



December 9, 2009

The Honorable Nancy Pelosi
Speaker of the House of Representatives
H-232, The Capitol
Washington, DC 20515

The Honorable John A. Boehner
House Minority Leader
H-204, The Capitol
Washington, DC 20515

Dear Speaker Pelosi and Leader Boehner:

On behalf of the Mortgage Bankers Association (MBA), I reluctantly write to express our opposition to H.R. 4173, the Wall Street Reform and Consumer Protection Act. This is not a decision that MBA has reached lightly. When the Treasury Department issued its financial regulatory reform plan in June, MBA looked forward to a process that would result in improvements to the regulation of the real estate finance industry, prevent future disruptions from occurring, and strengthen consumer protections. To promote a constructive dialogue, we put forth our own comprehensive set of recommendations to establish a tough new federal framework for the regulation of the residential mortgage industry – one that protects borrowers nationwide, ensures the consistent regulation of independent mortgage bankers and mortgage brokers, increases transparency, and helps foster a return to stability for the nation's financial system.

Unfortunately, MBA believes that H.R. 4173 does not achieve these goals of strengthening and modernizing the regulation of this country's finance system to the benefit of consumers. MBA's primary concerns with H.R. 4173 are its creation of a Consumer Financial Protection Agency (CFPA), the risk retention requirements contained in the bill's systemic risk title, and the intended inclusion of a modified mortgage reform bill that passed the House earlier this year.

Consumer Financial Protection Agency

While the concept underlying the creation of a CFPA – to improve consumer protections – is a good one, the approach taken in H.R. 4173 could worsen consumer protections and weaken the oversight of financial institutions. MBA's top concerns with the CFPA are that it would not have the power to establish uniform national regulatory standards for all lenders, and it would not have the power to protect all borrowers consistently regardless of where they live. The legislation specifically encourages states to enact duplicative and potentially contradictory state laws that will perpetuate and further complicate the current patchwork of federal and state financial regulation that impedes competition and imposes unnecessary costs on consumers. A better role for the states is for them to join in the process of developing national standards and to enforce the standards as full partners with federal regulators.

Another concern with this provision of the bill is that it establishes the CFPB as a separate agency within the government, rather than consolidating consumer protection functions within a new or existing federal financial regulator responsible for safety and soundness. Separating consumer protection from prudential financial supervision, as proposed in H.R. 4173, will result in a failure to achieve an appropriate balance of these two considerations. Moreover, the roles of consumer protection and safety and soundness supervision are not mutually exclusive. MBA believes a regulator equipped with firm and specific statutory guidance, subject to congressional oversight, and required to seek input from all interested parties, is able to balance these important responsibilities.

MBA also believes the reach and powers of the proposed CFPB are overly broad. Because the CFPB would have such a wide range of responsibilities, there is a very real danger that mortgage lending would not receive sufficient priority, delaying and even depriving homebuyers of sound credit options. A better regulatory model would assign a single federal prudential regulator (or a council of such regulators), with enhanced consumer protection capabilities, including responsibility for the regulation of state-regulated mortgage brokers and non-depository mortgage bankers. In addition to the implementation of uniform mortgage lending standards, assignment of this responsibility to such a regulator (or regulators) would, in the most efficient and effective manner, close obvious regulatory gaps that helped lead to the current economic crisis.

Although the bill is intended to strengthen consumer protections, MBA notes that H.R. 4173 does not properly address the important issue of providing homebuyers with accurate and timely mortgage disclosures. The mortgage industry and consumers face years of major but still uncoordinated reforms under the Real Estate Settlement Procedures Act (RESPA), the Truth in Lending Act (TILA), and potentially under new CFPB requirements. MBA supports efforts to develop a single combined RESPA/TILA disclosure. H.R. 4173 does not address the separate, ongoing efforts of the Department of Housing and Urban Development (HUD) and the Board of Governors of the Federal Reserve System to separately reform mortgage disclosures. Nor does it require collaboration between existing regulators – as did H.R. 1728, the Mortgage Reform and Anti-Predatory Lending Act, which passed the House earlier this year. (MBA further notes that the version of H.R. 1728 that will be merged with this bill no longer contains this important provision.)

MBA takes consumer protection very seriously and looks forward to working with Congress on strengthening consumer laws and improving financial regulation.

Risk Retention

H.R. 4173 contains provisions that would impose additional, extensive “risk retention” requirements for all entities engaged in financing or securitization. While MBA understands the stated purpose of these provisions – to assure that lenders and securitizers have a stake in the successful performance of loans and pools – the bill’s

overly broad requirements would have particularly dire consequences for the mortgage markets.

Coverage of all real estate loans under H.R. 4173's risk retention requirements would unnecessarily stem competition, reducing choices and increasing the costs of credit for consumers and other borrowers. In contrast, the more targeted provisions that the House passed earlier this year as part of H.R. 1728 would require risk retention only on higher-risk mortgages where these requirements may be warranted.

