

# **MEDIATION PROGRAM FOR DISTRESSED HOMEOWNERS: NON-JUDICIAL FORECLOSURE STATES**

PREAMBLE: (Include a strong statement of the purpose of the bill, the state's authority to enact foreclosure moratoria and other remedies which are more draconian than this bill, the state's authority to enact this bill, and data about the nature and extent of the foreclosure crisis in this state).

APPLICABILITY: To mortgage loans secured by residential property that is the principal dwelling of the homeowner.

## PROVISIONS:

1. The servicer (or holder or attorney representing the first lienholder servicer or holder, hereafter "servicer") shall send notice of default to the homeowner(s) and file a copy with [the named agency] (hereafter "agency").<sup>1</sup> The notice shall include the total amount due and an itemization of the arrearage and shall inform the borrower/mortgagor of the existence of local (within 100 miles) housing counseling agencies, lawyer referral services, and legal services offices where the homeowner may obtain assistance or representation. The notice shall list the names and addresses of any subordinate mortgage lienholders.
2. No additional fees<sup>2</sup> can accrue and no further action to initiate foreclosure can occur during the mediation period (this period runs from the date the notice of default is filed to the date of the filing of the mediator's report, as described below). The servicer may not take any action to commence the foreclosure process related to the mortgage loan in question until after the date on which the mediator files the mediation report as provided for below. If the servicer fails to file a notice of default with the agency, a subsequent foreclosure sale is void.
3. Upon receipt of the notice of default, the agency must send a notice of mediation to the homeowner(s), mediator, servicer, and any subordinate mortgage lienholder, specifying the initial session to occur within XX (30) days of the filing of the notice of default. The notice shall contain the date, time, and location of the mediation. The notice shall

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<sup>1</sup> The suggested default office is the local land records office.

<sup>2</sup> "Fees" does not include interest lawfully accruing under the terms of the loan note or reasonable fees to preserve the real estate securing the loan, if permitted in the loan note or mortgage.

also instruct the homeowner to bring specific information and supporting documentation (relevant to the current version of the FDIC Loan Modification Program (“FDIC Box” available at <http://www.fdic.gov/consumers/loans/loanmod/loanmodguide.html>)). The notice also instructs the servicer and subordinate lienholders to bring proof of authority to bind the holder, proof of the identity of the current holder (including copies of all relevant powers of attorney, copies of each and every endorsement of the loan note or in the case of bearer paper, copies of all documents showing the date of the transfer of possession, and copies of each assignments of the mortgage/deed of trust), the loan documents (including the loan note and riders, Truth in Lending statement, and final settlement statement), and specific information and supporting documentation (relevant to the FDIC Box). The mediator shall be trained on the current version of the FDIC Box and accompanying materials, loss mitigation options generally, and on issues related to standing and capacity to sign any resulting agreements. The mediator shall bring a laptop with the FDIC Excel spreadsheet, the FDIC Handbook, and capability to print out the prescribed documents. The attending parties shall negotiate in good faith.

4. If the homeowner is represented by an attorney, the homeowner or the servicer or subordinate lienholder can offer any reasonable proposal or can ask the mediator to first use the FDIC Box. If the FDIC Box is used and a loan modification is “feasible”<sup>3</sup> and agreed to by the parties, the mediator shall obtain the signature of the homeowner and servicer on the agreement (so long as the servicer has apparent authority to sign), file a copy with the local land records office (not the agency noted above, if different), and provide copies to each attendee. The loan modification agreement shall be in substantially the same form as the FDIC model document and include an affirmation separately signed by the servicer that the servicer has the legal authority to bind the holder, the name, address, and telephone number of the current holder, and the date the first payment is due and the amount. The servicer shall promptly change its internal records to reflect the agreement terms. If an agreement is reached without the use of the FDIC Box, the homeowner’s representative shall promptly submit the agreement in written form to the mediator and the servicer. The servicer shall promptly sign and return the agreement to the homeowner, file it with the local land records office (not the agency, if different), and change its internal records to reflect the agreement terms. The mediator also must promptly file a report of the outcome of the mediation with the agency (if the agency is

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<sup>3</sup> “Feasible” means that the FDIC Box shows that the net present value (NPV) test is met using the terms most favorable to the homeowner that meet the NPV test.

not the land records office) on a prescribed form and provide a copy to each attendee. If no agreement is reached, the mediator must promptly file a report of the outcome with the agency on a prescribed form and provide a copy to each attendee.

