Statement of David G. Kittle, CMB

Chairman-Elect

Mortgage Bankers Association

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Subcommittee on Commercial and Administrative Law

Committee on Judiciary

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Hearing on

"Straightening Out the Mortgage Mess: How Can We Protect Home Ownership and Provide Relief to Consumers in Financial Distress? – Part II"

Madam Chairwoman, Ranking Member Cannon and members of the Committee, I am David G. Kittle, CMB, President and Chief Executive Officer of Principle Wholesale Lending, Inc. in Louisville, Kentucky and Chairman-Elect of the Mortgage Bankers Association (MBA).[1] I appreciate the opportunity to appear before you today to testify on behalf of MBA and the mortgage industry concerning legislation that would alter the treatment of home mortgages under Chapter 13 of the Bankruptcy Code and seriously disrupt the U.S. home mortgage market.

The legislation in question is H.R. 3609, the ''Emergency Home Ownership and Mortgage Equity Protection Act of 2007,'' introduced by Representative Brad Miller (D-NC) and Chairwoman Linda Sanchez (D-CA). It makes key changes to Chapter 13 of the Bankruptcy Code including:

- removing anti-modification protections afforded to all mortgages secured by principal residences ("home mortgages");

- permitting modified home loans to be repaid beyond the term of the Chapter 13 plan, which today cannot exceed five years; and

- eliminating the requirement to obtain credit counseling before the debtor can file for bankruptcy.

If these provisions were enacted, it would increase the cost and reduce the availability of mortgage credit for principal residences. For these reasons, MBA opposes the passage of H.R. 3609.

Today, a mortgage secured by the principal residence of a debtor cannot be modified in bankruptcy. This policy has been in existence over 100 years, since the Bankruptcy Act of 1898, and is a cornerstone to an efficient U.S. residential mortgage market. The protection provided to home mortgages was not a loophole or oversight. It was a deliberate act of Congress to ensure the continued low cost and free flow of home mortgage credit. (See Legislative History, Attachment A). A shift in public policy to remove such protections and encourage debtors not to pay their contractual mortgage obligations would dramatically change the residential mortgage market. H.R. 3609 introduces significant new risks for home lenders, investors and loan servicers. These risks include the ability to set aside mortgage contracts and modify interest rates and

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[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 500,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 3,000 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

other terms. It would also allow liens to be stripped down to the fair market value of the underlying properties, although the bill does not define fair market value.

Impact of H.R. 3609 on Mortgage Financing Costs and Terms

Lenders, securitizers and loan servicers would have to take various precautions to avoid or offset the significant new risks H.R. 3609 would impose. Such precautions would include increasing interest rates and other compensation, tightening credit standards, requiring larger downpayments and restricting credit in declining markets. Failing to take such precautions would be unsound business management.

MBA was asked to estimate the severity of changes borrowers could face if H.R. 3609 were enacted as proposed. In general, we believe based on our preliminary estimates that downpayments would be required in the order of 20 percent or more,[2] as are currently required for mortgages secured by investment properties. Of course, there is some flexibility on this requirement as points are assessed in inverse proportion to the amount of the downpayment. In other words, a borrower can pay an extra point or more to make a 10 percent downpayment instead of a 20 percent or higher downpayment.

Rates and downpayment terms would no doubt vary among lenders, but it is very clear that it would be difficult for borrowers to get high loan-to-value (LTV) loans. The reason for this result is that if a lender is exposed to 95 percent of a property's value and a sizeable amount is forgiven, the lender cannot recoup that money. In addition to higher downpayments, we estimate, based on current pricing for mortgages on investment properties, that a borrower is likely to pay one to three points on the entire loan amount, depending on the size of the downpayment, and an additional 3/8 of a percent in mortgage interest rate. To explain this in terms of pure interest rate (versus a combination of rate and points/fees), we estimate that borrowers would see a 200 basis point jump in interest rates with a 5-10 percent downpayment home mortgage, with no points or fees at closing.

