



Commercial Real Estate/Multifamily Finance Board of Governors (COMBOG)  
**LOAN ORIGATION COMMITTEE MEETING**  
Sunday, February 1, 2004  
11:00 a.m. – 12:00 p.m.  
Southern IV, Ballroom Level  
Walt Disney World Dolphin Hotel in Orlando, Florida

## COMMITTEE NOTES

Chair: Deborah Schiavo, Bear Stearns & Co., Inc.  
Vice Chairs: Frank Fonda, CDC Mortgage Capital Inc.  
Debra Hausser, Zurich North America  
Charles Perry, Environmental Assurance Group  
Patrick Sargent, Andrews & Kurth L.L.P.  
MBA Staff Representative: Katie Schwarting  
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### I. Welcome and Introductions

### II. ACORD 28

#### A. Update

- i. ACORD 28 is coming in very slowly at companies. People are just starting to see ACORD 28 on new policies. Companies are working to implement the new form and the real estate community should continue to work with the insurance agents and brokers to get the ACORD 28.
- ii. Since October 2003, the ACORD 28 form has been available to download from the ACORD website at <http://www.acord.com/forms/download.aspx>. You must be a member of ACORD to download their forms.
- iii. Some of the larger insurance companies do not use ACORD 28, but the real estate community can play a part by asking borrowers to request the form.
- iv. Reminder – ACORD 27 is still in production and should be used for Evidence of Personal Property. The new ACORD 27 is NOT appropriate for use on commercial property any longer.
- v. There is a 6 months trial period with any ACORD form and MBA will have an opportunity to request changes/modifications were issues arise.
  - a. Please continue to submit any comments on the form to MBA.
- vi. Form Language – the insurance industry uses some different terminology to describe real estate transactions. Of note:
  - a. “All Risk” – called Special Cause of Loss on the ACORD 28
  - b. “Boiler and Machinery” – called Equipment Breakdown
  - c. “Waiver of Subrogation” – called Permission to Waive Subrogation

- vii. MBA is working with ACORD to enhance the ACORD 28 with a fill-in data entry fields capability.
- B. The MBA Insurance Task Force has ended. In the future, the work done on ACORD 28 and other communication/education initiatives with the insurance industry will continue under the Asset Administration Committee.

### III. Mold

- A. The MBA Mold Working Group is writing a White Paper on mold. Attached is a copy of the outline for the issues the paper will cover. A draft copy of the paper will be completed for the May Asset Administration and Technology Conference.
- B. The MBA is participating in the ASTM E50.02 Committee on Mold. The committee is drafting a document as the standard test screen for visible mold in commercial real estate. The next committee meeting is in April.
- C. MBA is a member of the National Institute of Building Sciences' (NIBS) Buildings and Mold Alliance Board of Direction. NIBS plans to do extensive research on mold, including a building condition assessment, remediation, prevention, O&M plans and building design guidance.
- D. The MBA Insurance Task Force has ended. In the future, the work done on mold will continue under the Loan Origination Committee.

### IV. New Committee Initiatives

- A. Complexity of Loan Structures
  - i. Typically the large loans
  - ii. Borrower side: wants more proceeds, so they explore different structures that permit increased funds to the borrower – mezzanine debt, A/B Notes
  - iii. Lender side: CMBS deals favor breaking up a large loan to mitigate risk, which helps the investors
  - iv. Should we do a project to help educate members about these structures and how to manage them?
- B. Tenants in Common Entity Structure (TICs)
  - i. TICs – when 2 or more people own an interest
  - ii. Issues with single purpose entity (SPE) – each person in a TIC must be a SPE
    - a. TICs allow greater freedom to change parties – which can lead to SPE changes all the time
  - iii. To mitigate the issues:
    - a. Ask parties to waive their partition rights – but can lead to complications with your tax attorney if the TIC looks too much like a Partnership.
    - b. Require parties to appoint a major party as the decision maker or key person.
    - c. Buy Out Process for Bankruptcy – if one tenant goes into bankruptcy the law states that the property of the entire TIC group can be sold to pay the one tenant's debts. To mitigate, require the other tenants in the TIC to buy out any tenant who falls into bankruptcy.
  - iv. Some lenders and special servicers/investors are very opposed to TICs.

