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NATIONAL CONSUMER LAW CENTER®
Advancing Fairness in the Marketplace for All

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Massachusetts Division of Banks
1000 Washington St., 10th Floor
Boston, MA 02118-6400

Re: An Act Preventing Unnecessary and Unlawful Foreclosures

The National Consumer Law Center ("NCLC") on behalf of its low-income clients submits the following comments addressing the recently enacted "Act Preventing Unlawful and Unnecessary Foreclosures" (H4323). In particular, we wish to urge the Division of Banking to adopt an interpretation of the Act's key term, the "affordable monthly payment," in a manner that will truly further the legislation's objectives. It is critically important that this term be defined clearly and objectively. If every foreclosing lender is given discretion to apply a vague or non-transparent standard for an affordable payment, enforcement of the new law in any meaningful way will impossible. Such an outcome would be unfortunate because clear formulas for applying this term have already been in widespread use around the country for many years. It is not necessary to re-invent the wheel.

As defined in H4323, "affordable monthly payment" means "monthly payments on a mortgage loan, which, taking into account the borrower's current circumstances, including verifiable income, debts, assets and obligations enable a borrower to make the payments." (H4323 lines 91-93)

The term "affordable monthly payment" plays a crucial role in the Act's provisions defining the steps a lender must take in good faith before proceeding with foreclosure of a "certain loan." The required pre-foreclosure steps mandate that before foreclosing the lender conduct, i*nter alia*, a two-part review. (H4323 lines 150-156). First, the lender must document that it considered an assessment of the borrower's ability to make the "affordable monthly payment." Second the lender must conduct a net present value test. The net present value test takes the "affordable monthly payment" and calculates whether a loan modification based on that affordable monthly payment is likely to produce more income in the long run for investors in the loan than the likely return these investors will receive from an immediate foreclosure. Given this framework, the manner in which the "affordable monthly payment" is calculated plays the paramount role. This calculation directs both the goal of the modification review and becomes the foundation of the net present value test.

Several widely recognized tools and formula for structuring a loan modification to arrive at an affordable monthly payment have been in use for several years. The Division should require adherence to these established formula to the greatest extent possible. These standards are objective, easy to use, and widely available to the industry and the public. They lend themselves to documentary review, which is critical if the provisions of this legislation are to be implemented effectively.

Approximately ninety percent of loans in foreclosure today are subject to the rules of the Home Affordable Modification (HAMP) program. The guidelines for HAMP are published in a Handbook available at https://www.hmpadmin.com/portal/index.jsp. All major mortgage servicers have signed contracts with Fannie Mae agreeing to review all residential mortgages they service for HAMP eligibility before proceeding with foreclosures. HAMP requires consideration of each borrower facing foreclosure for an affordable payment, and the HAMP Handbook defines how that affordable payment is to be determined. The HAMP "waterfall" sets out the detailed progression for the calculation of an affordable payment. (HAMP Handbook 4.0 Ch. II sec. 6.3, p. 92). The standard HAMP waterfall rules, applicable to GSE and non-GSE loans, state that "servicers must apply the modification steps enumerated below in the stated order of succession until the borrower's monthly mortgage payment ratio is reduced to 31 percent (target monthly mortgage payment ratio)."

The affordability target under HAMP is a payment for principal, interest, taxes and insurance that does not exceed 31% of the household's gross income. All relevant terms for this analysis are defined in the Handbook. The waterfall progresses by capitalization of arrears, interest rate reduction, term extension, and principal forbearance to reach this target level for the borrower. HAMP then requires a net present value test to determine whether a loan modification set at this affordable monthly level will likely be more beneficial to investors in the mortgage debt than proceeding with foreclosure. Massachusetts H4323 mandates a similar affordable payment determination and net present value test. (lines 150-156). There is no valid reason to deviate from the general structure of the HAMP program rules. This is particularly true when the vast majority of loans being foreclosed today are being foreclosed by servicers who are required to follow the HAMP rules in every foreclosure they undertake. The HAMP loan modification calculator is now publically available on-line and any industry representative, counselor, or homeowner may run the calculation for a particular loan. *See* www.checkmynpv.com.

The HAMP Handbook (Ch. II sec. 4.1.1. p. 78) also outlines a standard for treatment of the borrower's assets under the hardship eligibility criterion. To meet the standard, the borrower must have minimal cash reserves, defined as less than three times the borrower's monthly mortgage payment, and the definition specifically excludes retirement accounts.

The Federal Housing Administration (FHA) requires that servicers of FHA-insured loans consider borrowers for modifications as well. FHA has its own HAMP program (FHA-HAMP) that uses a 31% payment-to-income ratio to arrive at an affordable payment through defined steps. FHA also has its own rules for non-HAMP modifications of FHA-insured loans outside of its HAMP program. FHA rules for affordability apply to those modifications as well. There are thus objective and well-defined affordability standards built into the existing mandatory guidelines for loss mitigation for all defaulted FHA loans. For these loans, the Divisions should require adherence to the FHA rules.

Finally, for loans not subject to HAMP or to a federally insured loan program with its own affordability guidelines, such as FHA, the Division should require that all other foreclosing lenders evaluate the borrower for a loan modification under the FDIC's loan modification guidelines. These guidelines are public and objective. The calculator may be found at:

http://www.fdic.gov/consumers/loans/prevention/NPVCalculator.html

The FDIC loan modification calculator, like the HAMP guidelines, uses the 31% payment-to-income ratio as the affordability target. It is not necessary to create new or more elaborate alternatives when this calculator is already available and accessible. An affordability calculation, which is an industry standard, is built into this FDIC calculation tool just as it is in the HAMP "Checkmy NPV" on-line tool.

It should be noted that in several jurisdictions around the country, including Maine, Vermont, the District of Columbia, and Washington State, statutory mediation programs require use of one or more of these affordable payment and net present value calculation tools in the context of mediations. Since they represent industry standards and servicers are already required to use these tools for most loans in foreclosure, it would be inappropriate to mandate a less rigorous requirement for the reviews required under the new Massachusetts law.

Sincerely yours,

Geoff Walsh
Staff Attorney