NPM No. 025-2018

6 August 2018

MS. ROSABELLA C. JOSE
Vice-President, Securitization Group
NATIONAL HOME MORTGAGE FINANCE CORPORATION (NHMFC)
Filomena Building III, 104 Amorsolo St.,
Legazpi Village, Makati City 1229

Re: Applicability of Republic Act (RA) No. 9184 -

Dear Vice President Jose:

This refers to the Honorable NHMFC Vice-President's letter seeking categorical confirmation as to whether the engagement by NHMFC of third parties for purposes of securitization is not covered by RA 9184.

As represented, NHMFC was created by virtue of Presidential Decree (PD) 1267, dated 21 December 1977. It is the government's major Secondary Mortgage Institution whose primary purpose is to develop and provide for a secondary market for home mortgages through the issuance of mortgage-backed financial instruments. Its functions include providing liquidity to originators and recycling of funds for housing and home development. For its securitization activity, it operates under RA 9267, otherwise known as The Securitization Act of 2004.

For the basic securitization structure, the originator sells or transfers the portfolio of assets to a Special Purpose Trust (SPT) via a "True Sale" transaction. In turn, the SPT engages third parties to structure and package the loans to issue securities. The SPT raises funds from investors by issuing securities and uses the proceeds to pay for the upfront costs (cost of third parties and related expenses) and the originator for the sold assets. The SPT separates the credit risk of the asset pool from the originator. During the life of the transaction, the cash flow from the assets is used to make payment of principal and interest to the investors and third parties.

We wish to clarify that RA 9184 and its IRR apply to the procurement of infrastructure projects, goods, and consulting services, regardless of source of funds, whether local or foreign, by all branches and instrumentalities of government, its departments, offices and agencies, including Government-Owned and/or -Controlled Corporations (GOCCs) and Local Government Units (LGUs).[1] As there is no question that the NHMFC is considered as a GOCC[2] that is covered by RA 9184 and its IRR, the remaining pivotal issue at hand is whether the securitization process of NHFMC is considered as a procurement activity.

[1] Section 4 of RA 9184 and its IRR.
[2] https://www.gov.ph/directory-of-department-and-agencies accessed on 3 July 201, 8:50 am.

Procurement is defined as the acquisition of goods, consulting services, and the contracting for infrastructure projects by the procuring entity.[3] In the process of acquisition, public funds are disbursed by the government. Thus, in our previous opinion, we stated that for as long as public funds are utilized or is contemplated to be spent for any procurement activity, it shall, by force, fall within the ambit of the present procurement law.[4] Accordingly, there are two important elements to be considered in determining whether an activity is procurement that is covered by RA 9184 and its IRR, thus:

1. the activity involves the acquisition of goods, consulting services, and the contracting for infrastructure projects; and

2. public funds are utilized or is contemplated to be spent.

On the other hand, securitization is defined under Section 3(a) of RA 9267 as the process by which assets are sold on a without recourse basis by the Seller[5] to a Special Purpose Entity (SPE)[6] and the issuance of asset-backed securities (ABS)[7] by the SPE which depend, for their payment, on the cash flow from the assets so sold in accordance with the Plan[8]. As represented, for your securitization process, the transfer of portfolio of assets to a SPT is made via a "True Sale" transaction. At this juncture, it is worth emphasizing the characteristics of a "True Sale" under RA 9267, thus:

> "Sec. 12. Transfer of Assets and Security. – The transfer of the assets from the Originator or Seller to the SPE shall be deemed to be a "true sale" when it results in the following:
>
> (a) The transferred Assets are legally isolated and put beyond the reach of the Originator or Seller and its creditors;
>
> (b) The transferee SPE has the right to pledge, mortgage or exchange these transferred Assets;
>
> (c) The transferor relinquishes effective control over the transferred assets;
>
> (d) The transfer shall be effected by either a sale, assignment or exchange, in any event on a without recourse basis to the Originator or Seller;
>
> (e) The transferee shall have the right to profits and disposition with respect to the assets;

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[3] Section 5(n) of RA 9184.
[4] NPM No. 141-2004 dated 5 November 2004.
[5] Seller means the person or entity which conveys to the SPE the Assets forming the Asset pool in accordance with the Plan. In most instances, the Seller may itself be the Originator. (Section 3(j), RA 9267)
[6] Special Purpose Entity (SPE) means either a Special Purpose Corporation (SPC) or a Special Purpose Trust (SPT). (Section 3(l), RA 9267)
[7] Asset-backed securities (ABS) refer to the certificates issued by an SPE, the repayment of which shall be derived from the cash flow of the assets in accordance with the Plan. (Section 3(b), RA 9267)
[8] Plan means the plan for securitization as approved by the Securities and Exchange Commission, (Section 3(h), RA 9267)

(f) The transferor shall not have the right to recover the assets and transferre shall not have the right to reimbursement of the price or other consideration paid for the assets; and

(g) The transferee shall undertake the risks associated with the assets. This shall not, however, prevent the transferor from giving normal representations or warranties in respect of the assets sold.

A careful perusal of the transaction would reveal that securitization partakes of the nature of disposition rather than acquisition of government properties. It involves sale of assets to an SPE, wherein the transfer of assets is considered as "true sale" if the characteristics under Section 12 of RA 9267 are present. Accordingly, the transaction is totally opposed to the definition of procurement whereby procuring entities acquire goods, consulting services or infrastructure projects. It also bears stressing that in such a transaction, there is no disbursement of public funds to acquire government properties.

Based on the foregoing, it is our considered view that securitization process is not akin to procurement and therefore the engagement by NHMFC of third parties for purposes of securitization is not covered by RA 9184, but by RA 9267 and other applicable laws, rules and regulations. On the other hand, it is advisable and prudent for the NHMFC to establish a selection process in engaging SPTs for securitization to attain the objectives of transparency and competition.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this is issued on the basis of particular facts and situations presented, and may not be applicable given a different set of facts and circumstances. Should there be other concerns, please do not hesitate to contact us.

Very truly yours,

DENNIS S. SANTIAGO
Executive Director V

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