### C. Seismic – PML vs. SL Standard

- i. Loss analysis designed to measure potential future damages or loss to the property caused by earthquakes.
- ii. PML – Probable Maximum Loss – in the past represented a way to calculate potential for losses. However, there was no exact standard for calculation and consultants used different key elements to arrive at their numbers.
- iii. ASTM did a project a year ago to fully define the key characteristics to calculate the earthquake vulnerability of commercial buildings.
- iv. SL – Scenario Loss – the new term ASTM gave the new standard to avoid confusion with PML.
- v. ASTM does not encourage the use of the term PML any longer.
- vi. The change in calculation has caused some confusion in the real estate lending community.
  - a. Seismic reports continue to reference PML calculations and lenders continue to use PML in disclosure documents
  - b. Lenders are also beginning to get seismic reports referencing both SL and PML calculations
- vii. The use of the PML calculation may leave lenders and third party providers open to liability and risk – since PML is no longer the advised standard by ASTM (and in fact is discouraged from use), but seismic reports indicate work is performed in accordance with ASTM.
- viii. Loan Origination Committee would like to communicate and educate the industry on the change in the ASTM standard and determine how the change will impact lender underwriting practices.

### D. E-Appraisals

- i. MBA, through the Loan Origination Committee, is participating in discussions with the Appraisal Institute, which has initiated an effort to develop a fully electronic commercial appraisal report.
- ii. Deb Schiavo and Dan Szparaga (MBA staff) attended a meeting with Appraisal Institute in Chicago in October 2003.
  - a. The first step is to develop Commercial Appraisal Report Data Standards (CARDS).
  - b. CARDS will include a glossary of terms used by the real estate industry to define a commercial appraisal.
  - c. Next steps will include creating a report template and accompanying software.
- iii. MBA has put together a committee to continue to review the Appraisal Institute's progress and offer suggestions from the real estate viewpoint as needed. MBA will get an opportunity to view the prototype.

## V. MBA Updates

### A. REMIC Task Force

#### i. Background

- a. In the CMBS market there are strict tax rules that govern the assets in a securitization. The rules were developed under the Internal Revenue Code, Section 1001 called real estate mortgage investment conduit (REMIC). REMIC requires that once the loans are placed in securitization that the pool of loans remain static, with no material modifications to the real estate

structure. If there is an “exchange” or modification to the structure, REMIC dictates that the entire securitization will lose its tax-exempt structure.

- b. In December 2003, an opportunity arose to work with Congress to develop federal legislation to make the REMIC vehicle more flexible and useful for borrowers, lenders and others through modification of the collateral substitution rules.
- c. The MBA REMIC Task Force is working closing with other commercial real estate trade associations and member companies to ensure maximum participation in this initiative:
  - i. MBA is working with The Capital Consortium, made up of MBA, CMSA, The National Association of Realtors, The Bond Market and The Real Estate Roundtable.
  - ii. MBA and CMSA are jointly working together with member task forces to gather industry support.

ii. Task Force Update

- a. MBA has a short window of opportunity to submit REMIC rule changes to Congress for inclusion in the proposed federal legislation. Suggested language will need to be submitted in February for review and approval by several committees. The task force has drafted a letter to circulate on the Hill.
- b. MBA has hired an expert tax lobbyist’s consulting firm to aid in the initiative. The consult is advising us of the next steps to effectively execute our request for changes to REMIC.

