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The Business, Law & Ethics of Mortgage Modifications: Learn How to Legally Navigate in the New Mortgage Resolution Climate

Presented by the Coalition for Mortgage Industry Solutions

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The Business, Law & Ethics of Mortgage Modifications: Learn How to Legally Navigate in the New Mortgage Resolution Climate

Welcome everyone. My name is Richard Ivar Rydstrom, I am the Chairman of CMIS – the Coalition for Mortgage Industry Solutions of out DC. Today we will explore The Business, Law & Ethics of Mortgage Modifications – and Learn How to Legally Navigate in the New Mortgage Resolution Climate. The program is broken down into 6 sections:

Section 1 - Foreclosure or Loan Modification: That is the Question!
Section 2 - New *Required* Government Mortgage Workout Programs
Section 3- New *Required* State Court Structured Foreclosure Mediation & Monitor Programs
Section 4- Ethics, Jail & Challenges Facing the "Business of Mortgage Modifications"
Section 5 - Ethics in Today's Mortgage Crisis
Section 6 - Brief Litigation Update / Technology, Security, and Protecting the Privacy of Confidential Information

I will be joined by CYNTHIA A. NIERER of Rosicki, Rosicki & Associates, P.C. in Section 3, and ANDREW J. SHERMAN of Jones Day in Section 5.

You should have a 156 page PROGRAM BOOK and an extensive EXHIBIT BOOK. Please note the Exhibits to Section 2 – regarding the HAMP Updates and Supplemental Directives can be found online at at the HAMP website at: www.hmpadmin.com//portal/programs/directives.html or with Program Updates at www.CMISMortgageCoalition.org under Seminars/Exhibits/Followups.

The Business, Law & Ethics of Mortgage Modifications: Learn How to Legally Navigate in the New Mortgage Resolution Climate

Our Speakers

Sections 1-6: Richard Ivar Rydstrom, Esq., Chairman, CMIS (Coalition for Mortgage Industry Solutions); California Attorney at Law Representing Consumers and Business; Mortgage Industry Solutions Provider; Published by 110th Congress On Economic Solutions; Member of Servicers Working Group on HAMP with AFN (MBA, etc.); Reported Directly to Treasury on Redrafts of the HAMP Guidelines; On Treasury (AFN) Working Group seeking solutions to Attorney Client Relationship in the Foreclosure Context

Section 3: CYNTHIA A. NIERER is the directing partner of the Closing and Eviction Departments of Rosicki, Rosicki & Associates, P.C.; New York Attorney at Law; Graduate of St. John's University School of Law; Board member and education chair of REOMAC (a professional real estate organization); Member of NRBA (National REO Broker Association), REOConnection and the Queens County Women's Bar Association

Section 5: ANDREW J. SHERMAN is a partner in the Washington, D.C. office of Jones Day; International authority on the legal and strategic issues affecting small and growing companies; Adjunct professor in the Masters of Business Administration (MBA) program at the University of Maryland and Georgetown University; Author of seventeen books on the legal and strategic aspects of business growth and capital formation including *Road Rules Be the Truck Not the Squirrel*

Section 1 - Foreclosure or Loan Modification: That is the Question!

The 2009 Overview, State of the Housing Market, and the 2010 Outlook

We are in historic times. This year has proven that change is the only certainty. Changes in the mortgage, banking, and capital markets are numerous, systemic and of philosophical and structural significance. The country has seen over 3 million foreclosure filings to date (November) this year alone (2009). On October 8, 2009, Treasury Secretary Barr noted that analysts say more than six million Americans are at risk of foreclosure in the next three years. There are 6-13 million foreclosures expected over the next 5 years (Financial Stability website; Center for Responsible Lending Fact Sheet 9/25/09).

There are 1,400,000 bankruptcies expected by end of 2009 (from January through October, 1,182,362 consumer bankruptcies were filed ("the highest number since 2005“) *(MortgageDaily.com* Oct. 2 and Oct 4, 2009 (ABI); US consumers are saddled with $2.5 trillion in consumer debt, not including home mortgages (Federal Reserve). Of that, Americans owe $1 trillion on their credit cards. Unemployment was 10.2 percent in October (Dept of Labor); Consumer debt loads seriously weakening consumer spending with consumer credit falling 12 billion in August (Federal Reserve)

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The 2009 Overview, State of the Housing Market, and the 2010 Outlook

We will have over 33% to 48% or 16 million to 25 million homes "underwater" with negative equity (First American CoreLogic; Deutsche Bank AG, Aug. 5 2009 (Bloomberg) with more than $3 Trillion of property is at risk of default (CoreLogic). "More than 15.2 million U.S. mortgages, or 32.2 percent of all mortgaged properties were in a negative equity position as of June 30, 2009.

We have continuing substantial state court budget shortfalls. The courts and the related foreclosure and bankruptcy systems will continue to face debilitating backlogs not solvable through the current systems and processes.

Conflicting Laws, Rules, & Guidelines

The laws, rules, regulations, and related program Guidelines are not consistent with fast, efficient and effective resolution of the pending problems. In fact inconsistency and unfairness have yet to be reconciled. For example borrowers are commonly denied mortgage modifications due to excessive back-end consumer debt. Although that decision may be in violation of initial HAMP eligibility rules, it does make good business sense and it will lower re-default rates. However, it violates HAMP rules – and does not solve the workout problem as it ignores consumer debt. Consumer and mortgage debt must be addressed.

Section 1 - Foreclosure or Loan Modification: That is the Question!

Consumer Debt & Mortgage Debt - Never The Twain Shall Meet!

As Rudyard Kipling, in his *Barrack-room* ballads in 1892 used the phrase "Oh, East is East, and West is West, and never the twain shall meet“ - so too have Congress and the Administrations (Bush and Obama) ignored or designed solutions for political or policy reasons that isolate consumer debt from mortgage debt. The laws, rules and guidelines do not reconcile consumer debt along with mortgage debt. The policy of the “two things which are so different as to have no opportunity to unite” has failed. Unless tax and deficiency liability laws, rules, guidelines and *POLICY* are changed and reconciled in order to allow the borrower to reach forgiveness of consumer and mortgage debt, (without tax and deficiency liability), not only with a personal residence, but with all consequential personal liability debt loads and asset types including credit cards, second homes and investment real estate (1-4 units), the borrower will remain overburdened with debt – whether it be primary debt obligations or residual forgiveness of tax and liability debt. As such re-defaults and bankruptcies will explode.

As a result, the borrower will either not be eligible for program relief, or continue to re-default at rates of equal or exceeding the current re-default rate of 65-75%! (Fitch Ratings Report 2009). The typical “greater than 6% payment reduction” modification is simply not producing sustainable loss mitigation solutions. Treasury is left with the impossible task of implementing the Making Home Affordable (MHA) policy with HAMP Guidelines (or Supplemental Directives) that by definition must ignore Back-End DTI as initial eligibility - while the secret (proprietary) NPV models reject relief based upon back-end consumer debt realities and market assumptions.

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The result is more ineligible borrowers for MHA/HAMP/HARP relief. Without major changes in law, rules, Guidelines or policy, including specific consumer debt forgiveness of tax and deficiency liability, borrowers will be forced into bankruptcy for relief.

The Road to Bankruptcy – BK-HAMP-MODS!

As millions are currently begging for relief, with mega-millions on their way, it is shocking to acknowledge that current government policy and programs do not presently include a HAMP-BANKRUPTCY-MODIFICATION policy. Bankruptcy can and must be able to process HAMP MODS – as bankruptcy will provide relief to the borrowers from their overburdening consumer debt loads.

At this time, bankruptcy is the only holistic relief program that can forgive consumer debt loads with excessive consumer debt and mortgage debt, without incurring unaffordable residual tax and liability debt. It is simply unfair to expect lenders alone to cram-down mortgage debt sufficient enough to make the borrowers' consumer debt loads affordable. This is a policy decision that must be re-visited immediately by the Administration, Congress and Treasury.

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Lowering the RE-DEFAULT Rates is Critical!

Industry experts acknowledge that to lower the re-default rates substantially, the reduction in the borrower's monthly cash payment must exceed 20% (Diane Pendley, Managing Director, Fitch Ratings), and probably needs to approach 30%. To achieve this, principal reduction and or forgiveness must be aggressively pursued (Mark Zandi, Chief Economist, co-founder of Moody's Economy.com). To lower the re-default rates the following choices must be implemented:

1.Change & Reconcile Forgiveness of Tax and Deficiency Liability Debt Laws for Consumer Debt including Credit Cards, Second Homes, 1-4 Unit Investment Real Estate (to allow a deleveraging of the individual borrower by negotiating principal debt relief)

2.Create HAMP Policies that Allow & Reconcile BK-HAMP-MODS! Modifications including HAMP modifications should be fast tracked in bankruptcy courts (to allow holistic deleveraging of the borrower with excessive consumer and mortgage debt). Even if the law does not allow BK Cram Downs, it should fast track BK-HAMP-MODS with principal reduction and forgiveness pursuant to policy programs (i.e.: HAMP).

3.Create Regulations, Policy and New Financial Product Approvals – that allow for principal forgiveness of mortgage debt (1st, 2nd and junior) and consumer debt principal, all without 100% loss write-offs at the outset to the securitized holder/trust/REMIC, under FASB, Tax Regulations or new products rules.

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With the implementation of the new laws and Guidelines starting from HR 3221 (July 2008) and the new HAMP rules under Making Home Affordable (MHA) (including its March 4, 2009 HAMP Guidelines and the series of recent Supplemental Directives including 09-01 to 09-08), the question has been and generally remains, *whether a loan modification or foreclosure would yield a more beneficial net present value (NPV) for the investor*. Pursuant to HAMP, if the Net Present Value (NPV) of the loan as modified is positive, the modification is required. If the NPV is negative, it is within the discretion of the servicer (or investor) but principal reduction is limited to 100% LTV. See the NPV section below.

Loss Mitigation Options Generally

Generally the options were divided between two concepts commonly referred to as: Stay & Pay or Sell & Move. However, as of 11/5/09, Fannie Mae officially created a new category called: Deed for Lease (D4L). Now we generally have three (3) categories:

1) Stay & Pay

2) Sell & Move

3) Sell & Lease

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1) STAY & PAY Devices with HUD References:

Forbearance – This is a temporary solution. HUD Outreach (5/01 Bulletin) states: Your lender may be able to arrange a repayment plan based on your financial situation and may even provide for a temporary reduction or suspension of your payments. You may qualify for this if you have recently experienced a reduction in income or an increase in living expenses. Allows for short period of time to cure a temporary financial impairment. *The lender will require proof or a probably plan to cure the temporary hardship and revive the ability to pay*.

Repayment plan – This maybe temporary or long term solution depending upon the affordability of the plan and borrower's ability to pay. Your lender may agree to a plan that includes your regular monthly payments plus a portion of the past due payments each month until your payments are caught up.

Loan modification - This is intended to be a long term solution. HUD Outreach (5/01 Bulletin) states: You may be able to refinance the debt and/or extend the term of your mortgage loan. This may help you catch up by reducing the monthly payments to a more affordable level. You may qualify if you have recovered from a financial problem and can afford the new payment amount. *However, as of November 2009, generally we have HAMP, FHA-HAMP, Fannie-HAMP, Freddie-HAMP and NON-HAMP modification programs (See below).*

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1) STAY & PAY Devices with HUD References:

Partial claim - HUD Outreach (5/01 Bulletin) states: Your lender may be able to work with you to obtain a one-time payment from the FHA-Insurance fund to bring your mortgage current. You may qualify if:

1. your loan is at least 4 months delinquent but no more than 12 months delinquent;
2. you are able to begin making full mortgage payments.

When your lender files a Partial Claim, the U.S. Department of Housing and Urban Development will pay your lender the amount necessary to bring your mortgage current. You must execute a Promissory Note, and a Lien will be placed on your property until the Promissory Note is paid in full. The Promissory Note is interest-free and is due when you pay off the first mortgage or when you sell the property.

Reinstatement: Lenders are often willing to "reinstate" your loan if you make up the back payments in a lump sum by a specific date. A forbearance plan may accompany this option.

Assumption – Co-Borrower: This would allow the borrower to add a qualified co-borrower to the note, and allow the original borrower to stay in the home. A qualified buyer may be allowed to assume (take over) your mortgage.

Section 1 - Foreclosure or Loan Modification: That is the Question!

2) Sell & Move Devices with HUD References:

Short Sale: Allows the property to be sold for any amount less then the amount due on the loan. Income taxes may be due on the difference between the amount owed and the amount realized from the sale. (See herein Income Taxation). HUD Outreach (5/01 Bulletin) states:

Pre-foreclosure sale. This will allow you to avoid foreclosure by selling your property for an amount less than the amount necessary to pay off your mortgage loan. You may qualify if: 1. the loan is at least 2 months delinquent; 2. you are able to sell your house within 3 to 5 months; and 3. a new appraisal (that your lender will obtain) shows that the value of your home meets HUD program guidelines.

Sale: This would allow the borrower to list the property for sale over a specific amount of time and pay off the amount owed on your mortgage.

Assumption - New Buyer: A qualified buyer may be allowed to assume (take over) the mortgage (and title) with the original borrower moving out.

Deed-in-lieu of foreclosure: This would allow the borrower to “give back” the property to the lender, who forgives the balance of the loan. There may be income tax consequences. This option may be less damaging to the borrower’s credit rating. HUD Outreach (5/01 Bulletin) states: You can qualify if: 1. you are in default and don't qualify for any of the other options; 2. your attempts at selling the house before foreclosure were unsuccessful; and 3. you don't have another FHA mortgage in default.

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3) Sell & Lease –

New 11/5/09 Fannie Mae Deed for Lease Program

Lenders/Servicers may allow the borrower to transfer the title of the property to the lender but stay and pay as a tenant. On 11/5/09, Fannie Mae officially created a new category called: Deed for Lease (D4L).

Fannie Mae's "Announcement 09-33" introduced the Deed-for-Lease™ program (See Program Documents Announcement 09-33 __D4), as "a new option for qualified borrowers facing foreclosure (or their tenants) to remain in their home by signing a lease in connection with the voluntary transfer of the property to the lender through a deed-in-lieu of foreclosure transaction."

The Fannie Deed-for-Lease™ program is a program designed to minimize family displacement, deterioration of neighborhoods caused by vandalism and theft to vacant homes, and the effect these have on families, communities and home price stabilization. D4L allows qualifying borrowers of properties transferred through deed-in-lieu of foreclosure (DIL) to remain in their home and community by executing a lease of up to 12 months in conjunction with a DIL. Investment properties that are tenant-occupied may also be considered as long as the borrower is cooperative in providing information from the tenant to facilitate the D4L. (More Fannie Mae Info See: https://www.efanniemae.com/sf/servicing/d4l) (See Program Documents: Fannie Mae Deed for Lease™ (D4L) – Frequently Asked Questions_D5)

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3) Sell & Lease –

New 11/5/09 Fannie Mae Deed for Lease Program

SPECIAL NOTE RE D4L and Deed in Lieu of Foreclosure (DIL):

The D4L requires a DIL execution. Generally, DILs can be a two edged sword. There are advantages and disadvantages, all with risks. It may be useful to obtain mutual waivers (of lender liability and borrower deficiency liability), but new laws (HAMP) may preclude that a borrower waive any rights in reaching a resolution under certain programs like HAMP. *This may be a good reason for the borrower to be represented by his/her counsel of choice*. Also, HAMP would require that a modification 1st be evaluated and offered if eligible. Assuming there is no alternative solution under any required laws, rules, or programs, and then a DIL may be appropriate.

Danger lurks with respect to a lender extinguishing the lender's mortgage interest under the doctrine of common law merger. The agreements must expressly declare that there is no intent of merger. The agreement should document that it was a voluntary transaction, which is why it may not be advisable to run foreclosure parallel which may allow a borrower to claim coercion from the pending foreclosure proceedings. The lender would want to avoid evidence of a continuing security interest creating an equitable mortgage. See Fannie Mae's DIL program which requires DIL compliance in its new D4L lease back program.

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Other: Short (Payoff) Refinance – Home Affordable Refinance Program (HARP), H4H (HR 3221 etc), and its amendments and recent efforts by FHA/HUD, continue to broaden eligibility of for refinance programs. Efforts are underway to broaden the scope of troubled and pre-troubled borrowers into programs that would result in more affordable monthly payments through refinancing or refinancing with principal reductions/forgiveness. Declining property values and generally lower FICO scores are precluding many borrowers from eligibility. As of the date of this draft, pending new proposals were not yet announced. See below for HARP discussion. Updates will be offered on subsequent programs or website updates. Check online at: (www.CMISMortgageCoalition.org).

UPDATES: SHORT SALES, DILs & CRAM-DOWNS - On October 9, 2009 the Congressional Oversight Panel (COP) issued a report noting the ineffectiveness of HAMP. Lawmakers are promising to revisit the mortgage (bankruptcy) cram-down legislation. On October 22, 2009, Herbert Allison, the Treasury Department's Assistant Treasury Secretary for Financial Stability, told the COP that the Administration will visit additional legislation for foreclosure alternatives including government incentives for servicers to process *short sales and deeds-in-lieu (DIL)* intended for borrowers who will not qualify for loan workouts under HAMP.

Loss Mitigation Document Examples: See the Program Book and Exhibit Book for contract and letter examples of new principal forgiveness offers, Mod Agreement, Forbearance, and Security Retention Agreement.

