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before the

Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises

Committee on Financial Services

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Hearing on

"H.R. 5579, the Emergency Mortgage Loan Modification Act of 2008"

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Chairman Kanjorski, Ranking Member Pryce, members of the Subcommittee, I am Rob Story, Jr., CMB, President of Seattle Financial Group and Vice Chairman of the Mortgage Bankers Association (MBA).[1] I appreciate the opportunity to appear before you today on behalf of MBA and the mortgage industry to discuss H.R. 5579, the Emergency Mortgage Loan Modification Act of 2008.

H.R. 5579 would provide a safe harbor to servicers who execute certain loss mitigation actions from litigation risk. MBA appreciates Representative Castle's and Kanjorski's efforts to reduce the contractual and fiduciary risks servicers face in providing the full range of loss mitigation options. However, MBA continues to be concerned about how the alteration of contracts would impact future borrowers and liquidity in the marketplace.

Constraints of Legislative Action

MBA appreciates Congressional efforts to relieve servicers from risk of litigation for performing more loss mitigation activities. Any efforts that can help more borrowers save their homes or provide alternatives to foreclosure in a consumer friendly manner are welcomed. However, it is unclear whether the benefits of this proposal outweigh the potential harm. Borrowers and mortgage companies desperately need greater stability in the secondary mortgage markets. Without greater liquidity, the ability to refinance and make new loans will be significantly constrained by lenders' portfolio capacity, rather than the broader national and international capital markets. Given the lowered risk tolerance of lenders, portfolio capacity is severely limited.

The best way to improve liquidity is through investor confidence. This comes from greater clarity as to the risk undertaken when purchasing whole loans or mortgage backed securities (MBS), as well as, continued confidence that credit enhancements and waterfall distributions will not be disrupted. Unfortunately any statutory effort that increases investor risk or limits their maximum recovery, including protecting servicers from contractual liability, hampers this goal. We are concerned this bill may create investor uncertainty, similar to recent bankruptcy proposals, despite the care the drafters took in trying to balance the interests of investors and servicers.

This legislation appears to be designed to protect investor interests, as evidenced by the bill's controls over unrestricted modifications and work outs. In particular, H.R. 5579 continues to constrain servicers to the pooling and servicing agreements (PSAs). The bill also recognizes and restates common contractual and business limitations on servicer activities, including the fact that:

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 370,000 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.

(1) servicers are duty bound to maximize, or to not adversely affect, the recovery of total proceeds to the benefit of all investors and holders of beneficial interests in a pool in the aggregate and not to any individual party or group;

(2) servicer activities are limited to borrowers who are in payment default or in imminent or reasonably foreseeable risk of default; and

(3) servicers reasonably believe their loss mitigation actions, including accepting short payments or partially discharging principal, will maximize the net present value to be realized on the loan over foreclosure.

Because these limitations are generally consistent with the intent of current PSAs, the bill does not offer significant additional authority to perform loss mitigation beyond existing contracts. While MBA is not advocating abrogating contractual provisions, we do question whether the safe harbor will have the anticipated affect of materially increasing modifications. Instead, the bill may create a new federal duty to protect investor interests that goes beyond the contractual relationship and statutory loss mitigation preferences.

For perfectly reasonable causes, the bill does not override specific contractual restrictions found in PSAs that limit servicers' ability to perform loss mitigation. For example, some PSAs limit the amount of modifications that can occur in a pool. A smaller percentage expressly prohibit modifications altogether. Others limit the ability to extend maturity dates while others limit the length of repayment plans. This bill, of course, would not overcome these obstacles to loss mitigation and, therefore, should be viewed as protective of investors.

Conversely, the bill appears to establish statutory preferences for certain modifications over other types of loss mitigation tools, such as repayment plans, which could impact whether cash flows go to senior bondholders or junior bondholders. Preferences for modifications over repayment plans could also impact delinquency assumptions that would falsely trigger reduction or elimination of credit enhancements tied to the deal. If these modifications then perform badly, investors would take larger losses than expected. Reaction to any perceived change in how the securities and cash flows behave will affect investor confidence.

