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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ALLIANCE OF CALIFORNIANS FOR COMMUNITY EMPOWERMENT; HOUSING AND ECONOMIC RIGHTS ADVOCATES; URBAN REVIVAL dba CITY LIFE/VIDA URBANA; THE COLORADO FORECLOSURE RESISTANCE COALITION; HOME DEFENDERS LEAGUE; NEW JERSEY COMMUNITIES UNITED; NEW YORK COMMUNITIES FOR CHANGE, Plaintiffs, v. FEDERAL HOUSING FINANCE AGENCY, Defendant.	CASE No.: 13-cv-05618-KAW **DECLARATION OF SHAYLA SILVER-BALBUS IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** Hearing Date: July 18, 2014 Time: 11:00 a.m. Location: Oakland U.S. Courthouse Courtroom 4, 3rd Floor Judge: Magistrate Judge Kandis A. Westmore

1. I am counsel for Plaintiffs in this action. Except as otherwise stated, the information contained in this declaration is based upon my personal knowledge and if called upon to testify, I could and would competently testify thereto.

Factual Background on the Foreclosure Crisis

2. As part of my work on this Freedom of Information Act ("FOIA") action pertaining to the national foreclosure crisis, I keep abreast with developments regarding the foreclosure crisis, including news coverage of local, state, and federal responses to the crisis.

3. The foreclosure crisis has devastated the national economy and the lives of millions of families across the country. In California alone, banks have foreclosed on approximately 1.7 million homes since 2008 and another 65,000 California homeowners have received notice that they may soon face foreclosure. *See, e.g.*, Robert Jablon, *LA Sues Wells Fargo, Citigroup Over Foreclosures*, THE HUFFINGTON POST, Dec. 5, 2013, *available at* http://www.huffingtonpost.com/2013/12/06/la-sues-wells-fargo-foreclosures_n_4399353.html; *California in Crisis*: *How Wells Fargo's Foreclosure Pipeline is Damaging Local Communities*, March 14, 2013, *available at* http://populardemocracy.org/news/california-crisis-report. A true and correct copy of these articles is attached as Exhibit 1 to this declaration.

4. The crisis, while national in scope, disproportionately affects communities with large minority populations, like the City of Richmond, California. *See, e.g.*, Renae Merle, *Minorities hit harder by foreclosure crisis*, WASHINGTON POST, June 19, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/06/18/AR2010061802885.html; Travis Waldron, *Latinos, African Americans Twice as Likely as Whites to Have Been Affected by the Housing Crisis*, THINK PROGRESS, Nov. 18, 2011, *available at* http://thinkprogress.org/economy/2011/11/18/372517/latinos-african-americans-housing-crisis/. A true and correct copy of these news articles is attached as Exhibit 2 to this declaration.

5. Economists across the political spectrum have identified mortgage debt as one of the prime obstacles to strong economic growth and have recommended that the government

implement a program of widespread principal reduction. *See, e.g.*, Martin Feldstein, *How to Stop the Drop in Home Values*, NEW YORK TIMES, Oct. 12, 2011, *available at* http://www.nytimes.com/2011/10/13/opinion/how-to-stop-the-drop-in-home-values.html; Paul Krugman, *Fire Ed DeMarco*, NEW YORK TIMES, July 31, 2012, *available at* http://krugman.blogs.nytimes.com/2012/07/31/fire-ed-demarco/. A true and correct copy of these news articles is attached as Exhibit 3 to this declaration.

6. Foreclosures often reduce the value of surrounding properties. Helping homeowners avoid foreclosure thus benefits neighbors, and because foreclosures and declining property values reduce revenue to local governments, principal reduction can benefit communities and municipalities. *See, e.g.*, Robert Hockett, Paying Paul and Robbing No One: An Eminent Domain Solution for Underwater Mortgage Debt, 19 FEDERAL RESERVE BANK OF NEW YORK: CURRENT ISSUES IN ECONOMICS AND FINANCE (2013). A true and correct copy of this article is attached as Exhibit 4 to this declaration.

7. The Secretary of the Treasury has called for defendant Federal Housing Finance Agency ("FHFA") to permit Fannie Mae and Freddie Mac, the entities it oversees, to use principal reduction programs as an essential solution to the foreclosure crisis. *See* Letter from Secretary Geithner to Acting FHFA Director DeMarco on the Principal Reduction Alternative (PRA) Program, July 31, 2012, *available at* http://www.treasury.gov/connect/blog/Documents/letter.to.demarco.pdf. A true and correct copy of this letter is attached as Exhibit 5 to this declaration.

8. According to the Congressional Budget Office, such programs could also save taxpayers $2.8 billion. *See* Jacob Gaffney, *Widespread principal reductions could save taxpayers $2.8 billion*, HOUSING WIRE, May 1, 2013, *available at* http://www.housingwire.com/articles/widespread-principal-reductions-could-save-taxpayers-28-billion. A true and correct copy of this news article is attached as Exhibit 6 to this declaration.

9. Although principal reduction would yield widespread benefits, there are practical barriers to its implementation, particularly when it comes to mortgages that have been securitized. Ownership of mortgages by numerous bondholders creates collective action problems that impede

its implementation, even when it would be in the interest of the bondholders; these problems may be compounded by the conflict of interest between bondholders and the mortgage servicers, for which foreclosures may be more profitable (or less costly) than principal reduction. *See generally* Diane E. Thompson, Why Servicers Foreclose When They Should Modify, and Other Puzzles of Servicer Behavior, National Consumer Law Center, Oct. 2009, *available at* https://www.nclc.org/images/pdf/pr-reports/report-servicers-modify.pdf. A true and correct copy of the executive summary of this report is attached as Exhibit 7 to this declaration.

10. Seizing on this opportunity, municipalities across the country have proposed to purchase residents' underwater mortgages, paying the mortgage holders current market value for the loans, and then issuing new mortgages to the homeowners in amounts that reflect their homes' current value. *See, e.g.*, Eunice Lee, *Irvington Moves a Step Closer to Using Eminent Domain to Fight Foreclosures*, NJ.COM, March 30, 2014, *available at* http://www.nj.com/essex/index.ssf/2014/03/irvington_moves_a_step_closer_to_using_power_of_eminent_domain_to_stem_foreclosure_crisis.html. A true and correct copy of this news article is attached as Exhibit 8 to this declaration.

11. In 2013, Richmond, California was one of the first municipalities to announce a plan to purchase underwater mortgages secured by Richmond homes, and to indicate it would consider the use of eminent domain if lenders refused to sell the loans at fair market value. *See California City Oks Plan to Seize Underwater Mortgages Using Eminent Domain*, NBC NEWS, Sept. 11, 2013, *available at* http://www.nbcnews.com/business/real-estate/california-city-oks-plan-seize-underwater-mortgages-using-eminent-domain-f8C11128804. A true and correct copy of this news article is attached as Exhibit 9 to this declaration.

12. Many of the nation's most powerful financial lobby groups, including the American Bankers Association, the American Securitization Forum, and the Securities Industry and Financial Markets Association ("SIFMA") have registered strong opposition to local eminent domain proposals like Richmond's. *See* Peter Dreier, *To Rescue Local Economies, Cities Seize Underwater Mortgages Through Eminent Domain*, THE NATION, July 12, 2013, *available at* http://www.thenation.com/article/175244/rescue-local-economies-cities-seize-underwater-

mortgages-through-eminent-domain#; Press Release, SIFMA, *SIFMA Commends House Committee for Taking Action to Stop Eminent Domain Scheme*, May 21, 2014, *available at* http://www.sifma.org/newsroom/2014/sifma_commends_house_committee_for_taking_action_to_stop_eminent_domain_scheme/. Wells Fargo and other financial institutions went so far as to file litigation against the city. *See Banks Sue Richmond to Stop City's Plan to Help Homeowner's with Underwater Mortgages*, CBS SF BAY AREA, Aug. 10, 2013, *available at* http://sanfrancisco.cbslocal.com/2013/08/10/banks-sue-richmond-to-stop-citys-eminent-domain-plan-to-help-homeowners-with-underwater-mortgages/; *Wells Fargo v. City of Richmond*, No. 13-03663-CRB (N.D. Cal. filed Aug. 7, 2013); *Bank of New York Mellon v. City of Richmond*, No. 13-03664-CRB (N.D. Cal. filed Aug. 7, 2013). A true and correct copy of the foregoing press release and news articles is attached as Exhibit 10 to this declaration.

13. Notwithstanding the substantial benefits likely to flow to homeowners and taxpayers, and the urging of the Secretary of the Treasury, defendant FHFA refused to implement any principal reduction programs. *See* George Zornick, *Will Mel Watt Back Principal Reduction?*, THE NATION, June 27, 2013, *available at* http://www.thenation.com/blog/175016/will-mel-watt-back-principal-reduction; Peter Dreier, *What is Mel Watt Waiting For?*, THE HUFFINGTON POST, May 13, 2014, *available at* http://www.huffingtonpost.com/peter-dreier/post_7590_b_5313595.html. A true and correct copy of these news articles is attached as Exhibit 11 to this declaration.

14. FHFA threatened to take legal action against cities wishing to initiate local solutions to the foreclosure crisis. *See* Press Release, Federal Housing Finance Agency, *FHFA Statement on Eminent Domain*, Aug. 8, 2013, *available at* http://www.chapa.org/sites/default/files/FHFAStmtEminentDomain080813.pdf. A true and correct copy of this press release is attached as Exhibit 12 to this declaration.

15. FHFA's position against principal reduction and eminent domain is at odds with the opinions of top economists who identify private mortgage debt as the primary obstacle to economic recovery, and effectively blocks the communities hit hardest by the foreclosure crisis from pursuing a promising solution on behalf of their residents. *See* Zachary A. Goldfarb,

Economists, Obama Administration at Odds Over Role of Mortgage Debt in Recovery, WASHINGTON POST, Nov. 22, 2012, *available at* http://www.washingtonpost.com/business/economy/economists-obama-administration-at-odds-over-role-of-mortgage-debt-in-slow-recovery/2012/11/22/dc83f25e-2e87-11e2-89d4-040c9330702a_story.html. A true and correct copy of this news article is attached as Exhibit 13 to this declaration.

16. The foreclosure crisis is ongoing in communities across the country, and public interest in the issue, including efforts, like Richmond's, to find local solutions, remains high. For extensive media coverage on this issue, *see, e.g.*, Shaila Dewan, *A City Invokes Seizure Laws to Save Homes*, NEW YORK TIMES, July 29, 2013, *available at* http://www.nytimes.com/2013/07/30/business/in-a-shift-eminent-domain-saves-homes.html?pagewanted=all; Alejandro Lazo, *Richmond adopts eminent domain mortgage plan*, L.A. TIMES, July 30, 2013, *available at* http://articles.latimes.com/2013/jul/30/business/la-fi-mo-richmond-eminent-domain-20130730; Peter Dreier, *Wall Street Lobbyists Nervous As Cities Use Eminent Domain to Protect Homeowners*, THE HUFFINGTON POST, July 30, 2013, *available at* http://www.huffingtonpost.com/peter-dreier/wall-street-lobbyists-nervous_b_3679422.html; *Richmond Threatens Eminent Domain To Address Foreclosure Crisis*, CBS SAN FRANCISCO, July 30, 2013, *available at* http://sanfrancisco.cbslocal.com/2013/07/30/richmond-threatens-eminent-domain-to-address-foreclosure-crisis/; Dan Levy & Jody Shenn, *Richmond Escalates Eminent Domain Plan With Loan Offers*, BLOOMBERG NEWS, July 30, 2013, *available at* http://www.bloomberg.com/news/2013-07-30/richmond-escalates-eminent-domain-plan-with-loan-offers.html; Kate Berry, *Calif. City Threatens to Use Eminent Domain with Underwater Mortgages*, AMERICAN BANKER, July 30, 2013, *available at* http://www.americanbanker.com/issues/178_146/california-city-threatens-to-use-eminent-domain-with-underwater-mortgages-1060983-1.html; Carolyn Said, *Richmond's pioneering eminent-domain threat*, S.F. CHRONICLE, July 31, 2013, *available at* http://www.sfgate.com/realestate/article/Richmond-s-pioneering-eminent-domain-threat-4695857.php; Robert C. Hockett, *Geithner, Mian and Sufi on the Crisis*, THE HILL, May 8, 2014,

available at http://thehill.com/blogs/pundits-blog/finance/207353-geithner-mian-and-sufi-on-the-crisis-monday-morning-quarterbacking. A true and correct copy of these news articles is attached as Exhibit 14 to this declaration.The Haas Institute at the University of California recently released a report, titled "Underwater America," documenting the persistence of the mortgage crisis in communities across the country and calling for local or federal intervention to reduce mortgage principal. A copy of the report is available at http://diversity.berkeley.edu/underwater-america-report.

17. Members of Congress have introduced legislation regarding local eminent domain solutions, and principal reduction was a central topic of the recent Senate Banking Committee hearing considering the nomination of Congressman Melvin Watt to lead FHFA. *See* Ely Portillo, *Watt faces pointed questions at Senate hearing*, CHARLOTTE OBSERVER, June 27, 2013, *available at* http://www.charlotteobserver.com/2013/06/27/4132388/watt-to-face-questions-from-senators.html#.U4j4xhAvB7U; Appropriations Committee 2015 Report, *available at* http://appropriations.house.gov/uploadedfiles/hrpt-113-hr-fy2015-thud.pdf. A true and correct copy of this news article and relevant excerpts of the report is attached as Exhibit 15 to this declaration.

18. The media has dedicated significant coverage to FHFA's response to Richmond's proposal. *See, e.g.*, Nick Timiraos, *Fannie, Freddie Regulator Weighs Action on Eminent Domain*, WALL ST. J., Aug. 8, 2013, *available at* http://blogs.wsj.com/developments/2013/08/08/fannie-freddie-regulator-threatens-action-on-eminent-domain/; Margaret Chadbourn, *Freddie Mac may sue California city on eminent domain loan seizures*, REUTERS, Aug. 7, 2013, *available at* http://www.reuters.com/article/2013/08/07/us-usa-freddiemac-richmond-idUSBRE9760WT20130807. A true and correct copy of these news articles is attached as Exhibit 16 to this declaration.

Procedural History of Plaintiffs' FOIA Request

19. As counsel on this matter, and pursuant to standard office procedure at the American Civil Liberties Union Foundation of Northern California, I was copied on all correspondence relating to this FOIA request and litigation.

20. On October 1, 2013, Plaintiffs submitted a FOIA request to FHFA, seeking expedited processing. *See* Plaintiffs' FOIA request, a true and correct copy of which is attached as Exhibit 17 to this declaration.

21. After Plaintiffs filed suit, FHFA produced a first round of documents, by letter dated December 30, 2013. A true and correct copy of FHFA's letter accompanying the production is attached as Exhibit 18 to this declaration.

22. The parties thereafter met and conferred.

23. Plaintiffs' first follow-up letter to FHFA was sent on January 21, 2014. The letter identified numerous deficiencies in the production, explaining in detail why the agency's search was inadequate and the information it withheld was not exempt under FOIA. A true and correct copy of Plaintiffs' January 21, 2014 letter is attached as Exhibit 19 to this declaration.

24. In response to Plaintiffs' January 21, 2014 letter, the agency produced a second round of documents by letter dated March 13, 2014. In a letter accompanying the production, FHFA indicated that it was continuing to withhold a number of documents as exempt from disclosure and that it had not searched any agency phone records. A true and correct copy of FHFA's March 13, 2014 letter and relevant excerpts of the accompanying production of documents is attached as Exhibit 20 to this declaration.

25. Plaintiffs wrote a second follow-up letter to FHFA on April 1, 2014, a true and correct copy of which is attached as Exhibit 21 to this declaration. This April 1, 2014 letter raised many of the same objections as the January 21, 2014 letter. In particular, it identified documents in the record that positively indicated that several FHFA employees, whose records still have not been searched, participated in agency discussions about eminent domain and are thus likely to possess responsive records.

26. FHFA produced a third round of documents by letter dated May 8, 2014. FHFA also provided an additional letter, dated May 9, 2014, explaining its supplemental search and production. A true and correct copy of the May 9, 2014 letter is attached as Exhibit 22 to this declaration.

27. After FHFA filed its summary judgment brief, it provided Plaintiffs a supplemental production, via email, on May 21, 2014. A true and correct copy of the May 21, 2014 cover email and relevant excerpts of the May 21, 2014 production is attached as Exhibit 23 to this declaration.

28. I have reviewed all of the documents produced by FHFA as well as the agency's letters setting forth what it searched and did not search, and what it chose to withhold. From my review of that information, it is apparent that several of the issues raised by Plaintiffs in their first and second letters to FHFA remain unaddressed. FHFA did not search, as the basis for its final production, the records of Mario Ugoletti, Meg Burns, or Pat Lawler; the records of any administrative assistants; or any agency phone messages. Furthermore, it continues to withhold documents that Plaintiffs objected to in their second follow-up letter to FHFA.

Additional Information on Select FHFA Employees

29. I performed an internet search for the names of the following FHFA employees whose names appear in the documents produced by FHFA to ascertain their titles/positions with the agency. The results of my internet search indicate that the following four employees hold a senior-level position at FHFA. Mr. Ugoletti holds the position of "Special Advisor"; Ms. Burns the position of "Senior Associate Director for Housing and Regulatory Policy"; Mr. Lawler the position of "Chief Economist"; and Mary Ellen Taylor the position of "Senior Policy Advisor." *See* http://www.fhfa.gov/Media/PublicAffairs/Pages/Federal-Housing-Finance-Agency-Director-Mel-Watt-Announces-Four-Staff-Appointments.aspx; http://www.linkedin.com/pub/mario-ugoletti/3b/258/833; http://financialservices.house.gov/uploadedfiles/hhrg-112-ba16-wstate-mburns-20120507.pdf; http://www.linkedin.com/pub/patrick-lawler/a/b8/8ba; http://www.linkedin.com/pub/mary-ellen-taylor/18/39a/19b. My internet search revealed that Joan Harrington works as an "Administrative Office Manager" at FHFA. *See* http://www.linkedin.com/pub/joan-harrington/16/808/154. A true and correct copy of an FHFA announcement regarding Mr. Ugoletti's role at the agency obtained from the FHFA website; the cover page of a statement delivered by Ms. Burns to a Congressional Committee, indicating her title and obtained from the Committee's website; and information obtained from the profiles of

the foregoing employees from the social networking website "LinkedIn" is attached as Exhibit 24 to this declaration.

30. I have reviewed the documents produced by FHFA. Mr. Ugoletti's name appears as an attendee at a Bank of America meeting with other key FHFA employees, according to a meeting agenda produced by the agency. *See* Exh. 20 at Bates 16. The meeting must have addressed eminent domain issues because the agency produced the agenda, on which Mr. Ugoletti is identified, in response to this FOIA request. Mr. Ugoletti was also included on an email chain in which then-Acting Director DeMarco forwarded an email from SIFMA to General Counsel Alfred Pollard and Mr. Ugoletti. *See* Exh. 20 at Bates 17-18. Finally, Mr. Ugoletti is listed as an attendee at three meetings related to eminent domain, as documented by calendar entries produced by the agency. *See* Exh. 23 at Bates 3-5.

31. Ms. Burns and Mr. Lawler are shown to have attended the same Bank of America meeting as Mr. Ugoletti. *See* Exh. 20 at Bates 16. In addition, in calendar entries produced by FHFA, Mr. Lawler is listed as an attendee at five eminent domain meetings, and Ms. Burns is listed as an attendee at four. *See* Exh. 23 at Bates 5-9.

32. The documents produced by FHFA also show that Ms. Taylor was personally, and extensively, involved in agency discussions about eminent domain. She was tasked with spearheading the agency's discussions on eminent domain with a key industry trade group. In an email from Wanda DeLeo, in the FHFA Office of Strategic Initiatives, to Richard Dorfman of SIFMA, on which Ms. Taylor is copied, Ms. DeLeo wrote: "Good Morning Richard! . . . We would be happy to spend some time with you next week discussi[ng] eminent domain. Mary Ellen [Taylor] is going to take the lead here at FHFA to make this happen." *See* Exh. 20 at Bates 12-13. Ms. Taylor was also the recipient of multiple emails regarding eminent domain (produced as a result of searches of other employees' records). *See id.* at Bates 11-12, 14-15. Furthermore, Ms. Taylor attended numerous agency meetings on the topic, as evidenced by calendar entries produced by the agency which list her as an "attendee" of the meetings. Exh. 23 at Bates 5, 7. Nor was she merely a passive participant at these meetings. In one calendar entry, she provided other attendees with substantive background information in preparation for the meeting. The calendar

entry includes the following message from Ms. Taylor for attendees: "This meeting with Howard Altarescu is now at 11 on Tuesday instead of Monday. Sending their weekly publication just as background info. Mary Ellen." *See* Exh. 23 at Bates 2.

33. Ms. Harrington appears on at least one document produced by FHFA. The document is a calendar entry for a "[m]eeting sent out on behalf of Wanda DeLeo," but in which Ms. Harrington is listed as the actual "Organizer" of the meeting. *See* Exh. 23 at Bates 5. This calendar entry reveals that administrative support staff at FHFA assist senior FHFA officials in organizing meetings.

34. While Alfred Pollard holds the official title of "General Counsel" at FHFA, I have determined through publicly available news sources that he frequently advises on matters of policy for the agency. *See, e.g.*, Statement of Alfred M. Pollard Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, "Housing Finance Reform: Powers and Structure of a Strong Regulator," Nov. 21, 2013, *available at* http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=90f5f9d6-0ca1-46b8-919c-7dbec58740f0. A true and correct copy of this statement is attached as Exhibit 25 to this declaration.

Miscellaneous

35. This office previously litigated another FOIA action, *American Civil Liberties Union of Northern California v. Drug Enforcement Administration*, N.D. Cal. Case No. C 11-01997 RS ("*DEA*"). Pursuant to standard office policy, we maintain pleadings of litigation. A true and correct copy of the court's summary judgment decision in *DEA* that I obtained from the office files is attached as Exhibit 26 to this declaration.

36. The records produced to date confirm concerns that FHFA's aggressive stance may be the result of its close ties with the private financial industry. *See* Alexis Goldstein, *Wall Street Group Aggressively Lobbied a Federal Agency to Thwart Eminent Domain Plans: Emails obtained through a FOIA request reveal the extraordinary access SIFMA had to Federal Housing Finance Administration officials*, THE NATION, Jan. 17, 2014, *available at* http://www.thenation.com/article/177965/wall-street-group-aggressively-lobbied-federal-agency-

thwart-eminent-domain-plans. A true and correct copy of this news article is attached as Exhibit 27 to this declaration.

37. Fannie and Freddie have no competitors with respect to most of their functions because the two enterprises hold a "duopoly" over the securitization of conventional conforming mortgages. *See* David J. Reiss, *The Role of the Fannie Mae/Freddie Mac Duopoly in the American Housing Market*, 17 JOURNAL OF FINANCIAL REGULATION AND COMPLIANCE 336 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1387262; *Bid to Replace Fannie Mae and Freddie Mac Gets a Needed Push*, WASHINGTON POST, March 13, 2014, *available at* http://www.washingtonpost.com/opinions/bid-to-replace-fannie-mae-and-freddie-mac-gets-a-needed-push/2014/03/13/57b22a7c-aaec-11e3-98f6-; *8e3c562f9996_story.html*. A true and correct copy of these articles is attached as Exhibit 28 to this declaration.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 5th day of June 2014 in San Francisco, California.

/s/ Shayla Silver-Balbus

Shayla Silver-Balbus

Exhibit 1

June 3, 2014

HUFF POST LOS ANGELES

LA Sues Wells Fargo, Citigroup Over Foreclosures

By ROBERT JABLON 12/05/13 11:48 PM ET EST AP

LOS ANGELES (AP) — The Los Angeles city attorney sued Wells Fargo and Citigroup on Thursday, alleging the companies engaged in mortgage discrimination that led to a wave of foreclosures in minority communities during the housing crash.

The twin lawsuits, filed in federal court, are the latest fallout from the 2008 collapse of the subprime mortgage industry, which sparked a string of actions against various lenders by federal agencies and city governments.

The city attorney's suits allege a "continuing pattern of discriminatory mortgage lending practices" in Los Angeles that violate the federal Fair Housing Act. They claim Wells Fargo & Co. and Citigroup Inc. at first refused to grant mortgages in minority neighborhoods — a practice known as redlining — and later targeted black and Hispanic neighborhoods for predatory loans, known as reverse redlining.

Wells Fargo and Citigroup both said the suits are meritless.

"We are disappointed that the LA attorney does not recognize our deep commitment to fair lending," a Citigroup statement said.

The lawsuits contend that "vulnerable, underserved borrowers" denied by years of redlining jumped at the chance to obtain subprime home loans they couldn't afford, then were hit by a swarm of foreclosures when the housing bubble burst and they were denied refinancing.

"Since 2008, banks have foreclosed on approximately 1.7 million homes in California, and Wells Fargo is responsible for nearly one in five of these foreclosures," the lawsuit against Wells Fargo says.

A loan in a predominantly minority neighborhood of Los Angeles is nearly five more times more likely to result in foreclosure that one in a predominantly white neighborhood, the suit claims.

"These foreclosures often occur when a minority borrower who previously received a predatory loan sought to refinance the loan, only to discover that Wells Fargo refused to extend credit at all, or on equal terms as when refinancing similar loans issued to white borrowers," it says.

The foreclosures caused property values to tumble, costing the city tax revenue, and leaving it holding the bag for the cost of cleaning up and policing vacant properties, the lawsuit claims.

Citigroup said it "considers each applicant by the same objective criteria, which are blind to race, ethnicity, gender and any other prohibited basis," the bank said. "Using these objective criteria allows us to lend on terms that are consistent with the risk profile of each borrower and gives millions of qualifying consumers the opportunity to own a home."

"Wells Fargo has been a part of Southern California for over a century and we are proud of our record as a fair and responsible lender," that bank said in a statement, adding that the allegations "do not in any way reflect our values as a company."

Both lawsuits seek unspecified reparations and damages. However, they cite a report by the Alliance of Californians for Community Empowerment and the California Reinvestment Coalition that estimated the mortgage crisis resulted in more than 200,000 foreclosures from 2008 to 2012, with $481 million in lost property tax revenue to the city, and $1.2 billion in Los Angeles for "increased costs of safety inspections, police and fire calls, trash removal and property maintenance."

The Los Angeles city attorney's office has previously gone after other mortgage lenders in state court, blaming them for urban blight sparked by the housing market collapse.

Ongoing lawsuits filed against Deutsche Bank AG in 2011 and US Bancorp last year contend that the lenders destroyed neighborhoods by wrongly kicking people out of homes and leaving hundreds of properties to become trash-strewn crime magnets.

Bank officials said that they are not responsible for the decline.

The banks have been hit by other mortgage-related lawsuits in recent years. Last month, Wells Fargo disclosed that it will pay $335 million to resolve claims that it misled Fannie Mae and Freddie Mac about risky mortgage securities before the housing market collapsed.

In 2011, Wells Fargo agreed to pay $85 million to settle civil charges that it falsified loan documents and pushed borrowers toward subprime mortgages with higher interest rates during the housing boom. It was the largest penalty ever imposed by the Federal

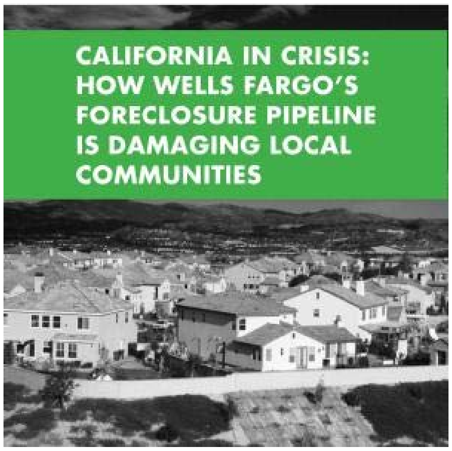
Reserve in a consumer-enforcement case.

Last year, Wells Fargo and Citigroup were among banks that reached a $25 billion settlement with attorneys general in 49 states over alleged widespread mortgage abuses. The banks did not admit or deny guilt in that settlement, which did not protect them from other litigation.

New York's state attorney general announced in October that he was suing Wells Fargo to force compliance with terms of the settlement.

THE CENTER FOR POPULAR DEMOCRACY

California in Crisis - The Report



Mar 14, 2013

A Report on the Foreclosure Crisis
California in Crisis: How Wells Fargo's Foreclosure Pipeline is Damaging Local Communities

Five years after the housing market collapsed, California's economy remains weak. The unemployment rate is nearly 10 percent, twice what it was in 2006, and in 2012 the State's underemployment rate averaged an astonishing 19.3 percent.

The continuing housing crisis remains a key cause of this widespread economic tragedy. Nearly two million California homeowners are underwater, owing more on their mortgage than their home is worth.

Since 2008, banks have foreclosed on approximately 1.7 million homes in the state. Right now, around 65,000 California homeowners are in the "foreclosure pipeline" – they've received a Notice of Default or a Notice of Trustee Sale. Every day, more and more families get added to this list.

Wells Fargo is the biggest mortgage service provider in California, responsible for nearly one in five of these impending foreclosures. This report shows the tremendous damage that will befall California's communities if Wells Fargo continues to foreclose on so many families.

Download the report here. (/sites/default/files/California-in-Crisis-Final-Report-compressed.pdf)

Executive Summary

Five years after the housing market collapsed, California's economy remains weak. The unemployment rate is nearly 10 percent, twice what it was in 2006, and in 2012 the State's underemployment rate averaged an astonishing 19.3 percent. Millions of Californians are struggling to make ends meet.

The continuing housing crisis remains a key cause of this widespread misery. Nearly two million California homeowners are underwater, owing more on their mortgage than their home is worth. This tremendous mortgage debt is severely crippling the State's economy by holding back consumer spending and preventing a robust recovery.

And the mortgage debt is devastating the lives of too many Californians. Since 2008, banks have foreclosed on approximately 1.7 million homes in the state. Right now, about 65,000 California homeowners are in the "foreclosure pipeline" – they've received a Notice of Default or a Notice of Trustee Sale. Every day, more and more families get added to this list.

Wells Fargo is the biggest mortgage servicer in California, responsible for nearly one in five of these impending foreclosures. This report shows the tremendous damage that will befall California's communities if Wells Fargo continues to foreclose on so many families. As of February 2013, Wells Fargo had 11,616 homes in its foreclosure pipeline. If all of these homes were to go through foreclosure:

- Each home would lose approximately 22 percent of its value, for a total loss of approximately $1.07 billion,
- Homes in the surrounding neighborhood would lose value as well, for an additional loss of about $2.2 billion; and
- Government tax revenues would be cut by $20 million, as a result of that depreciation.

Every month, more homes fall into the foreclosure pipeline, compounding this disaster. The foreclosure crisis has hit African-American and Latino borrowers and communities particularly hard. The pages below highlight the concentration of distressed loans handled by Wells Fargo that are in African-American and Latino neighborhoods. These communities have already suffered tremendous wealth loss due to the recession and this report shows that far more harm will occur in the coming months unless Wells Fargo changes its policies.

But Californians do not have to accept this bleak future. Economists and policy experts across the political spectrum agree that an alternative approach to the housing crisis can be a win-win-win for homeowners, mortgage holders, and California's economy. As this report explains, widespread modification of home mortgages to current market value would prevent tens of thousands of needless foreclosures, inject billions of dollars into the economy, create hundreds of thousands of new jobs – and would even be in the financial interest of the investors who own the mortgages.

Wells Fargo is a pivotal actor in determining whether principal reduction becomes a widespread solution. Its failure to lead on this issue is clear. The most recent report from the national monitor of the multi-state Attorneys General mortgage servicing settlement shows that in California, Wells Fargo is providing far less principal reduction than Bank of America, despite the fact that it services more loans.

The solutions are clear: Wells Fargo should (1) commit to a broad program of principal reduction, (2) be honest with Californians by reporting data on its principal reduction, short sales, and foreclosures by race, income, and zip code, and (3) immediately stop all foreclosures until the first two solutions are implemented.

After years of predatory lending and heartless foreclosures, it is time for Wells Fargo to stop. Stop the needless foreclosures. Stop the needless evictions. End this housing crisis.

Campaigns:

- Advocating for Housing Justice (/campaign/advocating-housing-justice)
- Increasing ACCE's Organizational Capacity (/campaign/increasing-acce-s-organizational-capacity)
- Restoring Community Wealth (/campaign/restoring-community-wealth)

News Categories:

- Publication (/news-categories/publication)

Exhibit 2

The Washington Post

Minorities hit harder by foreclosure crisis

By Renae Merle
Washington Post Staff Writer
Saturday, June 19, 2010; A12

Minority homeowners have been disproportionately affected by the foreclosure crisis and stand to lose homes at a faster pace than white borrowers in the future, according to a report released Friday by a nonprofit research group.

The study by the Center for Responsible Lending found that whites made up the majority of the 2.5 million foreclosures completed between 2007 and 2009 -- about 56 percent -- but that minority communities had significantly higher foreclosure rates.

While about 4.5 percent of white borrowers lost their homes to foreclosure during that period, black and Latino borrowers had 7.9 and 7.7 percent foreclosure rates, respectively. That means that blacks and Latinos were more than 70 percent more likely to lose their homes to foreclosure during that period, the study found.

Overall, blacks lost about 240,020 homes to foreclosure, while Latinos lost about 335,950, according to the study, which analyzed government and industry data on millions of loans issued between 2005 and 2008 -- the height of the housing boom.

The "analysis suggests dramatic differences in how the foreclosure crisis has affected racial and ethnic groups," the report said. "African American and Latino borrowers have borne and will continue to disproportionately bear the burden of foreclosures."

The study is the latest to examine the housing crisis and its disparate impact on minority communities. A study by the National Community Reinvestment Coalition released in April found that black and Latino homeowners in the Washington region were almost 20 percent and 90 percent more likely, respectively, to face foreclosure or lose their homes than similarly situated whites.

Housing experts have pointed to a variety of factors to explain the disparity, including higher unemployment rates in minority communities and traditionally fewer financial resources for black and Latino borrowers to fall back on.

But the Center for Responsible Lending's study found that the disparate foreclosure rates also apply to well-to-do homeowners. High-income black borrowers, for example, were 80 percent more likely to lose their homes to foreclosure than their white counterparts, while Latino borrowers were 90 percent more likely.

Research has shown that minority borrowers were more likely to receive subprime loans during the housing boom even if they had credit scores, incomes and loan sizes similar to those of whites. Some housing experts say that minority borrowers received higher rates on subprime loans compared with similarly situated white borrowers, resulting in higher monthly payments and quicker defaults.

"I think it reflects that minority borrowers were targeted by the sellers of these [risky] mortgages," said Barry Zigas, director of housing and credit policy at the Consumer Federation of America.

The Treasury Department has said it will collect data on the racial makeup of homeowners helped under its Making Home Affordable foreclosure-prevention program. That program's standards and processes should minimize disparities between how homeowners are treated, lending industry officials have said.

"It is incumbent upon us to make sure that we look at all of the options" under the federal program to help all homeowners, said Faith Schwartz, senior adviser and consultant to Hope Now, an industry group. "We can always step back and say, 'Is there anything more that can be done to neutralize any negative impact on minorities or borrowers' " with particularly risky types of loans.

In addition to the millions of borrowers who have already lost their homes, about 5.7 million are at risk of foreclosure, the report said. About 494,930 blacks and 731,660 Latinos are at imminent risk of foreclosure, the report said.

The report comes as government foreclosure-prevention efforts falter and banks make their way through a backlog of seriously delinquent homeowners and repossess homes at a higher rate. Economists expect distressed properties to be a drag on the housing market for years, particularly if high unemployment levels persist. Moody's Economy.com estimates that more than 1.5 million homes will be lost to foreclosure this year.

View all comments that have been posted about this article.

THINKPROGRESS

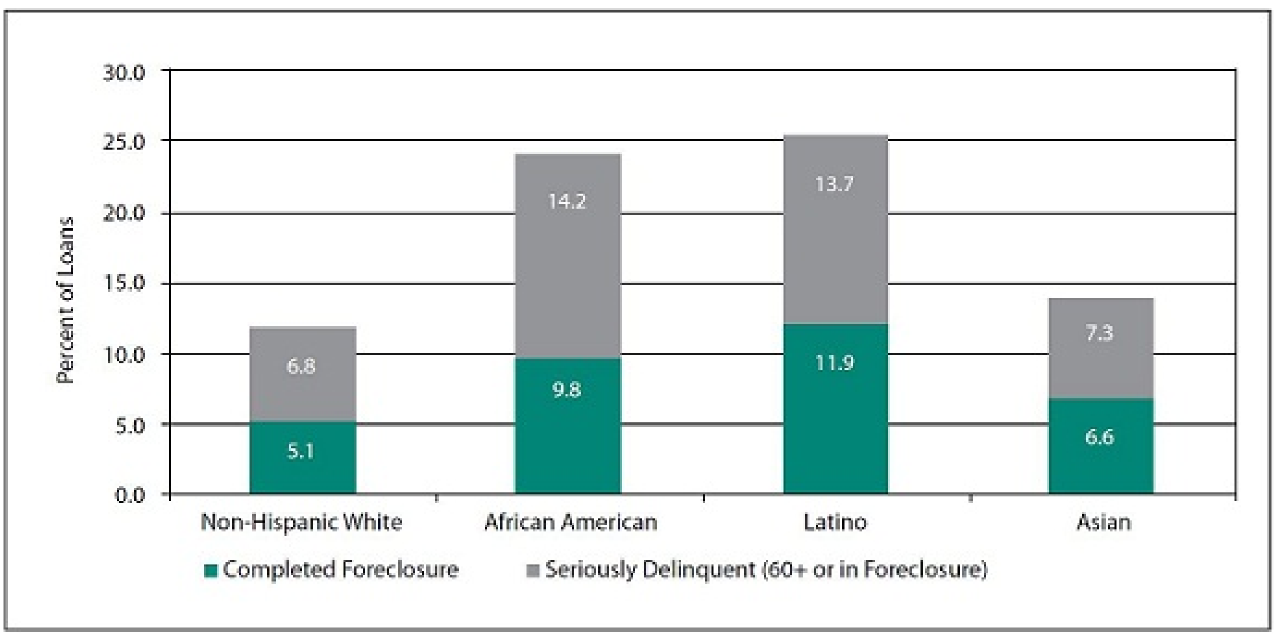
Latinos, African Americans Twice As Likely As Whites To Have Been Affected By The Housing Crisis

BY **TRAVIS WALDRON** NOVEMBER 18, 2011 AT 5:55 PM UPDATED: NOVEMBER 18, 2011 AT 6:15 PM

America's housing crisis is one of the biggest problems plaguing the economy, as the country's homes have lost $7 trillion in cumulative value over the last five years. Four million Americans are either behind on their payments or in foreclosure, and a quarter of the nation's homeowners are underwater on their mortgage. Those foreclosures have driven down home values in communities across the country.

According to a new report by the Center on Responsible Lending, however, the foreclosure crisis isn't finished yet. In fact, with 3.6 million households at immediate risk of losing homes, we're not even halfway through it. Even more damning from the report, though, is the fact that the housing crisis has disproportionately affected minority voters. Though more whites — who make up a larger share of homeowners — have been plagued by foreclosure, the percentage of blacks and Latinos affected is nearly twice as high:

> Although the majority of affected borrowers have been white, **African-American and Latino borrowers are almost twice as likely to have been impacted by the crisis**. Approximately **one quarter of all Latino and African-American borrowers have lost their home to foreclosure or are seriously delinquent, compared to just under 12 percent for white borrowers**. Asian borrowers have fared better as a whole than Latino and African-American borrowers, but they, too, have been disproportionately affected, especially in some metropolitan areas.



Wall Street banks and lenders took advantage of consumers throughout the lead-up to the housing crisis, and this report shows that the lending, at times, was even more predatory when targeting blacks and Latinos. ThinkProgress reported on this disparity in 2009, when bailed-out banks were found to have pushed many minorities who qualified for prime loans into higher-priced subprime loans, which can add more than $100,000 in interest payments over the life of

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higher-priced loans by large banks, compared to just 17.8 percent of white borrowers.

As with almost everything coming out of the banking industry regarding the financial crisis, the report only makes the case stronger for the newly-created Consumer Financial Protection Bureau, the agency tasked with targeting and ending predatory lending and banking excess. Discriminatory lending is illegal, and yet for years, the banks have largely been able to get away with it. If the CFPB is allowed to operate as it was envisioned, perhaps those days can finally come to an end.

Exhibit 3

October 12, 2011

How to Stop the Drop in Home Values

By MARTIN S. FELDSTEIN

Cambridge, Mass.

HOMES are the primary form of wealth for most Americans. Since the housing bubble burst in 2006, the wealth of American homeowners has fallen by some $9 trillion, or nearly 40 percent. In the 12 months ending in June, house values fell by more than $1 trillion, or 8 percent. That sharp fall in wealth means less consumer spending, leading to less business production and fewer jobs.

But for political reasons, both the Obama administration and Republican leaders in Congress have resisted the only real solution: permanently reducing the mortgage debt hanging over America. The resistance is understandable. Voters don't want their tax dollars used to help some homeowners who could afford to pay their mortgages but choose not to because they can default instead, and simply walk away. And voters don't want to provide any more help to the banks that made loans that have gone sour.

But failure to act means that further declines in home prices will continue, preventing the rise in consumer spending needed for recovery. As costly as it will be to permanently write down mortgages, it will be even costlier to do nothing and run the risk of another recession.

House prices are falling because millions of homeowners are defaulting on their mortgages, and the sale of their foreclosed properties is driving down the prices of all homes. Nearly 15 million homeowners owe more than their homes are worth; in this group, about half the mortgages exceed the home value by more than 30 percent.

Most residential mortgages are effectively nonrecourse loans, meaning creditors can eventually take the house if the homeowner defaults, but cannot take other assets or earnings. Individuals with substantial excess mortgage debt therefore have a strong incentive to stop paying; they can often stay in their homes for a year or more before the property is foreclosed and they are forced to move.

The overhang of mortgage debt prevents homeowners from moving to areas where there are better job prospects and from using home equity to finance small business start-ups and expansions. And because their current mortgages exceed the value of their homes, they cannot free up cash by refinancing at low interest rates.

The Obama administration has tried a variety of programs to reduce monthly interest payments. Those programs failed because they didn't address the real problem: the size of the mortgage exceeds the value of the home.

To halt the fall in house prices, the government should reduce mortgage principal when it exceeds 110 percent of the home value. About 11 million of the nearly 15 million homes that are "underwater" are in this category. If everyone eligible participated, the one-time cost would be under $350 billion. Here's how such a policy might work:

If the bank or other mortgage holder agrees, the value of the mortgage would be reduced to 110 percent of the home value, with the government absorbing half of the cost of the reduction and the bank absorbing the other half. For the millions of underwater mortgages that are held by Fannie Mae and Freddie Mac, the government would just be paying itself. And in exchange for this reduction in principal, the borrower would have to accept that the new mortgage had full recourse — in other words, the government could go after the borrower's other assets if he defaulted on the home. This would all be voluntary.

This plan is fair because both borrowers and creditors would make sacrifices. The bank would accept the cost of the principal write-down because the resulting loan — with its lower loan-to-value ratio and its full recourse feature — would be much less likely to result in default. The borrowers would accept full recourse to get the mortgage reduction.

Without a program to stop mortgage defaults, there is no way to know how much further house prices might fall. Although house prices in some areas are already very low, potential buyers continue to wait because they anticipate even lower prices in the future.

Before the housing bubble burst in 2006, the level of house prices had risen nearly 60 percent above the long-term price path. So there is no knowing how far prices may fall below the long-term path before they begin to recover.

I cannot agree with those who say we should just let house prices continue to fall until they stop by themselves. Although some forest fires are allowed to burn out naturally, no one lets those fires continue to burn when they threaten residential neighborhoods. The fall in house prices is not just a decline in wealth but a decline that depresses consumer spending, making the economy weaker and the loss of jobs much greater. We all have a stake in preventing that.

Martin S. Feldstein, a professor of economics at Harvard, was the chairman of the Council of Economic Advisers from 1982 to 1984 under President Ronald Reagan.

The New York Times

The Opinion Pages

Fire Ed DeMarco

July 31, 2012 2:56 pm

Do it now.

Who? you ask. DeMarco heads the Federal Housing Finance Agency, which oversees Fannie and Freddie. And he has just rejected a request from the Treasury Department that he offer debt relief to troubled homeowners — a request backed by an offer by Treasury to pay up to 63 cents to the FHFA for every dollar of debt forgiven.

DeMarco's basis for the rejection was that this forgiveness would represent a net loss to taxpayers, even if his agency came out ahead.

That's a very arguable point even on its own terms, because the paper he cited (pdf) in support of his stance took no account of the positive effects on the economy of debt relief — even though those effects are the main reason for offering such relief. Since a reduction in debt burdens would strengthen the economy, this would mean greater revenue — and this might well offset any losses from the debt forgiveness itself.

Furthermore, even if there's a small net cost to taxpayers, debt relief is still worth doing if it yields large economic benefits.

In any case, however, deciding whether debt relief is a good policy for the nation as a whole is *not DeMarco's job*. His job — as long as he keeps it, which I hope is a very short period of time — is to run his agency. If the Secretary of the Treasury, acting on behalf of the president, believes that it is in the national interest to spend some taxpayer funds on debt relief, in a way that actually improves the FHFA's budget position, the agency's director has no business deciding on his own that he prefers not to act.

I don't know what DeMarco's specific legal mandate is. But there is simply no way that it makes sense for an agency director to use his position to block implementation of the president's economic policy, not because it would hurt his agency's operations, but simply because he disagrees with that policy.

This guy needs to go.

Exhibit 4

FEDERAL RESERVE BANK OF NEW YORK
current issues
IN ECONOMICS AND FINANCE
Volume 19, Number 5 • 2013 • www.newyorkfed.org/research/current_issues

Paying Paul and Robbing No One: An Eminent Domain Solution for Underwater Mortgage Debt

Robert Hockett

In the view of many analysts, the best way to assist "underwater" homeowners—those who owe more on their mortgages than their houses are worth—is to reduce the principal on their home loans. Yet in the case of privately securitized mortgages, such write-downs are almost impossible to carry out, since loan modifications on the scale necessitated by the housing market crash would require collective action by a multitude of geographically dispersed security holders. The solution, this study suggests, is for state and municipal governments to use their eminent domain powers to buy up and restructure underwater mortgages, thereby sidestepping the need to coordinate action across large numbers of security holders.

It is now more than six years since U.S. residential real estate prices peaked and then plunged. Prices dropped nationally by 35 percent and still linger close to 30 percent below peak levels. In harder-hit communities, prices are considerably more than 50 percent below peak.[1] While cyclical fluctuations push prices up for brief periods, no consistent upward trend has been firmly established (Chart 1). Indeed, the highest post-bubble price peak prior to March 2013 came not last year or the year before but in July 2010, while early 2012 saw the deepest post-bubble trough since April 2009. Prices reached a seasonal peak in September 2012, then leveled off through February 2013. These fluctuations, highlighted in the moving average change measure in Chart 1, have been the pattern in home prices since 2009.

While home prices—and hence home equity values—have fallen and remain low, the fixed debt obligations that buyers had to take on to purchase homes under bubble conditions have not. Consequently, approximately 11 million homes, or slightly less than a quarter of all homes with mortgages outstanding, are "underwater"—meaning that the balance on the mortgage exceeds the current market value of the home. Of these mortgages, between 3 million and 4 million are in default, in foreclosure, or foreclosed and awaiting liquidation. Over 2 million more are seriously delinquent—two-to-four payments in arrears (Olick 2012; Goodman et al. 2012; Ritholtz 2012; Goodman 2012).

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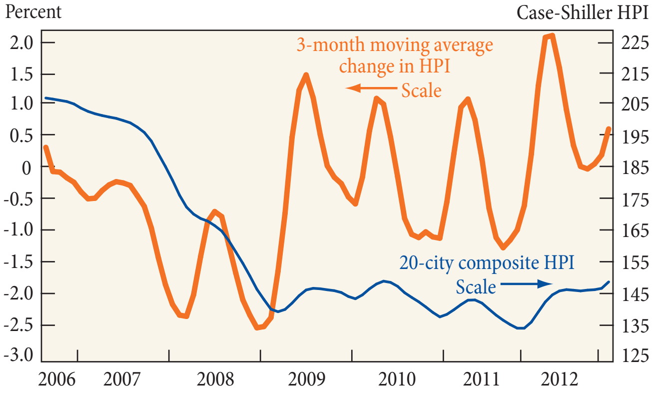
[1] Data are from CoreLogic, available at http://www.corelogic.com/, and from OCC Mortgage Metrics, available at http://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/index-mortgage-metrics.html.

Trends in Home Prices: July 2006–March 2013

Based on the Twenty-City Composite Case-Shiller Home Price Index



Source: Standard & Poor's/Case-Shiller Home Price Index (HPI).

Recognizing that defaults and foreclosures take a toll on the economic welfare of communities and the nation as a whole, many analysts have called for the write-down of principal on mortgage debt as the most effective solution to the problem of underwater mortgages. As these analysts attest, write-downs have the important advantage of *raising* value.

However, the difficulty lies in carrying out the write-downs. While principal reduction on mortgages held in bank portfolios occurs at significant and still growing rates, loans held in private-label securitization (PLS) trusts have certain structural features that make such reductions very rare. Specifically, these loans are subject to pooling and servicing agreements that would require collective action by a large majority of security holders before the loans could be modified or sold out of trusts. Conducting such a collective action across most holders of the securitized loans would be nearly impossible.

This edition of *Current Issues* puts forward a strategy for carrying out the write-downs. Essentially, it recommends that state and municipal governments use their eminent domain powers to address the collective action problems that now prevent the write-down of privately securitized loans. Under eminent domain, these governments can step in to purchase underwater loans at fair value, deal directly with the trustees of the private-label securitization trusts, and sidestep the rigidities of the pooling and servicing agreements. They can then reduce the principal on these loans, lowering the "water" and thereby reducing the risk of default.

The Mortgage Debt Overhang: Scope of the Problem

Fewer than half of the nation's roughly 11 million underwater mortgages are current, and large numbers of these mortgages go delinquent each month:[2] Together with loans that are already delinquent or in default, 7.5 to 9.5 million additional homes are expected to go into liquidation over the next several years absent remedial action.[3] These liquidations would further burden an already depressed market, yielding a backlog of vacant homes equal to 200 percent of U.S. annual home sales at the current sales pace (Olick 2012; Goodman et al. 2012; Ritholtz 2012; Goodman 2012).

For communities, the fallout from these developments is substantial, with residents forced to give up their homes and property tax bases weakened—ironically, just as abatement costs wrought by abandoned properties rise (Hockett 2012a). Other homeowners lose neighbors and endure the blight and lost value associated with boarded-up neighboring homes. Over time, they may see city services cut, school districts retrenching, and local economies shrinking—an aggregate monetized loss now estimated at $2 trillion (Hockett 2012a; Shoen 2012). Though causality is doubtless complex, the fact that so many counties have been filing for bankruptcy of late seems unsurprising against this backdrop (Church et al. 2012).

The mortgage debt overhang undermines the health of the national economy as well. Defaults and foreclosures in the housing markets feed back into the macroeconomy through effects upon net worth and spending (Federal Reserve Board 2012; Dudley 2012). And as reduced spending lowers growth and employment, more mortgages are drawn into foreclosure (Federal Reserve Board 2012; Dudley 2012; Hockett 2012a, 2012b). Hence the familiar "holding pattern" of high underwater loan and foreclosure rates yielding low growth and employment, which in turn yield yet more default and foreclosure, and so on (Hockett 2012a, 2012b, 2013).[4]

The Prudent Solution: Scaled Principal Write-Downs

The most effective means of averting mortgage delinquency, default, and foreclosure—and the associated economic costs—is principal reduction. As even creditors recognize,

[2] See Olick 2012, Goodman et al. 2012, Ritholtz 2012, and Goodman 2012, as well as the latest data from CoreLogic and OCC Mortgage Metrics, cited in note 1 above.

[3] See, for example, Fannie Mae 2012 Form 10-Q data, p. 111, available at http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2012/q22012.pdf. See also Olick 2012; Goodman et al. 2012; Ritholtz 2012; Goodman 2012.

[4] Of course not all mortgage troubles are attributable to declining home values. Some homeowners face difficulty keeping current on payments for reasons of temporary unemployment in a slack economy. For this class of mortgagor, several colleagues at the Federal Reserve Bank of New York and I have designed a Home Mortgage Bridge Loan Assistance Program, informed by a successful Pennsylvania program developed during the early 1980s steel slump (Orr et al. 2011). A draft bill to institute the program, which two of us coauthored, is under consideration in New York (Campbell and Hockett 2012a, 2012c). But even assuming success here and in other states, the nation's larger mortgage debt overhang problem will remain unaddressed (Campbell and Hockett 2012a, 2012b).

debt loss must be formally recognized in a manner that bears some intelligible relation to home *equity* loss. Moreover, for much underwater mortgage debt, write-downs raise value—a benefit borne out by the frequency with which portfolio loan holders write down debt (Olick 2012; Goodman et al. 2012; Ritholtz 2012; Goodman 2012).

Write-downs are not easily carried out in all cases, however. Much depends on whether the targeted loans are held in bank portfolios or by private-label securitization trusts. In the portfolio case, write-downs occur at significant and still growing rates (Goodman et al. 2012; Goodman 2012; Streitfeld 2011). Bank officers know that underwater loans foreclose at high rates, with the result that expected values fall needlessly short of face values; hence, they find it financially rational to write down these loans. In so doing, they benefit not only themselves, but also their debtors and the communities in which they reside. In this case, the interests of all parties converge.

Securitized mortgage loans, however, pose a problem. While it would be no less rational or beneficial to write these loans down, certain structural features of the loans—features that now act as market failures—prevent the rational thing from being done. The upshot is deadweight loss—loss whose recoupment and equitable distribution is one object of the plan sketched below.

Structural Impediments to Write-Downs

What are these structural impediments? A host of classic collective action problems, reinforced by dysfunctional contract provisions, stand in the way of the optimal solution (Hockett 2012a, 2012b; Shiller 2012). For one thing, there is a last-mover advantage where write-downs are concerned, owing to the benefits (positive externalities) that accrue to the creditors on later loans when principal is reduced on earlier loans. This problem afflicts portfolio loans too, of course, and probably therefore keeps modification rates lower than optimal even among banks. But in the case of privately securitized loans, it is reinforced by additional challenges.

Most decisive among the additional challenges is that so many of the pooling and servicing agreements governing the private securitization of loans—agreements drafted during the bubble years when few foresaw a marketwide housing price bust, and many rushed either to push or to purchase an innovative product—require supermajority voting among mortgage-backed securities (MBS) holders before loans can be modified or sold out of trusts. And these bondholders, geographically dispersed and unknown to one another, cannot collectively bargain with borrowers or buyers on workouts or prices.

Moreover, the agreements governing the loans prevent trustees and loan servicers, who are duty-bound to act on behalf of the bondholders and thus could in theory address their collective action problems, from modifying or selling off loans in the requisite numbers (Hockett 2012a, 2012b).[5] Finally, the agreements typically stipulate compensation arrangements that make it more profitable for servicers to oversee lengthy foreclosure proceedings than to seek modification. In sum, then, these contracts now virtually ensure that mortgage loans will default, harming all interested parties.

