

**Helping Homeowners Harmed by Foreclosures:  
Ensuring Accountability and Transparency in Foreclosure Reviews**

Written Testimony  
of

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also on behalf of

Community Legal Services of Philadelphia, Connecticut Fair Housing Center, Consumer Action, Consumers Union, Empire State Justice Center, Financial Protection Law Center, Housing and Economic Rights Advocates, Legal Aid Center of Southern Nevada, Inc., Michigan Foreclosure Task Force, National Association of Consumer Advocates, National Council of La Raza, National Community Reinvestment Coalition, National Fair Housing Alliance, National People's Action, Neighborhood Economic Development Advocacy Project, North Carolina Justice Center

Before the United States Senate Subcommittee on  
Housing, Transportation, and Community Development of the  
United States Senate Committee on  
Banking, Housing, & Urban Affairs

Dec. 13, 2011

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## I. Introduction

Chairman Menendez, Ranking Member DeMint, and members of the Subcommittee, thank you for inviting me to testify today regarding the mortgage servicing consent orders being implemented by the federal bank agencies.

I testify here today on behalf of the National Consumer Law Center's low-income clients. On a daily basis, NCLC<sup>1</sup> provides legal and technical assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country.

I also testify here today on behalf of Community Legal Services of Philadelphia, the Connecticut Fair Housing Center, Consumer Action, Consumers Union, the Empire Justice Center, the Financial Protection Law Center, the Housing and Economic Rights Advocates, the Legal Aid Center of Southern Nevada, Inc., the Michigan Foreclosure Task Force, the National Association of Consumer Advocates, the National Council of La Raza, the National Community Reinvestment Coalition, National Fair Housing Alliance, National People's Action, the Neighborhood Economic Development Advocacy Project, and the North Carolina Justice Center.

I have worked as an attorney in the area of sustainable mortgage lending for almost fifteen years. I have spent the last eight at NCLC providing technical assistance, training, and policy

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<sup>1</sup> The **National Consumer Law Center, Inc.** (NCLC) is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of eighteen practice treatises and annual supplements on consumer credit laws, including *Truth In Lending* (6th ed. 2007) and *Cost of Credit: Regulation, Preemption, and Industry Abuses* (3d ed. 2005) and *Foreclosures* (2d ed. 2007), as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low-income people, conducted training for thousands of legal services and private attorneys on the law and litigation strategies to deal predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. This testimony was written by Alys Cohen, Staff Attorney, and Diane E. Thompson, Of Counsel. Information on the other organizations on whose behalf this testimony is submitted may be found in Appendix A.

guidance to attorneys, housing counselors, policymakers, and others. In my role at NCLC, I have focused primarily on mortgage lending and servicing, and have spent the last several years following and advocating for mortgage servicing regulation. I have followed closely regulatory developments in mortgage servicing, including the April consent orders and the November roll out of the foreclosure reviews.

In the face of a foreclosure crisis of unprecedented proportions, the regulatory response has been staggeringly inadequate. The consent orders and foreclosure reviews leave unaddressed egregious violations of law by the servicers and fail to provide any meaningful redress for wronged homeowners. The current process is opaque, leaves too much control in the hands of the servicers—the firms that created the mess in the first place—and threatens to strip further rights from homeowners. Given the numerous shortcomings in the process and the potential that homeowners will be injured by the current implementation of the consent orders, we recommend that the Consumer Financial Protection Bureau take over the process of implementing the orders.<sup>2</sup> The CFPB is in a better position to balance the needs of financial institutions with those of homeowners facing foreclosure. The banking agencies have established a process that repeatedly favors banks over homeowners. That process cannot be permitted to continue.

The foreclosure crisis, the worst this nation has ever known, is not even half over.<sup>3</sup>

Homeowners, neighborhoods, and cities across the country face the economic and emotional toll

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<sup>2</sup> This action was brought as a safety and soundness enforcement action by the OCC, not under its UDAP jurisdiction. While these unfair and deceptive practices are certainly not conducive to safety and soundness, in this case the root conduct under scrutiny is clearly the unfair practices, and the OCC's failure to invoke that jurisdiction in this context can only be seen as an effort to protect the large banks from the supervisory oversight of the CFPB.

<sup>3</sup> Debbie Gruenstein Bocian, et al., Ctr for Responsible Lending, *Lost Ground, 2011* (Nov. 2011), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf> (finding at least 2.7 million mortgages loans originated between 2004 and 2008 ended in foreclosure , with almost 4 million more home

occasioned by soaring rates of vacant and abandoned properties. This widespread pain is not evenly distributed: communities of color face disproportionately high rates of foreclosure and ensuing vacancies.<sup>4</sup> Frustration and anger on the ground have been growing, as demonstrated by the December 6<sup>th</sup> Occupy movement's day of action focused on defending foreclosure-related evictions.<sup>5</sup>

Government intervention in this crisis has been narrow and mostly unsuccessful. While the Home Affordable Modification Program (HAMP) established the beginnings of a framework for appropriate and sustainable loan modifications, only a fraction of eligible homeowners have obtained access to this program, largely due to unaddressed servicer noncompliance.<sup>6</sup> Half of the government funding for the Emergency Homeowners Loan Program (EHLPP), the program to aid unemployed homeowners, has been returned to the Treasury unused,<sup>7</sup> and the refinancing program, HARP, leaves out homeowners who are in default—the ones who need assistance the most—while also excluding those homeowners, mostly seniors, who have managed to maintain equity in their homes. Nearly five years into the crisis we still have no plan for principal reductions for the over one in four, or nearly 15 million, households that are underwater.<sup>8</sup> Only now is the Federal Housing

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loans originated during the same period are at serious risk; estimating that the crisis will continue for another five to ten years).

<sup>4</sup> Bocian, *supra* 3 (while most of those who have lost their homes are white, African-American and Latino borrowers have been disproportionately affected. Approximately one fourth of these borrowers have lost their home to foreclosure or are seriously delinquent, while this figure is just under 12 percent for white borrowers). Across the country, low- and moderate-income neighborhoods and neighborhoods with high concentrations of minorities have been hit especially hard.

<sup>5</sup> Justin Elliot, *Occupy's Next Frontier: Foreclosed Homes*, Salon.com, Nov. 30, 2011.

<sup>6</sup> Paul Kiel, *Secret Docs Show Foreclosure Watchdog Doesn't Bark or Bite*, Pro Publica, Oct. 4, 2011 (noting that fewer than 800,000 have received loan modifications, fewer than 1 in 4 who have applied, and detailing rampant noncompliance by GMAC that has gone mostly unaddressed by the Treasury Department), *available at* <http://www.propublica.org/article/secret-docs-on-foreclosure-watchdog/single>.

<sup>7</sup> Cara Buckley, *U.S. Mortgage-Aid Program Is Shutting Down, With Up to \$500 Million Unspent*, N.Y. Times, Sept. 29, 2011 at A20.

<sup>8</sup> Jill Simmons, *Home Values Flat in the Third Quarter on Slow Road to Housing Market Bottom* Zillow Blog (Nov. 7, 2011), <http://www.zillow.com/blog/2011-11-07/home-values-flat-in-third-quarter-on-slow-road-to-housing-market-bottom/>.

Finance Agency considering a proposal to allow no-interest periods in Chapter 13 bankruptcy payment plans, which would provide principal reductions for some homeowners in bankruptcy. This plan, if adopted, will make a substantial difference to many homeowners, but cannot on its own help enough of them. The FHFA's servicing alignment initiative (SAI) in many ways is a step back from the standards established under HAMP. Although the FHFA's SAI establishes a better process for reviewing homeowners for modifications prior to initiation of foreclosure, it establishes stiff penalties for slowing the foreclosure once it has started, even where a homeowner has requested a loan modification.<sup>9</sup> The SAI's new standard loan modification is more expensive and less sustainable than HAMP modifications and perpetuates practices from the unsustainable lending that caused the crisis in the first place.<sup>10</sup> Although efforts continue by the state Attorneys General to hold the big servicers accountable,<sup>11</sup> any ultimate results at the state level are necessarily of limited reach. Nationwide enforcement and mortgage servicing standards are essential to stopping the onslaught of unnecessary foreclosures.<sup>12</sup>

The latest submission in the list of ineffective and potentially harmful responses to the foreclosure crisis is the joint OCC and FRB action against the nation's major mortgage servicers. The orders themselves are vague and weak, and the foreclosure review—the centerpiece of the

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According to the U.S. Census 2009 American Housing Survey, Mortgage Characteristics, Table 3-15, available at <http://www.census.gov/housing/ahs/data/ahs2009.html>, there are approximately 50,300,000 owner-occupied properties with mortgages on them; 28.6% of 50,300,000 is 14,385,800.

<sup>9</sup> See Fannie Mae SVC-2011-08R (Sept. 2, 2011); Freddie Mac Guide Bulletins 2011-11 (Implementation Requirements), 2011-16 (Standard Modification, *see also* Guide Chapter B65, Workout Options), 2011-17 (Post Referral Solicitation Requirements), & 2011-19 (Update).

<sup>10</sup> For example, the current modification interest rate is 5%, Fannie Mae, Announcement SVC-2011-08R at 28 (Sept. 2, 2011), although the current Freddie Mac primary mortgage market survey rate is 4%. See [www.freddiemac.com](http://www.freddiemac.com). Similarly, the front-end DTI may reach 55%, Fannie Mae, Announcement SVC-2011-08R at 27 (Sept. 2, 2011), far in excess of the 31% front-end DTI that has supported HAMP loan modifications with low redefault rates.

<sup>11</sup> Gretchen Morgenson, N.Y. Times, *Massachusetts Sues Five Major Banks over Foreclosure Practices*, Dec. 2, 2011 at B1.

<sup>12</sup> While certain minor improvements to mortgage servicing were included in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010), the key factors driving servicers to prioritize foreclosures over modification have not been addressed in any forum.

actions and the tool geared to homeowner remedies—is unlikely to prevent or reverse wrongful foreclosures or to provide sustainable solutions going forward. The lack of transparency and input into the process undermines public confidence as well as outcomes. To the extent homeowners do participate in the process, there remains the possibility that servicers will use the process to strip homeowners of their legal rights. The orders and the foreclosure reviews provide, at best, little more than window dressing for business as usual, even though business as usual has left us in the worst foreclosure crisis in our nation’s history and the worst economic crisis since the Great Depression.

The orders do not remove the need for national servicing standards. The standards adopted by the OCC and FRB permit the servicers wide discretion in creating their own servicing standards to suit their own purposes. These standards, moreover, apply only to a select group of servicers, lack significant enforcement or oversight mechanisms, and, outside of a narrow time window, provide no relief for homeowners injured by violations. In their blessing of dual track, the orders represent a step backwards from existing standards under HAMP and the FHFA SAI, and the lack of transparency shelters servicers in their abuse of homeowners.

