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September 7, 2010

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:

On behalf of Lead Plaintiffs Ohio Public Employees Retirement System and State Teachers Retirement System of Ohio and the Class in the currently pending federal securities fraud class action against Fannie Mae, Franklin Raines, Timothy Howard, and Leanne Spencer (*In re Fannie Mae Securities Litigation*, Consolidated Case No. 04-cv-1639 (D.D.C.)), we submit the following further comments and objections to the Rule proposed by the Federal Housing Finance Agency (FHFA) regarding Conservatorship and Receivership, 75 Fed. Reg. 39,462, RIN 2590-AA23 (the "Proposed Rule"), to supplement our comments filed on August 25, 2010. We submit these comments to emphasize another defect: Any final rule would be invalid for lack of a validly appointed officer heading FHFA. The issuance of binding regulations with the force and effect of law is one of the core functions of the Executive Branch. Neither the Constitution nor the

relevant statutes permits the issuance of such regulations where, as here, the agency lacks a properly appointed federal officer as its head.

ANY FINAL RULE WOULD BE INVALID BECAUSE FHFA DOES NOT HAVE A PROPERLY APPOINTED FEDERAL OFFICER AS ITS HEAD

The Proposed Rule should be rejected because FHFA, lacking the validly appointed principal officer that the Appointments Clause of the U.S. Constitution requires, cannot issue regulations that have the force and effect of law. The Appointments Clause, one of "the significant structural safeguards of the constitutional scheme," *Edmond v. United States*, 520 U.S. 651, 659 (1997), provides as follows:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. As the Supreme Court has explained, "*any appointee exercising significant authority* pursuant to the laws of the United States is an 'Officer of the United States,' and *must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.*" *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam) (emphasis added).

A. FHFA—an independent agency, 12 U.S.C. § 4511(a)—is supposed to have as its head a Director that is "appointed by the President, by and with the advice and consent of the Senate." *Id.* § 4512(b)(1). The Director serves for five years, subject only to for-cause removal by the President. *Id.* § 4512(b)(2). Those statutory provisions were designed to be consistent with the constitutional requirement quoted above. The Appointments Clause requires all "Officers of the United States" to be appointed "by and with the Advice and Consent of the Senate." There is an exception for "inferior Officers," who may be appointed by the President, the courts, or the Heads of Departments. But, as the Supreme Court explained in *Edmond v. United States*, 520 U.S. 651, 662-63 (1997), "[w]hether one is an 'inferior' officer depends on whether he has a superior"—"'inferior

officers' are officers whose work is directed and supervised at some level" by other officers appointed by the President with the Senate's consent. Here, the Director's work is not "directed and supervised" by any other officer. To the contrary, the Director answers only to the President himself. As a result, under the Appointments Clause, the Director must be appointed by the President and confirmed by the Senate.

That constitutional requirement has not been met. FHFA does not have a Senate-confirmed Director. Rather, "[o]n August 25, 2009 President Obama designated Edward J. DeMarco the Acting Director of the Federal Housing Finance Agency (FHFA), . . . effective September 1, 2009." FHFA, *Meet the Director*, http://www.fhfa.gov/Default.aspx?Page=67. Mr. DeMarco thus has served as Acting Director for over a year. No nomination for FHFA Director has been submitted to the Senate for confirmation.

B. FHFA's statute allows the President to "designate" an Acting Director. 12 U.S.C. § 4512(f). Even if that provision was properly invoked here, it cannot justify Mr. DeMarco's extended tenure. Courts have allowed an exception to the Appointments Clause's requirements to permit the President to appoint an acting official to serve in the role of principal officer *temporarily* so that the government can operate continuously pending the appointment and confirmation of the principal officer. But, consistent with the purposes of that judicially recognized exception, the President does not have unfettered ability to appoint temporary officers for extended periods of time. To the contrary, such temporary "acting" appointments can last only a reasonable period of time—a period that has long since passed in this case.

1. Courts have regularly recognized that "acting" agency heads cannot serve indefinitely but rather may serve only a reasonable period in view of the circumstances justifying the absence of a permanent head. For example, in *Williams v. Phillips*, 360 F. Supp. 1363 (D.D.C. 1970), the district court enjoined the Acting Director of the Office of Economic Opportunity from taking any future action because he served in that position illegally. The court held that, "[w]hatever the merits of the argument finding an interim appointment power in the President may be, . . . that power, if it exists at all, exists only in emergency situations." *Id.* at 1369. The court stated that "a Presidential power to appoint officers temporarily in the face of statutes requiring their appointment to be confirmed by the Senate . . . would avoid the nomination and confirmation process of officers in its entirety." *Id.* On appeal, the D.C. Circuit denied the government's motion for

stay. 482 F.2d 669 (D.C. Cir. 1973) (per curiam). Citing the Appointments Clause, the court concluded that the government had failed to show "sufficient likelihood of success on the merits to warrant a stay." *Id.* at 670. The court stated that, "[e]ven if the court should sustain" the view that the President had an implied power to appoint an acting director for a reasonable time period, "that would not establish that the President was entitled, for a period of four and a half months from the date the President obtained the resignation of the incumbent director, to continue the designation of Phillips as acting director without any nomination submitted for Senate consideration." *Id.* at 670-71.