H.R. 4173 would require lenders to retain up to five percent of the credit risk on all loan sale transactions regardless of whether the loan purchaser intends to permanently hold the loan in its own portfolio or resell it into the secondary market. It would also require that entities that acquire loans and issue asset-backed securities (ABS) also retain up to five percent of the risk on loans they securitize.

Today, nondepository independent mortgage bankers – mostly smaller, local, and regional mortgage companies – offer competitive pricing and quality service for sustainable financing to consumers. Consumers choose their services for more than 40 percent of all mortgage loans and 45 percent of Federal Housing Administration (FHA) loans. To be able to provide financing to consumers, these creditors sell loans into the secondary market. But this lending channel is unsustainable if all lenders are required to retain credit risk for all real estate loan originations.

If the requirements under H.R. 4173 are made applicable to all creditors, independent mortgage bankers could be forced out of business. At the same time, smaller community banks and even larger depositories would be constrained from lending – and available funds for home financing would be reduced by countless billions of dollars – to meet reserve requirements. All of these factors would work to unnecessarily constrict the availability of credit and increase consumer borrowing costs.

H.R. 1728, the mortgage reform bill that passed the House in May, offers the basis for a better approach to risk retention. It recognizes that some mortgages pose minimal risk to borrowers, lenders and investors and exempts them from risk retention requirements. Under H.R. 1728, mortgages are exempt if they do not possess certain characteristics such as allowing deferral of principal or interest, negative amortization, balloon payments, and higher interest rates that present additional risks to consumers, may invite steering and – in the view of the Congress – necessitate additional protections.

MBA believes a specific statutory exemption for qualified mortgages provides the level of clarity and certainty preferred by investors. Without this certainty, the investment community is likely to withdraw further from the market, thereby causing fewer funds to be available to lend.

MBA is also opposed to requiring risk retention on commercial real estate loans. Over the last two decades, commercial real estate has helped fuel our nation's economic growth while providing jobs and services to local communities and housing for millions

of Americans in multifamily dwellings. Lately, however, uncertainty about the commercial real estate market has hampered its ability to be an engine for growth and provider of affordable housing. The addition of a new risk retention requirement for commercial and multifamily mortgages would harm the recovery of this market and would be unnecessary in light of existing practices.

Commercial real estate transactions are business-to-business transactions. Commercial real estate investors and lenders weigh a variety of risks and benefits in making their decisions, and the market's structure – from the relative security of a first-lien mortgage to the higher risk and higher yield of mezzanine debt or preferred equity – requires a level of business sophistication to understand. As a point of illustration, the average size of a loan originated for the commercial mortgage-backed securities (CMBS) market in 2007 was \$26 million. As a business-to-business transaction among sophisticated participants, risk retention is not required to provide consumer protection.

More importantly, the CMBS model contains a first loss component that specialized investors purchase (B-piece investors). Because these investors are in a first loss position, they perform loan level due diligence on that loan pool that comprises each CMBS transaction. Through this process, B-piece investors will require loans with inferior credit quality to be pulled from the loan pool. Only after the B-piece investors have committed to the CMBS loan pool are the investment grade (AAA, AA, A, BBB) portions of a CMBS loan pool offered for sale. A powerful incentive for CMBS sponsors to contribute high quality loans to the pool is that they must retain the loans that have been rejected by B-piece investors on their balance sheet. In the case of CMBS, there already exists a category of investors that assume the risk of the first loss position, which negates the need for issuer-based risk retention.

Consequently, before requiring new risk retention for issuers of CMBS, MBA strongly recommends that a clear linkage between loan performance and the level of risk retention be demonstrated. Reforms aimed at the securitized credit markets should be customized and applied appropriately to the mortgage markets to avoid unintended consequences. Tailoring the final regulatory reform proposals and avoiding a “one-size-fits-all” approach will better protect consumers and support efforts to restore lending for housing – and the capital markets' investments that fuel such lending – that is critical to our nation's recovery. Such an approach would avoid potentially severe unintended consequences that a generic approach to securitization regulatory reform could foster.

Mortgage Reform

During floor consideration, H.R. 4173 is expected to be merged with H.R. 1728, the Mortgage Reform and Anti-Predatory Lending Act, so we wanted to reiterate our concerns with this legislation. As we stated back in May when the House first considered H.R. 1728, this legislation does not replace the uneven patchwork of state mortgage lending laws with a truly national standard that protects all consumers, regardless of where they live. Furthermore, MBA believes the bill's definition of “qualified mortgage” is 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. This definition should be expanded and provide a bright line safe harbor so that if creditors act properly, they will not be beleaguered by lawsuits that increase borrower costs.

Conclusion

Congress faces an historic opportunity to improve the structure and oversight of the nation's financial services system. 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. MBA, unfortunately, does not believe that H.R. 4173 would achieve these goals, but we stand ready – as we have throughout the year – to work with Congress on legislation that strengthens and improves the regulation of the United States financial infrastructure.

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