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Congress of the United States
House of Representatives

COMMITTEE ON FINANCIAL SERVICES
CAPITAL MARKETS AND GOVERNMENT SPONSORED ENTERPRISES
FINANCIAL INSTITUTIONS AND CONSUMER CREDIT
OVERSIGHT AND INVESTIGATIONS

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
RANKING MEMBER, ENERGY AND ENVIRONMENT
INVESTIGATIONS AND OVERSIGHT

Federal Housing Finance Agency
1700 G St NW
Washington, DC 20552

July 8, 2011

Acting Director DeMarco,

I am writing concerning the proposed settlement of claims against Bank of America for breach of the contractual representations and warranties, or "put back" claims, for residential mortgage-backed securities ("RMBS") issued by subsidiaries of Countrywide Financial Corporation, which was later acquired by Bank of America.

The proposed settlement is for $8.5 billion on RMBS with an initial par value of $424 billion. According to Bank of America, the unpaid principal balance on those RMBS is now $174 billion. The proposed settlement, therefore, is approximately two percent of the initial par value, and less than five percent of the unpaid principal balance.

The settlement is not of a class action by investors against Bank of America, but between Bank of America and the trustee for the RMBS, Bank of New York Mellon. Investors in the RMBS cannot petition to have their trusts excluded from the settlement so they can pursue their claims independently. Rather, the settlement would be a final adjudication of the claims of all trusts in the RMBS, including those whose investors object to the settlement. Bank of America and Bank of New York Mellon have petitioned for court approval of the settlement, and some investors have petitioned the court to object to the settlement.

I understand that both Fannie Mae and Freddie Mac ("the enterprises") have substantial investments in the RMBS subject to the proposed settlement and have already suffered substantial losses on the RMBS with further substantial losses expected in the future. (Federal Home Loan Banks, which are not in conservatorship but are subject to the regulatory jurisdiction of the Federal Housing Finance Agency ("FHFA"), apparently also have substantial investments in the RMBS.)

The polar star for FHFA in the conservatorship of the enterprises must be minimizing taxpayer losses. I have urged that FHFA zealously pursue all available legal claims to

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limit those losses, including claims against issuers of "private-label" mortgage-backed securities, such as the RMBS subject to the proposed settlement.

I have several questions concerning the proposed settlement.

First, does FHFA intend to join the investors objecting to the settlement? The objecting investors argue that Bank of New York Mellon has interests that conflict with those of investors in the RMBS. First, more than 60 percent of Bank of New York Mellon's trustee business comes from Bank of America. The dependence of Bank of New York Mellon on Bank of America's business, the investors contend, provides a powerful incentive for Bank of New York Mellon to be too deferential to Bank of America to the disadvantage of investors. Also, Bank of America indemnifies Bank of New York Mellon in the proposed settlement for any liability to investors arising from the settlement, which the investors contend is a conflict of interest for Bank of New York Mellon, also to the disadvantage of investors. The release apparently would include claims against Bank of New York Mellon for failing to provide accurate exception reports, and for failing to monitor the performance of the RMBS and take corrective action.

In short, the investors contend that the proposed settlement is not an arm's length transaction.

The investors further contend that Bank of America and Bank of New York Mellon have denied the investors the information necessary to determine the adequacy of the settlement. The investors have been unable to review the loan files for the mortgages to determine if those mortgages satisfied the contractual representations and warranties, or to determine whether breaches of representations and warranties were materially adverse to the interests of investors. Independent investigations show that perhaps two-thirds of the mortgages did not comply with the representations and warranties, however.

The enterprises are unique among the investors in that FHFA can issue subpoenas to obtain the information necessary to determine the adequacy of the settlement. In July of last year, FHFA issued 64 subpoenas to obtain information needed "to determine whether losses sustained by the enterprises on [private-label securities] are the legal responsibility of others," including "the contents of loan files, which include documents used in the underwriting process, such as loan applications and property appraisals." I understand that very little information has been provided in response to the subpoenas.

Did the subpoenas issued by FHFA last year pertain to the RMBS subject to the proposed settlement? If so, have Bank of America and Bank of New York Mellon fully complied with the subpoenas? Does FHFA intend to issue further subpoenas or take such further actions necessary to decide whether to support the proposed settlement?

The statue of limitations may be expiring with respect to some put back claims. Do the enterprises have tolling agreements with Bank of America and other potential defendants? If not, are the enterprises acting with urgency to bring actions to preserve potential put back claims?

Finally, what information concerning these claims will FHFA make available to the public, or at least to Congress as part of our oversight of FHFA? It is important that the American people know that their government is acting on their behalf, not on behalf of powerful financial institutions. It is important that the public and Congress be able to assess whether the enterprises settled claims that would limit taxpayer losses on a tough, arm's length basis, rather than providing another indirect subsidy to the banking industry.

Please contact Corey Frayer in my office at 202-225-3032 with any questions. I look forward to your response.

Sincerely,

Brad Miller

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