



September 7, 2012

FHFA Office of General Counsel
Attn: Mr. Alfred Pollard, Esq.
400 Seventh St. SW, 8th Floor
Washington, D.C. 20024

Dear Mr. Pollard:

On August 9, 2012, the Federal Housing Finance Agency (FHFA) published in the Federal Register a request for input concerning plans in California and elsewhere (the Proposals) to utilize eminent domain powers to refinance performing, underwater mortgages. The Mortgage Bankers Association (MBA)¹ appreciates the opportunity to lend its voice to this issue, and agrees wholeheartedly with FHFA's comment that "utilizing eminent domain in this way could undermine and have a chilling effect on the extension of credit" to prospective homeowners and investors.

This unprecedented use of eminent domain law, if successful, would dry up the availability of mortgage credit in the impacted areas, likely triggering a downward spiral of home values in those communities these proposals seek to help. Those who invest in mortgages will refuse to buy loans originated in these communities, and lenders who keep loans in their own portfolio will likely withdraw as well. Investors who remain will be forced to raise mortgage rates nationwide as they grapple with pricing an inherently unpredictable risk. As a result, mortgages will be more expensive for all borrowers. This withdrawal will suppress housing values by restricting the flow of credit to homebuyers, potentially stopping the nation's housing recovery in its tracks.

Credit Availability

Credit availability is critical to the housing market and its recovery, particularly in distressed, hardest hit markets; utilizing eminent domain to refinance underwater homeowners will chill credit availability for these borrowers.² Government actions of this type would be viewed by

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 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

² In essence, the Government entity is writing itself a "call option" on the mortgage, which they can then exercise when home values decline to their lowest points, seizing the mortgage and locking the lender and

the market as arbitrary and unpredictable, causing many investors, servicers, and lenders to simply cease operations in communities where eminent domain is a threat. Further repercussions could include the exclusion of loans subject to this risk from securitization or requiring special insurance policies to compensate investors for this unpredictable new risk.

The impact on the credit markets is being felt already. On July 19, 2012, the Securities Industry and Financial Markets Association (SIFMA) released a statement indicating that mortgages originated in areas subject to eminent domain risk should be ineligible for inclusion in To-Be-Announced (TBA) markets.³ TBA markets are the most liquid secondary mortgage market in the world, forming the benchmark for the mortgage market generally. At the heart of this success lies predictability in terms of the risks that an investor faces, a feature lost if mortgages become subject to eminent domain authority. It is not hyperbole to say that enacting the Proposal will roil the markets in an unprecedented way, and lost in the shuffle will be the marginal, prospective homebuyer whose ability to obtain credit depends on the economy of scale provided by TBA markets.

Two examples provide empirical evidence of the anticipated market reaction to the use of eminent domain. Cook County, Illinois imposed a process that would have required every loan application to be reviewed by the County, and Georgia passed a state law that would have held investors holding a mortgage legally liable for any mistakes or illegalities committed by the loan originator.⁴ In both cases, lenders stopped providing loans in these areas as secondary market investors refused to purchase mortgages with this liability, and a similar outcome will likely occur in areas where the threat of eminent domain exists.⁵

Halt the Recovery

Paradoxically, the proposed use of eminent domain harms the very homeowners the Proposal seeks to help. As investors withdraw from these markets, fewer credit-worthy borrowers will be able to purchase a home, depressing demand below its current levels. The result could be many more homeowners pushed underwater by further declines in home values. Mortgage rates will rise to compensate for the added eminent domain risk and in turn price many prospective homebuyers out of the market, particularly in distressed communities.

servicer into an assured loss. This risk was not priced into mortgages that have already been originated, and it is questionable whether any lender can adequately account for such risk.

³ SIFMA Statement on Eminent Domain and TBA Trading, SIFMA (available at: <http://www.sifma.org/news/news.aspx?id=8589939537>).

⁴ IL Public Act 94-2080, Georgia Fair Lending Act;

⁵ See Platt, Laurence E. and Weissgold, Nanci L., *Anti-Predatory Lending Kicker – New Statewide Anti-Predatory Lending Requirements*, K & L Gates LLP, June 2, 2008 (available at: <http://www.klgates.com/cook-county-database-redux-with-an-anti-predatory-lending-kicker---new-statewide-anti-predatory-lending-requirements-06-02-2008/>); see also *Georgia Measure Weakens Lending Law*, New York Times Business Day, March 7, 2003 (available at: <http://www.nytimes.com/2003/03/07/business/georgia-measure-weakens-lending-law.html>) (Noting that all three major credit rating agencies refused to rate pools containing Georgia mortgages because of the law).

The Proposals will fail to help those homeowners who are truly in need, including those who are delinquent or near foreclosure. Rather, they make providing necessary assistance more difficult due to the credit tightening that will exclude homeowners in affected areas from refinancing options and other opportunities. Effects include higher down payments generally, and the reduction or elimination of parts of government supported programs such as the Federal Housing Administration's low-down payment programs because of the increased risk passed on to the taxpayer.

Households nationwide would be impacted along another dimension because many mortgage securities are used by asset managers in local and federal pension plans, 401k plans, and endowments, as well as by individual investors, all of whom would see their accounts decline in value. Disrupting these investment instruments will harm the retirement savings of many middle class families, impacting the economy as a whole. For example, Moody's Investors Service suggests that adoption of eminent domain across the nation could cause mortgage-backed securities to suffer immediate losses as high as 30 percent. Considering that Fannie Mae and Freddie Mac alone own \$113 billion worth of private-label residential mortgage-backed securities and insure many times this amount, the economy-wide impact could be significant.

Alternatives

The housing recovery is a national concern for which there are no "silver bullet" cures. However, programs currently exist that can help homeowners of the type targeted by the Proposals. These programs are currently underutilized and do not pose the same risks as eminent domain. Moreover, these programs target homeowners who are truly at risk of losing their homes.

For example, the Home Affordable Refinance Program (HARP) is a program sponsored by the U.S. Departments of the Treasury and Housing and Urban Development which allows underwater homeowners who are current in their payments to refinance their GSE-owned mortgage for minimal costs. The Home Affordable Modification Program (HAMP) allows borrowers who are struggling with their payments to stay in their home while lowering their monthly payments. These are but two of the multitude of efforts to help homeowners harmed by the financial crisis, and state and local governments should encourage more widespread use of these proven tools.

Conclusion

While the housing market is not recovering as quickly as possible, policymakers must overcome the urge to implement policies that have costly unintended consequences that could harm taxpayers, consumers, and overall economic growth. Eliminating uncertainty, reducing foreclosure backlogs, creating a stable environment for private capital, and ensuring access to credit for qualified homeowners are the principles that will lead us into financial stability and economic growth.

MBA looks forward to assisting policy-makers in implementing these principles and continuing the housing recovery. Any questions should be directed to William Kooper, Associate Vice President, Legislative and Political Affairs (202) 557-2737 or wkooper@mortgagebankers.org, and Dan McPheeters, Policy Advisor (202) 557-2780 or dmcpheeters@mortgagebankers.org.

Sincerely,

A handwritten signature in black ink, appearing to read "D.H. Stevens". The signature is fluid and cursive, with a large initial "D" and "H" followed by a period and the name "Stevens".

David H. Stevens
President and Chief Executive Officer