The need for the additional costs and higher downpayment is straightforward. Losses on any foreclosure are high and lenders are always subject to fluctuations in real estate prices for the value of any collateral recovered. For example, if the terms of the debt are subject to an appraisal conducted years after origination and the courts can strip down the lien to the current fair market value, then the security interest in the collateral and the fundamental nature of secured home lending will differ. Bankruptcy filings will no doubt skyrocket as borrowers will seek the incentives H.R. 3609 creates. The severity and velocity of bankruptcy cram downs will be comparable, if not higher, than rates and

[2] It is unclear whether mortgage insurance would be available to offset this requirement. If insurers were willing to accept the risk of strip down, the cost of mortgage insurance would increase. Mortgage insurance is not available on weaker credit borrowers.

losses from foreclosure on investment properties[3] as bankruptcy attorneys will aggressively advertise to borrowers whose homes have declined in value, whether or not the borrower is in default, and when interest rates decline, advertise to all borrowers that bankruptcy provides an inexpensive method to refinance. The cost of defending these bankruptcy cases will be staggering to the industry.

It is important to understand what this bill does, to understand why it will so drastically affect the mortgage market and why MBA opposes its passage. In addition to the risk described above, other risks are introduced that are perhaps unintended, but which have serious consequences for all players in the mortgage market. We would like to discuss the full range of risks in greater detail, which will illustrate why mortgage rates and terms will change so dramatically.

Key Provisions of H.R. 3609 Introduce Substantial New Credit Risk

A. Permits Modifications and Strip Down of Home Mortgages

As stated above, the bill amends section 1322(b)(2) of the Bankruptcy Code, which currently prohibits bankruptcy judges from modifying the terms of mortgages secured by “principal residences” in Chapter 13. The bill would permit bankruptcy courts to change the terms of the mortgage without the lender’s consent (often referred to as a “cram down”), including modifying the interest rate, extending the maturity date, capitalizing arrearages and reamortizing the loan. In addition, judges would be granted the authority to “strip down” a secured home mortgage. A strip down (sometimes also known as a “lien strip”) is a type of cram down that effectively converts that portion of the secured debt that exceeds the fair market value of the home into unsecured debt. The unsecured portion is treated like other unsecured debt, which is generally paid little or nothing through the Chapter 13 Plan, and is discharged upon successful completion of the plan.

The modification provision in H.R. 3609 applies to all loans secured by principal residences, not just the narrowly defined classes of abusive mortgages that members of Congress claim is the reason for this drastic change in public policy. Needless to say, this broad application of cram downs to the entire spectrum of mortgage products introduces substantial new risks into first mortgage and home equity lending on principal residences.

[3] Unlike foreclosures, borrowers do not lose their assets in a Chapter 13. Rather the borrower receives a key benefit by imposing losses on the lender or investor. Because of this combination, the decision to file bankruptcy becomes significantly driven by economics (since home loss is not a factor). If the decline in property value is significant enough, the homeowner will have an incentive to seek cram down benefits comparable to an investor seeking to dispose of an underwater or financially draining asset.

B. Eliminates Substantial Controls

In addition to permitting cram downs of home mortgages, H.R. 3609 goes farther and removes significant controls that virtually ensure that bankruptcy filings will skyrocket. H.R. 3609 creates a quintessential moral hazard. Today, the Bankruptcy Code generally allows mortgages other than those secured by principal residences of the debtor to be crammed down. However, if such loans are crammed down, the debtor must pay the *entire amount* of the secured claim within the three-to-five-year duration of the Chapter 13 plan.[4] [5] For example, if a mortgage contract of $150,000 gets stripped down to $100,000, the debtor must pay the entire $100,000 within three-to-five years in equal monthly installments. This control limits unbridled runs on the bankruptcy court whenever property values or rates decline. This control, however, is stripped from the rights of creditors by allowing the modified debt to be paid over a term longer than the Chapter 13 plan, which currently cannot exceed five years. H.R. 3609 thereby ensures more borrowers will seek Chapter 13 Bankruptcy.

Of course, consumer groups argue that the bill will *not* substantially increase creditor risk or mortgage costs because cram downs of second homes and investor properties had minimal impact on rates since protections were removed on those property types in 1978. Consumer groups fail to mention the whole truth.