Additional complications arise from the fact that many underwater homes are subject to second liens that secure home equity lines of credit or closed-end second mortgages. First lienholders benefit little from loan modifications unless second lienholders modify too; hence, they are rationally reluctant to modify on their own. But second lienholders feel less pressure to modify because borrowers, strapped by post-bust liquidity needs for which home equity lines constitute precious sources of credit, are apt to make payments on them first—a reversal of the legal order of creditor priorities (Goodman 2012).[6] In addition, the second lienholders quite often are banks—the same banks that service the first-lien-secured loans. That poses a conflict of interest where firsts prefer that seconds modify too in order to optimize the benefits that modification brings to firsts, further obstructing agreement among borrowers and creditors.

Other constraints—including inapplicable bankruptcy laws and Internal Revenue Code and Trust Indenture Act uncertainties—impede the kind of collective action that would benefit both debtors and creditors (Hockett 2012a, 2012b). But the foregoing discussion suffices to indicate how formidable the obstacles to principal write-downs can be, particularly for loans held in private-label securitization trusts.

Bypassing the Impediments through Collective Agency

Solving a collective action problem requires a collective agent. Of course, that is what PLS trustees and servicers in theory are. But as we have seen, these agents are often hand-tied or conflicted. Who, then, will act for the creditors and, in so doing, for homeowners and spillover victims of local foreclosure and the continuing weakness in the U.S. mortgage market?

As it happens, governments are also collective agents. They are likewise the sole entities authorized to sidestep the contract rigidities of the pooling and servicing agreements that stand in the way of broad write-downs for PLS loans. But *which* government should take up this mantle—federal, state, or local?

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[5] In some cases, for example, pooling and servicing agreements allow no more than 5 percent of the loans in the pool to be modified. This percentage, which shows how little the marketwide crash was expected, has long since been reached in the case of most loan pools.

[6] Lee, Mayer, and Tracy (2012) offer a contrary view, finding that by the time a borrower goes delinquent on the first lien, there is little credit available on the home equity line.

In 2008-09, this author and two others separately advocated federal action under eminent domain—the power of governments to take private property for public use (Hockett 2009; Jackson 2008; Willis 2008). In 2010, two higher-profile advocates, including one member of Congress, added their names to the call (Miller 2010; Kuttner 2010). But thus far no action of this sort has been taken, even though other actions have brought some help.

The federal government's flagship Home Affordable Mortgage Program (HAMP), for example, has accomplished much, but it is not designed to deal with underwater or "negative equity" mortgages. For their part, the government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac have been steered clear of write-downs by their regulator and current conservator, the Federal Housing Finance Agency (Appelbaum 2012). Finally, Congress has twice now attempted but failed to get mortgaged homes into the Bankruptcy Code, thus leaving no means for bankruptcy judges to employ their equitable powers to salvage value among mortgagors and mortgagees as they routinely do among other debtors and creditors.[7]

The consequences of our failure thus far to focus on principal reduction can be seen in more numbers: Since 2007, little more than 1 percent of underwater home loans have seen write-downs. Fewer than half of these write-downs have brought loans above water. Meanwhile, only 2.7 million loans have been modified in any way by their servicers, while 40 percent of these modifications have reduced monthly payments by less than 10 percent.[8]

This weak response is surprising in light of the abundant evidence, derived from the portfolio loan case, that sizable write-downs save sizable value (Olick 2012; Goodman et al. 2012; Ritholtz 2012; Goodman 2012). And it is surprising too given the compelling evidence, found in the GSEs' filings with the Securities and Exchange Commission, that unmodified underwater PLS loans will default at high rates: For 2006 vintage loans, for example, 71 percent of subprimes, 70 percent of option adjustable-rate mortgages, 58 percent of variable-rate loans, and a surprising 40 percent of traditional fixed-rate loans have defaulted.[9]

The State/Municipal Eminent Domain Plan

If it is not to be federal instrumentalities or PLS trustees and servicers, then, the collective agents best able to address the structural problems that arise with the pooling and servicing agreements on privately securitized loans are state and municipal governments. These governments (a) face the brunt of mass foreclosure and its consequences more directly than the federal government in any event, and (b) have constitutional authority to address these exigencies.[10] Let us first consider how the subfederal units of government can act, then elaborate briefly on their suitability for these roles.

Using their traditional eminent domain powers—a legal authority enshrined in our state and federal constitutions for precisely such exigencies as the foreclosure crisis presents—states or their sub-units can compulsorily purchase underwater loans from private-label securitization trusts at fair value, dealing directly with trustees and sidestepping all contract rigidities. They can then write down the loans, reducing default risk and raising expected values in the process.

If need be, eminent domain authority can also be used to take second-lien-secured loans at fair value, or even the liens that secure them, while leaving the notes with their holders—effectively converting the latter to unsecured consumer debt. That prospect can bring recalcitrant second lienholders to the table with firsts—particularly if, as suggested below, they also are offered some fraction of the surplus recouped through the write-downs.

Financing the Refinancing: Federal Money, Private Money, or Both

But how are states or their sub-units to pay for the loans or the liens, given that the foreclosure crisis has left them more cash-strapped than the federal government? Here is how: One possibility is to finance the purchases with monies lent by federal agencies in the manner of the Treasury's Troubled Asset Relief and Public-Private Investment Programs, and the Federal Reserve Bank of New York's MBS stabilization programs, all of which ultimately have turned profits. Alternatively, they might use monies provided by private investors, or monies from both federal agencies and private sources. The federal agencies or private investors then can be paid from the proceeds of the refinanced and accordingly more valuable loans, or in bonds issued against pools of the same.

If private money is used, then the investors both can and ought to include current bondholders, who might receive warrants before federal or private investors are brought in. This approach respects bondholder interests and underscores the sense in which the eminent domain plan is meant simply to solve a collective action problem that dysfunctional pooling and servicing agreements prevent trustees and servicers from solving themselves on behalf of their bondholder beneficiaries.

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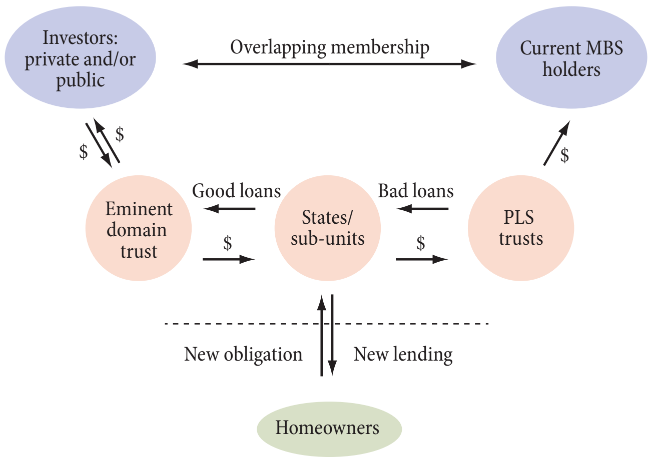
[7] For more on the 2009 and 2010 efforts to pass mortgage "cramdown" legislation, see Hockett (2012b).

[8] See the latest CoreLogic data and OCC Mortgage Metrics, cited in note 1.

[9] See Fannie Mae's second-quarter 2012 Form 10-Q, p. 111, available at http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2012/q22012.pdf, and its 2011 Form 10-K data, available at http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2011/10k_2011.pdf.

[10] Note, however, that Fannie Mae and Freddie Mac themselves hold significant numbers of underwater loans in their portfolios.

Basic Structure of the Eminent Domain Plan



Notes: The double-headed arrow represents class overlap rather than a flow. The two vertical arrows crossing the dotted line represent a detour between the "bad loan" and "good loan" arrows. *MBS* is mortgage-backed securities; *PLS* is private-label securitization.

By working with states or municipalities in this manner, current bondholders would piggyback on governmental authority to sidestep the contracts that currently preclude their doing what portfolio lenders already do. To note that these participating bondholders will be "paying themselves" less than face value would just be a roundabout way of saying that they are writing down principal.

The diagram above presents a schematic rendering of the eminent domain plan. The diagram, which should be read counterclockwise, shows investors, including current bondholders and perhaps federal agencies, conveying funds to eminent domain trusts operated by the states or their sub-units. These eminent domain trusts then purchase deeply underwater ("bad") loans from private-label securitization trusts. The states or their sub-units, in most cases probably advised or otherwise assisted by financial professionals, then work with homeowners to write new mortgages, replacing the negative equity loans with modestly positive equity loans—probably thirty-year fixed-rate mortgages in all cases.[11] Finally, the new ("good") loans are conveyed to the first-mentioned trusts, which convey the resultant funds to the first-mentioned investors.

The payouts will in most cases take the form that payouts on the earlier, unmodified loans took—bond yields to bondholders. And, as noted earlier, the new bondholders should include as many of the original bondholders as wish to participate, since the aim of the plan is to enable homeowners and bondholders to do what the pooling and servicing agreements now prevent them from doing—modifying underwater loans to recoup presently lost value.

The sequence of steps depicted in the diagram provides only the broad outline of the plan. More is required to render any particular variation operational. There are, for example, the matters of (a) selecting and valuing appropriate loans; (b) securing government and/or private investors, if any; (c) commencing the legal proceedings necessary to exercise eminent domain authority; (d) modifying and possibly re-securitizing the loans once purchased; (e) working with homeowners throughout the foregoing; and (f) compensating investors at appropriate stages.

All of these actions can be managed in various ways (Hockett 2012a). Briefly, on (a), the guiding criterion should be whether the loans' expected value can be raised sufficiently to offset the write-downs and associated transaction costs. A variation on this criterion, where public money is available to supplement private money, might be to include loans whose expected-value improvements fall slightly short of offsetting the write-downs and associated transaction costs, in light of the foreclosure externalities that write-downs will avoid.

On (b), if federal and subfederal units of government find merit in the plan, they can approach one another to arrange lending from the former to the latter. Either can also approach existing bondholders or other investors if desired.

On (c), states or their sub-units will commence the proceedings and courts will conduct them. In the "quick take" proceedings available in most states, the taking authority places the estimated value of the loans plus some margin in escrow when filing, explains the basis of its valuations to the court's satisfaction, then takes title. Subsequent litigation, if any, concerns only whether more should be paid, not whether the taking can proceed. In most cases, governments have accurately assessed the value of the loan, often with assistance from private valuation experts, and paid adequately. This bears noting in view of popular misconceptions concerning the likelihood of protracted litigation.

It should also be noted that, in view of the market failure and consequent waste stories that prompt this proposal, we can anticipate sizable pre-trial, out-of-court agreements among state or municipal governments and bondholders on loan selection and valuation criteria, particularly if relevant federal officials facilitate.

As for (d), (e), and (f), these are primarily matters for states or municipalities to manage, albeit again with assistance from public or private financial professionals in most cases. The municipalities are best situated to approach

[11] Freeing the loans from their PLS trusts, it bears noting, renders them amenable to the Federal Housing Administration Short Refinance, Hardest Hit Funds, and HAMP Principal Reduction Alternative programs.

prospective homeowner beneficiaries once qualifying loans are identified. Financial advisory assistance, in turn—whether from a federal entity like the Federal Housing Administration, from private providers, or both—will be helpful in most cases both in restructuring loans and in arranging investor compensation.

The Plan's Legal Basis: Taking Intangibles for Public Purpose and Paying Fair Value

How commonly is eminent domain used for more than compulsory land purchases for roads and bridges? Though non-lawyers are not always aware of the fact, governmental authorities compulsorily purchase property at fair value for public use all the time (Hockett 2012a, Section IV). And they do so with all manner of property—tangible and intangible, contractual and realty-related alike.

Forms of intangible property that have been purchased in eminent domain include bond tax exemption covenants, insurance policies, corporate equities, other contract rights, businesses as going concerns, and even sports franchises (Hockett 2012a). Because the law draws no distinctions between kinds of property that can be purchased in eminent domain, it is unsurprising that loans and liens in particular, as one form of contractual obligation among many, are themselves regularly purchased.[12] Among these are mortgage loans and liens, as the Supreme Court and state courts have long recognized.[13]

The question, then, is not what kinds of property can be taken, but whether a public purpose justifies the taking and fair value is paid. Preventing more foreclosures, blighted properties, revenue base losses, and city service cutbacks is recognized by courts as the most compelling of public purposes justifying use of the eminent domain authority.[14] As for fair value, how is this determined? Won't municipalities have to purchase loans at *less* than fair value to recoup enough margin to compensate the investors, public or private, who put up the purchase money?

First, on valuation, there are multiple methods available. Where mortgage-backed securities associated with a particular loan pool or analogous pools trade at a discount, for example, imputation of counterpart discounts to underlying loans is arithmetically straightforward. And private-label securitization bonds, it bears noting, are trading at very steep discounts.

[12] *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (accrued interest on account funds); *Armstrong v. United States*, 364 U.S. 40 (1960) (materialman's lien); and the iconic *Legal Tender Cases*, 79 U.S. (12 Wall) 457 (1870). See, generally, Hockett (2012a).

[13] *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602; *W. Fertilizer & Cordage Co. v. City of Alliance*, 504 N.W.2d 808, 816 (Neb. 1993). Again, see Hockett (2012a).

[14] *Kelo v. City of New London*, 545 U.S. 469 (2005).

Senior Bond Pricing for Private Label Securitization Trusts: August 2012

	Price as a Percentage of Senior Bond	Senior Bond Percentage of Total	Price as a Percentage of Loan UPB
Subprime	55.7	90.0	50.1
Option ARM	58.5	90.0	52.7
Alt-A ARM	66.7	90.0	60.0
Alt-A Fixed	73.1	90.0	65.8

Source: Amherst Securities.

Notes: *UPB* is unpaid principal balance. *ARM* is adjustable-rate mortgage; *Alt-A* is Alternative-A, a risk classification between prime and subprime.

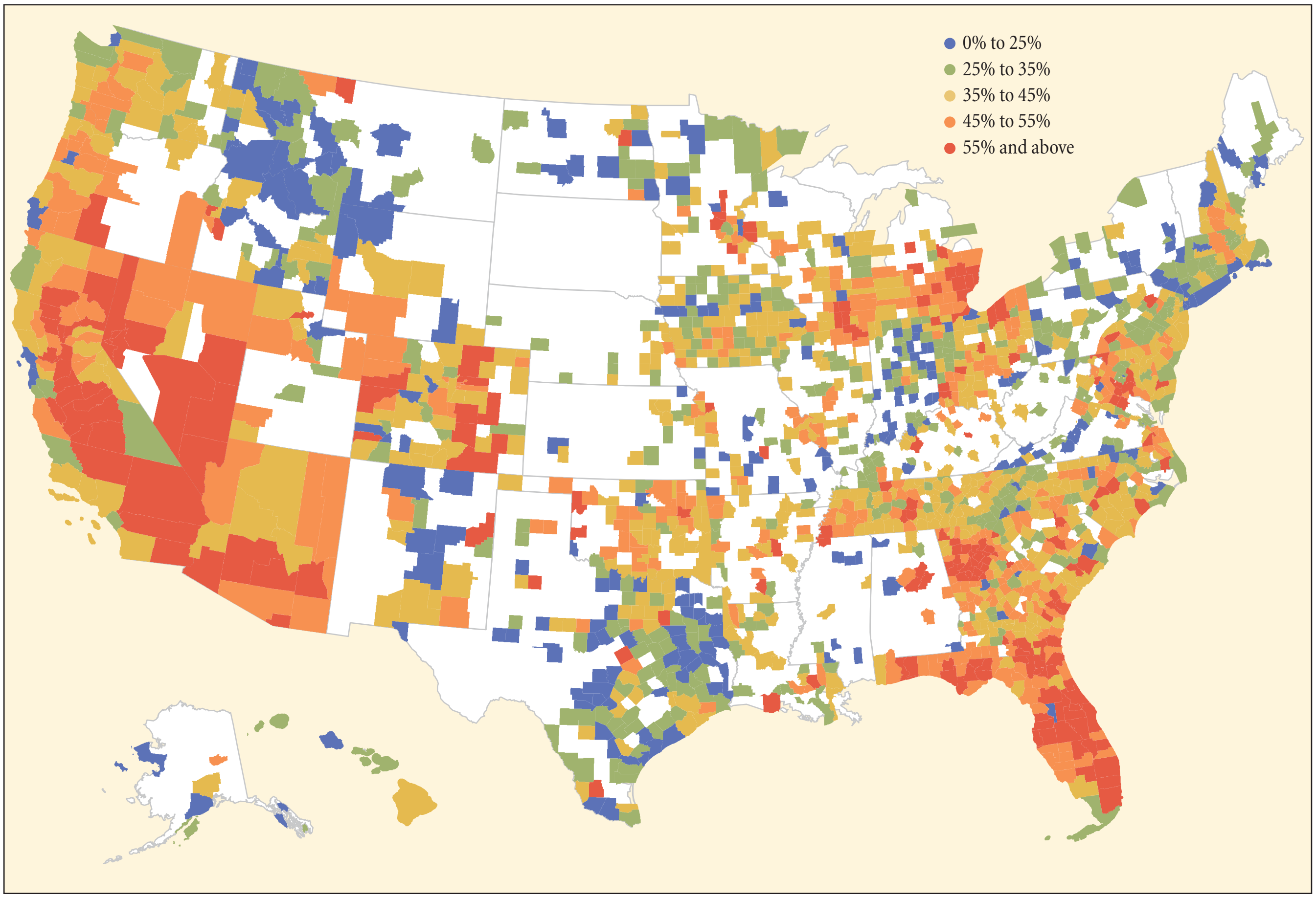
The latest data from Amherst Securities on PLS senior debt, for example, are telling, as are estimates of senior bonds as percentages of total bonds outstanding and prices thereof as percentages of unpaid principal balances (see table above).

Where bond-to-loan discount-imputation is unavailable owing to missing markets, discounted cashflow methods will do. As noted above, for example, Fannie Mae and Freddie Mac publish expected default rates for sundry classes of underwater PLS mortgages each year. From these—along with foreclosure costs, associated recovery rates (generally no more than 22 percent on defaulted loans), and discount rates—the calculation of net present values is not a recondite exercise. And our courts, which routinely hear valuation arguments in multiple contexts and often impanel experts, will oversee the proceedings as required by law, ensuring fairness to parties. Even this safeguard might be more than is necessary, however, if federally overseen valuation summits of the kind mentioned above and discussed further below should prove workable.

What about the putative need to pay current investors less than fair value to compensate new ones? Must one rob Peter to pay Paul? The answer is no. Eminent domain proceedings need not represent "zero sum games." By averting market failures—and the needless sacrifice of value that these failures entail—the plan proposed here recoups value, which can then be equitably distributed to render all stakeholders better off.

First lienholders who help finance the purchases from their PLS trusts receive loans that are higher in expected value in exchange for loans with lower expected value. First lienholders who do not thus participate receive fair value for otherwise unmarketable assets. (This is so even if trustees in some cases must divide proceeds among subclasses.) Homeowners receive modest equity in their homes and diminished default and foreclosure risk. Neighbors see their communities, property values, and municipal services stabilized, while municipalities see property tax revenues restored and abatement costs drop. Even second lienholders can benefit if paid a small fraction of

Underwater Mortgages as a Share of All Mortgages, by County
As of Fouth-Quarter 2012



Source: CoreLogic Negative Equity Report.

the value recouped by the write-downs, since in foreclosure they receive nothing.

Why the National Problem Is First a Local Problem

It was suggested earlier that state and local governments might be better situated than the federal government to take the lead in pursuing a plan like that sketched in this article—even if federal instrumentalities might play helpful supporting roles. Why is this the case? In what sense do localities face the worst of the mortgage debt overhang problem, and thus have incentive to act first?

The answer is that even though the problem is ultimately national in scope, its worst symptoms are locally concentrated. In some communities, more than 80 percent of PLS loans are underwater. The *degree* to which the loans are underwater, moreover, can be dramatic: some communities' underwater PLS loans have average loan-to-value (LTV) ratios greater than 200 percent, and many more have ratios approaching that number. The map above affords a telling, if understated,[15] picture of how localized the worst of the nation's underwater mortgage problems actually are.[16]

Concerns Raised by the Eminent Domain Plan

While it is not possible here to anticipate and fully address all concerns that the eminent domain plan might invite, one can cover the most obvious ones in broad outline. These fall under two headings—concerns of the sort that debt write-downs seem always to raise, and concerns relating to the reliance on state rather than federal authority to implement the plan.

[15] The chart covers all underwater loans, and does not distinguish high-LTV loans from lower-LTV loans.

[16] CoreLogic Negative Equity Report, Fourth-Quarter 2012, available at http://www.corelogic.com/.

Debates over the justice and efficiency of debt forgiveness are long-standing. Critics say that contracts are binding commitments that must be upheld, while proponents of debt forgiveness say some debts are "odious." Again, critics say that write-downs induce moral hazard and reduce credit availability, while proponents observe that you cannot squeeze blood from turnips. We are not going to settle such perennial questions here, any more than the Book of Leviticus or centuries of "law versus equity" have done. But three things bear noting.

First, owing to asset-price bubbles' status as collective action problems, it is doubtful that many homebuyers during the bubble years had much choice when it came to buying overvalued homes. That *most* homes were overvalued is what rendered the bubble a bubble. It therefore seems mistaken to blame homeowners as a class, or to characterize write-downs as per se unfair or morally hazardous. It is also easy to formulate loan-selection criteria in ways that do not encourage "strategic" defaults going forward—by reference to LTV/default correlations as suggested above (Hockett 2012a, 2013, 2010).

Second, for similar reasons, there seems little need to fear long-term contraction in liquidity or credit. Bubbles inflate only when credit is overabundant. We want, then, some credit-caution in future, just not too much. And we want to get to that middle ground as quickly as possible. The best way to do this is first to clear out the overhang under which 11 million homeowners still struggle, then to ensure that the pooling and servicing agreements for residential mortgage-backed securities going forward look more like the agreements for commercial mortgage-backed securities always have looked—providing in advance for value-salvaging modifications on a scale unanticipated before the most recent crisis, and thereby preempting the future need to resort to such methods as the one proposed here.[17] New residential mortgage securitizations suggest that the latter change is already under way. To resolve what earlier securitizations have wrought, however, requires a plan like that outlined above.

Finally, it is important to recall that write-downs are done on nonmortgage debt all the time. We call it bankruptcy, and afford it to firms because it salvages value. The plan proposed here does the same. And as noted above, the value thus saved can be shared among all stakeholder classes.

Turning now to issues linked to the plan's reliance on state, rather than federal, authority, we find some concerns stemming from possible differential application of the eminent domain plan across states and localities. Florida counties, for example, might construct variants of the plan that differ from those adopted by Louisiana parishes. California or Michigan plans might diverge from both. Would such differences raise fairness concerns?

The question is a complex one. We should certainly welcome some degree of national uniformity (this is one reason the present author [2009] first proposed federal, not state or local, action in 2008). But local conditions do vary from county to county, such that fairness itself dictates some variation. It is also the case that our federal system already involves quite significant state variation with respect to all manner of law—from property, tort, and even commercial law to electoral law. There will be nothing particularly unusual, then, in differing states' crafting differing variants of the plan here proposed. It might even be welcome—for the usual "laboratories of democracy" reasons given for local experimentation.

All of that said, however, federal agencies could be helpful in confining local variation within reasonable bounds, as well as in promoting efficient and amicable loan workouts nationwide along lines like those here proposed. By bringing municipal or state, homeowner, bondholder, and bank representatives together under one "summit" structure, the Treasury, Federal Housing Finance Agency, Federal Reserve Board or regional banks like the Federal Reserve Bank of New York operating thereunder, the Department of Housing and Urban Development, or some combination thereof could facilitate consensus among all concerned parties on the basic contours that all local variants of the eminent domain plan should take. There is no reason this consensus could not include loan-selection and loan-valuation principles as well as more detailed practical elements.

Conclusion: It Takes a Village—but a Federal Government Helps

The guiding ideal in any such summit as that proposed here should be to convert the eminent domain tool into a mere formality enabling all interested parties to sidestep dysfunctional pooling and servicing agreements consensually and thereby recapture lost value. Getting past these contracts and the collective action problems they underwrite is, after all, precisely and solely what this plan is for. States and their sub-units are best situated at this point to act. But federal agencies could be helpful facilitators for all.

The author thanks Kaushik Basu, Michael Campbell, Thomas Deutsch, Laurie Goodman, Howell Jackson, Darius Kingsley, Christopher Mayer, Brad Miller, Lawrence Rufrano, Robert Shiller, Joseph Tracy, Lauren Willis, and other colleagues at the Federal Reserve Bank of New York, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, the International Monetary Fund, the Treasury Department, and the World Bank, as well as in the academy, for helpful comments. The views expressed are nevertheless his own and not attributable to others absent express confirmation. Some of those named here oppose the proposal.

[17] For more on the differences between RMBS and CMBS pooling and servicing agreements, see Hockett (2012b).

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The Financial Crisis at the Kitchen Table: Trends in Household Debt and Credit

Meta Brown, Andrew Haughwout, Donghoon Lee, and Wilbert van der Klaauw
Current Issues in Economics and Finance, vol. 19, no. 2, 2013

Since the onset of the financial crisis, households have reduced their outstanding debt by about $1.3 trillion. While part of this reduction stemmed from a historic increase in consumer defaults and lender charge-offs, particularly on mortgage debt, other factors were also at play. An analysis of the New York Fed's Consumer Credit Panel—a rich new data set on individual credit accounts—reveals that households actively reduced their obligations during this period by paying down their current debts and reducing new borrowing. These household choices, along with banks' stricter lending standards, helped drive this deleveraging process.

Securitization and the Fixed-Rate Mortgage

Andreas Fuster and James Vickery
Staff Reports, no. 594, January 2013

Fixed-rate mortgages (FRMs) dominate the U.S. mortgage market, with important consequences for household risk management, monetary policy, and systemic risk. This study shows that securitization is a key driver of FRM supply. The analysis compares the agency and nonagency mortgage-backed-securities (MBS) markets, exploiting the freeze in nonagency MBS liquidity in the third quarter of 2007. Using exogenous variation in access to the agency MBS market, the authors find that when both market segments are liquid, they perform similarly in terms of supporting FRM supply. However, after the nonagency market freezes, the share of FRMs is sharply higher among mortgages eligible to be securitized through the still-liquid agency MBS market. The authors conclude that securitization is particularly important for FRMs because of the prepayment and interest rate risk embedded in these loans. They highlight policy implications for ongoing reform of the U.S. mortgage finance system.

Payment Size, Negative Equity, and Mortgage Default

Andreas Fuster and Paul S. Willen
Staff Reports, no. 582, November 2012

Surprisingly little is known about the importance of mortgage payment size for default, as efforts to measure the treatment effect of rate increases or loan modifications are confounded by borrower selection. This study examines a sample of hybrid adjustable-rate mortgages that have experienced large rate reductions over the past years and are largely immune to these selection concerns. The authors show that interest rate changes dramatically affect repayment behavior. Their estimates imply that cutting a borrower's payment in half reduces his hazard of becoming delinquent by about two-thirds, an effect that is approximately equivalent to lowering the borrower's combined loan-to-value ratio from 145 to 95 (holding the payment fixed). These findings shed light on the driving forces behind default behavior and have important implications for public policy.

A New Look at Second Liens

Donghoon Lee, Christopher Mayer, and Joseph Tracy
Staff Reports, no. 569, August 2012

The authors use data from credit reports and deed records to better understand the extent to which second liens contributed to the housing crisis by allowing buyers to purchase homes with small down payments. At the top of the housing market, second liens were quite prevalent: As many as 45 percent of home purchases in coastal markets and bubble locations involved a piggyback second lien. Owner-occupants were more likely to use piggyback second liens than were investors. Second liens in the form of home equity lines of credit (HELOCs) were originated to relatively high-quality borrowers, and originations were declining near the peak of the housing boom. By contrast, characteristics of closed-end second liens (CES) were worse on all these dimensions. The default rate of the second lien is generally similar to that of the first lien on the same home, although HELOCs perform better than CES. About 20 to 30 percent of borrowers will continue to pay their second lien for more than a year while remaining seriously delinquent on their first mortgage. By comparison, about 40 percent of credit card borrowers and 70 percent of auto loan borrowers will continue making payments a year after defaulting on their first mortgage. Finally, the authors show that delinquency rates on second liens, especially HELOCs, have not declined as quickly as those on most other types of credit, raising a potential concern for lenders with large portfolios of second liens on their balance sheets.

Payment Changes and Default Risk: The Impact of Refinancing on Expected Credit Losses

Joseph Tracy and Joshua Wright
Staff Reports, no. 562, June 2012

This paper analyzes the relationship between changes in borrowers' monthly mortgage payments and future credit performance. The relationship is important for the design of an internal refinance program such as the Home Affordable

Refinance Program (HARP). The authors use a competing risk model to estimate the sensitivity of default risk to downward adjustments of borrowers' monthly mortgage payments for a large sample of prime adjustable-rate mortgages. Applying a 26 percent average monthly payment reduction that they estimate would result from refinancing under HARP, the authors find that the cumulative five-year default rate on prime conforming adjustable-rate mortgages with loan-to-value ratios above 80 percent declines by 3.8 percentage points. Assuming an average loss given default of 35.2 percent, the authors determine that this lower default risk implies reduced credit losses of 134 basis points per dollar of balance for mortgages that refinance under HARP.

Real Estate Investors, the Leverage Cycle, and the Housing Market Crisis

Andrew Haughwout, Donghoon Lee, Joseph Tracy, and Wilbert van der Klaauw
Staff Reports, no. 514, September 2011

This study explores a mostly undocumented but important dimension of the housing market crisis: the role played by real estate investors. Using unique credit-report data, the authors document large increases in the share of purchases, and subsequently delinquencies, by real estate investors. In states that experienced the largest housing booms and busts, at the peak of the market almost half of purchase mortgage originations were associated with investors. In part by apparently misreporting their intentions to occupy the property, investors took on more leverage, contributing to higher rates of default. The authors' findings have important implications for policies designed to address the consequences and recurrence of housing market bubbles.

Help for Unemployed Borrowers: Lessons from the Pennsylvania Homeowners' Emergency Mortgage Assistance Program

James Orr, John Sporn, Joseph Tracy, and Junfeng Huang
Current Issues in Economics and Finance, vol. 17, no. 2, April 2011

In an environment of high foreclosure rates and distressed housing markets, federal policies are focusing on loan modifications to help delinquent homeowners pay their mortgages. While it is too soon to assess the effectiveness of these modifications, policymakers considering future refinements may gain insight from a more established, state-level enterprise that takes an alternative approach to mortgage relief. The Pennsylvania Homeowners' Emergency Mortgage Assistance Program provides temporary income support to homeowners unable to pay their mortgage during a spell of unemployment. The program has helped most participants retain their homes while paying off their loans—at a potentially lower cost than that of other relief initiatives.

A Private Lender Cooperative Model for Residential Mortgage Finance

Toni Dechario, Patricia Mosser, Joseph Tracy, James Vickery, and Joshua Wright
Staff Reports, no. 466, August 2010

This paper describes a set of six design principles for the reorganization of the U.S. housing finance system and applies them to one model for replacing Fannie Mae and Freddie Mac that has so far received frequent mention but little sustained analysis—the lender cooperative utility. The authors discuss the pros and cons of such a model and propose a method for organizing participation in a mutual loss pool and an explicit, priced government insurance mechanism. They also discuss how these principles and this model are consistent with preserving the "to-be-announced," or TBA, market—particularly if the fixed-rate mortgage remains a focus of public policy.

Second Chances: Subprime Mortgage Modification and Re-Default

Andrew Haughwout, Ebiere Okah, and Joseph Tracy
Staff Reports, no. 417, December 2009, revised August 2010

Mortgage modifications have become an important component of public interventions designed to reduce foreclosures. This study examines how the structure of a mortgage modification affects the likelihood of the modified mortgage re-defaulting over the next year. Using data on subprime modifications that precede the government's Home Affordable Modification Program, the authors focus attention on those modifications in which the borrower was seriously delinquent and the monthly payment was reduced as part of the modification. The average re-default rate over the twelve months following the modification was 56 percent. The data indicate that the re-default rate declines with the magnitude of the reduction in the monthly payment, but also that the re-default rate declines relatively more when the payment reduction is achieved through principal forgiveness as opposed to lower interest rates.

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Available at http://www.newyorkfed.org/householdcredit/

The Federal Reserve Bank of New York's *Household Debt and Credit Report* provides a quarterly snapshot of household trends in borrowing and indebtedness, including data about mortgages, student loans, credit cards, auto loans, and delinquencies. The report aims to help community groups, small businesses, state and local governments, and the public to better understand, monitor, and respond to trends in borrowing and indebtedness at the household level.

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Exhibit 5

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

July 31, 2012

Federal Housing Finance Agency
Office of the Director
400 7th Street S.W.
Washington, D.C. 20024

Dear Acting Director DeMarco,

I am writing in response to the decisions announced in your letter to Congress today. While I was encouraged that the Federal Housing Finance Agency (FHFA) is making progress on some initiatives we have discussed that will help the housing market recover, I am concerned by your continued opposition to allowing Fannie Mae and Freddie Mac (GSEs) to use targeted principal reduction in their loan modification programs.

FHFA is an independent federal agency, and I recognize that, as its Acting Director, you have the sole legal authority to make this decision. However, I do not believe it is the best decision for the country, because, as we have discussed many times, the use of targeted principal reduction by the GSEs would provide much needed help to a significant number of troubled homeowners, help repair the nation's housing market, and result in a net benefit to taxpayers.

Indeed, notwithstanding the selective numbers cited in your letter, FHFA's own analysis, which you have shared with us previously, has shown that permitting the GSEs to participate in the Principal Reduction Alternative program (HAMP-PRA) could help up to half a million homeowners and result in savings to the GSEs of $3.6 billion compared to standard GSE loan modifications. Furthermore, if the GSEs were to participate in HAMP-PRA, taxpayers would save as much as $1 billion on a net basis. In view of the clear benefits that the use of principal reduction by the GSEs would have for homeowners, the housing market, and taxpayers, I urge you to reconsider this decision.

I have asked Michael Stegman of my staff to restate in writing for you the case for principal reduction, consistent with FHFA's mandates as conservator and regulator of the GSEs, that the Treasury has made to you and your staff over the last several months. His memorandum is enclosed. Treasury stands ready to provide any additional analytical support to make a targeted principal reduction program at the GSEs successful.

We welcome the positive steps you announced today regarding further refinancing opportunities, providing clarity to lenders on legal exposures, aligning short sale practices, and putting foreclosed properties back on the market. All of these have the potential to help advance recovery of the housing market. As we have previously discussed, the impact of these steps will depend on the speed with which you act and the extent of the changes you make.

Five years into the housing crisis, millions of homeowners are still struggling to stay in their homes, and the legacy of the crisis continues to weigh on the market. You have the power to help more struggling homeowners and help heal the remaining damage from the housing crisis. I hope you will move to address these problems with a sense of urgency and force commensurate with the scale of the remaining challenges.

Sincerely,

Timothy F. Geithner

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

July 31, 2012

MEMORANDUM

TO: Acting Director Ed DeMarco
FROM: Michael Stegman, Counselor for Housing Finance Policy
RE: The Case for Principal Reduction

Secretary Geithner asked me to summarize below the case for using principal reduction in a targeted manner that the Treasury has made to you and your staff over the last several months.

Principal reduction benefits individual homeowners and the housing market as a whole.

The use of targeted principal reduction is beneficial for several reasons. It provides relief to a significant number of underwater troubled homeowners, helps repair the housing market and minimizes taxpayer losses. The basis for this judgment, which is consistent with Fannie Mae's study of Home Affordable Modification Program (HAMP) performance data and the behavior of private lenders and investors, is that a carefully designed, targeted program of principal reduction is effective in reducing the risk of re-default by borrowers who receive loan modifications.

In June 2010, Treasury introduced principal reduction as part of the Making Home Affordable program (HAMP-PRA) to help certain underwater borrowers who are struggling to avoid foreclosure and improve community and housing market stability. Under this program, financial incentives are paid to investors as a percentage of each dollar of principal reduction. Borrowers are eligible only if they face a financial hardship and demonstrate an ability to pay the modified mortgage amount. Moreover, participating servicers are encouraged to reduce principal only when the modification makes economic sense for the investor, taking into account the cost of modification and the risk (and potential cost) of foreclosure.

The available evidence on HAMP-PRA, as well as industry practice, indicates that targeted principal reduction makes economic sense for the holder of the credit risk, be it a bank holding the loan in portfolio, investors in private label securities, or Fannie Mae and Freddie Mac (GSEs) for loans they guarantee.

Fannie Mae, acting as Treasury's agent, analyzed HAMP modification performance data with and without principal reduction.[1] This analysis shows that six months following modification, controlling for loan and borrower characteristics, the re-default rate was lower for loans that were modified with principal reduction than the re-default rate for loans that were modified with

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[1] U.S. Department of the Treasury, The Effects of the Principal Reduction Alternative (PRA) on Re-default Rates in the Home Affordable Modification Program (HAMP): Early Results, July 2012. Summary of research performed by Fannie Mae.

comparable payment reductions but without principal forgiveness. This early positive difference in re-default rates in favor of principal reduction is expected to increase further as the loans age.

Fannie Mae's analysis suggests that using principal reduction to reduce the loan-to-value (LTV) ratio not only increases a borrower's *ability to pay*, but for these selected borrowers, it also increases the likelihood that they will *continue to pay*.

Principal reduction would provide additional benefits to households, communities, and taxpayers if Fannie Mae and Freddie Mac were to implement it as part of their modification programs.

Treasury believes that principal reduction is consistent with the Federal Housing Finance Agency's (FHFA) mandates as conservator and regulator of the GSEs because analysis shows it is economically beneficial to both the GSEs and taxpayers. Indeed, even FHFA's own analysis shows that permitting the GSEs to participate in a principal reduction program could help up to half a million homeowners and benefit the GSEs up to $3.6 billion and save taxpayers as much as $1 billion.

The 2008 law that created the FHFA as conservator and regulator of the GSEs gave the agency several responsibilities. One is to "preserve and conserve" the assets of the GSEs. A second is to help the housing market recover. Specifically, FHFA is to "ensure… that the operations and activities of each [GSE] foster liquid, efficient, competitive, and resilient national housing finance markets."[2]

In passing the Emergency Economic Stabilization Act of 2008 (EESA), Congress made it clear that FHFA's obligation to help the housing market heal involves helping homeowners avoid foreclosure. Under that law, FHFA is required to "implement a plan that seeks to maximize assistance for homeowners and use its authority to encourage the servicers of the underlying mortgages, and considering net present value to the taxpayer, to take advantage of… available programs to minimize foreclosures."

We believe that implementation of the principal reduction alternative under Treasury's mortgage modification program is not only consistent with FHFA's statutory responsibilities, but is also the most prudent way for FHFA to meet its obligations.

The targeted use of principal reduction will help preserve the assets of the GSEs, as well as minimize foreclosures and maximize assistance for homeowners. GSE loans represent more than half of the outstanding mortgages in the country. This means that the reach and impact of our housing programs depend to a significant degree on the participation of the GSEs. When the GSEs participate, as they have in the programs that give homeowners the chance to reduce their monthly mortgage payment, they have had a very substantial impact. When the GSEs do not participate, the impact of these programs is much more limited. Because of the importance of the GSEs to the housing market overall, FHFA's decision not to allow the GSEs to participate

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[2] Federal Housing Finance Regulatory Reform Act of 2008, enacted as Division A of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (Jul. 30, 2008)

substantially limits the effectiveness of the programs. Recognizing this, we have tried to make it easier and more compelling for the GSEs to align their programs with those in the private mortgage market.

Specifically, Treasury supports the use of principal reduction not for Fannie Mae and Freddie Mac's entire portfolios, but on a loan-by-loan basis. Principal reduction should only be used when the modified loan has a positive net present value (NPV) that is *greater* than any other modification.

FHFA's original analysis of principal reduction was not performed in this manner, showing instead that HAMP-PRA, when applied to the entire GSE portfolio of underwater borrowers, would generate negative NPV results as compared to other modifications. This, of course, is not how the program was designed to work, so the finding was not relevant to an adequate assessment of its benefit. Once performed correctly on a loan-by-loan basis, principal reduction would apply in a limited number of cases and show a positive NPV result for both GSEs and taxpayers.

FHFA's corrected analysis showed the following:

- Almost a half-million troubled, underwater borrowers with Fannie Mae or Freddie Mac loans could benefit from principal reduction.

- Applying HAMP-PRA to this eligible universe with full participation would result in net savings to the GSEs of $3.6 billion compared to standard GSE loan modification processes.

- After deducting Treasury incentives of $2.7 billion, there would still be a net savings to taxpayers overall of up to approximately $1 billion.

FHFA also found that a significant share of the economic benefits to the GSEs from their participation in HAMP-PRA would come from borrowers who are more than 12 months delinquent. While these loans may have a lower probability of curing, each borrower who gets back on track as a result of receiving principal forgiveness generates disproportionately large savings to the GSEs. Moreover, borrowers only receive principal reduction once they have successfully returned to making on-time payments and completed a trial modification. Even if these longer-delinquent loans are not included in the program, by FHFA's estimate, there are still almost 300,000 loans that can participate in HAMP-PRA at zero cost to the taxpayer.

Finally, the number of troubled, underwater borrowers who will ultimately benefit from GSE participation in HAMP-PRA depends on overall take-up. But even if only a portion of those eligible are helped, it is very important for those homeowners where it means the difference between keeping and losing their homes.

Concerns about the cost and administrative burden to the GSEs of implementing principal reduction can be addressed with support offered by the Treasury Department.

FHFA has expressed concern that implementation of HAMP-PRA would be an administrative and financial burden on the GSEs and would divert management attention from higher priority objectives. Treasury has offered to help FHFA address that problem by paying the additional administrative costs required to implement HAMP-PRA. We also have offered to work with the GSEs to rearrange Treasury priorities for other HAMP-related administrative projects to free up both human and technical resources to help accelerate implementation of a principal reduction program.

Concern regarding strategic default has been carefully addressed in the design of HAMP-PRA.

Critics of principal reduction argue that large numbers of currently performing underwater borrowers would strategically default on their loans, in the hope of getting principal reduction, and potentially raise the future cost of mortgage credit.

We believe the design of HAMP addresses this concern. First, there are a series of eligibility requirements that a borrower must meet. In order to qualify for a modification of any kind, a borrower must have a demonstrated financial hardship and must be delinquent or at risk of imminent default and sign an affidavit attesting to an economic hardship. The NPV model discloses whether a modification with principal reduction is more cost-beneficial to the investor than a standard HAMP modification without principal reduction. In addition, the borrower's modified mortgage payment must meet certain debt-to-income criteria. In essence, a borrower who defaults cannot be certain that he or she will obtain a HAMP modification, much less a HAMP modification with principal reduction. Therefore, a borrower would take a substantial risk by deliberately defaulting: they would have to choose to damage their credit for years to come and perjure themselves on the chance that they would be found eligible for the program. For these reasons, we do not believe implementation of HAMP-PRA by the GSEs alongside other mortgage relief programs would negatively affect the future cost and availability of credit.

Nevertheless, we have indicated to FHFA our willingness for the GSEs to include an asset test or other type of hardship screen to maximize the likelihood that only borrowers with genuine hardships receive principal reduction.

Importantly, banks are using principal reduction on loans in their own portfolios. Even before Treasury announced tripling incentives to encourage participation in HAMP-PRA, the use of principal forgiveness was on the rise in non-GSE modifications. Private lenders (including many who are not party to the national foreclosure settlement) are providing substantial sums of principal reduction through HAMP-PRA for a very high percentage of eligible borrowers on their own portfolios. Thus, facing the very factors faced by FHFA, including the risk of strategic default, private lenders have determined that the judicious use of principal reduction makes financial sense.

A recent Fitch Ratings analysis of strategic default within principal forgiveness programs operated under the national mortgage settlement finds little evidence of strategic default.[3] FHFA is also working closely with the California and Nevada Hardest Hit Fund programs to implement limited principal reduction programs (one in connection with a refinancing under the GSEs' own Home Affordable Refinance Program) that suggest that strategic default concerns can be adequately addressed.

The attached table was excerpted from FHFA's June 25, 2012, analysis.

[3] Jon Prior, "Fitch Sees No Sign of Strategic Default for Rising Principal Reductions"; *Housing Wire* (July 9 2012), http://www.housingwire.com/news/fitch-sees-no-sign-strategic-default-rising-principal-reductions

Federal Housing Finance Agency

Model Results Selecting Optimal HAMP Modification Based on Net Present Value (NPV)

Standard HAMP Modifications versus Optimal HAMP Option ($ in billions; loan counts rounded to nearest thousand; totals may not add due to rounding)	**Expected Losses, No Modification**	**Reduction in Losses, Standard HAMP**	**Reduction in Losses, Optimal HAMP Modification**	**Enterprise Benefit, Optimal HAMP Modification vs. Standard HAMP**	**Treasury Subsidy**	**Taxpayer Benefit**
Eligible Pool # of Loans: 497,000 UPB: $99.3 billion	$45.0	$6.6	$10.2	$3.6	$2.7	$1.0
Assumption: 50 percent take-up # of Loans: 248,000 UPB: $49.7 billion	$22.5	$3.3	$5.1	$1.8	$1.3	$0.5

Notes:

- Each loan tested for maximum NPV based on HAMP-PRA, traditional HAMP, or no modification. Loan assigned to category yielding the highest NPV, per the model.
- Pre-modification DTIs adjusted to reflect DTI distribution of loans that received HAMP modifications (delinquent loans only).
- Model results are still just that – model results based on assumptions about behaviors for which we lack much historical data.

Source: Federal Housing Finance Agency – Meeting with Treasury Secretary Geithner – June 25, 2012

Definitions:
UPB – Unpaid principal balance
DTI – Debt-to-income ratio
Standard HAMP Mod – A HAMP modification that uses forbearance for underwater homeowners rather than principal reduction. The protocol is to reduce the rate to 2 percent, extend term out to 40 years, and forbear principal. The protocol stops at any point in the process as soon as the target DTI of 31 percent is reached.
Optimal HAMP Mod – A HAMP-PRA modification that uses principal reduction for underwater homeowners. The protocol is to reduce principal until the LTV is reduced to 115 percent, then follow the steps in the Standard HAMP modification. Again, the protocol stops at any point in the process as soon as the target DTI of 31 percent is reached.

Exhibit 6

HW HOUSINGWIRE

Home

Widespread principal reductions could save taxpayers $2.8 billion

Jacob Gaffney
May 1, 2013

[Update 1: Clarifies CBO findings]

The **Congressional Budget Office** released the result of its investigation into the potential costs a widespread mortgage principal reduction program may have on taxpayers' bottom line.

The CBO concludes that, in one scenario, such a program could actually save taxpayers up to $2.8 billion.

Back in November, Rep. Elijah E. Cummings, ranking member of the **House Committee on Oversight and Government Reform**, requested an investigation into reducing principal for underwater mortgages backed by **Fannie Mae** and **Freddie Mac**.

"Today's report demonstrates that principal reduction programs are a win-win-win for our country — helping U.S. taxpayers, American homeowners and our nation's economy all at the same time," said Cummings in a press statement.

"Rather than implement these programs years ago when their benefits were obvious, ideologues ignored this evidence and harmed our nation as a result," he added. "I hope this report provides a new opportunity to anchor our nation's housing policy in facts rather than partisan politics."

After examining multiple scenarios, the CBO concluded that principal reduction programs could reduce defaults and contribute a slight boost overall economic growth.

The CBO examined scenarios to bring homeowners to 115%, 100% and 90% loan-to-value ratios, anticipating up to 95,000 homes could benefit from such a program.

Ed DeMarco, the current acting director of the **Federal Housing Finance Agency**, which oversees Fannie and Freddie, is opposed to principal reductions.

However, President Obama's expected pick of Rep. Mel Watt, D-N.C., to replace DeMarco at the FHFA would put the regulator on course to rapid changes with a potential populist replacing a financial regulator.

One of the largest oppositions to principal reduction is the moral hazard over loan forgiveness. Critics worry taxpayers will pay to reduce loan balances for homeowners, who may sell their properties at a profit and keep the proceeds.

"The most effective approach would be to offer principal forgiveness only to borrowers who were delinquent at the time the program was announced, thereby excluding borrowers who become delinquent in order to receive principal forgiveness," the report states.

"Another approach would be to forgive a portion of the borrower's loan in exchange for granting the lender a claim on future equity or home appreciation — that approach is known as a 'shared appreciation' modification."

In one example provided in the report, the lender could get the right to receive 25% of any future increase in the home's value.

A breakdown of findings is available below.

jgaffney@housingwire.com

Jacob Gaffney is the Executive Editor of HousingWire and HousingWire.com. He previously covered securitization for Reuters and Source Media in London before returning to the United States in 2009. While in Europe for nearly a decade, he covered bank loans and the high yield market, in addition to commercial paper, student loan, auto and credit card space(s). At HousingWire, he began focusing his journalism on all aspects of the housing and mortgage markets.

Exhibit 7

Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior

Servicer Compensation and its Consequences

October 2009

NATIONAL
CONSUMER LAW
CENTER INC

Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior: Servicer Compensation and its Consequences

Written by
Diane E. Thompson
Of Counsel
National Consumer Law Center

ABOUT THE AUTHOR

Diane E. Thompson is Of Counsel at the National Consumer Law Center. She writes and trains extensively on mortgage issues, particularly credit math and loan modifications. Prior to coming to NCLC, she worked as a legal services attorney in East St. Louis, Illinois, where she negotiated dozens of loan modifications in the course of representing hundreds of homeowners facing foreclosure. She received her B.A. from Cornell University and her J.D. from New York University.

ABOUT THE NATIONAL CONSUMER LAW CENTER

The National Consumer Law Center®, a nonprofit corporation founded in 1969, assists consumers, advocates, and public policy makers nationwide on consumer law issues. NCLC works toward the goal of consumer justice and fair treatment, particularly for those whose poverty renders them powerless to demand accountability from the economic marketplace. NCLC has provided model language and testimony on numerous consumer law issues before federal and state policy makers. NCLC publishes an 18-volume series of treatises on consumer law, and a number of publications for consumers.

ACKNOWLEDGEMENTS

My colleagues at NCLC provided, as always, generous and substantive support for this piece. Carolyn Carter, John Rao, Margot Saunders, Tara Twomey, and Andrew Pizor all made significant contributions to the form and content of this paper. Thanks as well to Kevin Byers for reading and commenting on this piece. Particular thanks to Denise Lisio for help with the footnotes, to Tamar Malloy for work on the charts, and to Julie Gallagher for graphic design. All errors remain the author's.

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617-542-8010 www.consumerlaw.org

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FIGURES AND CHARTS

EXECUTIVE SUMMARY

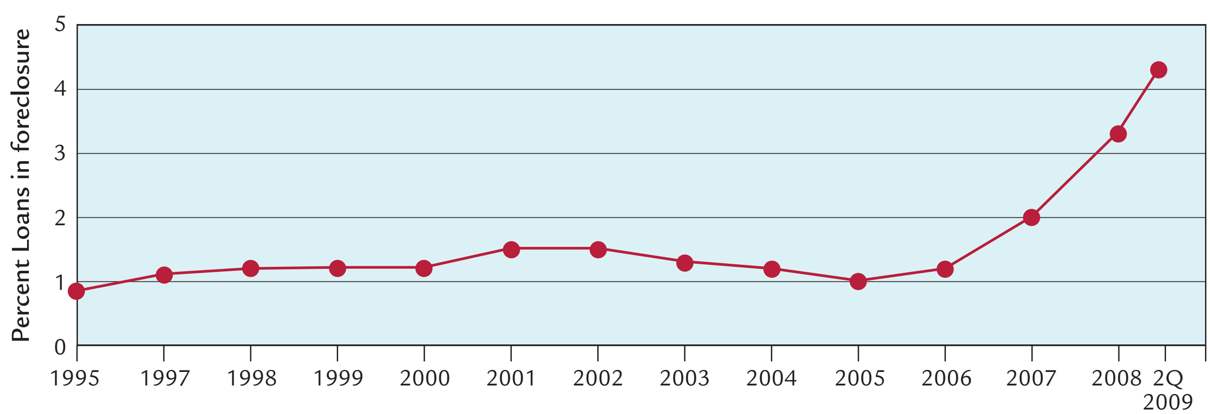
The country is in the midst of a foreclosure crisis of unprecedented proportions. Millions of families have lost their homes and millions more are expected to lose their homes in the next few years. With home values plummeting and layoffs common, homeowners are crumbling under the weight of mortgages that were often only marginally affordable when made.

One commonsense solution to the foreclosure crisis is to modify the loan terms. Lenders routinely lament their losses in foreclosure. Foreclosures cost everyone—the homeowner, the lender, the community—money. Yet foreclosures continue to outstrip loan modifications. Why?

Once a mortgage loan is made, in most cases the original lender does not have further ongoing contact with the homeowner. Instead, the original lender, or the investment trust to which the loan is sold, hires a servicer to collect monthly payments. It is the servicer that either answers the borrower's plea for a modification or launches a foreclosure. Servicers spend millions of dollars advertising their concern for the plight of homeowners and their willingness to make deals. Yet the experience of many homeowners and their advocates is that servicers—not the mortgage owners—are often the barrier to making a loan modification.

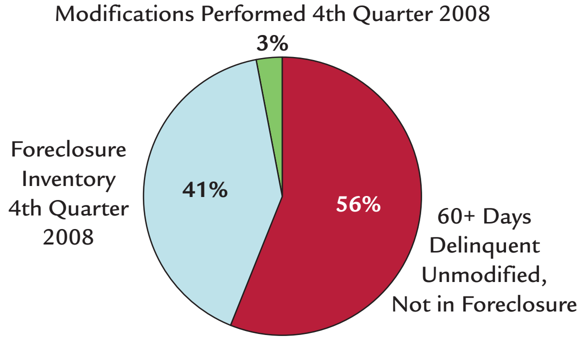
Servicers, unlike investors or homeowners, do not generally lose money on a foreclosure. Servicers may even make money on a foreclosure. And, usually, a loan modification will cost the servicer something. A servicer deciding between a foreclosure and a loan modification faces the prospect of near certain loss if the loan is modified and no penalty, but potential profit, if the home is foreclosed. The formal rulemakers—Congress, the Administration, and the Securities and Exchange Commission—and the market participants who set the terms of engagement—credit rating agencies and bond insurers—have failed to provide servicers with the necessary incentives—the carrots and the sticks—to reduce foreclosures and increase loan modifications.

Percentage of Loans in Foreclosure, 1995–2009



Sources: Inside Mortgage Finance, The 2009 Mortgage Market Statistical Annual; Mortgage Banker's Association, National Delinquency Survey, Q2 09

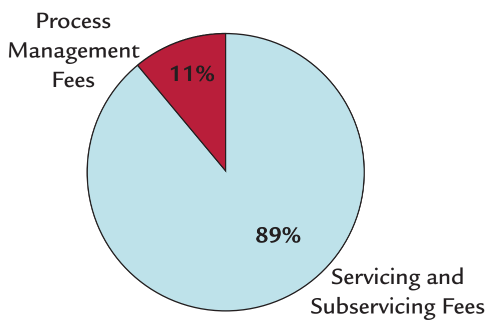
Modifications, Foreclosures, and Delinquencies as a Percentage of 60+ Day Delinquencies in 4th Quarter, 2008



The 60+ day delinquency rate for 4th quarter 2008 was 8.08% of all loans.

