



May 1, 2009

The Honorable Christopher J. Dodd
Chairman
Committee on Banking, Housing and Urban Affairs
Washington, DC 20510

Dear Mr. Chairman:

On behalf of the American Securitization Forum (ASF)¹, I am writing to express our strenuous opposition to servicer safe harbor provisions for mortgage loan modifications being considered in connection with S. 896, the “Helping Families Save Their Homes Act of 2009. We believe that certain provisions, if enacted into law, would cause significant and lasting damage to the country’s mortgage finance system.

ASF has consistently supported the aggressive use of mortgage loan modifications and other loss mitigation techniques to prevent avoidable foreclosures. In today's troubled housing market, loan modifications that are performed in a manner that is consistent with the spirit and intent of securitization contracts are likely to offer a preferable alternative to foreclosure for a larger universe distressed homeowners. However, the safe harbor provisions contained in S. 896 could have significant unintended consequences that will have adverse and long-lasting impacts on borrowers, investors and the mortgage finance system as a whole.

As you are aware, currently the majority of all mortgage loans are securitized, providing an essential source of mortgage financing via the capital markets. Securitization investors—including mutual funds, pension funds, insurance companies, asset managers and others who are entrusted with investing the assets of individual Americans—own large numbers of securitized mortgages. Loan servicers, the parties responsible for deciding whether to modify loans for distressed borrowers, are obligated by contract to act in the best interests of securitization investors in making these decisions. This means that they are required to maximize recoveries and minimize losses on troubled loans, and to decide whether a loan modification—versus foreclosure or some other loss mitigation alternative—is most likely to achieve that result.

¹ The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice initiatives. ASF members include over 380 firms, including issuers, investors, financial intermediaries, servicers, legal and accounting firms, and other professional organizations involved in the securitization market. The views expressed in this letter primarily reflect the views of ASF’s investor members—asset managers, investment companies, mutual funds, pension funds, money managers, insurance companies, hedge funds and others—who collectively supply private capital that funds a wide range of consumer and business lending via the securitization markets. More information about ASF, its members and activities is available at www.americansecuritization.com. ASF is an affiliate of the Securities Industry and Financial Markets Association.

Certain safe harbor provisions being considered as part of S.896 create the risk that loan modifications will be pursued not because they are in the best interest of investors, as required by securitization contracts, but instead because they offer legal immunity to servicers. Creating even the appearance of such a conflict of interest undermines the confidence of investors in the certainty of contracts upon which their investment decisions are based, and discourages the provision of capital to mortgage markets that desperately need liquidity, both now and in the future.

We have discussed this matter extensively with ASF's investor membership, which includes most of the largest and historically most active participants in the mortgage finance market. As with other ASF members, our investor members understand the critical situation facing policymakers with the current housing crisis and increasing rates of foreclosure in many communities. Though well-intentioned as a means of extending relief to borrowers in need, investors also believe that legislative intervention into otherwise valid and enforceable private contracts threatens the stability and predictable operation of the mortgage finance market. This will have a chilling and lasting effect on the willingness of private investors to participate in this market, harming current homeowners looking to refinance and all future mortgage borrowers. The result would be extremely counterproductive to the broader policy goal of reinvigorating the now-dormant private mortgage securitization market, so that financing to support home purchases and refinancings is available on affordable terms to all deserving Americans.

Moreover, the enactment of safe harbor legislation in the secondary mortgage market will have a damaging effect on the broader, multi-trillion dollar securitization market, undermining investor confidence and participation precisely at the time that the industry and government alike are attempting to restore function to this market, and to provide affordable credit to consumer and business borrowers. As we have seen recently in other contexts, such as the Term Asset-Backed Lending Facility ("TALF"), investors will regard Congress' action in creating a safe harbor as a further indication that the government will change the rules and override contracts in order to serve public policy goals. Confronted with this type of political and policy risk, investors may choose instead to curtail their participation in the capital markets.

We appreciate that various amendments and alternative formulations of safe harbor provisions are being considered, some of which address, at least in part, our key concerns. We nevertheless remain concerned about any safe harbor provisions that have the effect of negating specific contractual terms and protections that are integral to decisions by investors to commit capital to mortgage securitizations. If these terms and protections are susceptible to override by an act of Congress, investors will either charge higher premiums to compensate for political risk or, as noted above, curtail their participation in the mortgage securitization market.

We do not believe that a legislative safe harbor is necessary to encourage or facilitate otherwise desirable loan modifications. As noted above, servicers are already contractually obligated to undertake loan modifications that are in the best interests of investors. Since the onset of the housing market downturn, and driven by commercial and economic realities confronting servicers and investors alike, an ever-increasing volume of loan modifications have been made.

In addition, large-scale government loan modification programs offering financial incentives to borrowers, servicers and investors have recently come on line. Most recently, revisions to the Home Affordable Modification Program, or HAMP, were announced that focus on modifications of second liens and other topics of critical importance to investors. While additional implementation details relating to these program enhancements remain to be worked out, the existence and expansion of these programs makes it more likely that an even greater number of mortgage loan modifications

and refinancings will be offered in the future, obviating the need to attempt to achieve this objective via a legislative safe harbor. Private and public sector loan modification initiatives can and should be implemented in a manner that is consistent with—not in contravention of—contracts that provide bargained-for checks and balances on the conduct and expectations of private parties to those contracts.

We recognize that members of the servicing community have legitimate concerns about their potential legal exposure for engaging in loan modification activity, including initiatives conducted pursuant to government programs with the strong encouragement of the public sector. However, we believe that such concerns are best addressed by continuing to work collectively toward expanding loan modification and refinancing programs available to borrowers, establishing and implementing common loan modification standards and practices throughout the industry, and enhancing investor reporting and transparency of loan modification activity, rather than by legislative action that abrogates contracts, undermines investor confidence and inhibits the recovery of the mortgage securitization market.

I thank you for your consideration of these views, and we look forward to an opportunity to discuss them with you in greater detail. Should you have questions or desire additional information or clarification regarding any of the foregoing, please do not hesitate to contact me, or George Miller, ASF Executive Director, at 212.313.1116.

Sincerely,

A handwritten signature in black ink, appearing to read "R C Daloisio". The signature is written in a cursive style with a long horizontal stroke at the end.

Ralph Daloisio
Chairman
American Securitization Forum