



October 19, 2009

Mr. George P. Miller
Executive Director
American Securitization Forum
120 Broadway, 35th Floor
New York, NY 10271

RE: Model RMBS Representations and Warranties

Dear Mr. Miller:

On July 15, 2009, the American Securitization Forum (ASF) issued a press release describing a draft set of representations and warranties (Draft Reps and Warrants) ASF had developed for residential mortgage backed securities (MBS). According to the press release, ASF issued the Draft Reps and Warrants for the purposes of soliciting public feedback prior to compelling their industry-wide adoption. The Mortgage Bankers Association¹ (MBA) notes the Draft Reps and Warrants is incorporated into a broader undertaking referred to by ASF as “Project Restart,” an initiative to help rebuild investor confidence in mortgage and asset-backed securities

MBA shares ASF’s aspiration to restore vibrancy to the real estate finance secondary market. However, MBA is troubled by ASF’s allusion to Project Restart as an industry-wide mandate; we believe such mandates should originate from entities with true regulatory authority and abide by established supervisory protocols. MBA further questions whether a single trade group can accurately and objectively reflect the needs, capacities and priorities of the industry at large. We therefore reiterate our previous recommendation that ASF consider a more collaborative approach to its securitization transparency and reporting initiative. A collaborative approach not only ensures that all industry sectors play a role in, and therefore support the initiative; it also leads to fewer complications during adoption and implementation.

With respect to the Draft Reps and Warrants, MBA believes there are several provisions that change the landscape of risk and responsibility for originators and servicers. In those cases, we believe sellers and servicers of loans will be reluctant to agree to the model language and will negotiate alternate terms on a case-by-case basis. Moreover, to the extent that the investor community is moving away from representations and warranties and towards performing more due diligence, we anticipate that having standard representations and warranties will be less critical to investors on an individual deal basis. In addition to expressing our larger concerns, we offer several clarifying suggestions for various provisions.

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.

Fraud

The greatest variance between historical representation and warranty provisions and ASF's proposed model is the shifting of risk or liability for fraud. This change is very problematic for originators and servicers and will be hard to implement in actual purchase and servicing agreements. ASF's proposal allocates the risk of fraud to the originator regardless of actual knowledge or nexus to the party. The Draft Reps and Warrants also discourages the inclusion of a "knowledge qualifier."

In addition, we believe that requiring the originator to represent no "errors" and "omissions" by all parties to the transaction expands the fraud provision to an extreme level and does not go to the issue of fraud. This is problematic because the trustee could effectively put back a loan on a technicality that may or may not be related to the foreclosure. While servicers have a nexus with their own employees the nexus become tenuous as to all parties to the transaction, especially those not within the lender's control, such as appraisers, title agents, and borrowers.

MBA does not believe originators will accept this risk. Moreover, MBA understands that mortgage originators that assisted ASF in developing the proposed model strongly objected to this provision.

Fraud risk will be hard to price in any transaction, but it is especially hard to price on the front end as additional legislative, regulatory and legal pressure is placed on premium pricing. Moreover, premium pricing results in price compression that will certainly exacerbate the cost of mortgages to the consumer if primary markets must address the cost of this risk in their rates. The secondary market which sets the prices for various securities is better able to integrate that risk at "par" and has greater analytical resources to address this risk in MBS pricing.

MBA believes this provision will be a significant source of negotiation and modification to the Draft Reps and Warrants.

Early Payment Default (Covenant a)

This provision of the Draft Reps and Warrants attempts to standardize a determination of fraud based solely on a delinquency that occurs within the first three months of origination. This provision is particularly problematic because an early delinquency does not necessarily mean fraud or breach of other representations or warranties. We believe that originators will likely negotiate this provision accordingly on a case-by-case basis and thus may defeat the goal of standardization. To ensure greater standardization, we suggest restating the provision to indicate that a loan will be subject to repurchase if a loan defaults within the first three months, there is no cure within those three months, and the reason for such default was determined to be non-compliance with an underwriting requirement or breach of any other representation and warranty. Moreover, it is important that a breach of this representation and warranty is not created by the borrower sending a payment to the wrong party which is protected under the Real Estate Settlement and Procedures Act's transfer of servicing provisions and implementing regulations. Any delinquency that would occur due to automation would be quickly corrected in the servicer's system and expunged. Once again, it is important that a technicality such as this does not trigger a repurchase or other indemnification risk.

Mortgage Insurance (MI) Repurchase (Covenant b)

The provision calls for the originator to repurchase or pay the amount of the claim to the trustee in the event that *any* claim is rejected, denied or rescinded by a mortgage insurer (other than through the MI provider's breach or insolvency). The enhancement to "any claim" is problematic

because the insurer has a self interest in rejecting or denying claims and, therefore, such denial should not be the unilateral determinant of whether a breach of a representation occurred. Given the current the condition of the MI industry, MBA members are experiencing instances where insurers deny claims unjustly. Mortgage insurers are also reducing or denying portions of claims more frequently. MBA believes these partial rejections also should not automatically trigger a remedy for breach of a representation or warranty. In fact, MBA suggest that this provision should be eliminated in its entirety.