The stakes are high, especially in light of the disgraceful history of servicer noncompliance, even with specific and explicit rules. Servicers do not believe that the rules that apply to everyone else apply to them. This lawless attitude, supported by financial incentives and too often tolerated by regulators, is the root cause of the wrongful foreclosure of countless American families. Whether servicers’ errors are the result of intentional wrongdoing or mere incompetence, the result is the same: homeowners, investors, and the communities we all live in suffer, while servicers continue to profit. This process encourages the servicers to perpetuate abuses unchecked while hiding behind a

fig leaf of reform and accountability. It is time to transfer oversight of all consumer protection actions involving servicers to the CFPB, as Congress intended in enacting the Dodd-Frank Act.

## **II. The Mortgage Servicing Consent Orders Are Vague and Weak, Setting the Stage for an Inadequate Foreclosure Review Process**

On April 13, 2011, the federal banking agencies announced enforcement actions against mortgage servicers and other firms relating to problems with foreclosures.<sup>13</sup> The OCC is now overseeing the majority of the servicers implementing the consent orders, while the Federal Reserve is supervising four.<sup>14</sup> On November 1, 2011, the OCC and FRB announced the initiation of an outreach process to homeowners eligible for foreclosure reviews by the consultants. Although there is some variation between the agencies, and from servicer to servicer, the individual processes share major flaws.

The consent orders and the foreclosure review process as enunciated to date lack the rigor and breadth to ensure that homeowners are protected during the review process. The process may also be affirmatively harmful. Homeowners could be required to waive their rights in exchange for any available relief. Homeowners may be discouraged from pursuing other avenues of saving their homes by their misplaced reliance on this process. If so, homeowners could ultimately lose their homes in exchange for the uncertain and limited compensation provided under the foreclosure reviews.

Many of the deficiencies in the foreclosure review process being undertaken by the consultants have their origins in the consent orders. While the agencies could improve the process

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<sup>13</sup> See, e.g., <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html>.

<sup>14</sup> Although the OCC and the FRB are both implementing consent orders against mortgage servicers, the OCC has released substantially more information. Our comments will focus on the information currently available, and thus are based primarily on materials released by the OCC.



despite the orders, and could even re-open the consent orders, the process as it exists has substantial unaddressed weaknesses. The process cannot produce fair and equitable relief sufficient to address the scale of the crisis.

**The time limit on eligibility may disparately impact communities of color.** The reviews are time limited: they focus only on 2009 and 2010. Abuses occurring before or after this time will not be looked at. Because the subprime foreclosure wave came first, the review may disproportionately exclude low-income homeowners and homeowners of color, who were more likely to have received subprime loans.

**Necessary detail is lacking.** The consent orders provide no guidelines on loss mitigation or on evaluations for core servicing abuses, including application of payments, assessment of fees, or force-placed insurance. The lack of detail allows the servicers, the perpetrators of the illegalities recognized by the banking agencies in issuing the consent decrees, to control the independent review process and obscure many violations. In combination, the lack of detail and the unusual deference extended to the servicers undercut the possibility of meaningful change going forward.

**Dual track is affirmed.** The agencies fail to address “dual track”—the simultaneous processing of a loan modification and a foreclosure—in any effective way. The persistence of dual track has led to countless unnecessary and expensive foreclosures. Although the agencies purport to address dual track, the orders only stop a foreclosure when a homeowner has already obtained a trial or permanent loan modification. This result is probably dictated by contract law and is certainly not a far-reaching reform of current practice. The establishment of a foreclosure stop once a modification has been entered into is a commonplace part of how modifications are administered currently; if you are paying on your loan, then you should not be subject to foreclosure. (Of course,

servicers often fail even at this basic step). A foreclosure stop after a loan modification agreement is entered into does not end dual track, but blesses it, allowing an evaluation for a loan modification to occur simultaneously with the foreclosure. The result always is financial harm to homeowners and often wrongful foreclosure.

The orders do not even require a stop to foreclosures during the consultants' review process. Thus, a homeowner could be under review for the servicer's wrongful initiation of foreclosure, and the servicer could even ultimately be found to have wrongfully initiated foreclosure, and there would be no requirement to stop the foreclosure, leaving the homeowner a victim of wrongful foreclosure. The failure to provide for a foreclosure stop during review makes a mockery of any suggestion that the foreclosure review process will make homeowners whole. This result is so obviously wrong that few homeowners are likely to anticipate it; many homeowners may believe that, having submitted their claim form, they will not be dispossessed of their homes until a decision has been made as to the legality of the servicers' action. This is one of many ways that the foreclosure review process may exacerbate the harm already suffered by homeowners.

Significantly, in failing to require that the review be completed before the foreclosure sale, and that foreclosure actions be halted during the pendency of the review, the agencies have taken a gigantic step backward from existing standards under HAMP and the FHFA's SAI. Despite the limitations of both HAMP and the FHFA's SAI,<sup>15</sup> neither permits a home to be sold at foreclosure while under review. The agencies' foreclosure review process condones that result.

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<sup>15</sup> Neither HAMP nor SAI require the crucial step of a general stop to foreclosures already initiate. *See generally The Need for National Mortgage Servicing Standards: Hearing Before the S. Subcomm. on Hous., Transp., & Cmty. Dev.*, 112th Cong. 31-35 (2011) (written testimony of Diane E. Thompson, Of Counsel, Nat'l Consumer Law Center) (discussing weaknesses of the FHFA's SAI); *Problems in Mortgage Servicing from Modification to Foreclosure: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 111th Cong. 3-5, 8-17 (2010) (written testimony of Diane E. Thompson, Of Counsel, Nat'l Consumer Law Center) (discussing failures of HAMP).when a modification is being reviewed.

**The orders lack transparency and accountability.** The consent orders have no provisions for transparency in their implementation. The agencies have not committed to reporting the results of the reviews or providing information about the compensation provided homeowners. Periodic reports broken down by the state, race, income level, and property value of the homeowner, as well as by servicer and consultant are essential. The public is entitled to know how many homeowners are contacted, how many respond, what violations are found, and how much compensation is provided. Congress, affected homeowners, and the public at large cannot have confidence that the process is fair, consistent, and provides affected borrowers with adequate compensation absent transparency. Without transparency, there cannot be accountability for promises of an improved performance in the future.

There are no meaningful provisions for accountability. Servicers may not face any penalties for violations. The orders fail to provide directly for either bankruptcy or foreclosure court judges to enforce their terms, leaving homeowners at the mercy of the consultants' review. In many cases, the "project leads" of the foreclosure reviews are the servicers' own general counsel office.<sup>16</sup>

**Homeowners have no express right to enforce these agreements.** The agencies have referred to this process as a supervisory action. Such actions often remain non-public and solely in the purview of the regulator. This process, however, asks millions of homeowners to submit personal information (and potentially waive all legal rights) in exchange for possible but indefinite compensation. Homeowners cannot rely solely on the outcome of a secret, vague process to ensure they do not lose their homes. Nor should they be asked by servicers—who already have been found

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<sup>16</sup> See Francine McKenna, *OCC Foreclosure Review Disclosures Still Disappoint*, Am. Banker, Dec. 6, 2011 (noting that many of the servicers assert attorney-client privilege in the engagement letters with the independent consultants).

to have committed wrongdoing—to waive all rights in exchange for compensation unlikely to provide relief commensurate with the harm done.

**The orders could interfere with state enforcement actions.** While the Federal Reserve and the FDIC clearly stated that these actions in no way are intended to interfere with the actions currently underway by the U.S Department of Justice and the state Attorneys General, the OCC has not made such a statement. The OCC’s history of seeking to interfere with state enforcement of consumer protection laws does not inspire confidence that the agency will allow the work of the Attorneys General to go forward unimpeded. As discussed further below, during the years leading up to the current foreclosure crisis, the OCC aggressively tried to block state enforcement actions that could have dealt effectively with many of the industry practices that are wreaking havoc upon the American public today.<sup>17</sup> These consent orders appear to continue that pattern of attempting to block effective action at the state level, while permitting abusive practices by federally-regulated institutions to continue unchecked.

Millions of homeowners have been victimized by the fraudulent and abusive practices of mortgage servicers whose staff are trained for collection activities rather than loss mitigation, whose infrastructure cannot handle the volume and intensity of demand, and whose business records are a mess. The federal agency consent orders and the associated foreclosure reviews do not begin to adequately address these issues. They do not provide the accountability and rigor required to right this foreclosure crisis. To the extent these consent orders embolden servicers in their illegal activities and encourage homeowners to believe that the servicers are in fact subject to meaningful oversight, the foreclosure review process will affirmatively harm homeowners.

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<sup>17</sup> See III.F.

### **III. The Foreclosure Review Process Is Ineffective, Fails to Target Key Foreclosure Problems, and Does Not Protect Homeowners from Further Harm**

The foreclosure review process is fatally flawed. Every aspect errs on the side of bank comfort over accountability. Many of these problems could have been prevented if the OCC and the FRB had not followed a hasty and closed process but had incorporated recommendations from homeowner stakeholders. Restoring credibility would require new supervision and a fresh approach.

#### **A. The Process Allows Wrongful Foreclosures During the Review Process**

Homeowners filing claims under the foreclosure review process will be expecting a fair review and appropriate compensation. At a minimum, they are not expecting to lose their homes while they are waiting for long-needed help. Unfortunately, their homes are not protected.

The review process does not limit a servicer or consultant's actions regarding foreclosures, including sales, during the review process. The OCC's FAQs state in part:

The submission of a request for review form will not automatically postpone further foreclosure processing. However, the borrower will receive expedited attention where a foreclosure sale is imminent. This review will involve a case-by-case assessment of the borrower's individual circumstances and any legal requirements to determine if a foreclosure sale may be postponed or halted if the facts warrant.<sup>18</sup>

While some homeowners may be lucky enough to find out their sale has been stopped or their case has been escalated during the review, even these minimal standards are not publicly available and thus are subject to abuse and inconsistent application. Because foreclosure halts are not clearly available, additional wrongful foreclosures may actually occur during the review. Those wrongful foreclosures may not be remedied at all. Moreover, a foreclosure sale that was not imminent or even scheduled at the time of the submission of a claim may become so during the review of the

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<sup>18</sup> *Frequently Asked Questions Regarding the Interagency Foreclosure Enforcement Actions*, Office of the Comptroller of the Currency, available at <http://www.occ.treas.gov/topics/consumer-protection/foreclosure-prevention/foreclosure-faqs.html>.

claim. How will the independent consultants know when a foreclosure sale is imminent when the servicers do not even always know themselves?