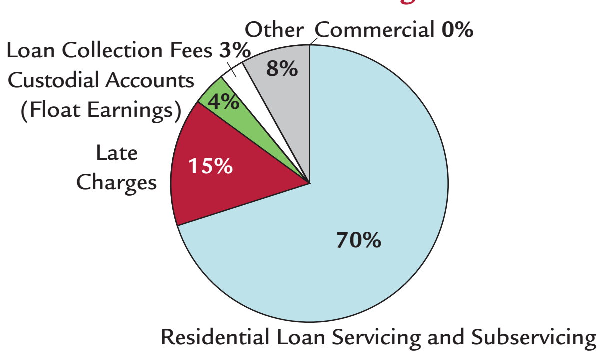
Sources: Mortgage Banker's Association, National Delinquency Survey, Q4 08; Manuel Adelino, Kristopher Gerardi, and Paul S. Willen, Why Don't Lenders Renegotiate More Home Mortgages? Redefaults, Self-Cures, and Securitization, Table 3.

Ocwen Asset Management Servicing Fees



Source: Ocwen Fin. Corp., Annual Report (Form 10-K) (Mar. 12, 2009)

Ocwen Asset Management Breakdown of Servicing Fees



Source: Ocwen Fin. Corp., Annual Report (Form 10-K) (Mar. 12, 2009)

Servicers remain largely unaccountable for their dismal performance in making loan modifications.

Servicers have four main sources of income, listed in descending order of importance:

- The monthly servicing fee, a fixed percentage of the unpaid principal balance of the loans in the pool;
- Fees charged borrowers in default, including late fees and "process management fees";
- Float income, or interest income from the time between when the servicer collects the payment from the borrower and when it turns the payment over to the mortgage owner; and
- Income from investment interests in the pool of mortgage loans that the servicer is servicing.

Overall, these sources of income give servicers little incentive to offer sustainable loan modifications, and some incentive to push loans into foreclosure. The monthly fee that the servicer receives based on a percentage of the outstanding principal of the loans in the pool provides some incentive to servicers to keep loans in the pool rather than foreclosing on them, but also provides a significant disincentive to offer principal reductions or other loan modifications that are sustainable on the long term. In fact, this fee gives servicers an incentive to increase the loan principal by adding delinquent amounts and junk fees. Then the servicer receives a higher monthly fee for a while, until the loan finally fails. Fees that servicers charge borrowers in default reward servicers for getting and keeping a borrower in default. As they grow, these fees make a modification less and less feasible. The servicer may have to waive them to make a loan modification feasible but is almost always assured of collecting them if a foreclosure goes through. The other two sources of servicer income are less significant.

If servicers' income gives no incentive to modify and some incentive to foreclose, through increased fees, what about servicers' expenditures? Servicers' largest expenses are the costs of financing the advances they are required to make to investors of the principal and interest payments on nonperforming loans. Once a loan is modified or the home foreclosed on and sold, the requirement to make advances stops. Servicers will only want to modify if doing so stops the clock on advances sooner than a foreclosure would.

Worse, under the rules promulgated by the credit rating agencies and bond insurers, servicers are delayed in recovering the advances when they do a modification, but not when they foreclose. Servicers lose no money from foreclosures because they recover all of their expenses when a loan is foreclosed, before any of the investors get paid. The rules for recovery of expenses in a modification are much less clear and somewhat less generous.

In addition, performing large numbers of loan modifications would cost servicers upfront money in fixed overhead costs, including staffing and physical infrastructure, plus out-of-pocket expenses such as property valuation and credit reports as well as financing costs. On the other hand, servicers lose no money from foreclosures.

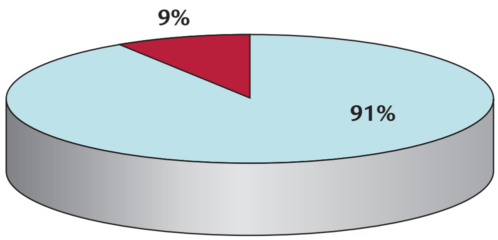
The post-hoc reimbursement for individual loan modifications offered by Making Home Affordable and other programs has not been enough to induce servicers to change their existing business model. This business model, of creaming funds

Effect of Components of Servicer Compensation on Likelihood and Speed of Foreclosure

	Favors Foreclosure?	Likely Effect on Speed of Foreclosure?
Structural Factors		
PSAs	Neutral	Speeds Up
Repurchase Agreements	Neutral	Slows Down
REMIC rules	Neutral	Neutral
FAS 140	Slightly Favors Foreclosure	Neutral
TDR Rules	Slightly Favors Foreclosure	Neutral
Credit rating agency	Slightly Favors Foreclosure	Speeds Up
Bond insurers	Slightly Favors Foreclosure	Speeds Up
Servicer Compensation		
Fees	Strongly Favors Foreclosure	Slows Down
Float Interest Income	Slightly Favors Foreclosure	Neutral
Monthly Servicing Fee	Strongly Favors Modification (but not principal reductions)	Slows Down
Residual Interests	Slightly Favors Modification (but not interest reductions)	Slows Down
Servicer Assets		
Mortgage Servicing Rights	Neutral	Slows Down
Servicer Expenses		
Advances	Strongly Favors Foreclosures	Speeds Up
Fee Advances to Third Parties	Slightly Favors Foreclosure	Speeds Up
Staff Costs	Strongly Favors Foreclosures	Speeds Up

HAMP Modifications as a Percentage of Delinquencies

Total 60+ Days Delinquencies as of June 30, 2009	5,360,961
HAMP Trial Modification Through September 30, 2009	487,081



June 2009 60+ Day Delinquencies without a HAMP Modification

HAMP Trial Modifications as of September 30, 2009

Sources: Mortgage Banker's Association, National Delinquency Survey, Q2 09; Making Home Affordable Program, Servicer Performance Report Through September 2009

from collections before investors are paid, has been extremely profitable. A change in the basic structure of the business model to active engagement with borrowers is unlikely to come by piecemeal tinkering with the incentive structure.

In the face of an entrenched and successful business model, servicers need powerful motivation to perform significant numbers of loan modifications. Servicers have clearly not yet received such powerful motivation. What is lacking in the system is not a carrot; what is lacking is a stick. Servicers must be required to make modifications, where appropriate, and the penalties for failing to do so must be certain and substantial.

Recommendations:

1. Avoid irresponsible lending.

We are now looking to loan modifications to bail us out of a foreclosure crisis years in the making. Had meaningful regulation of loan products been in place for the preceding decade, we would not now be tasking servicers with rescuing us from the foreclosure crisis. Any attempt to address the foreclosure crisis must, of necessity, consider loan modifications. We should also ensure that we are not permanently facing foreclosure rates at current levels. To do so requires thorough-going regulation of loan products, as we have discussed in detail elsewhere.

2. Mandate loan modification before a foreclosure.

Congress and state legislatures should mandate consideration of a loan modification before any foreclosure is started and should require loan modifications where they are more profitable to investors than foreclosure. Loss mitigation, in general, should be preferred over foreclosure.

3. Fund quality mediation programs.

Court-supervised mortgage mediation programs help borrowers and servicers find outcomes that benefit homeowners, communities and investors. The quality of programs varies widely, however, and most communities don't yet have mediation available. Government funding for mediation programs would expand their reach and help develop best practices to maximize sustainable outcomes.

4. Provide for principal reductions in Making Home Affordable and via bankruptcy reform.

Principal forgiveness is necessary to make loan modifications affordable for some homeowners. The need for principal reductions is especially acute—and justified—for those whose loans were not adequately underwritten and either: 1) received negatively amortizing loans such as payment option adjustable rate mortgage loans, or 2) obtained loans that were based on inflated appraisals. As a matter of fairness and commonsense, homeowners should not be trapped in debt peonage, unable to refinance or sell.

The Making Home Affordable guidelines should be revised so that they at least conform to the Federal Reserve Board's loan modification program by reducing loan balances to 125 percent of the home's current market value. In addition, Congress should enact legislation to allow bankruptcy judges to modify appropriate mortgages in distress.

5. Continue to increase automated and standardized modifications, with individualized review for borrowers for whom the automated and standardized modification is inappropriate.

One of the requirements of any loan modification program that hopes to be effective on the scale necessary to make a difference in our current foreclosure crisis is speed. The main way to get speed is to automate the process and to offer standardized modifications.

Servicers can and should present borrowers in default with a standardized offer based on information in the servicer's file, including the income at the time of origination and the current default status. Borrowers should then be free to accept or reject the modification, based on their own assessment of their ability to make the modified payments. Borrowers whose income has declined and are seeking a modification for that reason could then provide, as they now do under the Making Home Affordable Program, income verification. Only when a borrower rejects a modification—or if an initial, standard modification fails—should detailed underwriting be done.

The urgency of the need requires speed and uniformity; fairness requires the opportunity for a subsequent review if the standardized program is inadequate. Borrowers for whom an automated modification is insufficient should be able to request and get an individually tailored loan modification, at least when such a loan modification is forecast to save the investor money. Many of the existing loans were poorly underwritten, based on inflated income or a faulty appraisal. Borrowers may have other debt, including high medical bills, that render a standardized payment reduction unaffordable. Subsequent life events, including the death of a spouse, unemployment, or disability, may also make a standardized modification unsustainable. These subsequent, unpredictable events, outside the control of the homeowner, should not result in foreclosure if a further loan modification would save investors money and preserve homeownership.

6. Ease accounting rules for modifications.

The current accounting rules, particularly as interpreted by the credit rating agencies, do not prevent modifications, but they may discourage appropriate modifications. The requirements that individual documentation of default be obtained may prevent streamlined modifications. The troubled debt restructuring rules may discourage sustainable modifications of loans not yet in default, with the unintended consequence of promoting short-term repayment plans rather than long-term, sustainable modifications that reflect the true value of the assets. Finally, limiting recovery of servicer expenses when a modification is performed to the proceeds on that loan rather than allowing the servicer to recover more generally from the income on the pool as a whole, as is done in foreclosure, clearly biases servicers against meaningful modifications.

7. Encourage FASB and the credit rating agencies to provide more guidance regarding the treatment of modifications.

Investors, taken as a whole, generally lose more money on foreclosures than they do on modifications. Investors' interests are not necessarily the same as those of borrowers; there are many times when an investor will want to foreclose although a borrower would prefer to keep a home. Investors as well as servicers need improved incentives to favor modifications over foreclosures. Still, there would likely be far fewer foreclosures if investors had information as to the extent of their losses from foreclosures and could act on that information.

Even where investors want to encourage and monitor loan modifications, existing rules can stymie their involvement—or even their ability to get clear and accurate reporting as to the status of the loan pool. Additional guidance by FASB and the credit rating agencies could force servicers to disclose more clearly to investors and the public the nature and extent of the modifications in their portfolio—and the results of those modifications. Without more transparency and uniformity in accounting practices, investors are left in the dark. As a result, servicers are free to game the system to promote their own financial-incentives, to the disadvantage, sometimes, of investors, as well as homeowners and the public interest at large.

8. Regulate default fees.

Fees serve as a profit center for many servicers and their affiliates. They increase the cost to homeowners of curing a default. They encourage servicers to place homeowners in default. All fees should be strictly limited to ones that are legal under existing law, reasonable in amount, and necessary. If default fees were removed as a profit center, servicers would have less incentive to place homeowners into foreclosure, less incentive to complete a foreclosure, and modifications would be more affordable for homeowners.

Exhibit 8

nj.com True Jersey.

Irvington moves a step closer to using eminent domain to fight foreclosures

EX0909HUD GIAMBUSSO MCCREA.JPG

A Star-Ledger file photo of a boarded up home taken September of 2010. *(Jerry McCrea/The Star Ledger)*

Eunice Lee / The Star-Ledger By **Eunice Lee / The Star-Ledger**

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on March 30, 2014 at 8:55 AM, updated March 30, 2014 at 11:05 AM

IRVINGTON — It may seem like a small step, but town leaders say it's a significant one.

Irvington council members approved a resolution last week that brings the town a step closer to using eminent domain to seize underwater mortgages, a controversial tactic that's garnered national media attention in the aftermath of the foreclosure crisis.

Since last year, town attorneys have been **conducting a study** of the legal process, also known as "friendly condemnations," that would allow the township to seize underwater mortgages and restructure them on behalf of homeowners to make payments more affordable.

The resolution approved in a 6-1 vote on Wednesday effectively brings the issue of the radical approach to eminent domain before the township Planning Board, which will now identify properties "in potential foreclosure that may be designated as areas in need of redevelopment," the resolution states.

About 200 homes in Irvington may be eligible to be taken over, Mayor Wayne Smith said. He predicts that number could grow.

Using money from private investors, Irvington would pay the mortgage holders' fair market value and then restructure mortgages into lower principal payments that are more favorable for homeowners.

Smith said the town already has at least one investment firm that's expressed interest.

If Irvington uses its power of eminent domain to seize mortgages, not the homes themselves, it would be second municipality in the country, after Richmond, Calif., to use the tactic, according to NJ Communities United.

Despite voting to pass the resolution, Councilman Paul Inman reminded residents that employing eminent domain is not a silver bullet to the town's foreclosure woes.

"This is just another tool," he added.

About 25 people with NJ Communities United held a rally outside the council chambers calling for the town to help struggling homeowners. During the council meeting, several people held up signs urging a "yes" vote and all council members approved except Councilwoman Lebby Jones, who dissented.

The group presented the council with a petition including 2,000 signatures, according to field organizer Mary Szacik. More than 1,700 foreclosures have occured in Irvington since 2008 — after the housing bubble burst, the agency previously said.

"It is a cancer that threatens to spread," Szacik said.

Harry Perryman lives on Nesbit Terrace, two doors from a shuttered home. He said he has seen the negative impact the neglected property has had, including devaluing the rest of his street.

"It is not too late to stop the bleeding in this township," he told council members.

Smith is hosting a community forum at 6 p.m. Monday in the council chambers for homeowners facing foreclosures. Anyone with questions should contact town officials at (973) 399-6639.

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Exhibit 9

BUSINESS / REAL ESTATE

Sep 11

California city OKs plan to seize underwater mortgages using eminent domain

BY FROM WIRE SERVICES

A San Francisco Bay Area city is moving ahead with its first-in-the-nation plan to use the government's constitutional power of eminent domain to seize hundreds of underwater mortgages.

The Richmond City Council voted 4-3 early Wednesday to set up a Joint Powers Authority to bring more cities into the plan. Mayor Gayle McLaughlin says the city of El Monte in Southern California has expressed interest, and she believes other cities will follow.

Under the plan, Richmond would use eminent domain to seize the underwater mortgages. It would then offer the bank fair market value for it and give the homeowner a new loan that would lower monthly payments and improve the owner's

Richmond can now invoke eminent domain if trusts for more than 620 delinquent and performing "underwater" mortgages reject offers made by the city to buy the loans at deep discount pegged to their properties' current appraised prices to refinance them and reduce their principal.

A mortgage is under water when its unpaid balance is greater than its property's market value.

City council members opposed to the plan said that using eminent domain would put Richmond at risk of expensive lawsuits that could destroy the city's finances.

"A 1 percent chance of bankruptcy from this program is a deal-breaker for me," Councilman Jim Rogers told a crowd of about 300 people at the meeting, moved to a city auditorium from the council's chamber.

Other council members warned of a backlash from financial institutions, noting Richmond had no takers last month when the successor to its redevelopment agency put $34 million of bonds up for sale to refinance previous debt. The eminent domain plan had been disclosed to the U.S. municipal bond market.

While housing advocates urged support for the

Responding to the plan, the Federal Housing Finance Agency recently said it would press Fannie Mae and Freddie Mac to limit or cease its business where such proposals get approved, effectively closing off most mortgage financing there.

First published September 11th 2013, 8:00 am

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Exhibit 10

To Rescue Local Economies, Cities Seize Underwater Mortgages Through Eminent Domain

In Richmond, California, home prices plummeted 58 percent since their peak. Now the city is trying out a new way to help homeowners refinance—and halt the slide into foreclosure.

Peter Dreier *July 12, 2013*

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(Photo Credit: Shutterstock.com)

In 2005, Rodney Conway and his wife, Vicki, paid $340,000 for their 950-square-foot two-bedroom home in Richmond, California, a blue-collar city in the Bay Area. Today the home is worth about $140,000. But the couple still owes $320,000 and makes monthly mortgage payments to the Bank of America. “We’re basically renting this house for $2,000 a month,” said the 52-year-old Conway, who was disabled while serving on a Navy ship in Lebanon in 1983.

About the Author

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Peter Dreier teaches Politics and chairs the Urban & Environmental Policy Department at Occidental College. His...

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With her office job and his disability income, the Conways can barely make ends meet. “We don’t take trips or go to restaurants. We just went to a movie for the first time in a year,” said Conway, who spent twenty-six years as a letter carrier before being laid off in 2009. “I’d like to be able to give my wife a nice birthday present, but I can’t afford it.”

In almost every part of the country, entire neighborhoods—and in some cases, whole cities—are underwater. They are not victims of natural disasters like Hurricanes Katrina and Sandy. Like the Conways, they are drowning in debt, victims of Wall Street’s reckless and predatory lending practices.

Since 2006, when the speculative housing bubble burst, *Peter Dreier and Jennifer Fiore*

Pete Seeger Brought the World Together (Lived History, Activism, Music)

Pete's fingers can strum no longer, but, thanks to him, people around the world can have many "singing tomorrows."

Peter Dreier

home prices have plummeted; homeowners have lost more than $6 trillion in household wealth. Many now owe more on their mortgages than their homes are worth. Despite rising home prices in some parts of the country, more than 11 million American families—one-fifth of all homeowners with mortgages—are still underwater, through no fault of their own. If nothing is done, many will eventually join the more than 5 million American homeowners who have already lost their homes to foreclosure.

The nation's worst underwater "hot spots"—disproportionately black and Latino areas—are places that banks targeted for predatory lending, often pushing borrowers into high-interest, risky loans, even when they were eligible for conventional mortgages. Many have lost their jobs or seen their incomes fall as a result of the recession and are having difficulty paying the bills.

Dallas, Las Vegas, Miami, Houston, San Bernardino, Tampa, Jacksonville, Phoenix, Atlanta, Orlando, Stockton, Reno, Modesto and Detroit are among the most troubled "hot spots," but there are many other communities with huge inventories of underwater mortgages and where home prices are not participating in the recovery.

The problem is contagious. Communities with many underwater homes bring down the value of other houses in the area. Foreclosures alone have drained at $2 trillion in property values from surrounding neighborhoods, according to a Center for Responsible Lending study. The resulting decline in property tax revenues has plunged some cities into near-bankruptcy, lay-offs and cuts to vital public services.

Many economists, including Joseph Stiglitz and Mark Zandi, agree that the best solution is "principal reduction," where banks lower the borrower's mortgage principal. This is not an act of charity but a way to reverse the economy's freefall. If underwater mortgages were reset to fair-market values of homes, it would help homeowners and communities alike, and pump about $102 billion into the economy annually, according to a Home Defenders League report.

But homeowners who have asked banks to modify their mortgages typically get a cold shoulder or a bureaucratic runaround. So far, the Obama administration and Congress have been unwilling to require intransigent banks to reset loans.

Faced with this quagmire, a growing number of cities—with the support of community groups and unions—are taking things into their own hands. Thanks to a legal strategy initially formulated by Cornell University law professor Robert Hockett, city officials have discovered that they can use their eminent domain power—which they routinely use to purchase property for sidewalks, infrastructure, school construction and other projects—to buy underwater mortgages at their current market value and resell them to homeowners at reduced price and mortgage payments.

Richmond is the first city to pursue this strategy. Its city council—with the support of the Alliance of Californians for Community Empowerment (ACCE), which for years has organized homeowners against predatory banks—recently voted 6-0 (with one member absent) to make offers to buy underwater mortgages. If lenders refuse, the city will take them by eminent domain and work with a group of friendly investors (Mortgage Resolution Partners, or MRP) to refinance the loans with the Federal Housing Administration.

In this city of 103,000, dominated by a big Chevon oil refinery, home prices have plummeted by 58 percent since the 2007 peak. Homeowners lost over $264 million in wealth last year alone. Thousands of Richmond homeowners have lost their homes to foreclosure, and many others, like the Conways, are just hanging on. About 12,000 families—half of all homeowners with mortgages in the city—are underwater. The city government, which has lost millions of dollars in property tax revenues, has cut funds for road repairs and significantly reduced the number of municipal employees, including librarians. Meanwhile, it has had to spend scarce funds to deal with abandoned buildings, crime and drugs, and other problems caused by the foreclosure epidemic.

If banks reset Richmond's underwater mortgages to fair market value, homeowners would save an average of over $1,000 per month on their payments. If those savings were spent on local goods and services, it would generate about $170 million in economic stimulus and create at least 2,500 jobs.

This situation is particularly bizarre for homeowners whose mortgages were sold by banks to pools of private investors—an industry gambit called "private label security" (PLS) mortgages. The trustees for these mortgages—owed by dozens or hundreds of distant investors as part of a pool—claim they lack the authority to modify them.

Richmond is initially targeting these PLS loans so they can get the homeowners into sustainable mortgages with reduced principal. MRP, Richmond's funding partner, has agreed to a set of community-drafted principles to make sure that investors don't exploit desperate cities and homeowners. It has pledged, for example, that the program won't cost taxpayers a dime. MRP will earn a flat fee per mortgage. Homeowners can voluntarily opt out of the program.

Wall Street is up in arms. Since several cities began discussing this strategy last year, industry lobbyists have been fighting back. In a coordinated effort involving letters, phone calls and meetings, some of the nation's most powerful lobby groups—including the National Association of Realtors, the American Bankers Association, the National Association of Home Builders, American Securitization Forum, and the Securities Industry and Financial Markets Association (SIFMA)—have tried to dissuade local officials from pursuing the eminent domain strategy.

In April, for example, SIFMA officials Kim Chamberlain and Tim Cameron traveled from New York to Richmond to persuade Mayor Gayle McLaughlin and her Council colleagues to back off.

"We're not going to be intimidated by these Wall Street folks," said McLaughlin, a former teacher who has been mayor since 2006. "It is pretty outrageous to hear them opposing this. They're the ones who caused this crisis in the first place. And they don't have a solution. The city has every right to do this."

The Wall Street lobbyists have threatened to mire local governments in expensive lawsuits if they use eminent domain to take troubled mortgages. But MRP has agreed to cover the costs of any potential litigation, so most city officials recognize that this is mostly an empty threat.

The lobbyists have also warned local officials that if they go through with these plans, banks will increase the cost of future borrowing or even shut down credit entirely. They couch these warnings as if they were mere predictions. But they're threats—part of a coordinated, industry-wide credit boycott. This is another form of "redlining" (lending discrimination), which violates the nation's fair lending and antitrust laws.

A recent editorial published by *The Wall Street Journal* echoed the industry line that the eminent domain strategy is both illegal and ill-advised.

To pre-empt local governments, three Republican congressmen from California last month sent a letter to Housing and Urban Development Secretary Shaun Donovan on behalf of the industry, asking HUD to deny FHA financing from mortgages taken by eminent domain. Last year the financial, real estate and insurance industry topped the list of contributors to all three politicians—Gary Miller ($366,000), John Campbell ($484,000), and Ed Royce ($1 million) —according to OpenSecrets.org.

"We are concerned that the proposed use of eminent domain would slow the return of private capital to the housing finance system, and threaten our fragile housing recovery," they wrote Donovan.

Sound familiar? Throughout the last century, business lobby groups have consistently warned that government action to protect consumers, communities and workers—mandatory seat belts, the minimum wage, consumer protection laws, workplace safety rules and others—are "job killers" and business destroyers. Their dire warnings were bogus, but they repeat them so often that they often sound convincing.

Like their predecessors, the bank, securities and real estate lobby groups are crying wolf. They can file nuisance lawsuits, hire lobbyists and get the occasional hired-gun economist from a conservative think tank to peddle their propaganda, but cities have a legal right to use eminent domain to restore community wealth stripped by reckless banks.

Even so, Wall Street's intimidation ploy has worked in a few places. Earlier this year, elected officials in San Bernardino—where half of all homeowners are underwater—backed down after industry lobbyists swooped down on that troubled community an hour from Los Angeles. But in Richmond, Seattle, Newark and other cities—where community groups and unions have mobilized angry homeowners and their neighbors—local officials are determined to move forward, aware that they have the law and economics on their side.

"Wall Street is scared and using all its political muscle to stop us, " said Amy Schur, campaign director for ACCE, which is working on this strategy with homeowners and local officials in several cities, "but we know that David beat Goliath."

"We hope our city provides a model for other cities," said Richmond Mayor McLaughlin, "and that this becomes a national movement."

In Oregon, lawmakers devised a clever way to tackle student debt.

Peter Dreier *July 12, 2013*

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SIFMA Commends House Committee for Taking Action to Stop Eminent Domain Scheme

Release Date: May 21, 2014

Contact: Liz Pierce, 212.313.1173, lpierce@sifma.org

SIFMA Commends House Committee for Taking Action to Stop Eminent Domain Scheme

Washington, DC, May 21, 2014-SIFMA today issued the following statement from Kenneth E. Bentsen, Jr., SIFMA president and CEO, after the House Committee on Appropriations voted to adopt a legislative provision (Section 233) which, if signed into law, would effectively eliminate the threat that eminent domain could be used to seize mortgages, a serious concern of housing market participants for over two years:

"SIFMA commends the members of the House Committee on Appropriations for adopting a provision which would prevent the Federal Housing Administration (FHA) from using taxpayer monies to facilitate a scheme by which eminent domain would be used to seize mortgage loans from Main Street investors. Should FHA allow this scheme to move forward, investors in pension plans, 401Ks, mutual funds and other savings and retirement accounts will suffer the losses. Today's action is an important development in the fight to remove a cloud hanging over our housing markets."

-30-

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Latest News

Banks Sue Richmond To Stop City's Plan To Help Homeowners With Underwater Mortgages

August 10, 2013 5:23 PM

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A foreclosure sign hangs on a fence in front of a foreclosed home on April 6, 2011. (Justin Sullivan/Getty Images)

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RICHMOND (CBS/AP) — Two banks are suing the working class city of Richmond over its plan to invoke eminent domain to condemn and seize hundreds of underwater mortgages.

Richmond city officials say the idea is to help struggling homeowners refinance into new mortgages in line with their homes' current value. The move would be the first of its kind in the country.

Wells Fargo and Deutsche Bank filed a lawsuit this week, alleging the city's program could cost investors $200 million or more. The lawsuit seeks a preliminary injunction against Richmond and Mortgage Resolution Partners, an investment firm the city has partnered with on the plan.

Mortgage Resolution Partners Chairman Steven Gluckstern said the lawsuit is without merit.

Exhibit 11

George Zornick

Action and dysfunction in the Beltway swamp. E-mail tips to george@thenation.com.

Will Mel Watt Back Principal Reduction?

George Zornick on June 27, 2013 - 2:36 PM ET

A home under threat of foreclosure in San Antonio, Monday, February 23, 2009. (AP Photo/Eric Gay)

The crucial context to President Obama's nomination of Representative Mel Watt to head the Federal Housing Finance Agency is principal reduction for distressed homeowners: in other words, a policy to reduce what some people with underwater mortgages owe.

FHFA controls Fannie Mae and Freddie Mac, which in turn holds 60 percent of the mortgages in the United States. The Congressional Budget Office estimated last month that if the FHFA director ordered even a modest write-down of the underwater mortgages held by Fannie and Freddie, 1.2 million borrowers could benefit—and, the government would save $2.8 billion and avoid 43,000 defaults.

FHFA's current director, Edward DeMarco, has refused to enact this policy—leading to a progressive "Dump DeMarco" campaign. The administration presumably had this in mind when it nominated Watt—who has backed principal reduction strongly in the past—to take DeMarco's job. (Obama's Treasury Department agrees that write-downs should happen.)

So, naturally this all came up in Thursday's Senate Banking Committee confirmation hearing for Watt and four other financial regulatory nominees. Senator Pat Toomey pressed Watt to pre-emptively declare he would not engage in any write-downs.

Watt, to his credit, did not agree—but he also didn't endorse the policy, and said some potentially troubling things about its supposed necessity.

It's worth reproducing the exchange nearly in full, as it was the only time principal reduction came up.

> TOOMEY: Are you prepared to commit, now, that you will not implement principal reductions on mortgages?
>
> WATT: …I suspect I will be asked to look at that again because some people will still think it's a relevant question, despite the fact that housing prices have gone up and there are fewer and fewer people underwater at this point than there have been.
>
> But I would start, as I would with any issue that has been decided already by FHFA, I would start by studying carefully how that decision was reached, what it was based on, and then I would build on that new information—the information on which that decision was made is a year and a half old now—and make a responsible decision.

So Watt is pledging to revisit the issue and won't agree to rule out principal reduction—that's good. But his suggestion that it may no longer be "relevant" is slightly troubling—there millions of Americans still underwater, including over a million with mortgages at Fannie and Freddie that are either already delinquent or headed that way.

Toomey jumped back in here, and tried to pin Watt down by noting he signed a letter in December demanding DeMarco enact principal reduction.

> TOOMEY: The concern is that the information was quite recent, but available, when you signed a letter in December, urging exactly this principal reduction despite the fact that FHFA analysis [said] that this was not a good idea—was not a good idea for the enterprises, wasn't a good idea for the taxpayers, and I don't think it's a good idea for mortgage credit availability generally. And so the concern is that based on the data then, and the analysis then, that suggested this was a bad idea, you nevertheless recommended it. So that's why I'm wondering how we should view this now.

Note that Toomey is wrong here—the FHFA analysis didn't quite say that, or at least the parts it didn't release publicly didn't say that. Also, there's that recent CBO report saying the opposite, along with a raft of similar outside studies.

Watt immediately noted that—but then went on to almost disclaim the letter demanding principal reduction.

> WATT: First of all, there was conflicting data out there. Obviously FHFA had made a decision that reached one conclusion, but there was conflicting data.
>
> Second of all, you've got to understand that I was a member of Congress representing my constituents, many of whom were underwater and advocating for relief for them. You should have no doubt that I will be a strong and aggressive advocate for the taxpayers in this role, because I view them as my constituents in this role, not the constituents that I represented before.

What's potentially troubling here is that "I'm looking out for the taxpayers, not homeowners" was DeMarco's mantra when he declined to enact principal reduction.

That said, Watt is correct—if not inspiring—in describing his new constituency as potential FHFA head. And of course one must remember the context here: a tough confirmation process. Republican Senators Bob Corker and Mike Crapo both appeared to be opposed to Watt's nomination during the hearing. (At one point, Senator Elizabeth Warren said "If I could, I'd vote for Congressman Watt twice." Watt deadpanned: "You might need to do that.")

So should reformers be concerned about Watt's answers?

"That's what we expected," said Tracy Van Slyke, director of New Bottom Line, about Watt's careful comments around principal reduction. "He's not the head of FHFA yet. He needs to get in there…. We understand this is a confirmation hearing." She added that his past support of principal reduction "set the tone that he's going into FHFA with a much more open mind."

Van Slyke added that her group would continue to pressure Watt if he's concerned to make sure principal reduction is done, and done "the right way."

But she did acknowledge his answer that seemed to downplay its necessity was a little worrisome. "I think that's some education that still needs to happen," she said. "We know that right now the housing recovery, the so-called housing recovery, is actually benefiting the corporations and banks that profited off the first housing bubble."

George Zornick laments the long road towards justice for homeowners.

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What Is Mel Watt Waiting For?

Posted: 05/13/2014 8:42 am EDT Updated: 05/13/2014 8:59 am EDT
Print Article

Mel Watt, the head of the powerful Federal Housing Finance Agency, which oversees Fannie Mae and Freddie Mac, is expected to break his silence on Tuesday in a speech to the Washington, D.C. press corps, real estate lobbyists, and housing policy wonks. Watt, a former Congressman from North Carolina, will at speak the Brookings Institution about "The Future of Fannie Mae and Freddie Mac." It is being billed as a major policy address -- his first since assuming the job in January.

But if Watt really wants to know what he can do to address the nation's housing crisis, he should talk to the millions of Americans who are drowning in housing debt, including the Coronel family, whom Fannie Mae is trying to evict from their modest home in Azusa, California, a blue-collar suburb of Los Angeles.

(Left) The Coronel family with supporters from ACCE, a community organizing group. (Right) Mel Watt with President Obama

There are many things Watt can do to change the direction of these two mortgage giants which were put into government trusteeship after the mortgage meltdown. The eyes of most observers are on a variety of plans to restructure or privatize them. But one of the most pressing issues right now is the nation's epidemic of "underwater" mortgages. Many housing activists and homeowners are hoping that Watt will announce his support for "principal reduction" -- allowing Fannie and Freddie to re-set mortgages for underwater homeowners so that their payments reflect the current market value of their homes. This approach is already part of other mortgage modification programs. Experience reveals that it leads to more sustainable mortgages and reduces the likelihood of foreclosures.

Moreover, Watt can do this without Congressional approval.

Some pundits and politicians claim that America's housing market is now recovering from plummeting home prices and a years-long lull in new construction. But the so-called recovery is very uneven. Many communities remain devastated by widespread foreclosures and vacant homes. They will not be rescued by the rising tide of home prices, which has bypassed many parts of the country.

Many foreclosed houses in the hardest-hit areas are being purchased by Wall Street hedge funds and private equity firms, not homeowners who intend to live there. One of them, the Blackstone Group, is now the nation's largest owner of single-family rental homes. These practices have artificially boosted home prices in some areas but made local housing markets even more volatile. The investors are making a killing renting the properties, but continuing to drain wealth from these communities.

It begs the question: recovery for whom?

Certainly not Jaime and Juana Coronel, whom Fannie Mae is trying to oust from their 1,200 square foot home where they've lived for 25 years. The Coronels worked their entire lives, in landscaping and factory work, to afford the home where they raised their four kids. In 2010, after Jaime's hours were cut at work, Fannie Mae foreclosed on them even though they had the income to qualify for a loan modification.

Since the foreclosure, Jaime (who recently suffered a stroke) and Juana have paid the equivalent of a modified mortgage payment in rent to Fannie Mae in order to continue living in their home. But last November, without giving a reason, Fannie Mae began eviction proceedings against the family. Jaime and Juana offered to repurchase their home at its current market value, about $200,000, which is what Fannie Mae would get for the house in the open market. Fannie Mae responded by demanding that they pay $400,000 -- about twice the home's market value -- including a $45,000 cash deposit. A real estate agent from Century 21 verified that the Coronels qualify for a loan at the home's current market value.

Joining forces with the community organizing group the Alliance of Californians for Community Empowerment (ACCE), the Coronels, along with friends and neighbors, have told Fannie Mae that they won't move without a fight. They've demanded to know why Fannie Mae would put them out in order to sell it to someone else, most likely an investor, at a lower price.

The prolonged negotiations came to a head last week in a phone call between the Coronels and several Fannie Mae officials, including vice president Elonda Crockett. According to informed sources, a Fannie Mae attorney told the Coronels that Fannie Mae is not allowed to sell them back the property at market value while they are still in the house. They even defended Fannie Mae's current policy of opposing principal reduction, warning that it would lead to an epidemic of families refusing to pay their mortgages -- despite a lack of evidence that anything of the sort happened when banks reduced principal on many loans as part of mortgage settlements.

The Coronels are hardly alone. As I wrote in a *New York Times* op-ed on Friday, "What Housing Recovery?" the total value of America's owner-occupied housing remains $3.2 trillion below 2006 levels. According to Zillow, a real estate database, 9.8 million households still owe more on their mortgages than the market value of their homes. That's one-fifth of all mortgaged homes. Without government intervention, many of them are at risk of joining the almost five million households that have already suffered through foreclosure since the housing bubble burst in 2007.

With my coauthors Alex Schwartz of the New School, Gregory Squires of George Washington University, Saqib Bhatti of the Nathan Cummings Foundation, and Rob Call of MIT, I conducted a study, *Underwater America: How the So-Called Housing Recovery is Bypassing Many American Communities*, which was released last week by the Haas Institute at UC-Berkeley. Our study identified the 15 metropolitan areas, 100 cities, and 395 ZIP codes with the highest proportion of underwater mortgages.

How bad is it? More than 10 million Americans, spread across 23 states, live in ZIP codes where between 43 percent and 76 percent of homeowners are under water. The biggest concentrations are in Georgia, Florida, Illinois, Michigan and Ohio. The metro areas in the worst shape are Las Vegas, Atlanta, Jacksonville, Orlando and Chicago. Places with so many underwater homes are toxic; they depress the value of surrounding homes and undermine local governments' fiscal health.

The blame for this tragedy lies mostly with banks' risky, reckless and sometimes illegal lending practices. The story is a familiar one. In the late 1990s and early 2000s, millions of Americans bought or refinanced homes in an overheated market. Mortgage brokers lied or misled borrowers about the terms of these mortgages, often pushing borrowers into high-interest subprime loans, even when they were eligible for conventional mortgages.

They particularly targeted minority areas. In 2006, when subprime lending was at its peak, 54 percent of blacks, 47 percent of Latinos and 18 percent of whites received high-priced loans, according to the Federal Reserve Board.

Not surprisingly, the nation's worst underwater areas are disproportionately in black and Latino neighborhoods. In almost two-thirds of the hardest-hit ZIP codes, African-Americans and Latinos account for at least half of the residents.

The banks' risky loans eventually came crashing down, devastating communities and causing financial havoc. The federal government rescued the banks, but nobody came to the rescue of the homeowners and communities the banks left behind.

The banks own some of these underwater mortgages but when homeowners ask them to reset mortgages, they often get a cold shoulder or a bureaucratic run-around. In 2012, some of the biggest banks signed a settlement agreement with 49 state attorneys general to modify mortgages. This has resulted in some mortgage modifications, but many of these banks continue to heap abuse on their customers, and sufficient relief has not reached trapped homeowners.
Many banks and private mortgage companies pooled large numbers of subprime loans into private securities and sold them to investors. The banks that service these securities have used principal reduction on some loans but, in general, they've been reluctant to do so, which will eventually push many homeowners over the cliff into foreclosure.

But Fannie Mae and Freddie Mac own and/or guarantee the biggest bulk of these troubled loans. Watt's predecessor as FHFA head -- Ed DeMarco, a holdover Bush appointee -- opposed government efforts to help homeowners hurt by the Wall Street mortgage meltdown and the dramatic plunge in housing values.

DeMarco opposed efforts by cities, such as Richmond, CA, to address the problem of underwater mortgages by using their eminent domain authority to purchase these troubled loans from lenders and re-sell them to homeowners at current market values. DeMarco even issued a statement warning cities that FHFA would retaliate against homeowners within any jurisdiction that dared to use its legal authority this way.

Housing and consumer advocacy groups mobilized a "dump DeMarco" campaign to push President Obama to replace him. Activists protested in front of DeMarco's home and disrupted his testimony before Congress to draw attention to his misguided policies. Eight state Attorneys General, 45 members of the House of Representatives, and *New York Times* columnist Paul Krugman also called for DeMarco's ouster.

Obama nominated Watt for the job but Republicans in Congress refused for seven months to confirm his appointment. Finally, last January, a deal was struck and Watt took over control of the powerful FHFA.

Housing justice advocates now hope that Watt -- a Democrat who served in Congress from 1993 to the end of last year -- will put FHFA on the job of helping working families and communities damaged by the housing crisis. Although not well-known to the general public, FHFA controls over $5 trillion in housing assets and has enormous influence over the nation's mortgage market, including the lending practices of banks.
At the top of the advocates' wish list is putting FHFA firmly in support of "principal reduction." They want Watt to allow, encourage, and even require banks to modify mortgages for "underwater" homeowners (with loans controlled by Fannie and Freddie) so they can stay in their homes and pay their mortgages based on the current value of their home. If underwater mortgages were reset to fair-market values of homes, it would help homeowners and communities alike, and pump billions of dollars into the economy each year. It would also save taxpayers huge sums, especially local governments that have lost property tax revenues but still have to pay for the maintenance and security of vacant properties.

Housing justice advocates have also urged Watt to address other issues, including the following:

- Allow renters to remain, and continue to pay rent, in foreclosed homes with leases, fair rents, just cause/no fault eviction and quality conditions.
- Comply with federal law that requires Fannie Mae and Freddie Mac to contribute a percentage of their (now substantial) profits to the National Housing Trust Fund to help build, rehabilitate and preserve affordable housing
- Make it a priority to sell foreclosed Fannie and Freddie homes to residents and nonprofits rather than absentee investors.

- Restore Fannie and Freddie's role in investing in rental housing, which DeMarco scaled back over the past two years without any explanation, even though their rental investments remained profitable throughout the crisis.

Although consumer, housing and financial reform activists cheered Watt's confirmation, he is hardly a radical on banking issues. He has close ties to the banking industry, having represented Charlotte -- a major financial center -- in Congress. As a member of the House Financial Services Committee as well as the Congressional Progressive Caucus, he walked a tightrope, balancing consumer and banking industry concerns.

Even so, he was a strong advocate of creating the Consumer Financial Protection Bureau as part of the 2010 Dodd-Frank overhaul law and a long-time advocate of measures to reign in abuse mortgage lending. He was a leader (with fellow North Carolina Democrat Brad Miller) in getting anti-predatory lending provisions into the law.

Watt fills the FHFA job at a time when the public opinion is increasingly concerned with widening inequality, a declining standard of living, and the growing political influence of big business and Wall Street.

Indeed, the country has still not come to terms with the consequences of Wall Street's reckless behavior. A number of major banks have agreed to multi-billion dollar settlements with state Attorneys General and the U.S. Department of Justice for engaging in predatory lending and other irresponsible practices (such as selling toxic mortgages to unwitting investors, including union pension funds) that crashed the economy and stripped wealth from many families and communities. Although the settlement figures look large, they are pocket change to the huge banks whose current record profits are due in large part to taxpayer bail-outs.

Despite their culpability for the economy's hard times and widespread suffering, no major bank CEO has paid the price with jail time, as Senator Elizabeth Warren pointedly observed in a letter to federal bank regulators earlier this year.

Watt can't fix all these problems by himself. But he has more power than any other single person to stem the ongoing damage of the mortgage crisis by enacting a long-awaited program of principal reduction -- -a win/win deal with American homeowners and communities.

What is Watt waiting for?

Peter Dreier is professor of politics and chair of the Urban & Environmental Policy Department at Occidental College. He is coauthor of*Place Matters: Metropolitics for the 21st Century*(University Press of Kansas, 3rd edition, 2014) and author of *The 100 Greatest Americans of the 20th Century: A Social Justice Hall of Fame* (Nation Books, 2012).

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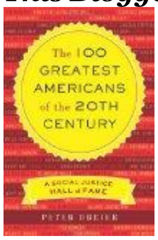

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The 100 Greatest Americans of the 20th Century: A Social Justice Hall of Fame
by Peter Dreier

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Exhibit 12

FEDERAL HOUSING FINANCE AGENCY

STATEMENT

For Immediate Release
August 8, 2013

Contact: Corinne Russell (202) 649-3032
Stefanie Johnson (202) 649-3030

FHFA Statement on Eminent Domain

"On August 9, 2012, the Federal Housing Finance Agency (FHFA) published a Notice in the *Federal Register* entitled 'Use of Eminent Domain to Restructure Performing Loans' and asked for public input. FHFA has concluded its review and based on its consideration of the law and input received, continues to have serious concerns on the use of eminent domain to restructure existing financial contracts and has determined such use presents a clear threat to the safe and sound operations of Fannie Mae, Freddie Mac and the Federal Home Loan Banks. This use of eminent domain also runs contrary to the goals set forth by Congress for the operation of the conservatorships by FHFA. Therefore, FHFA considers the use of eminent domain in a fashion that restructures loans held by or supporting pools guaranteed or purchased by FHFA regulated entities a matter that may require use of its statutory authorities.

"In response to an eminent domain action to restructure mortgage loans, FHFA may take any of the following steps: initiate legal challenges to any local or state action that sanctions the use of eminent domain to restructure mortgage loan contracts that affect FHFA's regulated entities; act by order or by regulation to direct the regulated entities to limit, restrict or cease business activities within the jurisdiction of any state or local authority employing eminent domain to restructure mortgage loan contracts; or take such other actions as may be appropriate to respond to market uncertainty or increased costs created by any movement to put in place such programs."

For a complete analysis of the input received by FHFA and implications of eminent domain for FHFA, please click here.

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The Federal Housing Finance Agency regulates Fannie Mae, Freddie Mac and the 12 Federal Home Loan Banks. These government-sponsored enterprises provide more than $5.5 trillion in funding for the U.S. mortgage markets and financial institutions.

Exhibit 13

The Washington Post

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Economists, Obama administration at odds over role of mortgage debt in recovery

By Zachary A. Goldfarb, Published: November 22, 2012

One year and one month before President Obama won reelection, he invited seven of the world's top economists to a private meeting in the Oval Office to hear their advice on what do to fix the ailing economy. "I'm not asking you to consider the political feasibility of things," he told them in the previously unreported meeting.

There was a former Federal Reserve vice chairman, a Nobel laureate, one of the world's foremost experts on financial crises and the chief economist of the International Monetary Fund , among others. Nearly all said Obama should introduce a much bigger plan to forgive part of the mortgage debt owed by millions of homeowners who are underwater on their properties.

Obama was reserved in response, but Treasury Secretary Timothy F. Geithner interjected that he didn't think anything of such ambition was possible. "How do we get this done through Congress?" he asked. "What could we actually do that we haven't done?"

The meeting highlighted what today is the biggest disagreement between some of the world's top economists and the Obama administration. The economists say the president could have significantly accelerated the slow economic recovery if he had better addressed the overhang of mortgage debt left when housing prices collapsed. Obama's advisers say that they did all they could on the housing front and that other factors better explain why the recovery has been sluggish.

The question is relevant because although Obama won reelection this month, the vast majority of voters still say the economy is weak and not getting better. Policymakers in Washington are now focused on another type of debt — the public debt all taxpayers owe — but the slow economic recovery, which depresses tax revenue, makes that problem harder to solve.

Nearly 11 million Americans, or more than a fifth of homeowners, are buried in debt, owing more than their properties are worth after piling their life savings into their properties — a persistent and largely unaddressed problem that represents the missing link in what many economists consider the administration's overall strong response to the recession.

"Housing was the neglected piece. They have the kind of attitude that they don't believe this is a good value for the money, this is politically unpopular, and there's not much we can do," said Alan Blinder, a former Federal Reserve vice chairman consulted frequently by the White House. "There were obvious things to do that academics and others started pointing out back in 2008. That could have shortened the recovery time."

Obama's economic advisers dispute that notion. Geithner said the administration chose the best options available to deal with the housing crisis.

"We knew the hit to wealth would be damaging. We knew the level of debt had the potential to restrain the strength of recovery," he said. "The only issue was, what could you do about it? What were the feasible options available? We chose the best of the feasible options."

Obama's advisers believe the ultimate pace of recovery is understandable, if disappointing, given the financial crisis and the collapse in housing prices, as well as surprises such as a drought this year, the European debt crisis, rising oil prices and the trade-disrupting Japanese earthquake. They argue that the course they pursued — spending more than $1 trillion on tax cuts and employment programs — helped all Americans and sped up the recovery, and that alternatives that dealt with housing debt directly were never viable.

Of the original members of Obama's economic crisis team, Geithner, the one still in office, has pressed this point most strongly. Others have said that if the administration did make a big error in its response to the crisis, it had to do with housing.

Lawrence H. Summers, formerly Obama's top economic adviser, has said he doesn't think the administration made a major mistake. But this month, he said at a conference in Washington that "if we made a serious mistake, the best arguments would be around questions about housing."

Former budget director Peter Orszag has said that "a major policy error" was made. And Christina D. Romer, formerly Obama's top economist, has said that the driving ideas "may have been too limited" and that there needs to be a bigger focus on reducing mortgage debt — a process known as "principal reduction."

"The new evidence on the importance of household debt has convinced me that we are likely going to need to help homeowners who are underwater," she said last month. "Many of these troubled loans will need to be renegotiated and the principal reduced if we are going to truly stabilize house prices and get a robust recovery going."

Why debt matters

Some of the most authoritative research on the role of mortgage debt in the recession and recovery — research reviewed by Obama — comes in part from an economist from Pakistan who started out studying why poor countries struggle to grow.

Atif Mian, now a Princeton professor, came to focus on how finance can destabilize an economy. He saw how foreign money had flooded Latin America in the 1980s and Southeast Asia in the 1990s, leading to borrowing booms and financial crises.

Not long before the U.S. recession, Mian and another young economist, Amir Sufi of the University of Chicago's business school, saw a similar trend here. "The common link to the emerging market crises," Mian said, "is that it all starts with leverage."

The two economists compared what happened in U.S. counties where people had amassed huge debts with those where people had borrowed little. It had long been thought that when property values declined in value, homeowners would spend less because they would feel less wealthy.

But Mian and Sufi's research showed something more specific and powerful at work: People who owed huge debts when their home values declined cut back dramatically on buying cars, appliances, furniture and groceries. The more they owed, the less they spent. People with little debt hardly slowed spending at all.

This was important because consumer spending makes up the lion's share of economic activity, and even a small increase or decrease can have a big impact on growth and affect millions of jobs.

From 2006 through 2009, overall consumer spending was flat, according to calculations Sufi completed for The Washington Post. But among the quarter of U.S. counties with the highest debt, it fell 5.5 percent. Without that hit, spending nationwide would have increased by 2.4 percent.

In other words, indebted Americans had an outsize effect, pulling down the rest of the nation's economy.

Some people reduced spending because they had lost their homes to foreclosure, damaging their ability to borrow. Others no longer could tap home-equity lines of credit. Still others, facing high monthly payments, used every extra penny to pay off debt.

When the Federal Reserve greatly lowered interest rates, it helped many borrowers but not those underwater, because banks wouldn't refinance their loans. Federal Reserve data show that the number of Americans paying more than 40 percent of their income toward debt — a high threshold — declined between 2007 and 2010. But among people whose wealth had disappeared, it surged.

Historically, Sufi said, "places that have bigger recessions usually have stronger comebacks." But his calculations showed that since the end of the recession, places with high levels of debt have not had robust recoveries.

Other economists — from both political parties — were making the same point around the time Obama came to office. Blinder, a Clinton administration official, and Martin Feldstein, a Reagan administration official, developed plans calling on the government to commit hundreds of billions of dollars to restructure millions of mortgages with lower interest rates and principal balances.

Said John Geanakoplos, a Yale economist who proposed a plan to reduce principal: "I think the missed opportunity to forgive principal at the end of 2008 and beginning of the 2009 was the biggest mistake the administration made in trying to deal with the crisis."

The Obama view

The architects of the Obama administration's response to the recession — Summers and Geithner — knew all too well the problems of a debt overhang.

The two had begun their public service careers — Geithner at the Treasury Department, Summers at the World Bank — in the shadow of the Latin American debt crisis. A tough-minded rescue plan by Treasury Secretary James A. Baker III had failed and been replaced by a more generous one by Baker's successor, Nicholas F. Brady, that finally helped Latin America shed its debt.

As Obama took office, Summers would note how the Brady plan had succeeded where the Baker plan failed.

But although the new Obama administration had hundreds of billions of dollars in unspent financial bailout money available to use, it decided against any significant program to reduce the debt of underwater homeowners.

"No one was in doubt that debt overhangs were an important problem," Summers said recently at a conference. But despite exploring many proposals, the administration did not see a plan that did not have the potential to cause "effects worse than the cure," he said, such as cratering the financial system by forcing banks to absorb huge losses.

At a more basic level, officials simply did not believe that a big program of debt forgiveness was a smart investment, costing hundreds of billions of dollars — money that it preferred to spend on a massive economic stimulus package that could much more quickly lift the economy. The administration also announced a more modest program designed to avert foreclosures by reducing mortgage payments but not the total debt balance.

In late 2009, the economy started to grow at a pace of 4 percent per year — fast enough that employment would have returned to normal by just about now. But in 2010, growth sputtered to 2 percent. The administration responded with more stimulus. But the pattern repeated itself in 2011 and this year.

Today, administration officials say they do not see the mortgage debt overhang primarily at work. Rather, they say, foreign shocks, cuts in local and state spending, and other factors dragged down the economy.

Still, in the past year, Obama has expanded programs to try to better tackle mortgage debt, announcing more federal funding to write down loans and an expanded program to allow underwater homeowners to refinance.

The efforts seem to have had positive effects. A greater number of underwater borrowers have reduced their principle balances and been able to refinance, and the housing market has had a modest recovery.

Not everyone is impressed, though. "I don't see the kind of aggressive approach that could make a big difference," Romer said in September at Hofstra University.

Many people still have a long way to return to normal, pre-boom levels of debt. Although Americans racked up $5 trillion in new mortgage debt before the crisis, they have erased only about $1 trillion of it, according to the Federal Reserve. Research by Karen Dynan of the Brookings Institution shows more than 10 percent of families would have to save all of their income for six months to pay down the debt they accumulated in the boom years.

"The housing sector is far from being out of the woods," Federal Reserve Chairman Ben S. Bernanke said last week. "We should not be satisfied with the progress we have seen so far."

Exhibit 14

The New York Times

July 29, 2013

A City Invokes Seizure Laws to Save Homes

By SHAILA DEWAN

The power of eminent domain has traditionally worked against homeowners, who can be forced to sell their property to make way for a new highway or shopping mall. But now the working-class city of Richmond, Calif., hopes to use the same legal tool to help people stay right where they are.

Scarcely touched by the nation's housing recovery and tired of waiting for federal help, Richmond is about to become the first city in the nation to try eminent domain as a way to stop foreclosures.

The results will be closely watched by both Wall Street banks, which have vigorously opposed the use of eminent domain to buy mortgages and reduce homeowner debt, and a host of cities across the country that are considering emulating Richmond.

The banks have warned that such a move will bring down a hail of lawsuits and all but halt mortgage lending in any city with the temerity to try it.

But local officials, frustrated at the lack of large-scale relief from the Obama administration, relatively free of the influence that Wall Street wields in Washington, and faced with fraying neighborhoods and a depleted middle class, are beginning to shrug off those threats.

"We're not willing to back down on this," said Gayle McLaughlin, the former schoolteacher who is serving her second term as Richmond's mayor. "They can put forward as much pressure as they would like but I'm very committed to this program and I'm very committed to the well-being of our neighborhoods."

Despite rising home prices in many parts of the country, including California, roughly half of all homeowners with mortgages in Richmond are underwater, meaning they owe more — in some cases three or four times as much more — than their home is currently worth. On Monday, the city sent a round of letters to the owners and servicers of the loans, offering to buy 626 underwater loans. In some cases, the homeowner is already behind on the payments. Others are considered to be at risk of default, mainly because home values have fallen so much that the homeowner has little incentive to keep paying.

Many cities, particularly those where minority residents were steered into predatory loans, face a situation similar to that in Richmond, which is largely black and Hispanic. About two dozen other local and state governments, including Newark, Seattle and a handful of cities in California, are looking at the eminent domain strategy, according to a count by Robert Hockett, a Cornell University law professor and one of the plan's chief proponents. Irvington, N.J., passed a resolution supporting its use in July. North Las Vegas will consider an eminent domain proposal in August, and El Monte, Calif., is poised to act after hearing out the opposition this week.

