NATIONAL BANKRUPTCY CONFERENCE
A Voluntary Organization Composed of Persons Interested in the Improvement of the Bankruptcy Code and Its Administration

July 23, 2008

Hon. Nancy Pelosi
Speaker
House of Representatives
Washington, D.C. 20515

Hon. Harry M. Reid
Majority Leader
United States Senate
Washington, D.C. 20510

Hon. John Boehner
Republican Leader
House of Representatives
Washington, D.C. 20515

Hon. Mitch McConnell
Minority Leader
United States Senate
Washington, D.C. 20510

Re: H.R. 3221–American Housing Rescue and Foreclosure Prevention Act of 2008

Dear Madame Speaker and Messrs. Leaders:

The National Bankruptcy Conference[1] writes to express its serious concern about the provision of H.R. 3221, the "American Housing Rescue and Foreclosure Prevention Act of 2008," that would, apparently inadvertently, allow a conservator or receiver in an insolvency proceeding for Fannie Mae or Freddie Mac to interfere with and possibly upset ordinary commercial transactions.

H.R. 3221 would create a Federal Housing Finance Agency with oversight over (1) Fannie Mae and its affiliates, (2) Freddie Mac and its affiliates, and (3) each of the Federal Home Loan banks, each (including, in the case of Fannie Mae and Freddie Mac, their affiliates) referred to in the statute as a "regulated entity". Among the powers of the new Agency would be the power to act as receiver or conservator for any of the regulated entities and in either of those capacities to avoid any transfer of property or obligation made or incurred within five years before the FHFA's appointment as receiver or conservator, with intent to hinder, delay, or defraud the regulated entity, the Agency, the receiver or the conservator. This power would be created by section 348 of the House version, passed on June 9, 2008 and section 1145 of the Senate amendment, adopted on July 15, 2008 each would enact a new section 1367(b)(15) of the Housing and Community Development Act of 1992.

The National Bankruptcy Conference generally supports the power to avoid fraudulent transfers as an important part of bankruptcy and insolvency law. A trustee or debtor-in-possession has this power in a case under the Bankruptcy Code and creditors have it outside of bankruptcy. The Conference believes this power contributes to the important goal of recovering and maximizing assets of failed company, including a regulated entity in receivership or conservatorship.

We are concerned, however, about two aspects of this proposed avoiding power.

[1] Information about the National Bankruptcy Conference is enclosed with this letter.

First, as drafted, the power reaches far beyond any existing avoidance power. As used traditionally, the avoidance power would bring assets formerly owned by the regulated entity back into its possession for the benefit of its creditors. The proposed avoidance power reaches transactions which had nothing to do with the regulated entity to recover property which never belonged to the regulated entity. It would reach transfers by all "affiliates" of the regulated entities, including for example officers and directors, and perhaps more troubling, transfers by anyone who owes money to the regulated entity, *including a home owner whose mortgage has been transferred to Fannie Mae or Freddie Mac*.

Second, the fraudulent transfer provision is expressly made "superior to any rights of a trustee or any other party (other than any party which is a Federal agency) under title 11, United States Code." *See* sec. 1367(b)(15)(D). We believe the effect of this superiority clause is to allow the receiver or conservator of the regulated entity to avoid transfers by either affiliates (regardless of whether they owe any money to the regulated entity) or by anyone who owes money to the regulated entity (including homeowners) for its benefit, to the exclusion of all other creditors of those affiliates or borrowers. We note that the proposed section 1367(*l*), which generally provides that this legislation does not supersede the provisions of title 11, excludes this provision and would arguably not prevent the conflicts we address here. (This proposed section 1367(*l*) is not in the Senate amendment.)

The reach of the avoiding power to cover transfers by entities that only owe money to the regulated entity is the most troubling aspect of this legislation. Bankruptcy and insolvency laws gives rights against over-reaching creditors of a failing company but never against a party who owes money to the failing company or, worse, to that party's own creditors, who are even one more step removed from the failing company. That is what proposed section 1367(d)(15) would do. We believe it should be stricken. Existing fraudulent transfer law is fully adequate to address the concerns that proposed section 1367(d)(15) attempts to address and fully protects the receiver or conservator.

If the entire provision is not stricken, the priority given to the receiver or conservator is very troubling. The general priority for federal government claims was eliminated in bankruptcy cases when the Bankruptcy Code was enacted in 1978. Here, the priority is new and not even for the benefit of the Federal government as a creditor, but rather for an entity over whom a Federal agency only has oversight. This priority is at least as harmful as the former federal priority was. No creditor through commercially reasonable due diligence can ever know with any degree of comfort whether its claims may be effectively subordinated to an unknown, contingent claim by a receiver or conservator for one of the other creditors of its borrower or, even more tangentially, a receiver or conservator for a regulated entity as to which the other creditor is a regulated entity-affiliated party. For these reasons, subparagraph (D) of proposed section 1367(d)(15) should be stricken.

As a secondary observation, we also note that the five-year reach of this avoiding power, in proposed section 1367(d)(15)(A), enabling the receiver or conservator to look back for five years before its appointment, is longer than the comparable four-year period incorporated into

the Uniform Fraudulent Transfer Act after much consideration and now adopted by 43 states and the District of Columbia.

Recommendation

The Conference strongly recommends striking proposed section 1367(b)(15), or at least subparagraph (D). We also recommend limiting the reach-back period in section 1367(b)(15)(A) to 4 years and revising section 1367(*l*) in the manner attached.

We remain available to address any questions you may have and to assist in any technical analysis or drafting that you may desire.

Sincerely,

/s/ Richard Levin

Richard Levin
Vice Chair
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Attachment to Letter of Richard Levin,
Vice-Chair, National Bankruptcy Conference, July 23, 2008

(*l*) PRESERVATION OF BANKRUPTCY LAW. – Nothing in this Act shall be construed to modify, impair, or supersede the operation of any provision of title 11 of the United States Code, or the operation of any provision of title 28 of such code that relates to cases under such title 11 or to civil proceedings arising under such title 11 or arising in or related to cases under such title 11, or the operation of any provision of the Federal Rules of Bankruptcy Procedure, except that the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation or any Federal home loan bank may not be a debtor under such title 11.[3]

[3] "Regulated entity" includes any affiliate (not defined) of the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation. For example, any officer of either entity might be an "affiliate" and therefore not eligible to file personal bankruptcy as this savings clause is currently drafted.

National Bankruptcy Conference

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formed from a nucleus of the nation's leading bankruptcy scholars and practitioners, who gathered informally in the 1930's at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940's and has been a resource to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 60 active members are leading bankruptcy scholars at major law schools, as well as current and former judges from eleven different judicial districts and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort and tax related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC. The current members of the NBC and their affiliations are set forth on the second page of this fact sheet.

Policy Positions. The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members - who represent a broad spectrum of political and economic perspectives - based on their knowledge and experience as practitioners, judges and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the deliberations of the Conference.

Technical and Advisory Services to Congress. To facilitate the work of Congress, the NBC offers members of Congress, Congressional Committees and their staffs the services of its Conferees as non-partisan technical advisors. These services are offered without regard to any substantive positions the NBC may take on matters of bankruptcy law and policy.

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