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Reference - Income Taxation - Home Foreclosure and Debt Cancellation –

Update Dec. 11, 2008 — The Mortgage Forgiveness Debt Relief Act of 2007 generally allows taxpayers to exclude income from the discharge of debt on their principal residence. Debt reduced through mortgage restructuring, as well as mortgage debt forgiven in connection with a foreclosure, qualify for this relief. This provision applies to debt forgiven in calendar years 2007 through 2012. Up to $2 million of forgiven debt is eligible for this exclusion ($1 million if married filing separately). There are some exceptions. According to IRS Pub 4682, Tax Form 982, and Publication 544, the most common situations when cancellation of debt income is not taxable involve:

Bankruptcy: Debts discharged through bankruptcy are not considered taxable income.

Insolvency: If you are insolvent when the debt is cancelled, some or all of the cancelled debt may not be taxable to you.You are insolvent when your total debts are more than the fair market value of your total assets.Insolvency can be fairly complex to determine and the assistance of a tax professional is recommended if you believe you qualify for this exception.

Certain farm debts: If you incurred the debt directly in operation of a farm, more than half your income from the prior three years was from farming, and the loan was owed to a person or agency regularly engaged in lending, your cancelled debt is generally not considered taxable income.

Non-recourse loans: A non-recourse loan is a loan for which the lender's only remedy in case of default is to repossess the property being financed or used as collateral. That is, the lender cannot pursue you personally in case of default. *Forgiveness of a non-recourse loan resulting from a foreclosure does not result in cancellation of debt income*.

--- END OF SECTION 1 ---

The Business, Law & Ethics of Mortgage Modifications:

Section 2 - New *Required* Government Mortgage Workout Programs

HAMP UPDATE: 11/10/09 - The Obama Administration announced that 650,000 modifications are under way across the country, and that the HAMP program is on track to meet its goals over the next several years. However, most experts report that the program will not reach its program or policy goals; and on October 9, 2009 the Congressional Oversight Panel (COP) issued a report noting the ineffectiveness of HAMP.

Making Home Affordable (MHA) - Congress passed the Emergency Economic Stabilization Act of 2008 (the "Act") on October 3, 2008. The purpose was restore liquidity and stability to the financial system, and ensure that such authority was used, in part, *to "preserve homeownership."* Treasury Secretary and the Director of the Federal Housing Finance Agency announced the *Making Home Affordable program on February 18, 2009*. Specifically, the Making Home Affordable program consists of two sub-programs: HARP and HAMP. On March 4, 2009 to present, the Treasury Department, Fannie Mae, Freddie Mac and HUD (FHA) have issued a series of directives for the servicers of mortgage loans for the implementation of HAMP and HARP.
Making Home Affordable established a public policy to help borrowers avoid foreclosures.

Lawsuits will test whether this is a new right, and whether there is a 5th amendment due process right affording the borrower the right to a modification, notice and opportunity to be heard, including a written notice of denial with reasons sufficiently set forth to afford borrower the opportunity to assess whether a denial of (HAMP) program benefits was in error or wrongful and in violation of his/her rights; and whether borrower has a right to appeal.

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Section 2 - New *Required* Government Mortgage Workout Programs

Test of HAMP as a Right:

On July 28, 2009, the Minnesota case of Nichole Williams, Johnson Sendolo vs. Timothy F. Geithner, as United States Secretary of the Treasury U.S. Department of the Treasury, etc. was filed; testing whether borrowers had a right to a HAMP modification.

Update 1: Since the filing of the original complaint (and first amended complaint was filed), and Guidelines and Supplemental Directives (09-01 to 09-08) have been announced clarifying that certain borrower notices and responses are in fact required from the Servicer including notices of acknowledgment of receipt of a HAMP request, and written approval or denial of a HAMP modification with an explanation, or consideration of alternative options (SD 09-07; SD 09-08). It appears that Treasury is continuing to implement the Program with more and more communication fairness and specificity; which acts to ensure due process rights. (See SD 09-07; SD 09-08).

Update 2: However, on Nov 17, 2009 the court dismissed the class action suit and denied the preliminary injunction. The judge noted: that the statutes did not create an absolute duty for the Secretary to consent to a modification; that the Secretary has discretion in determining NPV; and that modifications are not an entitlement; and Congress did not intend to mandate modifications.

However, a similar case has now been filed in DC (11/9/09) against Aurora Loan Servicers, Sec. Geithner, etc. You can expect more test cases on this topic.

The Business, Law & Ethics of Mortgage Modifications:

Section 2 - New *Required* Government Mortgage Workout Programs

Making Home Affordable

The Making Home Affordable Program offers two different potential solutions for borrowers: (1) refinancing mortgage loans, through the Home Affordable Refinance Program (HARP), and (2) modifying mortgage loans, through the Home Affordable Modification Program (HAMP). The official public website for the Making Home Affordable program directs borrowers to www.makinghomeaffordable.gov.

It is important to note that loans owned or guaranteed by the GSEs (Fannie Mae or Freddie Mac) are eligible. Also, NON-GSE loans are eligible if the servicer has signed a HAMP Servicer Participation Agreement agreeing to be bound by the program rules. Servicer participation is voluntary for non-GSE loans, and mandatory for loans owned or guaranteed by Fannie Mae or Freddie Mac.

Home Affordable Modification Program: Overview

The Home Affordable Modification Program is designed to help as many as 3 to 4 million financially struggling homeowners avoid foreclosure by modifying loans to a level that is affordable for borrowers now and sustainable over the long term. Borrower eligibility is based on meeting specific criteria including:

1) borrower is delinquent on their mortgage or faces imminent risk of default
2) property is occupied as borrower's primary residence
3) mortgage was originated on or before Jan. 1, 2009 and unpaid principal balance must be no greater than $729,750 for one-unit properties.

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Making Home Affordable

After determining a borrower's eligibility, a servicer will take a series of steps to adjust the monthly mortgage payment to 31% of a borrower's total pretax monthly income:

First, reduce the interest rate to as low as 2%,
Next, if necessary, extend the loan term to 40 years,
Finally, if necessary, forbear (defer) a portion of the principal until the loan is paid off and waive interest on the deferred amount.

The Home Affordable Modification Program includes incentives for borrowers, servicers and investors.

Treasury/HAMP Supplemental Directive (09-01) states at page 3:

"A borrower that is current or less than 60 days delinquent who contacts the servicer for a modification, appears potentially eligible for a modification, and claims a hardship must be screened for imminent default. The servicer must make a determination as to whether a payment default is imminent based on the servicer's standards for imminent default and consistent with applicable contractual agreements and accounting standards. If the servicer determines that default is imminent, the servicer must apply the Net Present Value test."

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Section 2 - New *Required* Government Mortgage Workout Programs

Initial Documentation Required:

Information about the monthly gross (before tax) income of your household, including recent pay stubs if you receive them or documentation of income you receive from other sources.

Your most recent income tax return.
Information about your savings and other assets
Information about your first mortgage, such as your monthly mortgage statement.
Information about any second mortgage or home equity line of credit on the house.
Account balances and minimum monthly payments due on all of your credit cards.
Account balances and monthly payments on all your other debts such as student loans and car loans.
A completed Hardship Affidavit describing any circumstances that caused your income to be reduced or expenses to be increased (job loss, divorce, illness, etc.) if applicable.

New HARDSHIP HAMP Form: Note that the "Hardship Affidavit" linked to the above as of 11/9/09 is the old hardship form, not the new hardship form now approved for use and required as of January 1, 2010. Also those using the old April Hardship form should cease doing so as it will no longer be accepted. The new Hardship form issued by Treasury on October 8, 2009 in Supplemental Directive 09-07 is entitled: MHA Request for Modification and Affidavit form (RMA) - This form incorporates borrower income and expense information, a revised Hardship Affidavit, the SIGTARP fraud notice and portions of the current Home Affordable Modification Trial Period Plan. The RMA follows: New Hardship RMA Form (See Program Documents MHA Request for Modification and Affidavit form (RMA) __D10) (SEE pages 41-43 of the Program BOOK)

The Business, Law & Ethics of Mortgage Modifications:

Section 2 - New *Required* Government Mortgage Workout Programs

Modification Evaluator for Home Affordable Mortgage Modification

Gross Monthly Income: is the total income of all borrowers who signed your mortgage before any taxes or other deductions are made. If more than one person signed your mortgage, such as your spouse or a co-signer, add the gross monthly income of all borrowers and enter this amount.

Mortgage Payment: is defined as what you pay on a monthly-basis for principal, interest, property taxes, hazard insurance and homeowner's association fees, if applicable. Please include information about your first (or "primary") mortgage only. Do not include any payments on your second mortgage. You may have taxes and interest in escrow added to your monthly payment already, so be careful to count taxes and escrow only once.

Mortgage Payment Guideline: this is calculated as 31% of your current monthly gross income. If your current monthly mortgage payment is above this amount, you may be eligible for the Home Affordable Modification.

CALULATION NOTE: To arrive at GROSS INCOME from NET INCOME multiple the NET by 1.25. For example, $3200 NET x 1.25 = $4,000 GROSS.

The Business, Law & Ethics of Mortgage Modifications:

Section 2 - New *Required* Government Mortgage Workout Programs

Payment Reduction Estimator

Under the Home Affordable Modification program, the target maximum amount for your mortgage payment (or mortgage debt-to-income) should be 31% of your gross (pre-tax) monthly income. This Payment Reduction Estimator will determine what your current mortgage debt-to-income is and how much your monthly payment may be reduced if you qualify for a modification. Do not include any payments on your second mortgage. You may have taxes and interest in escrow added to your monthly payment already, so be careful to count taxes and escrow only once.

Total Monthly Payment on Your First (or "primary") Mortgage

Be sure to INCLUDE principal, interest, taxes, insurance and homeowners association dues if applicable. Enter Your Gross Monthly Income. This is the income of all borrowers who signed your mortgage BEFORE taxes and any adjustments.

Current Debt-to-Income (DTI) Level __ %
Target DTI under the Home Affordable Modification is 31%
Potential New Monthly Payment If You Qualify
Potential Monthly Payment Reduction If You Qualify
This form is found at: http://makinghomeaffordable.gov/payment_reduction_estimator.html

The Business, Law & Ethics of Mortgage Modifications:

Section 2 - New *Required* Government Mortgage Workout Programs

Monthly Housing Payment Calculator

Total Monthly Payment on Your Primary First Mortgage: is your total monthly payment including principal, interest, taxes, insurance and homeowner's association dues or assessments. If you do not know this amount, use this calculator below:

Enter Monthly Principal and Interest on Your Primary Mortgage Only: Includes the amount you are required to pay each month, even if you currently pay interest-only.

Enter Monthly Taxes: Include only the monthly amount, no matter how it is billed. If you pay your taxes annual, divide this amount by 12 to get your monthly tax payment.

This is Your Total Monthly Housing Payment: If you know your total monthly housing payment for your primary mortgage, leave the above fields blank and enter your total monthly payment amount here.

Homeowner's Association Dues or Assessments: If you pay HOA dues or assessments once a year – divide the annual amount by 12 and enter that amount. If you pay quarterly – multiply the quarterly payment by 4 then divide by 12 and enter that amount.

The Business, Law & Ethics of Mortgage Modifications:

Section 2 - New *Required* Government Mortgage Workout Programs

UPDATE HAMP:
IMMINENT DEFAULT UNDER HAMP

Imminent default is where a borrower is current or fewer than 60 days past due but claims an eligible financial hardship. Borrowers who claim a financial hardship must be screened for imminent default and HAMP using the servicer's standards for imminent default consistent with applicable contractual agreements and accounting standards. Factors to consider will include the borrowers' financial condition and the hardship(s), and the condition of the property. The Servicer must document the basis for its analysis and decision, and retain any documentation used to reach its decision.

HARDSHIP UNDER HAMP

Financial hardship may be one or more of the following:

- Loss of job
- Reduction or loss of income
- Change in household financial circumstances
- Recent or upcoming increase in monthly mortgage payment
- Increase in expenses
- Lack of sufficient cash reserves to pay mortgage and basic living expenses but excluding retirement accounts, emergency funds
- Excessive monthly debt payments and overextension with creditors
- Other reasons for hardship

The Business, Law & Ethics of Mortgage Modifications:

Section 2 - New *Required* Government Mortgage Workout Programs

RULES FOR HAMP

The rules for HAMP are located in the HAMP SUPPLEMENTAL DIRECTIVES. The official list of Supplemental Directives (SD) located at https://www.hmpadmin.com//portal/programs/directives.html. As of November 9, 2009 Treasury had issued SDs from 09-01 to 09-08 as well as many NPV model updates, reporting and data collection updates, etc.

Supplemental Directives Discussion

Supplemental Directive 09-01, 09-07 and 08 are worthy of special mention. Supplemental Directive 09-01 remains the main body of guidance. It is referred to in most other directives. Supplemental Directives 09-07 and 08 are recent directives which in part, clarify and define duties incumbent upon the Servicer with respect to the borrower. Obligations to evaluate eligibility, and communicate to borrower in writing with certain and specific Notices are now contained in the directives. *Supplemental Directive 09-07*, in part moves to standardize the borrower's evaluation forms and process, and requires the Servicer to respond to the borrower within 10 days from receipt of the borrower submission of the required information. It also requires the Servicer to complete its evaluation of borrower eligibility and notify the borrower of its determination within 30 days. If the Servicer determines that the borrower cannot be approved for a trial period plan, the Servicer must send written notice of same, and "consider the borrower for another foreclosure prevention alternative."

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Supplemental Directive 09-08 (See Program Documents)

The directive states in part:

Borrowers must be informed in writing of the reasoning for servicer determinations regarding program eligibility. This Supplemental Directive provides guidance to servicers of first lien mortgage loans that are not owned or guaranteed by Fannie Mae or Freddie Mac (Non-GSE Mortgages). Servicers of mortgage loans that are owned or guaranteed by Fannie Mae or Freddie Mac should refer to the related HAMP guidelines issued by the applicable GSE. This Supplemental Directive provides servicers with additional guidance related to the format, content and timing of notices that must be provided to borrowers requesting consideration for a HAMP modification (Borrower Notices). This Supplemental Directive is effective January 1, 2010; however, servicers are encouraged to implement this guidance as soon as possible.

A servicer must send a Borrower Notice to every borrower that has been evaluated for HAMP but is not offered a Trial Period Plan, is not offered an official HAMP modification, or is at risk of losing eligibility for HAMP because they have failed to provide required financial documentation.

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UPDATE HAMP: The HAMP Waterfall –

Generally, the Waterfall calculation must be done first, then the Net Present Value (NPV) calculation. The Waterfall seeks to get the borrower's payment as close as possible to 31% of the Gross Income (See SD 09-05R April 21, 2009). The Fannie Mae Worksheet would combine columns W, X, Y and AN to arrive at the new PITIAS (principal, interest, taxes, insurance, association fees, escrow shortages). The Servicer may do a modification under 31%, however it will lose HAMP incentives on that portion below 31%. The waterfall calculation is used for calculating the NPV, trial period payment, and the final modification term. The documents or information needed to calculate the waterfall include the current mortgage data, current income, PITIAS, existing suspense amount, and amortization schedule.

HAMP WATERFALL: A STEP BY STEP APPROACH:

To achieve the 31% target monthly mortgage payment amount (principal and interest), the servicer must orderly complete each step, one at a time, only going to the next step if needed to reach the target 31% monthly mortgage payment ratio. The general Waterfall procedure starts by:

(1) Calculating the new principal balance,
(2) Reducing the interest rate,
(3) Extending the term,
(4) Forbearing partial principal,
(5) And alternative steps.

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Step One: Calculate New Principal Balance (NBP)

Capitalize delinquencies, accrued interest, escrow advances, and servicing advances to third parties by adding to loan balance (if allowed by applicable law), reduced by the estimated amount left in suspense.

A. To calculate the target monthly mortgage payment (P&I),

1. Multiply monthly gross income by 31% (the "target monthly mortgage payment")
2. Subtract monthly taxes, insurance and home owners association or condo dues from the Target Monthly Mortgage Payment

Note: Do not include borrower paid MI

Step Two: Reduce Interest Rate:

1. Reduce interest rate in increments of 1/8th or .125% down to a floor of 2%

Step Three: Extend Term:

1. Extend mortgage term by increments of 1 month, up to 480 months

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Step Four: Principal Forbearance:

Provide principal forbearance only if needed to reach 31% target by increments of $50, $100 (Freddie Mac) to $500 each.

If the servicer elects to modify a loan with principal forbearance that is NPV negative, the interest bearing (non-amortizing, unpaid principal balance excluding the deferred principal balloon amount) mark-to-market LTV ratio (current LTV based on new valuation) must be equal to or greater than 100%

The forbearance amount is added to the end of the note as a balloon; it is not forgiven.

The principal forbearance amount is payable at the first transfer, refinance, sale, payoff of the interest bearing unpaid principal balance, or maturity of the loan.
There is no requirement to forgive principal under HAMP

References: Supplemental Directive 09-01 (p9-10), Fannie Mae Announcement 09-05R, Freddie Mac Chapter 65 (p18).

The target DTI is 31% but not below. The practical target should be a range between 31.49% as a ceiling, and 31% as a floor.

Next step is to proceed to the NPV test. Run the worksheet through the Fannie Mae web-enabled NPV program to see results (negative or positive, etc.)