- ❖ A Washington state woman, who was current under a temporary payment agreement, received an eviction notice. The servicer's representative told the woman, when she called, that she was mistaken at best, and a liar at worst, and that there was no foreclosure action against her. Nonetheless, the purchaser of the property succeeded in evicting the family, who are now living in an apartment and have lost nearly \$200,000 in equity.
- ❖ A California family was foreclosed on after high-level executives at the bank assured the homeowner's attorney that the foreclosure sale would be stopped.
- ❖ Another California family has spent two years unwinding a foreclosure sale that happened while they were making payments under a temporary forbearance agreement. It took multiple phone calls to the servicer before the servicer acknowledged that the sale had occurred, albeit "in error."

This policy highlights the OCC's broader promotion of foreclosures over loss mitigation. The consent orders only call for a stop to a foreclosure where a homeowner already has obtained a modification. As described above, this turns the whole notion of ending dual track on its head.<sup>19</sup> Modification reviews will be faster and more accurate, and modifications will be more affordable and easier to obtain for homeowners, if the foreclosure process stops during modification reviews. In contrast to that approach, implemented in HAMP,<sup>20</sup> the OCC has now expanded its prioritization of foreclosures over loss mitigation into the foreclosure reviews currently underway.<sup>21</sup>

Homeowners should be guaranteed that their homes will not be sold at foreclosure while their files are being reviewed. This policy should be mandated and enforced by the agencies and made transparent to homeowners. Additionally, homeowners seeking modifications may be subject to wrongful foreclosure because the consent orders and reviews do not require that modifications be

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<sup>19</sup> See II.

<sup>20</sup> HAMP requires that loan modification reviews, or significant outreach, occur before a foreclosure is initiated and that no foreclosure sale happen while a review is pending. HAMP unfortunately does not require a full stop to a foreclosure once it has been initiated, only a halt to the sale.

<sup>21</sup> Adding insult to injury, the OCC continues to describe its policy as addressing "dual track," while perpetuating the exact harm that occurs when foreclosure and loss mitigation are parallel rather than serial.

provided, even where appropriate and money-saving for investors, only that evaluations be done. Moreover, modification reviews appear to be explicitly required only for junior liens.<sup>22</sup>

## **B. Outreach to Homeowners Is Fatally Flawed**

Outreach to homeowners began directly on November 1, 2011, with press releases released by the OCC and the FRB and letters sent to homeowners (at least those who are still in their homes). Problems with this process include the form itself, which is complex, misleading and intimidating, the limited outreach being done, the short time frame, language access issues, barriers to participation for homeowners with counselor or attorney representatives, and concerns about adverse consequences from participating. A copy of the letter and application form is attached as Exhibit A. This process is broken. Such a travesty cannot be allowed to continue.

**Homeowners' advocates cannot access the forms.** We have received reports that counselors and others working with homeowners cannot obtain access to the forms. Getting third party authorizations processed to allow that access has been difficult. No apparent effort has been made to facilitate this process.

**The outreach materials are not readable.** Both the cover letter and the form appear to have been written by lawyers for lawyers. An analysis of the documents under the Flesch-Kincaid grade level test indicates that both are written at an intermediate college reading level. (Indeed, because the form and letter consist of relatively short paragraphs, the Flesch-Kincaid grade level test may actually overstate the readability of the form and letter).<sup>23</sup> Best practices require outreach materials written at no more than an eighth grade reading level.

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<sup>22</sup> Office of the Comptroller of the Currency, *Interim Status Report: Foreclosure-Related Consent Orders 10-11* (Nov. 2011).

<sup>23</sup> According to our run of Microsoft Word's grammar check tool, the Flesch-Kincaid grade score is 14.2 for the OCC's cover letter and 13.5 for the form.

**Homeowners are likely to mistake the outreach materials for a foreclosure rescue scam.** The outreach materials refer consumers to “IndependentForeclosureReview.com.” The name, “independent foreclosure review,” sounds like something dreamed up by a foreclosure rescue scammer. Indeed, SIG TARP, the CFPB, and Treasury have recently reminded consumers to be wary of unknown organizations that contact them, promising help in obtaining a modification.<sup>24</sup> The dot com website address is another red flag. Information about the servicer and the government oversight is buried in the body of the text. Neither the consultants hired by servicers nor Rust Consulting, the firm engaged by the OCC to oversee the outreach, are known entities to homeowners or their advocates. The multiplicity of private consultants involved raise further skepticism: surely the servicer, the consultant hired by the servicer, and Rust Consulting cannot all be legitimate sources of information? The lack of transparency and accountability increases consumer mistrust.

**The OCC FAQ is misleading.** For example, the OCC FAQ says that the claims process accords “additional rights.” According to the FAQ, homeowners may still pursue other forms of legal action.<sup>25</sup> Yet the OCC has failed and refused to forbid waiver of legal rights. Servicers, in fact, are free to prevent homeowners from enforcing any claims.<sup>26</sup>

**The discussion of financial injury is confusing and misleading.** The FAQ, the letter, and the form all have a limited list of examples of how financial injury is defined.<sup>27</sup> Homeowners are unlikely to know the answers to technical questions, such as if their amounts due were calculated

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<sup>24</sup> Consumer Fraud Alert: Tips for Avoiding Mortgage Modification Scams, [http://www.sig tarp.gov/pdf/Consumer\\_Fraud\\_Alert.pdf](http://www.sig tarp.gov/pdf/Consumer_Fraud_Alert.pdf).

<sup>25</sup> See Office of the Comptroller of Currency, Frequently Asked Questions Regarding the Interagency Foreclosure Enforcement Actions, “Can I contest the remedy I am given?” (Nov. 22, 2011), <http://www.occ.treas.gov/topics/consumer-protection/foreclosure-prevention/foreclosure-faqs.html>.

<sup>26</sup> See III.E

<sup>27</sup> See generally III.C.



correctly. Homeowners are not told that they will be reviewed only for those injuries they identify or that they can obtain a general review by not specifying any financial injury. This perverse process penalizes homeowners who make a good faith attempt to identify the financial injury they suffered and encourages an arbitrarily narrow review.

**The required certification will chill homeowner participation.** Section 4 of the application form requires the homeowner to certify that all the information is truthful, and that “knowingly submitting false information may constitute fraud.” Homeowners are unlikely to have the information or skills to determine, for example, whether “fees charged . . . were inaccurately calculated, processed, or applied.”<sup>28</sup> The servicers' sloppy documentation,<sup>29</sup> the limited information provided most homeowners,<sup>30</sup> and the difficulty of interpreting even the information that is provided make it difficult for consumers to know what those charges are, and whether or not they are legitimate.<sup>31</sup>

Homeowners are also asked to certify they understand that they can “separately submit ‘a qualified written request’ relating to the servicing” of their mortgage under the Real Estate Settlement Procedures Act, that the independent review agent is not authorized “to act as an agent to receive a ‘qualified written request’ on behalf of [the] servicer,” and that a “qualified written request” must be submitted separately to their servicer at a special address. Very few people in this country could honestly certify that they understand that.

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<sup>28</sup> See OCC Request for Review Form at 1, attached as Exhibit A.

<sup>29</sup> See, e.g., *In re* Nosek, 363 B.R. 643 (Bankr. D. Mass. 2007) (detailing failure of servicer to account for borrower’s payments); *In re* Gorshtein, 285 B.R. 118 (Bankr. S.D. N.Y. 2002) (rejecting servicers’ “dog ate my homework” excuses for faulty accounting that led to certification of default by homeowners when there was none).

<sup>30</sup> See, e.g., *Maxwell v. Fairbanks Cap. Corp.*, (*In re* Maxwell), 281 B.R. 101 (Bankr. D. Mass. 2002) (reporting limited information provided homeowner, housing counselor, and homeowner’s attorney over two year period, such that it was impossible for the homeowner to determine the payoff amount; finding that the servicer “repeatedly fabricated the amount” due).

<sup>31</sup> See, e.g., *In re* Stewart, 391 B.R. 327 (Bankr. E.D. La. 2008) (determining that broker price opinion fees were overcharged, performed on the wrong property, and not reviewed by the servicer).

**The outreach is limited.** Required forms are available only in English and assistance is only available in Spanish and English. The media used for outreach may not reach communities of color.

**The OCC requires the use of paper documents, complicating document tracking and mandating delay.** The form is only available by mail; there is no mechanism for homeowners to submit the review request or supporting documentation electronically. The servicers' inability to keep track of paper documents has undermined the best loss mitigation efforts. The OCC, in implementing the foreclosure review process, has deliberately ignored existing best practices.

**The time to submit claims is compressed.** All claims must be submitted by April 30, 2012. This gives five months only for outreach and claims submission. Experience with EHLA and HAMP demonstrates that this is insufficient time.

Many of these problems could have been avoided if the outreach process had been vetted with groups that deal with homeowners regularly.

### **C. The Foreclosure Review Contracts and Materials Omit Many Typical Types of Harm, Steering Homeowners to a Narrow Review**

The consent orders and the documents connected with the foreclosure reviews take a constricted view of the harm caused by servicer abuses. They fail to cover all foreseeable economic damage in the definition of financial injury and omit common examples of significant financial harm to consumers. The claim form itself is confusing and suggests that the definition of financial harm is even more limited than it is. Because the process places the burden on homeowners to identify the harm, these omissions will likely result in inadequate compensation for homeowners. Such an outcome will be compounded if a homeowner is required to waive legal rights in exchange for the weak remedy.

The engagement letter released by the OCC contains the most detailed information we have as to the applicable definition of financial harm. This detailed list of twenty-two scenarios, attached as Exhibit B, omits the most common types of financial injury caused by servicer malfeasance in the foreclosure process. For example, servicer delays are widespread. Almost 89% of housing counselor in a national survey report that servicer processing delays are the most common barrier to obtaining a modification.<sup>32</sup> Servicer delays in processing and approving a modification cost homeowners thousands of dollars in additional interest and fees that is then rolled into the principal balance.

- ❖ In one case from Wisconsin, a servicer's two year delay in converting a temporary modification to a permanent modification resulted in additional interest charged to the homeowner of nearly \$43,000.
- ❖ A New York family, upon finally receiving an offer for a permanent modification, found themselves faced with a bill for over \$9000 in foreclosure related fees and costs.
- ❖ A Brooklyn homeowner's principal balance more than tripled, mostly due to the imposition of fees and costs, in the three years her servicer delayed in resolving a wrongful foreclosure after she attempted to pay off her loan.

Nor does the list provided in the engagement letter include the cost of being placed improperly in a proprietary modification and thus losing the benefits of HAMP, including the homeowner incentive payments. Similarly, while some review documents suggest that the difference in payments between a more expensive modification and the one the homeowner qualified for should count as financial injury, this is not among the examples listed in the engagement letter.

More fundamentally, nothing in the materials suggests that financial injury will be measured broadly enough to compensate homeowners for all economic injury. For example, HAMP

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<sup>32</sup> National Housing Resource Ctr Survey, Dec. 2011.

modifications have significantly lower redefault rates than similar proprietary modifications.<sup>33</sup> The increased risk of redefault is a quantifiable economic harm, but it does not appear compensable under the OCC metric.

