

Model State Law on Mortgage Servicing: An Outline*

January 2011

I. Pre-foreclosure requirements

- a. Loan modification offer that produces a *positive Net Present Value outcome* for the investor is offered to homeowners facing hardship on loans securing a primary residence. Modification should be based on a waterfall that prioritizes principal reduction and accounts for second liens. Modifications also should be sustainable by providing modifications for the life of the loan and by providing access to additional modifications where homeowner faces additional unexpected hardship. Process includes:
 - i. *Transparency* (re: application, NPV analysis, denial reasons). The Net Present Value analysis should be available to the public, and inputs and outputs should be provided to the homeowner. Denials should also include documentation of relevant investor contracts and correspondence regarding any related limitations and efforts to modify.
 - ii. *Notice* (re: stages of process and information regarding investor pooling and servicing agreements if investor reason for denial, as described above).
 - iii. *Time deadlines* for review and response.
 - iv. Establishment of *administrative appeals/escalation process* for wrongful denials and other modification problems.
- b. *End dual track*. Loan modification review should occur before foreclosure has been initiated and before any foreclosure-related fees have been incurred. Where application comes after foreclosure has started, both judicial and nonjudicial foreclosures should be frozen during review. This includes cancellation of scheduled sales.
- c. *Defense to foreclosure*. Failure to comply with (a) and (b) should serve as defense to judicial or nonjudicial foreclosure. Private right of action should be available to set aside the sale.
- d. *Mediation program with standards*. Violation of such rules should be a UDAP violation.
- e. *Default notices* should be signed under penalty of perjury. Foreclosure notices should be personally served.
- f. *Limit on foreclosure related fees*. Only one property valuation and one title search fee per foreclosure. Fees must be reasonable.

II. Application of Payments

- a. Clarify Dodd-Frank language *on crediting of payments* to ensure it does what it seems to do. Apply payment on date received.
- b. Payments should be *applied first to principal and interest*.

III. Application of Fees

- a. No fee for *home preservation services* if payment submitted within 60 previous days.
- b. All fees shall be *reasonably related to the cost* of providing the service. Fees include: late, bpo and other valuation fees, home inspection, force-placed insurance, attorney fees, title insurance, auction, legal, property preservation fees, and real estate owned sales fees.
- c. No fee shall be charged unless *advance notice* of such type of fee and circumstances has been provided.
- d. Mandatory disclosure on *monthly and annual statement* of fees incurred.
- e. Mandatory disclosure of fees that may be charged should be provided at *transfer of servicing and annually* (this is related to paragraph c. above and these matters are discussed further under Transfer of Servicing). This notice should not include wide ranges that are meaningless but meaningful notice re: amount and circumstances. (Information shall be provided with reasonable specificity.)
- f. *Late fees* should be regulated as they are under the Uniform Consumer Credit Code. That is, being late once should result in one late fee. This is a different concern from pyramiding.

IV. Force-Placed Insurance

- a. Require continuation of *existing insurance policy* or reestablishment of such policy if there is a lapse in payment.
- b. Premium payment information should be provided to creditor/servicer at closing, and updated if the policy changes, *whether or not there is an escrow*, so that existing policy can be continued in the event of a lapse.
- c. *Advance the fee* to pay the premium if there is no escrow. Collect the premiums in increments of 1/12 per month or through creation of escrow account under RESPA.
- d. Require *disclosure* up front of this process.

V. Transfer of Servicing and Periodic Statements (note these rules connect with rules for fees, above)

- a. Transfer notices should *advise if homeowner is current* and whether any unpaid fees.
- b. If a fee is not in the “goodbye letter” and “hello letter” to homeowner as having been incurred, it has been *waived*.

- c. Where notice indicates homeowner is not current or fees/late charges have been incurred, servicer must provide to homeowner a *payment history* at transfer of servicing.
- d. At transfer of servicing, servicer must indicate to homeowner whether a *loan modification is pending*.
- e. Require RESPA “safe harbor,” which provides that *payments mistakenly sent* to wrong servicer during 60-day period after servicing transfer date cannot be treated as late.
- f. If a *fee is not on monthly statement* as having been incurred, it has been waived.
- g. Monthly statements should advise of *dispute procedure*.
- h. Periodic statements, servicing transfer notices, and escrow account statements should be *provided notwithstanding delinquency* or default status (if homeowner is 30 days or more in arrears or in default, s/he still gets a periodic statement).
- i. New servicers must *accept and continue processing prior loan modification requests*; new servicers must honor loan modification agreements entered into by prior servicers.

VI. Dispute Procedures

- a. Homeowner has the *right to dispute* any act or omission of the servicer, and any failure to comply with servicing law.
- b. *Response time* periods as under Dodd-Frank.
- c. *No foreclosure while dispute is occurring* where the issue is a basis for foreclosure.

VII. Remedies (modification of RESPA)

- a. *Personal service*, notice of rights delivered via personal service, maximum bond plus waiver of bond requirements.
- b. *Statutory damages*, \$2,000 per violation and \$1 million class action cap, without pattern or practice requirement.
- c. *Actual damages including emotional distress*. No detrimental reliance required.
- d. *Defense to foreclosure* with damages as described above. Right of recoupment available as well.
- e. *Attorneys’ fees*.
- f. *Three year* statute of limitations plus recoupment.
- g. Clarify all actions of servicer are *binding upon owner of note and mortgage* in all actions and proceedings between owner and homeowner.
- h. Any violation of this Act constitutes a *UDAP violation* under state law.