

January 15, 2010

Jane M. Azia
Director of Non-Depository Institutions and Consumer Protection
State of New York Banking Department
One State Street Plaza
New York, NY 10004

Re: Servicing Mortgage Loans: Business Conduct Rules
Part 419 of the Superintendent's Regulations

Dear Ms. Azia:

The undersigned New York State non-profit organizations strongly support the proposed Business Conduct Rules for Servicing Mortgage Loans, prescribed by the Superintendent of Banking. If approved, these regulations would make New York State a national leader in foreclosure prevention and consumer protection.

Foreclosure filings and delinquencies in New York State continue to skyrocket -- with 239,279 past due mortgages at the end of the 3rd quarter of 2009, and more than 238,000 foreclosure filings projected state-wide through the end of 2012¹ -- and mortgage servicing abuses continue to be a major impediment to foreclosure prevention. The absence of standards, rules, or oversight has allowed servicing abuses to go unchecked. We commend the Superintendent for using his authority under the Banking Law to help ensure that mortgage loans are serviced in a fair and reasonable manner.

Servicing abuses are pervasive in the industry. The misapplication of even one payment can have a snowball effect leading to improper default, foreclosure, credit problems, and other harms. Common servicing abuses experienced by borrowers and advocates throughout the State have included lack of response and lengthy waiting periods; pyramiding of late fees and the assessment of other excessive and unwarranted fees; failure to timely post payments; misrepresentation of amounts owed; arbitrary denial of modifications; and the offering of unaffordable forbearance agreements with high up front payments required.

Mortgage servicers contract with lenders, not borrowers. Because servicers lack a contractual relationship with borrowers, and because borrowers are already "locked in" to the relationship, market forces do not provide any incentive for servicers to provide adequate customer service, or to deal with borrowers in a fair or scrupulous manner. The securitization structure has provided servicers a particular disincentive to work with borrowers and seek sustainable loan modifications. It costs servicers money to complete a loan modification (as cited in *Inside B & C Lending*), while servicers receive fees for foreclosures. The servicers' business model, and cash cow, is to charge as many fees to borrowers as they can get away with. Servicers have therefore resisted modifications and pushed foreclosures, even where modification would be in the best interest of investors.

¹ Center for Responsible Lending, [The Cost of Bad Lending in New York](http://www.responsiblelending.org/mortgage-lending/tools-resources/factsheets/new-york.html) (updated January 2010), available at <http://www.responsiblelending.org/mortgage-lending/tools-resources/factsheets/new-york.html>.

Although the federal Home Affordable Modification Program (HAMP) was designed to address these issues, the program is off to a slow and disappointing start, due in large part to the difficulty that servicers have had in moving away from a culture of fee-gouging and aggressive foreclosure. The proposed regulations are a step in the right direction in addressing this colossal market failure.

The regulations will help ensure that servicers deal with borrowers fairly and reasonably

We strongly support the servicer duty of fair dealing, as detailed in Section 419.2 of the proposed regulations. As stated above, servicers have little financial incentive to deal with borrowers fairly and reasonably, or to provide good customer service. The duty of fair dealing will help to reduce the number of delinquencies caused by abusive or negligent servicing practices; increase the number of modifications; and in general ensure that servicing practices do not needlessly harm borrowers.

Section 419.4 of the proposed regulations, which provides that servicers “shall have procedures and systems in place to respond to and resolve borrower inquiries and complaints in a prompt and appropriate manner,” will improve servicer accountability by allowing borrowers to access much-needed information about their account, and by providing for an escalation process when a servicer is not responsive.

Section 419.7, particularly the provision requiring servicers promptly to provide a payment history to borrowers upon request, is critical given the industry-wide lack of transparency regarding application of payments, and the widespread misrepresentation of the amounts owed. This provision could be strengthened, however, by requiring that the payment history must be provided by the servicer in a format that is understandable by the average borrower – in the rare instances when payment histories are provided by servicers, they are generally in a form that is unintelligible, even by experienced attorneys.

The rules will protect borrowers from being charged excessive and unreasonable fees

We strongly support Sections 419.6, 419.9, and 419.10, governing the crediting of payments and the charging of excessive fees. In the absence of regulation, servicers have routinely misapplied payments; failed to timely post payments; engaged in the “pyramiding” of late fees; and, more generally, charged excessive and unwarranted fees in the regular course of their business. These practices regularly spiral out of control and push borrowers into default and foreclosure. Given the economic stress in New York, the loss of income due to unemployment and underemployment, and the rash of abusive mortgage products like Payment Option Adjustable Rate Mortgages that have flooded the State, these unconscionable servicing abuses must be curbed.