5. If the homeowner is not represented by an attorney, the mediator must use the FDIC Box. The mediator inputs all relevant information into the FDIC Box. If a loan modification is feasible using the FDIC Box and the parties, other than any subordinate lienholder, agree, the mediator shall obtain the signature of the homeowner and servicer on the agreement (so long as the servicer has apparent authority to sign), file a copy with the agency, and provide copies to each attendee. The loan modification agreement shall be in substantially the same form as the FDIC model document and include an affirmation separately signed by the servicer that the servicer has the legal authority to bind the holder, the name, address, and phone number of the current holder, and date on which the first payment is due and the amount. The servicer and holder shall promptly change its internal records to reflect the agreement terms. If a loan modification is not feasible after exhausting all possibilities using the FDIC Box, the mediation is terminated. Regardless of the outcome, the mediator must promptly file a report of the outcome of the mediation with the local land records and the agency on a prescribed form and provide a copy to each attendee. If the parties agree to a loan modification, the mediator may also discuss a loan workout with a subordinate lienholder that is reasonable and feasible taking into consideration whether the fair market value of the property in relation to the amount owed on the first mortgage leaves any equity in the property to which the subordinate lien attaches.

6. Upon the filing of the mediator's report, the agency shall promptly inform the homeowner that s/he has the right to opt for a judicial foreclosure in the event that the homeowner attended the mediation and it was unsuccessful. The notice shall include a filing deadline and a form to return to effectuate this right. If the homeowner timely returns the form, the agency shall send a copy to the servicer. If the servicer and/or holder has grounds to foreclose after an unsuccessful mediation and the homeowner opted for a judicial foreclosure, the servicer/holder must proceed through the judicial process.<sup>4</sup>

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<sup>4</sup> If the case then proceeds via a judicial foreclosure, the foreclosure complaint must itemize the following: the principal balance, earned interest and method of calculation, and all fees and costs that the plaintiff alleges are due. The complaint must also allege with specificity the standing and capacity of the plaintiff to file the suit, the name, address, and telephone number of the holder/owner of the loan note and mortgage, and attach copies of all relevant powers of attorney, a copy of the loan note and any riders, a copy of each and every endorsement of the loan note or in the case of bearer paper, a copy of all documents showing the date of the transfer of possession, a copy of each

7. The cost of mediation for up to a total of three hours (including any postponements, at an hourly rate of XXX [\$125] shall be split evenly between the parties to the mediation. However, the servicer must advance the entire amount by bringing a check drawn from the servicer's business account (or the servicer attorney's account) payable to the mediator. The homeowner's portion may be included in the principal balance of any agreed upon loan modification, paid separately in cash, or otherwise paid through the terms of the agreement. If the parties do not reach an agreement, the homeowner's portion of the mediator's fee may be included in the homeowner's account if allowed by law and permitted by the loan note and/or deed of trust/mortgage or paid separately in cash. The cost of the parties to attend the mediation shall be borne by the party who incurred the cost.

8. There shall be a privilege against disclosure of a mediation communication as in section 4 and related sections of the Uniform Mediation Act (UMA).<sup>5</sup> Section 7 of the UMA restricting the ability of the mediator to report regarding the mediation is super ceded to a limited extent by provisions in this outline. Any documents generated by the parties or the mediator and that are required to be filed with any agency under these provisions shall contain only the last four digits of the homeowner's SSN and account number. The mediator shall provide the homeowner and the servicer shall receive copies of the FDIC spreadsheet if the program approves a loan modification, whether or not the parties agree to the loan modification. The mediator shall retain the FDIC spreadsheet in electronic form for XXX months/years and shall not release it unless in response to a subpoena issued by any court of competent jurisdiction.<sup>6</sup>

9. The state shall set standards for the quality of the persons seeking to be mediators under this program and shall provide training to all persons selected to serve as mediators, including training on loss

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assignment of the mortgage/deed of trust, and a copy of the Truth in Lending statement, and a copy of the final settlement statement. The complaint shall list the names and addresses of any subordinate mortgage lienholders. A notice accompanying the complaint also shall inform the borrower of the existence of local (within 100 miles) housing counseling agencies, lawyer referral services, and legal services offices where the homeowner may obtain assistance or representation.

<sup>5</sup> The Uniform Mediation Act is available at (<http://www.nccusl.org/Update/ActSearchResults.aspx>. Section 2 defines a "mediation communication." Section 5 addresses waivers and preclusion of the privilege; Section 6 creates exceptions to the privilege.

<sup>6</sup> This exception to the privilege of confidentiality is intended to supplement but not eliminate exceptions listed in Section 6 of the UMA.

mitigations programs and the FDIC loan modification program in effect at the mediator is approved to serve.

10. The agency may enact regulations to carry out these provisions.

11. The state legislature shall appropriate sufficient funding to cover the cost of the agency operations and staff to accept the required filings, schedule mediations, and train mediators. Suggested sources include imposing filing fees to record these additional documents, raising current filing fees, and/or imposing a surcharge on deed transfers or loan closing activities.