The focus is on financial harm writ narrowly. No provision is made for any of the foreseeable consequences of a wrongful foreclosure. The cost of credit and insurance are driven by credit scores: a wrongful foreclosure can easily cost a homeowner thousands of dollars annually just on these two fronts. Employers and landlords also both rely on credit scores; a wrongful foreclosure can result in lost jobs and difficulty locating alternative housing. Homeowners spend time and money trying to unravel wrongful foreclosures: the need to send notarized documents by overnight mail repeatedly to the servicer by itself can result in hundreds of dollars of out-of-pocket expenses. Children who suffer dislocation due to foreclosure may lose educational opportunities and experience poor health. Families are often torn apart by a foreclosure; no compensation is offered for any of the psychological and social damage done by a wrongful foreclosure. This narrow definition of financial harm is at conflict with long settled and well-established rules about available damages and undermines homeowners' rights.<sup>34</sup> It will leave many homeowners uncompensated for harm they have suffered at the servicers' hands.

Worse, the shrunken definition of financial injury may result in many homeowners being unable to pursue their claims for full compensation from the servicer elsewhere. This result could happen either because the servicers demand explicit waivers or because courts or other agencies defer to the OCC's cramped definition of harm. Unless homeowners remain free to pursue claims against the

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<sup>33</sup> See Office of the Comptroller of the Currency, *OCC Mortgage Metrics Report: Disclosure of National Bank and Federal Thrift Mortgage Loan Data, Second Quarter 2011*, 40 (June 2009)

<sup>34</sup> See, e.g., *DeGolyer v. Green Tree Servicing, L.L.C.*, 662 S.E.2d 141 (Ga. Ct. App. 2008) (holding that former homeowner may maintain claim for mental anguish as well as other damages in action for wrongful foreclosure).

servicer for a wider array of damages, homeowners will be left uncompensated by this process and without redress against the servicer.

The agencies have not protected homeowners' rights to bring these claims outside of the foreclosure review process. If the servicers require waiver of homeowners' legal rights in exchange for limited relief under the settlement, as they may in order to protect their own interests, the financial injury occasioned by the consent orders could far exceed the compensated financial injury under the consent orders.

The homeowner claim form takes an even narrower view of what constitutes financial harm. Instead of the twenty-two non-exclusive scenarios listed in the engagement letters from the OCC, , the homeowner claim form lists a bare twelve categories, with a final question permitting homeowners to list other ways they were financially injured. Homeowners are not offered guidance as to whether they should check all the applicable boxes. Indeed, the section on the form for identifying the financial harm is described as "background," downplaying its importance. The more prominent "examples" of financial harm listed on the first page of the form imply an even narrower range of harms under review. The examples are all focused on completed sales, complicated calculations, or express protections for servicemembers or homeowners in bankruptcy. Many homeowners who have been financially harmed fall outside of these categories.

The process leaves the burden on the homeowner to identify compensable harm, without much guidance. Homeowners will often not know whether or not the fees charged were illegal. They are unlikely to have full access to the servicer's records. Few homeowners possess the accounting savvy or legal expertise to identify illegal fees included in a deficiency judgment, illegal force-placed insurance, or botched escrow accounts, to give a few examples from the OCC's list. Homeowners

unrepresented by counsel or a competent housing counselor (which, given the lack of funding for housing counseling or legal services, will be most homeowners completing these claims forms) are at the mercy of the consultants to identify the financial harm. Yet the consultants are unlikely to identify financial injury not specified by the homeowner. The consultants will only review for the financial harm the homeowner identifies, unless the homeowner identifies no financial harm. If the homeowner identifies no financial harm, then, and only then, will the consultants do a general review to attempt to identify the financial harm suffered by the consumers. Whether that more general review, by consultants with limited experience with residential mortgage files, relying on the cramped definition of financial harm promulgated by the OCC, will produce a fair and comprehensive review is an open question.

**D. The Analysis of Homeowner Claims and Files Will Be Performed in a Vacuum**

The review of homeowner claims and files cannot provide meaningful results. The consultants will be relying on very limited, incomplete, and biased information—the servicer databases and files, as well as internal servicer reports, which are riddled with errors and missing paperwork. The claims forms from homeowners cannot adequately supplement the servicers' files, due to the problems in the outreach process<sup>35</sup> and the lack of funding for assistance to homeowners by housing counselors or legal services attorneys in completing these forms. The agencies have neither required homeowner interviews nor mandated that information supplied by the homeowner be given equal weight with the servicer's records. Implicitly, the agencies have discouraged homeowners from providing any detailed information of servicer wrongdoing: a general review of the servicer's misconduct will only be performed when the homeowner provides no information as

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<sup>35</sup> See generally III.B.

to the servicer's malfeasance; in order to obtain a general review of the servicer's records, then, the homeowner must remain mum as to what the homeowner knows.

The lack of information from homeowners has led to failed supervision for many years. Omitting the homeowner's perspective is like reading every third page of a novel. Nothing we now know about the consultants or their staff suggests they will have the wherewithal to supply the missing pages, or the inclination to do so.

The review process excludes homeowners while servicers retain significant control and input. Neither the agencies nor the consultants have included homeowner advocates in the design or implementation of the review. Instead, the entire program design and implementation is one-sided, filtered through the information and perspective of the servicers, if not entirely under their control. As described in a recent news report:

After the consultants have reviewed the loan files, they will write up their findings in a report, which will be turned over to regulators and the servicer of the loan but not to the borrower. Based on that report, the servicer will put together a report of its own on how it will compensate the borrower. Once regulators approve that plan, the servicer will send the borrower the findings of the review, including details on what compensation, if any, the borrower will receive.<sup>36</sup>

Notably, homeowners may not even then be informed as to what rights they will be asked to waive in exchange for limited compensation. Homeowners in this process are left entirely dependent on the servicers' munificence.

The sampling process also appears to have been heavily influenced, if not completely determined, by the servicers. The sampling approaches seem to vary widely by servicer and state. Although the servicers were not allowed to "dictate" the sample sizes and segments, they were

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<sup>36</sup> Paul Kiel, *Flaws Jeopardize New Attempt to Help Homeowners*, Pro Publica, Nov. 4, 2011, <http://www.propublica.org/article/flaws-jeopardize-new-attempt-to-help-homeowners>.

consulted in the design.<sup>37</sup> Indeed, the consultants' sampling design is heavily dependent on information supplied by the servicers:

In determining sample segmentation and assessing whether particular foreclosures cases or groups of cases require higher degrees of review, the servicers will use a variety of information available from the servicers. Such information includes internal reports or reviews, as well as information obtained through litigation or other means, that identified credible evidence of error, misrepresentations, or other deficiencies with the potential to cause financial injury.<sup>38</sup>

One wonders who determines what "credible evidence" of financial harm is: could it be that the consultants and the OCC are relying on servicers to identify the evidence of the servicers' own wrongdoing? The OCC's approach ignores the history under HAMP, where compliance officials have reported that they routinely receive no more than 50% of the documents and information they request from the servicer.<sup>39</sup> The servicers should not be in the position of gatekeeper when their own compliance is at stake.<sup>40</sup>

Finally, consulting firms who come to this review primarily with an industry-oriented point of view and a business model reliant on repeat engagements from the very servicers for whom they are doing reviews are unlikely to discern, or have an incentive to discern, the types of noncompliance intended to be discovered by the process. Typical problems that homeowners and their advocates see with HAMP noncompliance or fee abuses are unlikely to be apparent without proper training or consultation. Although some common servicer errors, like income calculation,<sup>41</sup>

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<sup>37</sup> Office of the Comptroller of the Currency, Interim Status Report: Foreclosure-Related Consent Orders 9 (Nov. 2011)

<sup>38</sup> Office of the Comptroller of the Currency, Interim Status Report: Foreclosure-Related Consent Orders 9 (Nov. 2011)

<sup>39</sup> Paul Kiel, *Secret Docs Show Foreclosure Watchdog Doesn't Bark or Bite*, ProPublica, Oct. 4, 2011, <http://www.propublica.org/article/secret-docs-on-foreclosure-watchdog/single>.

<sup>40</sup> See Francine McKenna, *OCC Foreclosure Review Disclosures Still Disappoint*, Am. Banker, Dec. 6, 2011 (noting that many of the servicers assert attorney-client privilege in the engagement letters with the independent consultants).

<sup>41</sup> Making Home Affordable Program Performance Report through July 2011, at 19-38 (describing rates of income calculation error at several servicers). The core question when a homeowner applies for a loan modification is whether current income makes the current loan terms unaffordable and whether that same income can support a modified payment. Improper income calculations thus can wrongfully deny homeowners access to the only help available and thus result in unnecessary home loss.



should be ascertainable by the consultants, the history of HAMP oversight is not promising. For example, Treasury found that Freddie Mac's first reviews of servicers under HAMP were "inconsistent and incomplete."<sup>42</sup> Even later reviews by Freddie accepted impermissible reasons for denial under HAMP.<sup>43</sup> If Freddie, which was involved in the design of HAMP from its inception, fails to recognize improper loan modification denials under HAMP, industry consultants with limited HAMP experience are likely to make many more mistakes.

Many of the common, improper reasons for denial require substantial, specialized expertise to identify. Some examples that cost homeowners significant money include baseless claims that the investor will not allow a modification, improper NPV analyses, and failure to provide a modification to divorced spouses and surviving family members in contravention of the Garn St Germain Act.

- ❖ A servicer represented to a California attorney that a pooling and servicing agreement forbade all modifications, when, in fact, the Pooling and Servicing Agreement specifically provided for modifications in the event of the borrower's default. The servicer representative in that case went so far as to provide the homeowner's attorney with an electronic copy of the relevant sections of the PSA from which the clause permitting modifications in default had been excised and a comma replaced with a period.
- ❖ After over a year and involvement of an attorney, one Ohio homeowner found out that his loan modification had been denied because the servicer had used the wrong property value in calculating the NPV test. Instead of using the value elsewhere reflected in their servicing records, the servicer used a value much higher than the property's actual value, which made it look, falsely, like the investor would profit more from a foreclosure than a loan modification.
- ❖ One California advocate reports that his client submitted his wife's death certificate no fewer than six times before the servicer processed the widower's application for a loan modification.

None of these errors are simple to identify, even by industry participants with long experience.

Recent job postings for personnel to conduct these reviews only decrease confidence in this process;

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<sup>42</sup> Paul Kiel, *Secret Docs Show Foreclosure Watchdog Doesn't Bark or Bite*, ProPublica, Oct. 4, 2011, <http://www.propublica.org/article/secret-docs-on-foreclosure-watchdog/single>.

