Written Testimony of Robert M. Couch
Hearing of The U.S. Senate Committee on Banking, Housing, and Urban Affairs
"Housing Finance Reform: National Mortgage Servicing Standards"
Tuesday, August 2, 2011 10:00 AM

Chairman Johnson, Ranking Member Shelby, and members of the Committee:

My name is Rob Couch, and I am attorney with Bradley Arant Boult Cummings, a law firm based in Birmingham, Alabama. Prior to joining the firm, I served as General Counsel of the United States Department of Housing and Urban Development from June 2007 to November 2008 and Acting General Counsel from December 2006 to June 2007. Before joining HUD, I served as president of the Government National Mortgage Association (Ginnie Mae). Prior to my government service, I was the CEO of New South Federal Savings Bank, then the largest thrift in Alabama and one of the most active residential mortgage lenders in the South. I have also served as Chairman of the Mortgage Bankers Association of America and as President of the Alabama Mortgage Bankers Association. Thank you for inviting me to testify today about the ongoing debate regarding national mortgage servicing standards.

Despite my years of involvement within the mortgage and financial services industries, perhaps the most profound lesson about mortgage banking that I ever learned occurred when I signed a mortgage of my own several years ago. It was about fifteen pages long. Right before I signed it, the closing agent looked at me and said, "Do you know what this document means, Rob?" "I think so," I replied. His response will remain with me forever: "If you pay, you stay. If you don't, you won't." While this summation may seem unduly harsh to some, it provides the essence of the subject of this hearing.

We are all painfully aware of the deficiencies in the mortgage process that came to light in the throes of the recent financial crisis. I believe that we are all in agreement about the need to go forward addressing these issues and focusing on the actual harm that they caused. We, of course, must also balance everything against the long-term impact that the unintended consequences of our actions will have on homeowners and the housing market. It is my hope that my testimony will illuminate the important issues of market certainty and fundamental fairness in a way that will encourage this Committee and the Congress to consider these principles and take a balanced approach as it proceeds with its important efforts.

Although there are multiple proposals to make changes to mortgage servicing standards, I think that it is important to recognize that historically, the process has worked just as it was supposed to. In the debate over how to prevent mistakes in the future, there is a tendency to overlook the basics. At the risk of oversimplifying, it is worth a couple of minutes to review how the system is supposed to work.

When an individual decides to borrow money to buy or refinance a home, she provides information to the bank that has the money and the bank makes the decision to lend based on the likelihood that the borrower will repay the money along with a fair market interest rate. At closing, the borrower receives the money and signs a note promising to pay the money back along with interest. She also signs a mortgage stating that, as collateral for the loan, the home itself is subject to being foreclosed upon if the borrower goes into default. This process provides certainty to both the borrower and the lender, which is vital to the markets. The borrower's promise to pay and the document that lays out the security is then saleable to investors. These investments have historically been attractive to pension plan managers and other long-term investors because pension plan participants and other beneficiaries of investments in mortgages have long-term horizons and 30-year mortgages provide just that.

While the intention behind setting national mortgage servicing standards is certainly laudable, such standards create unintended consequences that Congress should consider through the lens of certainty and fairness.

I. CERTAINTY

Much of the recent criticism of the mortgage industry is warranted. Recently, we have witnessed sloppiness and abuse of process by some lenders and servicers. Borrowers who have actually been harmed by any malfeasance should unquestionably be fully compensated as required by law. While national mortgage servicing standards may well address these mistakes, they can also potentially cause uncertainty to creep into the markets and devastate investment, which will ultimately be felt by homeowners. Efforts to slow down foreclosures have created a huge backlog that has become known as the "foreclosure overhang." This backlog has further depressed real estate markets that are still reeling from the recent recession.

Today, over 90% of all new mortgages have direct guarantees from the federal government. Such direct involvement is necessary to overcome the markets' uncertainty of investment in mortgages. Ongoing, heavy government involvement, however, is not sustainable over the long run. For private capital to return, certainty must exist.