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The HAMP Net Present Value (NPV) –

Generally, the Net Present Value (NPV) test is required to determine borrower's eligibility. HAMP requires Servicers to use its Base Model 3.0 NPV. (See Program Documents: NPV Base Model 3.0 __D14). Lenders/ Servicers with over $40 billion in loans can use an approved custom NPV. The NPV test compares the net present value of expected economic results with a modification, versus the expected economic results without a modification. An NPV is positive if the economic value with the modification is greater than the value without the modification. A positive NPV (Run Successful), with a positive Waterfall Test requires the Servicer to proceed with the modification. If the NPV is negative, it is within the discretion of the servicer (or investor) but principal reduction is limited to 100% LTV. The Fannie Worksheet, Column P divided by AA equals the Mark to Market LTV.

An AVM (automated valuation model), BPO (a broker price) opinion, or appraisal may be used for the property valuation input. The AVM must have a reliable confidence level. The servicer must maintain detailed documentation of all data used as inputs to the NPV test, assumptions used, and the NPV test and results.

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NPV Transaction Portal

The base model NPV is a web-enabled Fannie Mae model that Servicers must use by uploading a completed Worksheet through an LPS tool located at https://tportal.hmpadmin.com.

NPV CHART	NPV Positive	NPV Negative	Excessive Forbearance
GSE	Eligible	Eligible	Ineligible
NON GSE	Eligible	Discretion Requires Investor Approval	Ineligible

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The HAMP Base Net Present Value (NPV) Model Specifications updated June 11, 2009 state:

Net Present Value of Modification - In general, NPV refers to the value today of a cash-generating investment – such as a bond or mortgage loan. When an investor is faced with a choice between two alternative investments – specifically, between the timing and amounts of the cash flows for each investment – the investor obviously prefers the choice that has a higher present value. In the context of a mortgage borrower who has become distressed, the investor – or a third party servicer, acting on behalf of the investor – faces a choice of whether to modify the mortgage or leave it as-is. Each choice generates expected cash flows, and the present values of these two cash flows are likely to be different. If the loan is modified, there is a greater chance that the borrower will eventually be able to repay the loan in full. If not, there is a higher likelihood that the loan will go to foreclosure, and the investor will absorb the associated losses. If the NPV of the modified loan is higher than the NPV of the loan as-is, a modification is said to be "NPV positive." The Making Home Affordable Program is structured to produce modifications that are more likely to test NPV positive, increasing the number of modifications that will be done and keeping more Americans in their homes. It does this, first, by lowering the probability that borrowers will default by making borrower payments more affordable and, second, by providing incentive payments that are added to cash flows received by lenders (or investors).

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Both the base NPV model and a servicer's proprietary customized version will:

1. Compute the net present value of the mortgage assuming it is not modified.
a. Determine the probability that the mortgage defaults.
b. Project the future cash flows of the mortgage if it defaults and the present value of these cash flows.
c. Project the future expected cash flows of the mortgage if it does not default and the present value of these cash flows.
d. Take the probability weighted average of the two present values.

2. In the same manner, compute the net present value of the mortgage assuming it is modified, incorporating the effects on cash flows and performance of the modification terms and subsidies provided by the Home Affordable Modification Program.

3. Compare the two present values to determine if the HAMP modification is NPV positive. An NPV model used in the HAMP takes into account the principal factors that can influence these cash flows, including:

1. The value of the home relative to the size of the mortgage. 2. The likelihood that the loan will be foreclosed on. 3. Trends in home prices. 4. The cost of foreclosure, including:
a. legal expenses, b. lost interest during the time required to complete the foreclosure action, c. property maintenance costs, and d. the likelihood that a loan will be paid off before its term expires (prepayment probability).

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FANNIE HAMP | FANNIE HARP
Information on FANNIE's programs, go to: https://www.efanniemae.com/sf/mha/mharefi

FREDDIE HAMP | FREDDIE HARP

Information on FREDDIE's programs, go to:
http://www.freddiemac.com/singlefamily/makinghomeaffordable.html

Updates: At the end of November 2009, the current Fannie data collector tool is being retired and replaced with a NEW HAMP REPORTING TOOL (LPS).

Freddie Mac will soon introduce a new Imminent Default Indicator (IDI) which will replace a portion of the imminent default evaluation currently in use.

Freddie Mac is adding an additional limit around the amount of partial principal forbearance that can be used to achieve the Target Payment. Effective for Mortgages for which the Servicer begins a new evaluation under HAMP on or after December 1, 2009, the following forbearance requirements apply:

If partial principal forbearance is necessary to achieve the Target Payment (as described in Guide Section C65.6 (b) Step 5), the amount of partial principal forbearance is limited to the greater of (i) 30% of the unpaid principal balance of the Mortgage including the capitalization of arrearages or (ii) an amount resulting in a modified interest-bearing balance that would create a Mark-to-Market LTV Ratio equal to100% (collectively, the "Forbearance Limit").

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Target Payment is greater than the Forbearance Limit, then the Mortgage is not eligible for modification under HAMP. For example, if the amount of forbearance is 35% of the unpaid principal balance including capitalization and the interest-bearing balance creates a Mark-to-Market LTV Ratio of less than 100%, the Mortgage is not eligible for modification.

However, Servicers may forbear principal beyond the Forbearance Limit to achieve the Target Payment when determining the final amounts to be capitalized and preparing the Modification Agreement, provided the Mortgage met the partial principal forbearance and all other eligibility requirements, including the Forbearance Limit, at the time the
Borrower was qualified for the modification based on verified income.

If the result of the Treasury NPV test is negative, Servicers must continue to limit the amount of principal forbearance in accordance with current Guide requirements. That is, when the result of the Treasury NPV test is negative, the interest-bearing principal balance is limited to a Mark-to-Market LTV Ratio that is equal to or greater than 100%. (See section titled "NPV Requirements" below for additional limitations when the Treasury NPV result is negative.)

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Effective for new HAMP evaluations on or after December 1, 2009:

NPV eligibility rules for modifications *without* partial principal forbearance – If the proposed modification terms do not require partial principal forbearance and the Treasury NPV result is either positive or less than zero, but not less than negative $5,000, then the Servicer must process the modification. The Mortgage is not eligible for a modification under HAMP if the Treasury NPV result is less than negative $5,000 (i.e., negative $5,000.01 or lower).

NPV eligibility rules for modifications *with* partial principal forbearance -- If the proposed modification terms require partial principal forbearance to reach the Target Payment and the Treasury NPV result is positive, then the Servicer must process the modification provided the amount of forbearance does not exceed the Forbearance Limit. If the proposed modification terms require partial principal forbearance to reach the Target Payment and the Treasury NPV result is less than zero, but not less than negative $5,000, then the Servicer must process the modification provided the amount of partial principal forbearance does not create an interest-bearing balance with a Mark-to-Market LTV Ratio of less than 100%. If the amount of forbearance required to reach the Target Payment creates an interest-bearing balance with a Mark-to-Market LTV Ratio of less than 100%, the Mortgage is not eligible for a modification under HAMP. The Mortgage is not eligible for a modification under HAMP if the Treasury NPV result is less than negative $5,000 (i.e., negative $5,000.01 or lower).

The Business, Law & Ethics of Mortgage Modifications:

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HAMP TIPS & NOTES:

Waterfall / NPV

1. Generally, the Waterfall calculation must be done first, then the Net Present Value (NPV) calculation.
2. The Waterfall seeks to get the borrowers payment as close to 31% of the Gross Income as possible. The Servicer may do a modification under 31%, however it will waive its right to receive any HAMP incentives.
3. The number one mistake in running the HAMP NPV tool is failure of the mark to market LTV input. Column 3 divided by AA must Float to 5 decimal places.
4. The total monthly obligations of borrower includes all debt including all debt reported on the borrower's credit report.
5. Principal forgiveness is not required on GSE loans.
6. Servicer can re-run the NPV with changes numerous times.
7. Excessive Forbearance causes ineligibility for both GSE and non-GSE loans.
8. Excessive Forbearance causes ineligibility when request for forbearance amount exceeds market value.
9. Negative NPV causes GSE loan ineligibility.
10. Investors of non-GSE loans may give approval to proceed with modification even if Negative NPV.
11. Pursuant to SD 09-07 Social Security Income can be grossed-up to obtain eligibility.
12. Program changes are occurring all the time. New rules are expected, effective December 1, 2009.

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HAMP TIPS & NOTES:

13. Each of the agencies have its own version of HAMP. The rules differ. Effective 12/1/09, forbearance over 35% of UPB will be ineligible under Freddie HAMP. (See AllRegs Chapter 65 – Freddie)
14. Not enough income can cause excessive forbearance.
15. Lower FICO lowers the NPV amount.
16. The number of months past due changes the NPV.
17. The State (Zip Code) changes the NPV.
18. The Servicer must first evaluate and offer a HAMP modification (if eligible) over alternatives.
19. A borrower can be put into HAMP or a non-HAMP solution directly out of a successful forbearance-time agreement; but HAMP must be offered 1st if eligible.
20. Back End DTI (BE-DTI) is not taken into account for HAMP eligibility, but if BE-DTI is 55% of greater, the Borrower must be referred to a HUD Counselor.
21. The target DTI is 31% but not below. The practical target should be a range between 31.49% as a ceiling, and 31% as a floor.
22. If the NPV is negative, it is within the discretion of the servicer (or investor) but principal reduction is limited to 100% LTV. The Fannie Worksheet, Column P divided by AA equals the Mark to Market LTV.
23. Negative amortization is prohibited.
24. Support: Servicing_Solutions@fanniemae.com ; Support@hmpadmin.com ; hamp_intergration_team@fanniemae.com ; 1800-Fannie-5; 1888-326-6435; 1800-Freddie; 1800-939-4469 (Non GSE Loans; Non Servicers).

The Business, Law & Ethics of Mortgage Modifications:

Making Home Affordable Refinance Program: HARP

The official public website for the Making Home Affordable program directs borrowers to determine their initial eligibility for HARP refinances at the following url: http://makinghomeaffordable.gov/refinance_eligibility.html . The test is as follows:

Home Affordable Refinance
If you are a homeowner who is current on your mortgage payments but unable to refinance to a lower interest rate because your home value has decreased, you may be able to refinance.

Am I eligible for a Home Affordable Refinance? Answer these questions: 1. Are you the owner of a one- to four-unit home? Do you have a loan owned or guaranteed by Fannie Mae or Freddie Mac? Are you current on your mortgage payments?

"Current" means that you haven't been more than 30-days late on your mortgage payment in the last 12 months. Yes No4. Do you believe that the amount you owe on your first mortgage is about the same or less than the current value of your house? *You may be eligible if your first mortgage does not exceed 125% of the current market value of your home. For example, if your property is worth $200,000 but you owe $250,000 or less on your first mortgage, you may be eligible. The current value of your property will be determined after you apply to refinance. If unsure, click "Yes" for Question #4 and go to Refinance next steps.*

The Business, Law & Ethics of Mortgage Modifications:

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PRIVATE LABEL PROGRAMS | RE-DEFAULTS | SOLUTIONS:

First of all, it is important to note that each government agency (Fannie, Freddie, VA, FHA-HUD, etc.) has its own version of MHA/HAMP/HARP. However, most of these programs have been very slow to get started in terms of volume. This is mostly due to overly restrictive eligibility requirements, and understaffed government agencies. However, most programs are now ever-changing and being amended, and broadened, although not fast enough if the President's public policy goals are to be met. Moreover, it is widely expected that these government programs will fall far short of each of the program's goals.

Resolution of excessive debt must be made a chore of the workout (and or as a condition to approval). Unfortunately, consumer debt forgiveness triggers a taxable event, not yet waived by Congress. Congress has waived forgiveness of mortgage debt for a limited extended time, and it was paramount to do so in order to allow the borrower to avoid incurring an over-burden on monthly available cash flow. But excessive back-end consumer debt and income tax debt remain as impediments to achieving true affordability.

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PRIVATE LABEL PROGRAMS | SOLUTIONS:

To achieve this, principal reduction and or forgiveness must be aggressively pursued (Mark Zandi, Chief Economist, co-founder of Moody's Economy.com). Other payment reduction devices must also be considered, including graduated payment plans, shared appreciation modifications and mortgages, insured and guaranteed shared appreciation mortgages that can sell the insured pieces into the secondary market, quarantined mortgages that do not produce 100% loss incurrence at the outset, etc. The author has created numerous solutions to these issues, and has publically explored principal reduction techniques with Wilbur Ross at the CMIS Executive Leadership Summit in DC (June 2008). For more info visit: www.CMISMortgageCoalition.org

Most Notable Proprietary Program:

This year's most notable proprietary program comes from Bank of America. BofA has reached out and offered a select group of Option Arm borrowers, a pre-approved, aggressive, principal forgiveness modification. The author has reviewed one such example where the principal reduction was some 25%.

See Program Documents (Bank of America Principal Forgiveness Modification__D1

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UPDATE BORROWER NOTICES REQUIRED FROM SERVICER

OCTOBER 8, 2009: A BUSY HAMP DAY IN D.C.

QUICK SUMMARY: Also, with little fanfare, the Treasury released its *Supplemental Directive 09-07* which in part moves to standardize the borrower's evaluation forms and process, and requires the Servicer to respond to the borrower within 10 days from receipt of the borrower submission of the required information. It also requires the Servicer to complete its evaluation of borrower eligibility and notify the borrower of its determination within 30 days. If the Servicer determines that the borrower cannot be approved for a trial period plan, the Servicer must send written notice of same, and "consider the borrower for another foreclosure prevention alternative."

Section 3- New *Required* State Court Structured Foreclosure Mediation & Monitor Programs

My name is Richard Ivar Rydstrom, I am the Chairman of CMIS. I am joined by CYNTHIA A. NIERER of Rosicki, Rosicki & Associates, P.C. for Section 3. Cynthia is a national expert in foreclosure related law and procedures. Cynthia was also the proud recipient of the 2009 CMIS Expert in Law Award.

By way of opening comments:

Generally, in 2009 and into 2010 we will continue to see states rolling out Court Mediation or Monitor Programs or amendments to existing programs faster and faster. States are making rules through its legislature or its Supreme Court with its inherent powers to effectively control and administer justice within its court system.

Additionally, HAMP rules are being clarified to prohibit the processing of foreclosures until after the HAMP evaluation periods. Moreover, Congress is considering Mediation Programs particularly in the REED BILL (S 1731) incentivizing states and local governments to create strong mediation programs to find alternatives to foreclosure.

Section 3- New *Required* State Court Structured Foreclosure Mediation & Monitor Programs

Some states are implementing a state uniform mediation system while others like Florida or PA have county by county rules (with some local City Attorney ordinances or orders like in Los Angeles). There is a movement to standardize the foreclosure mediation process – at least state wide. There are at least 25 foreclosure mediation programs in at least 14 states (NCLC) (www.consumerlaw.org).

Consumer groups complain that the process is unfair to the borrower as the lender/servicers has too much discretion and control over the process, and homeowners – who are often not represented by an attorney – have no bargaining power.

The lender/servicers complain that the process causes unnecessary delays, is too costly, borrowers are unprepared and fail to timely produce the necessary documents and information, or that borrowers simply cannot afford a sustainable modification.

Most agree that HUD-Counselors have a very positive influence on the process, but are not equipped with the tools (software, etc.) necessary to advise borrowers on all workout options; and that borrowers should ALSO have an attorney.

Section 3- New *Required* State Court Structured Foreclosure Mediation & Monitor Programs

By way of UPDATES:

1. RE FLORIDA – On August 17, 2009, the Florida Supreme Court Task Force on the Residential Mortgage Foreclosure Crisis issued its FINAL REPORT AND RECOMMENDATIONS stating in part: The Task Force recommends adoption of a uniform, statewide managed mediation program to be implemented through a model administrative order issued by each circuit chief judge. Under this program, all foreclosure cases involving residential homestead property will be referred to mediation, unless the plaintiff and borrower agree otherwise, or unless pre-suit mediation was conducted. All cases will be assigned to mediation to be conducted by a Florida Supreme Court certified circuit court mediator.

2. RE: NOTE OF PENNSYLVANIA – The PA model is emerging as a model example for some states. In Philadelphia County, the Residential Mortgage Foreclosure Diversion Pilot Program was created by Joint General Court Regulation No. 2008-1 signed on April 16, 2008.

Section 3- New *Required* State Court Structured Foreclosure Mediation & Monitor Programs

By way of UPDATES:

3. RE: CALIFORNIA FOLLOWS NEVADA - California is holding hearings to implement a Court Monitor Program (Ca AB 1588) called "Monitored Mortgage Workout Program". Most judicial state programs are court monitored systems, however in non-judicial states like California programs often are not court supervised. AB 1588 is unique in that it would assign a state appointed workout monitor (who also calculates NPV – for the lender) over the process after the borrower elects into the program within 30 days after the Notice of Default is filed. If a workout is not successful or fails for bad faith, the monitor will make a proposal which can be enforced in a fast track hearing. It appears that California is favoring adopting measures from the Nevada program.

4. RE: NEVADA – On November 4, 2009 the Nevada Supreme Court issued an Order amending the foreclosure mediation rules and adopting standardized forms. The order requires both parties to submit required documents. The servicer/lender must submit an appraisal not more than 60 days old with an acceptable short sale valuation, and a confidential proposal with methodology of determining eligibility. The borrower must fill out a financial worksheet and submit a confidential proposal. (See Seminar Exhibits & Follow ups on www.CMISMortgageCoalition.org.

