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## **FHFA Final Rule - New Enterprise Products and Activities December 20, 2022**

On December 20<sup>th</sup>, FHFA published a [final rule](#) that requires Fannie Mae and Freddie Mac to provide advance notice to FHFA of new activities and obtain prior approval before launching new products. The final rule clarifies how FHFA will evaluate and approve new activities and products proposed by the enterprises and should enable the Enterprises to serve their mission while maintaining safety and soundness. This final rule will replace the interim final rule that has been in place since July 2, 2009 and will be effective 60 days from the date it is published in the Federal Register.

For several years, MBA has advocated for a more transparent process by which the GSEs develop new activities and products or undertake pilots. In response to a notice of proposed rulemaking in November 2020, MBA submitted written comments to FHFA which were generally supportive of the proposal. MBA offered technical recommendations and emphasized the importance of innovation along with the need for transparency, efficiency, and the protection of proprietary information. The letter also expressed that the processes by which these measures are undertaken should be fair, transparent, and supportive of the overall market. FHFA addressed some of these topics in the final rule.

The final rule is largely similar to the proposed rule but does contain some key changes, definitions, and topics which are highlighted below:

### **Key Changes**

- Abbreviates content requirements for a Notice of New Activity and retains comprehensive content requirements for a Request for Prior Approval of a New Product.
- Clarifies what are substantially similar activities (rather than what are not) and broadens the exclusion to include Enterprise technology systems that apply mortgage terms and conditions or underwriting criteria. In addition, an activity that requires the same or similar resource, type of data, policy, process, and infrastructure as an approved new product is substantially similar to the approved new product.
- Enhances review of pilots and specifies that modifications to the duration or volume of a pilot are also potential new activities (should help prevent “pilot creep”).
- Requires FHFA to report on determinations made on new activity and new product submissions.

### **Key Definitions**

The final rule defines “activity” as a business line, business practice, offering, or service, including a guarantee, a 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.



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The final rule defines “pilot” as an activity that has a limited term and scope for purposes of evaluating the viability of the activity, regardless of the name assigned to the activity. The word “limited” has been added to enhance clarity.

The final rule describes a “new product” as any new activity that FHFA determines merits public notice and comment about whether it is in the public interest.

A “new activity” is defined as any of the following if not engaged in by the Enterprise on or before the effective date of the final rule:

- 1) An activity as defined above
- 2) An enhancement, alteration, or modification to an activity that is described by one or more of the following criteria:
  - a. Requires a new resource, type of data, process, infrastructure, policy, or modification to an existing policy;
  - b. Expands the scope or increases the level of credit risk, market risk, or operational risk to the Enterprise; or
  - c. Involves a new category of borrower, investor, counterparty, or collateral;
- 3) A pilot or modification to the duration or volume of a pilot;
- 4) An activity that results from a pilot.

Excluded activities (not considered a new activity or new product) include:

- 1) Any enhancement, alteration or modification to the AUS, including any upgrades to the technology, operating system, or software to operate the AUS
- 2) Any enhancement, alteration or modification to the mortgage terms and conditions or underwriting criteria relating to residential mortgages that are purchased or guaranteed by an Enterprise
- 3) Any activity that is “substantially similar” to the above activities (as defined below)
- 4) Any activity that is “substantially similar” to an approved new product (as defined below)

A technology system that applies mortgage terms and conditions or underwriting criteria to residential mortgages purchased or guaranteed by an Enterprise is “substantially similar” to changes to the AUS, mortgage terms and conditions or underwriting criteria. In addition, an activity that requires the same or similar resource, type of data, policy, process, and infrastructure as an approved new product is “substantially similar” to the approved new product.

The final rule allows an Enterprise to engage in substantially similar activities provided that the Enterprise:

- Notifies FHFA 15 calendar days prior to engaging in the substantially similar activity;
- Provides a complete description of the substantially similar activity; and
- Describes why the activity qualifies for the substantially similar activities exclusion.



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## **Timeline**

The final rule largely mirrors the submission timeline contained in the proposed rule. FHFA has 15 calendar days to determine if the new activity is a new product that merits public notice and comment once a submission is “received”. If FHFA determines that a new activity is not a new product, the Enterprise may proceed with engaging in the new activity. If FHFA determines that a new activity is a new product, the final rule requires FHFA to publish a public notice soliciting comments on the new product for a 30-day period. After the comment period has ended, FHFA has 30 calendar days to make a decision on approval.

The final rule does not specify a timeline for getting new product or activity out for public comment as we requested, however it states that “FHFA will act expeditiously in its review of a submission, and the Final Rule states that FHFA will publish a public notice “without delay.”

## **Transparency**

The final rule requires agency reporting on the Enterprises’ new activity and new product submissions and FHFA’s decisions. FHFA hopes to leverage existing reports, such as the Annual Report to Congress or annual Performance and Accountability Report, to include a section that identifies new activity and new product submissions, describes the basic parameters of proposed activities or products, and summarizes FHFA’s new product determinations and subsequent reasoning.

The Final Rule contains a process for FHFA to enhance the transparency of its decision-making on new product determinations, approvals, and disapprovals. FHFA will be required to publish information related to the Director’s determinations on new activity and new product submissions within a reasonable time period after the end of the calendar year during which the Enterprises submissions were filed.

## **Proprietary Information**

While the final rule made no changes specific to the protection of proprietary information it does address concerns in response to comments received.

“An Enterprise may request that information provided to FHFA in any context, including as part of a new activity or new product submission, be afforded protection from public disclosure under the Freedom of Information Act (FOIA) and FHFA’s implementing regulation, 12 CFR part 1202. The fact that the Final Rule does not mention FOIA does not mean protections provided to an Enterprise under FOIA are unavailable. However, FOIA protections are triggered only when a member of the public requests that FHFA disclose information that an Enterprise has requested be kept confidential. As a general matter, FOIA does not limit or preclude FHFA from disclosing confidential, proprietary, or other non-public information at its own initiative. FHFA’s independent decision to disclose non-public information in



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connection with the publication of a notice soliciting public comments on a proposed Enterprise new product is governed by FHFA’s Availability of Non-public Information Regulation (12 CFR part 1214).”

The final rule does specify that all new reporting and disclosures required by the final rule would omit confidential and proprietary information not already published in connection with the public notice for a new product.

Additional details can be found in FHFA’s [fact sheet](#).