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Before the

Committee on Financial Services

United States House of Representatives

Hearing on

"H. R. 1728, the Mortgage Reform and Anti-Predatory Lending Act of 2009"

April 23, 2009

Chairman Frank, Ranking Member Bachus and Members of the Committee, good afternoon. As Chairman of the Mortgage Bankers Association,[1] I greatly appreciate the opportunity to testify before you today on proposals for mortgage lending reform.

Although we have some differences in approach, which I will discuss today, we share your commitment to improving mortgage regulation. Our nation faces a once-in-a-generation opportunity to improve the mortgage lending process and MBA welcomes the opportunity to participate in this important effort. If carefully crafted, improved regulation is the best path to restoring investor and consumer confidence in the nation's lending and financial markets and assuring the availability and affordability of sustainable mortgage credit for years to come. At the same time, if regulatory solutions are not well conceived, they risk exacerbating a credit crisis that trillions of public dollars have still not resolved.

To achieve reform, MBA and its members have been working on a parallel track to that of the committee to develop sensible approaches. Just last month, as a result of this work, we were able to submit to Congress the Mortgage Improvement and Regulation Act (MIRA), which I am attaching to this statement. MIRA would establish uniform lending standards and change the regulatory structure to make the market more transparent and better protect consumers.

MBA's proposal acknowledges the vast changes to the financial and regulatory landscape that have taken place in just the past two years. Since H.R. 3915 passed the House at the end of 2007, the Board of Governors of the Federal Reserve (the Board) undertook a careful review of abuses in the mortgage process that included public comment and open hearings. Following these deliberations, the Board finalized new comprehensive rules under the Home Ownership and Equity Protection Act (HOEPA) addressing the central issues raised by H.R. 3915. These include greater protections for subprime borrowers with new requirements for ability to repay determinations, documentation, escrows and prepayment penalties. The rules also include requirements for all mortgage loans to stem appraiser coercion, servicing and advertising abuses.

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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 280,000 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 2,400 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.

In establishing new lending standards, MIRA seeks to judiciously build on the Board's rules. It also includes legislative proposals that were developed by this committee as part of H.R. 3915, new transparency provisions to conform the Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act (TILA) disclosures, and MBA's own initiatives, such as proposals for a duty of care for loan originators – all with an eye to assuring consumer protection and returning liquidity to the market.

Taken together, we believe our proposed reforms comprise rigorous and workable standards that would include clear requirements for lenders and investors and equally clear protections for consumers, nationwide. Changes to the regulatory structure, among other things, would involve the establishment of a new federal regulatory agency that would implement the new standards and would also be charged with regulating independent non-depository mortgage bankers and mortgage brokers. The agency would also assume responsibility for national counseling and financial literacy programs.

While the new standards would be preemptive of state lending laws, the standards would be both consistent and dynamic, and would require a very high level of federal and state partnership in their development and enforcement. To achieve this, MIRA would establish a council of state and federal regulators to revisit and update the standards regularly to address current abuses and concerns. At the same time, state and federal regulators would work together in reviewing and examining mortgage bankers and brokers and in enforcing the new standards.

H.R. 1728, the Mortgage Reform and Anti-Predatory Lending Act

While we applaud the comprehensive nature of H.R. 1728 and believe legislation in this area is needed, we have several concerns that we will discuss in this testimony. On each of these issues, we believe our MIRA proposal presents an alternative and better approach.

Lack of national standards

First and foremost, H.R.1728 does not establish a national standard for mortgage lending that replaces the uneven patchwork of state mortgage lending laws.[2]

By making the new law a "floor" and not a "ceiling" for additional state and local laws – no matter how laudable their objectives – the bill will perpetuate and expand an already uneven and confusing regulatory patchwork of lending laws where the costs are ultimately borne by consumers. To illustrate this problem, with my testimony I am submitting a map of the patchwork of state anti-predatory lending laws that exist today. Some states have highest cost loan laws that track federal law, some have their

[2] Only the assignee liability provisions provide a narrow preemption.

own highest cost loan laws, some have both their own highest cost and higher-cost laws and some do not have highest cost or higher-cost loans at all.

MBA's MIRA proposal takes the opposite approach from H.R.1728 and preempts state laws, while still providing a pivotal role for state regulators. In a world that is seeking international and national solutions to the current crisis, MBA sees no reason to perpetuate separate federal and state lending requirements.

Lender retention of risk

We are just as concerned about the bill's provision requiring lenders to retain at least five percent of the credit risk presented by non-qualified mortgages. Lenders already have "skin in the game" by virtue of their representations and responsibilities to assignees and investors. At a time when policymakers are focusing so much of their efforts on injecting capital into the financial services sector, this provision would force an inefficient use of capital across all types of institutions, and would threaten to further impair their ability to lend at all.

The approach laid out in the bill would make it impossible for many lenders to operate, including smaller non-depositories who employ warehouse lines of credit. It will also necessitate that larger lenders markedly increase their capital. Both results will narrow choices, lessen credit and significantly increase costs for many borrowers, if credit is available at all.

Considering the potential national and even international effects of this provision, we recommend that, at minimum, this approach should be carefully studied along with workable alternatives before it is implemented. Moreover, because of its implications on secondary market financing, MBA believes this proposal would be more appropriately considered in the context of pending changes to secondary market regulation. The results of a comprehensive study would inform that debate.

Our MIRA proposal empowers the regulator to increase net worth and bonding requirements. MBA believes that such requirements offer a far more desirable alternative that would help align originators' interests with those of borrowers and at the same time provide borrowers a means of recompense in the event of failure.

