U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Decision

Matter of: Federal Housing Finance Agency—Applicability of the Congressional Review Act to FHFA Bi-Merge Requirement and Determination on Two New Credit Score Models

File: B-336260

Date: October 1, 2024

DIGEST

The Federal Housing Finance Agency (FHFA) directed Fannie Mae and Freddie Mac (the Enterprises) to require lenders to deliver credit reports from any two of the three nationwide consumer reporting agencies ("bi-merge requirement") for single family loans the Enterprises acquire. The bi-merge requirement replaced the requirement for lenders to provide credit reports from all three consumer reporting agencies ("tri-merge requirement").

The Congressional Review Act (CRA) adopts the definition of "rule" under the Administrative Procedure Act (APA) but excludes certain categories of rules from coverage. CRA requires that before a rule can take effect, an agency must submit a report on the rule to each house of Congress as well as the Comptroller General, and it provides procedures for congressional review where Congress may disapprove of rules. FHFA directed the Enterprises to change the credit reporting requirements in its capacity as a conservator of the Enterprises. When FHFA acts as conservator, it ceases operating as an agency as defined by APA and its actions are not agency statements, so they do not meet the APA definition of a rule. Therefore, FHFA's direction to replace the tri-merge requirement with the bi-merge requirement is not subject to CRA's submission requirements.

In addition, FHFA approved the Enterprises' determination to approve two new credit score models. APA's definition of a rule does not include orders, so they are not subject to CRA. FHFA's approval of these determinations falls within the APA's definition of an order, and is not subject to CRA's submission requirements.

DECISION

On October 26, 2022, the Federal Housing Finance Agency (FHFA) sent a conservatorship directive to Fannie Mae and Freddie Mac (the Enterprises) instructing the Enterprises to replace the existing "tri-merge requirement" with the new "bi-merge requirement." Letter from General Counsel, FHFA, to Assistant General Counsel, GAO (Response Letter), at 2. Under the tri-merge requirement, the Enterprises had required lenders from whom they acquired single-family loans to provide credit reports from all three nationwide consumer reporting agencies. *Id.* at 1. In moving to the bi-merge requirement, the Enterprises would require that lenders provide credit reports from only two of the three nationwide consumer reporting agencies. *Id.* We received a congressional request for a decision as to whether the direction to replace the tri-merge requirement with the bi-merge requirement is a rule subject to the Congressional Review Act (CRA). Letter from Senators Michael Rounds and Bill Hagerty to the Comptroller General (Apr. 16, 2024). In subsequent communications, the requesters also asked whether FHFA's approval of the Enterprises' determination to approve two new credit score models is a rule subject to CRA. *See* Email from Requester Staff to Assistant General Counsel, GAO, *Subject: Re: GAO CRA Legal Decision – FHFA Bi-Merge Requirement* (Aug. 8, 2024).

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *GAO's Protocols for Legal Decisions and Opinions*, GAO-24-107329 (Washington, D.C.: Feb. 2024), *available at* https://www.gao.gov/products/gao-24-107329. Accordingly, we reached out to FHFA to obtain the agency's legal views. Letter from Assistant General Counsel, GAO, to General Counsel, FHFA (Apr. 24, 2024). We received a response from FHFA on May 8, 2024. Response Letter. FHFA also provided supplemental information in response to additional follow-up requests from our office. Letter from General Counsel, FHFA, to Assistant General Counsel, GAO (June 13, 2024) (Supplemental Response); Email from Senior Deputy General Counsel, FHFA, to Assistant General Counsel, GAO, *Subject: Re: FHFA Response to GAO on Credit Reports: B-336260* (Aug. 21, 2024) (Credit Score Model Response).

BACKGROUND

FHFA's Conservatorship Authority

Fannie Mae and Freddie Mac (collectively, the Enterprises), were chartered by Congress in 1938 and 1970, respectively, and are both shareholder-owned companies tasked with providing "liquidity, stability and affordability to the mortgage market." FHFA, *About Fannie Mae & Freddie Mac*, *available at* https://www.fhfa.gov/about-fannie-mae-freddie-mac (last visited Sept. 16, 2024). To accomplish these goals, the Enterprises "buy mortgages from lenders and either hold these mortgages in their portfolios or package the loans into mortgage-backed

securities . . . that may be sold. Lenders use the cash raised by selling mortgages to the Enterprises to engage in further lending." *Id*.

The Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110–289, 122 Stat. 2654 (July 30, 2008) amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102–550, title XIII, 106 Stat. 3672, 3941–4012 (Oct. 28, 1992) to establish FHFA and give it supervisory and regulatory authority over the Enterprises, as well as other entities.[1] Under HERA, the Director of FHFA can also appoint the agency as conservator of the Enterprises. 12 U.S.C. § 4617(a)(1). The Director placed the Enterprises in conservatorship on September 6, 2008. History of Conservatorships.

When acting as conservator, FHFA has authority to, among other things, "take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity and conduct all business of the regulated entity" and to "perform all functions of the regulated entity in the name of the regulated entity which are consistent with the appointment as conservator. . . ." 12 U.S.C. §§ 4617(b)(2)(B)(i), (iii). Additionally, FHFA may "take such action as may be (i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D).

<u>FHFA's Announcement of the Bi-Merge Requirement</u>

According to FHFA, since at least the 1990s, both Fannie Mae and Freddie Mac have addressed credit reporting requirements in their respective "selling guides," which set out requirements for lenders selling loans to the Enterprises. Supplemental Response, at 6. FHFA noted that the credit reporting requirements, as well as the other requirements contained within the selling guides, have been treated as the respective Enterprises' business decisions for decades. *Id*.

FHFA first announced it was considering making changes to the Enterprises' credit reporting requirements in its 2015 Conservatorship Scorecard, which FHFA publishes annually to communicate to the public and to the Enterprises its priorities and expectations of the Enterprises. Response Letter, at 2–3. In its 2015 Conservatorship Scorecard, FHFA directed the Enterprises to "[a]ssess the

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[1] *See* 12 U.S.C. § 4511; *see also* FHFA, *History of Fannie Mae and Freddie Mac Conservatorships* (History of Conservatorships), *available at* https://www.fhfa.gov/Conservatorship/Pages/History-of-Fannie-Mae--Freddie-Conservatorships.aspx (last visited Sept. 16, 2024).

feasibility of alternate credit score models and credit history in loan-decision models, including the operational and system implications."[2]

To implement this directive, on December 20, 2017, FHFA published a request for public input on proposed changes to the Enterprises' credit report and credit score models.[3] FHFA explained that at that time, industry standard for mortgage lenders was generally to obtain credit reports and scores from all three nationwide consumer reporting agencies for each mortgage applicant when available.[4] The request for public input noted that FHFA was evaluating potential changes to this requirement, including requiring only two credit reports from applicants.[5]

About five years later, on October 24, 2022, FHFA issued a press release publicly announcing its intent to require the Enterprises to change to the bi-merge requirement.[6] On October 26, 2022, FHFA issued a conservatorship directive to the Enterprises communicating its decision to move from the tri-merge requirement to the bi-merge requirement. Response Letter, at 2. FHFA uses conservatorship directives "to set forth significant policy determinations by FHFA as conservator and provide specific direction to undertake separate or joint actions."[7] According to

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[2] FHFA, *2015 Scorecard for Fannie Mae, Freddie Mac and Common Securitization Solutions* (Jan. 2015), *available at* https://www.fhfa.gov/sites/default/files/2023-03/2015-Scorecard.pdf (last visited Sept. 16, 2024), at 2.

[3] FHFA, *Credit Score Request for Input* (Request for Input) (Dec. 20, 2017), *available at* https://www.mortgagetranslations.gov/sites/default/files/2023-05/CreditScore_RFI-2017.pdf (last visited Sept. 16, 2024), at 1–2.

[4] *Id.* at 20; *see also* Supplemental Response, at 6.

[5] Request for Input, at 25. FHFA noted that Fannie Mae has required a tri-merged credit report since the 1990s, and while Freddie Mac required only a bi-merged report, in practice almost all of the loans sold to Freddie Mac included a tri-merged report in order to satisfy both of the Enterprises' requirements. Supplemental Response, at 6.

[6] FHFA, *FHFA Announces Validation of FICO 10T and VantageScore 4.0 for Use by Fannie Mae and Freddie Mac* (Announcement), *available at* https://www.fhfa.gov/news/news-release/fhfa-announces-validation-of-fico-10t-and-vantagescore-4.0-for-use-by-fannie-mae-and-freddie-mac (last visited Sept. 16, 2024).