In addition to the restriction mentioned above, vacation homes and investment properties seldom get to the point of cram down because there is generally little reason to cram down these loans. A vacation home clearly is not necessary to provide a roof over the borrower's head and with no equity, and little or no income, is a burden on the estate. Likewise, an investor property that has no equity and a negative cash flow is not necessary for reorganization and is a burden on the estate.[6] Thus, cram down of these types of loans is seldom attempted. Instead, the lender obtains termination of the automatic stay and the property is foreclosed without stripping down the lien. Conversely, a principal residence *is essential* to the reorganization of the borrower and thus if H.R. 3609 is enacted, courts will not release these assets from the stay and judges will be required to impose cram downs.

Because H.R. 3609 also removes the credit counseling requirement when the debtor is in foreclosure, the bill removes the final control against unfettered bankruptcy filings. Congress enacted the pre-filing counseling requirement to assure that debtors in financial difficulty had the benefit of two independent

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[4] 11 USC 1322(d)(2007). See also In re Enewally, 368 F.3d 1165 (9th Cir., 2004).

[5] The unsecured portion of the claim that gets crammed down gets an apportioned payment to the extent there is additional income or cash that can support those payments. If there are no funds remaining to pay unsecured creditors after paying secured and priority claims, the unsecured creditors receive nothing and the unsecured debt is discharged upon termination of the plan.

[6] Investment properties with no equity but with a positive cash flow are still subject to repayment during the 3/5 year term of the plan and thus seldom get crammed down.

sources of information – approved non-profit counselors, and bankruptcy attorneys. Credit counselors are well versed in housing assistance that can help a borrower save his home without filing bankruptcy.

There is no doubt that the impact of the modification provision combined with elimination of all creditor protections will result in increased Chapter 13 filings. The considerable incentive of financial gain to the borrower will ensure that cram downs on home loans will skyrocket over the rate of existing cram downs on second homes and investor loans. Lenders will be forced to control or offset these costs through higher interest rates, points and fees; tighter underwriting restrictions; and bigger down payments. In addition, we believe that lenders and servicers would have a fiduciary duty to their stockholders to take precautions to minimize losses by avoiding declining markets. The bill has the potential to promote legal "red-lining" of distressed regions, such as the Rust Belt states. The result is counter to industry and legislative efforts to help these borrowers.

Impact of Cram Downs on Government Programs

A significant downside of the proposed bankruptcy legislation is the impact on mortgage servicers and ultimately the government housing programs. Today, the Federal Housing Administration (FHA), Department of Veterans Affairs Home Loan Guaranty Program (VA) and Rural Housing Service (RHS) are the prime liquidity vehicles for home purchases and mortgage refinances. FHA, for example, has seen a 15 percent increase in mortgage applications just in the last three months due to the exodus of private investors. VA and RHS programs, while smaller, offer significant benefits, including 100 percent financing, to a specialized segment of consumers.

When these government programs were created, there was no risk of cram down on home mortgages. As a result, authorizing statutes and regulations of the government programs fail to deal appropriately with the risk created by H.R. 3609. Statutes were developed to deal with foreclosures, not bankruptcy modifications and strip downs. As a result, the bankruptcy legislation, when combined with existing investor accounting and claim policies, creates perverse results for mortgage servicers. These results may cause servicers to avoid administering these products. Without servicers, originators cannot offer these products.

For example, the vast majority of FHA, VA, and RHS loans are securitized into Ginnie Mae securities. Ginnie Mae guarantees the timely payment of principal and interest to investors; but, servicers are bound by contract to remit scheduled principal and interest to Ginnie Mae regardless of receipt by the borrower. If a mortgage is modified as to rate, term, capitalization or amortization, the loan must be repurchased from the Ginnie Mae security by the servicer at par (the amount of the principal balance). Servicers often have to borrow the money to buy out the loan. In order to avoid taking principal losses, servicers quickly

resecuritize the modified loans into Ginnie Mae II securities. Today, there is no problem resecuritizing voluntary modifications because the borrower is brought current through the process. However, unlike voluntary modifications, it is unclear whether modified mortgages *in bankruptcy* will be eligible for resecuritization. Wall Street has little appetite for bankrupt debtors in securities. If bankruptcy modifications cannot be resecuritized, servicers will have to place these assets on their books, hold capital and loan loss reserves against them and take the risk of principal loss, which they do not typically do today. The servicer would also be paying the debt service on the commercial loan used to buy the loan out of the pool. Given our belief that Chapter 13 modifications will dramatically increase, the cost to the servicing industry would be substantial.