<sup>43</sup> Paul Kiel, *Secret Docs Show Foreclosure Watchdog Doesn't Bark or Bite*, ProPublica, Oct. 4, 2011, <http://www.propublica.org/article/secret-docs-on-foreclosure-watchdog/single>.

the consultants are not hiring staff with the credentials and experience to identify adequately the harm.<sup>44</sup>

Without truly independent consultants, who have access to deep expertise on loan modifications and full, detailed information from homeowners, the foreclosure review process is unlikely to produce meaningful results or even minimally acceptable accuracy in its conclusions. Moreover, this process papers over problems endemic to the servicing industry—sheltering servicers from accountability while giving the appearance that justice has been done.

#### **E. Remedies Likely Will Compromise Homeowner Rights While Providing Uncertain and Inadequate Compensation**

A process that begins with limited, confusing, and misleading outreach, proceeds through a narrow approach to finding and defining harm, and concludes with a one-sided review of partial information cannot produce meaningful remedies. Accordingly, this process is unlikely to provide widespread redress for servicer foreclosure abuses. Too few homeowners are likely to submit claims and those who do are unlikely to have enough information to be able to adequately describe harm they may have actually suffered. Reliance on servicer paperwork without consumer interviews will further foreclose opportunities for a meaningful review. For homeowners considering taking the time and trouble to submit a claim, there are two key questions: what is the possible cost and what is the possible benefit? The agencies have steadfastly refused to answer these questions.

Without full transparency from the agencies, homeowners and their advocates cannot reliably assess the risk of participating in this process. However, there are at least two ways that participating in this process could harm homeowners. Nothing in the process as currently designed

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<sup>44</sup> See Adam Levitin, Robosigning 2.0: Mortgage Foreclosure File Reviewers, Credit Slips Blog, Oct. 9, 2011, <http://www.creditslips.org/creditslips/2011/10/robosigning2.html#more>.

protects homeowners from the servicers using the foreclosure reviews to scam homeowners into unwittingly surrendering their rights or personal information that the servicer could use against them.

First, the servicer could use the updated contact information to collect an otherwise uncollectible deficiency judgment. Homeowners are given no assurance that information they give to the consultants will not be used against them by the servicers. Instead, for the chance of getting some uncertain potential benefit they are asked to provide current contact information to an entity that may have already engaged in illegal collection tactics with them. Servicers should not be able to use the foreclosure review process—a process proclaimed to serve the purpose of providing compensation to wronged homeowners—to obtain collection information on homeowners. The agencies must not sanction this classic and sleazy bait-and-switch collection technique.

Second, the servicers could require that homeowners waive some or all of their current or future legal rights in exchange for receiving any compensation. The agencies have so far ceded the issue of waiver to the servicers themselves. Servicers, left to their own devices, will likely choose to impose the most expansive waiver possible. It only makes good business sense as a profit-maximizing move. Indeed, servicers have routinely sought to extract overbearing waivers from homeowners in exchange for routine loan modifications or even for the promise of a review for a loan modification.<sup>45</sup> Unless the Congress or the agencies intervene, we should expect that servicers will require homeowners to waive all rights to challenge future wrongdoing by the servicer, as well as

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<sup>45</sup> See, e.g., *Preserving Homeownership: Progress Needed to Prevent Foreclosures : Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 111th Cong. 22 (2009) (written testimony of Diane E. Thompson, Of Counsel, Nat'l Consumer Law Center)

to seek additional compensation for the harm done by the servicer, regardless of how inadequate the compensation paid under the foreclosure review process is.

The failure to protect against waiver on the part of homeowners is particularly absurd when juxtaposed with the failure to stop foreclosures.<sup>46</sup> Homeowners are being asked to sign a blank check with respect to their rights in exchange for the possibility of receiving an undetermined amount of money, as decreed by an industry consultant hired by the servicer with little to no experience in evaluating wrongful foreclosure cases, using an undisclosed template for measuring the harm. At the same time, servicers are permitted to proceed with foreclosure, up until the moment that the same industry consultant the servicer has hired determines that the foreclosure is wrongful. Servicers are asked to surrender no rights. In fact, the foreclosure stop standard embodied in the consent orders is looser than existing guidance under HAMP and from the FHFA. In other words, the process as implemented by the OCC extends servicers' discretion at the expense of homeowners' existing rights.

A sustainable and equitable compensation scheme necessarily requires that homeowners retain their rights to protect themselves later against unsustainable loans. No homeowner should lose her right to defend herself against a foreclosure based on a small payment from the servicer. A waiver of rights will preclude homeowners from sustaining long-term homeownership in the face of continuing servicer abuses. Permitting servicers to extract waivers from homeowners is fundamentally at odds with any consumer protection purpose. The OCC and FRB's failure to prohibit waivers requires transfer to an agency with a consumer protection purpose, the CFPB.

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<sup>46</sup> See generally III.A.

## **F. The Process Is Primarily Supervised By an Agency Characterized by Bias toward Lenders and Servicers over Borrowers and Homeowners**

While the consent orders and foreclosure reviews are a joint regulatory effort to some extent, they are driven by the agency with the most servicers under its jurisdiction, the OCC. The OCC has released the most information on the process and was the agency that arranged to have briefings provided to stakeholders, such as housing counselors and consumer groups. (It should be noted that these briefings were carried out by an industry group, the Financial Servicers Roundtable—an approach that only raises additional questions about bias in the process.)

The OCC's record in siding with banks over consumers (and the states that seek to protect them) raises serious questions about whether the agency will promote a process that meets the needs of homeowners. From 2000 to 2004, the OCC worked with increasing aggressiveness to prevent the states from enforcing state consumer protection standards against national banks. For example, the OCC openly instructed banks that they “should contact the OCC in situations where a State official seeks to assert supervisory authority or enforcement jurisdiction over the bank,”<sup>47</sup> and warned states that national banks need not comply with state laws.<sup>48</sup> The OCC's efforts culminated in 2004, when the agency adopted a regulation preempting all state laws unless their effect on national bank powers was “only incidental.”<sup>49</sup> The regulation allows national banks to ignore state laws regarding licensing, terms of credit, disclosure and advertising, solicitations, billing, and other topics.

The OCC also asserted that the subsidiaries of national banks and federal thrifts—though they are creatures of state law, are not banks, and do not have a federal charter—can ignore state law

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<sup>47</sup>Office of the Comptroller of the Currency, Interpretive Letter No. 957 n.2 (Jan. 27, 2003) (citing OCC Advisory Letter 2002-9 (Nov. 25, 2002)) (viewed June 19, 2009, at <http://www.occ.treas.gov/interp/mar03/int957.doc> , and available at 2003 OCC Ltr. LEXIS 11).

<sup>48</sup>*See, e.g.*, Office of the Comptroller of the Currency, Preemption Determination and Order, 68 Fed. Reg. 46,264, 46,264 (Aug. 5, 2003).

<sup>49</sup>12 C.F.R. §§ 7.4007(c), 7.4008(e), 7.4009(c)(2).

to the same extent that their parents can.<sup>50</sup> The Supreme Court upheld this regulation in 2007.<sup>51</sup>

This exercise of preemption authority by the OCC and other federal banking agencies has limited the scope of what state actors can do to contain the current crisis.

The preemption of state laws in the mortgage area by the federal agencies is a significant cause of the current crisis. Bank domination was heaviest in the most dangerous, nontraditional interest-only and payment-option adjustable rate mortgage (ARM) markets: they held 51% of the total market in 2006.<sup>52</sup> Though these loans were nominally made to homeowners with prime-level credit scores, the loans were toxic.<sup>53</sup> Overall, in 2006, national banks, federal thrifts, and their operating subsidiaries were responsible for over \$700 billion of the riskiest loans.<sup>54</sup>

Many of the large servicers are national banks, whose primary regulator is OCC.<sup>55</sup> Unsurprisingly, then, many of these servicers are often unresponsive to state regulators or enforcement agencies. The resulting gap demands an aggressive, consumer-oriented regulator. Unfortunately, the OCC has not demonstrated, in this process or in its history, that it is willing or able to play that role. The OCC has not been a fair broker between the interests of homeowners and banks.

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<sup>50</sup> 12 C.F.R. § 7.4006 (OCC).

<sup>51</sup> *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007).

<sup>52</sup> Lauren Saunders, Nat'l Consumer L. Ctr., *Preemption and Regulatory Reform: Restore the State's Traditional Role as "First Responder"* 13 (Sept. 2009).

<sup>53</sup> *See, e.g.*, Allen J. Fishbein & Patrick Woodall, Consumer Federation of America, *Exotic or Toxic? An Examination of the Non-Traditional Mortgage Market for Consumers and Lenders* (May 2006), available at [http://www.consumerfed.org/pdfs/Exotic\\_Toxic\\_Mortgage\\_Report0506.pdf](http://www.consumerfed.org/pdfs/Exotic_Toxic_Mortgage_Report0506.pdf); *Mortgage Lending Reform: A Comprehensive Review of the Current Mortgage System*, H. Subcomm. Fin. Institutions and Consumer Credit, H. Fin. Services Comm., at 7-10 (Mar. 11, 2009)(statement of Margot Saunders, Of Counsel, Nat'l Consumer L. Ctr.) (describing dangers of payment-option adjustable rate mortgages).

<sup>54</sup> Lauren Saunders, Nat'l Consumer L. Ctr., *Preemption and Regulatory Reform: Restore the State's Traditional Role as "First Responder"* 13 (Sept. 2009).

<sup>55</sup> Six of the top ten servicers in 2009 were national banks, whose primary regulator was the Office of the Comptroller of the Currency. Those six are Bank of America, Wells Fargo, Chase, Citi, U.S. Bank, and PNC Mortgage. Numbers 11 and 12 on the 2009 list, HSBC and Metlife, are also national banks. 1 *Inside Mortgage Finance, The 2010 Mortgage Market Statistical Annual* 174 (listing top 50 mortgage servicers in 2009).

The OCC's latest preemption preserving position only bolsters this conclusion. The OCC blatantly ignored Congress's directive in the Dodd-Frank Act that it can only preempt state laws if it determines, on a case-by-case basis upon a review of a particular state law, that substantial evidence on the record of the proceeding shows that a particular state law would prevent or significantly interfere with the bank's exercise of its powers. Instead, the OCC re-promulgated its sweeping preemption regulations with barely a superficial effort to comply with Dodd-Frank.<sup>56</sup>

The OCC's failure to make this process transparent, its unwillingness to forbid waivers, and its reliance on industry insiders and the servicers themselves all demonstrate that the OCC remains inimical to the interests of homeowners.

#### **IV. Servicers Have Incentives to Ignore Directives to Modify Loans**

The OCC continues to let the servicers drive the bus. As discussed above, the OCC neither mandates that first liens be considered for loan modifications nor that, if such loans are considered for a modification, that a modification be offered where the investors would benefit.<sup>57</sup> Given the weight of servicer incentives, there is no reason to believe that such a toothless rule will result in improved outcomes for either homeowners or investors. Instead, the agencies' approach will allow servicers to continue to choose for themselves a loan modification or a foreclosure, without regard to the interests of homeowners or investors.

