

**Congress of the United States**  
Washington, DC 20510

May 12, 2016

The Honorable Mel Watt  
Director  
Federal Housing Finance Agency  
Constitution Center  
400 7<sup>th</sup> Street SW  
Washington, D.C. 20219

Dear Director Watt:

The Federal Housing Finance Agency (FHFA) has announced that, under the Housing and Economic Recovery Act of 2008 (HERA), it “has an obligation to protect Fannie Mae’s and Freddie Mac’s rights, and will aggressively do so by bringing or supporting actions to contest [homeowners’ association] foreclosures that purport to extinguish Enterprise property interests in a manner that contravenes federal law.”<sup>1</sup> Because FHFA’s position reflects a new interpretation of HERA and potentially affects millions of homeowners living in community associations across the country, we write to ask you to delay the implementation of this announcement until you solicit and consider public comments on its implications.

**State Super Lien Laws**

66.7 million Americans – just over 20% of the country’s population – live in communities managed by community associations.<sup>2</sup> These community associations rely on fees from member residents to provide general upkeep and maintenance. If members do not pay their fees, community associations can place a lien on the property to secure their funding and maintain their services.

In 22 states and the District of Columbia, so-called “super lien” laws grant community association liens priority over first mortgage liens. These super liens give associations the right to foreclose on the property to collect the statutorily prescribed “priority” portion of their lien – usually, up to six months’ worth of owed fees.<sup>3</sup> A foreclosure under a super lien law extinguishes the first lienholder’s property rights.<sup>4</sup>

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<sup>1</sup> *Statement on HOA Super-Priority Lien Foreclosures*, FEDERAL HOUSING FINANCE AGENCY (Apr. 21, 2015), available at <http://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx>.

<sup>2</sup> *National and State Statistical Review for 2014*, COMMUNITY ASSOCIATIONS INSTITUTE (2014), at 1, available at [http://www.cairf.org/research/factbook/2014\\_statistical\\_review.pdf](http://www.cairf.org/research/factbook/2014_statistical_review.pdf).

<sup>3</sup> See, e.g. Mass. Gen. Laws ch. 183A, § 6(a)(iii)(c).

<sup>4</sup> *SFR Investments Pool I, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 411-12 (Nev. Sept. 18, 2014); *Chase Plaza Condominium Association, Inc. v. JPMorgan Chase Bank, N.A.*, 93 A.3d 166, 168 (D.C. Court of App. Aug. 28, 2014).

Most super lien laws require the community association to provide notice to the first mortgage lienholder before foreclosure and to give the first lienholder an opportunity to pay the delinquent fees in order to protect their lien.<sup>5</sup> These super lien laws often encourage first mortgage lienholders to temporarily cover delinquent association fees, allowing associations to maintain upkeep without needing to raise fees on other residents of the community.<sup>6</sup>

### FHFA's Obligations Under HERA

Congress enacted HERA in July 2008. That September, FHFA placed Fannie Mae and Freddie Mac into conservatorship.<sup>7</sup> Under section 1144(j)(3) of HERA, while FHFA acts as conservator, no "property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without consent of the Agency."<sup>8</sup>

For several years, FHFA did not assert that section 1144(j)(3) of HERA preempted state super lien laws as applied to mortgages owned by Fannie Mae or Freddie Mac. Nor did the agency withhold consent in any foreclosure of a Fannie Mae or Freddie Mac property initiated under a state super lien law.

In fact, FHFA appeared to implicitly acknowledge that super lien laws could be used to foreclose on properties under its control. In 2012, Fannie Mae issued a Servicing Guide stating that its loan servicers must "protect the priority of the mortgage lien and [] clear all liens for delinquent homeowners' association dues and condo assessments."<sup>9</sup> The Guide stated that Fannie Mae "required servicers to advance funds when the servicer is notified by [a community association] that the borrower is 60 days delinquent in the payment of assessments or charges levied by the association if necessary to protect the priority of Fannie Mae's mortgage lien."<sup>10</sup> Fannie Mae would "provide[] for reimbursement to the servicer for up to six months of such advances in certain states."<sup>11</sup>

On December 5, 2014, however, FHFA challenged an attempt by a community association in Nevada to use that state's super lien law to foreclose upon a property owned by Fannie Mae. FHFA asked the federal court to find that "to the extent that the HOA Sale purported to extinguish Fannie Mae's first secured interest, it was invalid."<sup>12</sup> On June 24, 2015, the United States District Court for the District of Nevada granted summary judgment to Fannie Mae and FHFA, holding that HERA preempted the Nevada super lien statute.<sup>13</sup>

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<sup>5</sup> See, e.g. *id.*

<sup>6</sup> See Andrea J. Boyack and William E. Foster, *Muddying the Waterfall: How Ambiguous Liability Statutes Distort Creditor Priority in Condominium Foreclosures*, 67 ARK. L. REV. 225, 238-40, 279 (2014).