CYNTHIA A. NIERER - Section 3- New *Required* State Court Structured Foreclosure Mediation & Monitor Programs

A. Trends becomes the Norm!

•Trend: to extend in a general direction/to follow a general course/to veer in a new direction.
•Increased judicial scrutiny; additional notice requirements; and moratoriums.
•Foreclosure mediation—to combat disconnect between borrower and lender.
•Foreclosure mediation—"enough is enough" solution.

B. State Court Foreclosure/Mediation Programs in Force

•No uniformity—some are statewide programs…others are specific to certain municipalities/counties.
•One goal—communication between borrower and lender with the hope of one less foreclosure.

****Programs are constantly being created and/or altered. It is recommended that one contact an attorney in the particular state/jurisdiction for the most up to date information.

The Business, Law & Ethics of Mortgage Modifications: Learn How to Legally Navigate in the New Mortgage Resolution Climate

Section 3 Continued…

Connecticut:

- Statewide program. Applies to all foreclosures with return dates of 7/1/09 and after.
- Borrower: owner of 1-4 family residential property (his/her primary residence).
- Sunset provision—7/1/10.
- Mediation is mandatory for qualifying homeowners who appear in the action.
- No stay of the action—judgment not to be entered until mediation is complete.
- Lender's attorney may appear on behalf of lender so long as he/she has the authority to settle AND the lender must be available via telephone.

Delaware:

- Statewide program available to borrowers who own a 1-4 family residential property and reside in same as his/her primary residence.
- Applicable to foreclosure actions filed on or after 9/15/09.
- Borrower must elect to enter the program and must qualify.
- The lender must attend the mediation either in person or via telephone.

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Section 3 Continued…

Florida:

•Not statewide. All programs apply to residential mortgage foreclosures of owner occupied homes.
•Several similarities but not 100% uniform.

9th Judicial Circuit:

•Established 2/09.
•Requires initial notices be served upon the borrower.
•Lender's attorney to contact borrower if he/she answered in the action.
•If borrower does not have the ability or does not wish to cooperate lender may be excused from the program. If the mortgagor requests mediation, lender must coordinate same.
•Cost is borne by plaintiff--$275.00 for 2 hours (only half included in the judgment).
•Lender representative must have authority to settle. If located more than 25 miles from mediation site he/she may appear by telephone—lender's attorney must appear in person.

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Section 3 Continued…

11th Judicial Circuit:

•Effective 5/1/09-- Circuit Homestead Access to Mediation Program.
•Lender contacts Collins Center for Public Policy who contacts the borrower.
•No contact within 30 days--final hearing/entry of summary judgment may occur.
•Contact made—Collins Center refers the borrower to a HUD or NFMCP agency for counseling and mediation is then scheduled (mandatory).
•Mediator is paid $350 from $750 fee paid by lender.
•Lender may appear in person or be available via telephone. ***If any party breaches or fails to perform under an agreement the court may impose sanctions.

19th Judicial Circuit and 1st Judicial Circuit:

•Effective 3/09. Both utilize the Collins Center (process same as 11th Circuit).
•Mediation must be complied with prior to default/summary judgment/final hearing.
•Applies to residential property owned by the borrower and occupied by borrower OR immediate family member (spouse, child, parent, grandparent or sibling).
•Lender's attorney certifies type of property—owner-occupied or not AND identity of the bank's representative that can settle AND that he/she personally spoke with same to confirm this—this representative must appear at mediation.
•Lender is responsible for mediation fee--$750.00.

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Section 3 Continued…

18th Judicial Circuit (Brevard and Seminole Counties):

- Mediation is mandatory--$250 fee is borne by the plaintiff/lender.
- Borrower must reside in the property and must have filed responsive pleadings.
- Attorney for the lender coordinates the mediation prior to judgment being issued.
- Junior lien holders must be given notice.
- Identity of lender representative who has authority to settle must be provided.
- Lender's representative may participate via telephone (toll free number).
- Plaintiff's counsel must certify: identity/position of the lender's representative and that he/she has full authority to settle without needing to seek authorization.

12th Judicial Circuit:

- Quasi-mediation program/Homestead Foreclosure Conciliation Program.
- Applicable to cases filed 12/1/08 and after.
- Lenders to coordinate in a telephone conference with willing borrower/owners.
- Lenders must determine if the property is an owner occupied homestead.
- Homeowners must opt in.
- Lender can have more than one person participate—must be authorized to settle.
- Judgment not be granted until Attorney's Certificate of Compliance is filed.

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Section 3 Continued…

Indiana:

•Established 7/1/09.

•Not applicable if the property is not the borrower's primary residence or if the borrower defaulted on a previous foreclosure prevention agreement or if a Bankruptcy prohibits the settlement conference.

•Borrower must opt in before Court will schedule the settlement conference.

•Plaintiff is to provide the Court with a copy of the settlement or a notice advising an agreement was not reached.

Kentucky/Jefferson County:

•Residential Foreclosure Conciliation Program—adopted via a Court Order 3/09.

•Borrower must opt in.

•Borrower must submit, prior to the conference, a completed financial package.

•Lender is required to attend the conference. The person representing the lender must have decision making authority.

The Business, Law & Ethics of Mortgage Modifications: Learn How to Legally Navigate in the New Mortgage Resolution Climate

Section 3 Continued…

Maine:

•Statewide program established 6/15/09 (initially rolled out in York County).
•By 1/1/10, all counties are to have a mediation program in place.
•Applicable to foreclosure actions filed against owners of 1-4 family, owner occupied (primary residence) residential properties.
•Plaintiff/lender is required to advise borrower is mediation is available.
• Mediation held if borrower requests it or makes an appearance in the foreclosure.
•Judgment not entered until a mediator's report has been completed.
•Lender (who has authority to settle) must attend—may do so via telephone.
•If a party fails to attend or make a good faith effort the court can impose sanctions.

New Jersey:

•Applicable to foreclosures filed on/after 1/5/09 (motion by homeowner before then).
•Property must be a 1 - 3 family residential property owned by the borrower and occupied by the borrower as his/her primary residence.
•The program provides for 3 notices to the borrower during the foreclosure action.
•Borrower opts in—submits a financial worksheet and request for mediation form.
• Lender representative, able to settle, must be present or available by telephone.
• The sheriff's sale will not take place while mediation is pending.

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New Mexico (Santa Fe, Los Alamos and Rio Arriba):

•Program went into effect on 2/27/08.
•Conferences are referred via Court Order. The Court may schedule or may be requested by either party.
•The borrower must be the homeowner.
•The fee for the settlement facilitator is borne by the parties (Court formulates a sliding scale fee schedule).
• Plaintiff's representative must have full authority to settle and may appear by telephone if located outside of New Mexico.
•Requires information to be provided prior to conference—ie: copy of the note, mortgage and all assignments; notices to the borrower of the assignments; the identity of any investor that would need to be consulted prior to a settlement and their settlement guidelines; information about the loan (ie: original balance, current balance; current interest rate, etc.); what workout options will the lender consider.

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New York:

•Statewide mediation program created via statute on 8/5/08.
•Applicable to subprime, high cost and non-traditional home loans originated between 1/1/03 and 9/1/08.
•Borrower must be natural persons.
•Debt must have been incurred primarily for personal, family or household purposes.
•Applies to mortgaged premises that contain a structure or upon which a structure is to be built. Same is to be occupied as the borrower's principal residence.
•Conference to be held by the court on actions commenced on or after 9/1/08.
•Conference is to be scheduled by the court within 60 days of the filing of the affidavit of service on the mortgagor.
•Plaintiff must appear by counsel or in person. Appearing party must be authorized to settle the case. In most instances, the plaintiff must be available by telephone.
•No formal stay of the proceedings—judgment not entered until mediation complete.

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Ohio:

•Statewide program promulgated by Supreme Court Justice Moyer in 2/08.
•Not yet implemented in all counties (primarily due to financial hardship).
•Program is a model—counties have/can develop their own program with nuances.
•Borrower must request mediation—the court determines if mediation is appropriate.
•The parties must appear in person (unless given permission by the mediator/court to appear by phone) and with authority to settle.
•The mediator will not force the parties to settle.

Pennsylvania (programs (very similar) created by the courts—not statewide):

Alleghany County:

•Created by Administrative Order—effective as of 1/12/09.
•Applicable to foreclosure actions of residential owner-occupied properties.
•Lender's attorney must serve borrower with a special notice regarding mediation.
•Borrower is responsible for opting in and filing a Certification of Participation.
• Conference is scheduled by the court and a stay of the action is put into place.
•Prior to the conference the owner is to submit a proposal to the plaintiff's attorney.
•Lender's representative must have authority to settle (can appear via telephone).

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Bucks County:

•Program created by Administrative Order in 6/09 (in effect until 12/31/10).
•Foreclosure complaint must include a Certification Cover Sheet (certifying the property is residential and owner occupied) and an Urgent Notice directing the owner to contact a hotline for assistance.
•If the owner requests assistance/conference, the Court issues an Order for Conference to all parties—action is stayed at least 20 days after the conference.
•Lender's representative is required to appear with authority to settle.

Lackawanna County:

•Established via County Rules of Civil Procedure—effective as of 6/13/09.
•Initial 60 day stay for the borrower to determine if he/she qualifies for the program.
•Unrepresented, qualified borrowers must meet with a housing counselor.
•Borrower to provide financial worksheet to lender or case removed from program.
•A representative of the lender must attend/be available via telephone and must have authority to reach a mutually acceptable resolution.
•Prior to Sheriff's Sale, the plaintiff's attorney must file an affidavit—defendant has not opted in or a resolution was not reached.

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Philadelphia County:

•Residential Mortgage Foreclosure Diversion Pilot Program was created by Joint General Court Regulation No. 2008-1 signed 4/16/08—effective immediately.
•Applies to owner occupied residential properties.
•Conciliation Conference must be scheduled before the Sheriff can sell.
•The program terminates 12/31/09 unless extended.
•The entry of judgment is delayed until after the date of the Conciliation Conference.
•Representative of the lender(able to settle) must attend /be available by telephone.

********NON-STATE COURT MONITORED PROGRAMS********

California:

•Enacted 2/20/09 (CA Civil Code Section 2923.5 and Section 2923.52-53).
• Section 2923.5: mortgagee (or its trustee or agent) must contact borrower in person/by telephone to assess the financial situation and explore options.
•Notice of default cannot be filed until 30 days after contact is made or 30 days after satisfying the due diligence requirements (per the statute).
•Applicable to loans made from 1/1/03 to 12/31/07 and secured by owner-occupied residential real property.
•Statute is in effect until 1/1/13 unless modified.

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•Section 2923.52-2923.53(The California Foreclosure Prevention Act): provides additional time for borrowers to workout loan modifications.
•Additional 90 day period beyond the period already given to be provided to the borrower before a Notice of Sale can be served in order to allow the parties to look into a loan modification of certain loans.
•Requirements: the loan is a first mortgage recorded during the period of 1/1/03 to 1/1/08 on residential real property; the property is occupied by the borrower as his/her principal residence; the notice of default has been recorded on the property.
•The statute is in effect until 1/1/11 unless repealed or extended.
•Exception: mortgage loan servicers that have implemented a comprehensive loan modification program that meets the requirements of the section. The exempted mortgage loan servicers can be found on the California Department of Corporations website.

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Michigan:

•Statewide program created via statutes signed into law on 5/20/09.
•Effective as of 7/5/09 and is repealed as of 7/5/11.
•Lender is to notify borrowers of foreclosure via mail—must include the name of an individual at the lender's office who has the ability to modify the loan and a list of approved housing counselors.
•Once the borrower has met with a housing counselor, a meeting will be set up with the lender to attempt to work out a modification of the mortgage loan.
•Foreclosure cannot proceed for 90 days from the date of the initial notification.

Nevada:

•Established in 2/09—applies to owner occupied residential properties and foreclosures filed on/after 7/1/09.
•Borrower and lender must submit a non-refundable mediation fee of $200 each.
•Borrower must opt in—prior to mediation he/she must submit a financial statement and housing affordability worksheet, and a settlement proposal.
•Lender's representative must bring the original/certified copy of the note/Deed of Trust/any assignments, a copy of the most current appraisal, an estimate of the short sale value of the home and must show the method used to determine if the homeowner is eligible for a loan modification.

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Oregon:

•Process is in effect from 9/28/09 to 1/2/12. After said date only the foreclosure notice is required.

•Trustee for the lender is required to send the homeowner a notice: how to stop the foreclosure process, the amount needed to bring the loan current, sources for counseling/advice, the trustee's contact information with an individual contact who can discuss the payment and loan term negotiation/ modification options.

•Borrower is to "opt in"--request a loan modification and/or meeting with the lender.

•Lender has 45 days to advise if he/she qualifies for a modification.

•Lender's representative must have authority to make loan modification decisions (it can be in person or by telephone). The meeting must take place before the lender makes a decision on the loan modification.

•Ultimately, the lender must file an affidavit in the county where the property is located that states that the process was followed. The homeowner must receive a copy of the notice at least 25 days prior to the trustee selling the home.

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Wisconsin--Milwaukee:

•The Milwaukee Foreclosure Mediation Program was established pursuant to Milwaukee County Chief Judge Directive 9-14 and is being administered by the Marquette University Law School.
•Applicable to borrowers who are owner-occupants of residential properties with 4 units or less.
•A notice advising of the availability of mediation is to be attached to the foreclosure summons and complaint.
•Mediation must then be requested by either the borrower or lender.
•Both the borrower and lender must agree to the mediation.
•Non-refundable $100 mediation fee charged to both the homeowner and lender.
•There is no stay of the foreclosure proceeding.

C. State Laws & Judicial Orders

•See written materials for copies/links to the various statutes and orders.

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D. Related Pending Legislation

1) REED Bill/S. 1731—Preserving Homes and Communities Act of 2009

•Keep families in their homes and to protect communities from deterioration.

•Would require that "…qualified homeowners are evaluated for and offered loan modifications; establishing a new mortgage payment assistance program; and **incentivizing states and local governments to create strong mediation programs, which allow homeowners and servicers to meet face to face to try to find an alternative to foreclosure.**" (Emphasis added)

•Authorizes $80million in federal matching funds for states and localities to establish free, mandatory mediation programs. No qualification as to types of property or if the borrower must be an owner occupant.

•Provides for inclusion of junior lien holders in the mediation process (not mandatory) and stays any junior lien holder proceedings.

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2) Massachusetts

- Pending legislation—House No. 4003—which was filed on 2/12/09.
- Would establish a mandatory, statewide mediation program.
- Applies to residential real property with 4 or less units occupied by the borrower.
- Must be requested by borrower. Would be mandatory for the lender.
- Foreclosure proceedings would then be stayed.
- Within 5 days of the conference, the mediator is to make a determination if mediation is beneficial to the parties.

3) New York

- Statewide mediation program is already in place.
- Pending legislation in the New York Assembly (A08236) would extend the scope of the program.
- Would extend mandatory settlement conferences to include borrowers of all home loans.

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4) Wisconsin

- There is a mediation program in place.
- Under the proposed legislation, the lender would be required to inform the borrower of the right to request mediation.
- Exception: if the borrower has participated in mediation within the past 2 years or agreed to a loan modification with the same lender on the same property within three years.
- Foreclosure action would be stayed until the mediation process is complete.
- The parties are required to attend the mediation session and work towards a resolution in good faith.
- For a mortgagee, good faith includes (amongst other things) designating a representative with authority to fully settle/mediate the matter.
- The cost of the mediator may be added to the mortgage loan payments.
- The proposed legislation would be applicable to first or second mortgages given on residential real property (1-4 family dwelling) owner occupied (or to be occupied) by the borrower.

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Richard Ivar Rydstrom, Cynthia A. Nierer -

E. Conflicts in Law, Preemption Issues re: Federal, State and Local Laws

- Per Article VI, Section 2 of the US Constitution (also known as the Supremacy Clause), the "…Constitution, and the Laws of the United States…shall be the supreme Law of the Land."
- Certain issues are of such a national scope that federal law will preempt State law that is inconsistent.
- Clear preemption: "we hereby preempt".
- If there is conflict—the judiciary determines whether there is preemption or not.
- No current conflicts between Federal, State and/or local governments as to the instituting of foreclosure mediation programs.

F. Common Principles and Requirements

- Stay of the foreclosure proceeding
- Preliminary Notices
- Appearance by Both Parties
    - In person or via telephone…the lender's representative must have the authority to settle the matter.
- Applicability

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G. Unusual Principles and Requirements

- Occupancy Certification by Lender's Attorney
  - What if the occupants are uncooperative or are untruthful?
  - Is this knowledge the attorney would/should have?
- Fees
- Mandated Mediation

H. Problems Observed

- Lack of Uniformity
  - IE: Ohio's 88 Counties
- Preparedness
  - Financial Information
  - Financial Documentation
- Safe Harbor?
  - Helping Families Save Their Homes Act of 2009—Safe Harbor section.

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- Servicers who enter into a "loss mitigation plan" as to a residential mortgage (including those held in a securitization) originated prior to the Act are deemed to have satisfied the duty owed to investor's and/or other parties if:
  - default on the mortgage is imminent or has occurred;
  - the mortgagor occupies the premises as his/her primary residence;
  - and the servicer reasonably determined that entering into the plan would recover more money than foreclosure.
- 2008 Countrywide enters into an agreement with the AG's of 11 States to, in part, modify thousands of loans.
- *Greenwich Financial Services Distressed Mortgage Fund 3, LLC, et als. vs. Countrywide Financial Corporation, et al.* in the United States District Court, Southern District of New York, 08 Civ. 11343.
  - Investors on those loans not owned by Countrywide brought suit .
  - Allegation—Countrywide had not complied with the terms of the PSA's and was required to buy back the modified loans.
  - Countrywide argued that the Safe Harbor provision protected it.
  - Federal Court found that it did not have jurisdiction over the case and remanded to the State Court.