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<sup>56</sup> 76 Fed. Reg. 43,549 (July 21, 2011). See Comments of Consumer Organizations Regarding the OCC's Implementation of the Dodd-Frank Preemption Provisions, June 27, 2011, *available at* <http://www.nclc.org/images/pdf/preemption/occ-preemption-comments-6-27-11.pdf>.

<sup>57</sup> Office of the Comptroller of the Currency, Interim Status Report: Foreclosure-Related Consent Orders 9 (Nov. 2011). *See generally* III.A.

All of the various attempts to address the foreclosure crisis have failed in part because they do not grapple with the misaligned incentives of servicers.<sup>58</sup> The existing incentive structure has resulted in foreclosures that are costly to both investors and homeowners, but not to servicers. Without significant enforcement mechanisms for the consent orders, servicers' incentives will continue to encourage them to proceed with a foreclosure instead of modifying the loan. This incentive structure is one reason that the dual track system, and the OCC's acquiescence in its continuance, is so pernicious.

Once a loan is in default, servicers must choose to foreclose or modify. A foreclosure guarantees the loss of future income, but a modification will also likely reduce future income, cost more in the present in staffing, and delay recovery of expenses. Moreover, the foreclosure process itself generates significant income for servicers.<sup>59</sup>

For servicers, the true sweet spot lies in stretching out a delinquency without either a modification or a final foreclosure sale. Income from increased default fees and payments to affiliated entities can outweigh the expense of financing advances for a long time. This nether-world status also boosts the monthly servicing fee and slows down servicers' largest non-cash expense, the amortization of mortgage servicing rights, since homeowners who are in default are unlikely to prepay via refinancing.<sup>60</sup> Finally, foreclosure or modification, not delinquency by itself, usually

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<sup>58</sup> Cf., e.g., *Alternative Mortgage Servicing Compensation Discussion Paper*, Fed. Hous. Fin. Agency (Sept. 27, 2011)(discussing problems with current servicing compensation model).

<sup>59</sup> A fuller treatment of servicer incentives may be found in Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755 (2011). An earlier version of this work is available at Diane E. Thompson, Nat'l Consumer L. Center, *Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior* (Oct. 2009), available at <http://www.nclc.org/issues/general-mortgage-servicing-policy-analysis.html>. See also Adam Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1 (2010).

<sup>60</sup> See, e.g., Ocwen Fin. Corp., Annual Report (Form 10-K) 30 (Mar. 12, 2009): Servicing continues to be our most profitable segment, despite absorbing the negative impact, first, of higher delinquencies and lower float balances that we have experienced because of current economic conditions and, second, of increased interest expense that resulted from our need to finance higher servicing advance balances. Lower amortization



triggers loss recognition in the pool. Waiting to foreclose or modify postpones the day of reckoning for a servicer. But delay can cost a homeowner the opportunity to obtain a modification.

Servicers have two main expenses when a loan is in default: advances of principal and interest to the trust and payments to third parties for default services, such as property inspections. Financing these costs is one of servicers' biggest expenses.<sup>61</sup> Recovery of these fees (but not the financing costs) is more certain and often swifter via a foreclosure than a modification. Only when a modification offers a faster recovery of advances than a foreclosure, might the financing costs incline a servicer toward a modification.<sup>62</sup>

#### **A. Interest and Principal Advances to Investors**

Servicers, under their agreements with investors, typically are required to continue to advance interest on loans that are delinquent.<sup>63</sup> Unpaid principal may or may not be advanced, depending on the PSA.<sup>64</sup> The requirement for advances usually continues until a foreclosure is completed, a loan modification is reached, or the servicer determines that there is no realistic prospect of recovering the advances from either the borrower or the collateral.<sup>65</sup>

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of MSRs [mortgage servicing rights] due to higher projected delinquencies and declines in both projected prepayment speeds and the average balance of MSRs offset these negative effects. As a result, income . . . improved by \$52,107,000 or 42% in 2008 as compared to 2007.

<sup>61</sup> Ocwen Fin. Corp., Annual Report (Form 10-K) 5 (Mar. 12, 2009); Mary Kelsch, Stephanie Whited, Karen Eissner, Vincent Arscott, Fitch Ratings, *Impact of Financial Condition on U.S. Residential Mortgage Servicer Ratings 2* (2007).

<sup>62</sup>*Cf.* Wen Hsu, Christine Yan, Roelof Slump, FitchRatings, *U.S. Residential Mortgage Servicer Advance Receivables Securitization Rating Criteria 4* (Sept. 10, 2009) (finding that modifications do not appear to accelerate the rate of recovery of advances, in part because of high rates of redefault).

<sup>63</sup>Larry Cordell, Karen Dynan, Andreas Lehnert, Nellie Liang, & Eileen Mauskopf, Fed. Reserve Bd. Fin. & Econ. Discussion Series Div. Research & Statistical Affairs, *The Incentives of Mortgage Servicers: Myths and Realities 16* (Working Paper No. 2008-46).

<sup>64</sup>*See, e.g.*, Ocwen Fin. Corp., *supra* note 60, at 4 (advances include principal payments); Brendan J. Keane, Moody's Investor Services, *Structural Nuances in Residential MBS Transactions: Advances 4* (June 10, 1994) (stating that Countrywide was in some circumstances only advancing interest, not principal).

<sup>65</sup>Keane, *supra* note 64, at 3.

Servicers' advances are taken off the top, in full, at the post-foreclosure sale, before investors receive anything.<sup>66</sup> If advances of principal and interest payments remain beyond the sale value, servicers can usually collect them directly from the trust's bank account (or withhold them from payments to the trust).<sup>67</sup>

In contrast, when there is a modification, the general rule, announced repeatedly by the rating agencies, is that servicers should only recover their expenses from modifying a loan from either payments made on the modified loan or principal-only payments to the pool.<sup>68</sup> If servicers follow this rule,<sup>69</sup> it takes servicers longer to recover their advances post-modification than post-foreclosure.

## **B. Fee Advances to Third Parties**

In addition to interest advances, servicers advance expenses associated with default servicing, such as title searches, drive-by inspections, or foreclosure fees.<sup>70</sup> Taxes and insurance costs are also often advanced.<sup>71</sup> Some PSAs impose caps on these fee advances.<sup>72</sup>

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<sup>66</sup>Cordell et al., *supra* note 63, at 11; Ocwen Fin. Corp., *supra* note 60, at 4 (advances are “top of the waterfall” and get paid first); Wen Hsu, Christine Yan, Roelof Slump, FitchRatings, U.S. Residential Mortgage Servicer Advance Receivables Securitization Rating Criteria 1 (Sept. 10, 2009) (same); Prospectus Supplement, IndyMac, MBS, Depositor, IndyMac INDX Mortgage Loan Trust 2007-FLX5, at 71 (June 27, 2007) [hereinafter Prospectus Supplement, IndyMac et al.] (servicers repaid all advances when foreclosure is concluded); Letter from Kathy D. Patrick to Countrywide Home Loans Servicing, Oct. 18, 2010 (notifying a trust and master servicer of breaches in the master servicer's performance).

<sup>67</sup>*See, e.g.*, Ocwen Fin. Corp. *supra* note 60 at 11 (“[I]n the majority of cases, advances in excess of loan proceeds may be recovered from pool level proceeds.”); Prospectus Supplement, IndyMac et al., *supra* note 66, at 71 (permitting principal and interest advances to be recovered from the trust's bank account); Prospectus, CWALT, INC., Depositor, Countrywide Home Loans, Seller, Countrywide Home Loans Servicing L.P., Master Servicer, Alternative Loan Trust 2005-J12, Issuer 47 (Oct. 25, 2005) (limiting right of reimbursement from trust account “to amounts received representing late recoveries of the payments for which the advances were made).

<sup>68</sup>*See, e.g.*, MONICA PERELMUTER, WAQAS SHAIKH & MICHAEL STOCK, STANDARD & POOR'S, CRITERIA: REVISED GUIDELINES FOR U.S. RMBS LOAN MODIFICATION AND CAPITALIZATION REIMBURSEMENT AMOUNTS 3 (Oct. 11, 2007); Jeremy Schneider & Chuye Ren, Standard & Poor's, Ratings Direct, Analysis of Loan Modifications and Servicer Reimbursements for U.S. RMBS Transactions with Senior/Subordinate Tranches (Apr. 10, 2008).

<sup>69</sup> Servicers have tried to bypass this rule. *See* Jeff Horwitz, *A Servicer's Alleged Conflict Raises Doubts About 'Skin in the Game' Reforms*, Am. Banker (Feb. 25, 2011).

<sup>70</sup>Cordell et al., *supra* note 63 at 17; *cf.* American Securitization Forum, Operational Guidelines for Reimbursement of Counseling Expenses in Residential Mortgage-Backed Securitizations (May 20, 2008), *available at*

These fee advances may or may not represent actual out-of-pocket expense to the servicer. In many cases, affiliates of the servicer, not true third parties, receive the fees, and the resulting profit wipes out any cost of financing the advance.<sup>73</sup> These fees may also be marked up: in one case, Wells Fargo reportedly charged a homeowner \$125 for a broker price opinion when its out-of-pocket expense was less than half that, \$50.<sup>74</sup> Such padding more than offsets the cost of financing the advance. Force-placed insurance is frequently placed either through an affiliate or in exchange for a commission from the insurance company paid back to the servicer—again wiping out any true cost and turning the nominal advance into a profit center for the servicer.<sup>75</sup>

### C. Fees Are a Profit Center for Servicers

Most PSAs permit servicers to retain fees charged delinquent homeowners. Examples of these fees include late fees<sup>76</sup> and fees for “default management” such as property inspections.<sup>77</sup> The

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[http://www.americansecuritization.com/uploadedFiles/ASF\\_Counseling\\_Funding\\_Guidelines%205%2020\\_08.pdf](http://www.americansecuritization.com/uploadedFiles/ASF_Counseling_Funding_Guidelines%205%2020_08.pdf) (stating that payments of \$150 for housing counseling for homeowners in default or at imminent risk of default should be treated as servicing advances and recoverable from the general securitization proceeds).

<sup>71</sup> See, e.g., Ocwen Fin. Corp., *supra* note 60 at 4.

<sup>72</sup> Marina Walsh, *Servicing Performance in 2007*, Mortgage Banking 72 (Sept. 2008).