<sup>7</sup> *FHFA as Conservator of Fannie Mae and Freddie Mac*, FEDERAL HOUSING FINANCE AGENCY, available at <http://www.fhfa.gov/Conservatorship/Pages/History-of-Fannie-Mae--Freddie-Conservatorships.aspx>.

<sup>8</sup> 12 U.S.C. § 4617(j)(3).

<sup>9</sup> *Servicing Guide Announcement SVC-2012-05*, FANNIE MAE (Apr. 11, 2012), available at <https://www.fanniemae.com/content/announcement/svc1205.pdf>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Complaint at ¶ 49, *Federal National Mortgage Association v. SFR Investments Pool 1, LLC*, No. 2:14-cv-02046 (D. Nev. December 5, 2014).

<sup>13</sup> *Skylights LLC v. Byron*, 112 F. Supp. 3d 1145, 1159 (D. Nev. June 24, 2015).

As the Nevada case was unfolding, FHFA announced a new policy on any foreclosures of Fannie Mae and Freddie Mac properties under state super lien laws. On December 22, 2014, FHFA issued a release stating that the agency would “aggressively” protect the rights of Fannie Mae and Freddie Mac by “bringing actions to void foreclosures that purport to extinguish Enterprise property interests in a manner that contravenes federal law.”<sup>14</sup> FHFA reiterated this point on April 21, 2015, and added that “it has not consented, and will not consent in the future, to the foreclosure or other extinguishment of any Fannie Mae or Freddie Mac lien or other property interest in connection with [homeowners’ association] foreclosures of super-priority liens.”<sup>15</sup>


### **Request for Delay and Solicitation of Public Comments**

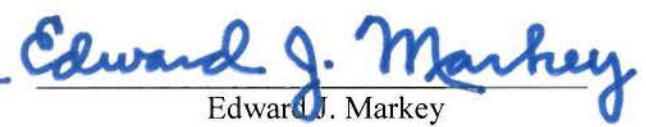
As FHFA’s actions and statements reflect, it has discretion to determine whether to consent to foreclosures brought under state super lien laws. The agency’s decision to rely on HERA to categorically withhold consent for such foreclosures – and to aggressively challenge any foreclosures initiated under state super lien laws – represents a significant shift in policy several years after the enactment of HERA. FHFA did not solicit public comment on that policy change even though its new position could potentially affect millions of homeowners and thousands of loan servicers and community associations.

Given the widespread effect that FHFA’s new policy will have, we believe the agency should solicit and consider public comments before implementing it. Accordingly, we request that FHFA delay implementation of its new policy on state super lien laws and set up a process for obtaining and reviewing public comments on the issue. FHFA should consider how its policy would advance each of its statutory purposes, including its obligation to ensure that “the operations and activities of each regulated entity foster liquid, efficient, competitive, and resilient national housing finance markets.”<sup>16</sup>

We appreciate your prompt consideration of this matter.

Sincerely,

  
Elizabeth Warren  
U.S. Senator

  
Edward J. Markey  
U.S. Senator

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<sup>14</sup> *Id.*

<sup>15</sup> *Statement on HOA Super-Priority Lien Foreclosures*, FEDERAL HOUSING FINANCE AGENCY (April 21, 2015), available at <http://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx>.

<sup>16</sup> 12 U.S.C. § 4513(a)(1)(B)(2).



Richard E. Neal  
Member of Congress



Michael E. Capuano  
Member of Congress



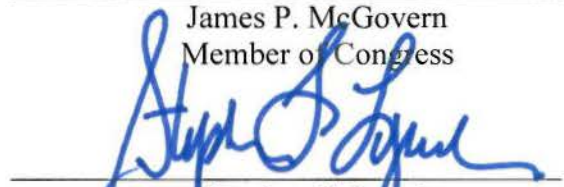
Niki Tsongas  
Member of Congress



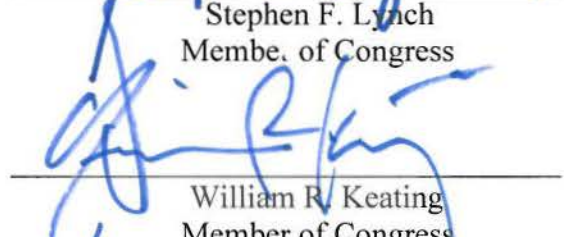
Joseph P. Kennedy III  
Member of Congress



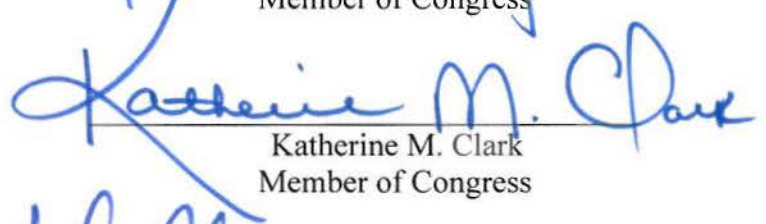
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Member of Congress



Stephen F. Lynch  
Member of Congress



William R. Keating  
Member of Congress



Katherine M. Clark  
Member of Congress



Seth Moulton  
Member of Congress