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I. Federal Default: Safe Act-A New World Starting August 1, 2009

- How to protect borrowers of the future?
- S.A.F.E. Mortgage Licensing Act of 2008 (Secure and Fair Enforcement for Mortgage Licensing Act of 2008).
- As of 8/1/09, any person who, for compensation or gain, takes a residential mortgage loan application or offers or negotiates terms of such an application must be licensed or registered as a mortgage loan originator.
- Do individuals in the lender/servicer's office that are negotiating loan modifications need to be licensed?
    - Not "originating" loans.
    - Possibly negotiating terms of an application for a loan.
    - The mortgage is already in existence.
    - Is an individual in the loss mitigation department being compensated as was meant by the statute.

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J. Court Monitor Programs: Example: Ca AB 1588

- Not all mediation programs are monitored.
- Proposed legislation in California calling for the creation of a "Monitored Mortgage Workout Program".
- Proposing state appointed monitors.
- Any borrower who received a notice of default is eligible to participate.
- Borrower must opt into the program.
- A Monitor would be appointed to work with the parties to determine the possibility of a loan modification.
- If the parties cannot reach an agreement, the Monitor will prepare a modification proposal that abides by the guidelines of HAMP, if feasible.
- If the lender refuses the proposal or acts in bad faith the borrower can bring a court action to enforce the Monitor's proposal.
- The foreclosure process is stayed until the program is completed.
- Concern: forcing lenders to accept modifications they have deemed not in their or their investors' best interests or pursuant to set guidelines.

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K. Bridging the GAP Among Courts, Servicers & Borrowers – Solutions

- Mediation is that bridge between the courts, servicers and borrowers.
- Disconnect still exists.
- Solutions:
  - providing financial information and documentation prior to the mediation conference.
  - Uniform approach to providing information
  - Uniformity in information/documentation to provide.

L. Borrower Representatives Equalize the Bargaining Positions

- Borrowers in default are:
  - unaware of their options
  - unwilling to speak to their lenders
  - are embarrassed
- Attorneys and housing counselors assist these borrowers.
  - Act as the voice of the borrower
  - Familiar with intricacies of the process and alternatives.

M. Do We Need Foreclosure Attorneys for Foreclosures and Workout Attorneys for Workouts?

- ***Maybe. Maybe not.***
- Many foreclosure attorneys handle more than just foreclosures.
- Separate departments/staff established.
- Information and background of the file is with that one firm.
- The borrower is familiar with the firm.
- ***Counter Argument & Concerns*****:** the foreclosure firm is burdened with possible conflicts and vulnerable to legal attacks especially from the borrower.
    - Foreclosure/workout attorneys working for the Servicer, but in contact with the borrower.
    - Borrower may have rights against same for any (mis)representations, etc.
    - Conflicts of interests, potential violations of FTC, FDCPA (confusion, overshadowing, etc.) and other laws should be avoided for benefit of all.
- **Can argue the servicer and the borrower should have their own workout attorney representing its respective interests**.

- **See Ethics Section on Foreclosure Attorney Conflicts of Interest**

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Summary – Court Mediation and Monitor Programs

New Court Mediation or Monitor Programs:

- Can play a crucial role in reaching alternatives to foreclosure.
- Programs must be standardized in order to reach uniform results.
- Programs must present an equally fair framework.
- Standards set must be objectively obtainable to avoid unfairness, confusion and disagreements.
- Information and document processing as well as loss mitigation determinations must be done prior to costly court hearings.
- The court must supply the fast track forum for matters that fail to resolve.
- Funding for court processing must be supplied by state and federal incentive programs, and by both parties to the mortgage, mediation, or litigation.

I want to thank CYNTHIA A. NIERER of Rosicki, Rosicki for her exceptional work and her time and effort to fly out to California to film this NBI CMIS special live webcast today.

This is the end of section 3

The Business, Law & Ethics of Mortgage Modifications:

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Overview of the Ethics of the Business of Mortgage Modifications –

This year we have also seen abuse of borrowers by unlicensed persons, ‘foreclosure rescue scammers’, “mod companies’, licensed brokers and attorneys acting on behalf of borrowers. We have also seen a strong, aggressive, and very successful response by the state licensing authorities, including State Bars, State Attorneys General, District Attorneys, and the FTC. We have seen attorneys disbarred, and persons sent to jail.

After the mortgage meltdown, throughout the country, non-lawyers engaged in a business model of referring clients to lawyers for a fee or a share in the profits. This was and is unethical but many lawyers still got caught-up in variations of such an arrangement, and by doing so, either directly or indirectly, engaged in numerous ethical and local law violations.

There is a national trend underway to prohibit persons, brokers as well as attorneys from charging up-front fees to assist or negotiate mortgage modifications for borrowers. The need to combat unscrupulous persons, including brokers and attorneys from taking advantage of borrowers in high volume boiler room type businesses, has tipped the scales in favor of placing legal restrictions on attorneys in how and when they can charge a borrower when representing him/her in a mortgage modification.

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Leading the charge, California enacted SB 94 as an emergency measure to protect the public from attorneys, brokers and all others who would seek to charge a borrower an upfront fee.

New California Law: SB 94 (Calderon) On October 11, 2009, California has aggressively moved to stave off attorney abuse of troubled borrowers by the passage of Senate Bill No. 94, known as the prohibition on advance fees. The State Bar of California issued its interpretation of SB 94 in part as follows:

Prohibition against Collection of Advance Fees The legislation prohibits the collection of advance fees for loan modifications, as specified. Among other provisions, new Civil Code Section 2944.7(a)(1) provides as follows:

“Notwithstanding any other provision of law, it shall be unlawful for any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to do any of the following: (1) Claim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform.”

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Civil Code Section 2944.7(d) provides that Section 2944.7 applies only to mortgages and deeds of trust secured by residential real property containing four or fewer dwelling units. Under new Business and Professions Code Section 6106.3(a), it constitutes cause for the imposition of discipline of an attorney for an attorney to engage in any conduct in violation of Civil Code Section 2944.7. The State Bar’s interpretation of the new statutory language, in response to the three most common questions it has received, is set forth below.

Common Questions & Answers:

The State Bar’s Office of the Chief Trial Counsel will enforce the statutory language consistent with this interpretation. *1. Is Civil Code Section 2944.7(a)(1) retroactive?* Agreements entered into and advance fees collected prior to October 11, 2009 are not affected. Advance fees based on agreements entered into prior to October 11, 2009, but collected after October 11, 2009, must be fully refunded.

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2. Is it a violation of Civil Code Section 2944.7(a)(1) to collect an advance fee, place that fee into a client trust account, and not draw against that fee until the services have been fully performed? Yes. The statutory language of the prohibition uses the word “receive” and the plain meaning of that term is broad enough to encompass a lawyer’s receipt of advance fees into a trust account. Civil Code Section 2944.7(a)(1) makes it unlawful to “collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform,” whether the compensation is placed into the lawyer’s client trust account, general account or any other type of account.

3. Is it a violation of Civil Code Section 2944.7(a)(1) to ask for or collect a “retainer”? Civil Code Section 2944.7(a)(1) makes it unlawful to “[c]laim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform,” even if that compensation is called a “retainer.”

Required Notice to Borrower - The legislation also requires that specified notice be provided to the borrower, as a separate statement, prior to entering into any fee agreement with the borrower. Among other provisions, new Civil Code Section 2944.6(a) provides as follows:

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“Notwithstanding any other provision of law, any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, shall provide the following to the borrower, as a separate statement, in not less than 14-point bold type, prior to entering into any fee agreement with the borrower:

It is not necessary to pay a third party to arrange for a loan modification or other form of forbearance from your mortgage lender or servicer. You may call your lender directly to ask for a change in your loan terms. Nonprofit housing counseling agencies also offer these and other forms of borrower assistance free of charge. A list of nonprofit housing counseling agencies approved by the United States Department of Housing and Urban Development (HUD) is available from your local HUD office or by visiting www.hud.gov.”

Even local jurisdictions have taken action. For example, the Los Angeles City Attorney’s Office signed Ordinance No. 180675 on 4/28/09, known as the Mortgage Modification Consultant Regulations. It added Article 7.2 to Chapter IV of the LA Municipal Code. At the time, the ordinance did not include attorneys exempted under the definition of “Foreclosure Consultant” by Subsection (b) of Section 2945.1 of the California Civil Code. However, with the passage of SB 94, attorneys are no longer exempted. The ordinance enacted a right of cancellation with contract notice provisions in 14 point boldface type. It also established a right to sue for any violation of the ordinance.

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Enforcement Actions: Mod Firms Bombarded With Lawsuits

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FTC, several states sue modification firms over big up-front fees and false promises
August 12, 2009, By SAM GARCIA

Government lawyers in several states have been busy filing nearly 200 lawsuits and other actions against loan modification companies. At issue in several cases reviewed by MortgageDaily.com are huge up-front fees, false promises of high success rates and money-back guarantees that are not honored.

In Florida, Attorney General Bill McCollum filed a lawsuit in the Fifteenth Judicial Circuit against FHA All Day.Com, its owner Jason Vitulano and three affiliated companies that allegedly charge up-front fees of as much as $5,000 for loan modification services, according to a copy of the complaint. The defendants earn around $1 million monthly from up-front modification fees through automated marketing phone calls that illegally used President Barack Obama's voice.

Claims that the company has a staff of attorneys were disputed by McCollum, who noted that Vitulano and company didn't perform promised services. More than 300 complaints were received about the company, and the attorney general hopes to collect civil penalties of $15,000 for each violation of the Foreclosure Fraud Prevention Act and obtain a permanent injunction barring up-front fees.

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In the other Sunshine State, Arizona, Attorney General Terry Goddard recently touted several actions taken against modification firms. Among those actions was a lawsuit filed against Hope for Homeowners Now LLC, which allegedly solicited up-front fees of $3,195. Another complaint filed against Loan Modification of America LLC accused that firm of falsely claiming a 90 percent success rate and a 100 percent money-back guarantee.

Loan Modification Professional Services is accused by Arizona of collecting between $1,500 and $3,500 from eight customers who claim they never received the services they were promised. That lawsuit was filed in Maricopa County Superior Court.

Santoya Financial Company LLC is accused in a lawsuit by Goddard of falsely advertising that its services were endorsed by the U.S. Department of Housing and Urban Development. Santoya allegedly suggested fees were refundable if the modification was unsuccessful because of the endorsement.

Goddard was making the announcements in conjunction with Operation Loan Lies -- an initiative undertaken by the Federal Trade Commission and several states that targeted 200 loan modifications firms. When the initiative was announced on July 15, the FTC indicated federal and state agencies took 189 actions.

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Over in New Jersey, Stephen Pasch, attorney Ejike N. Uzor, New Day Financial Solutions and several related companies were sued in New Jersey Superior Court in Essex County by Attorney General Anne Milgram, who claims the defendants offered worthless guarantees, wrongly advised customers to stop making payments and collected up-front fees of as much as $4,200 while not helping delinquent borrowers.

A second lawsuit filed in Superior Court in Mercer County by Milgram accuses Best Interest Rate Mortgage Co. of violating the Consumer Fraud Act and the New Jersey Debt Adjustment and Credit Counseling Act. Best offered modification services without a state license to conduct debt adjustment activity, while misleading solicitations appear to have been from a government agency. Borrowers were charged "several thousand dollars" up front, though they were promised it would be returned if the modification didn't go through, and were told to stop making payments.

"The defendants also are charged with misleading consumers through false advertising and deceptive solicitations, and engaging in debt adjustment activity without a license," the New Jersey news release said of defendants in both cases. "As with the New Day complaint, the state's lawsuit against Best Interest Rate Mortgage Co. asks the court to order a halt to the defendants' unlawful business practices, seeks restitution for consumers and the imposition of maximum civil penalties."

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California-based U.S. Homeowners Assistance was sued in the Hamilton County Court of Common Pleas by Ohio Attorney General Richard Cordray over allegations it misled borrowers and failed to deliver on promises. It is charged with violations of the Ohio Consumer Sales Practices Act, Telephone Solicitation Sales Act, Debt Adjusters Act and the Telephone Consumer Protection Act.

Customers responding to automated phone calls were charged $1,800, though U.S. Homeowners "fails to deliver and fails to refund consumers' money," according to Ohio. The lawsuit followed a cease-and-desist order issued in May. The judge in the case has reportedly granted a temporary restraining order to prevent the company from continuing its actions while the case is being decided.

California's Attorney General Edmund G. Brown Jr. announced five lawsuits filed against 21 individuals and 14 companies. Brown, who seeks full restitution from the defendants, claims the firms violated a range of California codes including the Business and Professions Code sections 2945.3, 17500 and 17200, Civil Code sections 2945 et seq., 2945.4 and 2945.45, and Penal Code section 487. Other codes allegedly violated included

One of the California lawsuits was against U.S. Homeowners Assistance and company executives Hakimullah "Sean" Sarpas and Zulmai Nazarzai for falsely claiming a 98 percent success rate and implying it was a government agency. None of its customers received loan modifications even though they paid up-front fees of as much as $3,500. The state seeks $7.5 million in civil penalties

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RMR Group Loss Mitigation Group and executives Michael Scott Armendariz , Ruben Curiel and Ricardo Haag are also accused of falsely claiming a 98 percent success rate and money-back guarantee -- taking in fees of $1 million from 500 borrowers. Also named as defendants in the lawsuit -- which seeks $7.5 million in civil penalties -- are Living Water Lending Inc., attorney Arthur Steven Aldridge, the law firm of Shippey & Associates and its principal attorney Karla C. Shippey.

A lawsuit filed against US Foreclosure Relief Corp., executives George Escalante and Cesar Lopez, and legal affiliate Adrian Pomery claims the defendants charged up to $2,800 up front -- earning $4.4 million in one nine-month period, California's statement said.

Another action against Home Relief Services LLC, executives Terence Green Sr. and Stefano Marrero, and attorney Christopher L. Diener his firm the Diener Law Firm alleged the defendants charged up to $4,000 in up-front fees. The firm allegedly promised modifications with 4 percent interest rates and 50 percent principal reductions -- though none of its customers actually received such modifications. California seeks $10 million in civil penalties.

Up the Pacific Coast in Seattle, Washington Attorney General Rob McKenna announced four lawsuits, including one filed against California-based Mason Capital Group over alleged violations of Washington's Consumer Protection Act, Mortgage Broker Practices Act, Distressed Property Conveyance Act and Credit Services Organization Act. The company wasn't authorized to do business in the state, collected up to $3,000 in up-front fees and didn't do anything for its customers.

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G Services Group, which does business as Guardian Services, faced similar allegations in a lawsuit filed by McKenna. The firm allegedly charged $1,500 in up-front fees.

Four Illinois lawsuits filed in Cook County Circuit Court by Attorney General Lisa Madigan alleged the defendants charged up-front modification fees but failed to perform any actual services. Violations of Illinois' Mortgage Rescue Fraud Act are alleged. In addition to a permanent injunction barring the defendants from mortgage rescues, Madigan is asking for each defendant to pay a civil penalty of $50,000 and for additional penalties where the intent to defraud borrowers of impacted senior citizens.

In Kansas, Attorney General Steve Six reported that he filed three lawsuits alleging that Kirkland Young LLC in Florida, ABS Saveco in Georgia and Helping Hands Support Services in California collected from $499 to thousands of dollars for doing nothing.

United Law Group claimed in a July 30 press release that it negotiated a Home Affordable Modification on a $700,000 that brought the monthly payment down to $2,570 from $4,112. The process with servicer Saxon Mortgage Services took nine months.

State of Florida, Office of the Attorney General, Department of Legal Affairs, Plaintiff, vs. FHA AllDay.com Inc., a Florida corporation; Safety Financial Services Inc., a Florida Corporation, Housing Assistance Law Center, PA, a dissolved Florida Corporation; Housing Assistance Now Inc., a dissolved Florida Corporation; Jason Vitulano, individually and as owner, officer and/or director of FHA AllDay.com Inc. and as owner, officer and/or director of Safety Financial Services Inc., Defendants.

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Mod Firms Targeted in 'Operation Loan Lies' - "Reprinted with permission from MortgageDaily.com" / "Copyright 2009 MortgageDaily.com.“ FTC, 23 states take 189 actions against loan modification firms - July 15, 2009 By MortgageDaily.com staff

State and federal officials have launched "'Operation Loan Lies" -- an effort targeting nearly 200 loan modifications firms for a number of alleged illegal practices including promising services they can't deliver, charging more than $5,000 in advance fees and misrepresenting their affiliations with mortgage servicers.

Federal and state agencies took 189 actions today against modification and foreclosure-rescue firms, the Federal Trade Commission announced. The coordinated actions were part of a national law-enforcement effort by 2 federal and 23 state agencies to crack down on loan modification scams.

Dubbed "Operation Loan Lies," the actions targeted firms that allegedly promised to obtain modifications or stop foreclosures -- though they did nothing. Advance fees charged by the firms were equal to one or more mortgage payments. The defendants are also accused of failing to provide promised refunds.Among the actions were four lawsuits file by the FTC, which is asking the court for consumer redress and a permanent ban on the deceptive practices.