But the cities face an uphill battle. Some have already backed off, and those that proceed will be challenged in court. After San Bernardino County dropped the idea earlier this year, a network of housing groups and unions began working to win community support and develop nonprofit alternatives to Mortgage Resolution Partners, the firm that is managing the Richmond program.

"Our local electeds can't do this alone, they need the backup support from their constituents," said Amy Schur, a campaign director for the national Home Defenders League. "That's what's been the game changer in this effort."

Richmond is offering to buy both current and delinquent loans. To defend against the charge that irresponsible homeowners who used their homes as A.T.M.'s are being helped at the expense of investors, the first pool of 626 loans does not include any homes with large second mortgages, said Steven M. Gluckstern, the chairman of Mortgage Resolution Partners.

The city is offering to buy the loans at what it considers the fair market value. In a hypothetical example, a home mortgaged for $400,000 is now worth $200,000. The city plans to buy the loan for $160,000, or about 80 percent of the value of the home, a discount that factors in the risk of default.

Then, the city would write down the debt to $190,000 and allow the homeowner to refinance at the new amount, probably through a government program. The $30,000 difference goes to the city, the investors who put up the money to buy the loan, closing costs and M.R.P. The homeowner would go from owing twice what the home is worth to having $10,000 in equity.

All of the loans in question are tied up in what are called private label securities, meaning they were bundled and sold to private investors. Such loans are generally the most unfavorable to borrowers and the most likely to default, Mr. Gluckstern said. But they are also the most difficult to modify because they are controlled by loan servicers and trustees for the investors, not the investors themselves. If Richmond's purchase offer is declined, the city intends to use eminent domain to condemn and buy the loans.

The banks and the real estate industry have argued that such a move would be unprecedented and unconstitutional. But Mr. Hockett says that all types of property, not just land and buildings, are subject to eminent domain if the government can show it is needed to promote the public good, in this case fighting blight and keeping communities intact. Railroad stocks, private bus companies, sports teams and even some mortgages have been subject to eminent domain.

Opponents, including the Securities Industry and Financial Markets Association, the American Bankers Association, the National Association of Realtors and some big investors have mounted a concerted opposition campaign on multiple levels, including flying lobbyists to California city halls and pressuring Fannie Mae, Freddie Mac and the Federal Housing Administration to use their control of the mortgage industry to ban the practice.

Tim Cameron, the head of Sifma's Asset Management Group, said any city using eminent domain would make borrowing more expensive for everyone in the community and divert profits from the investors who now own the loan to M.R.P. and the investors financing the new program. "Eminent domain is used for roads and schools and bridges that benefit an entire community, not something that cherry-picks who the winners are and who the losers are," he said.

Representative John Campbell, Republican of California, has introduced a bill that would prohibit Fannie, Freddie and the F.H.A. from making, guaranteeing or insuring a mortgage in any community that has used eminent domain in this way. Eminent domain supporters say such limits would constitute a throwback to the illegal practice called redlining, when banks refused to lend in minority communities.

Opponents have also employed hardball tactics. In North Las Vegas, a mass mailer paid for by real estate brokers warned that M.R.P. had "hatched a plan to make millions of dollars by foreclosing on homeowners who are current on their payments."

In a letter to the Justice Department, Lt. Gov. Gavin Newsom of California complained that the opposition was violating antitrust laws and that one unnamed hedge fund had threatened an investor in the project.

But not all mortgage investors oppose the plan. Some have long argued that writing down homeowner debt makes sense in many cases. "This is not the first choice, but it's rapidly becoming the only choice on how to fix this mess," said William Frey, an investor advocate.

Mr. Frey said that the big banks were terrified that if eminent domain strategies became widespread, they would engulf not only primary mortgages but some $450 billion in second liens and home equity loans that are on the banks' balance sheets. "It has nothing to do with morality or anything like that, it has to do with second liens."

Many of the communities considering eminent domain were targeted by lenders who steered minority families eligible for conventional mortgages into loans with higher interest rates and ballooning payments. Robert and Patricia Castillo bought a three-bedroom, one-bathroom home in Richmond because their son, who is severely autistic, would anger landlords with his destructive impulses. They paid $420,000 for a home that is now worth $125,000, Mr. Castillo, a mechanic, said.

They have watched as their daughter's playmates on the block have, one by one, lost their homes. But they are reluctant to walk away from the house in part for the sake of their son.

"We're in a bad situation," Mr. Castillo, 44, said. "Not only me and my family, but the whole of Richmond."

Alan Blinder contributed reporting.

Los Angeles Times | ARTICLE COLLECTIONS

← Back to Original Article

Richmond adopts eminent domain mortgage plan

July 30, 2013 | By Alejandro Lazo

Richmond is adopting a plan to take over underwater mortgages that would invoke the city's eminent domain powers if necessary.

The city will be the first in the nation to formally adopt the novel but controversial plan that was rejected by San Bernardino County and two of its cities earlier this year.

The city said it will buy home mortgages from financial institutions, write down those loans and refinance homeowners in the properties into new loans. If financial institutions do not cooperate, the city will seize the loans using eminent domain, Richmond Mayor Gayle McLaughlin said.

PHOTOS: SoCal's most affordable ZIP Codes for home buyers

"This is a tool to get the job done," McLaughlin said. "The housing crisis is still ongoing."

The city on Tuesday sent notice to the holders of more than 620 underwater mortgages for homes in the city, asking these servicers and trustees to sell the city these loans. The city sent letters to 32 entities. The city plans further such actions in the future, officials said in a conference call with reporters Tuesday.

Eminent domain is usually used to seize land — not loans — to serve the public good, as when local governments seize blighted properties. The Richmond plan would be the first widespread attempt at using eminent domain to seize residential mortgages.

The city will team up with the San Francisco firm Mortgage Resolution Partners, which last year pitched the plan to San Bernardino and two of its cities, Fontana and Ontario. That county and the two cities formed a Joint Powers Authority to consider the eminent domain idea but then shelved it after Wall Street groups voiced sizable opposition and little public support was heard. The county and the two cities were the first communities to consider the plan.

The Securities Industry and Financial Markets Association of New York has been a hefty opponent of the eminent domain plan, with its managing director appearing before a number of municipal meetings to speak against it. On Tuesday, the group reaffirmed its disapproval in a brief email to The Times.

McLaughlin, the Richmond mayor, said on Tuesday that city officials had spoken to members of the group but remained resolute to move forward despite their opposition.

"We are just not going to back down; we really feel it is the responsibility of the servicers and the banks to fix this, and they haven't, so we are taking this into our own hands," she said. "It is our community that is at stake here."

Mortgage Resolution Partners will provide the funding for Richmond to purchase the loans and also finance any litigation.

ALSO:

Southland home prices soar 28.3% in June

Pending home sales fall in June, Realtor group says

San Bernardino abandons eminent domain mortgage plan

June 3, 2014

HUFF POST POLITICS

Wall Street Lobbyists Nervous As Cities Use Eminent Domain to Protect Homeowners

Posted: 07/30/2013 8:58 pm

Usually a community group has to protest in front of a bank, take over a corporate shareholders' meeting, or get arrested at a politicians office or a slumlord's home to make the front page of the *New York Times.*

But on Tuesday, the Home Defenders League - a coalition of community groups who organize homeowners facing foreclosure - made the *Times'* front page simply by using two words: "eminent domain."

Reporter Shaila Dewan's article,"A City Invokes Seizure Laws to Save Homes," described the group's efforts in Richmond, California, where it is working with city officials to help families facing foreclosure and save blighted neighborhoods overrun with foreclosed homes by using its power of eminent domain to purchase mortgages and re-sell them to homeowners at a reduced price.

As the *Times'* story noted, Wall Street lobbyists are waging a legal, political, and ideological war to stop Richmond and other upstart cities from taking control of their own destinies.

Once it hit the *Times*' front page, other media outlets scrambled to catch up on this fascinating David vs. Goliath story. By mid-day - following a conference call with activists, Richmond Mayor Gayle McLaughlin, former Cong. Brad Miller, and others, as well as a press conference in front of Richmond City Hall - the rest of the media had the story, which they posted on their websites.

The headlines on stories posted by the *San Francisco Chronicle* ("Richmond First To Jump Into Eminent Domain") and the *Los Angeles Times* ("Richmond Adopts Eminent Domain Mortgage Plan") were straightforward. The *San Jose Mercury-News* accurately raised the specter of conflict: "Richmond Moves Ahead With Controversial Plan to Seize Underwater Mortgages from Investors."

Business Week's headline was a bit more confrontational: "Richmond Escalates Eminent Domain Plan With Offers to Buy Loans." *American Banker*, the voice of the banking industry, came up with the ominous headline, "Calif. City Threatens to Use Eminent Domain with Underwater Mortgages." Speaking for the conservative wing of the broader business community, *Fortune*'s headline warned readers: "California City's Drastic Foreclosure Remedy: Seizure."

Having read the *New York Times*' story about the situation, the opinion-shapers on the blogosphere quickly weighed in. "A Housing Crisis Solution Sure to Panic Wall Street," opined *Gawker.* "Will Richmond Take Eminent Domain Too Far" asked Alexandra Le Tellier in the *Los Angeles Times*

Slate's Matt Yglesias accepted as gospel the threats of several Wall Street lobby groups to sue cities who pursue this strategy, even though a number of prominent law professors have made the case that cities have a perfect right to do so and that the industry's threats to sue are empty. Thus, the *Slate* headline on Yglesias' opinion piece: "Richmond, Calif.'s Daring Plan to Help Underwater Homeowners Will Provide Massive Stimulus to Law Firms."

What's all the fuss about?

In Richmond, a blue-collar Bay Area city of 103,000 people where home prices have plummeted by 58 percent since the 2007 peak, thousands of homeowners have lost their homes to foreclosure, and about 12,000 families--half of all homeowners with mortgages in the city--are underwater, their homes worth much less than their mortgages.

Groups affiliated with the Home Defenders League have been working with homeowners for several years, trying to get banks to modify their mortgages - called "principal reduction" - so that mortgage payments are in sync with current home values. Many economists, including Joseph Stiglitz and Mark Zandi believe that this is the best solution. If underwater mortgages were reset to fair-market values of homes, it would help homeowners and communities alike, and pump about $102 billion into the economy annually, according to a Home Defenders League report.

But homeowners who have asked banks to restructure their loans typically get a cold shoulder or a bureaucratic runaround. And so far, the Obama administration and Congress have been unwilling to require intransigent banks to reset loans, even though, as Yglesias observed in *Slate*, the administration has made several "head fakes" in that direction.

As a result, cities like Richmond have come upon a local solution - buying the mortgages, resetting the loans, and selling them back to homeowners at the current fair-market price. This week, as Dewan reported in her article, Richmond will send letters to the owners of 626 mortgages asking to buy them at the current market price. If they refuse, the city government will buy the mortgages using its eminent domain powers.

The problem is front-page news in part because Richmond is hardly the only city facing a frenzy of foreclosures and underwater mortgages. Despite rising home prices in some parts of the country, more than 11 million American families--one-fifth of all homeowners with mortgages--are underwater, through no fault of their own. If nothing is done, many will eventually join the more than 5 million American homeowners who have already lost their homes to foreclosure.

A number of other cities - including Seattle, Newark and Irvington, N.J, El Monte, CA, and North Las Vegas - have taken steps to pursue the eminent domain strategy. Many other cities are sure to follow, since there are many "hot spots" where families and cities are drowning in underwater mortgages.

In the 1960s and 1970s, community groups were the ones fighting against the abuse of eminent domain by local governments, who deployed that legal tool to seize homes, raze them, and build office complexes, convention centers, sports stadiums, and luxury housing under the banner of "urban renewal," typically on behalf of big business interests. Back then, activists put their bodies in front of what they called the "federal bulldozer."

Over the past decade, Wall Street didn't have to use bulldozers to destroy homes. They used subprime loans and other risky, reckless and sometimes illegal mortgages, typically charging high interest and excessive fees, mostly targeting working class African American and Latino communities.
Now the same Wall Street players who crashed the economy in the first place are trying to stop local governments from solving the problem.

In her *Times* story, Dewan reported that "Opponents, including the Securities Industry and Financial Markets Association (SIFMA), the American Bankers Association, the National Association of Realtors and some big investors have mounted a concerted opposition campaign on multiple levels, including flying lobbyists to California city halls and pressuring Fannie Mae, Freddie Mac and the Federal Housing Administration to use their control of the mortgage industry to ban the practice."

Tim Cameron, a SIFMA lobbyist, told Dewan that banks would raise the cost of borrowing in cities that deploy the eminent domain strategy.

In April, Cameron and his SIFMA colleague Kim Chamberlain traveled from New York to Richmond to persuade Mayor Gayle McLaughlin and her Council colleagues to back off.

McLaughlin told Dewan: "We're not willing to back down on this. they can put forward as much pressure as they would like but I'm very committed to this program and I'm very committed the well-being of our neighborhoods."

The *San Francisco Chronicle*, which has been covering the discussions in Richmond for months, quoted SIFMA's managing director Chris Killian: "We think it is unconstitutional, illegal and very bad policy, " but didn't quote one of many legal experts - including Cornell university Law Professor Robert Hockett, who first came up with the eminent domain idea - who believe it is eminently legal. Cities routinely use eminent domain to purchase property from private owners for sidewalks, infrastructure, school construction and other projects. Mortgages, legal scholars say, are simply another type of property, and using eminent domain to eliminate blight and restore a city's fiscal health is a longstanding precedent.

The *Chronicle* observed that the city is "[t]aking a controversial plunge into uncharted waters."The paper quoted McLaughlin: "After years of waiting on the banks to offer up a more comprehensive fix or the federal government, we're stepping into the void to make it happen ourselves."

The San Jose *Mercury News* began its story by focusing on the legal question: "Ignoring warnings that the move is illegal and will dry up credit for homebuyers, city leaders and a private investment firm on Tuesday announced they have sent letters threatening to use eminent domain to seize 624 underwater mortgages if lenders don't agree to sell them the loans by Aug. 14."

Several papers quoted McLaughlin's contention that such threats--particularly as part of a coordinated, industry-wide credit boycott -- is another form of lending discrimnation called "redlining." In her *Times* story, Dewan pointed to a letter to the Justice Department from California's Lt. Gov. Gavin Newsom complaining that the opposition was violating antitrust laws and that one unnamed hedge fund had threatened an investor in the project.

Several news stories noted that Wall Street lobby groups persuaded three Republican congressmembers from California to send a letter to Housing and Urban Development Secretary Shaun Donovan, asking HUD to deny FHA financing from mortgages taken by eminent domain. "We are concerned that the proposed use of eminent domain would slow the return of private capital to the housing finance system, and threaten our fragile housing recovery," they wrote Donovan. But none of the stories noted that last year the financial, real estate and insurance industry topped the list of contributors to all three politicians--Gary Miller ($366,000), John Campbell ($484,000), and Ed Royce ($1 million), according to OpenSecrets.org.

A number of reporters expressed skepticism about the role of Mortgage Resolution Partners (MRP), a private firm that is helping cities line up investors to help refinance the loans. But Amy Schur - the campaign director for the Home Defenders League who works with one of its affiliates, The Alliance of Californians for Community Empowerment (ACCE) -- explained that

MRP, Richmond's funding partner, has agreed to a set of community-drafted principles to make sure that investors don't exploit desperate cities and homeowners. It has pledged, for example, that the program won't cost taxpayers a dime. MRP will earn a flat fee per mortgage. Homeowners can voluntarily opt out of the program. Schur said that her group will only work with private sector investors who agree to these principles.

During the telephone press conference, several reporters asked why cities needed to use eminent domain to save underwater homeowners because, they said, the housing market is improving on its own and home prices are rising. Sooner or later, they implied, these troubled homeowners will have their heads above water.

In fact, home prices are not rising in the hot spots with high concentrations of underwater mortgages. And where home prices are going up, it is not due primarily to more home purchasers by would-be homeowners, but as a result of purchases of foreclosed properties by real estate speculators who plan to sell their properties as rental properties, as the *Los Angeles Times* reported in March. In other words, even in places where there seems to be a housing "recovery" (judged by housing price figures alone), there isn't really much of a recovery - or increase in homeownership -- at all.

Peter Dreier is E.P. Clapp Distinguished Professor of Politics and chair of the Urban & Environmental Policy Department at Occidental College. He is coauthor of *Place Matters: Metropolitics for the 21st Century* (2005) and author of *The 100 Greatest Americans of the 20th Century: A Social Justice Hall of Fame* (2012)

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Richmond Threatens Eminent Domain To Address Foreclosure Crisis

July 30, 2013 3:56 PM

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Foreclosed homes on Lucas Street in Richmond (CBS)

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RICHMOND (KCBS) – Richmond city leaders were moving ahead with a plan to head off the foreclosure crisis, a plan that is not without controversy.

The city has offered to buy more than 600 underwater mortgages at below the homes' current value.

"If they are unwilling to negotiate a sale of the loans, which we want them to do, then we will consider using eminent domain as another option to purchase these loans at fair market value," said Richmond Mayor Gayle McLaughlin.

- Melissa Culross

00:00

Richmond is the first city in the country to take the controversial step of threatening to use eminent domain, the power to take private property for public use. But other cities have also explored the idea.

Bloomberg

Richmond Escalates Eminent Domain Plan With Loan Offers

By Dan Levy and Jody Shenn - Jul 30, 2013

Richmond, California, is planning to buy residential mortgages in low-income areas for as little as 25 cents on the dollar and may force the sales under eminent domain laws, moving forward with a controversial program that would potentially seize home loans from investors.

Richmond, a city of about 106,500 on the east side of San Francisco Bay, sent letters to 32 servicers and trustees with offers to purchase 624 mortgages whose loan balance exceeds the property value, officials said on a conference call. The loans are the first that the city plans to buy or seize under legal powers unless loan servicers agree to sell, Mayor Gayle McLaughlin said.

“Our community is suffering and we’ll stand together until the damage gets reversed,” McLaughlin said.

Richmond is the farthest along in a plan advocated by Steven Gluckstern’s Mortgage Resolution Partners LLC for U.S. cities to confiscate mortgages and write them down in an effort to help homeowners escape oversized debt burdens. The idea has drawn opposition from bondholders such as Pacific Investment Management Co. and DoubleLine Capital LP and at least 18 trade groups representing the finance industry, homebuilders and real estate firms.

Mortgage Resolution Partners has struck about a “half dozen” advisory agreements with local governments including North Las Vegas, Nevada, Gluckstern said in an interview earlier this month.

Unlikely Sellers

“Both federal and California law clearly show that this scheme is illegal,” said Tom Deutsch, executive director of the American Securitization Forum, a trade organization, said in a statement.

Other opponents, including bondholders, say it would cause unfair losses to investors holding some form of mortgage debt such as pension funds, push lenders to withdraw from markets and expose cities to legal risks.

None of the 32 servicer and bond trustees that oversee the loans are likely to sell willingly, Chris Killian, head of the securitization group for the Securities Industry and Financial Markets Association, Wall Street’s largest lobbying organization, said in a telephone interview.

"You just can't really sell performing loans out of securitizations," Killian said. "Additionally, everybody we talk to in the industry thinks this is a bad idea that will be bad for the mortgage markets."

Risky Terms

Fewer than a third of the loans that Richmond is offering to buy are delinquent. The rest are current on payments yet feature risky terms such as variable interest rates that lured millions of Americans to take on debt as home prices boomed from 2002 to 2006.

Low interest-only payments and negative amortization, where unpaid principal was added to the ballooning balance with interest compounded, are some of the exotic products that have since been abandoned by the mortgage industry after the worst housing collapse since the Great Depression.

Banks have been "unable or unwilling to fix" onerous loans, Amy Schur, executive director of the Los Angeles-based Alliance of Californians for Community Empowerment, said on the conference call. Communities would be better served if local groups help borrowers reduce debt, she said.

"Homeowner groups for years have been trying to get the banks to reduce principal and reset them to current market value," she said. "Our local strategy is to get the job done, save more homes and save our neighborhoods."

'Ill-Advised'

The Richmond program "is a short-term solution for a few underwater borrowers that will have severe negative long-term costs for every homeowner in the city," David H. Stevens, CEO of the Mortgage Bankers Association, said in a statement.

The city's proposed action is "ill-advised and likely unconstitutional and will add to Richmond's problems rather than solve them," Stevens said.

Richmond's $195,000 median home price last month, up almost 20 percent from a year earlier, ranked last among the 22 cities tracked in Contra Costa County by research firm DataQuick. The city's inland location is far from the technology firms in San Francisco and Silicon Valley, where new wealth propelled the nine-county Bay Area median residential value to $555,000 in June, a 33 percent gain, according to San Diego-based DataQuick.

Defaults Rise

New mortgage defaults in Contra Costa County rose 19 percent in the second quarter to 2,214 from the first three months, the highest total of any Bay Area county.

The mortgages Richmond wants to buy would be purchased at prices ranging from 25 percent to 100 percent, said Graham Williams, chief executive officer of Mortgage Resolution Partners.

The Richmond plan may not help homeowners who are already delinquent, said Deutsch of the American Securitization Forum.

"Further, potential homebuyers in Richmond will have to pay more for mortgages to cover the risk of eminent domain or simply not be able to obtain a loan at all," he said.

Richmond was a ship-building center during World War II. Today Chevron Corp. (CVX) is the largest employer, with 1,950 refinery workers, data from the city's most recent financial report show. The 17 percent poverty rate is higher than the California average of 14 percent, and two-thirds of the residents are black or Hispanic, according to the U.S. Census Bureau.

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AMERICAN BANKER

Calif. City Threatens to Use Eminent Domain with Underwater Mortgages

by Kate Berry
JUL 30, 2013 4:01pm ET

The city of Richmond, Calif., has offered to purchase 624 home loans from mortgage servicers and trustees and is moving forward with a plan to restructure the underwater loans or potentially seize them through eminent domain.

"We're not going to back down," Mayor Gayle McLaughlin told reporters on a conference call Tuesday. "We feel it's the responsibility of the servicers and banks to correct this."

On Monday, City Manager Bill Lindsay sent two-page "offer letters" to roughly 32 mortgage servicers and trustees requesting that the city be allowed to buy underwater home loans at reduced prices. If the servicers balk, city officials say they will seek to seize the properties. *The New York Times* first reported the story on Monday.

The city has set a deadline of Aug. 13 for servicers and trustees to accept offers on 624 loans that were appraised on June 30, McLaughlin said. The Richmond City Council is expected in September to either approve the offers to restructure the loans or to determine whether to seize the homes through eminent domain.

A key issue in any legal fight would be how bond investors, including Fannie Mae, Freddie Mac and Federal Home Loan Banks, which are investors in private-label mortgage-backed securities would be compensated for such seizures. Such investors have been vehement in their opposition to similar plans floated by other cities.

Earlier this year, the California cities of San Bernardino, Fontana and Ontario dropped their plans to use eminent domain to seize underwater homes, citing a lack of community support, while

Chicago's mayor vetoed a similar plan last year.

But in Richmond, a largely minority community where roughly 46% of borrowers owe more on their mortgages than their homes are worth, city officials have broad support for their plan.

Amy Schur, a campaign director for the Home Defenders League, a national coalition of 30 nonprofits, said homeowners got behind the plan at a town hall meeting in June when her group developed a statement of principles that "no homeowner would be worse off" from the process.

She also said that any home loan backed by Fannie Mae or Freddie Mac that meets the qualifications for refinancing would be allowed in the city's principal reduction program "because anything short of that would involve redlining against the communities."

In Tuesday's conference call, Mayor McLaughlin said city residents support her plan because many of them feel they were trapped into loans they could not afford. "Many of these people were directly targeted by subprime mortgages and predatory lending practices," McLaughlin told reporters. "We have neighborhoods that are suffering blight, which creates crime."

"The ball is in their court right now — the servicers and trustees need to make the right decisions and negotiate the sale of these loans," she added. "They are holding on to loans that they have been unable or unwilling to fix. We are willing to take those loans off their hands, purchase them at a fair price and save the city from the devastation that is happening."

Richmond laid the groundwork for the plan in April when it hired the San Francisco venture capital firm Mortgage Resolution Partners to acquire and restructure the loans. The firm, which would earn a fee for each loan it restructures, also was behind other cities' efforts to seize underwater loans through eminent domain.

Graham Williams, the chief executive of Mortgage Resolution Partners, said on the conference call with reporters Tuesday that most of the loans targeted for purchase are interest-only, low documentation loans with "a very high likelihood of default." One of the solutions is to simply refinance the underwater mortgages using a program for loans that are backed by Fannie Mae and Freddie Mac, he said.

But the Federal Housing Finance Agency has threatened to take action against municipalities that attempt to use eminent domain to refinance underwater mortgages.

Tom Deutsch, executive director of the American Securitization Forum, called the city's actions "unconstitutional and dangerous."

The securitization industry has threatened to file suits if eminent domain is used to seize loans from private investors. The industry has argued that doing so would jeopardize the ability of banks to lend in those communities because of the added legal costs to investors of defending against eminent domain.

"Both federal and California law clearly show that this scheme is illegal," Deutsch said. "Potential homebuyers in Richmond will have to pay more for mortgages to cover the risk of eminent domain or simply not be able to obtain a loan at all."

Richmond's pioneering eminent-domain threat

Carolyn Said
Updated 9:50 am, Wednesday, July 31, 2013

Taking a controversial plunge into uncharted waters, Richmond is poised to become the first city in the country to invoke eminent domain to address its foreclosure crisis.

"After years of waiting on the banks to offer up a more comprehensive fix or the federal government, we're stepping into the void to make it happen ourselves," Mayor Gayle McLaughlin said Tuesday.

On Monday the city sent letters to 32 banks and other mortgage holders offering to buy 624 underwater mortgages at discounts to the homes' current value. If the offers are spurned, the letter said Richmond may use the power of eminent domain to condemn the mortgages and seize them, paying court-determined fair market value.

The city would then help the underwater homeowners refinance into mortgages in line with their homes' current worth. City leaders said the goal is to stabilize the community and prevent foreclosures.

Wall Street vehemently opposes the untested idea, claiming it violates property rights and would have a chilling effect on future mortgages in Richmond and could lead to years of costly litigation.

"We think it is unconstitutional, illegal and very bad policy," said Chris Killian, managing director of the Securities and Financial Markets Association, a trade group representing banks, securities firms and others.

Could raise costs

Banks said future mortgages in Richmond would likely be much more expensive to compensate for the extra risk that the city could seize them. McLaughlin characterized that as "redlining" and said the city would fight it.

"Mortgage lending is a business, and lenders and mortgage investors have to say what kind of return they want and how much risk" they can tolerate, Killian said. "That's just the way markets work. If you buy a car and they say the brakes don't work all the time, would you pay full price?"

Wells Fargo, one of the largest mortgage holders in Richmond, said in a statement: "We believe this approach will harm mortgage investors, the housing market, and the communities and borrowers that its proponents claim they would be helping."

Richmond has partnered with San Francisco firm Mortgage Resolution Partners for technical assistance and financial backing.

The for-profit firm, which would receive a flat fee of $4,500 per mortgage, will provide funds to acquire the mortgages and then will help the homeowners refinance into loans backed by the Federal Housing Administration.

Many of the underwater mortgages were issued several years ago when interest rates were much higher. Plan proponents said that if Richmond's 4,600 underwater mortgages were reset to the homes' current market value and current interest rates, the homeowners would save an average of $1,180 a month on mortgage payments.

However, even backers said the plan can't be extended to every underwater mortgage in the city. Instead, it concentrates on ones that are not government backed and are held in Wall Street instruments called private securitization trusts.

The recent surge in home values hasn't helped Richmond, where 47 percent of mortgages are still underwater, according to real estate firm Zillow.com.

"In our community we have not seen nor felt any impacts of that" market rebound, said Morris LeGrand, whose Richmond home is worth about $130,000 - far less than he owes on it. "I'm a homeowner by technicality only," he said. "I will never own this home under the current conditions."

Using eminent domain

Eminent domain, which is used to acquire private property for public use, is more commonly associated with government-related development projects, such as buying houses to build a freeway or an airport. It requires paying fair market value for the seized property. Government bodies go before a jury to establish what would be a fair price.

Before that could happen, a Contra Costa County Superior Court judge would determine whether the city had the right to exercise eminent domain, said Bill Falik, an attorney and a partner in MRP.

"Richmond has tremendous legal authority to condemn underwater mortgages," he said. "It doesn't matter if this is a highway project. Foreclosures and underwater properties reduce property taxes and reduce neighboring homes' value. That's called blight, and eminent domain is the authority for cities like Richmond to correct blight."

Richmond and MRP want to buy the mortgages for 80 percent of the homes' current values, leaving a margin for profits and expenses. MRP says the 20 percent discount is what the banks would lose if the home went through foreclosure.

More cities in line

Several other cities, including North Las Vegas and the Southern California towns of El Monte and La Puente, are considering partnering with MRP. San Bernardino County as well as two of its cities, Fontana and Ontario, had previously looked at the idea but then dropped it in the face of fierce opposition from the banking industry.

"Richmond is not afraid to create innovative policies," said City Councilwoman Jovanka Beckles, standing on the steps of Richmond City Hall surrounded by several dozen supporters Tuesday, many from the activist group the Alliance of Californians for Community Empowerment. "In extreme times we create extreme solutions."

When local real estate broker Jeffrey Wright said he opposed the eminent domain plan as "fraught with peril" and bad for the housing market, the ACCE members loudly jeered at him.

Richmond's plan

Richmond hopes to pioneer an unorthodox use of eminent domain power to seize and restructure underwater mortgages. Here's how it would work:

Richmond and Mortgage Resolution Partners - a private firm that is handling the financial side - want to pay 80 percent of the homes' current value, leaving a margin for profits and expenses. MRP says the 20 percent discount is what the banks would lose if a home went through foreclosure.

For instance, if a home with a $300,000 mortgage is now worth $200,000, Richmond would seize the mortgage from the private bondholders who own it for $160,000, or 80 percent of $200,000.

The homeowner would then refinance at $190,000 - or 95 percent of the value. That would leave the homeowner with 5 percent equity. The $190,000 mortgage would pay back the $160,000 used to acquire the loan. The remaining $30,000 would be split among the city, the investors and for costs, including MRP's $4,500 fee.

444 Loans current on payments

180 Loans delinquent on payments

32 Servicers for those loans

$241.98 million Total face value of those 624 mortgages

$177.16 million Total current market value of the 624 homes

$68.82 million Negative equity in the homes

Carolyn Said is a San Francisco Chronicle staff writer. E-mail: csaid@sfchronicle.com Twitter: @csaid

THE HILL

May 28, 2014, 06:04 am

Geithner, Mian and Sufi on the crisis

Well, it seems that **Piketty fever** is finally cooling. After two months' lively discussion of *Capital in the Twenty-First Century*, talk is now turning to two books whose simultaneous publication could not have been better timed.

Former New York Federal Reserve President and Treasury Secretary Timothy Geithner's *Stress Test* recounts the heady days of 2008 and after, as the George W. Bush administration and then the Obama administration worked to prevent financial meltdowns from morphing into full macroeconomic catastrophe. He concludes that, apart from the inevitable false starts and missteps that attend any triage, he and his colleagues got things essentially right. Saving the banks quickly was requisite to saving the broader economy permanently.

House of Debt by Atif Mian and Amir Sufi of Princeton University and the University of Chicago, respectively, reads things a bit differently and, to my mind, more sagely. The authors contend that Geithner and colleagues erred mightily in not focusing more on homeowners. Homeowners' post-bubble mortgage debt overhang was a much greater long-term threat to the macroeconomy than was bank failure. It was also, as I and others **argued** at the time, the ultimate source of bank peril itself. Rescuing homeowners would accordingly have offered a twofer, binding the wounds that the bailouts could but bandage.

As superior to Geithner's take on the crisis as I find Mian and Sufi's to be, I am struck by something that all three of the gentlemen share. That is their tendency to employ the past tense, as though the crisis were safely behind us, and our only concern now were with how to avoid another. As valuable as Geithner's and, especially, Mian and Sufi's **proposals** for avoiding a replay might be, any suggestion that we're out of "the 2008 crisis" is seriously in error.

One-fifth of the nation's home loans remain underwater: Their debtors owe more on the loans than their homes are now worth. Another fifth have too little home equity to sell, even when selling would enable their moving to where jobs are. This is little improvement on where we were one, two ... even six years ago.

In what sense is this a continuation of the 2008 crisis? The answer came 80 years ago from one who is possibly the greatest American economist of whom you have never heard: Yale's Irving Fisher. Fisher, whom Mian and Sufi creditably cite but don't adequately credit in my view, lost a fortune in the 1929 crash. He also suffered an embarrassing reputational hit, having publicly observed earlier the same month that stocks had reached a new "permanently high plateau" (1929's eerie prequel to 1999's "new paradigm").

Fisher sought to redeem himself by uncovering the underlying dynamics of the 1920s' paired stock and real estate bubbles and busts (yes, there were both, then as now). He also sought to understand what was prolonging the 1930s depression that followed those busts. The answer in both cases, he found, was the same – **private debt**.

Fisher developed these findings in his "Debt-Deflation Theory of Great Depressions," which he elaborated both in a **journal article** in 1933 and in a monograph, ***Booms and Depressions***, the year before. If you read only one more book or article on what we have been through and are still going through, let it be one of these.

Fisher found that the worst bubbles and busts are those mediated by credit and debt. Credit worsens bubbles by enabling speculators to drive prices ever higher — so much so that even non-speculators must borrow ever more heavily to buy. (John Geanakoplos, Yale's latter-day Fisher, **has found** much the same.)

Debt worsens the busts that then follow these bubbles for reasons that Mian and Sufi now laudably highlight: Fixed debt obligations, which homeowners have no choice but to undertake when prices are driven by speculators, don't drop with asset prices post-crash. Millions are left underwater. Consumer spending thus plummets. Growth and employment thus slow, then go negative. Defaults thus ensue, harming banks and other creditors. Asset prices accordingly plummet yet further, feeding back into the same downward spiral.

This is still happening post-2008. As alluded to above, 10 million households **remain underwater**. Ten million more have **too little equity** to sell and then move to where jobs are. Consumer spending by the 40 percent of Americans most likely to spend thus continues to lag, and **employment** and **growth** remain sluggish in consequence.

But we also still have it within our power to arrest and reverse this still ongoing crisis.

How? First, we must mandate that government-held Fannie Mae and Freddie Mac **write-down their underwater loans** — as Geithner, to his great credit, finally called for in 2012. And second, we **must employ government's eminent domain authority** to purchase the millions of underwater *private-label securitized* (PLS) loans out of the trusts they are locked in, then write them down as well.

These write-downs will rescue debtors (homeowners) and creditors (banks and investors) alike — they're "win-win" — by preempting near-certain and costly defaults and foreclosures. Yet they cannot be privately done on an adequate scale thanks to **dysfunctional securitization contracts** that were drafted in haste during the bubble years. (This is why the Home Affordable Modification Program, Geithner's earlier answer to the mortgage crisis, was doomed ab initio. "Incentive" payments to loan servicers can't induce loan modifications when PLS contracts prohibit them.)

I **advocated** that Fannie, Freddie, and the Federal Housing Authority act in these manners in 2007 through 2009, as it's a job they were meant for and did wonderfully — even profitably — during the New Deal. In more recent years, after giving up on Washington, I have **argued** that states and cities should act on their own. Some are now **doing so** — even coordinating in so doing.

I won't rehash the plan's detailed mechanics and fuller rationale here; readers can find that in this New York Fed **paper**, among other places. Here I'll close simply by emphasizing once more that it both can, and must, still be done. I hope Geithner, Mian and Sufi might join me in making it happen. Only then will the crisis be ended, and our authors' (with **others'**) preventive proposals well-timed.

Hockett is a professor of law at Cornell University Law School.

TAGS: Thomas Pikkety, Timothy Geithner, Amir Sufi, Atif Mian, Irving Fisher, Mortgage-backed security, Subprime mortgage crisis, underwater mortgage

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Exhibit 15

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Posted: Thursday, Jun. 27, 2013

Watt faces pointed questions at Senate hearing

By Ely Portillo

PUBLISHED IN: BANKING

WASHINGTON Congressman Mel Watt defended himself at a Senate confirmation hearing Thursday from accusations he's unqualified to head the federal agency that oversees mortgage giants Fannie Mae and Freddie Mac, and signaled he supports moving the housing finance industry back toward the private sector.

And in a significant divergence from the policy of Fannie and Freddie's acting regulator, Watt also said he might consider reducing borrowers' principal on underwater mortgages.

President Barack Obama nominated Watt to head the Federal Housing Finance Agency in May. His pick has drawn sharp criticism from some Republicans, who favor keeping acting director Ed DeMarco.

Sen. Bob Corker, R-Tenn., told Watt he doesn't think the congressman is qualified to head the FHFA.

"I really thought this position, because of the nature of it, this was a job that needed a real technician," Corker said at the Senate Committee on Banking, Housing and Urban Affairs hearing. "If you were president, would you have selected you?"

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Watt responded with visible indignation. He said he believes that his years as a lawyer in private practice dealing with real estate and his service in the House on various financial committees make him qualified.

"A number of people throughout my life have questioned my qualifications to do things," said Watt. "I've had it questioned time after time after time. And so it's hurtful to have been doing ... 40-plus years ... and I'm the person designated out for 'He's not qualified.'

"I can get somebody to do the technician part," said Watt on of the job's more arcane aspects.

'Tin roof, holes in floor'

In his opening remarks, Watt emphasized his Charlotte roots – "out in the country, but with a Charlotte, North Carolina address." Watt reminisced about his family's small, rented house west of the airport, in an area known as Dixie.

"Tin roof, holes in the floor, no electricity and no inside plumbing," said Watt, 67. He fondly recalled the "family, food and the little country church that adjoined our front yard."

He said he views housing as a basic right. "Having a place to live is basic. That's true whether you rent or you own," he said.

Watt, a Democrat, represents North Carolina's 12th Congressional District, which includes much of Mecklenburg County and stretches past High Point. A UNC Chapel Hill graduate, he managed former Charlotte mayor Harvey Gantt's political campaigns and served in the state Senate before winning his congressional seat in 1992.

Senators from both parties praised Watt for his "American dream" life story. But he faced tough questions from Republican senators about his views on housing issues, including principal reduction. DeMarco has earned praise from Republicans and opposition from Democrats by resisting calls to have Fannie Mae and Freddie Mac implement principal reduction to help underwater borrowers – those who owe more than their homes are worth.

"Are you prepared to commit right now that you will not implement principal reduction?" asked Sen. Pat Toomey, R-Pa.

Watt said he expects to be asked to look at principal reduction again, and said he would study the issue and make a "responsible decision."

Watt said he would look at the issue from the perspective of protecting taxpayers from further losses as well as from the point of view of homeowners. He said fewer people are underwater now that housing values have rebounded.

Toomey also asked Watt about a 2003 statement he said the congressman made about private mortgage lenders, in which Watt said, "Most of them do not really give an (expletive deleted) about poor people and whether they have housing."

"Is that still your view?" asked Toomey. He questioned whether senators could trust Watt to lead a transition back to greater private-sector home lending.

Watt said the remarks were the product of predatory lending practices he had seen at the time.

"Loans were being made to people based on incentives for profit rather than on their ability to repay," Watt said. "They were taking advantage of them ... There are circumstances in which the profit motive overtakes anything else."

Sen. Mike Crapo of Idaho, the committee's ranking Republican, also questioned Watt's qualifications. He said the FHFA is a unique government agency that operates much like a private business and has tremendous sway over the U.S. mortgage market.

"The nominee must have the business strategies necessary to operate two multi-trillion dollar companies," said Crapo.

Crapo praised acting director DeMarco, calling him an "apolitical regulator." He said Watt's nomination comes as part of a campaign to remove DeMarco, who has headed the FHFA since 2009.

Winding down

If Watt is confirmed to head the FHFA, he could find himself in charge of phasing out Fannie Mae and Freddie Mac. The companies, which back the majority of U.S. mortgages, have been in government conservatorship since 2008. The federal government spent more than $187 billion to keep them from collapsing during the economic downturn.

A bipartisan group of senators introduced a bill this week that would wind down both government-sponsored mortgage entities over five years, along with the FHFA. A new federal mortgage insurance program would take their place and would play a much smaller role in the housing market.

Watt said Thursday that he supports that approach, and the mortgage system needs to move toward the private sector as much as possible.

“The goal is basically to put you out of a job, to eliminate Fannie and Freddie,” said Sen. Jack Reed, D-R.I.

“I’d be delighted to make that happen,” said Watt. “Putting me out of a job would mean we’ve gotten through this transition.”

But Watt emphasized that the future of mortgage lending is far from clear, and that he thinks Fannie and Freddie have a role to play for now.

“I’m hoping we can incentivize as much of this business going back to the private sector as possible,” said Watt.

After the hearing, Watt said he believed he had a good chance at confirmation but acknowledged there are still hurdles to clear.

“I’m hopeful that I will get confirmed, but that’s out of my hands,” said Watt.

Watt said the banking committee could vote on whether to move his nomination forward next month, in between the July 4 and August recesses. Obama’s first pick to fill the FHFA post, North Carolina Bank Commissioner Joe Smith, withdrew in 2011 after Republican opposition.

The hearing had lighter moments as well. Sen. Elizabeth Warren, D-Mass., said she thought Watt was a “strong choice” to lead the FHFA.

“If I could, I’d vote for Congressman Watt twice,” she said.

“You might need to do that,” quipped Watt, drawing laughs from the crowd.

The McClatchy Washington Bureau contributed

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[FULL COMMITTEE PRINT]

113TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT 113–

DEPARTMENTS OF TRANSPORTATION, AND HOUSING AND URBAN DEVELOPMENT, AND RELATED AGENCIES APPROPRIATIONS BILL, 2015

________ ____, 2014.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. LATHAM, from the Committee on Appropriations, submitted the following

R E P O R T

[To accompany H.R. ______]

The Committee on Appropriations submits the following report in explanation of the accompanying bill making appropriations for the Departments of Transportation, and Housing and Urban Development, and related agencies for the fiscal year ending September 30, 2015.

INDEX TO BILL AND REPORT

PROGRAM, PROJECT, AND ACTIVITY

During fiscal year 2015, for the purposes of the Balanced Budget and Emergency Deficit Control Act of 1985 (Public Law 99–177), as amended, with respect to appropriations contained in the accompanying bill, the terms "program, project, and activity" (PPA) shall mean any item for which a dollar amount is contained in appropriations acts (including joint resolutions providing continuing appropriations) and accompanying reports of the House and Senate Committees on Appropriations, or accompanying conference reports and joint explanatory statements of the committee of conference.

87–079

FEDERAL HOUSING ADMINISTRATION

MUTUAL MORTGAGE INSURANCE PROGRAM ACCOUNT

	Limitation of direct loans	Limitation of guaranteed loans	Administrative contract expenses
Appropriation, fiscal year 2014	$20,000,000	$400,000,000,000	$127,000,000
Budget request, fiscal year 2015	20,000,000	400,000,000,000	170,000,000
Recommended in the bill	20,000,000	400,000,000,000	130,000,000
Bill compared to:			
Appropriation, fiscal year 2014	– – –	– – –	+3,000,000
Budget request, fiscal year 2015	– – –	– – –	−40,000,000

The Federal Housing Administration's (FHA) mutual mortgage insurance program account includes the mutual mortgage insurance (MMI) and cooperative management housing insurance funds. This program account covers unsubsidized programs, primarily the single-family home mortgage program, which is the largest of all the FHA programs. These include the Condominium, Section 203(k) rehabilitation, and Home Equity Conversion Mortgage programs (HECM) and the multifamily Cooperative Management Housing Insurance Funds (CMHI). The cooperative housing insurance program provides mortgages for cooperative housing projects of more than five units that are occupied by members of a cooperative housing corporation.

COMMITTEE RECOMMENDATION

The Committee recommends the following limitations on loan commitments in the MMI program account: $400,000,000,000 for loan guarantees and $20,000,000 for direct loans. The recommendation also includes $130,000,000 for administrative contract expenses. The Committee continues language as requested, appropriating additional administrative expenses in certain circumstances.

The Committee's recommendation for administrative contract expenses is $40,000,000 below the budget request and $3,000,000 more than the level enacted in fiscal year 2014. The Committee denies any transfer of administrative contract expenses to the Management and Administration account.

The Committee includes bill language that lifts the statutory aggregate cap of 275,000 HECM loan guarantees in fiscal year 2015. The Committee has carried similar language in prior years.

Use of eminent domain to seize mortgages.—In its fiscal year 2014 report, the Committee directed HUD to submit a study by April 1, 2014 on the risk of using eminent domain on the housing market, including FHA primary and refinance market, the broader mortgage market, interest rates, homeownership, and affordability. The Committee has not received the report.

The Committee continues to be concerned about proposals for local governments to seize underwater performing mortgages and then refinance them into an FHA product. More than 20 municipalities have publically considered or are considering a plan using eminent domain and some have entered into an advisory services agreement with a firm for this purpose. Both an FHA official and the former head of the Federal Housing Financing Agency raised significant concerns about the proposal and its negative effect on private capital availability, mortgage credit, and its harm to investors and taxpayers.

The Committee includes a general provision that prohibits FHA from financing or refinancing a loan that has been seized using eminent domain.

Homeowners Armed With Knowledge.—The Committee has prohibited implementation of this new pilot program as it is dependent on implementation of a new fee on lenders. The Committee strongly encourages the authorizing committee of jurisdiction to consider the fee as proposed.

The Committee encourages HUD to coordinate with FEMA to identify eligible rehabilitation activities covered by HUD's Section 203(k) program that concurrently fulfill FEMA's hazard mitigation standards as reducing a structure's long-term flood risk, and mitigating potential damage from future disasters. The Committee directs HUD, with guidance from FEMA's Flood Insurance Advocate, to provide information on its Section 203(k) program website and other promotional materials that identify qualifying disaster mitigation rehabilitation options as another program benefit to homeowners.

GENERAL AND SPECIAL RISK PROGRAM ACCOUNT

	Limitations of direct loans	Limitations of guaranteed loans
Appropriation, fiscal year 2014	$20,000,000	$30,000,000,000
Budget request, fiscal year 2015	20,000,000	30,000,000,000
Recommended in the bill	20,000,000	30,000,000,000
Bill compared to:		
Appropriation, fiscal year 2014	– – –	– – –
Budget request, fiscal year 2015	– – –	– – –

The Federal Housing Administration's (FHA) general and special risk insurance (GI and SRI) program account includes 17 different programs administered by FHA. The GI fund includes a wide variety of insurance programs for special-purpose single and multifamily loans, including loans for property improvements, manufactured housing, multifamily rental housing, condominiums, housing for the elderly, hospitals, group practice facilities, and nursing homes. The SRI fund includes insurance programs for mortgages in older, declining urban areas that would not be otherwise eligible for insurance, mortgages with interest reduction payments, and mortgages for experimental housing and for high-risk mortgagors who would not normally be eligible for mortgage insurance without housing counseling.

COMMITTEE RECOMMENDATION

The Committee recommends a limitation on loan guarantees of $30,000,000,000, equal to the fiscal year 2014 level and the budget request. It includes a limitation of $20,000,000 for direct loans, which is the same as the fiscal year 2014 level and the budget request.

Section 232 long term care facility mortgage insurance program.—While the Committee appreciates HUD's willingness to amend some loan documents in FHA's section 232 program, all issues were not fully addressed. The Committee directs the Depart-

Exhibit 16

THE WALL STREET JOURNAL.
WSJ.com

August 8, 2013, 1:19 PM ET

Fannie, Freddie Regulator Weighs Action on Eminent Domain

ByNick Timiraos

The federal regulator of Fannie Mae and Freddie Mac said Thursday it would consider taking action to stop the companies from purchasing mortgages in municipalities that move ahead with plans to seize loans using eminent domain.

The announcement followed a lawsuit filed on behalf of a group of the nation's largest bondholders Wednesday against the city of Richmond, Calif., to prevent the loan restructuring program from moving forward. Fannie and Freddie are among the bondholders participating in the lawsuit, which was filed in federal court in San Francisco. Others include BlackRock Inc., DoubleLine Capital LP, and Pacific Investment Management Co.

Both volleys could serve as key tests for whether the city will move ahead with plans to forcibly buy mortgages from investors at prices potentially below the properties' current market values. The city wants to reduce loan balances resulting in lower mortgage debt for homeowners that owe more than their homes are worth in order to prevent foreclosures.

But investors have argued that the loan seizures would degrade the value of their investments and that they could introduce new uncertainties into mortgage markets.

In a statement, the Federal Housing Finance Agency said Thursday that it would consider additional lawsuits in any municipalities that approve the program or take steps to limit Fannie's and Freddie's ability to purchase loans in those communities.

FHFA said after a yearlong review of proposal, it had "serious concerns" with the program and that it had "determined such use presents a clear threat to the safe and sound operations" of Fannie and Freddie.

City leaders in Richmond, a working-class suburb of around 100,000 on the San Francisco Bay, began sending letters last week to mortgage companies seeking to purchase loans on 624 properties and threatening to force sales via eminent domain if investors resisted. The city is teaming up with Mortgage Resolution Partners, a private investment firm based in San Francisco, which was also named a defendant in the lawsuit.

The lawsuit alleges that the proposed use of eminent domain is unconstitutional because it benefits a small group of Richmond citizens at the expense of out-of-state investors, violating the law on interstate commerce. The lawsuit also argues that loans aren't being seized for a valid public purpose—a key criterion for a city that invokes eminent domain.

An MRP representative said it was confident its proposal is "entirely within the law." "No investor in any trust will be made worse off by the sale of any loan," said a company spokesman.

Eminent domain allows a government to acquire property by force that is then reused in a way considered good for the public—new housing or roads. Property owners are entitled to compensation, often determined by a court. Instead of acquiring houses, Richmond would buy the mortgages.

Legal advocates of the eminent-domain plan have said that constitutional challenges aren't likely to hold up in court. Supporters say their plan would help not only specific homeowners but also the broader community by reducing foreclosures that are hurting property values and eroding the tax base.

Of the loans that Richmond wants to buy, more than two-thirds, or 444, are current on their payments. Investors have said if the plan moves ahead lenders will require significant down payments or higher rates in communities where the threat of loan-seizures exists—much the way a sovereign-debt default can raise borrowing costs for a country.

Richmond Mayor Gayle McLaughlin said last week that threats by banks to withdraw lending in her city would amount to "redlining"—a term used for an allegation that banks have at times refused to lend money to certain communities where minorities live.

"It's not redlining," said Scott Simon, who retired in May as a managing director at Pimco. "If you were a lender, would you lend in an area that could literally say, 'Oh, I know you lent someone $100, but we are going to say you only get $50′?"

» **Print**

Freddie Mac may sue California city on eminent domain loan seizures

Wed, Aug 7 2013

By Margaret Chadbourn

WASHINGTON (Reuters) - Freddie Mac (FMCC.OB: Quote, Profile, Research, Stock Buzz), the government-owned mortgage finance company, on Wednesday said it is considering legal action against Richmond, California, if the city uses eminent domain to seize mortgages of local residents who owe more than their properties are worth in a bid to keep them in their homes.

The northern California city recently sent notice to the holders of more than 620 so-called underwater home mortgages in the city, asking them to sell the loans to the city. It would buy the mortgages for 80 percent of the fair value of the homes, write them down and help the homeowners refinance their loans.

"Our sense is that those so-called voluntarily loan sales would not be very voluntary," said Freddie Mac's general counsel William McDavid in a conference call with reporters to discuss the company's second-quarter financial results. "They're loan sales under pressure - in fact, under a threat of seizure by eminent domain. We would consider taking legal action."

Freddie Mac and its larger sister company, Fannie Mae, are some of the biggest buyers of private home-loan bonds. The two government-backed companies' finances would be affected if the eminent domain plan went forward and wiped out the worth of those bond investments.

"Fannie Mae and Freddie Mac are investors in these securities. This is an issue that we are discussing," said Denise Dunckel, a spokeswoman for the companies' regulator, the Federal Housing Finance Agency.

Both companies, operating under conservatorship since they were taken over by the government in 2008 during the financial crisis, would need the Federal Housing Finance Agency's permission to take legal action against the city of Richmond and possibly block the eminent domain seizures. The FHFA itself has previously raised concerns with an approach like Richmond's.

Using eminent domain in this fashion to force banks and other investors to sell mortgages is novel. Historically cities have used the power to force the sale of properties if they obstruct the construction of a project deemed beneficial to the wider community, such as a road or bridge.

Richmond is working with San Francisco-based Mortgage Resolution Partners, a private investment firm that has been pitching the plan to U.S. cities and municipalities for more than a year. MRP, raising money from private sources, would work with the city to obtain the financing to buy the distressed mortgages and restructure them. MRP would receive a fee for every troubled loan it restructured under the plan.

(Editing by Jan Paschal)

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Exhibit 17

David A. Lee, Chief FOIA Officer
FOIA Requester Service Center
400 7th Street, SW
8th Floor
Washington, DC 20024

October 1, 2013
Via Email and Certified Mail

Re: Freedom of Information Act Request
Expedited Processing Requested

Dear FOIA Officer,

The Center for Popular Democracy (CPD), Action United Pennsylvania, Alliance of Californians for Community Empowerment, Alliance for a Just Society, City Life, Colorado Foreclosure Resistance Coalition, Home Defenders League, Housing and Economic Rights Advocates, New Jersey Communities United, New York Communities for Change, and SEIU Healthcare Illinois-Indiana submit this expedited Freedom of Information Act (FOIA) request for records in the possession of the Federal Housing Finance Agency (FHFA). Requesters submit this request pursuant to the FOIA, 5 U.S.C. § 552, and implementing regulations 12 CFR §1202.1 *et seq*.

In the wake of the 2007 housing market collapse, economists from across the political spectrum identified mortgage debt as one of the prime obstacles to strong economic growth and recommended that the government implement a program of widespread mortgage principal reduction.[1] The Secretary of the Treasury has called for FHFA to adopt principal reduction[2] and

[1] Martin Feldstein, *How to Stop the Drop in Home Values*, NEW YORK TIMES, Oct. 12, 2011; Paul Krugman, *Fire Ed DeMarco*, NEW YORK TIMES, July 31, 2012.
[2] Letter from Secretary Geithner to Acting FHFA Director DeMarco on the Principal Reduction Alternative (PRA) Program, July 31, 2012.

the Congressional Budget Office has estimated that such a program could save tax payers $2.8 billion.[3] Despite this widespread consensus, the FHFA has refused to implement a principal reduction program on loans owned by Fannie Mae or Freddie Mac.

In the face of continued federal inaction and a continued foreclosure crisis that is crippling millions of families' budgets and the national economy, a set of municipalities have begun to explore local mortgage principal reduction solutions.[4]

The City of Richmond, CA has been one of the hardest hit municipalities in the housing crisis. Plummeting sale prices have resulted in a persistently high rate of underwater mortgages. Today, approximately 51 percent of mortgages are underwater in Richmond, and the average underwater homeowner owes 45 percent more than their home is worth.[5]

On July 31st, 2013, Richmond made offers to purchase 624 underwater mortgages from the current servicers and trustees in order to refinance the mortgages. The city offered prices per loan determined by an independent assessor to be the current fair market value for these loans. The city indicated its willingness to negotiate, in an effort to reach an agreed upon sale price. Richmond was also clear that it would consider using its eminent domain authority if the current loan holders refused to sell the loans voluntarily.