Other Industry Efforts

The servicing and investor communities have worked together through the current financial crisis to provide latitude in and clarity to contractual provisions. Significant strides have been made and will continue to be made, as servicers, attorneys and investors advance and test new concepts. It is important to reflect on some of the key industry efforts that have brought about record loss mitigation activity.

The industry coalesced to form the HOPE NOW[2] alliance to improve efforts to help homeowners avoid foreclosure, through funding of national home retention counseling, improved standardization, improved advertising and outreach to explain loss mitigation opportunities and the introduction of enhanced servicing practices.

Industry and Congress also worked together to address accounting issues that stood in the way of helping borrowers. MBA approached the Financial Accounting Standards Board to suggest treatment of current loans in foreseeable risk of default to bring about modifications of current loans. Following a letter from the Chairman Frank, Chairman Kanjorski and other members of the House, the Securities Exchange Commission's concurrence statement created confidence in the market that investors could permit the modification of current loans that are in imminent or foreseeable risk of default. This resulted in the American Securitization Forum's recommended standards for "Fast Track" modifications, which allow for more wholesale modifications of certain adjustable rate mortgages where borrowers are current, but at risk of defaulting in the future.[3]

Other actions by the investor community were also significant, including clarification that servicers can act in the best interests of the pool as a whole, rather than those investors that have first dollar risk.

Many servicers have also instituted a policy to "pause" foreclosure actions where reasonably possible and appropriate to allow processing and approval of loss mitigation requests.

We believe these industry practices have allowed servicers to do more loss mitigation and help keep borrowers in their homes.

The willingness of stakeholders to address alternatives to foreclosure has resulted in 1,178,000 repayment plans and modifications executed from July 2007 through February 2008, according to HOPE NOW. This is an unprecedented response by the mortgage industry and investor community.

Recommendations

To the extent that a safe harbor could hamper liquidity in the mortgage markets, MBA believes that public and private policy efforts should be focused on providing lenders and borrowers more options to work together to refinance people out of mortgages they have trouble paying. Therefore, we believe policy makers should focus on efforts that will help create new loan products and support a secondary market for those loans. These products should:

(1) allow borrowers behind on their payments to refinance their mortgage obligations to a lower rate or more favorable terms, thus overcoming the

[2] See: http://www.hopenow.com/members/members.html for current HOPE NOW members

[3] American Securitization Forum, *Streamlined Foreclosure and Loss Avoidance Framework for Securitized Subprime Adjustable Rate Mortgage Loans*, Dec. 6, 2007.

financial stress that caused the delinquency (whether job loss, mortgage interest rate increase, health emergency or other unanticipated increase in expenses); and

(2) allow borrowers who are “upside down” on their mortgages (their mortgage balance is now higher than their property value) the opportunity to refinance to a more affordable rate or term.

Chairman Frank, together with members of this Subcommittee, is currently working on such a proposal, and we look forward to working cooperatively and constructively throughout that process. We also applaud the Federal Housing Administration (FHA) for their recent announcement to increase access to FHASecure for more borrowers experiencing financial difficulties.

While Congress, government entities and the mortgage industry cannot save every homeowner from foreclosure, an appropriately designed refinance program will help many homeowners by overcoming some of the contractual and “interpretational” issues that are obstacles to work outs and modifications and with which H.R. 5579 is meant to assist.

An ideal refinance program and one that would ensure the greatest execution would limit principal write downs, allow investors to recover write downs, be eligible to delinquent borrowers (within certain limitations) and assist borrowers who are upside down on their mortgages (again within certain limitations).

Conclusion

The Mortgage Bankers Association appreciates your efforts to assist servicers in their efforts to help borrowers stay in their homes. Servicers will continue to use their contractual authority to perform loss mitigation to the extent permissible and prudent. It remains unclear to us, however, whether the benefits of H.R. 5579 outweigh the potential harm that the bill may cause the mortgage market overall. Efforts to amend consummated contracts by statute, without investor approval, may cause investors to avoid the mortgage market.

MBA continues to believe that helping the market create and offer innovative products will significantly help borrowers avoid default and foreclosure. Refinance programs, if structured properly, can benefit the borrower while avoiding the “investor approval” problem. Refinancings can also tap the significant capacity of lenders’ production departments to more quickly help more borrowers.

Thank you for the opportunity to address the Subcommittee today. I will be happy to address any questions you may have.