The proposed rules will help curb fee-gouging by requiring that fees must be reasonable and related to services rendered or costs incurred and by prohibiting fees that are not allowed by contract. The rules are also consistent with the standards established in the Federal Trade Commission settlement with the large subprime specialty servicer Fairbanks Capital

Corporation.² Further, the provision at section 419.10(c) will prohibit the common practice of “pyramiding” late fees, or charging borrowers multiple late fees for a single missed payment.

Importantly, these fee-curbing provisions will help reduce the profitability of foreclosure for servicers who routinely charge bogus fees to homeowners in foreclosure, such as multiple broker price opinions. The enormous fees that can be generated during the foreclosure process act as a tremendous disincentive to engage in serious loss mitigation efforts. Since servicers decide whether to modify, the fact that a modification rather than foreclosure would be in the interest of investors is irrelevant. Consequently, even when a workable solution is possible that makes sense for the New York homeowner and the investor as a whole, the servicer still has a perverse incentive to keep generating fees, end the modification process, and continue towards foreclosure. After a foreclosure sale, servicers are first in line to be paid off, so recoup all of the fees that they have charged in the process.

Attorneys fees have been a particular problem³. Attorneys fees are the single most costly foreclosure expense a borrower in foreclosure faces, and borrower advocates have seen enormous fee-padding around the State. Excessive attorneys fees make it more difficult for borrowers to enter into affordable loan modifications, as those fees are either capitalized into the new loan principal, or required to be paid in an up-front payment. The rules relating to attorneys fees should be strengthened to ensure that borrowers are not gouged by excessive and unreasonable attorneys fees⁴: We recommend the following addition to Section 419:

§ 419.10 Fees

- (d) Attorneys Fees. (1) In addition to the limitations set forth in (b), a borrower shall not be liable for attorney fees in connection with a foreclosure action in excess of “reasonable and customary fees” as set forth in the HUD Schedule of Allowable Attorneys Fees, Mortgagee Letter 2005-30. (2) In the event a foreclosure action is terminated prior to the final foreclosure sale, a borrower shall only be liable for attorneys fees for actual work performed at the time of termination of the action.

The regulations regarding loss mitigation will help ensure that all options are exhausted and that foreclosure is a last resort

Clear and effective rules pertaining to loss mitigation are essential to ensure that borrowers have a meaningful opportunity to resolve delinquencies and avoid foreclosure. We strongly support

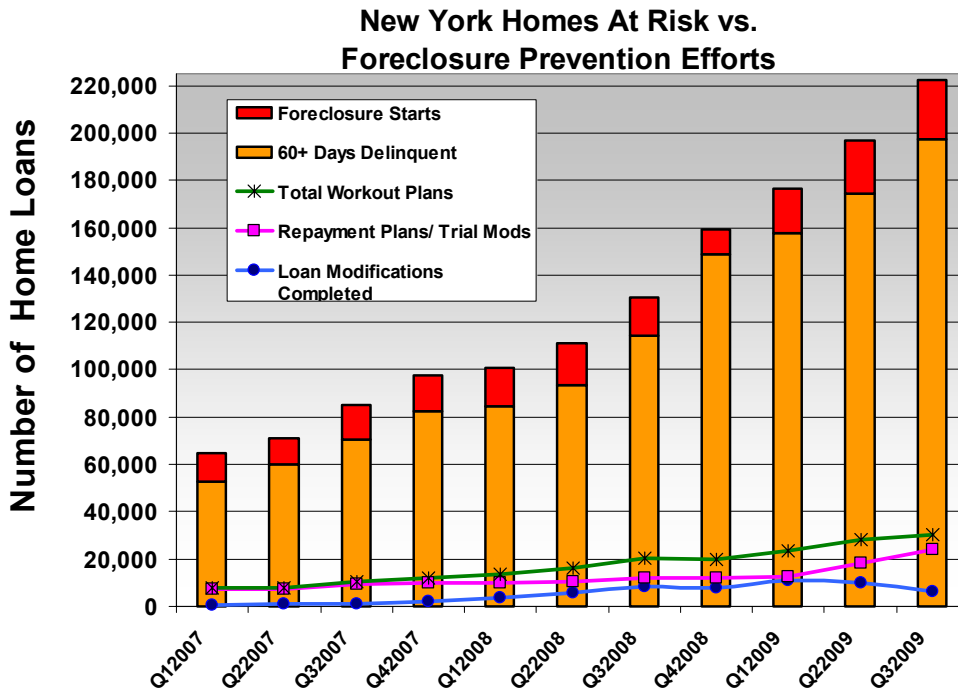
² The FTC settlement with Fairbanks Capital Corporation strongly affirms the Department’s proposed rule on servicing-related fees. See FTC’s Modified Stipulated Final Judgment and Order at <http://www.ftc.gov/os/caselist/0323014.shtm>. The Order decrees, in part, that all servicing-related fees must be “for services actually rendered... expressly permitted by law... not prohibited by the loan instruments; [and] reasonable.”