It is also important to note that servicers cannot submit an FHA insurance or a VA guarantee claim for the amount of any lien strip down. The servicer would have to advance the amount that was stripped down to Ginnie Mae security holders and absorb the principal loss. This is a substantial shift in liability that servicers certainly did not contemplate when they agreed to service Ginnie Mae securities. As stated previously, servicers rarely take principal losses today. The severity of losses to which servicers would now be exposed would be comparable to what FHA and VA lose with each foreclosure – more than $30,000 per property. Yet, if those loans went to foreclosure sale, FHA insurance and VA guarantees would kick in to protect the servicer against principal loss.

The risk of uninsured losses and repurchase risk created by H.R. 3609 will cause existing servicing portfolios to decline in value, requiring accounting write downs of servicing assets. The velocity at which loans would enter bankruptcy could cause capital and liquidity problems for servicers. This disruption could also cause significant problems with voluntary workouts as bankruptcy cram downs would consume the servicer's financial and personnel resources. The stated objective of encouraging more voluntary workouts through H.R. 3609 would simply not materialize because the reward in bankruptcy is far more lucrative than what servicers could or should offer.

Going forward, servicers would bid less for servicing assets, which will drive up mortgage rates and costs for borrowers. Also, because servicers do not currently bear the primary risk of principal loss, servicers may shun these products, require significantly greater compensation, or service only loans with protections (such as higher down payments) in the future. All of these options have a direct impact on the success of the government programs and program features that make them attractive today.

Consumer groups argue that lenders will convince these entities to merely change their policies. It is not so simple. FHA, for example, is not permitted *by statute* to pay an insurance claim for the strip down amount. [7] It was simply not

[7] 12 USC 1710a (2007). FHA can only pay a claim when it receives title to the property, the mortgage is foreclosed, the loan gets assigned, there is a pre-foreclosure sale or there is a loss mitigation partial claim.

contemplated. An act of Congress would be required to restore the 100 percent federal insurance that makes the FHA products marketable.

Impact of Cram Downs on Investors and the MBS Market

Securitization increases homeownership. Today, banks and other lenders resell mortgage debt to other investors, or "securitize" it. This frees up capital and allows banks and mortgage companies to invest more into local economies and makes home mortgage credit more widely available. As a result, homeownership has risen significantly since the mid-1990s. The share of Americans who owned homes rose from 64 percent in 1994 to 69 percent by 2005. This is the highest increase in homeownership since the surge that followed World War II.

Securitization of mortgages is based on the underlying value of those mortgage contracts. Granting bankruptcy judges the authority to retroactively modify a mortgage in Chapter 13 proceedings would have a materially adverse impact on the mortgage contract. The resulting uncertainty would mean that securitizers or investors could not assess prices or calculate the risk of how many mortgages could be modified. Such uncertainty would likely drive investment away from mortgage-backed securities (MBS) or result in overcompensating for risk through pricing. Existing MBS values could also decline as losses mount, resulting in additional downgrades of securities.

Investors such as Fannie Mae and Freddie Mac would be required to purchase the vast majority of loans out of the MBS pools if the loans are modified and absorb the principal losses.

It is unclear what would happen to investors. No doubt investors in non-guaranteed mortgages and MBS ultimately would take the principal loss and reduced yields, however, it is possible that if judges modify loans beyond the pool parameters (such as by converting a 15-year mortgage to a 30-year mortgage), the loans would have to be purchased out of the MBS pools. It is unknown if servicers would bear that cost.

Bankruptcy as a Low-Cost Refinance Alternative

H.R. 3609 not only creates an incentive to file bankruptcy in markets with declining property values, but it encourages solvent borrowers who can otherwise pay their mortgages to seek Chapter 13 to get what is essentially a low-cost refinance. It has happened before on non-home mortgage assets[8] and would likely occur with home mortgages if H.R. 3609 gets enacted given the removal of all restraints on cram downs. While interest rates have been at

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A partial claim is a specialized loss mitigation tool, which allows arrearages to be subordinated into a junior lien held by HUD.

