Bank of America

Legal Department

September 7, 2010

VIA E-MAIL: RegComments@FHFA.gov

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

Re: RIN 2590-AA23
Office of Federal Housing Enterprise Oversight
Notice of Proposed Rulemaking; Request for Comment – Conservatorship and Receivership

Dear Mr. Pollard:

Bank of America appreciates the opportunity to comment on the Federal Housing Finance Agency's ("FHFA") Notice of Proposed Rulemaking (the "NPR") concerning the framework for conservatorship and receivership of Fannie Mae and Freddie Mac. Bank of America, with total assets over $2.3 trillion, has full-service consumer and commercial operations in 50 states and the District of Columbia. We provide banking, investing, corporate and investment banking services and financial products to individuals and businesses across the United States of America and around the world. We work closely with the government-sponsored enterprises (the "GSEs") and other important participants in the domestic consumer mortgage finance sector to provide our customers with the products they need to participate in the housing market.[1]

[1] Bank of America securitized $350 billion of mortgage debt through the GSEs in 2009, and has entered into credit protection agreements with the GSEs totaling $6.6 billion and $9.6 billion as of December 31, 2009 and 2008, providing full protection on conforming residential mortgage loans that become severely delinquent. The

We thank the FHFA and its staff for their efforts in crafting the NPR. Bank of America concurs with the FHFA that additional certainty regarding conservatorship and receivership regulation will be beneficial to the GSEs, to creditors, and to the markets at large. Today, the GSEs serve as the primary source of liquidity for the residential mortgage market. Their involvement in this market also helps to ensure that banks have the capacity to make loans at an affordable rate, as the balance sheets of commercial banks cannot accommodate the amount of capital that is needed to maintain the mortgage finance system. With a multi-trillion-dollar market likely to be affected by any adjustment to the treatment of the GSEs, regulatory approaches must be measured. Abrupt disruptions to market expectations would be more harmful than helpful in the current climate. We offer three technical comments on the NPR, and a separate comment regarding broader policy considerations.

Treatment of Securities Litigation Claims.

We support the approach advanced by the FHFA in the NPR concerning the relative priority of securities litigation claims. The subordination of securities litigation claims (and related claims) in a receivership situation in a manner consistent with their treatment under the United States Bankruptcy Code represents sound public policy by treating these claims in a manner consistent with existing insolvency laws. The NPR's approach is particularly appropriate because during the GSE's pre-insolvency active operations equity holders enjoyed benefits arising out of the implied government guarantee that owners of other business organizations did not enjoy. The NPR's proposed harmonization of the treatment of securities

bank holds $23.5 billion and $52.6 billion at December 31, 2009 and 2008 of government-sponsored enterprise obligations.

litigation claims in a receivership situation ensures that these asymmetrical equity holder benefits do not extend into receivership. For the same reasons, we also support the NPR's treatment of securities litigation claims (and related claims) in a conservatorship situation. These claims should be postponed during conservatorship, either to reappear should the enterprise at issue become rehabilitated, or to be addressed in a receivership based on their priority.

Priority of Expenses and Unsecured Claims.

We request clarification and provide comment on certain of the provisions in the NPR relating to proposed regulation 12 C.F.R. § 1237.9. Paragraph (a) of the proposed regulation sets out the priority order for four types of unsecured claims, including "[a]ny obligation to current or former shareholders or members arising as a result of their current or former status as shareholders or members, including, without limitation, any Securities Litigation Claims." § 1237.9(a)(4). The following paragraph provides that the receiver will provide similar treatment to "all creditors under paragraph (a)." § 1237.9(b). We recommend that the term "creditors" be replaced with the word "claimants," to clarify that similar treatment is to be provided to securities litigation claims and any other claim under paragraph (a)(4) as it pertains to shareholders, including holders of preferred stock and common equity. For similar reasons, we recommend that the words "obligation to" in §1237.9(a)(4) be replaced with "claim of." In addition, the Director's authority to mandate "dissimilar" treatment of claims under paragraph (b)(1) could benefit from further clarification. If this discretion were

exercised too frequently or without reference to specific criteria, it could unnecessarily frustrate market expectations and undermine important principles of equity.

Transfer or Sale of Assets and Liabilities.

We also provide comment on the provisions in the NPR relating to proposed regulation 12 C.F.R. § 1237.3(c). The proposed language provides the FHFA with very broad powers concerning the transfer or sale of any asset or liability of an enterprise in conservatorship or receivership. We suggest that § 1237.3(c) be modified to provide that the transfer or sale of any asset or liability of an enterprise in conservatorship or receivership should occur only after the provision of notice and an opportunity for a hearing, unless such transfer or sale is part of the enterprise's ordinary course of business. An accommodation of this nature would place creditors and other interested parties on notice that their rights potentially could be affected through such transfer or sale and provides a forum for voicing these concerns. Again, if the proposed discretion were exercised too frequently or without reference to specific criteria, it could unnecessarily frustrate market expectations and undermine important principles of equity.

Policy Considerations.

The insolvency of a GSE is unlike any other insolvency – from both a qualitative perspective (the GSEs and the Federal Home Loan Banks are subject to a specific insolvency statute, 12 U.S.C. § 4501 *et seq.*) and from a quantitative exposure perspective. The issues raised by their administration are unique, with no clear historical precedent. Today, the FHFA uses its broad conservatorship powers to accomplish the often conflicting goals of

supporting national housing policy while also protecting the government's investment. The conservator does not limit its use of these special powers exclusively towards rehabilitation, which is the more traditional goal of a conservatorship. Accordingly, even in conservatorship, ambiguous boundaries and goals encumber the GSEs. The NPR suggests that this intermediate and uncertain state will last even into a potential receivership – possibly until the final payment is distributed. We suggest that the goals of conservatorship and receivership be clearly, narrowly, and carefully defined, in a way that is fair to commercial counterparties and other housing finance partners and recognizes the significant national interest in an orderly transition to a stable and sustainable housing finance system.

We appreciate the opportunity to comment on the NPR. If the FHFA or its staff has questions regarding the comments contained herein, you may contact me at (980) 388-7449 or at david.rich@bankofamerica.com, and I would be happy to address them.

Respectfully submitted,

David B. Rich III

David B. Rich III
Associate General Counsel & Managing
Director – Corporate Law