³ See National Consumer Law Center Foreclosure Manual at 6.4.4.3, for a discussion of cases and legal claims regarding unreasonable attorneys fees.

⁴ The FTC settlement with Fairbanks Capital Corporation also supports explicit efforts to curb attorney fees related to foreclosure and servicing activities. See FTC’s Modified Stipulated Final Judgment and Order at <http://www.ftc.gov/os/caselist/0323014.shtm>. “Defendants are hereby permanently restrained and enjoined, in connection with the servicing of any loan, from assessing and/or collecting attorneys’ fees [unless]... the fees are necessary to process a foreclosure sale of the property or are otherwise permitted fees [that is, for services actually rendered, bona fide and reasonable] and... a law firm has in fact charged Defendants for the services... [Fairbanks] ha[s] documented that the fees comply with the requirements of this Modified Order.”

the provisions of Section 419.11 governing residential mortgage loan delinquencies and loss mitigation efforts, but suggest a few changes to better clarify servicer obligations and provide greater transparency regarding the loss mitigation process, as detailed below.

The reference to “usual and customary industry standards” in § 419.11(a) clouds and may undermine the clear requirement that servicers make reasonable and good faith efforts to avoid foreclosure. Needless to say, current industry standards are an unacceptable measure of appropriate servicer conduct—put simply, delinquent borrowers and foreclosure starts continue to outpace modifications. *See chart below.*⁵ The reference to industry standards is not a proper,



fair, or reasonable benchmark for an industry that has performed at a very low standard in all respects, while causing great harm to the public.

The provisions on loss mitigation can be strengthened in several other areas. Section 419.11(b) should be amended to state that “servicers *shall* [rather than *should*] consider a loan modification as an alternative to foreclosure...” Requiring servicers to at least consider a loan modification is in line with FHA standards, and with the requirement to “make reasonable and good faith efforts to engage in appropriate loss mitigation options.”

Section 419.11(b) should also be amended so that servicers shall consider a borrower for a loan modification as an alternative to foreclosure when there is an impending increase in the borrower’s monthly payment due to a rate increase, and the borrower is at risk of imminent default because the new payment will be unaffordable. This is in line with the Treasury Department’s guidelines under HAMP, and will help to address the huge volume of rate re-sets that New Yorkers are facing, particularly on Payment Option Adjustable Rate Mortgages.

⁵ Center for Responsible Lending analysis.

The rules should be further amended to provide a clearer loan modification standard for non-HAMP servicers. Use of the FDIC's "Loan Mod in a Box" standard by non-HAMP servicers will reduce foreclosures by ensuring transparency, clarity, and consistency when determining whether a modification is in the best interest of investors. Use of this standard is already strongly encouraged for state banks by the FDIC, and will help to create a level of uniformity between HAMP and non-HAMP servicers. Section 419.11(b) should thus provide that servicers who are not participating in HAMP should use "the calculations, assumptions, and forms that are established by the Federal Deposit Insurance Corporation and published in the Federal Deposit Insurance Corporation Loan Modification Program Guide" when determining whether the net present value of a modification is greater than the net present value of a foreclosure.

We strongly support the provision in § 419.11(c) that borrowers receive written acknowledgement of their request for a loss mitigation option. However, borrowers also should be provided with basic information about the entities with the authority to make decisions regarding loss mitigation, including the "investor". The written acknowledgment thus should include "The name, address, telephone number, and other contact information for persons having full authority to modify the borrower's loan, including but not limited to the mortgagee, the servicer, and any entity with the authority to approve or deny a loan modification or other loss mitigation option."

We strongly support § 419.11(d), requiring servicers to provide borrowers with a written notice of a loss mitigation determination within 45 days of receiving all documentation. The mandated time frame will help address the all-too-common problem of servicers taking months on end to make a loss mitigation determination, which often forces borrowers into foreclosure, raises the amount of fees, and greatly reduces the borrower's chances of obtaining a loan modification. However, servicers often misplace documentation sent by borrowers, so the regulations should also require servicers to set up systems that track borrower documentation received. Such a provision will ensure that the loss mitigation process will not be delayed due to lost documentation.

The provisions regarding the denial letter should require that the written notice "must state *with specificity* the reasons for the determination", so that borrowers are better informed of the specific reason for denial (§ 419.11(d)). For example, where a HAMP modification is denied based on "investor guidelines", the denial letter should state the name of the investor and the guideline which prevents the modification. In addition, the denial letter should contain contact information for a representative at the servicer who can provide the borrower with more specific information regarding the denial. Finally, the denial notice should contain information about the Banking Department complaint process, for use by a borrower who believes that she has been wrongfully denied.