[8] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") prohibited the cram down of car loans for two and a half years from origination to stop borrower abuse.

historic lows, there is no guaranty that rates will not climb into the double digits as this country experienced in the late 1970s and early 1980s. When rates eventually decline, H.R. 3609 encourages borrowers to seek bankruptcy as a cheap alternative to refinancing.

Lenders Forced to Guarantee Origination Value of Properties Damaged or Destroyed by Natural Disasters or Borrower Misconduct

Another significant concern created by HR 3906 is the windfall borrowers would obtain when the property is either 1) damaged by the borrower or 2) damaged by natural disasters such as Hurricanes Katrina and Rita or the recent wildfires of Southern California.

Borrowers in default often fail to properly maintain their property, and sometimes intentionally damage their property. In some cases, borrowers attempt significant renovations but fail to complete them, leaving the collateral significantly devalued. We do not believe these debtors should be rewarded through loan stripping, but H.R. 3609 would do just that if passed.

Likewise, we do not think borrowers should be able to wipe out the security interests of creditors when their properties are destroyed by natural disasters, but H.R. 3609 would do just that. To illustrate our concern, we would like to focus on properties damaged by Hurricanes Katrina and Rita. As you might be aware, lenders have offered borrowers who were impacted by the Hurricanes over two years of forbearance and/or have also modified their mortgages. Some properties have zero or negative values. Now that community development block grant money is flowing to homeowners to rebuild these properties, Congress is poised to add another devastating blow to investors and servicers: the ability for borrowers to wipe out *all or significant portions* of the debt in Chapter 13 bankruptcy. The impact of lien stripping on insurance proceeds and grant funds as secured assets is also brought into question, leaving creditors with possibly no recourse to recover the value of the debts. H.R. 3609 places lenders, servicers and investors in an inappropriate role of property insurers of last resort and/or guarantors of property values. Mortgage lenders and servicers are not in a position to evaluate these risks.

H.R. 3609 Gives Enormous Windfalls to Borrowers

What is probably one of the most inequitable results of H.R. 3609 is the fact that debtors in depressed real estate markets or with damaged or destroyed properties will reap a windfall at the expense of servicers, investors and borrowers who honor their debts. This windfall occurs when the borrower is permitted to reduce the debt to the depressed value of the property, retain the property, and enjoy the benefits of appreciation in value when market conditions improve (or repairs get made with insurance and government aid), while having no obligation to pay the lender the full contractually agreed upon debt. Executing

a strip down based on a snapshot of value ensures borrowers will reap significant profits when the property appreciates later in time. The case in point is illustrated by In re: Enewally 368 F.3d 1165 (9th Cir., 2004).[9] While there are always pockets of declining home values, over the last 30 years home prices nationally have risen six percent per year on average.[10]

The unfair result H.R. 3609 creates does not occur today in Chapter 7 or when the borrower is allowed to foreclose on the property. The creditor in either case would have the right to acquire the property by bidding its claim. The creditor could then, if it chooses, hold the property until market conditions improve (and retain full insurance benefits and security interests in grant proceeds in the case of damaged property), thereby reducing its losses. In the case of a foreclosure, the servicer could in most cases also seek a deficiency judgment for the difference between the value of the property and the contractual obligation. No such remedies are contemplated in H.R. 3906.

Industry Efforts to Assist Distressed Borrowers

Members of this Committee have discussed their goal of keeping people in their homes. We at the Mortgage Bankers Association share that goal. None of us wants a family to lose its home and our members are trying their best to help. Servicers are providing loss mitigation to eligible borrowers in distress. These alternatives to foreclosure include forbearance and repayment plans, modifications, partial claims (FHA), short sales and deed in lieu of foreclosure. There has been a lot of criticism about the lenders' speed at modifying loans, but little recognition is given to the fact that many other workout options are being offered to borrowers in significant volume – most notably forbearance agreements that allow the borrower significant time to repay arrearages. The industry has also made strides in clarifying accounting and tax rules to allow for more modifications. However, wholesale modifications are not possible or advisable.

