American Securitization Forum

From:American Securitization Forum
Sent:8 Aug 2012 15:16:26 +0000
To:DeLeo, Wanda
Subject:ASF Alert: FHFA Sends Notice to Federal Register re Use of Eminent Domain to Seize Mortgage Loans

TO: Members of the ASF Government Relations Committee
Members of the ASF Investor Committee
Members of the ASF Legislative and Judicial Committee
Members of the ASF Regulatory Committee
Members of the ASF Financial Guarantor Subforum
Members of the ASF Financial Intermediary Subforum
Members of the ASF Master Servicer Subforum
Members of the ASF Outside Counsel Subforum
Members of the ASF RMBS Issuer Subforum
Members of the ASF Servicer Subforum
Members of the ASF Trustee Subforum
Members of the ASF Housing Finance Reform Taskforce

FROM: ASF Staff

DATE: August 8, 2012

RE: ASF Alert: FHFA Sends Notice to *Federal Register* re Use of Eminent Domain to Seize Mortgage Loans

Today, the Federal Housing Finance Agency ("FHFA") sent a notice to the *Federal Register* regarding its concern with the proposed use of eminent domain in various jurisdictions to seize and restructure underwater performing mortgage loans. FHFA's notice cites concerns that such programs would alter the value of Fannie Mae's and Freddie Mac's ("GSEs") and the Federal Home Loan Banks' securities holdings, may be unconstitutional, and could potentially negatively affect both investors and the extension of credit to borrowers. FHFA further notes that action in response to such programs may be necessary in its role as conservator of the GSEs. ASF plans to respond to the notice, on which FHFA is accepting public comment until September 7, 2012.

Please click here for the notice and here for the press release.

Background re Eminent Domain Proposals

On August 1, ASF and others met with Gregory Devereaux, the Chief Executive Officer of the San Bernardino County, California (the "County"), and his advisors regarding the proposed use of eminent domain to seize underwater performing mortgage loans from private-label RMBS. This productive meeting focused on the key goals of the Joint Powers Authority (the "JPA") and the shortcomings of Mortgage Resolution Partners' ("MRP") eminent domain proposal.

The meeting was intended as a collaborative effort to find potential solutions outside of eminent domain to the County's housing problems. Additionally, Mr. Devereaux confirmed that the agenda for the next meeting of the JPA, scheduled for August 16th, will NOT result in the publication by the JPA of a request for proposal. At that meeting, ASF and others may propose an ongoing working dialogue with the County and provide data and analytics regarding private-label loans, GSE loans and portfolio loans in the County. It appears clear that the County has NOT committed to MRP's eminent domain proposal and is considering alternative solutions, due in large part to the critical feedback from the securitization industry over the last 2 months.

In June 2012, the County and the cities of Ontario and Fontana entered into the Agreement forming the JPA, which is tasked with implementing the Homeownership Protection Program (the "Program"). The Program seeks to "assist in preserving home ownership and occupancy for homeowners with negative equity within the Parties' jurisdictions, avoid the negative impacts of underwater loans and further foreclosures, and enhance the economic vitality and the health of their communities." Please click here for the Agreement.

ASF Letter

On July 13, ASF submitted a detailed letter to the Board of Supervisors of the County and to the County's CEO and Counsel containing a comprehensive policy and legal discussion of the proposed use of eminent domain by the JPA to seize certain residential mortgage loans from private-label securitization trusts as a means of fulfilling the stated policy goals of the Program. We have also submitted our letter to the JPA Board. Mark Haddad, David Carpenter, and R.J. Carlson of Sidley Austin LLP served as outside counsel in the development of our letter.

Please click here for the letter and here for an article in the *Financial Times* featuring the letter (free registration required to access the article).

Our letter addresses the proposal that the JPA is considering to seize certain MRP-targeted mortgage loans that are underwater but performing at "fair market value" through the use of eminent domain. MRP would then "manage" the loans on behalf of the municipalities by refinancing them with Federal Housing Administration ("FHA") insurance and then selling them for substantial profit as whole loans or through new securitizations. Please click here for a list of FAQs from MRP and here for an MRP presentation about the Program.

The letter outlines ASF's strong opposition to the MRP proposal and the use of eminent domain as contemplated therein. Detailing the policy weaknesses and legal infirmities of the proposal, the letter concludes that the plan would hurt credit availability in the County, damage pension funds and mutual funds that own mortgage securities, provide little, if any, assistance to homeowners in distress, hurt property taxes and violate both the U.S. and California Constitutions, as well as incur substantial legal costs and delays for a County in significant financial distress. The letter also notably questions whether the motivations of MRP and the constituent members of the JPA are truly aligned.

Additional Background

On July 24, *The Wall Street Journal* published an article regarding the proposed use of eminent domain that may be considered by the JPA. According to the article, at least one hedge fund is considering becoming an investor in a program that the JPA is considering, which was brought forward by, and primarily benefits, MRP.

ASF continues to believe that the use of eminent domain as contemplated presents significant legal and constitutional challenges. Tom Deutsch, ASF Executive Director, is quoted in the article saying, *"The U.S. Constitution's eminent domain powers were not intended for the cherry-picking of performing loans to create exorbitant profits for private investment funds like MRP."* While MRP has defended the proposal as a solution to assist underwater homeowners, the article cites Steven Gluckstern, Chairman of MRP, as saying, *"We're also free-enterprise guys. We want to make money with the solution."* This statement highlights one of ASF's key arguments against the proposal, namely, that it fulfills neither the public purpose nor just compensation requirements of the use of eminent domain.