B. Brownfields – All Appropriate Inquiry

- i. MBA participated in the EPA negotiated rulemaking process to develop the new standard for an environmental inspection on real property.
- ii. The regulation will take the place of ASTM’s Phase I as a legal defense to liability for any hazardous substances on the property, which were caused by a previous owner or third party.
- iii. AAI is the initial review for releases or threatened releases and does not require sampling (Phase II) review.
- iv. AAI does not remove any state or federal requirements to clean up a hazardous substance once the buyer completes the real estate transaction and becomes the owner.
- v. The draft regulation is currently available on EPA’s website at <http://www.epa.gov/brownfields/regneg.htm>
- vi. EPA expects to offer the document for comment in April, with a 60 day comment period.
- vii. Once the comment period ends, the regulation will become final and is in effect as of the date final regulation is published.
- viii. For more information on the differences between AAI and ASTM’s Phase I, please review the notes from the MBA hosted AAI information conference call with Abbi Cohen in December, now available on the MBA’s website at: <http://www.mortgagebankers.org/cref/commit/collateral/lib/AAI%20Information%20Conference%20Call%202012-09-03%20-%20NOTES.pdf>

- C. Environmental Insurance Paper
  - i. MBA's Environmental Insurance Task Force completed a very thorough white paper reviewing environmental insurance.
    - a. Areas covered include: Role of the parties, coverage and options available by product type, underwriting requirements, CMBS considerations, rating agency viewpoint and due diligence scope.
    - b. The last page of the paper is an acknowledgement of all the hard work and effort the members of the task force put into completing the white paper.
  - ii. The task force recommends regular updates to the white paper to ensure it remains current with industry practice.
- D. MERS
  - i. MERS continues to work with the lenders to fully integrate the required MERS language changes in loan level and deal level documents.
  - ii. Wells Fargo plans to close all of their loans on MERS beginning in first quarter 2004, several other lender members of MERS are expected to follow once document reviews are completed.
  - iii. MBA would like to continue supporting the education and communication efforts of broadening participation with MERS.
- E. Sarbanes-Oxley Backup Certificates
  - i. Attached are copies of the four sample draft backup certificates for use by the Master Servicer, Subservicer, Limited Subservicer and Trustee for Sarbanes-Oxley.
  - ii. Please submit any comments on the draft documents to Katie Schwarting.
  - iii. The working group will incorporate any comments received and include a cover letter with the certificates.
  - iv. The final documents will be circulated to the industry for comments and approval.
- F. Terrorism Risk Insurance Act (TRIA)
  - i. The current legislation is scheduled to sunset under 2 dates:
    - a. December 31, 2004 – Insurance companies are no longer required to offer terrorism insurance after this date.
      - i. You may start to see insurance companies writing short policies in 2004 to get to this date and not have to provide any insurance next year.
    - b. December 31, 2005 – The Government will only provide financial support of a terrorist incident until this date.
      - i. If insurance companies continue to write policies through 2005, the government will pay any claims through December.
  - ii. TRIA provides for a possible one-year extension of the requirement to provide terrorism insurance. The provision would extend the make-available provision from December 2004 to December 2005.
  - iii. To date, there is strong resistance to any suggestions that the government's financial support of insurance companies for terrorist attacks become a permanent status.
    - a. The insurance industry is lobbying against the TRIA legislation extension or reauthorization.
    - b. Key members of the legislative community have verbally stated their opposition to a permanent backstop by the government.
  - iv. Real Estate Community

- a. TRIA has made life much easier for the real estate community, ensuring that a terrorism insurance policy is available to borrowers.
- b. The industry has been quiet because we are getting coverage
- v. Up Next
  - a. MBA will gather its members to start voicing the need for TRIA reauthorization, starting with the one-year extension.
  - b. MBA will look for possible alternatives to TRIA reauthorization.
- vi. The MBA Insurance Task Force has ended. In the future, the work done on TRIA will continue under the Legislative Committee.

## VI. Emerging Issues and Concerns

- A. Standard Inspection Form – review of the past work for any necessary updates
- B. Equity Lines – understanding the loan.
  - i. In some instances, equity lines are replacing primary mortgages
- C. Radon
  - i. Continues to cause problems – it is reoccurring, seasonal
  - ii. Quick fixes are still expensive
  - iii. Complex radon remediation still arise
    - a. Multifamily, leases on offices – need radon survey

## VII. Other Business

We plan to initiate topic specific committee conference calls in the first quarter of 2004 and welcome suggested topics.