On September 10th, 2013, the Richmond City Council voted to move forward with the implementation of their Local Principal Reduction program, which may end up utilizing the municipal power of eminent domain to achieve widespread debt reduction.[6] Richmond's program seeks to purchase underwater mortgages at fair market prices and refinance these loans at affordable rates so that residents will be able to stay in their homes.

The FHFA recently issued a statement threatening to "initiate legal challenges" against Richmond or other cities that use eminent domain to reduce mortgage principal and to issue regulations prohibiting Fannie Mae and Freddie Mac from re-purchasing mortgages on homes in such cities.[7] Not only has the FHFA refused to implement principal reduction on mortgages that it owns, but it is now attempting to block the restructuring of loans owned by private label securities.

Records indicate that there has been sustained contact about this proposal between the private banking industry and the highest levels of FHFA leadership.[8] These communications, and the FHFA's recent efforts to block an eminent domain solution, have reinforced the public's concern that the FHFA is advancing the interests of Wall Street firms at the expense of the nation's homeowners.

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[3] Jacob Gaffney, Widespread principal reductions could save taxpayers $2.8 billion, HOUSING WIRE, May 1, 2013.
[4] Lawrence Summers, *Why the housing burden stalls America's economic recovery*, FINANCIAL TIMES, Oct. 23, 2011 ("Surely there is a strong case for experimentation with principal reduction strategies at the local level").
[5] Mike Konczal, *Is Richmond's mortgage seizure scheme even legal?*, WASHINGTON POST, Sep. 21, 2013 (concluding that Richmond's use of eminent domain authority is legal).
[6] Jim Christie, *California city backs plan to seize negative equity mortgages*, REUTERS, Sep. 11, 2013.
[7] Press Release, Federal Housing Finance Agency, *FHFA Statement on Eminent Domain*, Aug. 8, 2013.
[8] E-mail from Richard Dorfman, Managing Dir. and Head of Securitization, SIFMA, to Edward DeMarco, Acting Director, FHFA (July 10, 2012, 14:00) (on file).

There has been widespread interest in the continued foreclosure crisis, the debate over federal principal reduction proposals, and the efforts of municipalities to find solutions for their local community. Members of Congress have submitted legislation regarding local eminent domain solutions. Principal reduction was a central topic of the recent Senate Banking Committee hearing considering the nomination of Mel Watt to lead the FHFA.[9] Given this on-going public and Congressional debate, there is great urgency to inform the public about the reasons for the FHFA's objections to Richmond's local principal reduction plan. It is imperative that community members, local elected officials, federal officials, and the media immediately gain a full and complete understanding of the priorities and opinions of high-ranking FHFA officials, as expressed to members of the financial industry.

I. REQUEST FOR INFORMATION

We request disclosure of all records[10] in your possession created since January 1st, 2012, pertaining to the use of eminent domain to purchase mortgages.

In particular, we seek the following:

1) All documents related to any and all communications or meetings between FHFA leadership and representatives of the Securities Industry and Financial Markets Association (SIFMA), the American Securitization Forum (ASF), the American Bankers Association (ABA), and the Association of Institutional Investors (AII) pertaining to the use of eminent domain to purchase mortgages. This includes correspondence, phone messages, emails, calendar entries, and notes or memoranda describing any such meetings.
2) All documents related to any and all communications or meetings between FHFA leadership and representatives of the California Mortgage Bankers Association (MBA), the California Mortgage Bankers Association (MBA), the Investment Company Institute (ICI), the Financial Services Roundtable (FSR), the National Association of Home Builders, DoubleLine, BlackRock, and the Pacific Investment Management Company (PIMCO) pertaining to the use of eminent domain to purchase mortgages. This includes correspondence, phone messages, emails, calendar entries, and notes or memoranda describing any such meetings.
3) All documents related to any and all communications or meetings between FHFA leadership and representatives of Wells Fargo Bank, Deustche Bank, Bank of America, Ally Bank, Chase Bank, and Citigroup, pertaining to the use of eminent

[9] Ely Portillo, *Watt faces pointed questions at Senate hearing*, CHARLOTTE OBSERVER, June 27, 2013.
[10] The term "records" as used herein includes all records preserved in written or electronic form, including but not limited to: calendar entries, correspondence, documents, data, videotapes, audio tapes, emails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, studies, and text messages. To the extent that the agency chooses to redact identifying information of individuals, we request that individuals be identified with an alphanumeric code so that multiple records related to the same individual can be recognized as such.

domain to purchase mortgages. This includes correspondence, phone messages, emails, calendar entries, and notes or memoranda describing any such meetings.

4) All documents related to any and all communications or meetings between FHFA leadership and any other firms or trade groups, pertaining to the use of eminent domain to purchase mortgages. This includes correspondence, phone messages, emails, calendar entries, and notes or memoranda describing any such meetings.

5) All documents, including correspondence, phone messages, emails, calendar entries, and notes or memoranda of describing meetings, regarding the City of Richmond's offer to buy underwater mortgages from residents.

6) Any studies or empirical analyses of the impact of eminent domain or principal reduction proposals relied upon by FHFA in support of the assertions and positions set forth in the General Counsel's August 7th, 2013 Memorandum titled "Summary of Comments and Additional Analysis Regarding Input on Use of Eminent Domain to Restructure Mortgages" and the FHFA's August 8th, 2013 "Statement on Eminent Domain."

We request that you search the following FHFA offices and all relevant employees: Acting Director, Chief Operating Officer (COO), Deputy Director for Enterprise Regulation, Deputy Director for Housing Mission and Goals, Deputy Director for Supervision Policy and Support, Deputy Director for Office of Strategic Initiatives, and General Counsel.

II. REQUEST FOR EXPEDITED PROCESSING

We seek expedited processing. Title 5 U.S.C. §552(a)(6)(E) provides for expedited processing of requests for information in cases in which the person requesting the records demonstrates a compelling need. The Federal Housing Finance Authority regulations state that FOIA requests are entitled to expedited processing when information requested involves, "An urgency to inform the public about an actual or alleged Federal Government activity if you are a person primarily engaged in disseminating information;" or "A matter of widespread and exceptional media interest in which there exists possible questions about the Federal Government's integrity, affecting public confidence." 12 CFR §1202.10(a)(2,4).

Expedited processing is critical. As demonstrated by the news coverage cited below, there is widespread and exceptional media interest in the use of eminent domain to purchase and refinance mortgages. In addition, the practices of the FHFA and Acting Director Ed Demarco, and the documented close relationship between the FHFA and major Wall Street firms, raise important questions about the government's integrity, which would affect public confidence. Additionally, there is strong evidence that SIFMA has engaged in illegal redlining practices and that the FHFA's threats to stop repurchasing mortgages originating in Richmond violate fair housing law. Expedited processing should therefore be granted pursuant to 12 CFR §1202.10(a)(2) and 12 CFR §1202.10(a)(4).

1. There is widespread media interest and there exist possible questions about the Federal government's integrity

There can be no doubt that the housing crisis, the proliferation of underwater mortgages, the FHFA's response to the crisis, and the proposal that municipalities use eminent domain to achieve widespread principal reduction have all received tremendous media attention. The subject has received front-page, "above the fold" coverage in The New York Times, followed by a flurry of coverage in other national outlets.[11]

In addition, the FHFA's actions and the actions of Ed DeMarco raise questions about the Federal Government's integrity, affecting public confidence. FHFA took the remarkable step of threatening to initiate legal action against any jurisdiction that seeks to protect homeowners by sanctioning the use of eminent domain to restructure mortgages.[12] While this position might benefit particular firms in the financial industry, it seems starkly at odds with the agency's "obligation[]" to "assist[] homeowners in trouble,"[13] and may violate federal fair lending law and overstep FHFA's statutory authority.

a. *Existing records of correspondence between FHFA and SIFMA*

There are serious questions as to whether the FHFA as an agency and DeMarco as Acting Director have stepped outside the bounds of their mandated roles. The FHFA has released records of sustained e-mail contact between Ed DeMarco, Acting Director of FHFA, and Richard Dorfman, a Managing Director of the Securities Industry and Financial Markets Association (SIFMA), regarding the prospect of local eminent domain solutions[14]

FHFA's role as an independent and regulatory body is potentially compromised by DeMarco's intimate relationship with those within the private banking industry. His tenure at FHFA has been marked by continued criticism of his close relationship to private banks and his equally absent relationship to struggling homeowners. His refusal to support debt reduction has resulted in public calls for his removal.[15]

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[11] See, e.g., Shaila Dewan, *A City Invokes Seizure Laws to Save Homes*, NY TIMES, July 29, 2013; Alejandro Lazo, *Richmond adopts eminent domain mortgage plan*, LA TIMES, July 30, 2013; Peter Dreier, *Wall Street Lobbyists Nervous As Cities Use Eminent Domain to Protect Homeowners,* THE HUFFINGTON POST, July 30, 2013; *Richmond Threatens Eminent Domain To Address Foreclosure Crisis*, CBS SAN FRANCISCO, July 30, 2013; Dan Levy and Jody Shenn, *Richmond Escalates Eminent Domain Plan With Loan Offers*, BLOOMBERG NEWS, July 30, 2013; Kate Berry, *Calif. City Threatens to Use Eminent Domain with Underwater Mortgages*, AMERICAN BANKER, July 30, 2013; Carolyn Said, *Richmond's pioneering eminent-domain threat*, SAN FRANCISCO CHRONICLE, July 31, 2013; Nick Timiraos, *Fannie, Freddie Regulator Threatens Action on Eminent Domain*, WALL ST. J., Aug. 8, 2013; Margaret Chadbourn, *Freddie Mac may sue California city on eminent domain loan seizures*, REUTERS, Aug. 7, 2013; Ilyce Glink, *Millions of homeowners still underwater, despite price gains,* CBS NEWS, Sep. 12, 2013.

[12] *See* FHFA Press Release, *supra* note 7.

[13] FHFA Report to Congress 2012, at page i, available at http://www.fhfa.gov/webfiles/25320/FHFA2012_AnnualReport.pdf.

[14] E-mail, *supra* note 8.

[15] See e.g. Paul Krugman, *Debt, Depression, DeMarco*, NYTIMES, Aug. 2, 2012; Bonnie Kavoussi, *Van Jones: Firing FHFA Chief Ed DeMarco Could Be 'The Biggest Stimulus Program In America*', HUFFINGTON POST, Aug. 9, 2013.

The requested records will provide substantial information that will speak to DeMarco's ability to lead the agency, the foundation for the FHFA's current position regarding the use of eminent domain, and the appropriate position for the agency to take in the future.

b. *Statutory Authority of the FHFA*

In addition, the FHFA has potentially violated federal fair lending law and overstepped its statutory authority by attempting to limit or restrict purchases of mortgages by Fannie Mae and Freddie Mac in any jurisdiction that utilizes eminent domain to seize privately held loans.

On August 8th, 2013, just one day after suit was filed against Richmond, the FHFA released a statement citing "serious concerns on the use of eminent domain to restructure existing financial contracts."[16]

The FHFA also listed a number of possible sanctions and/or legal actions that might be initiated against municipalities or states that implemented such a policy. The FHFA indicated that it "may take any of the following steps: initiate legal challenges to any local or state action that sanctions the use of eminent domain to restructure mortgage loan contracts that affect FHFA's regulated entities; act by order or by regulation to direct the regulated entities to limit, restrict or cease business activities within the jurisdiction of any state or local authority employing eminent domain to restructure mortgage loan contracts; or take such other actions as may be appropriate to respond to market uncertainty or increased costs created by any movement to put in place such programs."[17]

There is a strong legal argument that the actions listed above would both violate federal fair lending law and overstep FHFA's statutory authority. Furthermore, the threatened actions compromise the FHFA's regulatory independence and increase costs and risks for the Freddie Mac and Fannie Mae, violating the FHFA's mandate to conserve those assets for the benefit of American taxpayers.

2. <u>The urgency to inform the public is high</u>

Expedited processing should be granted for the independent reason that there is great urgency to inform the public about these issues and requesters are primarily engaged in disseminating information. The legality and wisdom of local eminent domain solutions is currently being debated in Congress, state legislatures, City Councils, and courtrooms all over the country. The information sought in this request would contribute to the current public and legislative debate.

a. *Federal legislation has been introduced that, if successful, would effectively destroy this program.*

The influence of the private banking industry is manifested in multiple legislative initiatives that, if successful, would restrict municipalities' constitutional power to use eminent domain to spur

[16] FHFA Press Release, *supra* note 7.
[17] *Id.*

economic development and eliminate blight and would effectively eliminate the possibility of mortgage relief for countless homeowners.

On June 27th, 2013, there was an attempt in the U.S. Senate to attach language to the federal HUD appropriations bill that would block loans obtained through eminent domain from refinancing into an FHA product.[18]

On July 18th, 2013, U.S. Representative John Campbell (CA-45), introduced a bill that that would prohibit the FHA and the FHFA from making, guaranteeing, or insuring a mortgage in any community that has used eminent domain to purchase mortgages.[19] The legislation has the potential to halt proposals like Richmond's, despite the countless legal and economic experts who have testified to its legality and touted its ability to deliver widespread economic benefits.

Because Representative Campbell's bill has already been introduced, the legislative debate is ongoing and the requested information is extremely time sensitive.

b. Representative Keith Ellison has also circulated a letter of support for this utilization of eminent domain.

On August 9th, 2013, U.S. Representative Keith Ellison (MN-5) released a statement explaining that "FHFA's decision to support the lawsuit against Richmond hurts struggling homeowners in a city overwhelmed by high levels of delinquencies and foreclosures."[20] He and U.S. Representative Raúl Grijalva (AZ-3) are currently circulating a "Dear Colleague" letter to oppose discrimination in credit access for mortgages modified by eminent domain.

c. Lawsuits have been filed against Richmond and Las Vegas.

On June 19th, 2013, the city of North Las Vegas entered into an advisory agreement with Mortgage Resolution Partners, which provides private funding for local governments interested in using the power of eminent domain to purchase underwater mortgages. On June 28th, 2013, a lawsuit was filed against the City of North Las Vegas because members of its city council publicly considered the use eminent domain to acquire loans.[21]

On July 31st, 2013, the City of Richmond, CA made offers to purchase 624 underwater mortgages from the current servicers and trustees in order to refinance the mortgages. On September 11th, 2013, the Richmond City Council voted to move forward with the use of eminent domain to provide relief to struggling homeowners.

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[18] *Senate and House Committees Release Reports re Eminent Domain*, AMERICAN SECURITIZATION FORUM, July 11, 2013 at http://www.americansecuritization.com/content.aspx?id=9593#.UkbtNGRgawF.
[19] Heide Malhotra, *California City Invokes Eminent Domain on Underwater Mortgages*, EPOCH TIMES, Sep. 17, 2013
[20] Press Release, *Rep. Ellison Statement on the Lawsuit Filed Against the City of Richmond, CA*, Aug. 9, 2013.
[21] Jon Ralson, *Federal lawsuit filed to block eminent domain scheme in North Las Vegas*, RALSTON REPORTS, June 28, 2013.

On August 7th, 2013, Wells Fargo and Deutsche Bank filed a federal lawsuit against the City of Richmond in an attempt to block the City from this contemplated use of eminent domain. While the lawsuit was dismissed for ripeness in early September, it will likely be re-filed and fully adjudicated when Richmond implements its plan.[22]

d. The FHFA has taken steps to limit or restrict purchases of mortgages by Fannie Mae and Freddie Mac in any jurisdiction that utilizes eminent domain to seize privately held loans.

As stated above, on August 8th, 2013, just one day after the banks' suit was filed against Richmond, the FHFA released a statement citing "serious concerns on the use of eminent domain to restructure existing financial contracts." The FHFA also listed a number of possible sanctions and legal actions that might be initiated against municipalities or states that implemented such a policy.

e. The nomination of Mel Watt to replace FHFA Acting Director Ed DeMarco is currently pending

Who is at the helm of FHFA will have a critical impact on the success of future eminent domain proposals in municipalities. Information about the DeMarco's administration's communications with the banking industry regarding this policy issue is an incredibly time-sensitive given this pending nomination.

f. Requestors are persons primarily engaged in disseminating information

The Center for Popular Democracy, Action United Pennsylvania, Alliance of Californians for Community Empowerment, Alliance for a Just Society, City Life, Colorado Foreclosure Resistance Coalition, Home Defenders League, New Jersey Communities United, New York Communities for Change, and SEIU Healthcare Illinois-Indiana are organizations focused on ensuring and protecting the public's legal, constitutional, and civil rights. Together, these organizations have extensive ties to communities across the country, including in Richmond, CA. These organizations work on behalf of – and serve as a resource to— struggling homeowners, and have an established responsibility to provide all available information and assistance to those people directly or indirectly affected by the mortgage crisis.

* * *

In short, expedited processing is warranted for two independent reasons. First, there is widespread media interest in the topic of using eminent domain for principal mortgage reduction, and serious questions about the Federal Government's integrity in threatening to take legal action against jurisdictions that seek to protect homeowners through eminent domain. *See* 12 CFR §1202.10(a)(4). Second, there are on-going public and Congressional debates on this topic, as evidenced by, among other things, recently introduced legislation and the pending nomination of a candidate to serve as head of FHFA. The information sought in this request would shed light on

[22] Robert Rogers, *Investors' suit to block Richmond eminent domain plan dismissed in federal court*, CONTRA COSTA TIMES, Sep. 17, 2013.

these debates and must be disclosed now to have any relevance to the debates. There is therefore urgency to this request, which is made by requesters primarily engaged in the dissemination of information.

III. REQUEST FOR WAIVER OF PROCESSING FEES

We request a waiver of process fees. Such a waiver is appropriate for two reasons.

First, the requesters are “representative[s] of the news media.” Fees associated with the processing of this request should therefore be “limited to reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(II).

The communications departments of all of the requesters regularly publish newsletters, news briefings, right to know materials, and other materials that are disseminated to the public. Their material is widely available to everyone, including tax-exempt organizations, not-for-profit groups, and the public, for no cost. The requesting organizations regularly communicate about housing policy and news to their email listservs of over 100,000 members. The websites of the requesting organizations feature in depth information about housing policy and mortgage principal reduction. Members and staff employees of the requesting organizations frequently speak in digital and print media and make frequent public presentations at meetings and events. Due to these extensive publication activities, the requesting organizations are “representative[s] of the news media” under the FOIA and agency regulations.[23]

Second, a fee waiver for duplication costs should be granted for the independent reason that disclosure of the requested information is in the public interest. See 5 U.S.C. § 552(a)(4(ii)(II)-(iii). Disclosure will further public understanding of government conduct, in particular the FHFA's policies, attitudes, and statements regarding principal reduction. The Center for Popular Democracy’s communications department is a division of a nonprofit 501(c)(3) organization and is a “representative of the news media.” It and the other requesting organizations are well situated to disseminate information gained through this request to the public, to affected communities, and to political and religious organizations.

If the fee waiver is denied, the requesters are prepared to pay fees up to $500 and request to be informed of further fees that may be charged, but reserve the right to appeal a denial of fee waivers.

* * *

We seek the determination of this request for expedited processing within 10 calendar days and the determination of this request for documents within 20 days. *See* 28 CFR §16.5(d)(4); 5 U.S.C. §552(a)(6)(A)(i).

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[23] Courts have found that organizations with missions similar to those of the requesting organizations are "primarily engaged in disseminating information." *See, e.g., Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005).

If this request for information is denied in whole or in part, we ask that you justify all deletions by reference to specific provisions of the Freedom of Information Act. We expect you to release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or deny a waiver of fees.

Thank you for your prompt attention to this matter. Please furnish all applicable records to Josie Duffy, Center for Popular Democracy, 802 Kent Ave., Brooklyn, NY, 11233 or via email at jduffy@populardemocracy.org.

I affirm that the information provided supporting the request for expedited processing and the fee waiver is true and correct to the best of my knowledge and belief.

Sincerely,

Josie Duffy

on behalf of

The Center for Popular Democracy
Action United Pennsylvania
Alliance of Californians for Community Empowerment
Alliance for a Just Society
City Life Vida Urbana
Colorado Foreclosure Resistance Coalition
Home Defenders League
Housing and Economic Rights Advocates
New Jersey Communities United
New York Communities for Change
SEIU Healthcare Illinois-Indiana

Exhibit 18

Federal Housing Finance Agency

Constitution Center
400 7th Street, S.W.
Washington, D.C. 20024
Telephone: (202) 649-3800
Facsimile: (202) 649-1071
www.fhfa.gov

December 30, 2013

VIA UPS

Ms. Josie H. Duffy
Center for Popular Democracy
802 Kent Avenue
Brooklyn, NY 11205

Re: FHFA FOIA No.: 2014-FOIA-001

Dear Ms. Duffy:

This letter is in response to your Freedom of Information Act (FOIA) request, dated October 1, 2013. Your request, FHFA FOIA request number 2014-FOIA-001, was processed in accordance with the FOIA (5 U.S.C. § 552) and FHFA's FOIA regulation (12 CFR Part 1202).

You requested the following documents:

> . . . all records in your possession created since January 1, 2012, pertaining to the use of eminent domain to purchase mortgages. In particular, we seek the following:
>
> 1) All documents related to any and all communications or meetings between FHFA leadership and representatives of the Securities Industry and Financial Markets Association (SIFMA), the American Securitization Forum (ASF), the American Bankers Association (ABA), and the Association of Institutional Investors (AII) pertaining to the use of eminent domain to purchase mortgages. This includes correspondence, phone messages, emails, calendar entries, and notes or memoranda describing any such meetings.
>
> 2) All documents related to any and all communications or meetings between FHFA leadership and representatives of the California Mortgage Bankers Association (MBA), the California Mortgage Bankers Association (MBA), the Investment Company Institute (ICI), the Financial Services Roundtable (FSR), the National Association of Home Builders, DoubleLine, BlackRock, and the Pacific Investment Management Company (PIMCO) pertaining to the use of eminent domain to purchase mortgages. This includes correspondence, phone messages, emails, calendar entries, and notes or memoranda describing any such meetings.
>
> 3) All documents related to any and all communications or meetings between FHFA leadership and representatives of Wells Fargo Bank, Deustche Bank,

Bank of America, Ally Bank, Chase Bank, and Citigroup, pertaining to the use of eminent domain to purchase mortgages. This includes correspondence, phone messages, emails, calendar entries, and notes or memoranda describing any such meetings.

4) All documents related to any and all communications or meetings between FHFA leadership and any other firms or trade groups, pertaining to the use of eminent domain to purchase mortgages. This includes correspondence, phone messages, emails, calendar entries, and notes or memoranda describing any such meetings.

5) All documents, including correspondence, phone messages, emails, calendar entries, and notes or memoranda of describing meetings, regarding the City of Richmond's offer to buy underwater mortgages from residents.

6) Any studies or empirical analyses of the impact of eminent domain or principal reduction proposals relied upon by FHFA in support of the assertions and positions set forth in the General Counsel's August 7th, 2013 Memorandum titled "Summary of Comments and Additional Analysis Regarding Input on Use of Eminent Domain to Restructure Mortgages" and the FHFA's August 8th, 2013 "Statement on Eminent Domain."

We request that you search the following FHFA offices and all relevant employees: Acting Director, Chief Operating Officer (COO), Deputy Director for Enterprise Regulation, Deputy Director for Housing Mission and Goals, Deputy Director for Supervision Policy and Support, Deputy Director for Office of Strategic Initiatives, and General Counsel.

A search of FHFA's files and records located material responsive to your request. Details regarding FHFA's response to each requested item (1-6) are described below:

In response to numbers 1-4 of your request, FHFA located 465 pages, consisting of emails and attachments, pertaining to the use of eminent domain. The documents are being partially released. Information is redacted pursuant to exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552 (b)(5), (pertaining to the deliberative process); and exemption 6 (5 U.S.C. §552(b)(6)), (the disclosure of information (*i.e.*, email addresses, telephone numbers, *etc*.) "would constitute an unwarranted invasion of personal privacy.").

In response to number 5 of your request, FHFA did not locate any responsive documents.

In response to number 6 of your request, FHFA located documents which FHFA's General Counsel relied upon to support the General Counsel's August 7, 2013 Memorandum titled "Summary of Comments and Additional Analysis Regarding Input on Use of Eminent Domain to Restructure Mortgages" and the FHFA's August 8, 2013 "Statement on Eminent Domain." The documents are being partially released as set forth below:

Document Description	FOIA Exemption(s) Applied
Public comments, in response to FHFA's August 6, 2012 notice on the "Use of Eminent Domain To Restructure Performing Loan," – 532 pages – released in full	N/A
FHFA's General Counsel's papers and notes – withheld in full	Exemption 5 (5 U.S.C. §552(b)(5)), pertaining to the deliberative process and attorney work product.

A copy of the releasable material, totaling 997 pages, is on the enclosed CD.

This is the final decision on your FOIA request. If you wish to appeal any aspect of FHFA's decision on your request, you must forward within 30 days:

- A copy of your initial request;
- A copy of this letter; and
- A statement of the circumstances, reasons, or arguments for seeking disclosure of the affected record(s).

The appeal must be sent either electronically through FHFA's public access link by clicking here https://publicaccesslink.fhfa.gov/palMain.aspx or by mailing to the "FOIA Appeals Officer" at the above address. The subject line, or the envelope and the letter of appeal, must be clearly marked "FOIA Appeal." Please note that all mail sent to the FHFA via the United States Postal Service is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.

Your FOIA request is releasable to the public under subsequent FOIA requests. In responding to these requests, FHFA does not release personal information, such as home or email addresses and home or mobile telephone numbers which are protected from disclosure under FOIA Exemption 6 (5 U.S.C. § 552(b)(6)).

All fees have been waived.

If you have any questions regarding the processing of your request, please contact us at foia@fhfa.gov or 202-649-3803.

Sincerely,

S. Easter

Stacy J. Easter
FOIA/Privacy Officer

Enclosure (CD)

1. **Ensure there are no other shipping or tracking labels attached to your package.** Select the Print button on the print dialog box that appears. Note: If your browser does not support this function select Print from the File menu to print the label.

2. **Fold the printed sheet containing the label at the line so that the entire shipping label is visible. Place the label on a single side of the package and cover it completely with clear plastic shipping tape. Do not cover any seams or closures on the package with the label.** Place the label in a UPS Shipping Pouch. If you do not have a pouch, affix the folded label using clear plastic shipping tape over the entire label.

3. **GETTING YOUR SHIPMENT TO UPS**
   UPS locations include the UPS Store®, UPS drop boxes, UPS customer centers, authorized retail outlets and UPS drivers.
   Schedule a same day or future day Pickup to have a UPS driver pickup all your CampusShip packages.
   Hand the package to any UPS driver in your area.
   Take your package to any location of The UPS Store®, UPS Drop Box, UPS Customer Center, UPS Alliances (Office Depot® or Staples®) or Authorized Shipping Outlet near you. Items sent via UPS Return Services(SM) (including via Ground) are also accepted at Drop Boxes. To find the location nearest you, please visit the Resources area of CampusShip and select UPS Locations.

   Customers with a Daily Pickup
   Your driver will pickup your shipment(s) as usual.

FOLD HERE

NICHELLE JETER
202-649-3093
FEDERAL HOUSING FINANCE AGENCY
400 7TH SW ST
WASHINGTON DC 20024

1 LBS PAK 1 OF 1

SHIP TO:
JOSIE H. DUFFY
CENTER FOR POPULAR DEMOCRACY
802 KENT AVENUE
BROOKLYN NY 11205-1518

NY 111 9-10

UPS NEXT DAY AIR 1

TRACKING #: 1Z 2A7 04E 01 9449 9958

BILLING: P/P

CS 16.0.32. WNTNV50 45.0A 10/2013

Exhibit 19

ACLU
AMERICAN CIVIL LIBERTIES UNION of NORTHERN CALIFORNIA
FOUNDATION

January 21, 2014

Via electronic and United States mail

Rebecca Falk, Assistant United States Attorney
Assistant U.S. Attorney
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102
Email: Rebecca.Falk@usdoj.gov

Re: *ACCE, et al. v FHFA,* Case No. 3:13-cv-05618-KAW
FHFA FOIA No. 2014-FOIA-001

Dear Ms. Falk,

Thank you for taking the time to speak with me on the telephone today. We are pleased that the agency produced responsive records shortly after we filed our complaint in this matter. As I outlined on our call, however, we have concerns with respect to apparent gaps in the document production and request that you conduct a further search. In addition, some information has been withheld pursuant to FOIA's Exemptions 5 and 6, and also on the grounds that it is "non-responsive." We do not believe that these redactions are appropriate and ask that the agency disclose the information. I am setting forth in further detail our areas of concern. As we discussed, please also advise me if your client takes the position that a formal "administrative appeal" submitted to its FOIA Appeals letter is necessary, given that administrative appeals are a prerequisite to suit but that in this instance, litigation has already commenced. I request a response on the administrative appeal issue by January 27, 2014.

I. Adequacy of Search

A. Legal Standard

FOIA imposes on the agency a duty to "conduct[] a search reasonably calculated to uncover all relevant documents." *Weisberg v. United States Dep't of Justice,* 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see also Zemansky v. United States EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (adopting *Weisberg* standard). A search is "inadequate" where "the record itself reveals 'positive indications of overlooked materials.'" *Valencia-Lucena v. United States Coast Guard,* 180 F.3d 321, 327 (D.C. Cir. 1999) (citation omitted). Thus, courts have held that the government cannot prevail on summary judgment where the requester independently confirms the existence of responsive documents that the agency failed to produce. *See, e.g., Krikorian v. Dept. of State*, 984 F.2d 461, 468 (D.C. Cir. 1993) (requester "found Department documents relevant to his request … that the Department had evidently failed to locate"); *Founding Church of Scientology of Washington, D.C., Inc. v. NSA*, 610 F.2d 824, 834-35 (D.C. Cir. 1979) (requester learned, through separate FOIA litigation against other agencies, of existence of responsive documents that agency failed to produce); *Oglesby v. United States Dept. of Army,* 79 F.3d 1172, 1185 (D.C. Cir. 1996) (record suggested that another FOIA requester had obtained documents from agency). In addition, failure to search an office "likely to turn up the information requested" renders a search "deficient." *Valencia-Lucena,* 180 F.3d at 326, 327 (agency's search inadequate where it failed to search records in Georgia) (internal quotation marks, citation omitted); *see also Krikorian*, 984 F.2d at 468-69 (D.C. Cir. 1993) (reversing summary judgment for agency where it had not searched offices with potentially responsive documents). Similarly, an agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998) (internal quotation marks, citation omitted).

B. Documents produced to date

The agency located 465 pages of emails and attachments pertaining to the use of eminent domain and produced them as Part I of its response. Information on some of the pages was redacted. Part II consisted of 523 pages of public comments received in response to the FHFA's August 6, 2012 Notice 2012-N-11 ("Use of Eminent Domain to Restructure Performing Loans"). The FHFA also identified but withheld in full an unspecified number of documents constituting the General counsel's "papers and notes," pursuant to Exemption 5 for deliberative process and attorney work product documents. *See* Dec. 30, 2013 letter from Stacy Easter to Josie Duffy (hereinafter "Dec. 30, 2013 letter").

At the outset, we note that some of the FOIA requesters in this matter submitted an earlier, similar FOIA, dated August 30, 2013, and which is not the subject of this litigation. The agency provided documents responsive to that request on December 17, 2013. Part I of the documents the agency provided in response to the instant request is virtually identical to the December 17, 2013 production in response to the August 30, 2013 initial FOIA. But the scope of the initial FOIA is much narrower, both in date range and in the specific topics about which information is sought. To the extent that the agency relied on the search conducted in response to the August 30, 2013 FOIA, and then also produced the public comments in response to the agency's August 6, 2012 notice, we contend that the agency's search would not be reasonable. This is so because the two FOIAs seek different documents. A search responsive to the narrower August 30, 2013 is not reasonably calculated to produce all documents responsive to the separate, broader request that is the subject of this litigation.

C. Gaps in production

There are several apparent gaps in the production.

Date range. Our FOIA request seeks documents created since January 1, 2012. In response to Items 1 through 4 of our request, the agency produced the documents in Part I. *See* Dec. 30, 2013 letter. But the emails and attachments all date from 2013. We are concerned that the agency has not searched for the full date range sought in our request.

Offices searched. Our FOIA request (Items 1 through 4) seeks "[a]ll documents" pertaining to communications or meetings between FHFA leadership and representatives of various firms or trade groups pertaining to the use of eminent domain. We expressly requested that you search the following FHFA offices and all relevant employees: Acting Director, Chief Operating Officer, Deputy Director for Enterprise Regulation, Deputy Director for Housing Mission and Goals, Deputy Director for Supervision Policy and Support, Deputy Director for Office of Strategic Initiatives, and General Counsel. These are all offices likely to be involved in formulating policy relating to eminent domain and thus likely to be contacted by or communicate with firms or trade groups interested in this matter. As noted below, we also have positive indications that some of these offices were in fact in communication with firms or trade groups about this matter. The documents produced by the agency, however, consist almost exclusively of correspondence to Alfred Pollard, General Counsel. We are therefore concerned that the agency has failed to search all of these other, also relevant offices. *See Valencia-Lucena,* 180 F.3d at 326, 327 (search "deficient" where agency fails to search office "likely to turn up" responsive records); *Krikorian*, 984 F.2d at 468-69 (same). We therefore request that you search each of the offices mentioned above as well as any other offices likely to contain responsive records, or at a minimum explain to us why you believe each such office is *not* likely to contain responsive records.

Types of documents/Records systems searched. We are also concerned that Part I of the agency's response includes only emails and attachments thereto. But our request is not limited to emails and instead expressly seeks "[a]ll documents," including "correspondence, phone messages, ... calendar entries, and notes or memoranda," relating to "communications or meetings between FHFA leadership" and firms or trade groups about such meetings.

The documents produced by the agency confirm that such in-person meetings did indeed occur. A July 24, 2013 email from Chris Killian, managing director of the Securities Industry and Financial Markets Association ("SIFMA"), to FHFA General Counsel Pollard (page 432 of Part I), states: "Good to see you the other day and thanks for coming up to talk to our members. I hope it was useful for you; it was for us." An April 18, 2013 email from Mr. Killian to Mr. Pollard (page 415 of the pdf file) states: "Hi Alfred, Good to see you the other week." In-person meetings undeniably occurred and it is likely that calendar entries or other documents related to such in-person meetings exist. We are concerned, based on the fact that the agency has only produced emails, that it only searched recordkeeping systems for emails. *See Campbell*, 164 F.3d at 28 (agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested") (internal quotation marks, citation omitted). We therefore request that, consistent with our FOIA request, you search for and produce calendar entries, notes and memoranda, and any other records of such meetings.

Further, there is evidence of phone communications. For example, a June 11, 2013 email from General Counsel Pollard to Chris Killian of SIFMA (which appears at page 458 of the pdf file) states "Will call," which presumably signified Mr. Pollard's intent to place a telephone call to Mr. Killian. We requested all documents relating to communications between FHFA leadership and firms or trade groups about eminent domain. The agency should therefore produce phone messages as well as telephone records of calls made between Mr. Pollard, and other agency staff, and firms or trade groups. No such documents, however, have been produced to date and we are concerned that the agency has not even searched for them.

In addition, of the emails produced, there only appear to be emails sent to FHFA personnel and very few authored by FHFA personnel. We are concerned that the search may have somehow excluded emails authored by the agency.

Item 5. The agency contends that it did not locate any responsive documents in response to Item 5 of our request for documents regarding the City of Richmond's offer to buy underwater mortgages. The agency clearly has documents responsive to this request, as evidenced by the documents it actually produced. See for example the emails produced in Part I and beginning at pages 1, 34, 42, and 411. We are concerned that the agency's statement that it lacks documents responsive to this request – when that is plainly not the case – indicates that it somehow misconstrued the plain language of the request and as a result did not search in all locations likely to turn up responsive documents.

Positive indications of overlooked materials. Compounding our concerns about the inadequacy of the present search, we are aware of numerous documents that are responsive to this request but that the agency has not produced. *Valencia-Lucena,* 180 F.3d at 327 (search is "inadequate" where "the record itself reveals 'positive indications of overlooked materials'") (citation omitted). For example, in response to a separate FOIA request, dated July 18, 2012 to the FHFA (FHFA FOIA Request No. 2012-FOIA-127), the agency produced 19 documents and withheld some information pursuant to Exemptions 4, 5, and 6. The July 18, 2012 request seeks "correspondence, phone messages, emails, calendars and any other items related to any and all communications or meetings with … trade groups, advisors, or private parties relating to the acquisition of mortgages through the use of eminent domain in San Bernardino County, California or elsewhere." For your convenience, a copy of the agency's response letter is attached. All of the documents produced in response to FOIA Request No. 2012-FOIA-127 are responsive to our FOIA request, but almost none has been produced in response to us.

In addition, the production in response to the related but narrower August 30, 2013 FOIA request discussed above (*see supra* Part I-B) was 467 pages. Part 1 of the production in response to the instant, broader FOIA request was inexplicably shorter, 465 pages.

These discrepancies confirm that the search conducted to date in response to our FOIA request has not yielded a complete universe of documents.

Information about search. For the foregoing reasons, we have concrete reasons to believe that the search conducted to date was not reasonably calculated to lead to the discovery of all relevant documents. We therefore request that you supplement your search. We also request that you provide us with information about the search conducted to date (such as a description of the agency's recordkeeping systems, the systems searched, and the search terms used), so that we can provide more informed feedback on the adequacy of the agency's search.

II. Information Withheld

We also have concerns about information that the agency has withheld. (Of course, a further search may yield additional responsive documents, as to which the agency may wish to assert exemptions and we reserve the right to challenge any such exemptions after they are asserted.)

Exemption 5. The agency asserts Exemption 5 (deliberative process) for some of the information responsive to Items 1 through 4, and Exemption 5 (both deliberative process and attorney work product) for information responsive to Item 6.

With respect to the documents responsive to Items 1 through 4, Exemption 5 does not apply for the following reasons. First, the documents sought here pertain to communications between the agency and outside non-governmental actors. To be covered by Exemption 5, the document must be "inter-agency or intra-agency." 5 U.S.C. §552(b)(5). To be sure, there may be limited situations in which this exemption covers communications between an outside consultant retained by an agency, in particular, in circumstances where "the consultant does not represent an interest of its own, or the interest of any other client," and instead simply "advises the agency that hires it." *Dep't of Interior v. Klamath Water Users Protective Assn.*, 432 U.S. 1, 11 (2001). But here, by contrast, the financial industry trade groups whose communications with the FHFA are at issue have not been retained by FHFA as consultants and in any event they were communicating with FHFA to represent their own interests, in opposition to eminent domain proposals. Exemption 5 is therefore inapplicable to documents pertaining to their communications or meetings with the agency.

Second, the agency has publicly asserted its position on eminent domain in an August 7, 2013 memorandum by the General Counsel and an August 8, 2013 "Statement on Eminent Domain" by the agency. To the extent these documents reflect the agency's reasons for its public position, they are no longer subject to the deliberative process privilege, pursuant to the doctrine of incorporation. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975).

Third, even assuming the deliberative process privilege applies, the agency must segregate factual from opinion materials. *See Pacific Fisheries, Inc. v. United States,* 539 F.3d 1143, 1150 (9th Cir. 2008).

With respect to the documents FHFA's General Counsel's papers and notes, which have been withheld in full, Exemption 5 similarly does not apply. The deliberative process privilege does not justify the wholesale withholding of these documents, under the doctrine of incorporation, and because the agency must segregate fact and opinion materials. The attorney work product privilege is similarly inapplicable because of the "working law" exception to Exemption 5. *Sears*, 421 U.S. at 149. As the Supreme Court has explained, "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted." *Id.* at 152. As a result, General Counsel Pollard's papers and notes, to the extent they reflect "the reasons which … supply the basis for" the agency's adoption of its public position on eminent domain, "constitute the 'working law' of the agency" and must be disclosed. *Id.* at 152-53.

Exemption 6. The agency has also asserted Exemption 6 for personal privacy to justify withholding information produced in response to Items 1 through 4. While we do not object to the redaction of contact information such as telephone numbers for various individuals, we do object to the application of this exemption to withhold anything other than contact information. For example, Exemption 6 has been invoked to withhold all or substantial portions of pages 36-39 of the pdf file. (The document is an email string that was forwarded from David Stevens to former Acting Director DeMarco on June 20, 2013.) There are other instances in which more than contact information appears to have been redacted pursuant to Exemption 6. *See, e.g.,* email at page 458 (in which the name of an individual has been redacted) and 461 (in which the first sentence of an email has been entirely redacted).

To the extent information other than purely contact information has been redacted, we do not see the basis for withholding the information under Exemption 6. To invoke this exemption, FHFA must show that disclosure would result in a "clearly unwarranted" invasion of privacy. *See* 5 U.S.C. §552(b)(6). There is a strong public interest in learning the identity of those who choose to with high level agency officials. *See Electronic Frontier Fdn. v. ODNI,* 639 F.3d 876, 887 (9th Cir. 2010) (requiring disclosure of names of lobbyists); *Sims v. Central Intelligence Agency*, 642 F.2d 562, 575 (D.C. Cir. 1980) ((b)(6) is "not intended to shield matters of such clear public concern as the names of those entering into contracts with the federal government").

In addition, any privacy interests can be adequately safeguarded through selective redactions of contact information but the remainder of this information must be provided. *See* 5 U.S.C. §552(b) (agency has duty to provide reasonably segregable portions of non-exempt information).

Non-responsive. The agency has also redacted information from documents it has produced on the grounds that it is "non-responsive." *See, e.g.*, email at page 460 of pdf. FOIA requires an agency to produce responsive records unless they fall into one of nine statutory exemptions. *See* 5 U.S.C. §552(b). Agencies are required to produce all non-exempt information that is reasonably segregable. *See id.* While an agency has no obligation to produce a record that is entirely non-responsive, "non-responsive" is not among the statutory exemptions and thus cannot be used as a basis for redacting information from a record the agency has produced and therefore acknowledged to be responsive.

In *Dunway v. Webster,* 519 F.Supp. 1059, 1083 (N.D. Cal. 1981), the Northern District of California held that agencies are obliged under FOIA "to release any information, subject to the specified exemptions, which relates to the subject of the request or which in any sense sheds light on, amplifies, or enlarges upon that material which is found in the same documents. The agency may withhold material found in documents which are in any way responsive to the request only if that material is clearly and without any doubt unrelated to the subject of the request." *Id.* at 1083 (N.D. Cal. 1981). The purpose of this FOIA request is to shed light on the extent and nature of the financial industry's relationship with the FHFA and to ascertain whether it was able to leverage its relationship with FHFA leaders in order to influence the formulation of the agency's policy. Even if the redacted portion of the email at issue does not directly address eminent domain, discussion on other topics between the financial industry and FHFA leadership in the very same email "sheds lights on, amplifies, [and] enlarges upon" their communications about eminent domain and attempts to influence the agency's position, by illuminating the nature and extent of the relationship. *See also ACLU v. FBI,* 2013 WL 3346845 *11 (N.D. Cal. July 1,

2013) (ordering agency to submit for "non-responsive redactions" for in camera review and stating, in accord with *Dunway,* that court would "only uphold redactions if it is utterly convinced that they do not shed light on, amplify, or enlarge upon that responsive information").

* * *

Thank you for your assistance in this matter. We request that the agency revise its search and reconsider its decision to withhold information on the grounds discussed above.

Sincerely,

Linda Lye

Enclosure

Federal Housing Finance Agency
Constitution Center
400 7th Street, S.W.
Washington, D.C. 20024
Telephone: (202) 649-3800
Facsimile: (202) 649-1071
www.fhfa.gov

January 10, 2012

Mr. Graham Williams
Chief Executive Officer
Mortgage Resolution Partners LLC
33 Pier
Suite 201 South
San Francisco, CA 94111

Re: FHFA FOIA Request No.: 2012-FOIA-127

Dear Mr. Williams:

This letter is in response to your Freedom of Information Act (FOIA) request, dated July 18, 2012. Your request was processed in accordance with the FOIA (5 U.S.C. § 552) and FHFA's FOIA regulation (12 CFR Part 1202).

You requested the following:

> "Pursuant to the federal Freedom of Information Act, 5 U.S.C. §552, I request access to and copies of any and all of the following information: correspondence, phone messages, emails, calendars and any other items related to any and all communications or meetings with the Securities Industry and Financial Markets Association (SIFMA), the American Securitization Forum (ASF), American Bankers Association, American Council of Life Insurers, American Land Title Association, Association of Mortgage Investors, California Bankers Association, California Land Title Association, California Mortgage Bankers Association, Community Mortgage Banking Project, Consumer Mortgage Coalition, Inland Valleys Association of Realtors, Investment Company Institute, Mortgage Bankers Association, National Association of Home Builders, Residential Servicing Coalition, The Financial Services Roundtable, The Housing Policy Council of the Financial Services Roundtable and any and all other trade groups, advisors, or private parties relating to the acquisition of mortgages through the use of eminent domain in San Bernardino County, California or elsewhere."

After review of agency files and records, FHFA has located 19 documents responsive to your request. Documents are being withheld pursuant to exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552 (b)(4), pertaining to trade secrets and commercial or financial information obtained from a person that is privileged or confidential; exemption 5 (5 U.S.C. §552(b)(5)), pertaining to the deliberative process, attorney work product, and/or attorney-client privileges; and exemption 6 (5 U.S.C. §552(b)(6)), as disclosure of certain information (e.g., telephone numbers, email addresses, loan information, etc.), "would constitute an unwarranted invasion of personal privacy." FHFA's determination of the documents releasability is described below:

Document Description	Number of Documents/Pages withheld in full or in part(redacted), or released in full	FOIA Exemption(s) Applied
6/28/2012 email from SIFMA re: consequences of using eminent domain for mortgages	2 pages redacted	(b)(6)
6/28/2012 Joint Letter	2 pages released in full	n/a
First Amended and Restated Joint Exercise of Powers Agreement HP program	18 pages released in full	n/a
7/12/12 FHFA letter to Counsel of County of San Bernardino	2 pages released in full	n/a
6/28/2012 document entitled "Amherst Mortgage Insight"	15 pages released in full	n/a
7/13/12 Meeting of the Home Ownership Protection Program Joint Powers Authority	2 pages released in full	n/a
7/13/2012 letter from American Securitization Forum re: Joint Exercise of Powers Agreement	10 pages released in full	n/a
7/17/2012 email from SIFMA re: eminent domain	2 pages redact	(b)(6)
7/16/2012 letter from O'Melveny & Myers LLP re: San Bernardino Eminent Domain Proposal	16 pages released in full	n/a
6/28/2012 email from American Securitization re: eminent domain	3 pages redacted	(b)(6)
7/13/2012 email from American Securitization re: eminent domain	3 pages redacted	(b)(6)
7/10/2012 email from SIFMA re: Update on matters in San Bernardino County	2 pages redacted	(b)(6)
6/20/2012 email from American Securitization re: San Bernardino Program permitting use of eminent domain	2 pages redacted	(b)(6)
7/11/2012 emails re: San Bernardino Matter	2 pages redacted	(b)(5) and (b)(6)
7/9/2012 email from Fannie Mae	2 pages withheld in full	(b)(4) and (b)(6)

e: San Bernardino County marked "confidential"		
7/10/2012 emails re: San Bernardino County	3 pages redacted	(b)(4) and (b)(6)
7/10/2012 email from SIFMA re San Bernardino County	2 pages redacted	(b)(6)
7/13/2012 Statement of Timothy W. Cameron (SIFMA)	2 pages release in full	n/a
7/19/2012 email from American Securitization to FHFA re: link to: http://www.americanbanker.com/issues/177_139/eminent-domain-mortgage-seizures-would-hurt-fannie-freddie-1051080-1.html?zkPrintable=1&nopagination=1	3 pages redacted	(b)(6)

A copy of the accessible material is enclosed (on CD).

This is the final decision on your FOIA request. If you wish to appeal any aspect of FHFA's decision, you must forward within 30 days:

- A copy of your initial request;
- A copy of this letter; and
- A statement of the circumstances, reasons, or arguments for seeking disclosure of the affected record(s).

The appeal must be sent either electronically through FHFA's public access link by clicking here https://publicaccesslink.fhfa.gov/palMain.aspx or by mailing to the "FOIA Appeals Officer" at the above address. The envelope and the letter of appeal must be clearly marked "FOIA Appeal." Please note that all mail sent to the FHFA via the United States Postal Service is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.

Your FOIA request is releasable to the public under subsequent FOIA requests. In responding to these requests, FHFA does not release personal information, such as home or email addresses and home or mobile telephone numbers which are protected from disclosure under FOIA Exemption 6 (5 U.S.C. § 552(b)(6)).

The processing cost for your request is $194.75. This includes IT search time ($59.00 x .25 hours) and professional review time ($72.00 x 2.50 hours). The invoice is enclosed.

If you have any questions regarding the processing of your request, please contact us at foia@fhfa.gov .

Sincerely,

Stacy J. Easter
FOIA/Privacy Officer

Exhibit 20

United States Attorney
Northern District of California

11th Floor, Federal Building
450 Golden Gate Ave., Box 36055
San Francisco, CA 94102-3495

(415)436-7022
FAX: (415) 436-6748

Via U.S. Mail and E-mail

March 13, 2014

Linda Lye, Esq.
American Civil Liberties Union Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111
llye@aclunc.org

Re: *ACCE, et al., v. FHFA*, Case No. 3:13-cv-05618-KAW

Dear Ms. Lye:

This letter responds to your letter dated January 21, 2014.

FHFA's Initial Search and Production

The Federal Housing and Finance Agency ("FHFA") received Josie Duffy's[1] Freedom of Information Act ("FOIA") request, FHFA FOIA No. 2014-FOIA-001, on October 1, 2013 ("FOIA Request"). FHFA interpreted the scope of the request and records sought to include documents regarding eminent domain and the city of Richmond, California.

On December 30, 2013, FHFA produced 465 pages in response to the FOIA Request. Certain information was redacted pursuant to Exemption 5, 5 U.S.C. §552(b)(5), pertaining to the deliberative process as well as attorney work-product and the attorney-client privileges; and Exemption 6, 5 U.S.C. §552(b)(6), as its disclosure "would constitute an unwarranted invasion of personal privacy." In your January 21, 2014 letter, you raised concerns with respect to the application of both exemptions, as well as information withheld as non-responsive.

[1] Ms. Duffy's request was submitted on behalf of The Center for Popular Democracy, Action United Pennsylvania, Alliance of Californians for Community Empowerment, Alliance for a Just Society, City Life Vida Urbana, Colorado Foreclosure Resistance Coalition, Home Defenders League, Housing and Economic Rights Advocates, New Jersey Communities United, New York Communities for Change, SEIU Healthcare Illinois-Indiana.

FHFA has determined it will release certain information that was withheld from the December 30, 2013 production pursuant to Exemption 5 and as non-responsive.

With respect to Requests 1-5, FHFA will release the following information.

Page Number	Description
460	Content in March 8, 2013 email from Andrew Szalay of Mortgage Bankers Association to FHFA General Counsel Alfred Pollard regarding an invitation to present at the Mortgage Bankers Association Mortgage Fraud Issues Conference previously withheld as non-responsive
461	Content in July 10, 2013 email from Chris Killian of SIFMA to FHFA General Counsel Alfred Pollard regarding travel previously withheld as non-responsive
463	Content in July 23, 2012 email from Michael Powers of FHFA to John Greenlee, previously of FHFA and Richard Dorfman of SIFMA regarding Freddie Mac previously withheld pursuant to Exemption 5

With respect to Request 6, FHFA will release the following information. Certain documents responsive to Request 6 remain redacted pursuant to Exemptions 5 and 6. Certain documents have also been redacted pursuant to Exemption 4, as they contain information that is exempt from public disclosure because it is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential. *See* 5 U.S.C. § 552(b)(4); *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir. 1994).

Page Number	Exemption Applied	Description
1	n/a	6/11/2013 Congress letter to HUD re: 5/16/13 hearing on Eminent Domain
2-3	n/a	5/31/2013 letter from Erste Abwicklungsanstalt to General Counsel re: Mortgage Resolution Partners Eminent Domain Program
4	n/a	Letter from Congress to HUD re: Eminent Domain
5	n/a	Letter from Congress to FHFA, "Sign on Letter Opposing Discrimination in Credit Access for Mortgages Modified by Eminent Domain"
6-7	n/a	8/2013 Document from Home Defenders League entitled "Plan to reserve Homeownership, Reset Mortgage and Aid Local Economies"
8-10	n/a	7/15/2013 SIFMA Letter to Congress re: Housing Crisis
11-12	n/a	7/29/2013 Letter to Congress from various Associations re: Eminent Domain
13-14	(b)(5)	FHFA General Counsel's handwritten notes have been redacted.