[7] FHFA Office of Inspector General, *FHFA Followed Its Guidance When Making Conservatorship Decisions But Needs to Improve Retention of Decision Documentation and Update the Conservatorship Decision Policy and Procedures*, AUD-2023-003 (FHFA OIG Report) (Mar. 29, 2023), *available at* https://www.fhfaoig.gov/sites/default/files/AUD-2023-003.pdf (last visited Sept. 16, 2024), at 7.

FHFA, the change to the bi-merge requirement is "expected to reduce costs and encourage innovation, without introducing additional risk to the Enterprises."[8]

Approval of Enterprises' Determination to Approve New Credit Score Models

FHFA's October 24, 2022, press release also announced the validation and approval of two new credit score models—the FICO 10T credit score model and the VantageScore 4.0 credit score model—for use by the Enterprises. Announcement.

According to FHFA, it does not itself validate and approve credit score models. Credit Score Model Response. Rather, its role is to ensure the Enterprises have satisfied the statutory and regulatory requirements in proposing to approve or disapprove new credit score models. *Id*. Specifically, the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018, Pub. L. No. 115-174, § 310, 132 Stat. 1296, 1351–55 (May 24, 2018), required FHFA to "establish requirements for the validation and approval of third-party credit score models," which were set forth at 12 C.F.R. part 1254. *See also* Credit Score Model Response. This process begins when the Enterprises publish a Credit Score Solicitation requesting applications from credit score model developers, which the Enterprises review. *Id*. Then, the Enterprises conduct a Credit Score Assessment and an Enterprise Business Assessment. *Id.* Following this, the Enterprises submit to FHFA a proposed determination of approval or disapproval for each application, and FHFA makes a final determination on the proposal. *Id.* Also at issue in this decision is the final step in this approval process.

The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires federal agencies to submit a report on each new rule to both houses of Congress and to the Comptroller General for review before a rule can take effect. 5 U.S.C. § 801(a)(1)(A). The report must contain a copy of the rule, "a concise general statement relating to the rule," and the rule's proposed effective date. *Id.* CRA allows Congress to review and disapprove of federal agency rules for a period of 60 days using special procedures. *See* 5 U.S.C. § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. 5 U.S.C. § 801(b)(1).

CRA adopts the definition of rule under the Administrative Procedure Act (APA), 5 U.S.C. § 551(4), which states that a rule is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 804(3). However,

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[8] FHFA, *Fact Sheet: FHFA Announcement on Credit Score Models*, *available at* https://www.fhfa.gov/sites/default/files/2024-02/CS-Fact-Sheet-2022.pdf (last visited Sept. 16, 2024).

CRA excludes three categories of rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. *Id.*

DISCUSSION

Applicability of CRA to Bi-merge Requirement

FHFA did not submit a CRA report to Congress or the Comptroller General on the direction for the Enterprises to implement the bi-merge requirement. In its response to us, FHFA stated that the adoption of the bi-merge requirement was not a rule because the decision to replace the existing tri-merge requirement with the new bi-merge requirement was issued by FHFA in its capacity as the conservator for the Enterprises and therefore did not constitute an agency action. Response Letter, at 1–2.

CRA adopts the APA definition of rule, which, in part, requires that an action constitute an “agency statement.” *See* 5 U.S.C. § 804(3); 551(4). CRA also adopts the APA definition of “Federal agency,” which is described as “each authority of the Government of the United States” excluding Congress, the courts, and other specified entities. *See id*. § 804(1); 551(1). We have previously concluded that FHFA is a federal agency, except where it acts as a conservator. B-335424, Mar. 7, 2024; *see also* 12 U.S.C. § 4511(a) (establishing FHFA as “an independent agency of the Federal Government”). Where we found FHFA acted as a conservator, we also concluded that directives it issued for the Enterprises were not subject to CRA’s requirements. B-335424, Mar. 7, 2024.

Here, we must also consider whether FHFA acted in its conservator role when it directed the Enterprises to implement the bi-merge requirement, and whether such action was an agency statement under the APA definition of rule. As explained below, because FHFA was acting in its capacity as conservator when it directed the adoption of the bi-merge requirement, we conclude that it is not a rule and therefore is not subject to CRA’s requirements.

