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September 2, 2010

VIA FEDEX & E-MAIL

Mr. Alfred M. Pollard
General Counsel
Attention: Comments/RIN 2590-AA23
Federal Housing Finance Agency
Fourth Floor
1700 G Street, N.W.
Washington, D.C. 20552

Re: Proposed Rule Regarding Conservatorship and Receivership
75 Fed. Reg. 39,462 (July 9, 2010); RIN 2590-AA23

Dear Mr. Pollard:

The National Association of Shareholder and Consumer Attorneys ("NASCAT") is a nonprofit membership organization founded in 1988. NASCAT's member law firms represent investors (both institutions and individuals) in securities fraud and shareholder derivative cases throughout the United States. NASCAT and its members are devoted to representing victims of corporate abuse, fraudulent schemes, and so-called "white collar" criminal activity in cases that have the potential for advancing the state of the law, educating the public, modifying corporate behavior, and improving access to justice and compensation for the wrongs inflicted upon victims. NASCAT advocates the principled interpretation and application of the federal securities laws — including the Securities Act of 1933 (the "1933 Act"), the Securities Exchange Act of 1934 (the "1934 Act"), and the Private Securities Litigation Reform Act of 1995 (the "PSLRA") — to protect investors from manipulative, deceptive and fraudulent practices, and to ensure that the nation's capital markets operate fairly and efficiently.

NASCAT submits this objection to RIN 2590-AA23 (the "Proposed Rule"). The Proposed Rule violates the express provisions of the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654, exceeds FHFA's authority, and is otherwise arbitrary, illegal, and unconstitutional.[1]

[1] The overwhelming legal precedent for why the Proposed Rule is illegal and unconstitutional is set forth in the comment letter dated August 25, 2010 by Waite, Schneider, Bayless & Chesley Co., L.P.A., Molo Lamken LLP and Morton Rosenberg on behalf of the Class in the currently pending securities fraud class action against Fannie Mae and its three former senior officers, which is posted on FHFA's website and hereby incorporated herein by reference.

Under HERA, (i) FHFA must accord tort victims priority in receivership equivalent to that of other unsecured creditors, and (ii) FHFA, as conservator, must pay valid legal judgments against Fannie Mae and Freddie Mac. In the Proposed Rule, however, FHFA proposes to modify HERA by (i) relegating securities fraud claims — even those reduced to final judgment in federal court — to the lowest priority, on par with equity, and (ii) allowing the FHFA Director not to pay a securities litigation claim against a regulated entity – even one reduced to final judgment in federal court - if the Director determines it is not in the interests of the conservatorship.

In addition to being illegal and unconstitutional, these proposed revisions of HERA are bad policy and grossly unfair to the millions of pensioners, companies and other taxpayers that purchased stock of Fannie Mae and Freddie Mac prior to the enactment of HERA. Public and private pension funds throughout the 50 states invested heavily in securities of Fannie Mae and Freddie Mac prior to the enactment of 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 the rights given to them by 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.

The Proposed Rule would effectively insulate Fannie Mae and Freddie Mac from accountability for their past fraudulent acts because FHFA would not be required to pay any Court judgment against Fannie Mae or Freddie Mac during conservatorship, and securities fraud claims would be the lowest in priority in receivership.

Sound policy reasons have led Congress in the past to reject similar attempted subordination of securities fraud claims, *i.e.* that doing so "would undermine fraud enforcement" and be "unfair to private plaintiffs who were innocent victims of wrongdoing."[2] These policy reasons apply with compelling force here. The Proposed Rule would deny recovery to innocent

[2] HERA's legislative history indicates Congress modeled FHFA's conservator and receivership powers on the Federal Deposit Insurance Act. H.R. Rep. 110-142, at 90 (2007). When Congress enacted the Federal Deposit Insurance Act, it considered, but expressly rejected, subordinating securities fraud claims. Members of Congress explained that they deleted the subordination provision in conference because subordination was "fundamentally unsound as a policy matter." 135 Cong. Rec. 18,571 (1989) (Rep. Glickman). "[G]iving the FDIC an absolute priority [over securities fraud claims] would undermine fraud enforcement, would be potentially unfair to private plaintiffs who were innocent victims of wrongdoing, and would be at cross-purposes with the thrust of the savings and loan legislation." *Id.* "[P]rivate parties would have little chance of recovery and as a result would no longer bring fraud suits," eliminating a "necessary supplement to the enforcement efforts of the SEC and the Department of Justice, which do not have the resources to enforce the law on their own." *Id.* "[T]here was no evidence that [subordination] would benefit the American taxpayers in any meaningful way, especially in view of the likelihood of increased fraud." *Id.* And subordination would be "a disincentive to investment in savings institutions, since an investor would have no recourse if his investment was procured through fraud." *Id.*; *see also id.* at 18,575 (Rep. Staggers) (making the same points). The House conferees thus voted "overwhelmingly," "on a bipartisan basis," to delete the subordination provision, and the Senate conferees agreed. *Id.* at 18,575.

investors who, while accepting the risk of business failure, never accepted the risk of fraud. Millions of public service pensioners and other victims of fraud throughout the 50 States should not be denied their just compensation. As a matter of law and policy alike, the Proposed Rule cannot be adopted.

Accordingly, NASCAT respectfully requests that the Agency withdraw and not adopt the Proposed Rule.

Sincerely,

Ira A. Schochet/jb

Ira A. Schochet
President, NASCAT

Cc: Edward J. DeMarco, Acting Director