<sup>73</sup> See Complaint ¶ 15, Fed'l Trade Comm'n v. Countrywide Home Loans, Inc., No. CV-10-4193 (C.D. Cal. Jun. 7, 2010), available at <http://www.ftc.gov/os/caselist/0823205/100607countrywidemcpt.pdf> (alleging that Countrywide's “countercyclical diversification strategy” was built on its subsidiaries funneling the profits from marked-up default fees back to Countrywide); Peter S. Goodman, *Homeowners and Investors May Lose, But the Bank Wins*, N.Y. Times, July 30, 2009; Peter S. Goodman, *Lucrative Fees May Deter Efforts to Alter Troubled Loans*, N.Y. Times, July 30, 2009; Letter from Kathy D. Patrick to Countrywide Home Loans Servicing, Oct. 18, 2010 (notifying a trust and master servicer of breaches in the master servicer's performance). Letter from Kathy D. Patrick to Countrywide Home Loans Servicing, Oct. 18, 2010 (notifying a trust and master servicer of breaches in the master servicer's performance).

<sup>74</sup> *In re Stewart*, 391 B.R. 327, 346 (Bankr. E.D. La. 2008), *aff'd*, 2009 WL 2448054 (E.D. La. Aug. 7, 2009); see also Complaint ¶ 18, *Fed'l Trade Comm'n v. Countrywide*, *supra* note 73 (alleging a subsidiary of Countrywide routinely marked up property preservation fees by 100%); Jeff Horwitz, *Ties to Insurers Could Land Mortgage Servicers in More Trouble: Force-Placed Policies Impose Costs on Both Homeowner, Investor*, Am. Banker, Nov. 10, 2010 (reporting on fee markups in force-placed insurance).

<sup>75</sup> See, e.g., Jeff Horwitz, *Ties to Insurers Could Land Mortgage Servicers in More Trouble: Force-Placed Policies Impose Costs on Both Homeowner, Investor*, Am. Banker, Nov. 10, 2010.

<sup>76</sup> See, e.g., Prospectus, CWALT, INC., Depositor, Countrywide Home Loans, Seller, Countrywide Home Loans Servicing L.P., Master Servicer, Alternative Loan Trust 2005-J12, Issuer 56 (Oct. 25, 2005) (“In addition, generally the master servicer or a sub-servicer will retain all prepayment charges, assumption fees and late payment charges, to the extent collected from mortgagors). *But see* Prospectus Supplement, IndyMac et al., *supra* note 66 at S-11 (late payment fees are payable to a certificate holder in the securitization).

<sup>77</sup> See, e.g., Prospectus Supplement, IndyMac et al., *supra* note 66 at S-73:

profitability of these fees can be significant.<sup>78</sup> Late fees alone constitute a significant fraction of many subprime servicers' total income and profit.<sup>79</sup>

Servicers can collect these fees post-foreclosure before the investors receive any recovery.<sup>80</sup> This guaranteed recovery of fees strongly favors foreclosures over modifications that waive fees, including HAMP,<sup>81</sup> and encourages servicers to delay foreclosures in order to maximize the number of fees charged.<sup>82</sup> In a self-perpetuating cycle, the imposition of fees makes a foreclosure more likely, by pricing a modification out of a homeowners' reach.<sup>83</sup>

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#### Default Management Services

In connection with the servicing of defaulted Mortgage Loans, the Servicer may perform certain default management and other similar services (including, but not limited to, appraisal services) and may act as a broker in the sale of mortgaged properties related to those Mortgage Loans. The Servicer will be entitled to reasonable compensation for providing those services, in addition to the servicing compensation described in this prospectus supplement.

<sup>78</sup>See *In re Stewart*, 391 B.R. 327, 343, n.34 (Bankr. E.D. La. 2008) (“While a \$15.00 inspection charge might be minor in an individual case, if the 7.7 million home mortgage loans Wells Fargo services are inspected just once per year, the revenue generated will exceed \$115,000,000.00.”), *aff'd*, 2009 WL 2448054 (E.D. La. Aug. 7, 2009); Complaint ¶ 15, *Fed'l Trade Comm'n v. Countrywide*, *supra* note 73.

<sup>79</sup>See, e.g., Ocwen Fin. Corp., *supra* note 60, at 34 (revenue from late charges reported as \$46 million in 2008 and made up almost 18% of Ocwen's 2008 servicing income); Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers*, 15 Housing Pol'y Debate 753, 758 (2004); Gretchen Morgenson, *Dubious Fees Hit Borrowers in Foreclosures*, N.Y. Times (Nov. 6, 2007) (reporting that Countrywide received \$285 million in revenue from late fees in 2006).

<sup>80</sup>See, e.g., Prospectus Supplement, Chase Funding Loan Acquisition Trust, Mortgage Loan Asset-Backed Certificates, Series 2004-AQ1, at 34, (June 24, 2004), available at <http://www.sec.gov/Archives/edgar/data/825309/000095011604003012/four24b5.txt> (“[T]he Servicer will be entitled to deduct from related liquidation proceeds all expenses reasonably incurred in attempting to recover amounts due on defaulted loans and not yet repaid, including payments to senior lienholders, legal fees and costs of legal action, real estate taxes and maintenance and preservation expenses.”); Letter from Kathy D. Patrick to Countrywide Home Loans Servicing, Oct. 18, 2010 (notifying a trust and master servicer of breaches in the master servicer's performance).

<sup>81</sup>See Manuel Adelino, Kristopher Gerardi, and Paul S. Willen, Fed. Reserve Bank of Boston, *Why Don't Lenders Renegotiate More Home Mortgages? Redefaults, Self-Cures, and Securitizations* 6 (Public Pol'y Paper No. 09-4, July 6, 2009), available at <http://www.bos.frb.org/economic/ppdp/2009/ppdp0904.pdf>. (“In addition, the rules by which servicers are reimbursed for expenses may provide a perverse incentive to foreclose rather than modify.”). Under the Department of the Treasury's Home Affordable Modification Program, servicers are required to waive unpaid late fees for eligible borrowers, but all other foreclosure related fees, including, presumably, paid late fees, remain recoverable and are capitalized as part of the new principal amount of the modified loan. See Home Affordable Modification Program, Supplemental Directive 09-01 (Apr. 6, 2009).

<sup>82</sup>Peter S. Goodman, *Lucrative Fees May Deter Efforts to Alter Troubled Loans*, N.Y. Times, July 30, 2009 (“So the longer borrowers remain delinquent, the greater the opportunities for these mortgage companies to extract revenue—fees for insurance, appraisals, title searches and legal services.”).

<sup>83</sup>See Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 Tex. L. Rev. 121 (2008); *Jones v. Wells Fargo Home Mortg.* (In re Jones), 366 B.R. 584 (Bankr. E.D. La. 2007), *aff'd Wells Fargo v. Jones*, 391 B.R. 577, 595 (diversion of mortgage payments to cover inspection charges led to increased deficiency and imperiled bankruptcy plan).

In addition to pre-foreclosure fees, servicers are usually entitled to recover the costs of selling the home post-foreclosure, before investors are paid.<sup>84</sup> The sometimes substantial fees paid to servicers in foreclosure tend to be invisible to investors.<sup>85</sup>

The agencies in these consent orders have not made even a superficial attempt to grapple with these misaligned incentives. Instead, the OCC proposes that servicer requirements to evaluate homeowners for loan modifications be further diminished through a process left nearly entirely to the control of the servicers.

## **V. The CFPB Should Have Responsibility for the Reviews and National Servicing Standards Should Be Implemented To Fill the Continuing Void in Servicing Regulation**

The dismal beginning of the agencies' foreclosure review process, the questionable history of the lead agency, and the masses of unanswered questions as to whether homeowners will actually be harmed by this process inevitably point to moving the entire process over to an agency that can offer credible implementation. The CFPB, as the agency with a mandated consumer protection focus and general supervisory authority over servicers, is the obvious choice. Given the fatal flaws in the foreclosure review process, originating in the consent orders themselves, the CFPB must undertake a top-to-bottom review of the entire process in order to protect consumers from harm and restore rationality to the foreclosure process at the affected servicers.

As demonstrated, the existing consent orders and foreclosure review process are inadequate to the foreclosure crisis. Even if improved, they would still not cover the entire market and their ability to protect homeowners facing foreclosure is uncertain. National servicing standards must be established so that the ongoing travesty of foreclosures without reasonable loss mitigation is

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<sup>84</sup>See, e.g., Prospectus Supplement, IndyMac et al., *supra* note 66 at S-73 (noting that the servicer is entitled to retain the costs of managing the REO property, including the sale of the REO property).

<sup>85</sup>Peter S. Goodman, *Lucrative Fees May Deter Efforts to Alter Troubled Loans*, N.Y. Times, July 30, 2009.

replaced with a system where incentives are aligned and homeowners, communities, and investors are no longer at the mercy of servicers still focused only on lining their own pockets.

To restore rationality to our markets we must take the following steps:

- ❖ Eliminate the two-track system. Homeowners should be evaluated for a loan modification before a foreclosure is initiated or continued, and that evaluation (and offer of a loan modification, if the homeowner qualifies for a loan modification) should be completed before any foreclosure fees are incurred. Such a requirement could be imposed by legislation or by regulation.
- ❖ The failure to offer loan modifications to homeowners, where doing so is predicted to save the investor money under the Net Present Value test, must be made a clear and absolute defense to foreclosure, in both judicial and non-judicial foreclosure states.
- ❖ Net Present Value tests for modifications should be standardized and made public.
- ❖ Loan modifications for qualified homeowners facing hardship, including those in bankruptcy, should be permanent, affordable, assumable, and available without any waiver of a homeowner's legal rights. Where appropriate, principal reduction should be prioritized and available in a modification as well through bankruptcy.
- ❖ Homeowners denied a loan modification should receive a written servicer communication documenting the NPV inputs, any relevant investor restrictions and efforts to obtain an exception, and the appeal process. Appeals should be processed before a foreclosure commences or continues.
- ❖ Homeowners should be provided with access to full documentation of any investor restrictions, as well as all servicer attempts to procure a waiver, upon any denial based on investor guidelines.
- ❖ Servicers must be required to seek, and investors should be encouraged to grant, waivers of any restrictions prohibiting modifications.
- ❖ Homeowners must be provided the tools to focus servicer attention on resolving individual cases.
- ❖ Quality foreclosure mediation programs should be funded in every community to provide an opportunity to resolve disputes outside of litigation.
- ❖ Funding for legal services lawyers and housing counselors representing homeowners facing foreclosure must be increased to allow our adversarial justice system to function as designed.

- ❖ Principal reductions should be mandated where they return a net benefit to the investor and also should be permitted in bankruptcy courts.
- ❖ Fees to servicers must be limited to those both reasonable and necessary for them to carry out their legitimate activities. Default-related fees should not remain an unconstrained profit center for servicers.
- ❖ Force-placed insurance should be replaced by a default reliance on replacing or continuing the existing coverage at a reasonable price.
- ❖ Transfer notices and periodic statements should be used to increase servicing transparency.
- ❖ Application of payments and use of suspense accounts should be fair and reasonable.
- ❖ Foreclosure documentation and notice standards should be established.
- ❖ A national system for assisting unemployed homeowners should be established. The Emergency Homeowner Loan Program (EHLP) must be made permanent and properly funded and implemented.