The lawsuits were filed against Lucas Law Center, which charged advance fees up to $3,995 and told borrowers to stop making their payments; Apply2Save, where modifications were promised in 30 to 90 days for advance fees up to $995; US Foreclosure Relief, which falsely claimed years of experience; and Loss Mitigation Services, which charged up to $5,500 in advance, misrepresented its relationship with servicers and falsely promised to obtain a modification -- according to the FTC.

In all, the consumer protection agency said it has filed 14 lawsuits mortgage tied to foreclosure rescue and loan modification scams.

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CASES / FDCPA - FORECLOSURE ATTORNEY ACTIONS:

Reginald Warren, Sr. v Countrywide Home Loans, Inc. (USCA 11th Cir.) No. 08-16171
The case of Reginald Warren, Sr. v Countrywide is cited by the foreclosure bar as assurance that the conduct of the foreclosure attorney is not subject to liability under FDCPA – when foreclosing on a home. Since, most court agree that the conduct of foreclosing on a home is not debt collection for purposes of section 1692g, (not 1692f(6) and 1692i(a)) a claim for violation of the FDCPA limited to that conduct would not lie. However, it is important to point out that if a foreclosure attorney acts as a debt collector – in the capacity other than foreclosing on the home, or in direct contact with the borrower with efforts to obtain a workout solution, the foreclosure attorney is probably exposed to liability for his/her conduct as a debt collector, and for any (mis)representations, overshadowing, confusion, etc. caused by his conduct. See Program Documents _D19

Karen L. Jerman v Carlisle, McNellie, etc. In Jerman v Carlisle, the court upheld the FDCPA defense of mistake of law. However, it is important to note that defendants were found to have violated the FDCPA by instructing Jerman that she must dispute the debt in writing, however, the defendants qualified for the FDCPA bona fide error defense (15 U.S.C. Section 1692k(c)) because they had taken reasonable precautions or steps to maintain proper business and educational procedures intended to avoid such legal errors. An unintentional violation with an intentional communication may be covered by the bona fide defense. See Program Documents _D20

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FTC ACTIONS:

FTC, California Attorney General Brown, Missouri Attorney General v. US FORECLOSURE RELIEF CORP., (7/7/09) - Pursuant to the Preliminary Report of Temporary Receiver, US Foreclosure claimed to be *an attorney based firm*. The complaint alleged that although attorneys performing legal services in the course of representing clients may charge clients up-front retainer fees, *the attorney exemption did not apply in this case* – if an attorney is not in fact rendering legal services but is merely acting as a font for non-attorney foreclosure consultants in an attempt to avoid compliance with Civil Code Section 2945.4. The case also alleges violations of B&P Code 17500 for untrue and misleading statements, 17200 for unfair competition and violation so f Missouri law regarding advance fees (Sections 407.935 to 407.943). See Program Documents _D21

The People of the State of California v RMR Group, etc. (July 2009) - Defendant RMR Group is not a law corporation or licensed as a real estate broker or an entity authorized to make loans or extensions of credit. This case was filed by California Attorney General Brown against Defendants for unlawfully charging customers up front fees (ranging in the thousands of dollars) while falsely promising to help them negotiate better mortgage terms from their lenders and to rescue them from foreclosure. Despite taking these exorbitant advance fees, Defendants provide little or no assistance to their customers. As many other foreclosure rescue companies have done, in an attempt to avoid statutory prohibitions on collecting fees before any services have been rendered, Defendants have included one or more attorneys in their scheme. Noting the alarming trend in the number of complaints issued against attorneys involved with foreclosure rescue companies, the State Bar has issued an Ethics Alert cautioning attorneys from lending their names to loan modification companies when non-lawyers purportedly negotiate with the lenders on the customers’ behalf but actually provide little to no services; meanwhile, the non-lawyers also collect fees from the consumers and provide distressed homeowners with reckless and harmful advice on how to deal with their lenders.

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The complaint also alleges CRIMES: (f) Violating Penal Code section 487, by taking money of a value exceeding $400 from consumers by theft, as described in Paragraphs 41, 50, and 51 above;

(g) Violating Penal Code section 532, by knowingly and designedly obtaining consumers' money by false pretenses, as described in Paragraphs 32 and 41 above;

(h) Violating Civil Code section 1632 by negotiating foreclosure consultant contracts primarily in Spanish to Spanish-speaking consumers, but not providing a translation of the contract in that language before requiring the consumer to sign a contract printed in English, as described in Paragraph 44 above;

(i) Violating Business and Professions Code sections 6151 and 6152, by engaging in "running and capping," the practice of non-attorneys obtaining business for an attorney, as described in Paragraph 36 above;

(j) Violating Business and Professions Code section 6155, by Defendants RMR Group, Living Water Lending, Armendariz, Curiel, Haag, and Does 1-100 in directly or indirectly referring potential clients to Defendants Shippey, Aldridge, and Shippey Law Firm without seeking registration as a lawyer referral service by the State Bar, and by Defendants Shippey, Aldridge, and Shippey Law Firm in accepting referrals of such potential clients, as described in Paragraph 36 above;

(k) Violating 18 United States Code section 1014 and California Penal Code section 532a by knowingly submitting false statements regarding their customers' income and expenses in attempt to induce federally insured lenders to agree to modifications of the customers' mortgage loans, as described in Paragraph 43 above; and

(l) Violating Business and Professions Code section 17500, as more particularly alleged in Paragraphs 52 through 54 above. See Program Documents _D22

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THE PEOPLE OF THE STATE OF CALIFORNIA, v. HOME RELIEF SERVICES, LLC, et al

The complaint alleges that the attorney exemption does not apply in this case. The defendants are non attorneys and attorneys. The complaint alleges in part:

DRE ordered Defendant HRS, Defendant Marrero, Defendant Green, and other persons to desist and refrain from continued unlicensed activities related to marketing and soliciting consumers for loan modification services. On February 9, 2009, Defendant Specter, acting as counsel for Defendant HRS, Defendant Marrero, and Defendant Green, informed DRE that Defendant HRS would cease operation on February 27, 2009, and the remainder of Defendant HRS' client files would be forwarded to Defendant Diener Law Firm. Thereafter, Defendants have operated under the names US Loan Mod Processing and Diener Law Firm. Since at least Spring 2008, Defendants have advertised, marketed, offered for sale, and sold purported mortgage loan modification and foreclosure rescue services. As more particularly alleged below, Defendants engaged in a scheme to swindle distressed homeowners by enticing them to engage Defendants to negotiate loan modifications from their respective lenders. Defendants falsely represented both their success rate in negotiating loan modifications for customers and the type of loan modification they could secure for homeowners, including lower, fixed interest rates, principal reductions, lower monthly payments, and forgiveness of arrears. Defendants market their services to homeowners who are in financial distress and in danger of losing their homes to foreclosure. Defendants also solicit consumers through telemarketing and in-home solicitations, and through the use of referrals from brokers and other third parties. Defendants are not currently registered as telephonic sellers in the State of California.

Defendants also tell consumers that their success rate in modifying loans is 90% or 95%. In fact, Defendants are unable to obtain loan modifications for most of their customers. Customers are not given any opportunity to speak with or have any contact with any attorneys affiliated with Defendants about their loans, and neither Defendants Diener and Diener Law Firm nor any other attorneys affiliated with Defendants review customers' financial documents or negotiate with lenders on their behalf. Moreover, Defendants' customers are informed by their lenders that the lenders have not been

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While California's law defining and regulating foreclosure consultants under the Mortgage Foreclosure Consultant Act ("the Act"), as codified in Civil Code section 2945 *et seq*., includes exceptions for attorneys licensed to practice law in California when "render[ing] [foreclosure consultant] service in the course of his or her practice as an attorney at law" (Civil Code, § 2945.1(b)(1)), and while Defendant Diener is an attorney licensed to practice law in California, the exemption does not apply here, nor do any of the exceptions set forth in the Act. Defendant Diener does not perform (or claim to perform) foreclosure consultant services for consumers while also providing them with legal services.

43. Defendants improperly collect fees before completing all services they agree to provide to consumers.
58. Consumers retain Defendants to be their negotiator and advisor during the loan modification process. Defendants then use information provided by their customers to market their real estate services to lenders. Defendants advertised *to their own customers' lenders* that, on average, it would take eight months before lenders could sell their clients' homes. This pitch is not meant to advantage the customer; rather, Defendants mean to highlight their "retail auction" services to lenders, whereby Defendants act as the lenders' agent in a short sale of their customers' homes. Defendants assure the lenders that Defendants could short sell their customers' homes in 45 days or less. By exploiting their trusted position with their customers and their inside information about their customers' financial circumstances, Defendants attempt to use this information for the benefit of themselves and the lenders, and to the extreme detriment of their customers.

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59. Defendants acted as mortgage loan brokers in connection with negotiating home loans for customers, performing services for customers in connection with home loans, and/or engaging in any other conduct requiring real estate licensure and, therefore, owed a fiduciary duty to each customer. That fiduciary duty imposed an obligation (1) to make a full and accurate disclosure of the status of the customer's loan modification application and the material terms of any proposed modification agreement that might affect a borrower's decision to accept the modification; (2) to act always in the utmost good faith toward the customer; (3) to act in accordance with principles of complete loyalty to the customer's best interests and to the exclusion of all others' interests; (4) to avoid taking any positions or making any statements that are in conflict with the customer's best interests; and (5) not to obtain any advantage over the customer. By offering to be the lenders' agent to short sale their customers' homes while purporting to act as their customers' agent in loan modification, Defendants violated their fiduciary duties to their customers.

Business and Professions Code section 17200. Such acts or practices include, but are not limited to, the following:

(a) Failing to perform on their promises, made in exchange for upfront fees ...
(b) Luring customers into paying upfront fees with promises to refund…which were routinely denied…
(c) Deceiving customers into believing that failing to contact their lenders, or evading their lenders' communications, would increase the odds…
(d) Deceiving customers into believing that suspending mortgage payments, and diverting those funds to pay Defendants' upfront fees instead, would increase the odds …
(e) Negotiating with consumers in a language other than English, but requiring consumers to sign contracts printed in English …

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The complaint also alleges CRIMES and FIDUCIARY DUTY VIOLATIONS:

(f) Violating Penal Code section 487, by taking money of a value exceeding $400 from consumers by theft, as described in Paragraphs 46, 57, and 60 above; (g) Violating Penal Code section 532, by knowingly and designedly obtaining consumers' money by false pretenses, as described in Paragraphs 37 and 46 above;

(h) Violating section 17511.3 of the Business and Professions Code by failing to register as a telephonic seller prior to utilizing the telephone to conduct sales of its loan modification services, as described in Paragraphs 34 and 35 above; (i) Violating Business and Professions Code section 17533.6, by employing the use of logos and seals on their documents, which appear to resemble the governmental seal of the United States Department of Housing and Urban Development, as described in Paragraph 33 above; (j) Violating Business and Professions Code sections 6151 and 6152, by engaging in "running and capping," the practice of non-attorneys obtaining business for an attorney, as described in Paragraph 41 above; (k) Violating Business and Professions Code section 6155, by Defendants HRS, Golden State Funding, PRS, Marrero-Davis, Green, Marrero, Burrell Marrero, Specter, Buhler, and Does 1-100 in directly or indirectly referring potential clients to Defendants Diener and Diener Law Firm without seeking registration as a lawyer referral service by the State Bar, and by Defendants Diener and Diener Law Firm in accepting referrals of such potential clients, as described in Paragraph 41 above; (l) Violating 18 United States Code section 1014 and California Penal Code section 532a by knowingly submitting false statements regarding their customers' income and expenses in attempt to induce federally insured lenders to agree to modifications of the customers' mortgage loans, as described in Paragraph 48 above; (m) Violating Civil Code section 1632 by negotiating foreclosure consultant contracts primarily in Spanish to Spanish-speaking consumers, but not providing a translation of the contract in that language before requiring the consumer to sign a contract printed in English, as described in Paragraph 49 above; (n) Violating their fiduciary duty to their customers by offering to be the lenders' agent to short sale the consumers' homes while acting as the customers'

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The complaint alleges:

19. Since at least June 2007 to present, Defendants operated primarily under the name US Homeowners Assistance and USHA. 20. Since at least June 2007, Defendants have advertised, marketed, offered for sale, and sold purported mortgage loan modification and foreclosure rescue services. As more particularly alleged below, Defendants engaged in a scheme to swindle distressed homeowners by enticing them to engage the Defendants to negotiate loan modifications from the homeowners' respective lenders. Defendants falsely represented both their success rate in negotiating loan modifications for customers and the type of loan modification they could secure for homeowners, including lower, fixed interest rates, principal reductions, lower monthly payments, and forgiveness of arrears. Defendants market their services to homeowners who are in financial distress and in danger of losing their homes to foreclosure.

21. Defendant Statewide Financial and Defendant US Homeowners Preservation are not licensed by DRE. None of the Defendants have submitted advance fee agreement applications and none of the Defendants have received the required response from DRE — known as “no objection” — allowing them to charge advance fees to consumers.

36. Defendants also falsely state to consumers that attorneys affiliated with Defendants review customers' financial paperwork and also negotiate with the lenders on their behalf. In reality, however, customers are not given any opportunity to speak with or have any contact with any attorneys affiliated with Defendants about their loans, and no attorneys affiliated with Defendants review customers' financial documents or negotiate with lenders on their behalf. Moreover, Defendants' customers are told by their lenders that the lenders have not been contacted by Defendants or any of Defendants' representatives on the customers' behalf.

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40. Defendants also prepare false financial statements that do not reflect their customers' actual income and expenses and submit the fraudulently modified information to lenders. Defendants counsel their customers that Defendants will determine how much the customers can afford and draft the financial worksheets to submit to the lenders. In doing so, Defendants invariably inflate income amounts or create additional income streams, while also reducing expenses and debts — in some cases flagrantly inventing income and debt streams and amounts — such that the financial worksheet ultimately submitted to the lender reflects the debtor's inability to pay the current loan amount. In some instances, Defendants knowingly submitted false information related to consumers' income and expenses to federally insured lenders without consumers' knowledge and/or permission.

The complaint also alleges crimes:

(f) Violating Penal Code section 487, by taking money of a value exceeding $400 from consumers by theft, as described in Paragraphs 38, 48, and 49 above;

(g) Violating Penal Code section 532, by knowingly and designedly obtaining consumers' money by false pretenses, as described in Paragraphs 32 and 38 above;

(h) Violating 18 United States Code section 1014 and California Penal Code section 532a by knowingly submitting false statements regarding their customers' income and expenses to induce federally insured lenders to agree to modify the customers' mortgage loans, as described in Paragraph 40 above.

See Program Documents _D24

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Credit Repair Firms Targeted by Regulators: FCC, states go after credit repair firms: Oct. 28, 2009 By SAM GARCIA - "Reprinted with permission from MortgageDaily.com" / “Copyright 2009 MortgageDaily.com.“

Federal and state regulators have been on a recent rampage filing lawsuits and taking actions against credit repair firms. The companies -- many located in Florida -- are accused of collecting huge up-front fees and promising services that are not delivered. Meanwhile, the implementation of a new rule will require disclosures about free credit reports.

Earlier this month, the Federal Trade Commission said it is seeking public comment about its proposal to amend the Free Annual File Disclosures Rule, which is also known as the "Free Credit Report Rule." The proposed amendments would implement a new law designed to prevent consumer confusion in free credit report advertisements and would address practices that could hamper a consumer's ability to obtain a free credit report from credit reporting agencies that are already required to provide such under federal law. The FTC is required to issue a rule by Feb. 22, 2010, under the Credit CARD Act of 2009. Offers for free credit reports would need to prominently disclose that the offers are unrelated to federally mandated free credit reports.

On Friday, the FTC announced Operation Clean Sweep, a joint effort with 24 state agencies to crack down on 33 operations that deceptively claim they can remove negative credit information -- even when the negative items are accurately reported. The actions were taken as a result of thousands of complaints from consumers.

"Companies that promise they are able to scrub your credit reports of accurate, negative information for a fee are lying -- plain and simple," Lydia Parnes, director of the FTC's Bureau of Consumer Protection, said in the statement. "Under federal law, accurate, negative information can be reported for up to seven years, and some bankruptcies can be reported for up to 10 years."

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Credit Repair Firms Targeted by Regulators:

The seven firms were accused of violating the FTC Act, the Credit Repair Organizations Act and state laws by making false and misleading claims and by charging advance fees for credit repair services.

Among the companies charged were Florida-based Nationwide Credit Services Inc., which allegedly charged advance fees of between $75 and $150 and total fees of between $300 and $1,000 that were debited monthly from bank accounts. Nationwide allegedly did no work for the customers and denied refund requests. Another Florida firm, Clean Credit Report Services Inc., faced similar accusations but collected $400 in advance fees.

RCA Credit Services LLC, also based in Florida, allegedly promised to raise credit scores above 700 in as little as 30 days and remove all negative credit for a cost of between $500 and $3,000 with a portion paid in advance. But RCA often did nothing. It also violated the CROA by failing to provide a written statement of Consumer Credit File Rights Under State and Federal Law before contracts were signed, by not conspicuously noting in their contracts that consumers have a three-day right of rescission and for failing to provide a written notice-of-cancellation form.