Another problem that servicers are attempting to resolve is the low contact rate servicers have with borrowers. Historically, 50 percent of borrowers who reached foreclosure had no contact with the servicer despite multiple efforts on the servicer's part to reach out. Contact volume is still low and borrowers often simply don't know where to turn for reliable advice and assistance. Servicers have been working diligently to ensure all borrowers know about alternatives to foreclosure and to coordinate with housing counselors if borrowers are uncomfortable talking to their servicers. To help provide a coordinated and centralized approach to foreclosure prevention, the industry, with the assistance

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[9] At the time of the bankruptcy court's ruling in 2001, the debtor's property had declined in value to $210,000. The mortgage debt was approximately $245,000 and the borrowers sought cram down. However by the time the United States Supreme Court rejected the Writ of Certiorari three years later, that same property was worth $600,000. Had the debtors' cram down not been overturned on appeal, the debtors would have received a significant windfall.

[10] OFHEO House Price Index.

of the Department of Treasury, Department of Housing and Urban Development and the Housing Policy Council of the Financial Services Roundtable, recently launched HOPE NOW.[11] This effort will provide additional outreach attempts to borrowers, provide a centralized approach to managing housing counselors, centralized points of contact, and will track various metrics on housing counseling and loss mitigation activities.

Alternative Congressional and Government Actions

Members of the House can take considerable pride in the steps you have taken to address problems in the mortgage market. The House passed legislation modernizing the FHA, giving it a greater ability to help troubled borrowers refinance their loans. The House has passed legislation that would exclude discharged debt on principal residences from gross income for tax purposes, thereby saving borrowers already in trouble from higher tax bills and encouraging work outs. The House has passed meaningful housing government sponsored enterprise (GSE) reform and has passed legislation establishing an affordable housing trust fund to ensure more high quality housing is available for more low- and moderate-income families.

Moreover, the Financial Services Committee is currently working on legislation, H.R. 3915, that will create a new regulatory regime for the mortgage market. Let me assure you, this is a very serious piece of legislation. While we are not able to offer our support for that bill at this time, we are working with Chairman Frank to improve the bill. We understand that the Chairman intends to have that bill on the floor of the House by the end of this year.

In addition to Congressional actions, FHA recently announced FHASecure,[12] which allows borrowers the opportunity to refinance into FHA insured loans. What is remarkable about this program is that it would allow a borrower who is six months delinquent on an adjustable rate (ARM) loan to refinance into an FHA loan, despite his or her delinquency, provided the borrower had a good payment history prior to the ARM rate reset and he can afford the new payments. The program also allows borrowers who are upside down on their mortgages (i.e., owe more than their property is worth) to refinance a portion of their loan into non-FHA insured subordinate liens. In the past, combined loan-to-value requirements prohibited such activity. Unfortunately, passage of H.R. 3609 would prevent these subordinate loans from being originated, thus depriving borrowers of useful assistance.

While Congress has made strides in assisting borrowers in distress, H.R. 3609 goes too far. It encourages damaging behavior that will only serve to increase the cost and reduce the availability of home financing. It repudiates existing contracts, imposes mandatory buyback options or home price guarantees on all

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[11] http://www.hopenow.com/
[12] http://www.fha.gov/about/fhasfact.cfm

mortgages and an option to change rate terms. For proponents to argue that such options and guarantees will not come with a price is simply disingenuous.

Conclusion

MBA opposes H.R. 3609 because of the harm it will cause to the mortgage market and borrowers who seek home mortgages. While well-intentioned, H.R. 3609 will increase rates, tighten credit standards, and dry up investor interest in mortgage-backed securities. Our preliminary estimates indicate that mortgage interest rates could jump as much as 200 basis points per loan and down payment requirements will increase if proposed amendments to Chapter 13 of the Bankruptcy Code are enacted. Government programs also stand to be negatively impacted due to the increased costs to administer these programs. With investor appetite for U.S. mortgages waning, it is ill-advised to pass legislation that will further disrupt the mortgage market. We urge Members of the House to look deeper into the implications of H.R. 3609. We are convinced that upon further detailed analysis you will agree that further action on this legislation is ill-advised.

Thank you for this opportunity to share our concerns with the Subcommittee.