We strongly support § 419.11(d), prohibiting servicers from requiring homeowners to waive legal claims and defenses as a condition of a loan modification. For years, servicers have used their unequal bargaining power to force borrowers to waive valuable defenses to foreclosure, often in exchange for unsustainable repayment or forbearance agreements. If borrowers subsequently went into foreclosure, they had no defense to the loss of their home, even where they had been targeted for a predatory loan. Most homeowners entering modification agreements will not have the opportunity to have their agreement reviewed by a lawyer. This provision will restore some equity to the bargaining process, by ensuring that servicers do not

force homeowners to bargain away legal defenses. The provision is also in line with federal standards under HAMP, which also prohibit servicers from requiring borrowers to waive legal claims as a condition of a loan modification.

Finally, the rules should ensure that servicers of FHA loans comply with all FHA loss mitigation rules in good faith. We thus recommend that § 419.3 be amended to add “...the U.S. Department of Housing and Urban Development regulations for administration of FHA-insured loans (including HUD Handbook 4330.1 and Mortgagee Letter 2009-23), as well as Veteran’s Administration guidelines for VA loans.” Also, § 419.11(b) should be amended to state: “...Servicers that are participating in HAMP shall offer loan modifications in compliance with HAMP guidelines and directives (including Mortgagee Letter 2009-23 pertaining to FHA loans).”

Foreclosure activity should be stayed during the pendency of the loss mitigation process

A provision should be added to § 419.11 to require servicers to stay foreclosure activity during the pendency of the loss mitigation process. Servicers typically proceed with a foreclosure action, even while they are actively working with a borrower on loss mitigation. Borrowers are often blindsided by a foreclosure filing while they are working with the servicer on a resolution, and attorneys fees and other unnecessary fees accrue, making it more difficult for a borrower to ultimately get a loan modification. A requirement that servicers hold foreclosure actions during the pendency of loss mitigation will increase the number of loan modifications, and induce servicers to complete the loss mitigation process in a timely manner.

The North Carolina Commissioner of Banks has proposed a rule which would provide that “no mortgage servicer shall initiate or further a foreclosure proceeding or impose a charge incident to a foreclosure proceeding during the pendency of a loss mitigation request.” The New York Superintendent of Banking should follow suit. At the very least, the rules should contain a provision stating that “in the event that foreclosure may continue simultaneously with the loss mitigation efforts, it should be clearly and conspicuously communicated to the homeowner.”

The reporting requirements will increase accountability

We strongly support the quarterly and annual reporting requirements, as they will significantly increase servicer transparency and accountability. The provision that requires the reporting of the number and type of REO properties held also should require that the address and zip code of the properties be provided, to give communities around the State a clearer picture of REO ownership and assist communities with neighborhood stabilization strategies. Section 419.13(b)(3) should require that servicers maintain a record of communications and correspondence with “the holder of the mortgage or person acting on the holder’s behalf, including the servicer, master servicer, trustee, or investor.”

Conclusion

Finally, we strongly support the servicer prohibitions contained in § 419.14. These prohibitions will help to hold servicers accountable for abusive servicing practices, and will provide some balance to the servicer-borrower relationship. *These prohibitions will only be effective, however, if accompanied by strong enforcement by the Banking Department.*

Thank you for the opportunity to provide comments on the proposed Business Conduct Rules for Mortgage Loan Servicers. As non-profit groups providing direct services to New Yorkers, we have witnessed the extent to which problems and abuses in the servicing industry have led to default and foreclosure for so many New York homeowners. We commend the Superintendent for proposing sensible business conduct rules for the mortgage servicing industry, and strongly support their final approval.

If you have any questions, please feel free to contact Josh Zinner of NEDAP at 212-680-5100, Meghan Faux of South Brooklyn Legal Services at 718-246-3276, or Kirsten Keefe of Empire Justice Center at 518-462-6831.

Sincerely,

AARP
Better Neighborhoods, Inc.
CHANGER
Chhaya Community Development Corporation
Cypress Hills Community Development Corporation
Empire Justice Center
Fair Housing Council of Central New York
Legal Aid Society
Legal Services – NYC
Legal Services for the Elderly in Queens
Legal Services of the Hudson Valley
Long Island Housing Services
Margert Community Corporation
Nassau-Suffolk Law Services
NEDAP
Neighbors Helping Neighbors
NYPIRG
Pratt Area Community Council
Queens Legal Services
South Brooklyn Legal Services
St. John's University Elder Law Clinic
Staten Island Legal Services
Troy Rehabilitation and Improvement Program (TRIP)
University Neighborhood Housing Program
Western New York Law Center