Defining "qualified mortgages"

MBA believes the definition of "qualified mortgage" is far too limited and will result in the unavailability of sound credit options to many borrowers and the denial of credit to far too many others. Under H.R. 1728, only qualified mortgages will be excluded from the new rules requiring lenders to retain five percent of the credit risk and only qualified mortgages will be subject to the presumption that the ability to repay and net tangible benefit standards have been met. Consequently, loans outside this set will be made at substantially higher costs, if at all.

We urge the committee to redefine the term “qualified mortgage” to provide more flexible standards that will still protect borrowers. Specifically, the regulator should be provided authority to identify products as “qualified mortgages” and the interest rate triggers (1.5 percent over the prime rate for first lien loans and 3.5 percent over the prime rate for subordinate lien loans) should be removed. Doing so would permit both subprime and prime loans to be “qualified” unless they contain nontraditional features that might be regarded as higher risk such as teaser rates, negative amortization provisions, or no documentation requirements. Such a reconfiguration would ensure that sound credit options can be made available to borrowers across the credit spectrum and that jumbo loans, which could easily exceed the trigger, would continue to be available to borrowers in high-cost areas.

Furthermore, any fixed-term loan of 15 to 40 years, government-backed loans, including FHA, VA, Rural Housing, as well as Fannie Mae and Freddie Mac mortgages, should all be regarded as “qualified mortgages” to assure their continued availability to borrowers. MBA notes that an earlier draft of H.R. 1728 permitted mortgages with a fixed payment for a minimum of five years and limited adjustment features to be regarded as “qualified.” Other adjustable loan products, including yearly adjustable mortgages without risky features, can be beneficial for borrowers and should be regarded as “qualified” under specified circumstances as well.

Steering

MBA believes the prohibitions against steering are unclear, overly broad and would unnecessarily prohibit incentive-based compensation to loan officers for mortgage lenders and mortgage brokers, notwithstanding their far different roles.   The restriction may also cover payments from the secondary market to mortgage lenders. There also is a lack of clarity surrounding what is meant by the prohibition against payment based on “loan terms.”

MBA has consistently reminded policymakers that lenders and their employees offer products that borrowers shop for and compare, whereas mortgage brokers act as intermediaries between lenders and the borrowers who employ brokers to shop for them. Consequently, considering the differing functions of mortgage brokers and lenders, whether or not lender loan officers’ employees are paid on commission, they do not present the same steering concerns as mortgage brokers or their employees.

Payments from the secondary market to lender companies based on the terms of loans should not be restricted by anti-steering provisions. Such compensation represents efficient, market-driven means of valuing loans and servicing through which liquidity is provided to the primary market. It differs from, and need not affect, originator compensation. MIRA addresses steering judiciously by requiring a much greater level of disclosure by loan officers. Mortgage brokers would be required to disclose whether they are acting as the borrower’s agent and the sources of their compensation; at the same time lender loan officers would disclose if they are paid on commission.

Safe harbor

We are concerned that the bill's presumptions do not result in bright line safe harbors. As such, they will discourage lenders and investors from entering the market even for qualified mortgages, no matter how promising the borrower. MIRA, on the other hand, would establish bright line safe harbors so that if creditors act properly, they will not be dogged by litigation that increases borrower costs.

Assignee liability

The assignee liability provisions in H.R. 1728, as in MIRA, should include provisions from H.R. 3915 that allow assignees to satisfy their obligations through due diligence and other specified standards. The absence of these provisions, which are contained in MIRA, will discourage investors and hamper the return of sustainable credit to nonprime borrowers.

Other Concerns

MBA has several other concerns that we would be pleased to discuss in greater detail. These include that the definition of a "mortgage originator" may cover mortgage servicers – inadvertently impeding the committee's, the administration's and the industry's efforts to assist troubled borrowers. While MIRA would require the new regulator to implement servicing standards, our proposal does not contain this confusing definition.

The bill's provisions empowering the federal banking agencies to establish net tangible benefit rules for refinancings should require that these standards comprise bright-line tests such as a specific percentage decrease in loan payment or percentage increase in loan amount. If these standards remain subjective, credit will be far more costly, if it is available at all.

While the duty of care is similar to MBA's MIRA proposal, H.R. 1728 should provide that forms be developed for borrowers to provide such information as income, net worth and risk profile so lenders can determine which loans are appropriate based on borrower information.

The bill's provision that tenants in foreclosed properties can stay until the end of the existing lease is well meaning, but will unnecessarily increase financing costs for rental properties. While MIRA establishes clear standards for reasonable notice to tenants, it would not impair the value and costs of financing rental properties to the same extent as H.R. 1728.

H.R. 1728 would make several changes to the existing requirements for very high-cost (HOEPA) loans, resulting in far more loans being categorized as high-cost loans. Because of the nature of HOEPA's restrictions, however, few HOEPA loans are ever made. Like the Board, MIRA would focus protections on loans below the HOEPA thresholds rather than expanding HOEPA's high-cost requirements and shutting off credit.

Finally, at a time when the mortgage process needs to be made more understandable for consumers, H.R. 1728 does little to achieve this result. The bill should call upon the Department of Housing and Urban Development to withdraw its RESPA rule and join with the Federal Reserve to truly simplify mortgage disclosures. MBA has worked with industry experts to develop forms that would satisfy RESPA and TILA requirements. These forms, which we would be happy to share with the committee, can serve as a basis for a new, much more comprehensive reform effort.

Conclusion

Congress is facing a historic opportunity to improve mortgage lending for years to come. While we strongly favor comprehensive legislation in this area and commend the committee for the priority it has placed on addressing this issue, we feel that H.R. 1728 does not yet strike a proper balance between protecting consumers and maintaining the availability of credit that has helped so many Americans realize the dream of homeownership. MBA looks forward to working with Congress on legislation that will replace our patchwork quilt of regulations with a strong uniform lending standard that works for the entire nation.

MORTGAGE BANKERS ASSOCIATION

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