15-27	n/a	Mortgage Resolution Partners Presentation entitled Homeownership Protection Program
28	n/a	8/16/2012 News Article, "Washington's Highest Court Foreclose on Homeowners"
29-40	n/a	7/29/2012 New Article by Katz entitled "How Eminent Domain Can Save Our Cities"
41-46	n/a	Paper entitled Explanation of How Eminent Can Be Used to Restore the Real Estate Market.
47-49	n/a	6/26/2012 Action Calendar from the City of Berkeley to Mayor/City Council
50	n/a	7/30/2012 San Bernardino Letter to General Counsel re: Homeownership Protection Program
51-52	(b)(5)	FHFA analysis of eminent domain issues with General Counsel's handwritten notes.
53-59	n/a	Wikipedia Article on Eminent Domain
60-67	n/a	9/10/2012 CA Lt. Governor Letter to DOJ and Asst. Attorney General re: Eminent Domain and PLS Trust
68-123	n/a	Cornell Law School Legal Studies Research Paper Series, "It takes a Village: Municipal Condemnation Proceeding and Public/Private Partnerships for Mortgage Loan Modification…"
124-138	n/a	6/28/2012 Amherst Mortgage Insight Article on Eminent Domain/PLS Trust
139-140	n/a	6/28/2012 SIFMA letter re: Joint Exercise of Powers Agreement
141-152	n/a	5/4/2012 Mortgage Resolution Partners, "Frequently Asked Questions"
153-155	n/a	7/25/2012 Document entitled City Council Document Tracking Sheet/Resolution
156-159	(b)(6)	7/25/2012 Email to FHFA re: News article on seized mortgages by eminent domain. Contact information redacted.
160	n/a	7/25/2012 Wall Street Journal article, "An Eminently Bad Idea"
161-162	(b)(6)	7/19/2012 SIFMA email re: Press Statements on Eminent Domain. Contact information redacted.
163-171	n/a	First Amended and restated Joint Exercise
172-174	n/a	4/18/2013 SIFMA letter re: Eminent Domain and Underwater Mortgages in Richmond
175-177	n/a	4/18/2013 SIFMA letter re: Eminent Domain and Underwater Mortgages in Las Vegas
178-179	n/a	7/13/2012 ASF letter - "Joint Exercise of Powers Agreement"
180-181	n/a	7/13/20120 ASF – "Meeting of the Homeownership

		Protection Program Joint Powers Authority"
182-186	n/a	7/13/2012 Statement of Timothy Cameron to the Special Meeting of the Homeownership Protection Program
187-188	n/a	7/12/2013 Wall Street Journal article, "The Fed's Eminent Domain Mistake"
189-194	n/a	6 Graphs re: Eminent Domain in San Bernardino County
195-197	n/a	HR 6397 with handwritten notes
198	n/a	Article "Defending American Taxpayers form Abusive Government Talking Act"
199	n/a	Article, "Underwater and Drowning? Some Facts about Mortgage that could be targeted by eminent domain.
200	n/a	6/11/2013 Congress letter to HUD re: Hearing on 5/16/13
201	n/a	6/28/2013 MRP letter to IMPAC re: CA cities acquiring mortgage loans
202-204	n/a	7/24/2013 K&L Gates article, "Eminent Domain Needs More than a Magic Wand…"
205-213	n/a	6/28/2012 Opinion and Order – City of Joliet
214-218	(b)(4)	8/5/2013 Freddie Mac memo to General Counsel re: Eminent Domain. Contains privileged material (attorney-client and attorney work product) and confidential commercial and financial information.
219	(b)(6) (b)(4)	8/6/2013 Fannie Mae email to General Counsel re: Eminent Domain Action announced by City of Richmond. Contact information, privileged (attorney-client and attorney work product) material and confidential commercial and financial information redacted.
220	(b)(5)	8/6/2013 General Counsel memo to Acting Director re: Eminent Domain litigation by Fannie and Freddie with Acting Director's approval.
221-223	(b)(5)	7/1/2013 General Counsel draft memo on Use of Eminent Domain to Restructure Mortgage redacted.
224-225	(b)(5)	7/31/2013 City of Richmond sample letter. General Counsel's handwritten notes redacted.
226-250	n/a	Opinion and Order – AFSA
251-258	n/a	7/11/2012 Document entitled, "The Math of Sisyphus"
259	(b)(5)	7/16/2013 calendar printout. Handwritten notes redacted.
260	n/a	Sect. 3 of Real Estate Settlement Procedures Act
261-262	n/a	7/13/2012 Agenda on Homeownership Protection Program
263-267	(b)(5)	5 pages of General Counsel handwritten notes

Your letter notes that you do not object to the application of Exemption 6 with respect to contact information. As we discussed by phone, the information FHFA withheld on the basis of privacy consists of contact and personal information. To address your concern, the information that has been redacted from FHFA's production for privacy reasons is described in detail below:

Page Numbers	Description of Information Redacted Pursuant to Exemption 6
35	Telephone numbers
36-39	List of email addresses
42	Email addresses
43	Telephone numbers
139-140	Telephone numbers
141	Telephone numbers and email address
148	Email addresses and telephone numbers
149-150	Telephone numbers
154	Telephone numbers
385	Email Addresses
386	Telephone number
402	Telephone number
404	Telephone number
405	Telephone and email address
406-07	Email address
408-411	Telephone numbers and email address
415-16	Email address and telephone numbers
423	Telephone numbers and email address
427	Telephone numbers and email address
429-30	Telephone numbers and email address
432	Telephone numbers and email address
436	Telephone numbers and email address
440-441	Email addresses
445-46	Telephone numbers and email address
448	Telephone numbers
449	Email addresses
450-51	Telephone numbers and email addresses
455	Email addresses and telephone numbers
457	Telephone numbers
458	Email addresses, name of employee who recently left SIFMA, and telephone number
460	Email addresses
461	Email addresses and telephone numbers
463	Email addresses and telephone numbers and a sentence discussion regarding Freddie Mac
465	Email addresses and telephone numbers

Your letter also notes that calendar entries and phone messages were not included in the December 30, 2013 production. FHFA continues to consider your concerns regarding production of calendar entries. FHFA does not retain phone messages as agency records. In addition, FHFA does not have the capability to search telephone records.

FHFA's Supplemental Search and Production

FHFA conducted a supplemental search for documents to address your concerns regarding the sufficiency of its original search. FHFA recently installed a document collection system. It used this system to search both the email of certain employees and its Information Management System ("IMS"), which stores other types of documents.

FHFA searched for communications between the following FHFA employees and housing and financial organizations and firms that contain the term "eminent domain," using a date range of January 1, 2012 through October 1, 2013. FHFA searched IMS using the same terms.

Edward DeMarco, FHFA Acting Director
Richard Hornsby, FHFA Chief Operating Officer
Jon Greenlee, FHFA Deputy Director for Enterprise Regulation
Sandra Thompson, FHFA Deputy Director for Housing Mission and Goals
Nina Nichols, FHFA Deputy Director for Supervision Policy and Support
Wanda DeLeo, FHFA Deputy Director for Office of Strategic Initiatives
Alfred Pollard, FHFA General Counsel[2]

Securities Industry and Financial Markets Association
American Securitization Forum
American Bankers Association
Association of Institutional Investors
California Mortgage Bankers Association
Investment Company Institute
Financial Services Roundtable
National Association of Home Builders
DoubleLine
BlackRock
Pacific Investment Management Company
Wells Fargo Bank
Deutsche Bank
Bank of America
Ally Bank
Chase Bank
Citigroup

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[2] Although not specifically named in the FOIA request submitted by Ms. Duffy, FHFA Ombudsman Michael Powers and FHFA Assistant Director, Office of Women & Minority Inclusion Nancy Burnett were added to the search to ensure completeness.

The search retrieved additional documents (including 11 pages that were previously produced in response to FOIA request 2012-FOIA-027). These documents are being released with redactions pursuant to Exemption 5, 5 U.S.C. §552(b)(5), pertaining to the deliberative process as well as the attorney work-product and the attorney-client privileges; and Exemption 6, 5 U.S.C. §552(b)(6), as its disclosure "would constitute an unwarranted invasion of personal privacy." Details regarding the documents are listed below:

Page Number	Exemption Applied	Document Description
1-2	(b)(6)	6/28/2012 Email between ASF/FHFA re: memo to members of ASF on eminent domain details. Contact information redacted.
3-7	(b)(6)	8/8/2012 Email between ASF/FHFA re: memo to members of ASF on FHFA notice on eminent domain use. Contact information redacted.
8-10	(b)(6)	7/11/2012 Email between ASF/FHFA re: memo to members of ASF on San Bernardino City. Contact information redacted.
11-13	(b)(6)	7/10/2012 Email between ASF/FHFA re: memo to members of ASF on San Bernardino City. Contact information redacted.
14-18	n/a	5/2/2013 SIFMA SmartBrief email
19-20	(b)(6)	10/19/2012 Email between ASF/FHFA re: SIFMA's 2013 outlook conf. Contact information redacted.
21-23	(b)(6)	9/25/2012 Emails between SIFMA /FHFA re: Year-end mortgage finance. Contact information redacted.
24-26	(b)(6)	8/10/2012 between FHFA/SIFMA re: eminent domain. Contact information redacted.
27-29	(b)(6)	7/23/2012 Emails between FHFA/SIFMA re: eminent domain press statement. Contact information redacted.
30-31	(b)(6)	7/11/2012 Emails between FHFA/Govt's/SIFMA re: San Bernardino. Contact information redacted.
32-37	n/a	9/14/2012 SIFMA SmartBrief email
38-43	n/a	9/7/2012 Ltr from various Assoc. to FHFA re: eminent domain Restructure Performing Loans
44-59	n/a	7/16/2012 O'Melveny & Myers memorandum for SIFMA re: San Bernardino Eminent Domain Proposal
60-65	n/a	12/4/2012 SIFMA SmartBrief email
66	n/a	9/25/2013 CMBA email re: eminent domain update
67-68	n/a	4/10/2013 CMBA email re: eminent domain update
69	n/a	8/15/2013 CMBA email re: eminent domain update
70	(b)(6)	4/18/2013 Email between SIFMA/FHFA re: Eminent Domain Condemnation of Mortgage Loans. Contact information redacted.
71-73	n/a	4/2/2013 City of Richmond Agenda Report
74-75	n/a	9/20/2013 ABA news article email
76-77	(b)(6)	9/11/2013 Email between SIFMA/FHFA re: ALTA Statement on Richmond Eminent Domain Plan. Contact information redacted.

78	(b)(6)	8/8/2013 SIFMA email re: Bondholders Sue Richmond. Contact information redacted.
79	(b)(6)	9/16/2013 SIFMA email re: Community Groups Briefing on Eminent Domain. Contact information redacted.
80	n/a	9/16/2013 Document entitled "Local Principal Reduction
81-82	n/a	8/2013 Document entitled "Plan to Preserve Home ownership…)
83	n/a	Ltr to HUD from Congress re: Eminent domain and FHA loans
84	n/a	Ltr to FHFA entitled Sign on Letter Opposing Discrimination in Credit Access…)
85-86	(b)(6)	9/11/2013 Email between SIFMA/FHFA re: Richmond City Council Votes on Eminent Domain. Contact information redacted.
87	n/a	8/9/2013 Email from SIFMA re: Richmond Offers
88-123	n/a	8/9/2013 document entitled Securitized Products Weekly
124-125	(b)(6)	8/16/2013 Email between SIFMA/FHFA re: ALTA Quote on Eminent Domain. Contact information redacted.
126-130	(b)(6)	7/30/2013 Email between SIFMA/FHFA re: Richmond Press Call Summary. Contact information redacted.
131	n/a	8/12/2013 Email between Citi/FHFA re: Legal Memo
132-136	(b)(6)	4/17/2013 Email between Wells Fargo/FHFA re: eminent domain. Contact information redacted.
137-138		9/6/2013 ABA news email
139-140	(b)(6)	1/24/2013 Email between SIFMA/FHFA re: San Bernardino Rejects Eminent Domain. Contact information redacted.
141	(b)(6)	7/16/2013 Email between SIFMA/FHFA re: Steering Committee Meeting. Contact information redacted.
142	(b)(6)	1/14/2013 Email between SIFMA/FHFA re: eminent domain/condemnation issue. Contact information redacted.
143-144	n/a	8/9/2013 ABA new email
145	n/a	7/18/2012 Meeting Agenda with BOA
146	(b)(5)	7/18/2013 Acting Director Meeting handwritten notes
147	n/a	2012 Housing Summit Discussion Topic
148-150	(b)(6)	Emails re: BOA meeting. Contact information redacted.
151	n/a	2012 Housing Summit Discussion Topic
152-159	n/a	2012 Housing Summit Material
160-161	(b)(6)	10/2/2012 Emails re: SIFMA Year End Mortgage Conf. Contact information redacted.
162-169	n/a	12/6/2012 FHFA presentation entitled "Building a Mortgage Infrastructure for the Future"
170-181	n/a	9/7/2012 ASF letter to FHFA re: Use of Eminent Domain to Restructure Loans
182-187	n/a	9/7/2012 Housing Policy Council Ltr to FHFA re: Use of Eminent Domain to Restructure Loans
188-191	(b)(6)	9/7/2012 Mortgage Bankers Ltr to FHFA re: underwater mortgage. Contact information redacted.

192-193	(b)(6)	6/28/2012 SIFMA Email re: memo to members of SSG on Consequences of using eminent domain. Contact information redacted.
194-195	n/a	6/28/2012 Ltr from various entities re: Joint Exercise of Powers Agreement
196-213	n/a	Document entitled "First Amended and Stated Joint Exercise of Powers Agreement...)
214-228	n/a	6/28/2012 Amherst Mortg. Insight document entitled, "Creative Uses of ED...)
229-230	n/a	7/13/2012 ASF documents entitled, Meeting of the Home Ownership Protection Program...)
231-238	n/a	7/13/2012 ASF Ltr re: Joint Exercise of Powers Agreement
239-240	(b)(6)	7/17/2012 SIFMA email re: memo to Investors on Eminent Domain - Legal Issues with San Bernardino Proposal. Contact information redacted.
241-243	(b)(6)	7/13/2012 ASF email to FHFA re: Eminent Domain Seizures. Contact information redacted.
244-245	(b)(6)	7/10/2012 Email between SIFMA/FHFA re: San Bernardino County. Contact information redacted.
246-247	(b)(6)	6/20/2012 ASF email re: memo to ASF committee on San Bernardino Re-approves programs permitting eminent domain. Contact information redacted.
248-249	(b)(5) (b)(6)	7/11/2012 Email between SIFMA/FHFA/Govt re: San Bernardino Matter. Contact information and agency deliberations redacted.
250	(b)(6)	7/9/2012 Email between SIFMA/FHFA re: San Bernardino/TBAs. Contact information redacted.
251	(b)(6)	SIFMA Ltr updating on eminent domain. Contact information redacted.
252-253	(b)(6)	7/10/2012 Email between SIFMA/FHFA re: San Bernardino County. Contact information redacted.
254-255	n/a	7/13/2012 document entitled "Statement of Timothy W. Cameron"
256-259	(b)(6)	7/19/2012 ASF News email. Contact information redacted.

FHFA asked each FHFA employee identified above to search their offices for hard-copy documents responsive to the FOIA Request. FHFA renewed this request after receiving your letter. No additional documents were identified as a result of this effort.

FHFA is also conducting a supplemental search for documents containing the terms "underwater mortgages" and "Richmond." I will let you know if any additional responsive documents are identified by way of this search.

Please do not hesitate to contact me if you have any questions or need further information.

Very truly yours,
MELINDA HAAG

United States Attorney

REBECCA A. FALK
Assistant United States Attorney

Taylor, Mary Ellen

From:Taylor, Mary Ellen
Sent:7 Nov 2012 10:43:15 -0500
To:DeLeo, Wanda
Subject:FW: SIFMA Year-End Mortgage Finance/Securitization Conference
-in case you don't have this, sending just to highlight Richard's way of characterizing SIFMA view. ME

From: Dorfman, Richard
Sent: Tuesday, September 25, 2012 2:53 PM
To: 'DeMarco, Edward'
Subject: SIFMA Year-End Mortgage Finance/Securitization Conference - December 2,3 or 4, 2012

Dear Ed,

I have decided to use one of the above dates to produce a mortgage finance and securitization conference at SIFMA's
headquarters at 120 Broadway in New York City. The conference would be positioned from retrospective and prospective
views.

I consider you to be the speaker of greatest interest and impact for the large and diverse audience we expect,
as I have said before, so I offer you the opening keynote speech on the date of your choice, December 2,3 or 4,2012.
Our preliminary syllabus has the event running form 1:00 PM through 5:30 PM, with your discussion in first position.
The subject matter can be entirely your choice, as diverse or focused as you want. Your very choice of topics would be news in itself.

You would be followed by a broadly distinguished panel of six experts who we would expect to discuss a range of topics
pertinent to the FHFA from the perspective of GSE performance, finance and operations, single platform, single security,
reps and warrantees, servicing and the like. Clearly we want to underscore SIFMA's view that the government
guaranteed part of the market, while it must be changed radically, must go onward and perform its indispensable role as the
inception point of a vast and synchronous mortgage finance progression, resulting in a national housing finance
system that is accessible, transparent, affordable, fair and fully prudential.

The second half of the program will deal with the eminent domain matter, as it may exist at that time. Then there will be a
discussion by a senior SEC official of their interests in securitization, particularly around AB2. We will close with another
diverse panel that will look ahead to 2013.

Taylor, Mary Ellen

From:Taylor, Mary Ellen
Sent:10 Aug 2012 13:52:12 -0400
To:Dorfman, Richard
Cc:QSmith@sifma.org;Killian, Chris (b)(6) @sifma.org);DeLeo, Wanda;Naiman, Cheryl A.;Harrington, Joan
Subject:RE: Eminent Domain

Richard,

We're set for 10 a.m. on Thursday (August 16). We look forward to seeing you and Joseph Cox then. Alfred will join us. I'm copying Joan Harrington and Cheryl Naiman on this note, as they'll make sure that you clear security easily, and Joan or Cheryl will escort you to a conference room.

We look forward to your visit.

Regards,

Mary Ellen

From: Dorfman, Richard [mailto: (b)(6) @sifma.org]
Sent: Friday, August 10, 2012 11:43 AM
To: DeLeo, Wanda
Cc: Taylor, Mary Ellen
Subject: RE: Eminent Domain

Dear Wanda,

Thank you for your responsive note.

Please be assured that I would not stress the immediacy of any issue were it not genuine. Accordingly, the "just compensation" concept and its calculation takes on great urgency because I consider that central to Ed's resolution of the eminent domain controversy, and Ed has set a thirty day response window. Thank you for recognizing this.

I do, of course, look forward to our organizing our discussion with Mary Ellen. I know you would understand when I say that I would like even one day to take-in the beauty of the Georgia pines.

With kind regards,

Richard

From: DeLeo, Wanda [mailto:Wanda.DeLeo@fhfa.gov]
Sent: Friday, August 10, 2012 10:13 AM
To: Dorfman, Richard
Cc: Taylor, Mary Ellen
Subject: RE: Eminent Domain

Good Morning Richard! Hope all is well with you also. We would be happy to spend some time with you next week discussion eminent domain. Mary Ellen is going to take the lead here at FHFA to make this happen. I look forward to seeing you next week.

Wanda

Wanda I. DeLeo, PhD, CPA
Deputy Director, Office of Strategic Initiatives
Constitution Center
400 7th Street SW
Washington DC 20024
202-649-3400
202-361-5424 (cell)

From: Dorfman, Richard [mailto (b)(6) @sifma.org]
Sent: Thursday, August 09, 2012 4:49 PM
To: DeLeo, Wanda
Subject: Eminent Domain

Dear Wanda,

I trust you are well.

Given Ed Demarco's cautionary statement about the use of a "takings" process under eminent domain, and the thirty days he has allowed
for public replies, I would like to meet with you urgently to focus on the matter of the related "just compensation" requirement.
My argument on that point is that the compensation must apply not only to the invested asset (each mortgage loan taken from a securitized pool), but to the investment position necessarily created to hold the asset in a safe and sound, risk mitigated, condition. That would include funding and risk-mitigation instruments, likely to be derivatives. Essentially, this is a "but for" type of test, in that "but for the asset," the composite position would not exist. Accordingly, the "taking " of the asset should trigger an additive value calculation inclusive of all elements of the position.

If my contention is correct, the justly compensated cost of such a taking could be much greater than assumed by the promoter.

Another related matter would review the meaning of eminent domain to the FHLBs. I question how the collateral value of pledged RMBS or mortgages could be established, at least without large haircuts, if the RMBS markets become devalued under the threat of eminent domain.

I intend to be in Washington next week. I would be grateful for a meeting with you.

With regards,

Richard

Richard A. Dorfman
Managing Director,

Killian, Chris

From:Killian, Chris
Sent:24 Jan 2013 18:57:28 +0000
To:Pollard, Alfred;Taylor, Mary Ellen
Cc:Dorfman, Richard
Subject:San Bernardino Rejects Eminent Domain
Alfred and Mary Ellen –

Hope things are well. See below for a summary of today's hearing out in San Bernardino. We view this as a very positive outcome to this issue as regards San Bernardino and hopefully more generally. Let us know if you have any questions or need further color.

Regards,
Chris

Chris Killian
Managing Director - Securitization
Sifma
(b)(6) (o)
(m)

From: Killian, Chris
Sent: Thursday, January 24, 2013 1:40 PM
To: Killian, Chris
Subject: San Bernardino HPPJPA Rejects Eminent Domain for Mortgage Loans

Re: San Bernardino HPPJPA Rejects Eminent Domain for Mortgage Loans

The Homeownership Preservation Program Joint Powers Administration (HPPJPA) of San Bernardino County (CA) met today to consider an request for qualifications (RFQ) for programs to assist troubled homeowners, as well as an affirmation of cooperation that was put forth by SIFMA, the Inland Valley Association of Realtors (IVAR), Association of Mortgage Investors (AMI), California Bankers Association (CBA), and California Mortgage Bankers Association (CMBA). At this hearing, the members of the board of the HPPJPA voted to issue an RFQ that specifically does not include the usage of eminent domain, and to enter in to the affirmation of cooperation.

You may recall that the HPPJPA was formed in 2012 in response to proposals that eminent domain could be used to seize mortgage loans from their holders so that they could be restructured. SIFMA has led a coalition of more than two dozen groups strongly opposed this proposal, in San Bernardino and elsewhere that it has been presented.

A detailed summary of the hearing follows.

Request for Qualifications: During the discussion of the RFQ, HPPJPA Chair Greg Devereaux indicated that he has considered proposals to use eminent domain, and had been interested in them, but does not believe efforts involving eminent domain are an appropriate path for the HPPJPA to follow. Devereaux indicated that he supported the issuance of the RFP, but was not interested in solutions involving eminent domain. Two other members of the HPPJPA spoke, echoing Devereaux's concerns and sharing the view that eminent domain presented significant risks to the communities.

During the time provided for public comment on this agenda item, Tim Cameron from SIFMA, Paul Herrera from IVAR, Chris Katopis from AMI, and Dustin Hobbs from CMBA spoke in support of the elimination of eminent domain from the consideration of the HPPJPA. One member of the public spoke in support of eminent domain. Another spoke in support of the efforts of the HPPJPA more generally without reference to eminent domain. Another spoke seemingly in support of eminent domain. Another spoke on behalf of a local non-profit, with strong opposition to eminent domain. The last speaker spoke in support of removing eminent domain from consideration.

The HPPJPA voted to approve a motion to issue the RFQ. **The motion provided that the RFQ will be revised to specifically disclaim the use of eminent domain.** The Chair was authorized to determine a response date for the RFQ. HPPJPA members also requested more specific language regarding targeting of programs in response to the RFQ. Specific language and dates will be determined at a later time.

Affirmation of Cooperation: The next item of consideration was the affirmation of cooperation between the HPPJPA and the organizations noted above. Tim Cameron of SIFMA provided an overview of the affirmation and the benefits of public-private coordination. The HPPJA voted to support joining the agreement.

General Public Comments: In the general public comments section at the end of the meeting, a speaker representing the At Home Coalition discussed its proposal in a non-specific manner, and spoke in general support of the efforts of the HPPJPA. Another speaker spoke on behalf of a group he represents indicating his group will respond to the RFQ. Finally, two Realtors spoke in opposition to the use of eminent domain.

A replay is available here: http://www.sbcounty.gov/main/countydirect.asp (look for Homeownership Protection Program Joint Powers Authority Meeting).

***

Please contact us with any questions. Regards,

Chris

Chris Killian
Managing Director – Securitization
Sifma
(b)(6) (o)
(m)

Meeting w/ Bank Of America

DATE: July 18, 2012

TIME: 3:30 p.m. – 5:00 p.m.

SUBJECT:

LOCATION: Plaza Level, Conference Room 1-203

ATTENDEES:
Edward J. DeMarco
Mario Ugoletti
Wanda DeLeo
Meg Burns
Jon Greenlee
Pat Lawler

Josh Wright
Larry Rufrano
Michael Nierenberg
Hayley Boesky
Chris Flanagan
Mike Malloy
Ed Hill
Mike Hokin
Michelle Meyer
James White
JM Chadonic
Wellington Denahan
Gary Kain
Ron Faris
Diana Aras

Vince Fiorillo
Fabian Jones
Randy Robertson
Joe York
Jonathan Lieberman
Deepak Narula
Colin Teichholtz
Bob Walters
Gene Lugat
Jim Lockhart
Stewart Zimmerman
Kevin Grant
Jay Bray
Richard Ginn

From: DeMarco, Edward

Sent: Tuesday, July 10, 2012 3:32 PM

To: Pollard, Alfred; Ugoletti, Mario

Subject: FW: San Bernardino County

FYI

From: Dorfman, Richard [mailto (b)(6) @sifma.org]
Sent: Tuesday, July 10, 2012 2:00 PM
To: DeMarco, Edward
Subject: San Bernardino County

Dear Edward:

This is a continuing update on matters in San Bernardino County, CA, or possible other jurisdictions, contemplating the use of the U.S. Constitutional authority of eminent domain to support and execute possible condemnation and taking of residential home loans and associated mortgages, both in securitized and non-securitized form, from a potential broad range of financial institutions. Clearly, such possible actions could lead to gigantic losses-on-sale at such financial institutions.

As you know, SIFMA has previously and continues to advocate for the absolute abandonment of the described approach, as we believe it is unconstitutional, unethical, dysfunctional, and portends ruinous consequences to a range of US financial institutions. SIFMA has also requested that Freddie Mac, Fannie Mae, and Ginnie Mae adopt amendments to their seller-servicer programs that would effectively prohibit the purchase, guarantee, or resecuritization of any mortgage loan submitted, to each or all of them, that has been acquired through a takings process.

In order to update you on SIFMA activities on this matter, please note that this morning, SIFMA executive management was authorized by the appropriate members' committee to draft language to amend the TBA market rules for good delivery, as administered by SIFMA, to reflect, from the effective date of such amendment, that residential mortgage loans acquired from investing institutions through a takings process will be ineligible as good delivery into a TBA contract now and into the future.

Please also note, that on behalf of its vast membership of financial institutions, SIFMA has retained distinguished legal counsel to access, advise, and execute on matters of law, as may be pertinent and necessary to defeat the kinds of transactions described in this note.

I will continue to update you on this matter as we move forward. Meanwhile, I urge each of you to engage promptly in whatever actions would be necessary to exclude from acquisition-guarantee and/or securitization by Freddie Mac, Fannie Mae, and Ginnie Mae, residential mortgage loans having the characteristics described above.

Sincerely,

Richard

Richard A. Dorfman
Managing Director,
Head of Securitization
SIFMA
120 Broadway, 35th Floor, New York, NY 10271
O: (b)(6)
F:
(b)(6) @sifma.org
www.sifma.org
www.investedinamerica.org

Stacy J. Easter
Freedom of Information Act/Privacy Officer
Federal Housing Finance Agency
Office of General Counsel
400 7th Street, SW | Washington, DC 20024
Office: 202-649-3067 | Cell: 202-604-1024 | Fax: 202-649-4067

Exhibit 21

ACLU
AMERICAN CIVIL LIBERTIES UNION of NORTHERN CALIFORNIA
FOUNDATION

April 1, 2014
Via electronic and United States mail

Rebecca Falk, Assistant United States Attorney
Assistant U.S. Attorney
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102
Email: Rebecca.Falk@usdoj.gov

Re: *ACCE, et al. v FHFA,* Case No. 3:13-cv-05618-KAW
FHFA FOIA No. 2014-FOIA-001

Dear Ms. Falk,

Thank you for your letter dated March 13, 2014 responding to our January 21, 2014 letter and explaining the supplemental search and production. We are very appreciative of your efforts and that of your client to resolve this matter. There still, however, remain a few outstanding issues, regarding both the search and exemptions.

I. Adequacy of Search

A. Parties Communicating with FHFA employees

Your letter explained that the agency conducted a search for communications between specified FHFA employees and 17 financial organizations and firms. We recognize that these 17 financial organizations and firms were identified in our FOIA requests 1 through 3. But our request 4 seeks: "All documents related to any and all communications or meetings between FHFA leadership *and any other firms or trade groups*, pertaining to the use of eminent domain to purchase mortgages." (Emphasis added.) As a result, a search that is limited to communications between FHFA employees and the 17 listed financial organizations and firms would exclude documents responsive to our FOIA request 4. For this reason, the search performed was *not* "reasonably calculated to uncover *all* relevant documents." *Weisberg v. United States Dep't of Justice,* 705 F.2d 1344, 1351 (D.C. Cir. 1983) (emphasis added); *see also Zemansky v. United States EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (adopting *Weisberg* standard). *We therefore request that you perform a search that eliminates the restriction regarding the identity of the other party to the communication.*

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
39 DRUMM STREET, SAN FRANCISCO, CA 94111 | T/415.621.2493 | F/415.255.1478 | TTY/415.863.7832 | WWW.ACLUNC.ORG

B. Employees whose records have been searched

Your letter indicates that you have now searched records of the following FHFA employees:

Edward DeMarco, FHFA Acting Director
Richard Hornsby, FHFA Chief Operating Officer
Jon Greenlee, FHFA Deputy Director for Enterprises Regulation
Sandra Thompson, FHFA Deputy Director for Housing Mission and Goals
Nina Nichols, FHFA Deputy Director for Supervision Policy and Support
Wanda DeLeo, FHFA Deputy Director for Office of Strategic Initiatives
Alfred Pollard, FHFA General Counsel
Michael Powers, FHFA Ombudsman
Nancy Burnett, FHFA Assistant Director, Office of Women & Minority Inclusion

The foregoing list consisted of a point person in each of the FHFA offices we identified in our FOIA request, as well as the Ombudsman's office and Office of Women & Minority Inclusion, which were not named in our FOIA request. While we are pleased the agency has included *an individual* from each of the offices identified in our FOIA request, we expressly requested and a reasonable search would include a search of the named offices "and *all relevant employees*." (FOIA Request at page 4, emphasis added.)

For example, because our FOIA request seeks records pertaining to "communications and meetings" between FHFA leadership and trade groups, *executive or scheduling assistants to FHFA leadership are likely to have responsive records. We therefore request that you expand the search to include other individuals in each of the foregoing offices or explain why no other individual in each office is likely to have responsive records*.

Relatedly, the records produced to date point to concrete indications that other individuals at FHFA were involved in eminent domain discussions and are therefore likely to have responsive records. Their files should therefore be searched. *See Campbell v. United States Dep't of Justice,* 164 F.3d 20, 28 (D.C. Cir. 1998) (agency "must revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry"). These individuals include:

- Mary Ellen Taylor: Page 25 of the pdf entitled "2nd Search_Redacted" is an email from Wanda DeLeo, in the Office of Strategic Initiatives, to Richard Dorfman of SIFMA and reads: "Good Morning Richard! … We would be happy to spend some time with you next week discussi[ng] eminent domain. Mary Ellen [Taylor] is going to take the lead here at FHFA to make this happen." Ms. Taylor was clearly involved in agency discussions on this topic, as evidenced by this email and her inclusion on other emails that were produced (apparently as a result of searching other employees' files). *See* pages 21, 24, 139-40 of the pdf entitled "2nd Search_Redacted."

- Mario Ugoletti: Page 244-45 of the pdf entitled "2nd Search_Redacted" is an email chain in which Acting Director DeMarco forwarded an email from SIFMA to General Counsel

Pollard and Mario Ugoletti. Mr. Ugoletti also attended a meeting with Bank of America and is listed with other key FHFA employees in attendance. *See* page 145 of the pdf entitled "2nd Sarch_Recated." Mr. Ugoletti has served as a Special Advisor to the Acting Director. *See* Mel Watt Announces Four Staff Appointments (Jan. 10, 2014).[1] His title alone suggests that he is likely to have responsive records, but the record constitutes concrete evidence confirming that to be the case.

- Meg Burns and Pat Lawler: Page 145 of the pdf entitled "2nd Search_Redacted" is an agenda for a meeting with Bank of America. It lists numerous FHFA attendees, including both individuals whose files have been searched and two individuals – in addition to Mr. Ugoletti – whose files have not been searched: Meg Burns, Senior Associate Director for Housing and Regulatory Policy,[2] and Pat Lawler, who leads the Office of Policy Analysis and Research. *See* FHFA Announces Organizational Changes and New Positions (Feb. 2, 2011).[3] This agenda provides concrete evidence that Ms. Burns and Mr. Lawler were involved in agency discussions on eminent domain issues.

We therefore request that you search the records of Mary Ellen Taylor, Mario Ugoletti, Meg Burns, and Pat Lawler, as well as executive or scheduling assistants of all relevant employees.

C. Search Terms

Your letter explained that the search performed of communications and the agency's Information Management System used the term "eminent domain." You further advised that that the agency is performing a supplemental search for documents containing the terms "underwater mortgages" and "Richmond." *We also request that you perform a search using the following terms "local principal reduction"; "Brockton," "Irvington," "Newark" and "San Bernardino."*

"Local principal reduction" is a substitute term that would likely be used to refer to "eminent domain" in this context. In addition, although we had a request that specifically sought information about Richmond, most of our requests were not geographically specific. We therefore think it makes sense to use the names of the localities that have most seriously considered eminent domain proposals, to ensure that the "search [is] reasonably calculated to uncover *all* relevant documents." *Weisberg,* 705 F.2d ta 1351 (emphasis added).

D. Calendar Entries

Your letter indicated that the agency is still evaluating its position on the production of calendar entries. The record is clear that such entries do exist. *See* page 141 of the "2nd Search_Redacted" file (7/16/13 email from Peter Ryan at SIFMA to Alfred Pollard stating "I'll send you a calendar invite following this e-mail"). Please note that we do not seek calendar entries that would reflect purely personal meetings (doctor's appointments and the like) of

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[1] http://www.fhfa.gov/webfiles/25943/FHFAStaffApptsPR011014Final.pdf
[2] *See* http://www.fhfa.gov/webfiles/23920/5-7-12_Burns_Final_HFS_Subcommittee_on_Capital_Markets_REO_Testimony.pdf
[3] http://www.fhfa.gov/webfiles/19674/Reorganization020211.pdf

agency employees. Rather, we seek only calendar entries that reflect meetings pertaining to agency business, in particular, meetings regarding eminent domain. *See Consumer Fed. of America v. Dep't of Agriculture,* 455 F.3d 283 (D.C. Cir. 2006) (electronic appointment calendars of Department of Agriculture officials constituted agency records under FOIA); *Judicial Watch, Inc. v. United States Secret Service,* 579 F.Supp.2d 182, 187 (D.D.C. 2008) (information from agency records pertaining to visitor names, dates and times of visits, and persons visited not exempt under FOIA). There is a significant public interest in disclosure of information pertaining to the outside entities that met with agency officials on official agency matters. *See Electronic Frontier Fdn. v. ODNI,* 639 F.3d 876, 887 (9th Cir. 2010) (requiring disclosure of names of lobbyists); *cf. Sims v. Central Intelligence Agency*, 642 F.2d 562, 575 (D.C. Cir. 1980) ((b)(6) is "not intended to shield matters of such clear public concern as the names of those entering into contracts with the federal government").

We therefore request that you produce responsive calendar entries.

E. Phone messages

Your letter states that "FHFA does not retain phone messages as agency records." Please clarify whether this means that the FHFA does not retain phone messages at all, or does not view phone messages as "agency records" within the meaning of FOIA. If the latter, we believe that view is incorrect. Documents are agency records if the "agency … 'either create[s] or obtain[s]' the requested materials," and "the agency [is] in control of the requested material at the time the FOIA request is made." *United States Dep't of Justice v. Tax Analysts*, 492 U.S. at 136, 144-45 (1989). *We therefore request that you either produce phone messages or clarify if in fact the FHFA's practice is never to retain phone messages.*

F. Incomplete documents

Some of the documents produced appear to be cut off and because there is no indication that information was intentionally withheld pursuant to a FOIA exemption, we suspect these were inadvertent errors. *We request that you produce the missing pages of the following documents that begin at the page numbers listed below*:

AP Folder_Redacted:

Page 11 of 267:	7/29/13 Letter from American Bankers Assn, et al. to U.S. House of Representatives is cut off after first page.
Page 12 of 267:	Undated letter to Members of Congress contains first page only, no signature page.
Page 163 of 267	Joint Exercise of Power Agreement Home Ownership Program: only odd pages produced, even pages missing.
Page 195 of 267:	HR 6397: only odd pages produced, even pages missing.
Page 205 of 267:	City of Joliet opinion and order: only every other page produced.
Page 251 of 267:	7/11/12 document entitled "The Math of Sisyphus: only every other page produced.

II. Information Withheld

A. Information withheld from first document production

We appreciate the agency's reconsideration of some of the exemptions previously invoked and its decision to release previously redacted information from Pages 460, 461 and 463 of the first production.

With respect to the information withheld from the first document production pursuant to Exemption 6, the supplemental information you provided describing the redacted information (on page 5 of your March 12, 2014 letter) is extremely helpful. We have no objection to these redactions except for the large redaction that appears on pages 36-39 of the first document production. We recognize that this was a long list of email addresses, but the information also serves to identify the participants on this email communication. Other (b)(6) redactions of email information have been more targeted, and left visible the identity of the recipient or sender, or at least the entity with which he or she is associated. For example, on this same page (page 36), it is apparent that that sender of the third email is Chris Killian associated with SFIMA because of the appropriately selective redaction ("Killian, Chris <(b)(6)@sifma.org<mailto(b)(6)@sifma.org>>").

Given that selective redactions are entirely feasible, we ask that you reconsider the block redaction on pages 36-39. We also renew our objections previously articulated in my January 21, 2014 letter as to all other withholdings that the agency has not reconsidered.

B. Information withheld from second document production

Thank you for the helpful description of each document produced in the second document production and notation as to exemptions invoked. We do not object to any of the Exemption 6 redactions in the second production.

1. "AP Folder_Redacted.pdf"

We object to the following information withheld from the file "AP Folder_Redacted.pdf":

Pages 13-14, 51-52, 220. 221-23, 224-25, 259 & 263-67 and Exemption 5. The agency has withheld analysis and handwritten notes by the General Counsel on eminent domain issues on the foregoing pages, relying on Exemption 5. We are unclear on whether this is duplicative of or in addition to the "FHFA's General Counsel's papers and notes" referenced on page 3 of the agency's December 30, 2013 letter, accompanying the first document production. In any event. the exemption is inapplicable.

The documents at issue were all produced in response to our FOIA request 6, which seeks documents "relied upon by FHFA in support of the assertions and positions set forth in the General Counsel's August 7th, 2013 Memorandum titled "Summary of Comments and Additional Analysis Regarding Input on Use of Eminent Domain to Restructure Mortgages" and the FHFA's August 8th, 2013 "Statement on Eminent Domain." Because these documents reflect the agency's reasons for its public position on eminent domain, they are not subject to the deliberative process privilege, pursuant to the doctrine of incorporation. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975).

Relatedly, these documents reflect the agency's "working law." "Exemption 5, properly construed, calls for 'disclosure of all "opinions and interpretations" which embody the agency's effective law and policy.'" *Id.* at 153 (citation omitted). This exemption simply shields an agency's "'group thinking in the process of working out its policy and determining what its law shall be,'" in part because the public is only "marginally concerned" with learning about a policy or the reasons in support of a position "an agency has rejected." *Sears*, 421 U.S. at 152, 153 (citation omitted). By contrast, "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted." *Id.* at 152. As a result, an actual "agency policy" and "the reasons which … supply the basis for" its adoption "constitute the 'working law' of the agency," which must be disclosed. *Sears*, 421 U.S. at 152-53. Here, the agency actually adopted a public position on eminent domain, and the reasons which supplied the basis for its adoption constitute the agency's working law and therefore must be disclosed.

Further, even assuming the deliberative process privilege applies, the agency must segregate factual from opinion materials. *See Pacific Fisheries, Inc. v. United States,* 539 F.3d 1143, 1150 (9th Cir. 2008).

Pages 214-18 & 219 and Exemption 4. Exemption 4 does not justify the agency's withholding of pages 214-18 or the text of the email on page 219.

Pages 214-18 are described as a "Freddie Mac Memo to General Counsel re: Eminent Domain Action announced by City of Richmond."

First, we note that although Exemption 5 is not expressly listed, your letter describes this document as "attorney-client and attorney work product." The privilege for attorney-client communications plainly does not apply because it is a memo authored by Freddie Mac and sent to the General Counsel of a separate agency, the FHFA – in other words, between two entities that do not have an attorney-client relationship. Similarly, any work product privilege Freddie Mac may have had for an internal communication was waived by providing this document to an outside entity, FHFA.

Second, Exemption 4 has no applicability here. Exemption 4 "is available to prevent disclosure of (1) commercial and financial information, (2) obtained from a person or by the government, and (3) that is privileged or confidential." *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir. 1994). Even assuming the first two prongs apply (and we do not concede this point), we do not believe the third prong applies. "[C]onclusory and generalized allegations of competitive harm are insufficient to show that requested information is 'confidential'". *Id.* at 1113. Rather, the agency must offer "evidence revealing (1) actual competition and (2) a likelihood of substantial competitive injury is insufficient to bring commercial information under Exemption 4." *GC Micro*, 33 F.3d at 1113. The mere fact that the "information [was] obtained by a promise of confidentiality on the part of an agency" does not render the information "confidential" within the meaning of Exemption 4. *Save the Dolphins v.*

United States Dep't of Commerce, 404 F. Supp. 407, 411 (N.D. Cal. 1975) (rejecting argument that film made by National Marine Fisheries Service on experimental tuna fishing cruise contained exempt fishing trade secrets); *see also GC Micro*, 33 F.3d at 1113 ("whether the information is of a type which would normally be made available to the public, or whether the government has promised to keep the information confidential is not dispositive under Exemption 4").

Even if Exemption 4 did apply, the agency should produce the remainder of the memo, selectively redacting only the confidential commercial or financial information. *See* 5 U.S.C. §552(b) (agency has duty to provide reasonably segregable non-exempt information).

Page 219 is an email from Bradley Lerman, General Counsel of Fannie Mae, to FHFA General Counsel Pollard. We do not object to the Exemption 6 redaction on this page of a portion of Mr. Lerman's email. We do, however, object to the Exemption 4 redaction of the text of the email. As with the document at pages 214-18, the agency describes page 219 as "attorney-client and attorney work product" material. For the same reasons those privileges are inapplicable to pages 214-18, they are also inapplicable to this communication between a lawyer from one agency to a lawyer in a separate, non-client agency. Exemption 4 is also inapplicable for the reasons stated above.

2. "2nd Search_Redacted.pdf"

We object to the following information withheld from the file "2nd Search_Redacted.pdf":

Page 146 and Exemption 5. We object to the withholding of page 146 in full. The page is described as "7/18/2013 Acting Director Meeting handwritten notes" and has been withheld pursuant to Exemption 5.

From the context of the document production, the page is likely the Acting Director's handwritten notes on the agenda of the meeting with Bank of America described on the immediately preceding page, page 145 (which is described as a "Meeting Agenda with BOA" but contains no agenda at all, only information about the date, time, location of, and attendees at the meeting). Even assuming the Acting Director's handwritten notes are exempt, any other information on this page – such as the agenda of the meeting – is reasonably segregable and should be produced. *See* 5 U.S.C. §552(b).

In any event, we do not believe Exemption 5 applies, even to any handwritten notes on this page. An agency invoking this exemption must "pinpoint an agency decision or policy to which the document contributed." *Senate of the Com. of Puerto Rico on Behalf of Judiciary Committee v. United States,* 823 F.2d 574, 585 (D.C. Cir. 1987) (citation omitted). This exemption only applies where records were "prepared to assist an agency decision-maker in arriving at a future particular decision." *Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 981 (9th Cir. 2009). Documents that were not prepared for this purpose – even internal drafts involving "a continuing process of agency self-examination" – cannot be covered by the privilege, because they are not "predecisional." *Id.* (citation omitted) Specificity is required; an agency cannot meet its burden by providing only "speculative or generalized purposes for which the information would be used." *Id.* Because these notes appear to be the Acting Director's reflections on a meeting, and there is no indication that this page of handwritten notes reflects the agency's process in arriving at any particular decision, Exemption 5 does not apply. But to the extent these notes constitute deliberations on the agency's ultimate decision to adopt a position on eminent domain, as reflected in its August 8, 2013 "Statement on Eminent Domain," Exemption 5 is not applicable for the reasons set forth above with respect to pages 13-14, 51-52, 220. 221-23, 224-25, 259 & 263-67 of the "AP Folder_Redacted" file.

* * *

Thank you for your assistance in this matter. We believe the second production has significantly narrowed the issues in this dispute. However, several issues, discussed above, remain outstanding:

1) We request that you perform a search that eliminates the restriction regarding the identity of the other party to the communication. This is necessary because the search previously performed captures only communications between FHFA employees and individuals at enumerated firms and financial organizations, thereby failing to capture our request for communications with "any other firms or trade groups. (FOIA request 4.)[4] *See* Section I-A above.

2) We believe the records of additional FHFA employees, and not only the heads of certain departments, should be searched. We request that you expand the search to include records of Mary Ellen Taylor, Mario Ugoletti, Meg Burns, Pat Lawler, executive or scheduling assistants of all relevant employees, and any other individuals in each of the offices noted in Section I-B above who are likely to have responsive records.

3) We request that you perform a search using the following terms "local principal reduction"; "Brockton," "Irvington," "Newark" and "San Bernardino." We await the results of your supplemental search using the terms "underwater mortgages" and "Richmond." *See* Section I-C above.

4) Please produce responsive calendar entries. *See* Section I-D above.

5) Please either produce phone messages or clarify if in fact the FHFA's practice is never to retain phone messages. *See* Section I-E above.

6) Some documents that were produced are incomplete. Please provide complete versions of the documents, listed in Section I-F above.

---

[4] This would require re-running the search already performed using the search term "eminent domain" (and also "Richmond" and "underwater mortgages" to the extent that search has already been performed), and would apply to future searches using the new terms discussed in number 3 and Section I-C below.

7) We also object to the agency's withholding of information as discussed in Section II above.

Thank you for your cooperation. We look forward to your response.

Sincerely,

Linda Lye

Exhibit 22

United States Attorney
Northern District of California

11th Floor, Federal Building
450 Golden Gate Ave., Box 36055
San Francisco, CA 94102-3495

(415)436-7022
FAX: (415) 436-6748

VIA U.S. Mail

May 9, 2014

Linda Lye, Esq.
American Civil Liberties Union Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111
llye@aclunc.org

Re: *ACCE, et al., v. FHFA*, Case No. 3:13-cv-05618-KAW

Dear Ms. Lye:

This letter is to supplement FHFA's March 13, 2014 response to your letter dated January 21, 2014, and respond, in part, to your letter of April 1, 2014. In that letter FHFA noted that it was conducting a supplemental search for documents containing the terms "underwater mortgages" and "Richmond." That search has been completed, and the results are described below.

As specified in your FOIA requests, FHFA searched for documents relating to "Richmond's offer to buy underwater mortgages." Specifically, FHFA searched the emails of relevant agency personnel[1] and the agency's Information Management System for documents containing the terms "underwater mortgages" and "Richmond," using a date range of January 1, 2012 through October 1, 2013.

The search retrieved 20 additional documents. Of these documents, 16 are being released in full or with redactions of personal information pursuant to exemption 6 of the Freedom of

[1] As discussed in the March 13, 2014 letter, relevant agency personnel included Edward DeMarco, FHFA Acting Director, Richard Hornsby, FHFA Chief Operating Officer, Jon Greenlee, FHFA Deputy Director for Enterprise Regulation, Sandra Thompson, FHFA Deputy Director for Housing Mission and Goals, Nina Nichols, FHFA Deputy Director for Supervision Policy and Support, Wanda DeLeo, FHFA Deputy Director for Office of Strategic Initiatives, Alfred Pollard, FHFA General Counsel, Michael Powers, FHFA Ombudsman, and Nancy Burnett, FHFA Assistant Director, Office of Women & Minority Inclusion.

Information Act, 5 U.S.C. §552(b)(6), as disclosure of the redacted information (telephone numbers and email addresses) "would constitute and unwarranted invasion of personal privacy." Four documents have also been withheld pursuant to exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), exemption 5 of the FOIA, 5 U.S.C. §552(b)(5), or exemption 8 of the FOIA, 5 U.S.C. §552(b)(8). Details regarding the documents are listed below:

Page Number	Exemption Applied	Document Description
	(b)(4)*	Confidential draft Aug. 2013 Freddie Mac Enterprise Risk Management Committee meeting notes
	(b)(4)*	Confidential Sept. 2013 Freddie Mac Enterprise Risk Management Update
	(b)(6)	Sept. 22, 2013 email re: Reuters article on plan to use eminent domain
	(b)(4), (b)(5), (b)(8)*	Confidential Aug. 8, 2013 FHFA email re: Fannie Mae Management Committee meeting on Aug. 5, 2013
	(b)(4)*	Confidential Jul. 31, 2013 Management Committee meeting notes
	(b)(6)	Aug. 27, 2013 email re: Bloomberg news article on eminent domain
	(b)(6)	Aug. 1, 2013 Canfield & Associates Daily Financial Clips – Commentaries and Editorials
	(b)(6)	Aug. 1, 2013 Canfield & Associates Daily Financial Clips
	(b)(6)	Aug. 7, 2013 Deutsche Bank Markets Research – The Outlook in MBS and Securitized Products
	(b)(6)	Aug. 26, 2013 Canfield & Associates Daily Financial Clips
		Jul. 31, 2013 FHFA News Summary
	(b)(6)	Jul. 12, 2013 email re: Association of Institutional Investors Mortgage Committee Call
	(b)(6)	Sept. 14, 2013 Canfield & Associates Daily Financial Clips
	(b)(6)	Sept. 18, 2013 Canfield & Associates Daily Financial Clips
	(b)(6)	Sept. 23, 2013 Canfield & Associates Daily Financial Clips – Commentaries and Editorials
		Sept. 18, 2013 SFIG Newsletter
		Declaration of Peter Dreier in Wells Fargo v. City of Richmond
		Declaration of Robert Hockett in Wells Fargo v. City of Richmond
		Defendants' Opposition to Motion for Preliminary Injunction in Wells Fargo v. City of Richmond
		Motion for Leave to File *Amicus Curiae* Memorandum in Wells Fargo v. City of Richmond

* Withheld in full.

Also included are replacement copies of the incomplete documents identified on page 4, Section F your April 1 letter.

In addition, although FHFA deems the redacted information on pages 36-39 of its first document production to be non-responsive to your requests, as noted in Section A, page 5 of your April 1 letter, in the interest of resolving issues prior to the filing of any motions, it will produce those pages to you again, with limited redactions showing only the entities on the distribution list of the related email. These documents will follow in a subsequent production.

Please do not hesitate to contact me if you have any questions or need further information.

Very truly yours,
MELINDA HAAG

United States Attorney

REBECCA A. FALK
Assistant United States Attorney

Exhibit 23

Linda Lye

From: Wright, Frank <Frank.Wright@fhfa.gov>
Sent: Wednesday, May 21, 2014 3:33 PM
To: Linda Lye
Cc: 'Rebecca.Falk@usdoj.gov'
Subject: FHFA 2014-FOIA-001 - Supplemental Production
Attachments: 2014-FOIA-001 Calendars and Revised Redactions.pdf

Ms. Lye,

Please find attached a copy of the supplemental production for FOIA request 2014-FOIA-001, consisting of additional responsive calendar entries and a revised set of redactions for pages 36-39 of the first document production. Another copy has been sent to you via overnight mail.

Frank R. Wright
Federal Housing Finance Agency
400 Seventh Street, S.W.
Washington, DC 20024

Easter, Stacy

Subject:	Meeting with Howard Altarescu (Orrick)
Location:	New York
Start:	Tue 11/20/2012 11:00 AM
End:	Tue 11/20/2012 12:00 PM
Show Time As:	Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer:	Lowry, Amanda L.
Required Attendees:	DeLeo, Wanda; Stauffer, Lawrence; Singh, Manoj; Scholz, Elizabeth; Newell, Jamie; OSIPrep@Sharepoint.fhfa.gov

This meeting with Howard Altarescu is now at 11 on Tuesday instead of Monday. Sending their weekly publication just as background info. Mary Ellen

Orrick's Financial Industry Week in Review

November 12, 2012

Dodd-Frank	Housing Finance System Reform	State Governments
Orrick Alerts	Derivatives	WIR Archives

Financial Industry Developments

- Federal Reserve Board Launches 2013 Capital Planning and Stress Testing Program
- Joint Agency Guidance on Regulatory Capital Rulemakings
- Rating Agency Developments

RMBS Litigation

- Motions to Dismiss FHFA's Claims in Two Actions Granted in Part and Denied in Part
- Judge Denies S&P's Motion to Dismiss Claims Brought By Illinois AG
- Royal Park Investments Sues Bank of America Over $1.6 Billion in RMBS
- Sealink Sues Citigroup over $513 Million in RMBS

European Financial Industry Developments

- Short Selling Regulation and Updates to FSA Handbook

Easter, Stacy

Subject:	Tozer
Location:	Tozer Office (8-211)
Start:	Wed 4/24/2013 1:30 PM
End:	Wed 4/24/2013 2:00 PM
Recurrence:	(none)
Meeting Status:	Meeting organizer
Organizer:	Pollard, Alfred
Required Attendees:	Ugoletti, Mario; Becchi, Rosemary ((b)(6)@PattonBoggs.com)

At the meeting they would like to discuss:

1. All views on how to expand HARP into PLS.
2. Creating market certainty around when HARP and HAMP will end.
3. Discuss the continued potential use of Eminent Domain nationally/continued concerns/developments.
4. Current GSE Reform positions/ideas from All view.

Expected Attendees: Senior Executives from Pimco, MetLife, Fidelity, State Street, Loomis Sayles and others.

Easter, Stacy

Subject:	Eminent Domain
Location:	Director's Board Room
Start:	Fri 6/28/2013 2:30 PM
End:	Fri 6/28/2013 3:00 PM
Show Time As:	Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer:	DeMarco, Edward
Required Attendees:	Ugoletti, Mario; Dunckel, Denise; Pollard, Alfred; Thompson, Sandra

Easter, Stacy

Subject:	Eminent Domain with Richard Dorfman and Joseph Cox from SIFMA
Location:	PL Plaza Conference Room 1-201
Start:	Thu 8/16/2012 10:00 AM
End:	Thu 8/16/2012 11:00 AM
Recurrence:	(none)
Meeting Status:	Accepted
Organizer:	Harrington, Joan
Required Attendees:	Pollard, Alfred; Cross, Stephen; DeLeo, Wanda
Optional Attendees:	Lawler, Patrick; Dickerson, Chris; Stauffer, Lawrence; Singh, Manoj; Newell, Jamie; Scholz, Elizabeth; Taylor, Mary Ellen; Ugoletti, Mario

Meeting sent out on behalf of Wanda DeLeo.
Wanda received the request below from Richard.

Dear Wanda,

I trust you are well.

Given Ed Demarco's cautionary statement about the use of a "takings" process under eminent domain, and the thirty days he has allowed for public replies, I would like to meet with you urgently to focus on the matter of the related "just compensation" requirement.
My argument on that point is that the compensation must apply not only to the invested asset (each mortgage loan taken from a securitized pool), but to the investment position necessarily created to hold the asset in a safe and sound, risk mitigated, condition. That would include funding and risk-mitigation instruments, likely to be derivatives. Essentially, this is a "but for" type of test, in that "but for the asset," the composite position would not exist. Accordingly, the "taking " of the asset should trigger an additive value calculation inclusive of all elements of the position.

If my contention is correct, the justly compensated cost of such a taking could be much greater than assumed by the promoter.

Another related matter would review the meaning of eminent domain to the FHLBs. I question how the collateral value of pledged RMBS or mortgages could be established, at least without large haircuts, if the RMBS markets become devalued under the threat of eminent domain.

I intend to be in Washington next week. I would be grateful for a meeting with you.

With regards,

Richard

Richard A Dorfman

Easter, Stacy

Subject: ABA CT/MA/RI Bankers Association Stakeholders Mtg.
Location: PL Training Rooms 1-101 & 1-103

Start: Wed 9/11/2013 10:00 AM
End: Wed 9/11/2013 11:00 AM

Recurrence: (none)

Meeting Status: Accepted

Organizer: Dunckel, Denise
Required Attendees: Pollard, Alfred; Greenlee, Jon; DeLeo, Wanda; Lawler, Patrick; Burns, Meg; Fernandez, Maria; Pryor, Sika; Graham, Fred C.; Thompson, Sandra

Please see list of attendees attached.

CT.MA.RI
Attendees 2013.xls

Please see agenda items for next week's ABA Stakeholders meeting with CT/MA/RI. They will have up to 40 members attending this meeting.