Other cases likewise recognize that the Appointments Clause's express requirement—that principal officers be nominated to their position by the President and confirmed by the Senate—cannot be evaded by appointing an "acting" agency head for an indefinite period. In *Olympic Federal Savings & Loan Ass'n v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183 (D.D.C. 1990), *appeal dismissed as moot*, 903 F.2d 837 (D.C. Cir. 1990), the court granted the plaintiff's "motion for a preliminary injunction prohibiting the Acting Director of OTS or any officer at OTS from appointing a receiver or conservator for [the plaintiff] until a new Director of OTS ha[d] been nominated by the President and confirmed by the Senate." *Id.* at 1187. Citing the D.C. Circuit's decision in *Williams*, the court concluded that, "if the President has any inherent authority to appoint temporary officers, his authority is limited." *Id.* at 1200. The President had no such authority in that case, in part because "the government ha[d] not argued that any emergency existed beyond the general emergency which exists whenever a regulatory body charged with important functions is left without its primary officer." *Id.* at 1199. The court thus concluded that there was a "strong likelihood" that the plaintiff would "succeed on the merits of its Appointments Clause challenge." *Id.* at 1185.

2. The Executive Branch likewise has recognized that a temporary principal officer, designated to head an agency without Senate confirmation, can exercise that power only for a limited, reasonable period, pending confirmation of a permanent head. For example, the Office of Legal Counsel has concluded that, even though the Deputy Director of OMB is confirmed by the Senate, he may not later serve as Acting Director "indefinitely," even when "there is no express statutory limit on the length of such tenure." *Status of the Acting Director, Office of Management and Budget*, 1 Op. Off. Legal Counsel 287, 289-90 (1977). The Office of Legal Counsel concluded that a three-month period as Acting Director was "reasonable" and thus permissible under the circumstances. *Id.* at 290. Those circumstances included the fact that the Senate had already adjourned, so "it would

clearly be reasonable for the President to wait until the Senate reconvene[d]" one month later before sending a nomination to the Senate. *Id.*; *see also Designation of Acting Director of the Office of Management and Budget*, 2003 WL 24151770, at *4 n.2 (O.L.C. June 12, 2003).

One year later, the Office of Legal Counsel again recognized that temporary designees may serve as "acting" agency heads, without Senate confirmation, only for a reasonable period of time. *See Department of Energy—Appointment of Interim Officers—Department of Energy Organization Act (42 U.S.C. § 7342)*, 2 Op. Off. Legal Counsel 405 (1978). That opinion concluded that (1) two temporary appointments that collectively spanned nine months (from September 1977 to at least May 1978) were "reasonable" because "[t]heir extended acting service [was] due exclusively to delay in the confirmation process"; and (2) two other temporary appointments from the same time period were reasonable even though the nominations were not submitted to the Senate until January 1978 because of the "difficulty of finding suitable candidates for the complex and responsible positions in the Department of Energy," the "uncertainties created by delays in the enactment of the pending energy legislation," and a one-month period when the Senate was in recess. *Id.* at 409-10.

In 1996, the Office of Legal Counsel conducted a thorough review of Appointments Clause issues and again confirmed that, where the President designates an "acting" agency head to serve without Senate confirmation, such an officer can serve only for a reasonable period given the circumstances. Noting the importance of a pending nomination, the Office stated that it "would not currently view a *four-and-a-half-month* temporary appointment as necessarily exceeding a reasonable duration, *provided that a nomination is submitted to the Senate.*" *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 163 (1996) (emphasis added).

Those decisions make clear that Mr. DeMarco's tenure as "acting" Director crosses the constitutional line. If the President could not, consistent with the Appointments Clause, appoint an acting director and continue that designation "for four and a half months" from the "resignation of the incumbent director" in *Williams*, the President certainly cannot appoint Mr. DeMarco and continue his designation here for *more than a year* following his putative predecessor's resignation. If four and a half months was permissible in OLC's view "provided that a nomination is submitted to the Senate," then Mr. DeMarco cannot serve for more than three times that time with no nomination on the horizon. Indeed, Mr.

DeMarco's tenure exceeds even the nine months OLC (grudgingly) deemed permissible where the permanent agency heads were tied up in the nomination process, and statutory reforms made finding replacements difficult. To the contrary, no permanent head has been nominated for more than a year, and no compelling circumstances for that inordinate delay are apparent.

3. Congress itself has recognized that temporary appointments of "acting" principal officers must be just that—temporary. In determining how long an acting officer may be in place, *i.e.*, what constitutes a "reasonable" period, courts have sometimes sought guidance in statutes that authorize time-limited, acting appointments. In *Williams*, 482 F.2d at 671, for example, the D.C. Circuit concluded that a reasonable time period for a temporary appointment would be *30 days*, consistent with the then-limitation in the Vacancies Act, 5 U.S.C. § 3348 (1970). Even if reasonableness were tied to the current limitation in the Vacancies Act, the permissible period would be 210 days, 5 U.S.C. § 3346(a)(1)—a period that lapsed more than 150 days ago. It is difficult to imagine what kind of "emergency" would justify evading the Appointments Clause for over a year, much less doing so without so much as presenting a permanent successor to the Senate for confirmation.