Latrese & Kevin Enterprises Inc., which also operates as Hargrave & Associates Financial Solutions, charged around $250 per person to erase bad credit. The Florida firm is also charged with violating the FTC Act by falsely claiming consumers will receive a credit card with a credit line as high as $10,000 after paying an advance fee of as much as $300.

The Florida firms of ACE Group Inc. -- which also does business as American Credit Experts Inc., The Ace Group Inc., The Ace Group and ACE -- and Legal Credit Repair Center Inc., also known as LCRC, promised 60-day results for advance fees of around $50 plus $59.95 a month. But their method was to repeatedly send dispute requests even after the bureaus have verified that the entries were accurate.

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Credit Repair Firms Targeted by Regulators:

California-based Successful Credit Service Corp., which also does business as Success Credit Services, claimed it had special relationships with creditors, collection companies, credit bureaus and public record providers, according to the agency. Customers were charged advanced fees of between $3,000 and $4,000. Successful agreed to an $8.3 million settlement with the FTC a few weeks ago.

Over in Illinois, Advantage Credit Repair LLC advertised that it didn't charge large up-front fees, though it did require as much as $269 in advance, and promised a refund after 60 days if there were no results, though it rarely gave refunds.

Earlier in the month, Texas-based Lee Harrison Credit Restoration, which also operated as Credit Restoration and Lee Harrison Associates Credit Restoration, agreed to a $2.5 million FTC settlement.

New Jersey's Office of the Attorney General and its Division of Consumer Affairs obtained a final consent judgment against United Credit Adjusters, Bankruptcy Masters Corp., United Counseling Association, Inc., and Credit Bureau Controls Corp. The defendants were ordered to pay $500,000 in civil penalties and $86,918 in reimbursement to the state. In addition, two officers of the companies were ordered to pay $15,022 in restitution to 17 consumers.

All of the defendants were banned from credit-related businesses. The state claims that the defendants charged up-front fees but failed to deliver the promised services, including raising credit scores and removing negative entries.

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Conflicts of Interest - Foreclosure Attorneys

Some Servicers are requiring that the borrower contact the foreclosure attorney directly, and the foreclosure attorney, sale-trustee or 3rd party service are requiring borrower to fill out its forms and submit confidential financial information to it at the same time as the servicer is requiring the borrower to fill out its different forms and submit same to the servicer overburdening the borrower with multiple sets of different financial forms with varying imposed short trigger deadlines; both acting as debt collectors coached as ‘partners’ in seeking a loss mitigation/modification solution for the borrower; conflicts, confusion, overshadowing and FDCPA/FTC issues abound; fundamental fairness has been lost.

Maybe the time has come to acknowledge that the borrower is entitled to his/her attorney of choice, and that the servicer should use a *workout attorney* for negotiating workouts, other than its foreclosure attorney performing the foreclosure, especially if attorney is in direct contact with the borrower (as a debt collector under FDCPA/FTC rules). Conflicts of interests, potential violations of FTC, FDCPA (confusion, overshadowing, etc.) and other laws should be avoiding for the benefit of all parties to the workout process. The plaintiffs bar may see great opportunity to take action against those playing on both sides of the court. The servicer and the borrower should have their own workout attorney representing its respective interests.

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Conflicts of Interest - Foreclosure Attorneys (FA)

Many foreclosure law firms for the lender/servicer also handle mortgage workouts with the borrower. Although it is seemingly natural for the foreclosing attorney to entertain settlement options with the borrower, the borrower is most often not represented by an attorney. The foreclosure attorney has a duty to its client, not the borrower. The borrower is desperate and will rely on the representations of the foreclosing attorney; and as such will have rights against the FA for misrepresentations, potential violations of FTC, FDCPA (confusion, overshadowing, etc.) and other laws.

As the ‘man-in-the-middle’ the FA is inherently burdened with conflicts of interest, and as such is vulnerable to legal and ethical attacks especially from the borrower. Conflicts of interests even the appearance of same should be avoided.

Servicers should implement what this author calls: Servicer Workout Attorneys (SWA) which function separate and distinct from the FA. The borrower should use HUD Counselors and his/her own Borrower Workout Attorney (BWA).

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Section 4- Conflicts of Interest - Foreclosure Attorneys (FA)

Foreclosure Attorney (FA) vs. Borrower or vs. Res	Foreclosure Attorney (FA) Offering Foreclosure Settlement Options
Generally an FA is a Debt Collector; However; it may not be a Debt Collector if only function is foreclosure against res when borrower has no personal (deficiency) liability (bankruptcy; no reaffirmation; lender waived right; etc.) at law.	**FA offering Settlement Options to Consumer (Borrower)** – FA is Debt Collector but per FTC March 19, 2008 Letter Ruling (Exhibit) it is **NOT a Per Se Violation BUT** it may be!
However; FA is Debt Collector if there is potential personal liability to borrower (deficiency, cost, fees, etc.) – this is the common situation for an FA workout offering settlement options (alternatives to foreclosure). **LAW/RULES:** FDCPA - Section 809(a) of 15 U.S.C. 1692g(a) – Debt Collector must send within first 5 days after initial contact with debtor, a written - Validation Notice – with amount of debt, the debtor's RIGHT TO DISPUTE THE AMOUNT OR VALIDITY OF CLAIMED DEBT in WRITING WITHIN 30 DAYS and the debt collectors OBLIGATION TO VERIFY DEBT if DISPUTED. Although Settlement Options may be added to the notice – the communication cannot be UNDERMINE or effectively OBSCURE the consumer protections of section 809(a) or 809(b) where collection activities within the 30 day DISPUTE PERIOD CAN NOT OVERSHADOW or b e INCONSISTENT with the 809(a) DISCLOSURE; or be false, misleading or deceptive (per Section 807), or any other law or rules of ethics, for example the FA may not omit any material fact! Section 807is not limited to the 16 specific listed practices, but would "enable the courts where appropriate, to proscribe other improper conduct which is not specifically addressed." (S. Rep No 95-382 at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1698.	**However;** Per FTC: "determining whether a specific communication is false or misleading **is a fact-based inquiry** that considers all the facts and circumstances surrounding the particular communication at issue." For example: potential liability may also revolve around **whether FA omitted any material fact (or all available workout options)** to an unrepresented Borrower **The FTC Letter Ruling also states**: "However, we stress that a particular communication with settlement option information would be deceptive in violation of Section 807 if it contains a false or misleading representation or omission of material fact…" **HAMP SD 09-01** states servicers shall not proceed with foreclosure until after borrower is evaluated for HAMP. So if the FA is proceeding with foreclosure and at the same time coordinating the HAMP evaluation; the FA is either not following the Treasury SD Guidelines, or is presenting the borrower with conduct contrary to law or confusing or misleading, etc.

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FTC MARCH 19, 2008 LETTER RULING RE FDCPA – FORECLOSURE ATTORNEYS

With respect to a foreclosure attorney acting as a debt collector seeking to discuss settlement workout options with the debtor (borrower), in an FTC advisory opinion, the FTC found that there was no per se violation of Section 809 in the debt collector's initial or subsequent communications with the consumer. However, the FTC also found that this did not prevent a *fact-based finding* that a specific communication violates the FDCPA if it overshadows or inconsistent with the disclosures of the consumer's right to dispute the debt within 30 days.

With respect to a whether it would violate the prohibitions on false, deceptive, or misleading representations made in collection of a debt, the FTC that is was not a *per se* violation but that the FTC would conduct a *fact-based inquiry* to determine whether a specific communication is false or misleading based on all the facts and circumstances concerning the communication.

FTC ADVISORY OPINIONS: The Commission, where appropriate, responds to requests for formal advisory opinions regarding the application or interpretation of the FDCPA. In May 2008, the FTC issued an advisory opinion regarding whether debt collectors in the foreclosure context would violate the Act if they communicate with consumers about possible settlement options that may assist consumers to avoid foreclosure. The FTC's advisory opinion concluded that debt collectors do not commit a *per se* violation of the FDCPA when they provide such information to consumers, provided that the information is truthful and non-misleading.

See Program Documents FTC Advisory Opinion Dated May 19, 2008 D25

Section 4- Ethics, Jail & Challenges Facing the "Business of Mortgage Modifications“

Has Protection of Borrowers Gone Too Far or Not Far Enough?

This year we have also seen abuse of borrowers by unlicensed persons, ‘foreclosure rescue scammers’, “mod companies’, and licensed brokers and attorneys acting on behalf of borrowers. We have also seen a strong, aggressive, and very successful response by the state licensing authorities, including State Bars, State Attorneys General, District Attorneys, and the FTC. We have seen attorneys disbarred, and persons sent to jail. We must now decide if we have gone far enough or have we gone too far? Are we impeding upon the very basic right of borrowers to hire and pay an attorney of his/her choice? Have we already thrown the baby out with the bath water? Borrowers are presently without sufficient attorney representation according to many articles (See Documents Article Time Where Are All The Foreclosure Lawyers?, by Tim Padgett /10/24/09 __D17), pro bono or legal-aid groups, and HUD Counselors. Mortgage and foreclosure workouts are a complex area of the law. Volunteers, law students, and new attorneys may simply not have the knowledge, experience, or tools to effectively represent borrowers at this critical time.

Do We Need More Borrower Attorneys in the Mix?

Melanca Clark, counsel at the Brennan Center, says: "We need structural reforms as badly as we need more [foreclosure defense] lawyers," HUD Counselors, consumer groups and the Florida Task Force on Foreclosure Mediation have acknowledged that borrowers are usually not represented and need a lawyer.

Section 4- Ethics, Jail & Challenges Facing the "Business of Mortgage Modifications“

One More Example Why Borrowers Must Have Effective Representation or His/Her Own Attorney –

Would Servicers Wrongfully Deny Initial HAMP Eligibility?

Servicers would argue they don’t wrongfully deny initial HAMP eligibility and they wouldn’t because its goal is to afford itself and its investors the government program HAMP incentives. However, some Servicers are denying borrowers HAMP initial eligibility (See Program Documents: Rydstrom Article: OCTOBER 8, 2009: A BUSY HAMP DAY IN D.C. New HAMP Supplemental Directive 09-07, The HAMP 500,000 Modification Milestone Announcement, New Servicer Performance Report, COB 9-30-09 Making Home Affordable Remaining Problems & Solutions: __D18).

But why would a Servicer do that? Here are some possible motivating factors:

A. Excessive Back End Debt (DTI) is probable to cause re-default (and that creates greater losses to investors)

B. Back End DTI is not an initial eligibility factor. Only excessive Front End DTI (>31%) is a DTI factor of HAMP eligibility.

C. To Start or Continue the Foreclosure Process (to avoid prolonging the time line to recover the asset in foreclosure)

Section 4- Ethics, Jail & Challenges Facing the "Business of Mortgage Modifications“

One More Example Why Borrowers Must Have Effective Representation or His/Her Own Attorney –

Current Misrepresentations Being Made to Borrower (by the system):

1. Making Home Affordable website represents to the borrower: “MANY LENDERS HAVE MADE A COMMITTMENT TO DELAY FORECLOSURE ON ALL LOANS THAT MEET THE MINIMUM ELIGIBILITY CRITERIA FOR A HOME AFFORDABLE MODIFICATION.” (November 9, 2009)

2. HAMP SD 09-01 states that foreclosures must be postponed until after the HAMP evaluation.

3. Some servicers and FA’s are stating that foreclosure will continue during the evaluation process (in writing) – but on the phone – borrower represents both that he/she is being told to send in the information to be considered for HAMP to postpone foreclosures and that foreclosures will not be postponed (which is against the HAMP rules). Borrowers are scared and confused.

This is reason enough to enhance the safeguards for the borrower. One way to do that is to relax prohibitions on attorneys seeking to represent borrowers. California for example prohibits a borrower’s attorney from charging upfront legal fees for workout services. Although this is a well intended prohibition, which has and will reduce events of borrower abuse, it has the unintended result of stripping the borrower from effective counsel – leaving the (HAMP) system to perpetuate misuse of government programs (HAMP) intended to benefit the borrower by offering ‘alternatives to foreclosure.’ Maybe it’s time to safeguard the borrower and the servicer with its own attorney representative for workouts. If appears that alternative means of supplying attorneys to borrowers will be required, or borrowers will continue to suffer from lack of effective representation.

The Business, Law & Ethics of Mortgage Modifications:

Section 4- Ethics, Jail & Challenges Facing the "Business of Mortgage Modifications“

One More Example Why Borrowers Must Have Effective Representation or His/Her Own Attorney –

UPDATE: California has enacted the nation's first "Civil Gideon" statute (pilot project, AB590 by Assemblyman Mike Feuer, D-Los Angeles; which expands Gideon v. Wainwright), to provide a lawyer to people who cannot afford one in civil cases related to critical basic human needs. Unfortunately this law is not likely to help the unrepresented people in need in California, as it goes into effect July 2011. It’s named the Sargent Shriver Civil Counsel Act, after Schwarzenegger’s father-in-law. Cases intended to be covered include housing-related matters, domestic violence and civil harassment restraining orders, probate conservatorships, guardianships, elder abuse and actions by a parent to obtain sole legal or physical custody of a child. With some 6-13 million foreclosures projected over the next 5 years or more, and with more than 4.3 million Californians now believed to be unrepresented in court proceedings, the question remains:

whether a BLANKET prohibition against ethical attorneys from normal advance fee retainer work in the foreclosure and loss mitigation/ modification fields will solve or exacerbate the unrepresented borrower problem in California (and in the nation). Maybe the Illinois model of capping fees in relation to the work or results would serve society better?

The Business, Law & Ethics of Mortgage Modifications:

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Section V. Ethics in Today's Mortgage Crisis

It is unethical and unlawful to engage in an “Attorney Backed Loan Mod Company” in part because it creates an unlawful practice of law. It is aiding and abetting the unauthorized practice of law. In People v. Sipper (1943) 61 Cal. App. 2d Supp. 844. Lawyers cannot be partners with non-lawyers. Lawyers cannot split legal fees with non-lawyers. Non-lawyers or brokers cannot perform legal tasks, or give legal advice including advising a client as to what documents or agreements are needed in a certain loss mitigation or mortgage workout situation, negotiate with the lender/bank/servicer (without other authority), or give advice regarding the meaning of the legal documents or arrangement. An attorney cannot pay for leads, pay for clients, or pay referral fees, directly or indirectly. Such is capping and running and remains unethical.

The Ohio Supreme Court suspended an attorney for providing token legal services to customers of a high-volume mortgage foreclosure counseling firm that was engaged in the unauthorized practice of law (Cincinnati Bar Ass'n v. Mullaney, Ohio, No. 2008-0412). The court also enjoined another attorney as pro hac vice, and reprimanded another.

The Business, Law & Ethics of Mortgage Modifications:

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The Wrongful Conduct Red Flag Reminder List:

Attorney Backed Loan Mod Company
Attorney Affiliated Loan Mod Company
Attorney Based Loan Mod Company
Accepting Referral or Marketing Fees
Fee-Splitting
Unauthorized Practice of Law
Foreclosure Delay Lawsuits or Motions
Broker's referring clients to lawyers for fees, profit, or gain
Lawyers as partners with non-lawyers
Capping and Running
Misleading Advertising
Contacting a troubled homeowner in person or by telephone referred by a foreclosure consultant or someone else unless the lawyer has a family or prior professional relationship with the homeowner
Failing to perform competently

Signs of Borrower Mortgage Scams:

Demands to Transfer Title
Demands for Upfront Fees
Lease Back Scams
Foreclosure Defense delay tactics, including filing bankruptcy, wrongful motions, etc.
No Face to Face Meetings
Signing in Blank
Unlicensed Persons or Companies

The Business, Law & Ethics of Mortgage Modifications:

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In response to the foreclosure rescue scams the California State Bar issued an ethics alert in February 2, 2009 reminding attorneys of the rules of professional conduct, including in part the following:

A California lawyer may not pay a referral or marketing fee to a foreclosure consultant or other person for referring distressed homeowners to the lawyer.

A California lawyer may not directly or indirectly split any attorney's fees that the lawyer earns from a distressed homeowner client with the foreclosure consultant or any other non-lawyer.

A California lawyer may not aid a foreclosure consultant or anyone else in the unauthorized practice of law. A lawyer may not form a partnership or joint venture with a foreclosure consultant or other non-lawyer if any of the activities of the business would involve providing legal services. A lawyer may not, under the guise of serving as in-house counsel for a foreclosure consultancy business, perform legal services for a distressed homeowner.

A California lawyer may not contact in person or by telephone a distressed homeowner referred to the lawyer by a foreclosure consultant or someone else unless the lawyer has a family or prior professional relationship with the homeowner. Nor may a lawyer direct another to do so on the lawyer's behalf. A lawyer, however, may write to a distressed homeowner who is a prospective client.

A California lawyer may not without good cause file a lawsuit or motions in a lawsuit that are simply intended to delay or impede a foreclosure sale.

A lawyer may not intentionally or recklessly fail to perform legal services with competence.

A lawyer should be wary of accepting fees for little or no work.