1. GSE reform: Senate and House Bills	Views on House and Senate approaches. Future of Fannie/Freddie/FHLBs?
2. State and Local Foreclosure Laws/Ordinances	FHFA views on state and local foreclosure, property maintenance and eminent domain laws/ordinances
3. QM/Ability to Repay Rules	Implementation of these rules and impact on GSEs.
4. GSE Servicing Issues	Issues smaller servicers should be aware of? Changes to servicing/loss mitigation policies?
5. Federal Home Loan Bank Issues	Any emerging issues/trends? Overall health of the FHLB system.

Easter, Stacy

Subject:	Illinois Bankers Briefing
Location:	PL Training Room 1-103
Start:	Wed 9/12/2012 9:00 AM
End:	Wed 9/12/2012 10:00 AM
Show Time As:	Tentative
Recurrence:	(none)
Meeting Status:	Declined
Organizer:	Pryor, Sika
Required Attendees:	Pollard, Alfred; Cross, Stephen; Lawler, Patrick; Taylor, Mary Ellen; Greenlee, Jon; DeLeo, Wanda; Burns, Meg; Dunckel, Denise; Roberts, Toi
Optional Attendees:	Singh, Manoj; Newell, Jamie

Quick Update,

Just to cut down on confusion, these briefings are kept to an hour with the first half hour being reserved for presentations by FHFA staff. The remaining 20 to 30 minutes are left for questions from the attendees. I shared discussion issues that the Illinois Bankers are interested in for your information. Some of these items will be more appropriate for other federal regulators they will visit while in D.C. The following list will give you an idea of speakers and the issues they might touch on behalf of FHFA.

If you have already declined the meeting, please disregard this message.

Alfred – Mortgage, legal, regulatory issues including QRM, pending lawsuit and eminent domain (attending)
Pat – Economic issues, including G-fees, risk transfer, Basel (tentative)
Stephen – FHLB status (attending)
Wanda - Strategic initiatives (attending)

Meg – You were included because there may be discussion around reps and warrants.

Thanks.

Hello All,

Below is the list of discussion items the Illinois Bankers Association is interested in. Also attached is the attendee list and itinerary (while in D.C.) for the Illinois Bankers Association. Please let me know whether you plan to attend next Wednesday if you haven't responded already.

Thanks.

Sika

Easter, Stacy

Subject: ABA CT/MA/RI Bankers Association Stakeholders Mtg.
Location: PL Training Rooms 1-101 & 1-103

Start: Wed 9/11/2013 10:00 AM
End: Wed 9/11/2013 11:00 AM

Recurrence: (none)

Meeting Status: Declined

Organizer: Dunckel, Denise
Required Attendees: Pollard, Alfred; Greenlee, Jon; DeLeo, Wanda; Lawler, Patrick; Burns, Meg; Fernandez, Maria; Pryor, Sika; Graham, Fred C.; Thompson, Sandra

Please see list of attendees attached.

CT.MA.RI
Attendees 2013.xls

Please see agenda items for next week's ABA Stakeholders meeting with CT/MA/RI. They will have up to 40 members attending this meeting.

1. GSE reform: Senate and House Bills	Views on House and Senate approaches. Future of Fannie/Freddie/FHLBs?
2. State and Local Foreclosure Laws/Ordinances	FHFA views on state and local foreclosure, property maintenance and eminent domain laws/ordinances
3. QM/Ability to Repay Rules	Implementation of these rules and impact on GSEs.
4. GSE Servicing Issues	Issues smaller servicers should be aware of? Changes to servicing/loss mitigation policies?
5. Federal Home Loan Bank Issues	Any emerging issues/trends? Overall health of the FHLB system.

Easter, Stacy

Subject: ABA Illinois Bankers Association Stakeholders Mtg.
Location: PL Plaza Training Room 1-101; PL Plaza Training Room 1-103

Start: Wed 9/18/2013 10:30 AM
End: Wed 9/18/2013 11:30 AM

Recurrence: (none)

Meeting Status: Accepted

Organizer: Dunckel, Denise
Required Attendees: Pollard, Alfred; Greenlee, Jon; DeLeo, Wanda; Lawler, Patrick; Burns, Meg; Thompson, Sandra; Graham, Fred C.; Pryor, Sika
Optional Attendees: Garuccio, Peter

13 IL
Attendees.xlsx

1. GSE Reform/Mortgage Reform	Roles of GSEs under current reform proposals. Accessibility to long-term fixed rate mortgage products following GSE reform.
2. FHFA Legal Challenge to Chicago's Vacant Property Ordinance	Agency's reactions to decision. Next steps for mortgagees with Fannie and Freddie loans, implications for non-GSE mortgages, and impact on other municipalities with similar ordinances.
3. Chicago's Rent Control Ordinance	Agency's reactions and discussion.
4. Impact of QM Rules & Related Issues	Mortgage lending challenges for community banks.
5. Eminent Domain	FHFA actions on municipal proposals to seize "underwater" mortgages.

Exhibit 24

News Release

Federal Housing Finance Agency Director Mel Watt Announces Four Staff Appointments

FOR IMMEDIATE RELEASE

1/10/2014

Washington, D.C. – Mel Watt, who was sworn in on January 6, 2014 as Director of the Federal Housing Finance Agency, today announced the appointment of four special advisors—Megan Moore, Bob Ryan, Eric Stein and Mario Ugoletti—to provide counsel on policy and strategic decisions at the FHFA.

Megan Moore will join the FHFA as Special Advisor – Intergovernmental. Moore has worked at the U.S. Department of the Treasury since June 2009, most recently as Deputy Assistant Secretary for Housing, Small Business and TARP in the Office of Legislative Affairs. Moore also worked in the U.S. House of Representatives from 2006 to 2009. Moore holds a Master's degree in Public Administration from Baruch College at City University of New York and a Bachelor's degree from Howard University. Moore will join the FHFA later in January.

Bob Ryan will join the FHFA as Special Advisor – Industry. Ryan most recently served as a Senior Vice President of capital markets at Wells Fargo Home Mortgage. From 2009 to 2012 he was a Senior Advisor to U.S. Department of Housing and Urban Development Secretary Shaun Donovan and served as the first chief risk officer at the Federal Housing Administration. Ryan also spent 26 years at Freddie Mac. Ryan earned a B.S. in Business from George Mason University. He will also join the FHFA later in January.

Eric Stein will serve initially as Special Advisor and Acting Chief of Staff and later will become Special Advisor – Consumer. He previously worked at Self-Help and the Center for Responsible Lending for 17 years, most recently as Senior Vice President. Stein also served at the Treasury Department as Deputy Assistant Secretary for Consumer Protection from 2009 to 2010. Stein holds a law degree from Yale University and a B.A. from Williams College. Stein joined the FHFA on January 7.

Mario Ugoletti has served as a Special Advisor to the Acting Director of the FHFA since 2009 and has been appointed by Mr. Watt as Special Advisor – Agency. Prior to joining the FHFA, Ugoletti spent 14 years at the Treasury Department and served as Director of the Office of Financial Institutions Policy from 2004 to 2009. Ugoletti has a Ph.D. in Economics from Penn State University.

"I am very pleased that Megan, Bob, Eric and Mario have agreed to be part of the FHFA team and to provide solid advice and perspective on the important issues I will be facing as Director of the Agency. Along with the strong staff already in place, these advisors have diverse skills and experience in housing finance policy that will help me build a stronger foundation for our nation's housing finance system," said Watt.

###

The Federal Housing Finance Agency regulates Fannie Mae, Freddie Mac and the 12 Federal Home Loan Banks. These government-sponsored enterprises provide more than $5.5 trillion in funding for the U.S. mortgage markets and financial institutions.

Contacts: Stefanie Johnson (202) 649-3030 / Corinne Russell (202) 649-3032

Mario Ugoletti

Economist at USG

Experience

Special Advisor at Federal Housing Finance Agency
September 2009 - Present (4 years 10 months)

Director, Office of Financial Institutions Policy at U.S. Department of the Treasury
April 2004 - September 2009 (5 years 6 months)

Economist at U.S. Department of the Treasury
June 1995 - April 2004 (8 years 11 months)

Skills & Expertise

Data Analysis
Statistics
Analysis
Economics
Policy Analysis
Financial Analysis
Forecasting
Policy
Financial Modeling
Research
Microsoft Excel
Project Management
Sustainability
SAS
Strategic Planning
Business Analysis
Microsoft Office
Budgets
Financial Reporting
Public Policy

Education

Penn State University
Doctor of Philosophy (PhD), Economics, 1989 - 1995

Mercyhurst College
1980 - 1984

Mario Ugoletti

Economist at USG

Contact Mario on LinkedIn

Statement of

Meg Burns
Senior Associate Director for Housing and Regulatory Policy
Federal Housing Finance Agency

Before the U.S. House of Representatives Committee on Financial Services, Subcommittee on Capital Markets and Government Sponsored Enterprises

"An Examination of the Federal Housing Finance Agency's Real Estate Owned (REO) Pilot Program"

May 7, 2012

Patrick Lawler

Chief Economist at OFHEO

Experience

Chief Economist at Federal Housing Finance Agency
2008 - Present (6 years)

Chief Economist at Office of Federal Housing Enterprise Oversight (OFHEO)
1994 - 2008 (14 years)

Skills & Expertise

Macroeconomics
Econometrics
Stata
Banking
Econometric Modeling
Economics
Public Policy
Policy Analysis
Statistics
Policy

Patrick Lawler

Chief Economist at OFHEO

Contact Patrick on LinkedIn

Joan Harrington

Administrative Office Manager at Federal Housing Finance Agency

Experience

Administrative Office Manager at Federal Housing Finance Agency
April 2006 - Present (8 years 3 months)

Administrative Assistant at W.W. Grainger
1998 - 2006 (8 years)

Skills & Expertise

Government
Research
Program Management
Data Analysis
Non-profits

Education

Emory and Henry College
BA, Psychology, 1971 - 1975

Joan Harrington

Administrative Office Manager at Federal Housing Finance Agency

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Contact Joan on LinkedIn

Mary Ellen Taylor

Senior Policy Advisor at FHFA

Experience

Senior Policy Advisor at FHFA

Skills & Expertise

Policy Analysis
Risk Management
Public Policy
Government
Financial Regulation
Policy
MBS

Mary Ellen Taylor

Senior Policy Advisor at FHFA

Linkedin

Contact Mary Ellen on LinkedIn

Exhibit 25

Statement of

Alfred M. Pollard
General Counsel
Federal Housing Finance Agency

Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs

"Housing Finance Reform: Powers and Structure of a Strong Regulator"

November 21, 2013

Statement of Alfred M. Pollard, General Counsel
Federal Housing Finance Agency
Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs
November 21, 2013

Chairman Johnson, Ranking Member Crapo and members of the Committee, thank you for your invitation to testify on the powers and structure of a regulator for a revised housing finance system. My name is Alfred M. Pollard and I am General Counsel for the Federal Housing Finance Agency (FHFA), which is the safety and soundness regulator of the Federal Home Loan Bank System and Fannie Mae and Freddie Mac. The introduction of S. 1217 and the work of the cosponsors and of the Chairman and Ranking Member in moving forward with housing finance reform are important steps. I have addressed the questions you put to me in your letter and will be pleased to answer any questions you may have.

Supervisory Tools Available to FHFA

Following enactment of the Housing and Economic Recovery Act of 2008 (HERA), the new Federal Housing Finance Agency came into existence with an enhanced array of supervisory tools. These include explicit authority to impose and enforce prudential standards, including capital standards; obtain reports from parties on a regular and on an as-requested basis; conduct targeted and full scope examinations; oversee executive compensation, including incentive compensation and golden parachutes; require remedial actions; and authorities to undertake a full range of enforcement actions.

FHFA's predecessor as supervisor of Fannie Mae and Freddie Mac was the Office of Federal Housing Enterprise Oversight (OFHEO). In general, OFHEO did not have a full range of authorities, including authority to set capital requirements or to undertake supervisory actions that were comparable to those of other financial regulators; HERA corrected that. At OFHEO, congressional appropriations were required, subjecting the regulator to potential disruptions if a budget were not in place; HERA corrected that. At OFHEO, no receivership authority existed which symbolized a regulator without a full range of capacities; HERA corrected that. At OFHEO much had to be done with implied authorities; HERA corrected that, providing explicit authorities and language regarding "incidental authority." In addition, by merging OFHEO and the Federal Housing Finance Board, FHFA's predecessor as supervisor of the Federal Home Loan Bank System, HERA increased synergies over the regulation of the government-sponsored sector of the housing finance market. Overall, HERA made important changes to the regulatory authority over Fannie Mae and Freddie Mac, but by the time the law was passed it was too late to implement those authorities prior to the need for conservatorships.

More specifically, let me cover a few of the basic regulatory tools that FHFA has today:

Supervision and Examination. FHFA has a full array of supervisory tools, many of which were unavailable to OFHEO, but provided under HERA to FHFA. Since its creation in 2008, FHFA has implemented these tools through a comprehensive supervisory program described here.

FHFA supervision is carried out by two divisions—the Division of Enterprise Regulation with responsibility for Fannie Mae and Freddie Mac and the Division of Bank Regulation with responsibility for the twelve Federal Home Loan Banks and the Office of Finance. Both Divisions employ on-site examination and off-site analysis and carry forward prudential standards set forth in regulation to meet FHFA's responsibilities relating to safety and soundness and compliance with laws and regulations.

With respect to Fannie Mae and Freddie Mac, even in conservatorships, FHFA maintains a permanent on-site presence of examiners who conduct examinations and monitor business activities, key risks and compliance. With respect to the Federal Home Loan Banks, FHFA typically carries out three on-site examinations per quarter so that all twelve FHLBanks are examined on-site once per year. As with Fannie Mae and Freddie Mac, FHFA has an ongoing program of off-site monitoring of the FHLBanks.

FHFA has established comprehensive examination manuals that serve as guides for examination efforts and are available to the regulated entities and to the general public. FHFA continues to issue Advisory Bulletins on a timely basis regarding key matters such as credit risk management and model risk governance. Typically, these are based on best practices that have emerged in bank regulation, though appropriately adapted to the unique characteristics of our regulated entities, starting with the fact that they are not commercial banks. FHFA remains the only financial regulator tasked with providing an annual report to Congress on its examination results.

FHFA's two supervisory Divisions work closely with the Division of Housing Mission and Goals that has expertise in mortgage-related products and markets, to ensure the agency maintains a comprehensive view of risks and housing finance activities. Together these three divisions also conduct the mission oversight of the regulated entities.

With Fannie Mae and Freddie Mac each in conservatorship, FHFA's oversight of these companies goes beyond traditional supervisory activities. As the conservatorships have lasted far longer than originally anticipated, FHFA has responded by developing an Office of Conservatorship Operations and an Office of Strategic Initiatives that carry out FHFA's responsibilities regarding the current operations of the conservatorships. These Offices coordinate and collaborate with the other divisions to enable FHFA to meet its responsibilities and its mission of ensuring our regulated entities operate in a safe and sound manner so they may serve as a reliable source of liquidity and funding for housing finance and community investment.

Enforcement. FHFA may take a broad range of enforcement actions by statute and, by regulation and policy guidance, has elaborated on the conduct of such powers. Cease and desist orders, civil money penalties, debarment of officials, the ability to act against institution-affiliated parties all exist within the ambit of our statute; additionally, the Agency has created a process for suspending individual or corporate counterparties found guilty of criminal law violations. Overall, FHFA has broad administrative enforcement powers regarding the regulated entities and the ability to access judicial remedies if necessary to address third parties through its independent litigation authority.

Emergency Tools. HERA provided FHFA a broad range of regulatory tools for addressing emergency situations. The Agency does not possess a fund such as the Deposit Insurance Fund to cover specified losses, but it does maintain a working capital fund and has the ability to impose special assessments on the regulated entities to address any shortfalls in its resources in order to respond to emergency situations. Temporary emergency funding was provided in the form of a support agreement with the U.S. Treasury Department in 2008 and this remains the main source of funding to provide capital support to the conservatorships. Finally, FHFA has employed its authorities and they have been affirmed in a number of important court rulings.

As to those court decisions, several have aided in rounding out FHFA authorities. Significantly in a case in the Southern District of New York, the Court found not only that FHFA had examination privilege, but also shared similar authorities to banking regulators. This solidified the examination privilege that facilitates effective supervision, but as well made clear that FHFA supervisory actions find support in long-standing bank regulatory powers. For a new agency, these judicial decisions are important.

In sum, the agency is equipped to meet the mission Congress has set for it. What I will now address is the regulatory structure set forth in S. 1217, and, based on some of the lessons learned during this crisis, where areas exist for improvement in terms of regulatory structure and powers.

S. 1217, Housing Finance Reform and Taxpayer Protection Act of 2013

FHFA has endorsed the need for legislative action on housing finance reform. S. 1217 is an important effort in moving that process forward.

Proposed Regulatory Structure. S. 1217 would establish a new model for the secondary mortgage market and a new supervisory agency, the Federal Mortgage Insurance Corporation (FMIC). The range of FMIC's duties and responsibilities represents a movement away from traditional examination- and enforcement-based supervision to a multi-faceted construct that covers availability and transparency of information, standard-setting to enter and participate in the market, supervision of participants, access to credit and the secondary mortgage market, insurance of securities and establishment and operation of databases including a mortgage data repository. Implementation of the bill's varied elements will require careful thought and planning over the five-year transitional period and the undertaking of appropriate transitional steps. It must be noted, however, that beyond the regulatory structure and authorities, a key lesson learned during the financial crisis is that, even with adequate powers, regulators will not always get it right; therefore, if taxpayers are going to be exposed to risk of losses, sufficient private capital must be available in front of taxpayers, as contemplated in S. 1217.

Regulatory Tools That Should Be Added. The bill provides FMIC with limited explicit regulatory authority, though additional tools may be implied and, importantly, an "incidental powers" provision is set forth. Making regulatory authority clear and explicit, including where appropriate the ability to establish prudential standards, set capital requirements and take enforcement actions, would enhance market stability and provide a higher degree of confidence to all market participants. Further, the ability to address both the primary parties to be regulated and to have certain authorities in relation to their contractual counterparties would be in line with existing legal practice. Where the bill implies authority, but does not expressly confer it, action FMIC would determine to take could lead to litigation and result in different outcomes in different jurisdictions, undermining the operation of a national housing finance market.

Reliance on implied authority also makes it difficult to say what is missing. What is clear is that FMIC needs a full array of supervisory and enforcement authorities with regard to the market participants for which it must set standards and approve entry, including the authority to set capital standards, request reports from and examine these participants, establish enforceable prudential standards, require participants to undertake remedial actions where appropriate and impose penalties for bad behavior and bad actors. In the structure proposed in S. 1217, providing FMIC with these tools is not only important for market integrity, but also to protect taxpayers in light of the risks associated with FMIC insurance. These powers are familiar to current participants in the housing finance market—many of which are already subject to supervision by FHFA or by a state or federal regulatory authority—and to the extent they have not been provided to FMIC or are only implied in S. 1217, they should be made explicit.

FHFA has provided language to demonstrate how these powers, which could be implied and are incidental to other authorities already expressed in S. 1217, could be made clearer in the bill. For example, FMIC has authority to approve or suspend approval for participants and "suspending" implies requiring remedial action; this should be made explicit. Also, FMIC's authority to revoke approvals implies the ability to revoke participation and thus prohibit participation; such prohibition should be made explicit.

Finally, as re-affirmed by the crisis, greater sharing of supervisory information among regulators, greater cooperation among regulators, such as FHFA-CFPB efforts on a national mortgage data base, and greater transparency for markets, such as FHFA directing the publication by the Enterprises of historical loan data, are critical. These are core areas on which FHFA is working and will continue to build.

Improvements to S.1217 Regulatory Structure. Because S. 1217 sets a new direction for the housing finance market, two questions are critical—as the Committee has asked, does the legislation get the right structural pieces in place for the new market to function smoothly and efficiently and does it provide for an effective transition from the current system to the new market. FHFA has identified some areas where the bill could more fully answer these questions.

For example, S. 1217 acknowledges that many likely participants in the new market are already subject to prudential supervision by other safety and soundness state or federal regulators by authorizing consultation or directing FMIC to coordinate with another agency, but more could be done to ensure that other regulators share information with FMIC and that exams are coordinated, reducing burdens on participants and improving supervisory approaches and outcomes. FMIC and FHFA roles in the Financial Stability Oversight Council should be clarified to ensure that during market transition appropriate representation remains in place. FMIC should have an appropriate and explicit role in the Federal Financial Institutions Examination Council.

There may also be gaps to be filled. For instance, today all mortgage servicers are subject to certain compliance oversight with regard to consumer protections, but non-bank servicers may not be subject to prudential oversight. The bill does not address enhanced supervision of non-bank servicers, even though their safety and soundness and their conformance with required practices are critical to FMIC's mandate to protect taxpayers. Assigning regulatory oversight to FMIC with the ability to set and enforce prudential requirements could help fill this gap. Additionally, FHFA has seen certain state and local laws that may impair the efficient operation of a national secondary mortgage market.

The bill also provides for FMIC to be funded exclusively by insurance fees, which would be collected on mortgage-backed securities that FMIC insures. Relying exclusively on fees as a funding base, particularly as the new market is developing, may present certain challenges. Clearly, at its inception, FMIC should have sufficient resources to be fully operational and sound. Further, funding FMIC and growing the insurance reserve could require rather large insurance fees in FMIC's early years. In times of market distress, FMIC revenues could drop substantially. These challenges may be addressed by expanding FMIC's sources of funding to include other fees and assessments; for example, creating application fees, which are not explicit, and restoring assessments on the Home Loan Banks for their supervision.

Transition. Transition to the new agency involves a simultaneous wind-down of the Enterprises and the transfer of functions and employees from FHFA to FMIC and the hiring of additional employees as needed to fulfill the new agency's responsibilities. FHFA was created five years ago by merging the functions and employees of three agencies—OFHEO, the Finance Board and elements of the Department of Housing and Urban Development—into a single agency with all of the functions of its three parts. Here, the transition involves employees from one agency, but into a framework with multiple responsibilities. S. 1217 establishes a two-step transition that would have FHFA and FMIC co-exist for five years, which could be confusing and inefficient for both market participants and agency employees.

FHFA's experience in standing up a new agency would argue in favor of immediately transferring all FHFA personnel and responsibilities to FMIC, thus permitting a smooth integration, a focus on meeting the bill's five-year goal of full implementation and maintaining the congressional direction to wind down Fannie Mae and Freddie Mac. In particular, moving all employees to the new agency—or, possibly, renaming and empowering FHFA as FMIC—avoids issues of dispersion of resources and expertise that may prove beneficial to the various tasks assigned in the legislation. Guidance would be helpful on the legal authority of FMIC's Director to act before the Board is fully constituted. Funding in transition may be critical to assure that a smooth start for FMIC occurs with a solid capitalized reserve fund, systems and technology in place and providing resources to address challenges not anticipated at this time.

New Utilities. FHFA continues work on the Common Securitization Platform. As FHFA and, later, FMIC move to develop more fully the National Mortgage Database and an approach for a national mortgage market repository for notes and other documents, it may be beneficial to address these two items with additional legislative language. A national note repository can bring benefits to homeowners, lenders, the state foreclosure process and efforts of groups such as the Uniform Law Commission to make more uniform state foreclosure laws.

Conclusion

FHFA continues to support early congressional action to make clear for FHFA, for its regulated entities, for borrowers and for financial markets the directions you believe most appropriate to protect taxpayers, maintain access to housing finance products and services and the strongest regulatory structure that is credible, empowered, clearly defined and transparent to carry forward your directions. While all of this has complexities, that should not deter prudent actions.

In closing, FHFA appreciates the opportunity to work with you and your staffs and those of the cosponsors, as well as those of other committee members, to assist in any way we can as you move forward on this critical task of addressing a new housing finance structure. The certainty that can come from such efforts will benefit homeowners, investors and taxpayers.

Exhibit 26

E-Filed 10/28/11

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

United States District Court
For the Northern District of California

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA; SAN FRANCISCO BAY GUARDIAN,

Plaintiffs,

v.

DRUG ENFORCEMENT ADMINISTRATION,

Defendants.

____/

No. C 11-01997 RS

ORDER GRANTING IN PART AND DENYING IN PART CROSS MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

The American Civil Liberties Union (ACLU) and the *San Francisco Bay Guardian* bring this action for declaratory and injunctive relief under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking disclosure of Drug Enforcement Administration (DEA) records concerning several states' efforts to import sodium thiopental, a drug used to carry out executions by lethal injection. The DEA claims it has discharged its legal obligations by identifying 281 pages of responsive documents, many of which have been withheld in full or in part. Plaintiffs claim the DEA has failed to conduct an adequate search, and challenge the propriety of particular withholdings. After oral argument, based on the entire record, and for the reasons stated below, the cross motions for summary judgment are each granted in part and denied in part.

II. BACKGROUND

Sodium thiopental is a Schedule III controlled substance used by many states for executions by lethal injection. It is unlawful to "import or cause to be imported" sodium thiopental unless the importer is registered (or exempt), and has filed a DEA Form 236 import declaration with the agency. 21 C.F.R. §§ 1312.11(b), (c), 1312.18(b). In May 2010, the news media reported that a domestic shortage of sodium thiopental prompted some states, including Alabama, Arizona, Arkansas, California, Georgia, Kentucky, Nebraska, South Carolina, South Dakota, and Tennessee, to attempt to import the drug from two international sources. According to news reports submitted by the plaintiffs, the DEA subsequently took custody of these imported stocks due to the states' alleged failure to comply with federal import regulations. DEA allegedly seized imported sodium thiopental from Georgia sometime in March of 2011, from Kentucky and Tennessee on or about April 1, 2011, from South Carolina on or about April 21, 2011, from Alabama on or about April 26, 2011, and from Arkansas on or about July 22, 2011. On January 4, 2011, plaintiffs submitted a FOIA request seeking twelve categories of information related to the states' importation of sodium thiopental.[1]

Absent "unusual circumstances," agencies have 20 days to inform the requester whether it will comply with the request. § 552(a)(6)(A)(i). The DEA acknowledged receipt of plaintiffs' request on January 12, 2011, and on January 18, granted plaintiffs' petition for expedited processing. According to the DEA, its FOIA Unit initiated a search for documents on February, 1, 2011 and determined that the Office of Diversion, which is responsible for overseeing the

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[1] The records requested by plaintiffs include: communications between the DEA and state officials regarding importation, transfer, or purchase of sodium thiopental for executions; internal DEA communications regarding the importation, transfer, or purchase of sodium thiopental by state officials for executions; communications between the DEA and any person abroad, including foreign government officials, regarding the importation of sodium thiopental by state officials for executions; communications between the DEA and private individuals regarding the importation, transfer or purchase of sodium thiopental by state officials for executions; communications between the DEA and the Food and Drug Administration (FDA) or Customs and Border Protection (CBP), regarding the importation, transfer, or purchase of sodium thiopental by state officials for executions; records regarding the actual importation, transfer, or purchase of sodium thiopental for the purpose of execution; and, a list of approved importers of sodium thiopental allegedly provided by the DEA to the California Department of Corrections and Rehabilitation (CDCR).

importation of controlled substances, would likely possess responsive records. The Office of Diversion searched for, and identified, such materials in its Regulatory Section and Policy and Liason Section. According to the DEA, it completed this search on February 8. One month later, on March 8, the DEA sent plaintiffs a letter apologizing for the delay in processing their request, and advising plaintiffs that they would receive notice of the agency's initial determination about whether to comply with the request by later correspondence. On April 7, the ACLU left a voicemail with the agency inquiring about the status of its request, to which the agency never responded. In late April of 2011, two states, Arizona and Nebraska, scheduled executions for May and June of 2011, respectively. The plaintiffs filed this action on April 22, 2011, seeking injunctive and declaratory relief to obtain disclosures from the DEA before the scheduled executions occurred.

When the DEA received notice of plaintiffs' complaint on April 23, it conducted a litigation review of the administrative file on plaintiffs' request, prompting a supplemental search for records. DEA personnel familiar with the sodium thiopental seizures determined that the Deputy Assistant Administrator, Office of Diversion, as well as the Phoenix, Atlanta, and St. Louis Field Division Offices, would likely possess responsive documents. On April 27, the Deputy Assistant Administrator was informed of the request and provided a file of responsive emails, which were processed and submitted to plaintiffs. In addition, the Office of Diversion searched the Controlled Substance Import/Export Database (CISMEX), a database used to process and maintain import and export declarations of controlled substances, using the keywords "sodium thiopental" and "thiopental." It found no responsive records. Finally, the Policy and Liaison Section of the Office of Diversion conducted a manual search of its "Chron files," an archive on a shared drive, for responsive communications. These records were processed and submitted to plaintiffs.

The Field Division Offices were notified of plaintiffs' request between April 27 and April 29, 2011. The Diversion Program Manager of the Atlanta Division, who knew of two open multi-state criminal investigations in his region, queried the DEA's Investigative Management Program and Case Tracking System (IMPACT), a web-based case management system that is used by Field Divisions to record, access, and analyze information related to agency investigations. The Division

Program Manager's search of IMPACT identified the relevant cases and the Investigators responsible for them. The Investigators then furnished the criminal investigative files and searched their office files for responsive communications that were not already included in the case files. These records were processed and submitted to plaintiffs. The St. Louis Division followed a similar procedure, but found no related active criminal investigations in the region, and produced no documents. The Phoenix Division asked personnel likely to have knowledge of any sodium thiopental seizures, including the Assistant Special Agent in Charge, to identify responsive records. The Division determined that, at least at the time of the search, there were no active investigations. However, the Division performed a search of email accounts using the keywords "sodium thiopental" and "thiopental," and responsive records were identified and disclosed to plaintiffs.

Following the initiation of this suit, the parties failed to agree on a satisfactory production schedule, leading plaintiffs eventually to move for a preliminary injunction on April 28, 2011. In its opposition to plaintiffs' motion, the DEA agreed to produce responsive documents by May 16, 2011, *i.e.*, prior to the first scheduled execution. On May 4 or 5, the DEA produced 27 documents. At a hearing on May 12, the Court ordered the parties to file a joint status report following production, and subsequently denied plaintiffs' motion for an injunction. On May 16, the DEA notified plaintiffs that it had identified an additional 238 pages of responsive documents. One hundred sixty of these pages were withheld in full because they encompassed active criminal investigative files. Of the other 78 pages identified, 19 were withheld in full, 32 were withheld in part, and 27 were released in full. The DEA also released 12 pages of documents that had previously been referred for consultation with other agencies.

On May 17, the agency notified Chemique Pharmaceutical, Inc., an importer of sodium thiopental, of the instant litigation and solicited the company's opinion as to whether information concerning Chemique's supplier and imported stock of sodium thiopental, disclosed to the agency in a mandatory import declaration, constituted privileged or confidential commercial information under § 552(b)(4). Chemique took the position that the information was confidential, and objected to disclosure. The agency informed plaintiffs of the same, and withheld portions of documents it disclosed accordingly. Throughout the rest of May, June, and July, the DEA continued to produce responsive documents. In total, the DEA's search unearthed 281 pages of responsive materials. Of these, 104 pages were produced in part or in full, and 177 pages were withheld in full.

III. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party succeeds in carrying its burden, it shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). *See also Celotex*, 477 U.S. at 323. A genuine issue of material fact is one that could reasonably be resolved in favor of the nonmoving party, and which could affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court must view the evidence in the light most favorable to the nonmoving party and draw all justifiable inferences in its favor. *Id.* at 255. FOIA cases are frequently resolved on summary judgment because the facts are usually undisputed. *Id.* When an agency claims to have satisfied its obligations under FOIA and moves for summary judgment, the court must view the facts in the light most favorable to the requester. *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994). "[T]he FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'" *U.S. Dep't of Justice v. Reporters Comm'n for Freedom of the Press*, 489 U.S. 749, 754 (1989), *citing* § 552(a)(4)(B).

IV. DISCUSSION

The FOIA "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *E.P.A. v. Mink*, 410 U.S. 73, 80 (1973) (superseded on other grounds). The Act is "broadly conceived," *id.*, and reflects "'a general philosophy of full agency disclosure.'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976), *quoting* S. Rep. No.

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813, 89th Cong., 1st Sess., 3 (1965). Thus, upon receiving a request for records, federal government agencies must conduct a "search reasonably calculated to uncover all relevant documents, construing the facts in the light most favorable to the requester," and then produce the documents identified. *Citizens Comm'n on Human Rights v. F.D.A.*, 45 F.3d 1325, 1328 (9th Cir. 1995), *citing Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985). "At the same time, the FOIA contemplates that some information can legitimately be kept from the public through the invocation of nine 'exemptions' from disclosure." *Yonemoto v. Dep't of Veterans Affairs*, 648 F.3d 1049, 1055 (9th Cir. 2011). In this case, defendant moved for summary judgment, claiming it has fulfilled its obligations under the FOIA. Plaintiffs moved for summary judgment, challenging the adequacy of the DEA's search, and specific withholdings, including redactions to 18 pages produced in part, and the withholding of 177 pages in full.

A. Adequacy of the Search

The first issue raised by the parties' cross-motions for summary judgment is the adequacy of the search performed by the DEA. The FOIA requires the DEA to conduct a "search reasonably calculated to uncover all relevant documents, construing the facts in the light most favorable to the requester." *Citizen Comm'n on Human Rights* 45 F.3d at 1328. The "issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Id.* To determine the adequacy of the search the court may rely on "reasonably detailed, nonconclusory affidavits submitted in good faith" by the agency. *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985), *quoting Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). To satisfy the law, the agency's affidavit must describe the method of searching, such as the search terms used or the type of search performed, and show that "all files *likely* to contain responsive materials (if such records exist)" were searched. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (emphasis added). "However, if a review of the record raises substantial doubt, particularly in view of 'well defined requests and positive indications of overlooked materials, summary judgment is inappropriate.'" *Id.*, *quoting Founding Church of Scientology v. Nat'l Sec. Agency*, 610 F.2d 824, 837 (D.C. Cir. 1979).

The touchstone for determining the adequacy of the agency's search methodology is thus the "reasonableness test," applied in light of the Act's policy favoring disclosure. *Valencia-Lucena*, 180 F.3d at 325-26. *Accord Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998). "The court evaluates the reasonableness of an agency's search based on what the agency knew at its conclusion rather than what the agency speculated at its inception." *Campbell*, 164 F.3d at 28. In other words, the agency must "revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry." *Id.* If disclosed records indicate that a search of another record system or other facilities would likely uncover additional documents, then the agency must expand its search, barring an "undue burden." *Valencia-Lucena*, 180 F.3d at 326-27. On the other hand, "[w]hen a request does not specify the locations in which an agency should search, the agency has discretion to confine its inquiry to a central filing system if additional searches are unlikely to produce any marginal return." *Campbell*, 164 F.3d at 28.

1. DEA Administrator's Office

Plaintiffs argue that the DEA's failure to search several additional offices beyond those already canvassed renders the agency's search inadequate. First, plaintiffs argue that the DEA's failure to search DEA Administrator Michele Leonhart's office was a mistake, given the agency's disclosure of three documents indicating the Administrator's involvement in the sodium thiopental seizures, and the plaintiffs' own independent discovery of several letters sent to her office concerning the same. The DEA's own documents implicating the Administrator's involvement include: (1) a draft briefing paper on the issue of sodium thiopental written for the DEA Administrator; (2) a heavily redacted, internal DEA email entitled "RE: Execution drug issue" listing the Administrator as a direct recipient; and (3) an internal DEA email chain stating that "the sodium thiopental situation" has received media attention, and "has made its way to the Administrator and AG's radar as well." *See* Exh. 2 to Minsker Decl. in Support of Pl.'s MSJ (Bates 97). According to the DEA, the briefing paper was merely a draft, circulated prior to the

Administrator's confirmation hearing, and may not have been ever actually reviewed by the Administrator. Regardless of whether the briefing paper made it into the Administator's hands, however, the internal DEA emails leave little doubt that the Administrator's office was monitoring "the sodium thiopental situation" and receiving communications concerning it. This conclusion is confirmed by the plaintiffs' submission of three letters, sent to the DEA Administrator by counsel for several death row inmates incarcerated in states that reportedly imported sodium thiopental, that express concern about the constitutionality of using imported drugs of questionable quality for lethal injection.

In response, the DEA, relying on *Miller v. U.S. Dep't of State*, 779 F.2d 1378 (8th Cir. 1985), argues that its search is not rendered inadequate merely because plaintiffs have managed to identify particular documents that are internally referenced in disclosed documents, but missing from the agency's production. *Miller*, however, is merely persuasive authority and, upon examination, does not stand for the simple proposition the DEA suggests. The *Miller* court, in upholding the adequacy of the State Department's search, noted that the Department *had* in fact produced requested material that was internally referenced in other disclosed documents and that was easily discovered (through a computer search). *Miller*, 779 F.2d at 1385. *Miller* merely deemed reasonable the Department's decision not to produce older documents, retrieval of which would have been "impracticable" due to the cumbersome filing method used prior to 1973. *Id.* Here, by contrast, the DEA offers no analogous explanation for its refusal to search the Administrator's files. It does not argue, for example, that the Administrator's office lacks a centralized file for letter correspondence, or an electronically-searchable archive of internal communications. Rather, ignoring the fruits of its search, the agency rests on the conclusory assertion that it simply "did not determine that the office of DEA Administrator Leonhart was likely to contain responsive documents." Def.'s Reply, 6:16-17. The DEA further contends that plaintiffs' "'speculative claims about the existence and discoverability' of responsive documents may not be used to second-guess [the agency's] reasonable, good-faith determination." *Id.* at 6:17-19.

The agency's position mischaracterizes the evidence and the standard of review. There is nothing speculative about the internal DEA emails, or the external correspondence from inmates' counsel, that plaintiffs have produced. Rather, it is the agency that has failed to offer a single, specific reason in support of its belief that the Administrator's office is unlikely to possess, or cannot reasonably be searched for, responsive documents concerning an issue that (the agency admits) has garnered significant attention from the news media. As for the applicable standard at summary judgment, the agency's conclusory "determination" concerning the proper scope of its search is due no deference. The FOIA places "the burden 'on the agency to sustain its action,'" and it is up to the Court, viewing the facts in the light most favorable to the requester, "to 'determine the matter de novo.'" *Reporters Comm'n on Freedom of the Press*, 489 U.S. at 754, *citing* § 552(a)(4)(B). The DEA has not sustained its burden. Together, the plaintiffs' evidence constitutes "positive indications" of overlooked records, and raises "substantial doubt" about the DEA's failure to search the Administrator's office for responsive records.[2] *Cf. Valencia-Lucena*, 180 F.3d at 326. Accordingly, summary judgment is denied to the agency and granted to plaintiffs. The DEA must search Administrator Leonhart's office for responsive files.

<u>2. Field Division Offices</u>

Plaintiffs additionally argue that the DEA's search was inadequate due to its failure to search Field Division Offices located in Detroit, New Orleans, and California, in addition to those already searched in Atlanta, Phoenix, and St. Louis. The agency apparently chose to search those Division Offices based on a determination, made by agency personnel familiar with the issues, that those Divisions would likely possess responsive documents concerning "known or anticipated seizures/surrenders." Def.'s Reply, 6:23-7:3. Plaintiffs contend that the DEA did not apply this criterion consistently because it failed to search Division offices where additional known seizures or

[2] Although the Court previously found the DEA's evidence "sufficient, *at this stage*, to support DEA's position that it engaged in a reasonable search," Order Denying Mot. for Prelim. Inj., 5:19-20, the procedural posture of the case has obviously changed. In that Order, the court considered the plaintiffs' motion for a preliminary injunction, "an extraordinary remedy" typically only awarded in FOIA cases where the government agency has failed to produce any documents in response to a plaintiff's request. *Id.* at 4:26-5:24. The Court's decision today contemplates the adequacy of the search for purposes of full summary judgment, not, as then, whether the DEA's efforts were so inadequate as to merit preliminary injunctive relief.

surrenders took place. Specifically, plaintiffs argue that the DEA should have searched the Detroit Division, which is responsible for Kentucky, because that state surrendered its supply of sodium thiopental to the DEA on April 1, 2011. Likewise, the New Orleans Division is responsible for Alabama and Arkansas, states which allegedly surrendered their stocks of the drug to the DEA on or about April 26, 2011, and July 22, 2011, respectively. Plaintiffs insist an adequate search would have contemplated that responsive documents likely reside at these Division Offices, given the extensive documentation required to import drugs, and the internal email communications plaintiffs presume must precede any such high-profile surrender or seizure.

In defense of the agency's decision not to search these offices, the DEA again relies heavily on the initial determination made by agency personnel about which offices likely possessed responsive documents. With respect to the New Orleans Field Division, the agency argues that "events … regarding a seizure that took place in Arkansas, did not, at the time of the search, reasonably suggest that the New Orleans Field Division was likely to have responsive information," and that, in any case, the Arkansas seizure occurred after the search concluded. Def.'s Reply, 7:4-8. The DEA makes identical arguments with respect to Alabama. As for Detroit, the agency simply asserts in its brief that it "chose not to search the Detroit Field Division." Def.'s Reply, 7:2-3.

Campbell instructs that "reasonableness of an agency's search [is] based on what the agency knew at its conclusion rather than what the agency speculated at its inception." 164 F.3d at 28. Here, by the agency's own account of events, the Field Divisions were notified of plaintiffs' request around April 27-29, 2011. The DEA does not contest that it took custody of Kentucky's supply of sodium thiopental on April 1, and does not otherwise offer any specific reasoning to defend its decision not to search the Detroit Field Division.[3] Although the DEA emphasizes that it initially consulted with knowledgeable agency personnel about likely locations of responsive records, nothing indicates that the DEA or its employees actually made an affirmative decision to forego a

[3] At oral argument, the DEA's counsel represented, for the first time on record, that the agency had chosen not to search the Detroit Field Division because the Kentucky shipment of sodium thiopental was routed through Georgia, and therefore fell within the Atlanta Division's jurisdiction. Because this argument was not properly raised in defendants' papers, and there is no evidence in the record to support counsel's contention, it cannot be considered.

search of the Detroit Division, or adopted any rationale supporting that omission. Accordingly, the DEA has not sustained its burden concerning its decision not to search the Detroit Division. With respect to the New Orleans Division, however, it appears from the record that the DEA's search of Field Divisions occurred simultaneously with the Alabama seizure, and several months prior to the Arkansas surrender. Here, at least, the agency does not rely solely on its bald assertions that, "[t]he DEA chose not to search the New Orleans Field Office." Def.'s Reply, 2:4. Although the agency does not explain precisely how or why the events surrounding those surrenders suggested to its personnel that the New Orleans Division would not possess responsive documents, the DEA's affidavits do identify the personnel who made this determination and plaintiffs do not contend that the agency lacks a good faith basis for its decision. In light of the timing of the seizures, and the explanations the agency has offered to justify the reasonableness of its search, it does not appear, at least upon this review, that the DEA's failure to search the New Orleans Division was unreasonable.

That said, plaintiffs object generally to the DEA's decision to search only those Field Divisions where "known or anticipated seizures/surrenders" took place. They note that their original request covers any communications or records related to the *importation* of sodium thiopental by state officials for executions – not just *seizures*.[4] By improperly restricting the scope of its search, the plaintiffs argue, the DEA excluded those Divisions responsible for California, which actually imported the drug. Plaintiffs have submitted correspondence between a California corrections official and the "DEA Oakland Diversion Group," concerning the state's "international drug import issue," as well as communications between other state officials and other Field Divisions, in support of their contention that responsive documents likely reside at the DEA Divisions responsible for California. The DEA counters that plaintiffs may not judge the adequacy of the search by identifying specific missing records, but does not otherwise address the plaintiffs' argument that its search of Field Division Offices was, by its own terms, necessarily under inclusive. Notably, the DEA does not, for example, aver that Divisions are unlikely to correspond with local state officials concerning importation of controlled substances, or respond if an

[4] The DEA asserts, and plaintiffs do not contest, that the agency does not maintain any records regarding the transfer or purchase of sodium thiopental by state officials.

importation is not properly documented. At oral argument, counsel for the DEA also invoked a D.C. Circuit opinion for the proposition that the agency has no duty to search Field Divisions if the records sought are also available at its Headquarters. *Weisberg*, 745 F.2d at 1487. The analogy is inapposite. In *Weisberg*, the FBI filed "numerous, extremely detailed, nonconclusory affidavits" detailing the scope of its efforts, and produced 15,000 pages of documents from various field offices, in addition to many more from its headquarters. *Id.* at 1486. Thus, to the extent plaintiff in *Weisberg* failed to persuade the court that the FBI unreasonably refused to conduct additional searches of its "divisional files," that result has little bearing on the reasonableness of the DEA's search in this case.

In sum, the agency has again failed to carry its burden with respect to the scope of its search of Field Divisions. Plaintiffs, on the other hand, have mustered uncontroverted "positive indications" of overlooked records, and raised "substantial doubt" about the DEA's decision to restrict its search to only those Field Divisions that contemplated or actually performed seizures. *Valencia-Lucena*, 180 F.3d at 326. Consistent with the plaintiffs' original request, defendant is ordered to perform a search for responsive documents of all Field Divisions it deems likely to possess records concerning the importation of sodium thiopental by state officials for executions. Based on the record, this includes, at minimum, the Detroit and California Divisions.

3. Offices Already Searched

Finally, plaintiffs argue that the DEA's affidavits do not describe the searches the agency has already conducted in sufficient detail to permit the court to make an independent determination about whether the agency's methodology was "reasonably calculated to uncover all relevant documents." *Citizen Comm'n on Human Rights*, 45 F.3d at 1328. First, plaintiffs note that although the DEA has produced four documents relating to the agency's Regulatory Section, the DEA has not provided any description whatsoever of its search of that Section's records. The DEA does not contest the fact that it identified the Regulatory Section as likely possessing responsive documents, or that it failed to describe its search. It relies instead on general averments that its affiants are knowledgeable, that its affidavits are reasonably detailed, and nonconclusory, and that it has made a good faith effort to conduct a search for the requested records, using methods which can reasonably be expected to return responsive documents.

Merely rehearsing the requirements set forth by the law, without furnishing any factual details, is plainly insufficient to sustain the DEA's burden at summary judgment. *Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007) ("single, conclusory affidavit that generally asserts adherence to the reasonableness standard" is insufficient to sustain agency's burden at summary judgment (citation omitted)). Plaintiffs, on the other hand, rely on several disclosed documents to suggest that both the Regulatory Unit and the Import/Export Unit, within the Regulatory Section, played a role in handling the DEA's response to the importation of sodium thiopental by the states. Included among these is an email from the Unit Chief of the "Regulatory Unit/ODGR" to employees of other government agencies, coordinating a conference call to make available "[r]epresentatives from our regulatory, import/export, and policy and liaison sections" to answer questions. *See* Exh. 2 to Minsker Decl. in Support of MSJ (Bates 10). In light of the DEA's failure to describe its search of the Regulatory Section's files in any detail, an independent determination about the reasonableness of the search is not possible. Moreover, plaintiffs' evidence raises "substantial doubts" about the adequacy of the search performed by the DEA. Therefore, the defendant is ordered to supplement the description of its search of the Regulatory Section's records and, as necessary, expand its search to meet the "reasonableness" standard.

Plaintiffs similarly challenge the adequacy of the DEA's searches, within the Policy and Liaison Section, of the Office of Diversion's correspondence files, and the correspondence files of the Deputy Assistant Administrator for the Office of Diversion. In both cases, the DEA has submitted minimal descriptions of the searches it performed for records of responsive communications. As for the Office of Diversion, the DEA asserts that it conducted a manual search of the Section's "Chron files," which, according to the agency, include communications saved on a shared drive organized by month and would likely contain responsive records. Plaintiffs, however, have submitted a letter from a California correctional official to a redacted recipient at the "Office of Diversion Control," thanking the Office for "taking the time to talk and assist us in finding a solution in procuring Sodium Thiopental." Exh. 17 to Minsker Decl. in Support of Pl.'s MSJ. According to plaintiffs, this letter is precisely the kind of record that the "Chron files," if they are as defendant describes them, should have included. With respect to the Deputy Assistant Administrator's files, the DEA states only that it "provided all of the Deputy Assistant Administrator's emails stored in a folder assigned to the topic of sodium thiopental." Exh. 1 to Myrick Decl. in Support of Def.'s MSJ, 3:4-5.

Undoubtedly, the agency's position would be stronger if it specifically averred that neither the Office of Diversion nor the Deputy Assistant Administrator for Diversion maintains any other files archiving correspondence. Still, it is not necessarily unreasonable that, in attempting to locate responsive communication records, the agency searched only two files within the Office of Diversion – one Office-wide file, and one specific to the Deputy Assistant Administrator. *But see Campbell*, 164 F.3d at 28 (agency cannot limit its search to one database where others are likely to return responsive records). Plaintiffs' production of a single document suggesting that some correspondence may be missing from the records returned by the DEA's search is insufficient to deem the entire search inadequate.[5] *Citizen Comm'n on Human Rights*, 45 F.3d at 1328 (the "issue to be resolved is not whether there might exist any other documents possibly responsive to the request"). Thus, although the circumstances concerning the DEA's search of the Office of Diversion's files present a relatively close case – largely due to the agency's relatively minimal descriptions of its efforts – the agency has provided some specific details to suggest that the search was reasonably calculated to return responsive records of communications. Therefore, the DEA's search of the Office of Diversion was adequate, and sufficiently detailed in its affidavits, to entitle the agency to summary judgment. However, summary judgment is granted to plaintiffs insofar as the defendant is ordered to supplement the description of its search of the Regulatory Section's records and, as necessary, expand its search to meet the "reasonableness" standard.

[5] Similarly, to the extent plaintiffs object that several particular documents it has identified are missing from the DEA's production of records – including a memo to the FDA and a list of registered sodium thiopental suppliers sent to the FDA – these omissions have little bearing on the ultimate "reasonableness" of the agency's search. *Citizen Comm'n on Human Rights*, 45 F.3d at 1328. To be reasonable, the agency's search need not produce every document plaintiffs can ultimately identify.

B. Withholdings Pursuant to Exemptions

The DEA moves for summary judgment on, and plaintiffs challenge, its decision to redact, and withhold in part, 18 pages of records (Bates 3, 25, 39, 51, 57, 70, 71, 88, 89, 97, 99, 101, 106, 108, 110, 113, and Bates 3 and 4 of the disclosed import declarations), as well as its decision to withhold 177 pages in full (Bates 40-50, 54-56, 96, 109, 118-277). The FOIA codifies nine "exemptions" from the Act's policy of disclosure that are discretionary, exclusive (meaning that information not within their bounds must be disclosed), and narrowly construed. *See* § 552(b)(1)-(9), *and Yonemoto*, 648 F.3d at 1055. As the Supreme Court has clearly instructed, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361.

The agency invoking the exemption bears the burden of proving the applicability of the exemption, and the duty to provide all "reasonably segregable" portions of a redacted record to the requester. *Yonemoto*, 648 F.3d at 1055. To carry its burden on summary judgment, an agency must typically submit a *Vaughn* index[6] and "detailed public affidavits identifying the document withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exception." *Lion Raisins v. U.S. Dep't of Agriculture*, 354 F.3d 1072, 1082 (9th Cir. 2004). The *Vaughn* index entries and the affidavits must be "detailed enough for the district court to make a *de novo* assessment of the government's claim of exemption." *Id.* The index need not, of course, "disclose facts that would undermine the very purpose of withholding," *id.* at 1084, but should "reveal as much detail as possible as to the nature of the document." *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). From the requester's perspective, "[t]he purpose of the [*Vaughn*] index is to 'afford the FOIA requester a meaningful opportunity to contest … the soundness of the withholding.'" *Weiner v. F.B.I.*, 943 F.2d 972, 977 (9th Cir. 1991), *quoting King v. U.S. Dep't of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987).

1. Adequacy of the *Vaughn* Index and Affidavits

6 *See Vaughn v. Rosen*, 484 F.2d 820, 823-25 (D.C. Cir. 1973).

Plaintiffs challenge the adequacy of the DEA's *Vaughn* index and the accompanying affidavit as a threshold issue. The agency's disclosures are variable, and it would be inappropriate to address them as a group. As discussed below, the DEA has disclosed sufficient information to provide a basis for, and justify, its decision to withhold certain records under some specific exemptions. In other instances, it has failed to provide adequate information to justify its decision to withhold. The agency therefore must supplement the *Vaughn* index and accompanying affidavit as described below.

<u>2. § 552(b)(4): Sodium Thiopental Supplier and Quantity Imported</u>

Plaintiffs challenge the DEA's invocation of § 552(b)(4) to withhold the identity of a sodium thiopental supplier, as well as the quantity imported, as reflected in an internal DEA email (Bates 3).[7] Exemption 4 permits agencies to withhold documents containing matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." § 552(b)(4). Under Exemption 4, "whether the information is of the type that would normally be made available to the public, or whether the government has promised to keep the information confidential, is not dispositive." *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994). The agency may withhold information that is involuntarily submitted to the government if disclosure would: (1) impair the agency's ability to obtain this information in the future or (2) cause substantial competitive harm to the entity that submitted the information. *Id.* at 1112.

Although the DEA contends that release of the information would impede its ability to obtain similar disclosures from importers in the future, absent some form of compulsion, the agency also concedes that failure to complete DEA Form 236 precludes the importation or exportation of controlled substances. *See* 21 CFR §§ 1312.11(b), 1312.18(c)(2). Plaintiffs suggest, further, that failing to file the required declaration may expose importers to felony prosecution under 21 U.S.C. §

[7] The same information has been redacted from two import declarations subsequently produced to plaintiffs under a separate FOIA case number (DEA Form 236, Bates 3-4). The parties debate whether these records are properly before the Court as part of plaintiffs' original request for records. It is not strictly necessary to address this question, however, because the same information, to the extent it is withheld on Bates 3, must be released pursuant to this order.

952. The DEA does not explain why these existing legal obligations to disclose are ineffective at compelling disclosure. Nor has the agency presented any evidence whatsoever that it has had difficulty obtaining like information in the past, or that importers are likely to risk prosecution to preserve commercial confidences. The agency bears the burden of establishing that disclosure would hinder its ability to obtain the requested information in the future, and here it cannot credibly do so. *Cf. GC Micro Corp.*, 33 F.3d at 1112.

Alternatively, the DEA argues that release of the information would harm Chemique's competitive position. Relying on a declaration submitted by that company, the agency asserts that the company's competitors "could use Chemique's diligence in finding the sodium thiopental source to undercut future contracts between Chemique and other government agencies." Exh. L to Myrick Decl. in Support of Def.'s MSJ, ¶ 9. However, neither the agency nor the company provides any additional information to substantiate this contention. For instance, neither the DEA nor Chemique alleges actual competition in the market for importing sodium thiopental, nor submits any data to suggest that such competition exists. *Compare GC Micro Corp.*, 33 F.3d at 1113-15. The mere fact that Chemique never publicly discloses the information, moreover, is not dispositive. *Id.* at 1113. The lack of detail substantiating the claim that disclosure would harm Chemique's competitive posture is fatal, as it is the DEA's burden to establish the applicability of Exemption 4. Accordingly, summary judgment is granted to plaintiffs. The agency must release the identity of the sodium thiopental supplier and the quantity imported.

<u>3. § 552(b)(5): Draft Briefing Paper and Intra-agency Emails</u>

Plaintiffs also challenge the DEA's reliance on § 552(b)(5) to withhold nineteen pages in part or in full (Bates 25, 39, 49-51, 70-71, 88-89, 95-97, 99, 101, 106, 108-110, 113). Exemption 5 permits agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." § 552(b)(5). To fall within the exemption, first, the record must be "predecisional" – that is, it must have been "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g*, 421 U.S. 168, 184 (1975). *See also Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 981-982 (9th Cir. 2009). Although the agency's failure to identify a specific, actual decision flowing from a withheld record is of relevance, the "emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared." *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975).

