



September 2, 2010

Alfred Pollard
General Counsel
Attn: Comments/ RIN 2590-AA23
Federal Housing Finance Agency
Fourth Floor
1700 G Street, NW
Washington, DC 20552

RE: Framework for Conservatorship and Receivership of Fannie Mae, Freddie Mac and Federal Home Loan Banks

Dear Mr. Pollard:

The American Association for Justice (AAJ), formerly known as the Association of Trial Lawyers of America (ATLA®), hereby submits comments in response to the Federal Housing Finance Agency's Proposed Rule regarding conservatorship and receivership operation for the Federal National Mortgage Corporation (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Federal Home Loan Banks. *See*, 75 Fed. Reg. 39462-72.

AAJ, with members in the United States, Canada and abroad, is the world's largest trial bar. It was established in 1946 to safeguard victims' rights, strengthen the civil justice system, promote injury prevention, and foster the disclosure of information critical to public health and safety. AAJ has been a vocal advocate for the protection of shareholders from corporation's fraud and abuse. The proposed regulation will deny justice to the millions of American shareholders that were defrauded into buying shares of Fannie Mae and Freddie Mac. Furthermore, the proposed regulation's restructuring of priority in receivership and discretion to deny valid legal judgment during conservatorship exceeds the authority of the Federal Housing Finance Agency (FHFA) and is otherwise unconstitutional.

1. The Proposed Regulation Denies Justice to Millions of Innocent Victims of Fraud.

In the Proposed Regulation, the FHFA relegates securities fraud claims, even those reduced to final judgment in federal court, to the lowest priority in receivership, on par with equity. Additionally, the proposed regulation would give the FHFA Director the authority to deny payment to any securities litigation claims against a regulated agency, even one reduced judgment in federal court, if the Director determines it is not the interest of conservatorship. These proposed rules would deny justice to millions of innocent investors who, while accepting the risk of business failure, never accepted the risk of fraud.

Public and private pension funds throughout the 50 states invested heavily in securities of Fannie Mae and Freddie Mac prior to the enactment of Housing and Economic Recovery Act of 2008 (HERA) based upon the materially false and/or misleading representations and omissions by those companies and their former officers. Participants in those pension funds include over 30 million active and retired fire fighters, police officers, teachers, health care providers, transportation workers, and other public service employees. To pursue their rights under federal securities laws, these funds filed federal securities fraud lawsuits against Fannie Mae and Freddie Mac and certain of their former officers prior to the enactment of HERA. Some of these victims have already received federal judgments in their favor.

Yet, under the proposed rule, these victims receive the lowest priority in receivership, and even if a regulated entity is able to pay these valid claims, the Director may choose not pay to these legal judgments during conservatorship. The proposed rule denies just compensation to millions of public service pensioners and other victims of fraud, and effectively insulates Fannie Mae and Freddie Mac from accountability for their past fraudulent acts. As a matter of public policy, the proposed rule cannot be adopted.

2. The Proposed Regulation Exceeds and Contradicts the Statutory Authority of the Federal Housing Finance Agency and Raises Constitutional Concerns

A. The FHFA Has Exceeded and Contradicted Their Statutory Authority

Under HERA, the FHFA must accord tort victims priority in receivership equivalent to that of other unsecured creditors and FHFA, as conservator, must pay valid legal judgments against Fannie Mae and Freddie Mac. As recognized in other comments submitted to the Agency, FHFA's proposed rule exceeds the authority, and in fact is contrary, to HERA.

The Supreme Court has ruled on this issue and held that absent statutory authority stating otherwise, securities fraud claimants must be treated, like all other tort claims, as an unsecured creditor in receivership.¹ Nowhere in HERA is there statutory language to give FHFA the authority to prioritize securities fraud claims as mere equity during receivership. Thus, without such Congressional authorization, FHFA must treat the secured fraud claims against Fannie Mae and Freddie Mac as unsecured debts. FHFA lacks the authority to treat securities fraud claims as equity during receivership, and their perceived authority to completely deny such claims during mere conservatorship is blatantly unfounded.

Furthermore, FHFA's proposed rule contradicts HERA. HERA states that the lowest priority is reserved for obligations to shareholders and members "arising as a result of their status as shareholder or members"² A securities fraud claimant's obligation is a legal claim, arising as a result of their status as a tort victim, and their status as a shareholder is a consequence of the fraud. Additionally, HERA's legislative history³ shows the statute's receivership and

¹ *Oppenheimer v. Harriman Nat'l Bank & Trust Co.*, 301 U.S. 206, 213-15 (1937).

² 12 U.S.C. §4617(c)(1)(D).

³ H.R. Rep. 110-142, at 90 (2207) ("The conservatorship and receivership provisions were modeled after similar provisions in the Federal Deposit Insurance Act that apply to federally insured depository institutions.")

conservatorship provisions were modeled after the Federal Deposit Insurance Act, a statute that, as interpreted through case law, clearly treats securities fraud claims as unsecured debt.

B. The Proposed Rule Raises Constitutional Concerns

The proposed rule may give rise to several Constitutional challenges. The Agency's denial of securities fraud claimant's legal judgment without just compensation may constitute a taking under the Fifth Amendment. Furthermore, the Proposed Rule violates the Separation of Powers principles, by making a judgment of the Judicial Branch subject to review by an agency within the Executive Branch.

AAJ appreciates this opportunity to submit comments in response to the Agency's Notice regarding framework for the conservatorship and receivership of Fannie Mae, Freddie Mac, and Federal Home Loan Banks. If you have any questions or comments, please contact Sarah Rooney, AAJ's Regulatory Counsel at (202) 944-2805.

Sincerely,

Handwritten signature of C. Vance in black ink, consisting of the letters 'C', '3', and 'U' followed by a horizontal line.

Gibson Vance, President
American Association for Justice