Federal courts have largely found that when FHFA takes action as conservator for the Enterprises, it “‘step[s] into the [Enterprises’] private shoes’” and “‘shed[s] its government character.’” *Id.* (*quoting Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017)) (alterations in original). Given the nature of conservatorship under HERA, federal courts have concluded FHFA conservatorship directives are not agency actions subject to APA requirements but are instead “insulated from judicial review.” *Id. quoting County of Sonoma v. FHFA*, 710 F.3d 987, 993–94 (9th Cir. 2013); *see also Town of Babylon v. FHFA*, 699 F.3d 221 (2d Cir. 2012) (finding that HERA precluded a claim that FHFA conservatorship directives failed to comply with APA); *Leon County, Florida v. FHFA*, 700 F.3d 1273 (11th Cir. 2012) (same).

Here, FHFA acted as conservator when it directed the Enterprises to change their credit reporting policies from the tri-merge requirement to the bi-merge requirement. The decision to adopt the bi-merge requirement was communicated to the Enterprises through a conservatorship directive, which FHFA uses to set policy for the Enterprises in its role as conservator. FHFA OIG Report, at 7. Additionally, the credit reporting requirements are business decisions of the Enterprises and have been treated as such for decades. Supplemental Response, at 6. Further, FHFA, when acting as a conservator, may "mak[e] business decisions that are both broad in scope and entirely prospective," as it did with regard to the entirely prospective credit reporting requirements at issue here. *County of Sonoma*, 710 F.3d at 994. And, as the Supreme Court has clarified, FHFA may act as a conservator in a way that it believes beneficial to itself and the "public," and does not have to act with only the Enterprises' interests in mind. *Collins v. Yellen*, 141 S. Ct. 1761, 1776 (2021).

When FHFA is acting as conservator of the Enterprises, as it did here, it is not acting as an agency. B-335424, Mar. 7, 2024. To meet the APA definition of rule, an action must constitute an "agency statement." 5 U.S.C. § 551(4). Because FHFA was not acting as an agency when it directed the Enterprises to implement the bi-merge requirement, it does not constitute an agency statement. Therefore, FHFA's direction to adopt the bi-merge requirement is not a rule for purposes of CRA and is not subject to its submission requirements.

<u>Applicability of CRA to FHFA's Approval of Enterprises' Determination to Approve New Credit Score Models</u>

FHFA did not submit a CRA report to Congress or the Comptroller General on its approval of the Enterprises' determination to approve the two new credit score models. In its response to us, FHFA stated that while it acted in its capacity as an agency when it made a determination to approve the Enterprises' proposal to approve the use of two new credit score models, that action is not subject to CRA because it is an order and therefore not a rule under APA or CRA. Credit Score Model Response.

CRA adopts the APA definition of a rule and implicitly excludes agency orders from coverage. *See* B-332233, Aug. 13, 2020 (describing rules and orders as "mutually exclusive categories"). APA defines an order as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). An order is a "case-specific, individual determination of a particular set of facts that has immediate effect on the individual(s) involved." B-334309, Nov. 30, 2023 (*citing United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 245–246 (1973); *Neustar, Inc. v. FCC*, 857 F.3d 886, 893 (D.C. Cir. 2017); *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994)).

We previously determined that the Environmental Protection Agency's (EPA) denial of petitions for exemptions under the Clean Air Act's Renewable Fuel Standard

(RFS) Program was an order not subject to CRA. B-334400, Feb. 9, 2023. We reached this conclusion because EPA's action constituted the final disposition of the applicants' EPA petitions, and the action at issue was EPA's application of the agency's interpretation to the facts presented by the petitions. *Id.*

According to FHFA, when approving the Enterprises' determinations with respect to the two new credit score models, it applied criteria found in its existing regulations. Credit Score Model Response; *see also* 12 C.F.R. § 1254.9. Similar to the facts at issue in B-334400, Feb. 9, 2023, FHFA approved these proposals by applying existing legal standards to the facts in the applications. Therefore, this action constitutes an order under APA and cannot be a rule for purposes of CRA.

CONCLUSION

FHFA's direction to the Enterprises to implement the bi-merge requirement and approval of the Enterprises' determination to approve two new credit score models are not rules as defined by APA and therefore not subject to CRA's requirements.

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