Consumer Affairs and Business Regulation

Industry Letter on Mortgage Loan Modifications

MORTGAGE LOAN MODIFICATIONS

April 27, 2009

To All Interested Parties:

Over the course of this year, the Division of Banks (the "Division") and numerous state and federal government agencies have continuously encouraged lenders and servicers to work with homeowners who are having difficulty making mortgage payments or are in default to pursue to the greatest extent possible a modification of an existing loan which makes financial sense to both the homeowner and the lender or servicer.

The Division has been presented with the question as to whether a licensed mortgage broker may receive compensation or gain from a borrower or other source in connection with providing assistance or a referral to obtain a loan modification on behalf of a borrower. In addition, a question has been raised as to whether providing services to assist a borrower in obtaining such a loan modification would trigger the mortgage broker and/or mortgage originator licensing requirements under chapter 255E and 255F of the General Laws.

A significant provision within Chapter 206 of the Acts of 2007 ("Chapter 206" or the "Act") was to provide homeowners a 90 day Right To Cure from a default on a mortgage loan, the intention of which was to provide opportunity for lenders and borrowers to engage in meaningful efforts to reach agreement on a loan modification. On June 25, 2008, the Division issued Opinion 08-016 pertaining to loan modifications and protecting lien status. As set out in said Opinion, SECTION 11 of the Act amended subsection (d) of section 35A of Chapter 244 of the General Laws to state that "To cure a default prior to acceleration under this section, a mortgagor shall not be required to pay any charge, fee, or penalty attributable to the exercise of the right to cure a default." The only exceptions provided for are for late fees and per diem interest.

It is clear that the intent of the Legislature in enacting this prohibition on charges and fees to be imposed on the mortgagor was in recognition of the overriding purpose of the Act to provide assistance and foreclosure relief to homeowners facing foreclosure and not to unnecessarily increase the amount of outstanding debt as a result of a borrower's efforts during the 90 day right to cure period. Given this prohibition, it would not be permissible for a broker or any third party to impose a loan modification fee or any other charge, fee or penalty attributable to the exercise of the right to cure a default.

As discussed in Opinion 08-016, the Division is also cognizant of the provision within the Act amending chapter 183, section 63A of the General Laws permitting a mortgagee or the mortgage holder to amend the terms of a mortgage and to charge a specified fee for a revision of terms. While the charging of such fees may be permissible for mortgage holders, the Division continues to encourage loan modification approaches that are motivated by avoiding the full costs related to foreclosures and not driven by the fees that may be charged. Chapter 183, section 63A permits fees to be charged only by the mortgage holder.

The Division has actively encouraged lenders to engage homeowners to effect loan modification and debt restructuring plans that result in more affordable monthly payments for borrowers. To that end, various workshops have been held across the Commonwealth to increase the pace of loan modifications and prevent foreclosures. Lenders have been encouraged to adhere to a set of "best practices" when working with borrowers in financial trouble. With the cooperation of lenders and servicers, the Division has actively secured numerous voluntary stays for homeowners facing imminent foreclosure. In addition, non-profit organizations have provided invaluable assistance to borrowers facing financial hardships at minimal or no cost to these borrowers.

The Attorney General's regulation at 940 CMR 25.00, prohibiting foreclosure-rescue schemes, also prohibits the acceptance of any advance fees in connection with offering, arranging or providing foreclosure-related services defined as'"any goods or services related to, or promising assistance in connection with: (a) avoiding or delaying actual or anticipated foreclosure proceedings concerning residential property; or (b) curing or otherwise addressing a default or failure to timely pay, with respect to a residential mortgage loan obligation". This regulation also prohibits advertising a foreclosure-related service without disclosing, clearly and conspicuously the precise goods and/or services offered and to be provided by the promoter and a precise description of how the promoter will assist persons in avoiding or delaying foreclosure or curing or otherwise addressing a default or failure to timely pay a residential mortgage loan obligation.

In recognition of the Legislature's recent enactment of Chapter 206 and the intent of these recent initiatives to

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Division of Banks

encourage loan modifications which benefit borrowers, it is the Division's position that it is not permissible for a mortgage broker to charge a borrower a fee or to receive compensation or gain in any form, from any source, for negotiating or assisting in the process of obtaining a loan modification from a mortgagee or mortgage holder on behalf of a borrower. Moreover, such activity engaged in by an unlicensed person will trigger the mortgage broker and/or mortgage loan originator licensing requirements of Chapters 255E and 255F of the General Laws in the event modification efforts result in the making of a new (refinanced) loan secured by the subject property.

Please be advised that such modification activity may also trigger state law regulatory requirements applicable to financial advisors and may be construed as credit counseling services or activities of a credit services organization subject to various provisions of state law.

If you have any questions regarding this letter, please feel free to contact Cynthia Begin, Senior Deputy Commissioner, at (617) 956-1500 ext. 523.

Very truly yours,

Steven L. Antonakes
Commissioner of Banks