submission process. Clearly outlining pilot requirements strengthens the set-up/launch process and provides a clear path to all organizations that are eligible and wish to participate. FHFA also should use this opportunity to require that the Enterprises, when feasible, include a diverse set of companies in their pilot programs. If there are any overarching conditions for an institution’s participation in a pilot program (e.g., the institution is in good standing or meets certain minimum performance requirements), the Enterprises should be required to make such conditions publicly known.

Pilot programs should not confer prolonged or permanent first-mover benefits to those institutions selected to participate – beyond those benefits necessary to carry out the objectives of the pilot program. The proposed rule appears to address this issue, noting that “an activity emerging from a pilot is not an enhancement, alteration, or modification to an existing pilot but a new activity that must be submitted in a notice of new activity.” It is imperative that pilots follow defined timelines and either are broadened for widespread industry use or are terminated once end dates have been reached and enough information has been gathered to evaluate them.

Further, FHFA should ensure that any new technologies developed or used by the Enterprises support, not supplant, primary market activities. Technological innovation should be promoted, but technology should not allow the Enterprises to displace lenders and vendors operating in the primary market, or effectively choose winners and losers among primary market participants.

MBA also appreciates that the proposed rule outlines information that must be provided for new activities that emerge from pilot programs, such as descriptions of pilot objectives and success criteria; volume of activity, performance, risk metrics and controls; and the modifications made for a broader offering and rationale. The policy objective of increasing transparency in both pilot set-up and new activity offerings must be balanced, however, against the need to protect the proprietary information of participants. We encourage FHFA to clearly address the protection of proprietary information in this rulemaking, as any confusion in this area could discourage participation and innovation.

Review Process and Timing

The proposed rule both streamlines and clarifies various aspects of the review process for new activities and products. MBA believes all current forms and templates are sufficient and

guidelines for submission are appropriate. We also appreciate the prospective rather than retroactive approach to the review process. It would not be feasible or beneficial to review all new activities undertaken by the Enterprises since July 2008. Pilots and activities that have not yet been approved as new products should be subject to the updated review process while new products that already have been approved should be excluded. MBA also appreciates that new activities FHFA already has approved for one Enterprise, or substantially similar activities, are subject only to a streamlined, 15-day notice procedure.

MBA appreciates FHFA's efforts to implement the proposed rule in the near term, as there will be a need for an enhanced review and comment process both while the Enterprises remain in conservatorship as well as after their eventual release. Streamlining the Enterprise notice requirements to FHFA should help FHFA develop public notices that provide potential commenters with relevant information about future Enterprise activities.

Opportunities for public comment will be critically important given the Enterprises' public mandates and their substantial roles in the market. The proposed rule carefully navigates the review and comment process and appropriately balances effectiveness and efficiency. For example, after an initial 15-day period, the Enterprises may begin a new activity if FHFA deems that it does not meet the criteria for a new product or if there is no determination made within this time frame. If FHFA determines that it is indeed a new product, the proposal calls for a 30-day comment period and a 30-day approval period. MBA believes these timelines should provide adequate opportunities for public comment while also ensuring innovative ideas are not unnecessarily delayed by an overly lengthy or cumbersome process.

One portion of the timeline, however, would benefit from greater specificity in the rulemaking. The proposed rule does not explicitly provide a limit on the time that can elapse between the FHFA determination that a new activity constitutes a new product and the solicitation of public comments. That is, to place a limit on the overall length of this review process, FHFA should include in the rule a set period of time by which it will begin the public comment period. This addition to the rule would ensure that all steps in the review process are subject to transparent timelines.

In light of recent events, we appreciate that the proposal recognizes the importance of providing "temporary approval" to address circumstances in which the Enterprises may need to undertake new activities or implement new products in response to exigent circumstances. The ongoing COVID-19 pandemic has highlighted the need for the Enterprises to be able to adapt quickly to changing circumstances. Innovation in the form of new activities and products often can be the solution to issues that arise during uncertain times. The proposed rule appears to allow for this by providing a mechanism for situations such as these and allowing for a certain level of regulatory flexibility in response.

Conclusion

MBA believes the development of new Enterprise activities and products should be encouraged while also considering the need for transparency, efficiency, and the protection of proprietary information. The proposed rule applies these principles and provides a framework that is intended to enable the Enterprises to continue to safely and responsibly innovate. The positive changes in the proposed rule, along with the recommendations described above, will provide an appropriate path for the Enterprises and market participants to support the broader market. Thank you again for the opportunity to comment, and we look forward to continued partnership on this issue and other critical market conduct reforms of the Enterprises.

Should you have questions or wish to discuss these comments, please contact Bruce Oliver at (202) 557-2840 and boliver@mba.org or Sasha Hewlett at (202) 557-2805 and shewlett@mba.org.

Sincerely,

A handwritten signature in black ink, appearing to read "R. D. Broeksmit". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert D. Broeksmit, CMB
President and Chief Executive Officer
Mortgage Bankers Association