Please click here for the article (subscription required).

In addition, Moody's has released a report regarding the potential effects of the implementation of the program. The report concludes that, although unlikely, if all 50 states were to adopt the program, losses for prime jumbo RMBS pools would increase by around 30%, resulting in an average downgrade of three notches for investment-grade RMBS. Fitch Ratings and DBRS have also issued releases stating that the proposed use of eminent domain would negatively impact the performance of private-label RMBS and could potentially cause downgrades.

Please click here for the Moody's report, here for the Fitch release, and here for the DBRS release.

Efforts in Other Cities

On July 25, the City of Chicago adopted a resolution to hold hearings of the Joint Committee of the Committee on Finance and Committee on Housing and Real Estate regarding the implementation of a program to use eminent domain to seize mortgages. Chicago's resolution specifically cites the proposal currently under consideration in San Bernardino County.

Please click here for the resolution and here for more information about the resolution.

In addition, on July 24, the City of Berkeley, CA requested meetings to explore its options to prevent foreclosures, including requiring documentation of full ownership of the note by mortgage companies in order to proceed with evictions, as well as the use of eminent domain to seize mortgages. It appears that the City is contemplating a proposal targeting notes with "clouded" titles, in which the mortgage company is unable to produce sufficient documentation of ownership due to the complexity of securitized loans, and as such, may attempt to seize the notes without compensation. This letter also apparently references the San Bernardino proposal, stating that "some county jurisdictions have used forms of eminent domain to take over the mortgage to enable homeowners to stay in their own homes. We would like to convene to look at what legal options can be adopted by Alameda County to minimize the devastating consequences of foreclosures."

Please click here for the letter.

ASF will monitor this development and communicate any additional information as soon as it is available.

JPA Initial Board Meeting

On July 13, the Board of the JPA held its initial public meeting. The meeting was strictly organizational in nature and there was no agenda discussion on any of the various proposals for the implementation of the Program, such as the use of eminent domain, that the JPA may eventually examine. While public comment was allowed, California law precluded the JPA Board members from discussing or taking action on anything not posted on the agenda.

Please click here for an ASF summary of the meeting. Please click here for the agenda and here for more information about the meeting, where a webcast is available under the "Other Meetings & Events" tab.

On July 13, Steven Gluckstern, Chairman of Mortgage Resolution Partners, issued the following statement:

> "The suggestion that Wall Street firms might seek to retaliate against municipalities working to address their underwater mortgage loan crises by holding these cities' residents financially hostage is not only reprehensible and immoral, it is likely illegal.
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> "What these firms are threatening is a variant of what is called 'geographic redlining'. This form of insidious discrimination has been prohibited at least since passage of the Fair Housing Act of 1968. And in intervening years the importance of equal credit opportunity for all has come to be only more widely recognized.
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> "That recognition has found further expression, for example, in such enactments as the Consumer Credit Protection Act, the Equal Credit Opportunity Act, the Community Reinvestment Act, and of course the Dodd-Frank Wall Street Reform and Consumer Protection Act.
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> "Those who would employ discriminatory means to coerce cities from staving off mass foreclosure and blight, rather than assisting cities in that urgently needed effort, are accordingly playing with fire."

Previous ASF Advocacy

ASF staff have been monitoring the development of the JPA since it became known that the JPA would consider the use of eminent domain in June. More information on our advocacy regarding this issue may be found below.

On June 28, ASF and a number of other industry trade associations submitted a letter to the County Board of Supervisors expressing strong opposition to the Agreement forming the JPA, which bestows upon the JPA the authority to use eminent domain as contemplated above. The letter explains that the potential use of eminent domain to seize mortgage loans may raise serious legal and constitutional issues, and that credit availability for home purchases and refinancing in the affected areas could be significantly compromised. Please click here for the letter.

According to the Agreement, "the Program may include the Authority's acquisition of underwater residential mortgage loans by voluntary purchase or eminent domain and the restructuring of these loans to allow homeowners to continue to own and occupy their homes." After using eminent domain to purchase loans for fair market value, the JPA could modify, restructure, hypothecate, assign, pledge, securitize, convey, or reconvey these loans and deeds of trust. However, the Agreement stipulates that the JPA may consider any of a number of options to achieve its mission. The JPA has indicated it will put out a request for proposals in the coming months to solicit ideas from interested parties.

The San Bernardino County Board of Supervisors previously approved the Agreement on April 10, 2012; however, while the City Councils of both Ontario and Fontana have taken actions approving entering into the Agreement, the City of Hesperia, which was included in the initial Agreement, has not. Therefore, the Board of Supervisors approved an amended Agreement on June 19, 2012 allowing the three jurisdictions to move forward, while allowing other jurisdictions to join the Agreement at a later time. Please click here for the adopted resolution, here for the Record of Action, and here for more information on the June 19, 2012 San Bernardino County Board of Supervisors meeting.

Please click here for a paper by Robert Hockett, Professor at Cornell Law School, advocating the use of eminent domain to acquire and modify mortgages, here for a July 10, 2012 op-ed by Joe Nocera of the *New York Times* supporting the program, and here for a June 23, 2012 editorial by Robert Shiller published in the *New York Times*, also supporting the program.

Please contact Tom Deutsch, ASF Executive Director, at (b)(6) @americansecuritization.com or at (b)(6) with any questions that you may have.

Thank you.

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