C. Any Final Rule would also violate the Appointments Clause for a second reason—it is inconsistent with FHFA's organic statute in multiple ways.

1. First, Mr. DeMarco's extended tenure is contrary to the statute's structure. Congress designated FHFA to be an *independent* agency; it accomplished that goal by making FHFA's head—the Director—removable only *for cause*. *See* 12 U.S.C. § 4511(a)-(b). Currently, however, an Acting Director, who is removable at will, has headed FHFA for over a year. That is wholly at odds with Congress's effort to establish an *independent* agency headed by an officer subject only to for-cause removal. And allowing an Acting Director to serve for over a year undermines Congress's authority in yet another way. The Constitution and the statute establishing FHFA both give the Senate an important role in the selection of the principal officer who heads FHFA—such an officer, after being selected by the President, must be confirmed by the Senate. Allowing an Acting Director, whom the Senate *never* confirmed as agency head, to run FHFA indefinitely deprives the Senate of the authority over agency-head selection—*i.e.*, to confirm or not—that the Appointments Clause and the statute afford it.

2. Second, the appointment of the current Acting Director is not authorized by the terms of the statute. In appointing the current Acting Director, the President invoked 12 U.S.C. § 4512(f). That provision states: "In the event of the death, resignation, sickness, or absence of *the Director*, the President shall designate either the Deputy Director of the Division of Enterprise Regulation, the Deputy Director of the Division of Federal Home Loan Bank Regulation, or the Deputy Director for Housing Mission and Goals, to serve as acting Director until the return of the Director, or the appointment of a successor pursuant to subsection (b)." 12 U.S.C. § 4512(f) (emphasis added). That provision by its terms requires *first* that there be a lawfully appointed FHFA Director (*i.e.*, one appointed by the President and confirmed by the Senate pursuant to Section 4512(b)(1)-(2)). Then, in the event of the "death, resignation, sickness, or absence of *the Director*," a temporary Acting Director may be appointed. *Id.* § 4512(f). In other words, the appointment of an Acting Director is permissible only *after* there has been a validly appointed Director. The statute permits an Acting Director to be appointed where *the Director* becomes unable to fulfill his duties—not where *no validly appointed Director* has ever been in place at all. *Cf. Olympic*, 732 F. Supp. at 1194-95 (similar conclusion under the Vacancies Act).

Here, FHFA has never had a properly appointed principal-officer Director as its head. The first official to run the agency, who preceded the current Acting Director, obtained his position pursuant to 12 U.S.C. § 4512(b)(5), which designated "the person serving as the Director of the Office of Federal Housing Enterprise Oversight of the Department of Housing and Urban Development" as the first FHFA Director. That designation inadvertently crossed constitutional boundaries because the legislature cannot, by statute, appoint a principal officer to a new position. Instead, principal officers such as the initial FHFA Director must be appointed through presidential nomination and Senate confirmation. *See Olympic Federal*, 732 F. Supp. at 1191-93. As the D.C. District Court observed in invalidating a similar effort, a contrary rule would allow Congress to "exercise[] the kind of decisionmaking about who will serve in the Executive department posts that the Constitution says it cannot." *Id.* at 1193. Since the first Director "required re-nomination and re-confirmation before he could constitutionally take office as [FHFA] director," that Director "never constitutionally took office." *Id.* As *Olympic Federal* recognizes, the absence of a validly appointed initial director precludes the exercise of statutory authority to appoint an "acting" official as his successor. *Id.* at 1194-96. Congress limited the authority to appoint an Acting Director to the circumstances where there previously had been a validly appointed Director in office. That congressional limit must be respected.

Weiss v. United States, 510 U.S. 163 (1994), is not to the contrary. That case addressed whether military officers who were already Senate-confirmed, commissioned officers needed to be re-confirmed to be a military judge. The statute there "authorized an indefinite number of military judges, who could be designated from among hundreds or perhaps thousands of qualified commissioned officers." *Id.* at 174. Because of those large numbers, "there [wa]s no ground for suspicion . . . that Congress was trying to both create an office and also select a particular individual to fill the office." *Id.* Here, however, Congress created the position of FHFA Director and selected a particular individual to fill that office—the then-Director of the Office of Federal Housing Enterprise Oversight of the Department of Housing and Urban Development. *See* 12 U.S.C. § 4512(b)(5). Here, moreover, Congress substantially increased the authority of FHFA over the powers formerly exercised by its predecessor organizations, including by giving it the conservatorship and receivership powers at issue. *See* 12 U.S.C. § 4617. Given that statutory expansion of authority, Congress could not itself appoint an existing principal officer as head of the new entity. Rather, the Constitution requires appointment by the President and confirmation by the Senate.

For all of the foregoing reasons, FHFA does not have the authority to adopt the Proposed Rule.

Respectfully yours,

WAITE, SCHNEIDER, BAYLESS & CHESLEY CO., L.P.A.

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