Occupancy (c)

The Draft Reps and Warrants states that originators will test the reasonableness of the borrower's statement of owner occupancy by considering other real estate owned, *commuting distance to work*, and appraiser notes. This is a very specific underwriting requirement and is potentially inconsistent with current prudent underwriting standards. For example, underwriters today look at commuting distance if the borrower has an existing home that is not being sold. Commuting distance by itself would not trigger a review standard unless there is something obviously questionable. While the use of the word "and" in this paragraph implies that the borrower must both own other real estate and have a long commute associated with the transaction at hand, the language is not completely clear. The "appraiser notes" reference also causes confusion since there is rarely any notation by the appraiser as to occupancy. The representations and warranties should not impose new underwriting standards that would be difficult and subjective to apply. We understand that investors want servicers to have a standard by which to assess occupancy. We suggest using the following language "With respect to each Mortgage Loan, the originator gave due consideration at the time of origination to factors that may suggest that the borrower does not plan to occupy the residence."

Underwriting (g)

This provision recognizes managerial discretion to allow variances to the originator's written guidelines provided that there are documented compensating factors. We agree with this portion of the Draft Reps and Warrants. However, the provision would also require that such compensating factors be disclosed in a disclosure document that is not yet developed. The concept of providing this level of detail or narrative on loans where variances are offered will involve implementing a new burdensome system of tracking and reporting. We suggest clause (2) simply state "if not underwritten in conformance to the originator's guidelines, has documented compensating factors."

Hazard Insurance (z)

We have several comments on the hazard insurance section of the Draft Reps and Warrants and believe it should be revised to conform more closely to existing requirements and standards and to respond to problems with determining value and coverage for condominiums. The suggested language below recognizes the replacement cost concept and clarifies that blanket policies secured by the servicer will cover individual units. Also, since insurers do not currently offer per unit valuations, servicers are unable to determine value based on specific upgrades a borrower may have installed after the Master Policy is issued.

MBA offers the following alternative language:

"The Mortgaged Property securing each Mortgage Loan is insured by an insurer acceptable to Fannie Mae or Freddie Mac against loss by fire and such hazards as are covered under a standard extended coverage endorsement, in an amount which is not less than the lesser of 100% of the insurable value of the Mortgaged Property, on a replacement cost basis, and the

outstanding principal balance of the Mortgage Loan.; if the Mortgaged Property is a condominium unit, hazard insurance coverage should be in place to protect 100% of the insurable value (replacement cost not inclusive of unit upgrades) or the loan balance as evidenced by a Master Condominium Policy for the building or it is included under the coverage afforded by a blanket policy for the project; ."

Environmental Laws (ii)

The model language calls for originators to warrant that the property is in material compliance with all then applicable environmental laws, including those pertaining to asbestos. Clearly lenders cannot attest to this standard without performing significant due diligence and originators are likely to include a knowledge qualifier. However, to insert the knowledge qualifier will require an entire rewrite of the paragraph to indicate that the originator has no knowledge or notice of non-compliance. As a result, we suggest the following changes to this paragraph in order to promote standardization: "There is no pending action or proceeding directly involving the property of which the originator is aware in which compliance with any environment law or regulation is an issue."

Insurance Coverage Not Impaired (ji)

The seller cannot attest to prior holders' actions that may impair insurance coverage or claims and such reference to "prior holders" should be removed.

Mortgage Recorded (II)

This provision requires that all assignments be recorded when necessary to perfect ownership of the mortgage by the trust. Although the lender will give an assignment to the trustee (or its document custodian), the assignment is not usually recorded. The servicer is usually the last in the chain of recorded assignments to allow for proper administration of the loan. The assignment is recorded by the trustee or special servicer if the primary servicer defaults. This common practice should be reflected in the language. We suggest adjusting the language as follows: "Each original mortgage is recorded or being recorded and all intervening assignments of the original mortgage have been or are being recorded in the appropriate jurisdiction in which such recordation is necessary. The assignment of mortgage to the trustee is in recordable form and is acceptable for recording under the laws of the jurisdiction in which the mortgage property is located."

Due-On-Sale (mm)

This provision requires a loan to have a due on sale clause that accelerates the payment of the principal if the property is sold or transferred without the prior written consent of the mortgagee. While we agree that due on sale provisions should be in the mortgage, we suggest the following clarification to avoid technical put-backs: "The mortgage contains an enforceable provision for the acceleration of the payment of the unpaid principal balance of the Mortgage Loan in the event that the Mortgaged Property is sold or transferred without the prior written consent of the mortgagee subject to the protections with the Garn St. Germain Depository Institutions Act of 1982." This clarifies that there are protected classes of transfers that do not trigger the due on sale clause.

Conclusion

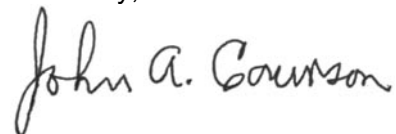
MBA believes it is critical that sufficient representative samples of originators, servicers, and other market participants have offered their perspectives regarding all elements of Project Restart. MBA further recommends that ASF actively solicit the feedback and involvement of

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industry segments that have not expressed their views. MBA is uniquely positioned to facilitate input and interaction from all segments of the housing finance system.

If you have any questions regarding MBA's comments, please contact Vicki Vidal, Associate Vice President, at (202)557-2861 or vvidal@mortgagebankers.org or Michael Carrier, Associate Vice President at (202)557-2870 or mcarrier@mortgagebankers.org.

Sincerely,

A handwritten signature in black ink that reads "John A. Courson". The signature is written in a cursive, slightly slanted style.

John A. Courson
President and Chief Executive Officer
Mortgage Bankers Association

cc: Tom Deutsch