To illustrate my point, over the past three years, only two private label securities, backed by mortgages, have come to market. They were worth approximately $500 million.[1] In 2006, by comparison, multiple private label securities worth over $700 billion were issued backed by mortgages.[2] The lack of private money in the marketplace is in a large part due to uncertainty and any national mortgage servicing standards must take that uncertainty into consideration and sufficiently address it.

Much of this uncertainty in the market is attributable to uncertainty in the foreclosure arena, the execution of the second half of my closing agent's simple principle: "if you don't, you won't." Investors, many of whom are retirees, watch the value of their mortgage-backed investments fall as well-intended efforts to be compassionate to struggling borrowers proliferate. These efforts take many forms, including loan modifications extending or reducing interest rates on loans, reduction of the principal amount owed, or indefinite postponement of foreclosure

[1] Mark Fogarty, *Trouble Ahead*, NATIONAL MORTGAGE NEWS, Mar. 10, 2011.

[2] The Board of Governors of the Federal Reserve System, *Report to Congress on Risk Retention*, Oct. 2010.

rights. All of these proposals may change the terms of the contract the investor purchased and contribute to the uncertainty surrounding the mortgage marketplace.

II. FAIRNESS

The national average of the amount of time between delinquency and foreclosure is 400 days.[3] Put another way, on average, a person who cannot or will not pay their home mortgage stays in his or her home rent-free for an average of 400 days before possession of the home is transferred to the owner of the debt. In some states, this figure is much higher. In New York and New Jersey, it is taking an average of 900 days – almost two and a half years – to move a loan from default to foreclosure. In Florida, the average foreclosure timeline is about 680 days.[4] Many of the provisions under debate in negotiations on nationwide standards, such as principal write-downs, are well-intended efforts to provide relief to borrowers who do not pay. Any national mortgage servicing standards, however, must also address the marketplace and equally important, the people who *do* pay.

The vast majority of people being foreclosed upon are not legally damaged or suffering demonstrated harm. As an aside, this fact demonstrates one of the major flaws with the proposed settlement by state attorneys general as reported in the press because they propose to collect money from servicers without basing the collection on demonstrated harm.[5] Individuals who have been harmed during the foreclosure process already have avenues to pursue their legal rights and obtain damages due to them. Fact-based determinations in a court of law, however, are far better and ultimately provide more protection than simply requiring servicers to contribute money to a fund.

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[3] Jon Prior, *Delays Push Foreclosures to 40-Month Low in April*, HOUSING WIRE, May 11, 2011.

[4] *Id.*

[5] Kerri Panchuk, *Congress Wants CFPB to Come Clean on Mortgage Servicing Settlement*, HOUSING WIRE, Jul. 14, 2011.

Most of the servicing standard proposals, however, do not consider the majority of hard-working Americans who do pay their mortgages every month. National servicing standards that do not address the marketplace or the people who are not in default subject those people to the "foreclosure overhang." Requiring lenders to reduce mortgage balances increases costs that will ultimately be borne by all borrowers. Mortgage write-downs also remove incentives for banks to lend money and for investors to purchase mortgages, denying people access to credit needed to purchase or refinance homes and negatively impacting an already devastated housing market. In sum, an efficient foreclosure process is necessary to clear local markets, facilitate economic recovery, and protect the borrowers who are not in default.

III. Adequacy of State Law

Finally, Congress should be mindful that policies and procedures relating to the foreclosure process historically have resided within the province of state laws dealing with foreclosure processes and consumer protection. Each state has adopted procedures spelling out how the foreclosure process should be conducted and what protections should be afforded to borrowers. These procedures have worked very well for many years. Federal and state regulators should be slow to override state law sovereignty by effectively making mortgage servicers subject to new rules without a legislative mandate. Moreover, in most cases, remedies under state laws, regulations and requirements already exist for a majority of the perceived problems within the mortgage industry and any national servicing standard should consider the existence and adequacy of existing rules so that borrowers who suffer actual harm may avail themselves of compensation already afforded by state law.

Thank you again for holding this important hearing and for sharing everyone's commitment to certainty and fairness as we continue to pave the road to our nation's economic recovery together. I urge you to be deliberate and balanced in your approach to these important issues and be mindful of the unintended consequences of your actions. I look forward to answering your questions.