Second, the document must also qualify as "deliberative." A record implicates the deliberative process if "the disclosure of [the] materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Assembly of State of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992), *quoting Dudman Comms. Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). Deliberative documents may include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. *Id., quoting Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Generally, "factual summaries do not qualify as deliberative," but facts may nonetheless be withheld if releasing them would reveal the mental processes of agency employees or deter the agency from gathering such information. *Wolfe v. U.S. Dep't of Health and Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988).

In this case, the withheld records include a "draft briefing paper" on the issue of sodium thiopental (Bates 49-50), prepared for DEA Administrator Leonhart. According to the DEA, the "paper was drafted by the Office of Diversion and circulated within the DEA to advise the Administrator prior to her confirmation hearing and contains factual details of the shortage of Sodium Thiopental and DEA's role in importation and exportation of the controlled substance." Exh. 2 to Myrick Decl. in Support of Def.'s MSJ, 6:1-6. Contrary to plaintiffs' claims, the DEA's failure to identify a specific decision resulting from the draft briefing paper is not dispositive in the analysis. *N.L.R.B.*, 421 U.S. at 151 n.18. Although the DEA's affidavit sheds little light on the decision contemplated by Administrator Loenhart, the circumstances strongly suggest that the ongoing investigations and the prospect of prosecutions of state officials posed a host of issues requiring the Administrator's judgment. The agency's affidavit does state, moreover, that the document was being circulated "between DEA offices for comments." This is precisely the kind of "deliberative process" that Exemption 5 was intended to protect.

On the other hand, to the extent the agency describes the contents of the briefing paper in its brief and in the *Vaughn* index, those disclosures suggest that the briefing paper merely contains various "factual details," including a "description of what Sodium Thiopental is, what it is used for, [and] DEA registration requirements under the Controlled Substances Act…." Exh. 2 to Myrick Decl. in Support of Def.'s MSJ (*Vaughn* index). Mere facts are potentially segregable and subject to disclosure. *Wolfe*, 839 F.2d at 774. The DEA's averment to the contrary – "there is no reasonably segregable, non-exempt information," the agency argues – is merely conclusory. Because the *Vaughn* disclosures and the accompanying affidavit contain insufficient detail to permit the court to arrive at an independent, *de novo* determination about the applicability of Exemption 5, the agency cannot prevail on summary judgment. The agency therefore must supplement its description of the briefing paper's contents, to identify the decision making process that it allegedly undertook, and to disclose any reasonably segregable, factual passages within the briefing paper.

The remaining withholdings under Exemption 5 are email communications involving DEA Special Agents and Diversion Investigators from the Phoenix Field Division and Office of Diversion personnel. According to the agency, these emails reflect "dialog within DEA and the exchange of ideas and suggestions pertaining to law enforcement actions." Def.'s MSJ, 10:9-10. The agency also alleges that disclosure of the emails would "severely hamper the efficient day-to-day workings of the DEA as law enforcement personnel would no longer feel free to discuss law enforcement matters in email communications." *Id.* at 10:10-12. Although plaintiffs question whether these emails truly contain "dialogue and suggestions," rather than the collection of factual data, they have no concrete reasons to doubt the agency's description of these documents. The DEA's *Vaughn* disclosures and affidavits, therefore, are sufficient to establish the applicability of Exemption 5 to the emails in question. Accordingly, summary judgment is granted to defendant on this issue.

4. § 552(b)(6) and (7)(C): Private Information

Next, plaintiffs challenge the DEA's claim that § 552(b)(6) and (7)(C) entitle the agency to withhold portions of records to the extent they contain the names of elected officials, political appointees, or other senior policymakers (Bates 25, 40-48, 51, 54-57, 70-95, 96, 108-10, and 118-227). Exemption 6 applies to "personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." § 552(b)(6). Exemption 7 applies to "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … could reasonably be expected to constitute an unwarranted invasion of personal privacy." § 552(b)(7)(C).

Both exemptions are applied using a balancing test that weighs the public's right to disclosure against the personal privacy interests of those individuals identified in the documents. *See Rose*, 425 U.S. at 372. It is clear from the language of the statute, however, that Exemption 6 requires a relatively higher threshold showing by the agency, "that disclosure would constitute a clearly unwarranted invasion of personal privacy." By contrast, Exemption 7(C) requires only that release of law enforcement records "could reasonably be expected to constitute" an invasion of privacy. *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). Among the factors to be considered in balancing the opposing interests are the existence of any official misconduct (which heightens the public's interest in disclosure), and the relative strength of the privacy interests of named government employees or private individuals. *Lissner v. Customs Serv.*, 241 F.3d 1220, 1223 (9th Cir. 2001).

The parties appear to agree that the records at issue are portions of investigative case files "compiled for law enforcement purposes," and thus potentially subject to either Exemption 6 or 7(C). Although plaintiffs argue that the agency's invocation of Exemptions 6 and 7(C) cannot justify withholding 160 pages of records in full, this is plainly not the DEA's position. Rather, the agency has invoked multiple subsections of § 552(b)(7) to justify full nondisclosure, and explained that, as for the privacy exemptions, "each piece of information was examined to determine the degree and nature of the privacy interest of any individual whose name and/or identifying data appeared in the documents at issue." Exh. 2. to Myrick Decl. in Support of Def.'s MSJ, 15:1-15.

According to the agency, it redacted only names, titles, places of work, addresses, and phone numbers under Exemptions 6 and 7(C). *Id.*

As the parties both acknowledge, lethal injection drugs represent a "hotly-contested" matter of public interest. Plaintiffs stress, further, that their FOIA request uncovers possible government misconduct – namely, "whether states complied with federal law in importing sodium thiopental," and "whether the federal government acted appropriately or was intentionally lax in enforcing federal drug laws because states were importing the drug to carry out executions." Pl.'s MSJ, 19:18-20. Plaintiffs stop short of actually accusing any particular DEA officials or agents of committing a wrong, however. There is a fundamental distinction between the public's interest in guaranteeing the integrity and reliability of government investigations, and the public's right to know the names of individual government agents whose integrity is not at issue. Public law enforcement agents are entitled to maintain some degree of privacy, albeit it to a lesser extent in some respects than private citizens. *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 478-88 (D.C. Cir. 1980).

In this case, however, plaintiffs are merely requesting the identification of political appointees and senior officials, whose privacy interests are "not strong" thanks to the nature of their responsibilities. *Lissner*, 341 F.3d at 1223. The DEA does not debate that high level officials have relatively little privacy interest, and are of much greater public interest, than rank-and-file investigators. At oral argument, counsel for the DEA stated a willingness to review the records to determine whether names of high level officials had been withheld. Because there has been no showing, even under the lower standard provided by § 552(b)(7)(C), that the disclosure of such names could "reasonably be expected to constitute an unwarranted invasion of personal privacy," plaintiffs' motion for summary judgment is granted. § 552(b)(7)(C). Accordingly, defendant must identify the names of any high level DEA officials, including the Administrator, Deputy Assistant Administrators, Special Agents in Charge, Section Chiefs, Unit Chiefs, and those similarly situated within the agency, subject to other claimed exemptions.

5. § 552(b)(7)(A): Investigatory Records and Intra-agency emails

The DEA moves for summary judgment on, and plaintiffs challenge, its withholding of 187 pages of records (Bates 25, 40-48, 51, 54-56, 70, 88-89, 95-97, 99, 101, 106, 108-110, 113, and 118-277) in part, or in full, pursuant to § 552(b)(7)(A). Exemption 7(A) allows agencies to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … could reasonably be expected to interfere with law enforcement proceedings." § 557(b)(7)(A). To carry its burden in asserting Exemption 7(A), the agency must, consistent with the general principles explained above, submit nonconclusory affidavits that suggest "how [release of] the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding." *Campbell*, 682 F.2d at 259.

A minority of the withheld documents under Exemption 7(A) are internal DEA emails. In its *Vaughn* index, the agency has detailed, fairly precisely, how each of these records relates to "potential" or "ongoing law enforcement investigations." At oral argument, counsel for the plaintiffs questioned the applicability of Exemption 7(A) to emails from Field Divisions that are not overseeing active law enforcement investigations. The case law is settled, however, that Exemption 7(A) may be appropriately applied to records concerning "concrete prospective law enforcement proceedings." *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Justice*, 658 F.Supp.2d 217, 230 (D.C. Cir. 2009). Moreover, the agency's accompanying affidavit avers that release of these records would allow "suspected individuals/entities to develop enforcement countermeasures, [to] avoid detection and apprehension." Exh. 2 to Myrick Decl. in Support of Def.'s MSJ, 13:21-14:3. Although plaintiffs doubt whether state officials would do any such thing, there is no reason to believe that the DEA's investigation is limited to state officials. Plaintiffs' doubts, moreover, are not sufficient to deprive defendant of summary judgment where it has submitted adequate *Vaughn* disclosure and affidavits that support the applicability of Exemption 7(A). Accordingly, defendant's motion for summary judgment, as to Bates 25, 40-48, 51, 54-56, 70, 88-89, 95-97, 99, 101, 106, 108-110, and 113, is granted.

The remaining, challenged withholdings encompass two active law enforcement investigation case files, and one investigative file that is "under consideration by the DEA for potential civil or administrative enforcement actions." *Id.* at 13:9-19. In justifying withholdings from these files, the agency need not "proceed on a document-by-document basis, detailing to the court the interference that would result from the disclosure of each of them." *Bevis v. U.S. Dep't of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986). Instead the agency may review and categorize each document according to its "functional" characteristics, thereby allowing "the court to trace a rational link between the nature of the document and the alleged likely interference." *Campbell*, 682 F.2d at 265.

This is what the DEA apparently attempted to do in the present case. The agency's affidavit identifies and describes, in relatively extensive detail, six forms (e.g., "DEA Report of Drug Property Collected, Purchased, or Seized, DEA Form 7") that it claims constitute the investigatory files at issue, as well as their respective functions. *See* Exh. 2 to Myrick Decl. in Support of Def.'s MSJ, 6:25-7:8. For example, the agency explains that DEA Form 6 records are "used by DEA to memorialize investigative and intelligence activities and information." *Id.* at 7:10-16. The agency then goes on to describe the contents of the form. *Id.* at 7:23-8:3 (the "Indexing Section" of Form 6 "appears at the end of the narrative [field] and contains identifying details about the indexed individual or entity that may include physical descriptions, aliases, social security numbers, various license numbers, phone numbers, addresses, and/or occupations").

There are, however, some deficiencies in the DEA's disclosures. For instance, the agency's affidavit also refers to what appears to be a "catch-all" category of diverse records, including "other miscellaneous forms, memoranda, exhibits and documents relevant to investigations." This is not a coherent category by any measure, and the agency says nothing about how the release of these records would imperil enforcement activities. Likewise, the DEA's affidavit generally asserts, without explaining, that disclosure of "any details from these case files would reveal the scope, direction, nature and pace of the investigation as well as reveal information that could harm the government's potential prosecution or other enforcement actions currently under consideration in these matters." Exh. 2 to Myrick Decl. in Support of Def.'s MSJ, 13:9-19. The only specific averment offered by the agency in this regard is that release might increase the risk of witness interference. The enactment of Exemption 7(A), however, "was designed to eliminate 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). Conclusory statements, without more, cannot provide an adequate basis for an independent judicial assessment of the agency's Exemption 7(A) claim. *Campbell*, 682 F.2d at 259. The agency must explain how releasing the distinct categories of documents it has identified would interfere with is law enforcement mission.

The appropriate remedy in this situation is for the agency to supplement its existing disclosures with sufficient detail to enable specific issues to be joined for court resolution. *Weiner*, 943 F.2d at 979. The defendant is therefore ordered to: (1) review and re-categorize, by function, the "miscellaneous forms, memoranda, exhibits and documents relevant to investigations" it has identified in the case files; (2) explain how disclosure of each category of documents would interfere with law enforcement proceedings; and (3) release any records that do not fall into a category of documents that has been properly withheld. Because the facts cannot be established on the present record, the cross motions for summary judgment are each denied regarding the applicability of Exemptions 7(A)-(F) until the DEA files an adequate *Vaughn* index and accompanying affidavits.

V. CONCLUSION

The DEA's motion for summary judgment is granted in part, insofar as: (1) defendant has satisfied its obligation to conduct an adequate search for records of communications within the Office of Diversion and the Deputy Assistant Administrator's files; (2) defendant has established the applicability of Exemption 5 to withhold email communications; and (3) defendant has established the applicability of Exemption 7(A) to withhold email communications. Defendant's motion is, in all other respects, denied.

Plaintiffs' cross-motion for summary judgment is granted in part, insofar as: (1) defendant is ordered to search the Administrator's office for responsive records; (2) defendant is ordered to search any Field Division Offices it deems reasonably likely to possess responsive records concerning the states' importation of sodium thiopental for executions; (3) defendant is ordered to supplement its description of its search of the Regulatory Section, and as necessary, expand the scope of its search to meet the "reasonableness" standard; (4) defendant is ordered to disclose the identity of the sodium thiopental supplier and quantity imported on the internal DEA email (Bates 3); (5) defendant is ordered to supplement its description of the draft briefing paper's contents, the decision making process it allegedly undertook, and to disclose any reasonably segregable portions of the document; (6) defendant is ordered to disclose the names of senior DEA political appointees and officials, subject to other claimed exemptions; and (7) defendant is ordered to categorize all "miscellaneous" documents contained within its withheld investigatory files, explain how disclosure of each category of documents would interfere with law enforcement proceedings, and disclose any that do not fall within a properly withheld category. Those actions listed above must be completed by defendant within 30 days from the date of this order. Plaintiffs' motion is, in all other respects, denied.

IT IS SO ORDERED.

Dated: 10/28/11

RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

Exhibit 27

Want To Do Something About Climate Change? Stop Cove Point

Wall Street Group Aggressively Lobbied a Federal Agency to Thwart Eminent Domain Plans

E-mails obtained through a FOIA request reveal the extraordinary access SIFMA had to Federal Housing Finance Administration officials.

Alexis Goldstein *January 17, 2014*

A foreclosed home in Brockton, Massachusetts (MassAGO/Flickr)

Despite Wall Street's recent gains, the foreclosure crisis that displaced 10 million Americans continues to wreak havoc on communities. One ongoing problem is that 10.7 million homeowners are stuck in underwater homes, in which the mortgage is more than the house is currently worth. Although the federal government doled out $700 billion to Wall Street via TARP during the 2008 financial crisis, it has *not* taken bold action to solve this problem. Money set aside during the bailout to help homeowners remains largely unspent, and a key federal housing regulator refused to pursue mortgage write-downs for struggling borrowers, even though their own analysis showed these loan modifications would save the agency money.

In this vacuum, several cities have begun to take matters into their own hands, as Peter Dreier reported on for *The Nation*. One plan by private equity company Mortgage Resolution Partners proposes that cities use eminent domain—a power traditionally reserved for seizing property for public use—to seize mortgage loans. The amount owed on the loans would then be reduced so that the borrower was no longer underwater, avoiding foreclosure. In January 2013, Brockton, Massachusetts commissioned a study and formed a working group to investigate using eminent domain to help struggling homeowners. In September 2013, the city council of Richmond, California, voted to move forward with such a plan.

One might think these small, local efforts shouldn't be of much concern to Wall Street—after all, Richmond's plan affects a mere 624 loans. But one of Wall Street's most powerful trade groups, the Securities Industry and Financial Markets Association (SIFMA), has responded with ferocious urgency. SIFMA is the attack dog the largest Wall Street banks send when they don't want their names attached to politically controversial lobbying efforts or lawsuits. The group does everything from denying that "too big to fail" still exists to drafting lengthy comment letters arguing for weaker financial regulation.

New e-mails obtained through a Freedom of Information Act request by the Alliance of Californians for Community Empowerment (ACCE) and a coalition of other community groups and shared with *The Nation* reveal the extent to which SIFMA has been spearheading Wall Street's fight against using eminent domain to mitigate the foreclosure crisis. (The complete set of e-mails are available at the website of the ACLU, which sued the FHFA when the original FOIA request was ignored). When Brockton began considering using eminent domain, SIFMA employees traveled there and kept an entire section of its website, complete with an array of resources, to decrying the plans.

Grace Ross, Coordinator of the Massachusetts Alliance Against Predatory Lending and one of the members of Brockton's eminent domain working group, said she was "shocked by the huge amount of resources SIFMA threw at this small study process in Brockton. While pursuing a plan like this would be deeply meaningful to Brockton, with up to 2,300 households that could have been directly affected, it's small potatoes" for an industry as large as Wall Street. In April 2013, by a vote of 7-5, Brockton's eminent domain working group concluded that the City did not have the legal authority to pursue an eminent domain plan.

SIFMA also made sure to send its careful notes and observations to a key staffer at the Federal Housing Finance Agency (FHFA), General Counsel Alfred Pollard. The FHFA is the regulator who oversees Fannie Mae and Freddie Mac, which have been under federal government control since the 2008 financial crisis. In 2008, Congress also charged the FHFA with implementing "a plan to maximize assistance for homeowners." But not only has FHFA failed to meaningfully help homeowners, in an August 2013 statement, the agency threatened to take legal action against localities that used eminent domain to restructure mortgages, and it raised the possibility that Fannie Mae and Freddie Mac would be ordered to stop doing business altogether in areas that pursued eminent domain plans.

Through e-mails obtained by the ACCE's FOIA request, we now know that SIFMA urged the FHFA to take precisely this course of action. In a March 25, 2013, e-mail to FHFA's General Counsel Pollard, Richard Dorfman, then-head of SIFMA's Securitization group, writes that "a federal solution would be the only way to quell this menacing concept." Dorfman goes on to insist that the FHFA disallow Fannie Mae and Freddie Mac "to acquire, guarantee, securitize or otherwise transact in any loan" that could even hypothetically be subject to an eminent domain plan. And that is *exactly* what the FHFA did four months later.

Easter, Stacy

From:	Dorfman, Richard <(b)(6)@sifma.org>
Sent:	Monday, March 25, 2013 12:24 PM
To:	Pollard, Alfred
Subject:	Mortgage Resolution Partners - Mortgage Loan Condemnations Under Power of Eminent Domain

Dear Alfred,

I regret approaching you yet again on the captioned subject. However, because of the necessity of municipal execution of any such plan it is ever more clear that a federal solution would be the only way to quell this menacing concept.
In the case of the FHFA that would mean disallowing the Enterprises to acquire, guarantee, securitize or otherwise transact
in any loan presented to the Enterprises for such purposes if any such loan at any point in its existence has been subject to condemnation and seizure. The same disallowance should also apply to any and all FHLBs, there to include acceptance as collateral
for advances.

In response to a request for comment on whether SIFMA's e-mails influenced the FHFA's actions, an FHFA spokesperson said, "FHFA first expressed concerns about the use of eminent domain when it requested public input on August 8, 2012." The spokesperson noted that the August 2013 statement "reflected FHFA's analysis of input provided, legal matters, and safety and soundness concerns for its regulated entities (Fannie Mae, Freddie Mac and the 12 Federal Home Loan Banks).” The spokesperson also said that the statement was “influenced by legal research and robust public input, including 75 letters from a variety of stakeholders.”

But SIFMA did not stop at demanding the FHFA’s help in threatening cities that pursued eminent domain mortgage seizures; it also asked FHFA staff to drum up local opposition. In the March 25 e-mail to Pollard, Dorfman writes, “Councilor Tom Brophy…is a key participant in the eminent domain working group in Brockton. [He] wants to speak with you by telephone pertinent to the matters I have raised…. I am accordingly asking you to agree. Please agree to do so, and we will make the arrangements.”

Brophy ultimately voted with the majority to scuttle the eminent domain plan on the grounds that Brockton did not have the legal authority to seize mortgages. Reached for comment, Brophy said that he does not recall any specific conversation with anyone from the FHFA, and the FHFA declined to comment on whether or not Pollard and Brophy ever talked on the phone. Whether or not that particular conversation took place, however, the e-mails reveal the active role SIFMA took in lobbying federal agencies to intervene in the Brockton vote, and they raise a question about how much influence SIFMA had on the outcome.

In addition to the comfort level displayed in their requests, the sheer volume of e-mails from SIFMA employees to General Counsel Pollard is significant. There is a formal comment process, yet SIFMA appears to have the capacity to *supplement* this process with these informal, previously private, e-mails to Pollard. When asked if e-mailing General Counsel Pollard directly is something that is available to all stakeholders, an FHFA spokesperson noted, “The Office of General Counsel email address is available to all stakeholders on the FHFA website.” But the e-mail provided on that website is OGCPublic@FHFA.gov. In the FOIA response, the e-mail used by SIFMA to contact Pollard is different: Alfred.Pollard@fhfa.gov.

The FHFA spokesperson also stated, “FHFA’s General Counsel routinely communicates with a variety of interested parties on numerous issues affecting Fannie Mae, Freddie Mac and the Federal Home Loan Banks.” Of the personal e-mails revealed by the FOIA, twenty-four are from SIFMA, and the rest are primarily from other Wall Street stakeholders (The additional listed documents are court filings or public comment letters—some of which were sent via e-mail and are thus listed as “comment e-mails”). And while the October 2013 FOIA did ask specifically for e-mails between Wall Street stakeholders and FHFA, it *also* included a much broader request for “all documents,” correspondence and meetings “regarding the City of Richmond’s offer to buy underwater mortgages from residents.” One would expect to see e-mail exchanges to Alfred Pollard from non–Wall Street stakeholders about Richmond, if FHFA truly had as close a relationship with others as they appear to have with SIFMA.

Perhaps one of the most damning e-mails is one forwarded to Pollard by SIFMA’s Dorfman on February 15. In it, Kimberly Chamberlain—managing director and associate general counsel of state government Affairs at SIFMA—laments the lack of bankers on Brockton’s Eminent Domain Working Group. Chamberlain concedes that there is an Oppenheimer representative, Stephen Bernard, on the working group. But it appears that to Chamberlain, Bernard’s industry credibility is in question, due to his association with the NAACP. Chamberlain writes, “The list does not appear to include local bankers or local mortgage bankers. The Oppenheimer representative he previously alluded to is Stephen Barnard [*sic*], *who is also a Past President of the Brockton NAACP. At first blush, it would appear we have our work cut out for us with this group*” [emphasis added].

From: Chamberlain, Kimberly
Sent: Thursday, February 14, 2013 10:02 PM
To: Eminent Domain Internal Workgroup
Subject: Fwd: First meeting of the Brockton MA Eminent Domain Working Group

FYI -

Please see e-mail below from Jass Stewart, the Chairman of the Brockton City Council's Working Group on Eminent Domain.

Among other things, Mr. Stewart details the Working Group charge and provides a list of Group Members. The list does not appear to include local bankers or local mortgage bankers. The Oppenheimer representative he previously eluded to is Stephen Barnard, who is also a Past President of the Brockton NAACP. At first blush, it would appear that we have our work cut out for us with this group

It remains unclear why an affiliation with the NAACP is relevant for SIFMA to note, especially before stating that "this group" will require more work on their part. In response to a request for comment on the e-mail, a SIFMA spokesperson stated: "The e-mail from Ms. Chamberlain simply restates the information in Mr. Stewart's original e-mail, which notes the affiliations of the working group members. SIFMA had been told, prior to the working group being formed, that the group would include several financial services representatives who could speak firsthand about the negative impact of eminent domain on mortgage credit. Without this firsthand experience, SIFMA felt it would be important to spend time educating working force members."

In some e-mails, SIFMA also appears dismissive of the scale of the foreclosure crisis. In the March 25 e-mail, Dorfman calls the eminent domain plans "tedious." In a March 8 e-mail to Pollard, Chris Killian, managing director and head of securitization at SIFMA, insults Brockton's eminent domain committee, writing "the current 'committee' carries many markings of a charade."

SIFMA's concern is not the plight of these cities—but rather the time and money SIFMA has lost fighting eminent domain plans. In the February 15 e-mail, Dorfman writes to Pollard about eminent domain plans in Brockton and in Phoenix, Arizona: "One of the City Council members has found a messianic calling in the eminent domain scheme, so we are once again investing time and resources in this matter," time that he laments should instead be focused on the "flurry of regulatory activity derived from Dodd Frank."

The re-focusing of SIFMA's attention from federal regulations to the actions of a few small cities trying to creatively solve their foreclosure crisis tells us that these eminent domain plans are a significant threat to Wall Street. SIFMA is terrified that this idea will spread. As SIFMA's Killian wrote on March 8, "one of these places where there is smoke will soon catch fire." If there is one thing SIFMA does not want, it is for banks to have to go to court, in multiple cities, to try and fight seizures of mortgages via eminent domain.

As of January 6, 2014, the FHFA has a new head—Mel Watt, who until recently served as a Democratic Representative from North Carolina. SIFMA has hardly made it a secret that it is expecting Watt to continue FHFA's war on eminent domain plans. When Watt's nomination was first announced, SIFMA released a statement insisting Watt "explicitly address the continued threat" of plans using eminent domain to seize mortgages. One of the first questions the public should ask is: Will the FHFA under Watt continue this tradition of using its power to act as a proxy for SIFMA? Or will Watt support cities' searching for new and novel approaches to foreclosures?

Given that it's been five years since the crisis and the federal government has done appallingly little to help homeowners, the least the FHFA could do is stay out of the way.

Alexis Goldstein *January 17, 2014*

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Exhibit 28

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The role of the Fannie Mae/Freddie Mac duopoly in the American housing market

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Abstract

Purpose – The purpose of this paper is to provide a brief introduction to the role of the Fannie Mae/Freddie Mac duopoly in the American housing market.

Design/methodology/approach – First, the paper defines the "government sponsored enterprise," which is the type of hybrid public/private entity that Fannie and Freddie are and provides an introduction to the other significant government sponsored enterprises. It then explains what Fannie and Freddie do in the American mortgage market and provides a brief history of how the two companies developed. Finally, it evaluates the two companies as duopolists in the conforming mortgage market.

Findings – The paper concludes by suggesting that the current financial crisis presents an opportunity to rethink whether the Fannie/Freddie duopoly continues to serve the public interest.

Research limitations/implications – Because of its length, the paper does not review alternative approaches to the status quo that the US Government can take to ensure that it has a stable federal housing finance policy.

Practical implications – The paper argues that the current financial crisis provides an opportunity to revisit the design of the structure of the US housing finance market.

Originality/value – The paper sets forth the rationale and legal basis for characterizing Fannie Mae and Freddie Mac as duopolists.

Keywords United States of America, Mortgage companies, Housing, Government policy

Paper type Conceptual paper

The Federal National Mortgage Association (commonly known as "Fannie Mae") and the Federal Home Loan Mortgage Corporation (commonly known as "Freddie Mac") are two of the ten largest companies in the USA measured by assets[1]. While they are for-profit, privately owned mortgage finance companies whose shares trade on the New York Stock Exchange, they are also two of the few companies directly chartered by congress[2]. Congress created them to develop a liquid national market for residential mortgages in order to encourage homeownership[3]. The privileges attendant to this special relationship with the federal government has been the source of their competitive advantage in the American residential mortgage market (Reiss, 2008, p. 1019).

Fannie and Freddie primarily engage in two activities. First, they help mortgage originators package their mortgages into residential mortgage-backed securities

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(RMBS) by providing credit guarantees for those securities. This helps maintain a stable and liquid market for RMBS. Second, the two companies raise capital by issuing debt securities and use those funds to purchase mortgages and related securities. Fannie and Freddie have historically profited in this second line of business because of the spread between their low cost of capital and the amount that they must pay for the mortgage investments they keep for their own portfolios[4]. These two activities, and particularly the second one, have driven the rapid growth and high profitability of the two companies in recent years[5].

In the early 2000s, the two companies were hit by accounting scandals (Reiss, 2008, pp. 1078-79). The fallout of these scandals led to a slowdown in their growth as their regulators and congress took steps to limit their activities (Reiss, 2008, pp. 1035-39). Just as they put some distance between themselves and their scandals, the ongoing credit crisis began to unfold in 2007. Despite their denials, the two companies had significant exposure to the subprime and Alt-A mortgage markets (Browning, 2008). Their underwriting of the prime market had also been overly optimistic and the two companies began posting losses that are now being measured in the hundreds of billions of dollars[6]. As the extent of their problems began to come into focus, congress passed the Housing and Economic Recovery Act of 2008 in the Summer of 2008. Within weeks of its passage, then – Secretary of the Treasury Henry M. Paulson Jr placed the two companies into conservatorship, pursuant to the act (Hagerty and Paletta, 2009, p. 14).

Notwithstanding this turn of events, Fannie and Freddie remain huge: together they own or guarantee more than 44 percent of all the residential mortgages in the USA[7]. The two companies have a combined \$5.30 trillion in mortgage-related obligations (OFHEO, 2008a), which is of roughly the same magnitude as the \$5.81 trillion of federal government debt held by the public[8]. They also continue to have an extraordinary impact on the operations of the secondary mortgage market. The crisis that they find themselves in does present, however, an opportunity to reevaluate their proper role in the American residential mortgage market.

This paper proceeds as follows. Section I defines the "government sponsored enterprise," which is the type of hybrid public/private entity that Fannie and Freddie are. Section I also provides a brief introduction to the other significant government sponsored enterprises (GSEs). Section II explains what Fannie and Freddie do in the American mortgage market. Section III provides a brief history of how they developed. Section IV evaluates the two companies as duopolists in the conforming mortgage market. Section V concludes by suggesting that the current crisis presents an opportunity to rethink whether the Fannie/Freddie duopoly continues to serve the public interest.

I. The government-sponsored enterprise

Fannie and Freddie are GSEs. A GSE is:

> [. . .] a federally chartered, privately owned, privately managed financial institution that has only specialized lending and guarantee powers and that bond market investors perceive as implicitly backed by the federal government (Carnell, 2005, pp. 565, 570)[9].

Congress has a long history of relying upon GSEs to spur private investment.

The special privileges accorded a GSE are variants on the longstanding government practice of spurring private investment in various arenas by granting some privilege or monopoly power to a party that will infuse the activity with needed capital or bring focused attention to it. For example, government-granted monopolies can take the form of a charter granting a monopoly on trade, such as the one granted by Queen Elizabeth I to the English East India Company in 1600 in order to increase English trade with Asian nations (Lawson, 1993, p. 5-6). They can take the form of a system such as that governing American patents, granting patent-holders the sole right to exploit a patent for a certain period in order to encourage innovation[10]. Or they can take the form of a regulated natural monopoly, like a utility company, that is regulated not only to protect consumers from monopoly pricing but also to ensure that the company can make a fair return on its investment (Grossman and Cole, 2003).

Congress typically relies on the GSE structure to provide liquidity to a fragmented credit market. The Farm Credit System is the oldest GSE. It is a network of "borrower-owned lending institutions comprised of cooperatives and related service organizations" (Farm Credit Services, 2009). This network "provides privately financed credit to agricultural and rural communities" (Federal Budget, 2009, p. 4). Farmer Mac, another GSE, is an independent institution which is a part of the Farm Credit System (Walker, 2004). It was chartered for the primary purpose of creating "a secondary market for agricultural real estate and rural home mortgages" (Federal Budget, 2009, p. 5). Farmer Mac, a publicly traded corporation like Fannie and Freddie, is able to exploit its regulatory privilege in ways that are similar to those two companies, although it operates in a smaller market[11].

The other major GSE is the Federal Home Loan Bank System[12]. The system is comprised of 12 regional banks that are structured as cooperatives[13]. The 12 banks operate semi-independently, each maintaining its own president and board of directors[14]. The system's primary mission:

> [. . .] is to provide cost-effective funding to members for use in housing, community, and economic development; to provide regional affordable housing programs, which create housing opportunities for low- and moderate-income families; to support housing finance through advances and mortgage programs; and to serve as a reliable source of liquidity for its membership[14].

Because of its overlapping mission, the FHLBS is effectively a smaller sibling of Fannie and Freddie[15].

II. What Fannie and Freddie do

Fannie and Freddie are by far the largest of the GSEs. They are also the entities that have had the biggest role in creating and developing the modern secondary market for residential mortgages. Mortgages have always been bought and sold by investors, but until relatively recently; the secondary mortgage market has been an informal arrangement (van Order, 2000, pp. 233, 236). The introduction of RMBS in the 1970s changed that; once mortgages are converted into RMBS, they can be easily traded on the secondary market with comparatively few transaction costs[16]. In the simplest terms, this is how it works:

- Borrowers get mortgages from lenders in the primary market (US Senate Committee on Banking, Housing, and Urban Affairs, 2005).
- Primary market lenders then sell these mortgages to secondary mortgage market firms and use the proceeds to originate more mortgages in the primary market[17].

- The secondary mortgage market firms then sell securities backed by the mortgages that they purchased to investors and use the proceeds of the sale to purchase more mortgages from primary market lenders (Freddie Mac, 2009c).

As mentioned above, Fannie and Freddie participate in the secondary market in two ways, by:

(1) issuing and guaranteeing RMBS for a fee; and

(2) issuing debt and purchasing, for their own portfolios, mortgages and RMBS with the proceeds[18].

Because of their consistently cheaper borrowing costs, Fannie and Freddie have been able to profit greatly from this second line of business. This is because they can make money on the spread between their low cost of funds and what they must pay for the mortgage-related investments in their portfolios[4].

The two firms face a variety of risk in their lines of business. In both lines, Fannie and Freddie absorb the risk that the borrower will default (Jaffee, 2006). As to the mortgages that Fannie and Freddie keep for their own accounts, prepayment risk (the risk that a borrower will prepay a mortgage prior to the end of its term when interest rates have dropped) poses a greater threat to profitability[19]. Prepayment risk is linked to interest rate risk (the risk that the payments that the two companies owe on the short-term debt that funds their mortgage purchases become mismatched with the payments they receive from the mortgages with long-term interest rates that Fannie and Freddie keep for their own account)[20]. Finally, Fannie and Freddie are exposed to operational risk, "the risk of loss due to inadequate or failed internal procedures and systems" (Weiss, 2005, p. 5). The accounting scandals that have overtaken the two companies in recent years have highlighted the danger that operational risk can pose to large financial institutions[21].

The GSEs' charters restrict the mortgages they may buy (Passmore *et al.*, 2002). In general, they may only buy mortgages with loan-to-value ratios of 80 percent or less unless the mortgage carries mortgage insurance or other credit support[22] and may not buy mortgages with principal amounts greater than an amount set each year (OFHEO, 2008b). Loans that comply with the restrictions placed on Fannie and Freddie are known as "conforming" loans[23]. Those that do not comply with either of these restrictions are known as "nonconforming" loans, which may not be purchased by Fannie or Freddie[24].

The two companies effectively have no competition in the conforming market because of advantages granted to them by the federal government in their charters (Bruskin *et al.*, 2000). The most significant of these advantages has been the federal government's implied guarantee of Fannie and Freddie's obligations (Bruskin *et al.*, 2000, p. 1033)[25]. The government's guarantee allows Fannie and Freddie to borrow funds more cheaply than its fully-private competitors and thereby offer the most attractive pricing in the conforming market, a market in which they can effectively act as duopolists[26].

Fannie Mae and Freddie Mac now own or securitize roughly 44 percent of the outstanding stock of single-family residential mortgages[27]. The remainder of the secondary market (other than the portion originated by Ginnie Mae – see below) comes from "private label" firms – a large component of which is composed of jumbo and subprime mortgage securitizations[28]. Private-label firms are not in a position to compete head on with GSEs as their cost of capital is greater[29].

Notwithstanding their huge size, there was a consensus that Fannie and Freddie were insufficiently monitored as compared to other federally regulated financial institutions such as members of the Federal Reserve System and the Federal Deposit Insurance Corporation[30]. As part of the Housing and Economic Recovery Act of 2008, Congress strengthened the regulatory oversight for Fannie and Freddie[31]. Prior to the passage of the act, Fannie and Freddie's "financial safety and soundness" regulator was OFHEO, which was an independent agency located within HUD[32]. The act replaced OFHEO with a new independent Federal Housing Finance Agency (the "Agency")[33]. The Agency has general regulatory authority over Fannie and Freddie as well as the Federal Home Loan Banks. The Agency is similar to OFHEO, but it has been granted significantly more power. Indeed, Congress intended it to be a first class financial regulator like the Federal Deposit Insurance Corporation[34].

III. A brief history of Fannie and Freddie

Fannie and Freddie effectively created the modern secondary market for residential mortgages in the early 1970s[35]. These two companies were unlike nearly all other financial institutions in the 1970s in that their businesses were not geographically restricted and they could develop a truly national market for mortgages[36]. Fannie's origin stretches back, however, to the Great Depression.

Fannie Mae was originally chartered in the 1930s for the limited purpose of providing a government-owned secondary market for loans insured by the Federal Housing Administration (van Order, 2000, p. 236). In 1954, Fannie Mae was reorganized to allow private capital to replace federal funds (Lea, 1996). It operated by issuing its debt and purchasing mortgages that it held in its portfolio (van Order, 2000, p. 236). The Housing and Urban Development Act of 1968 partitioned Fannie Mae into a privately-financed secondary market institution, today's Fannie Mae, and a government agency called the Government National Mortgage Association, today's Ginnie Mae (van Order, 2000).

Freddie Mac was created by the Emergency Home Finance Act of 1970 (EHFA) to form a secondary market for Savings and Loan (S&L) mortgages (About Fannie Mae > Our Charter, 2009). Freddie Mac was initially owned by the Federal Home Loan Bank System and its member thrifts; now it is a publicly traded company like Fannie Mae[37]. When it was first created, Freddie Mac purchased mortgages from S&Ls, and Fannie Mae purchased mortgages from mortgage bankers; their purchasing practices have since converged (van Order, 2000, p. 236)[38]. Fannie and Freddie, as the dominant purchasers of residential mortgages, have effectively standardized prime residential mortgages by promulgating buying guidelines (Stanton, 1991). Such standardization has led to increases in the liquidity and attractiveness of mortgages as investments to a broad array of investors[39].

While Fannie Mae had created a secondary market for government guaranteed and insured residential mortgage loans prior to 1970, the broad secondary market began in earnest with the passage of the EHFA, which allowed both GSEs to purchase and securitize conventional mortgages as well as government-insured or guaranteed mortgages[40]. In the late 1970s, RMBS securitization took off as traditional lenders could not keep up with the demand for home mortgages[41]. Investment in RMBS exploded again after institutional investors entered the market; indeed, the RMBS market has increased by more than 500 percent from 1984 through the early 2000s (Lore and Cowan, 2005, Subsections 1.3 and 2.23). Starting in the late 1970s, non-federal-related issuers, such as commercial banks and mortgage companies, began to issue "private label" RMBS, a market that exploded in the ensuing years (Forte, 1996, pp. 489, 491). The subprime boom and bust of the 2000s took place in large part in this "private label" RMBS market.

IV. Fannie and Freddie as duopolists

Commentators have argued that Fannie and Freddie effectively have a duopoly in the conforming mortgage market because they can borrow money so much more cheaply than their competitors, thereby excluding them from that market[42]. Unlike pure duopolists, Fannie and Freddie's duopoly is limited by the nature of their competitive advantage: in an otherwise efficient market, the maximum amount that they can retain as duopoly profits is the spread between the interest rates they must pay and those that their competitors must pay[43]. And retain duopoly profits they do[44].

If Fannie and Freddie were a duopoly, one might reasonably wonder whether their actions violate Section 2 of the Sherman Act, which forbids monopolization[45]. The Supreme Court has interpreted Section 2 to mean that the monopolization resulted from "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident"[46]. Given that Fannie and Freddie were created by the federal government, they would seem to be immune from the charge of "willful acquisition or maintenance." Moreover, the federal government has already designed a regulatory regime with which it can evaluate Fannie and Freddie's past behavior and mold their future actions[47]. Thus, it seems (a conclusion that is further supported by the absence of litigation regarding this issue) that the two companies do not violate the Sherman Act[48].

One might also wonder whether Fannie and Freddie are best described as duopolists or oligopolists. The fewer firms there are in a market, the more likely they are to act like duopolists (Vives, 2000). This is because the opportunities for passive collusion are greater when there are fewer competitors. Passive collusion can take the form of failing to vigorously compete. It is also more likely where potential duopolists can monitor their competitors for "cheating" (that is, attempting to take more market share by competing more vigorously). This is easier to do "where the number of firms in the industry is small, the firms are similar in product offerings and technology, the firms have frequent interactions through the process of attracting customers, and it is easy for the firms to observe the actions of their competitors"(Seiler, 1999, p. 125).

As Seiler (1999) makes clear, Fannie and Freddie have a number of the characteristics of duopolists: there are only two of them; they finance similar mortgages, they use similar technology and they have frequent interactions. Seiler does note that the two firms cannot directly monitor the terms that the other has negotiated with lenders who provide them with loans. Seiler finds, however, that Fannie and Freddie can indirectly monitor each other such that they can maintain the equilibrium necessary to act as a duopoly (Seiler, 1999)[49] There is also some empirical support for the claim that Fannie and Freddie have opportunities to collude, based on their historically high profits (Hermalin and Jaffee, 1996, p. 225; Goodman and Passmore, 1992)[50]. Thus, Fannie and Freddie are best described as duopolists in the conforming residential mortgage market[51]. Since their duopoly is the result of government-granted privileges (and is not a natural monopoly), it is suspect from the perspective of competition theory.

V. Conclusion

Fannie and Freddie were chartered to create a liquid secondary market for residential mortgages. They achieved that goal. Since they were profit-driven private companies, they also developed lines of business which allowed them to dominate the conforming mortgage market to the exclusion of all competitors. As a result, they grew extraordinarily large. Because of the risks that they took and because of the extraordinary conditions throughout the mortgage market in the last few years, they became critically undercapitalized such that the federal government found it necessary to place them in conservatorship. While this particular crisis shall cost the American taxpayer hundreds of billions to rectify, it also presents an opportunity to rethink whether the Fannie/Freddie duopoly is still necessary for a healthy residential mortgage market in the USA. And clearly, the burden of proof rests on Fannie and Freddie to demonstrate that their duopoly does serve the public interest[52].

Notes

1. See, *The Forbes Global* (2000, pp. 8, 10) showing Fannie Mae and Freddie Mac ranked.
2. See, Fannie Mae (2008) and Freddie Mac (2006) describing Fannie Mae as private company and Freddie Mac common stock will continue to be listed on the New York Stock Exchange, respectively.
3. USC 1716.
4. See, Fannie Mae (2009a) and Freddie Mac (2009a) describing Fannie Mae's and Freddie Mac's businesses, respectively.
5. On average – "the combined size of the Fannie Mae and Freddie Mac has more than doubled every five years between 1968 and 2002" (Moe and Kosar, 2005).
6. See, Hagerty and Saha-Bubna (2009, p. A3) and Hagerty and Paletta (2009, p. A2) reporting that Freddie's and Fannie's loss for all of 2008 were \$50.1 billion and \$58.7 billion, respectively.
7. Office of Federal Housing Enterprise Oversight (OFHEO 2008a) showing outstanding mortgage debt through 2008 with figures updated through March 12, 2009.
8. Federal Reserve Board (2008) providing public debt data as of September 30, 2008.
9. See also 2 USC Section 622 (2006) (giving similar definition for purposes of Congressional Budget Act).
10. US Constitution, Article 1, Section 8.
11. See, Farmer Mac web site, www.farmermac.com/company/profile/profile.aspx and Farmer Mac (2006).
12. The Federal Home Loan Bank members are lending institutions such as federally insured savings associations, commercial banks, credit unions and insurance companies. Federal Home Loan Banks web site, www.fhlbanks.com/html/faq.html
13. Federal Home Loan Banks web site, www.fhlbanks.com/
14. Federal Home Loan Banks web site, www.fhlbanks.com/html/fhlb_system.html
15. Federal Home Loan Banks web site, www.fhlbanks.com/html/faq.html Congress has created other GSEs at various points for a variety of reasons. In 1987, the federal government created a GSE, the Financing Corporation (FICO), to take on the obligations of the insolvent Federal Savings and Loan Insurance Corporation (FSLIC). See, Competitive Equality Bank Act of 1987, Public Law No. 100-86, Title III (codified at 12 USC Section 1441 (2006)). See generally, White (1991) reviewing history of S&L crisis, Section 1441(e)(6). In 1989, Congress created

the Resolution Funding Corporation (REFCO) to deal with the ongoing effects S&L crisis. Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989, Public Law No. 101-73, 103 Stat. 183 (establishing REFCO). Sallie Mae (originally, the Student Loan Marketing Association), a former GSE that has been privatized, finances student loans (Reiss, 2008, pp. 1078-79).

16. "The rise in the secondary market in the 1970s and (especially) 1980s came about largely because of standardization of pools of mortgages [. . .]" (van Order, 2000).
17. See, Freddie Mac (2009c) showing how Freddie Mac enters secondary market.
18. See, Fannie Mae (2009b) explaining involvement in US housing industry and Freddie Mac (2009a) and Reiss (2008) describing activity in secondary mortgage market.
19. See, "Prepayment risk is potentially more serious [than credit risk]" (Weiss, 2005, p. 4).
20. See, "Interest rate risk can be very serious. Many savings and loan associations became insolvent in the early 1980s because of it" (Weiss, 2005, pp. 4-5).
21. See, "Fannie Mae's current accounting problems, and those of Freddie Mac in 2003, raise questions about internal controls" (Weiss, 2005).
22. See, 12 USC Section 1454(a)(2) and 1717(b)(2) of 2006 providing restrictions for Freddie Mac and Fannie Mae.
23. See, Freddie Mac (2009b) defining "conforming mortgage."
24. See, Bruskin *et al.* (2000) identifying major categories of nonconforming loans as jumbos and B/C quality, which includes subprime low- and no-doc loans.
25. Some commentators believe, with good reason, that what had been characterized as an implied guarantee had been converted into an explicit guarantee once the Housing and Economic Recovery Act of 2008 was passed. See, e.g. Wallison (2008) describing post-Act Fannie and Freddie as "explicitly government-backed entities."
26. See, Standard & Poor's (2000), the nonconforming rate usually is 25-50 basis points higher than the conforming rate.
27. See, Office of Federal Housing Enterprise Oversight (OFHEO 2008a) showing residential mortgage debt outstanding.
28. See, van Order (2000, p. 237) describing breakdown of secondary mortgage market and use of "private label" secondary market.
29. "The lower interest rates that Fannie and Freddie can command because of their government backing permit them to out-compete any private-sector rival and to dominate any market they are permitted to enter" (Wallison and Ely, 2000).
30. See, for example, "There is a general consensus that the current regulatory regime is ill-equipped to deal effectively with the housing GSEs" (Nott and Miles, 2006).
31. Public Law No. 110-289 (2008), 122 Stat. 2008.
32. Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 12 USC Subsection 4501-4641 (2006).
33. Housing and Economic Recovery Act of 2008 Section 1101; see, Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 12 USC Sections 1301 (2006) (abolishing OFHEO) and 1311 (abolishing, in addition, Federal Housing Finance Board which regulated Federal Home Loan Banks).
34. See, Summary of the Housing and Economic Recovery Act of 2008 – available at: http://banking.senate.gov/public/_files/HousingandEconomicRecoveryActSummary.pdf
35. See, van Order (2000, p. 236) discussing history of secondary mortgage market.
36. Thomas (1999) noting that Fannie and Freddie's national charters allowed them to overcome market imperfections in 1970s and 1980s that resulted from legal restrictions on banks and thrifts that have since been lifted. With the modernization of the financial system, the *raison d'être* of Fannie and Freddie disappeared, but they remained. See, Felsenfeld (1998) reviewing loosening of restrictions on interstate banking in latter part of twentieth century.

37. See, Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Public Law No. 101-73, 103 Stat. 183 (codified in scattered sections of 12 USC) (converting Freddie Mac's ownership structure). The term "thrifts" is a catchall that includes savings and loans, savings banks, and mutual savings banks. See, 12 USC Section 1841(i) (2006) (defining "thrift institution" for purposes of Bank Holding Company Act of 1956).
38. While Fannie and Freddie started out with different missions, they grew to have the same one (van Order, 2000, p. 236).
39. See, Jensen (1972, pp. 397, 400) noting that Fannie Mae created task force to identify "substantive mortgage clauses which would be essential to make the [uniform form of] mortgage saleable to investors."
40. See, Carrozzo (2005, p. 793) describing enactment of EHFA.
41. See, Kendall (1996, pp. 1, 6) describing funding shortfall caused by strong desire for home ownership.
42. See, e.g. Seiler (1999, pp. 117, 125); see also Mortgage Bankers Association (2005), "[T]he GSEs have established a duopoly in loan underwriting technology." Gan and Riddiough (2007) "GSEs effectively lend directly to consumers as an informationally advantaged monopolist."
43. Some may argue that the "conforming mortgage market" is not a meaningful market for the purposes of an analysis of whether Fannie and Freddie are engaged in anticompetitive behavior; rather, the argument goes, they should be seen as just two of the competitors in the significantly larger "residential mortgage market" along with that larger market's numerous lenders. It might then follow that Fannie and Freddie are better characterized as rent-seekers in the entire residential mortgage market than as duopolists in the conforming market. Whether Fannie and Freddie are best characterized as duopolists or rent-seekers does not impact my ultimate thesis: their regulatory privilege does not appear to be in the public interest. See, Macey (1988, pp. 471-2, n. 4), "An example of rent-seeking is a firm's attempt to secure government-granted monopolies. Such monopolies allow a firm to increase its prices above competitive levels. The resulting profits represent economic rents from government regulation." Mueller (1989, p. 229) noting that the government can "help create, increase, or protect a group's monopoly position. In so doing, the government increases the monopoly' rents of the favored groups, at the expense of the buyers of the group's products and services. The monopoly rents that the government can help provide are a prize worth pursuing, and the pursuit of these rents has been given the name of rent seeking."
44. The Congressional Budget Office (CBO) estimated that Fannie and Freddie kept up to as much as 40 percent of the spread and passed the remainder on to borrowers. See, CBO (2001, p. 27) estimating Fannie and Freddie retain 16 basis points of government subsidy out of total 41.
45. USC Section 2 (2006).
46. *US* v. *Grinnell Corp*., 384 US 563, 571-72 (1966).
47. In *Credit Suisse* v. *Billing*, the Supreme Court set forth four elements to determine whether antitrust law should defer to a financial regulation regime. The four elements are: "(1) an area of conduct squarely within the heartland of securities regulations; (2) clear and adequate SEC authority to regulate; (3) active and ongoing agency regulation; and (4) a serious conflict between the antitrust and regulatory regimes" (127 S. Ct. 2383, 2397 (2007). Stigler (1986b, pp. 184, 192), "Most exempt industries are subjected to regulation of other sorts, and presumably have economic characteristics which distinguish them from nonexempt unregulated industries." The same logic applied to Fannie and Freddie would lead to the conclusion that antitrust law should not apply, given that they are regulated by three instrumentalities of the federal government, the agency (and previously, OFHEO), HUD and the treasury (Reiss, 2008, pp. 1033-6).

48. See Weiser (2005, pp. 549-0), "where regulatory agencies are on the scene, antitrust courts should retreat"; see, Schneider (2002) arguing that Freddie Mac's standardized mortgage buying guidelines have antitrust immunity; but see Stanton and Moe (2002), "Until 1989, the Freddie Mac charter also contained other provisions that confused public and private characteristics. Although Freddie Mac was a privately owned company, its charter conferred upon the GSE, '[. . .] all immunities and priorities, including [. . .] all immunities and priorities under any such law or action, to which it would be entitled if it were the United States or if it were an unincorporated agency of the United States.' This provision thus exempted Freddie Mac from antitrust laws and also conferred sovereign immunity from suit and a priority in claims in bankruptcy, among other benefits. Fortunately, Congress repealed that provision in 1989 before Freddie Mac grew to a size where the need for the discipline of the antitrust laws became especially important."
49. Fannie Mae, unsurprisingly, disagrees with this assessment. Seiler (1999) citing Fannie Mae (1996, p. 314).
50. Woodward (2005) who has consulted for Freddie Mac, disputes the notion that Fannie and Freddie act as duopolists because of the murkiness in market for Fannie and Freddie's guarantee fees (on file with author). Indeed, she believes that such a market approximates pure competition (Woodward, 2005, p. 28).
51. It is a widely accepted hypothesis that oligopolists "wish to collude to maximize joint profits" (Stigler, 1986a). This is because the "combined profits of the entire set of firms in an industry are maximizes when they act together as a monopolist" (Stigler, 1986a).
52. See generally, Reiss (2009) arguing that Fannie and Freddie should be privatized because their privilege position imposes a net cost on the public.

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Bid to replace Fannie Mae and Freddie Mac gets a needed push

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HOUSING FINANCE reform, the great unfinished business of the financial crisis, got a push forward Tuesday from the top Democrat and top Republican on the Senate banking committee. Chairman Tim Johnson (D-S.D.) and ranking member Mike Crapo (R-Idaho) put forward a proposal to replace Fannie Mae and Freddie Mac, which currently back three-fifths of all new home loans.

Instead of those two government-sponsored mortgage guarantors, which have been under direct federal control since their collapse in 2008, a new federal entity would, in return for a fee, insure private-sector mortgage securitizers against catastrophic losses. The private companies would put up 10 cents of their own money for every dollar of risk, and the federal insurance would cover losses above that stake, using accumulated insurance fees. This is roughly the approach outlined last year by banking committee members Mark Warner (D-Va.) and Bob Corker (R-Tenn.); the Obama administration has signaled its support.

Ideally government would get out of the mortgage securitization business, limiting its intervention to a program targeted transparently at low-income, first-time home buyers. Political realities being what they are — chiefly, the housing sector's dependence on the 30-year, fixed-rate mortgage — such an approach is not in the cards, at least for now. The Johnson-Crapo approach, modeled on Corker-Warner, aims to create a second-best solution. In contrast with the Fannie-Freddie model, in which government implicitly guaranteed the liabilities of two non-transparent, highly politicized entities, the proposed alternative would expressly guarantee not firms but assets — mortgages — whose risks can be more readily analyzed.

As with all federal insurance programs, a major concern about the proposed entity is that interest-group lobbyists would pressure it to charge too little for the federal guarantee, thus replicating Fannie and Freddie's distorting effect on capital allocation. Rep. John Delaney (D-Md.), a former financier, has suggested a solution: Private-sector entities should be allowed to bid on the security-guarantee business as well, assuming a share of the government's risk in return for a share of the profits. Under Mr. Delaney's proposal, the private-sector bids would set the price of the federal guarantee, thus ensuring that it reflects market considerations over political ones.

Ultimately, the quality of the underlying mortgages will determine how much exposure the government — and, by extension, the taxpayer — takes on. Poorly underwritten loans brought down both the "private-label" mortgage securities industry and the Fannie-Freddie duopoly. Yet a wide array of interest groups, from the housing lobby to low-income advocates, can be counted on to insist that standards be relaxed, bit by bit, in the name of homeownership.

The Johnson-Crapo proposal adopts federal “qualified mortgage” standards that basically rule out “no-doc” loans and the like — but it would also make mortgages with down payments as low as 3.5 percent eligible for government-backed securitization. Congress must resist any temptation to debase credit standards. If recent history teaches anything, it’s this: A mortgage securitization system is only as strong as its weakest borrower.

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