The Business, Law & Ethics of Mortgage Modifications:

Section 5 - Ethics in Today's Mortgage Crisis

Unlawful Practice of Law:

ABA Model Rules of Professional Conduct - Law Firms And Associations

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

The Business, Law & Ethics of Mortgage Modifications:

Section 5 - Ethics in Today's Mortgage Crisis

Unlawful Practice of Law:

California Illustrative Professional Rules of Conduct:
Rule 1-300 Unauthorized Practice of Law

(A) A member shall not aid any person or entity in the unauthorized practice of law. (B) A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

In California, Business and Professions Code §6125, and §6126 make it a crime for anyone to practice law without an active license. 6125**.** No person shall practice law in California unless the person is an active member of the State Bar.6126. (a) Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, or otherwise authorized pursuant to statute or court rule to practice law in this state at the time of doing so, is guilty of a misdemeanor punishable by up to one year in a county jail or by a fine of up to one thousand dollars ($1,000), or by both that fine and imprisonment. Upon a second or subsequent conviction, the person shall be confined in a county jail for not less than 90 days, except in an unusual case where the interests of justice would be served by imposition of a lesser sentence or a fine. If the court imposes only a fine or a sentence of less than 90 days for a second or subsequent conviction under this subdivision, the court shall state the reasons for its sentencing choice on the record.

The Business, Law & Ethics of Mortgage Modifications:

Section 5 - Ethics in Today's Mortgage Crisis

ABA Model Rules of Professional Conduct - Law Firms And Associations

Rule 5.4 Professional Independence Of A Lawyer

(a) A lawyer or law firm **shall not share legal fees with a nonlawyer**, except that:
(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.
(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or
(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

The Business, Law & Ethics of Mortgage Modifications:

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California Rule 1-310 Forming a Partnership With a Non-Lawyer

A member shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law.

Rule 1-320 Financial Arrangements With Non-Lawyers – In Pertinent Part

(A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:

(1) An agreement between a member and a law firm, partner, or associate may provide for the payment of money after the member's death to the member's estate or to one or more specified persons over a reasonable period of time; …

(4) A member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California.

(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

The Business, Law & Ethics of Mortgage Modifications:

Section 5 - Ethics in Today's Mortgage Crisis

ABA Model Rules of Professional Conduct

Client-Lawyer Relationship

Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

The Business, Law & Ethics of Mortgage Modifications:

Section 5 - Ethics in Today's Mortgage Crisis

California Rule 3-100 Confidential Information of a Client – in Pertinent Part

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.
(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual. (C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:
(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and (2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

The Business, Law & Ethics of Mortgage Modifications:

Section 5 - Ethics in Today's Mortgage Crisis

ABA Model Rules of Professional Conduct

Client-Lawyer Relationship *Rule 1.1 Competence*

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 3-200 Prohibited Objectives of Employment

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is: (A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

California Rule 3-110 Failing to Act Competently -

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

The Business, Law & Ethics of Mortgage Modifications:

Section 5 - Ethics in Today's Mortgage Crisis

ABA Model Rules of Professional Conduct
Client-Lawyer Relationship
Rule 1.5 Fees
(a) A lawyer shall not make an agreement for, charge, or collect an **unreasonable fee** or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent. (continued)

California Rule 4-200 Fees for Legal Services

(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee. (B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following: (1) The amount of the fee in proportion to the value of the services performed. (2) The relative sophistication of the member and the client. (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly. (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.

(5) The amount involved and the results obtained. (6) The time limitations imposed by the client or by the circumstances. (7) The nature and length of the professional relationship with the client. (8) The experience, reputation, and ability of the member or members performing the services. (9) Whether the fee is fixed or contingent. (10) The time and labor required.

(11) The informed consent of the client to the fee.

(Amended by order of Supreme Court, operative September 14, 1992.)

Rule 3-200 Prohibited Objectives of Employment

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is: (A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

Information About Legal Services

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
(1) pay the reasonable costs of advertisements or communications permitted by this Rule;
(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;
(3) pay for a law practice in accordance with Rule 1.17; and
(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
(i) the reciprocal referral agreement is not exclusive, and
(ii) the client is informed of the existence and nature of the agreement.
(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

California Rule 1-400. Advertising and Solicitation

(A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or

(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or

(4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

(B) For purposes of this rule, a "solicitation" means any communication:

(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and

(2) Which is;

(a) delivered in person or by telephone, or

(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

California Rule 1-400. Advertising and Solicitation

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.

(D) A communication or a solicitation (as defined herein) shall not:

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or

(5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

(6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.

(continued)

California Rule 1-400. Advertising and Solicitation

Standards:

Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:

(1) A "communication" which contains **guarantees, warranties, or predictions** regarding the result of the representation.

(2) A "communication" which contains **testimonials about or endorsements** of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

(3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a **physical, emotional, or mental state** that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.

(4) A "communication" which is transmitted **at the scene of an accident or at or en route to a hospital**, emergency care center, or other health care facility.

(5) A "communication," **except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page**. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof.

(6) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which **states or implies a relationship between any member in private practice** and a government agency or instrumentality or a public or non-profit legal services organization.

California Rule 1-400. Advertising and Solicitation

Standards:

(7) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.

(8) A "communication" which states or implies that a member or law firm is "of counsel" to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.

(9) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.

(10) A "communication" which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.

(11) A "communication" which states or implies that a member is a "certified specialist" unless such communication also states the complete name of the entity which granted the certification as a specialist. (Repealed by order of the Supreme Court, effective June 1, 1997. See rule 1-400(D)(6).)

The Business, Law & Ethics of Mortgage Modifications:
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***California Rule 1-400. Advertising and Solicitation* - Standards:**

(12) A "communication," except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.
(13) A "communication" which contains a dramatization unless such communication contains a disclaimer which states "this is a dramatization" or words of similar import.
(14) A "communication" which states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.
(15) A "communication" which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.
(16) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

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Section 5 - Ethics in Today's Mortgage Crisis

Discussion – End of Section 5

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Litigation Notes:

State of Ohio et al v Carrington Mortgage (Contractual Duties re Unfair & Deceptive Practices)

In July, this became the first case by an Attorney General to sue a loan servicer for unfair and deceptive loan modifications. This case is currently in litigation in Franklin County Court of Common Pleas. As of Sept. 30, Carrington implemented a voluntary 60-day moratorium on home foreclosures

OHIO ATTORNEY GENERAL v AHMSI (Incompetent Loan Servicing; Deceptive Acts)

On November 9, 2009, Ohio Attorney General Richard Cordray filed another lawsuit against a Servicer for poor or unfair mortgage servicing, this time against American Home Mortgage Servicing Inc., a Texas-based company servicing more than 12,000 subprime and prime mortgage loans in Ohio. The lawsuit alleges numerous violations of the Ohio Consumer Sales Practices Act, including but not limited to: incompetent and inadequate customer service, failure to respond to requests for assistance, failure to offer timely or affordable loss mitigation options to borrowers and unfair and deceptive loan modification terms. The suit alleges that defendant's acts were more than negligent, but predatory financial practices. It alleges that AHMSI required loan modification agreements that forced consumers to pay excessive fees, waive their rights, and that the terms of loan modifications were unconscionably one-sided in favor of AHMSI.

UPDATE: On or about 11/6/09 AHMSI filed a lawsuit against the Ohio Attorney General seeking declaratory judgment finding that its servicing practices are compliant with Ohio law.

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Litigation - Servicers and HAMP Guidelines:

UPDATE 11/18/09 - Treasury eliminated written notice of outstanding documentation when notifying borrower of a trial extension. Although this may speed up communication via telephone (if borrowers are available for the call), this type of rule feeds the litigation pipeline because now servicers will say that they told the borrower that a particular document was missing – and the borrower will say that the servicer never informed them of the missing document. The subjective nature of that dispute will in most jurisdictions require a fact finder (jury) to decide who was correct. As a subjective triable issue of fact – summary judgment should be denied the servicer, forcing the servicer to trial. A better approach would be to require the written notification – which would assure the borrower communication process and supply an objective standard defensible in lawsuits.

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Litigation - Servicers and HAMP Guidelines:

UPDATE 11/18/09 - HAMP UPDATE - November 18, 2009
HAMP Update -- Amendment Waiver Issued

Amendment to Trial Period Extension Waiver #20090803 Effective today, the "Temporary HAMP Waiver for Extension of the Trial Period for Borrowers with Trial Period Plan Effective Dates of 9/1/09 or Earlier #20090803" (as amended) is further amended.
Details Servicers sending written notification of a borrower's trial period extension (as outlined in the waiver) are no longer required to include a list of the borrower's missing/outstanding documentation.
With this amendment, servicers now have the option to notify borrowers that documents are outstanding and follow up with them (via phone) to verbally communicate the extension and review the missing/outstanding documents still needed. Servicers should notate their files to reflect the date and time that such communication takes place. Note: written notification of the trial period extension (as well as all other conditions outlined in the original waiver) is still required.
By eliminating the specific loan-level documentation requirements in the mailed notification, servicers should be able to more quickly notify borrowers about their extension.

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Litigation – Potential Challenges

The plaintiffs bar will continue to invoke as many bars to filing and maintaining a foreclosure action as is possible including standing, proof of note, assignments signed and recorded prior to filing the foreclosure suit or maintaining a Notice of Default and or Trustee Foreclosure Sale, as well as new law burdens including the principle of the "Unlawful Discrimination Hurdle" found in the 1937 case of Junkersfeld v. Bank of Manhattan Co:

"This Court further holds that the lender who has brought this proceeding to foreclose the mortgage must demonstrate by a fair preponderance of the evidence that the mortgage was not the product of unlawful discrimination. [Since it is the lender-plaintiff who seeks equitable relief from this Court, the onus is upon the lender to satisfy the requisites of equity and come to this Court with "clean hands." Junkersfeld v. Bank of Manhattan Co., 250 A.D.646 (1st Dept. 1937). This is a threshold action is of no moment."

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Legislation Notes:

Title V - S.A.F.E. Mortgage Licensing Act - Secure and Fair Enforcement for Mortgage Licensing Act of 2008 or S.A.F.E. Mortgage Licensing Act of 2008 – Section 1501 states:

> Encourages the states, through the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators, to establish a Nationwide Mortgage Licensing System and Registry for the residential mortgage industry in order to increase uniformity, reduce regulatory burdens, enhance consumer protection, and reduce fraud.

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Legislation & Regulation Notes:

Red Flags Rule Delayed - FTC delays enforcement until June 2010

The Federal Trade Commission announced Friday that enforcement of the rule has been delayed until June 1, 2010. From April, to August, then November 2009, and now to June 2010. What is going on?

Red Flags Rule – Will require firms that handle personal data "to develop and implement written identity theft prevention programs to help identify, detect, and respond to patterns, practices or specific activities -- known as 'red flags' -- that could indicate identity theft."

***FTC Business Alert* - Federal Trade Commission Bureau of Consumer Protection Division of Consumer & Business Education - New 'Red Flag' Requirements for Financial Institutions and Creditors Will Help Fight Identity Theft -** Identity thieves use people's personally identifying information to open new accounts and misuse existing accounts, creating havoc for consumers and businesses. Financial institutions and creditors soon will be required to implement a program to detect, prevent, and mitigate instances of identity theft.

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Red Flags Rule Delayed - FTC delays enforcement until June 2010

The Federal Trade Commission (FTC), the federal bank regulatory agencies, and the National Credit Union Administration (NCUA) have issued regulations (the Red Flags Rules) requiring financial institutions and creditors to develop and implement written identity theft prevention programs, as part of the Fair and Accurate Credit Transactions (FACT) Act of 2003. The programs must be in place by November 1, 2008, and must provide for the identification, detection, and response to patterns, practices, or specific activities — known as “red flags” — that could indicate identity theft.

Who must comply With the Red Flags Rules? The Red Flags Rules apply to “financial institutions” and “creditors” with “covered accounts.” Under the Rules, a **financial institution** is defined as a state or national bank, a state or federal savings and loan association, a mutual savings bank, a state or federal credit union, or any other entity that holds a “transaction account” belonging to a consumer. Most of these institutions are regulated by the Federal bank regulatory agencies and the NCUA. Financial institutions under the FTC’s jurisdiction include statechartered credit unions and certain other entities that hold consumer transaction accounts.

NOTE: Loan Brokers are included!

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A transaction account is a deposit or other account from which the owner makes payments or transfers. Transaction accounts include checking accounts, negotiable order of withdrawal accounts, savings deposits subject to automatic transfers, and share draft accounts.

A creditor is any entity that regularly extends, renews, or continues credit; any entity that regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who is involved in the decision to extend, renew, or continue credit. Accepting credit cards as a form of payment does not in and of itself make an entity a creditor. Creditors include finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies. Where non-profit and government entities defer payment for goods or services, they, too, are to be considered creditors. Most creditors, except for those regulated by the Federal bank regulatory agencies and the NCUA, come under the jurisdiction of the FTC.

A covered account is an account used mostly for personal, family, or household purposes, and that involves multiple payments or transactions. Covered accounts include credit card accounts, mortgage loans, automobile loans, margin accounts, cell phone accounts, utility accounts, checking accounts, and savings accounts. A covered account is also an account for which there is a foreseeable risk of identity theft – for example, small business or sole proprietorship accounts.

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Complying With The Red Flags Rules

Under the Red Flags Rules, financial institutions and creditors must develop a written program that identifies and detects the relevant warning signs — or "red flags" — of identity theft. These may include, for example, unusual account activity, fraud alerts on a consumer report, or attempted use of suspicious account application documents. The program must also describe appropriate responses that would prevent and mitigate the crime and detail a plan to update the program. The program must be managed by the Board of Directors or senior employees of the financial institution or creditor, include appropriate staff training, and provide for oversight of any service providers.

How Flexible Are The Red Flags Rules?

The Red Flags Rules provide all financial institutions and creditors the opportunity to design and implement a program that is appropriate to their size and complexity, as well as the nature of their operations. Guidelines issued by the FTC, the federal banking agencies, and the NCUA (ftc.gov/opa/2007/10/redflag.shtm) should be helpful in assisting covered entities in designing their programs. A supplement to the Guidelines identifies 26 possible red flags. These red flags are not a checklist, but rather, are examples that financial institutions and creditors may want to use as a starting point. They fall into five categories:

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Five Red Flag Categories:

- alerts, notifications, or warnings from a consumer reporting agency;
- suspicious documents;
- suspicious personally identifying information, such as a suspicious address;
- unusual use of — or suspicious activity relating to — a covered account; and
- notices from customers, victims of identity theft, law enforcement authorities, or other businesses about possible identity theft in connection with covered accounts.

More detailed compliance guidance on the Red Flags Rules will be forthcoming. For questions about compliance with the Rules, you may contact **RedFlags@ftc.gov** .

THIS IS THE END OF THE PRESENTATION

SPEAKER BIOS & CONTACTS TO FOLLOW:

The Business, Law & Ethics of Mortgage Modifications: Learn How to Legally Navigate in the New Mortgage Resolution Climate

Speakers

Presented by:

RICHARD IVAR RYDSTROM is a recognized national authority on the legal, strategic, and best practices issues affecting policy, business, accounting, mediation or litigation in the residential and commercial mortgage and secondary markets. Mr. Rydstrom was chosen by Chairman Charles Rangel to submit a neutral analysis of the economic and mortgage crisis that was then about to unfold. The 110th Congress, House Ways & Means Committee published Mr. Rydstrom's statement in hearings held by Chairman Charles Rangel on, "The State of the Economy and Challenges Facing the Middle Class, Homeownership & Retirement." He is also the author of one of the first public outreach booklets dealing with mortgage and tax workout solutions, and its 2009-2010 edition titled, 'The 13 Homeowner Solutions to Default & Foreclosure." Mr. Rydstrom is a practicing member of the State Bar of California. He is the creator of numerous solutions to the mortgage and debt crisis facing the nation and the co-founder and chairman of the Coalition for Mortgage Industry Solutions out of DC (CMIS). He is a frequent and nationally known keynote speaker and guest panelist concerning the problems and solutions for the mortgage and secondary market crisis. Mr. Rydstrom was directly involved in redrafts of the HAMP Servicer Guidelines as a member of the Servicers Working Group (AFN, MBA, Hope Now, and Financial Services Roundtable) and directly with Treasury. He has created solutions for all participants, to the mortgage or debt transaction, including the borrower, the court, and the industry. Mr. Rydstrom has created solutions for financing or debt workouts and its related decisioning and processing. He earned his J.D. degree in law, his B.S. degree in public accounting, and his LL.M. degree in taxation.

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Speakers

Presented by:

CYNTHIA A. NIERER is the directing partner of the Closing and Eviction Departments of Rosicki, Rosicki & Associates, P.C. Ms. Nierer has been with the firm since 1995, and is a graduate of St. John's University School of Law. She received her undergraduate degree from St. John's University. Ms. Nierer is active in the Muscular Dystrophy Association, the “Make a Wish” Foundation of Greater New York, the New York City Rescue Mission, and Girls and Boys Town. Professionally, she is a board member and education chair of REOMAC (a professional real estate organization), and a member of NRBA (National REO Broker Association), REOConnection and the Queens County Women's Bar Association.

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Speakers

Presented by:

ANDREW J. SHERMAN is a partner in the Washington, D.C. office of Jones Day, with more than 2,400 attorneys worldwide. Mr. Sherman is a recognized international authority on the legal and strategic issues affecting small and growing companies. He is an adjunct professor in the Masters of Business Administration (MBA) program at the University of Maryland and Georgetown University, where he has taught courses on business growth, capital formation and entrepreneurship for more than twenty years. Mr. Sherman is the author of seventeen books on the legal and strategic aspects of business growth and capital formation. His eighteenth book, *Road Rules Be the Truck Not the Squirrel*, is an inspirational book which was published in the fall of 2008.

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Presented by the Coalition for Mortgage Industry Solutions

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