National standards must be a floor, not a ceiling, so states can play the traditional role of legal laboratories to further protect homeowners, investors, and communities.

## **VI. Conclusion**

Thank you for the opportunity to testify before the Subcommittee today. The foreclosure crisis continues to swell. Servicers have exacerbated the crisis, as they profit from foreclosures. The federal banking agencies overseeing the consent orders and foreclosure reviews have failed the public and the homeowners who need assistance to stop avoidable foreclosures. As the process stands now, it threatens homeowners with the loss of legal rights without meaningful compensation. It rolls back the clock on hard-won servicing improvements under HAMP. The entire process should be moved over to the new Consumer Financial Protection Bureau. The CFPB must be given the opportunity to review this process from scratch and implement a program that is fair, honest, and accountable. National servicing standards should be established to prevent further malfeasance

by the servicing industry and create a level playing field for honest actors. Together, these measures would save many homes and stabilize the market. We look forward to working with you to address the economic challenges that face our nation today.



**Exhibit A: OCC Notice and Request for Review**

# Independent Foreclosure Review

[Customer 1]  
[Customer 2]  
[Customer 3]  
[Address 1]  
[Address 2]  
[City], [State] [ZIP]

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## Important Notice:

Your loan may be eligible for an Independent Foreclosure Review that may result in compensation or other remedy.

Please respond by [Month, Date, Year].

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Loan Number: [XXXXXXXXXXXXX]

Reference Number: [XXXXXXXXXXXXX]

Property Address: [Property Address]  
[Property City, State, ZIP]

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*If you have more than one mortgage account that meets the initial criteria for an independent review, you will receive a separate notice for each. You will need to submit a separate Request For Review Form for each account.*

## You are receiving this notice because the above property is or was active in the foreclosure process between January 1, 2009 and December 31, 2010.

Si usted habla español, tenemos representantes que pueden asistirle en su idioma.

The Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency (federal bank regulators) have required an **Independent Foreclosure Review** to identify customers who may have been financially injured as a result of errors, misrepresentations, or other deficiencies made during the foreclosure process. [Servicer]'s records indicate that your loan may meet the initial criteria:

- Your mortgage loan was active in the foreclosure process between January 1, 2009 and December 31, 2010.
- The property was your primary residence.

If you believe that you may have been financially injured, you may submit a Request for Review Form for an **Independent Foreclosure Review** by a consultant outside of [Servicer].

The **Independent Foreclosure Review** will not have an impact on your credit report or any other options you may pursue related to your foreclosure. If you filed a complaint about the foreclosure process prior to this independent review, you are still eligible to submit a Request for Review Form.

## The Review Process

### Step 1: Review the enclosed Request for Review Form.

The form describes examples of situations that may have led to financial injury during the foreclosure process.

### Step 2: After reviewing the form, if you believe you may have been financially injured, complete and submit a Request for Review Form describing your situation.

Return the completed form using the enclosed prepaid envelope by April 30, 2012.

You will be sent an acknowledgement letter within one week after your request is received.

### Step 3: Your request will be evaluated to confirm eligibility for the Independent Foreclosure Review.

If your request meets the eligibility requirements, it will be reviewed by an independent consultant.

**Step 4: Your request will be reviewed to determine if financial injury occurred because of errors, misrepresentations, or other deficiencies in the foreclosure process.**

[Servicer] will provide relevant documents along with any findings and recommendations related to your request for review to the independent consultant for review. [Servicer] may be asked to clarify or confirm facts and disclose reasons for events that occurred related to the foreclosure process. You could be asked to provide additional information or documentation. Because the review process will be a thorough and complete examination of many details and documents, the review could take several months.

The **Independent Foreclosure Review** will determine if financial injury occurred as a result of errors, misrepresentations, or other deficiencies in the foreclosure process. You will receive a letter with the findings of the review and information about possible compensation or other remedy.

**Your Request for Review Form must be postmarked no later than April 30, 2012.**

To find answers to your questions about the review process as well as information to help you complete the Request for Review Form, visit [IndependentForeclosureReview.com](http://IndependentForeclosureReview.com) or call 1-XXX-XXX-XXX Monday through Friday, X a.m.–X p.m. ET or Saturday, X a.m.–X p.m. ET.

**If you are currently represented by an attorney at law with respect to a foreclosure or bankruptcy case regarding this mortgage, please refer this letter to your attorney.**

This notice is being sent at the direction of federal bank regulators and does not constitute an attempt to collect a debt or to impose personal liability for any obligation, including, without limitation, any obligation that was discharged, or is subject to an automatic stay in bankruptcy under Title 11 of the United States Code.

Esta información es precisa a la fecha de impresión y está sujeta a cambios sin previo aviso. Tenga en cuenta que el resto de la correspondencia, documentos legales y notas aclaratorias le serán suministrados en inglés. Le recomendamos que obtenga los servicios de un intérprete independiente para que le ayude según sus necesidades. This information is accurate as of date of printing and is subject to change without notice. All other communications, legal documents and disclosures will be provided to you in English. We recommend that you obtain the services of an independent third party interpreter to assist you as needed.

#### **Consent Order Details**

Pursuant to enforcement actions issued on April 13, 2011, [Servicer] signed a consent order with the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS) (independent bureaus of the U.S. Department of the Treasury), or the Board of Governors of the Federal Reserve System. As part of this order, the mortgage servicer has hired an independent consultant to independently review certain residential foreclosure actions regarding individual borrowers.

[Servicer] or their affiliate must make all reasonable efforts to contact potentially affected customers to alert them of their opportunity to have their foreclosure action reviewed. The review will assess whether the customer incurred financial injury and should receive compensation or other remedy due to errors, misrepresentations, or other deficiencies in the foreclosure process during the period 1/1/2009 to 12/31/2010.

# Independent Foreclosure Review

## Request for Review Form

**It is important that you complete the form to the best of your ability; all information you provide may be useful.**

If the foreclosure process was active on your primary residence between January 1, 2009 and December 31, 2010, you are eligible to request an Independent Foreclosure Review that may result in compensation or other remedy.

If you think you may have been financially injured as a result of errors, misrepresentations, or other deficiencies made during the foreclosure process, you may complete and submit a Request for Review Form.

**Send this completed form to:**

Independent Review Administrator  
[Address, City, State ZIP]

Your form must be postmarked no later than  
**April 30, 2012**

To find answers to your questions about the review process as well as information to help you complete the Request for Review Form, visit **IndependentForeclosureReview.com** or call **1-XXX-XXX-XXX** Monday through Friday, X a.m.–X p.m. ET or Saturday, X a.m.–X p.m. ET

**Listed below are examples of situations that may have led to financial injury. This list does not include all situations.**

- The mortgage balance amount at the time of the foreclosure action was more than you actually owed
- You were doing everything the modification agreement required, but the foreclosure sale still happened
- The foreclosure action occurred while you were protected by bankruptcy
- You requested assistance/ modification, submitted complete documents on time, and were waiting for a decision when the foreclosure sale occurred
- Fees charged or mortgage payments were inaccurately calculated, processed, or applied
- The foreclosure action occurred on a mortgage that was obtained before active duty military service began and while on active duty, or within 9 months after the active duty ended

Section 1: Property information	
[Servicer]	Property address:
Mortgage loan number: [XXXXXXXXXXXX]	[Street Address]
Reference number: [XXXXXXXXXXXX]	[City, State, ZIP]



**Section 2: Your information**

First name:	Middle initial:	Last name:
Address:		
City:	State:	ZIP:
Phone (day) <input type="text"/> <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>	(evening) <input type="text"/> <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>	
Email address:		

**PREFERRED MAILING ADDRESS AND TELEPHONE NUMBERS**

This information will be used to contact you throughout the Independent Foreclosure Review process.

Check here if same as above

Mailing address:		
City:	State:	ZIP:
Phone (day) <input type="text"/> <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>	(evening) <input type="text"/> <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>	

**Section 3: Background**

1. Was this property your primary residence?	<input type="checkbox"/>	<b>YES</b>	<input type="checkbox"/>	<b>NO</b>
2. Were you under bankruptcy protection or waiting for the final ruling on your bankruptcy case when the foreclosure action happened?  If yes, date your bankruptcy case was filed: ____ / ____ / ____ (if available)	<input type="checkbox"/>	<b>YES</b>	<input type="checkbox"/>	<b>NO</b>
3. Do you believe that the mortgage balance amount at the time of the foreclosure action was more than the amount you actually owed on the mortgage?	<input type="checkbox"/>	<b>YES</b>	<input type="checkbox"/>	<b>NO</b>
4. Do you believe that the foreclosure action was pursued because your mortgage payments were inaccurately processed or applied?	<input type="checkbox"/>	<b>YES</b>	<input type="checkbox"/>	<b>NO</b>
5. Do you believe you were protected by an insurance policy issued by the servicer or an affiliate that would have made your payments in the event of unemployment, disability, or illness, but did not do so?	<input type="checkbox"/>	<b>YES</b>	<input type="checkbox"/>	<b>NO</b>
6. Did you attempt through the court to have the decision to foreclose on your home reversed?  If yes, court date: ____ / ____ / ____ (if available)	<input type="checkbox"/>	<b>YES</b>	<input type="checkbox"/>	<b>NO</b>
7. Do you believe you provided all the necessary documents required to obtain payment assistance or a mortgage modification before the foreclosure action occurred?	<input type="checkbox"/>	<b>YES</b>	<input type="checkbox"/>	<b>NO</b>

Section 3: *continued*

8. Was a deficiency judgment obtained against you for an amount that included money that you should not have been required to pay?  YES  NO

9. Do you believe you were making on-time monthly payments in the required dollar amount on your mortgage or an approved loan modification, trial modification, or payment plan, yet the foreclosure action still occurred?  YES  NO

10. Do you believe that you were denied a modification when you qualified under the applicable program rules?  YES  NO

If possible, provide dates and details if you believe you were wrongly denied assistance:

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11. Do you believe you paid fees or charges that you should not have been required to pay in addition to your normally scheduled principal, interest, taxes, and insurance payments?  YES  NO

If possible, provide dates, types of fees or charges, and amounts you paid:

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**Important note: The questions below are specific to military servicemembers. If you or a co-borrower have not been in the military, go to question 13.**

12. Did you or a co-borrower have your mortgage loan before active duty military service began?  YES  NO

If you responded yes to question number 12, complete the following:

Name of servicemember: \_\_\_\_\_

Date active duty began: \_\_\_\_ / \_\_\_\_ / \_\_\_\_

Date active duty ended: \_\_\_\_ / \_\_\_\_ / \_\_\_\_ OR  Still on active duty as of today







## **Exhibit B: Regulator Scenarios of Financial Injury**



## **Exhibit C - OCC and FRB Guidance - Financial Injury or Other Remediation**

### **OCC and FRB Guidance - Financial Injury or Other Remediation**

The April 13, 2011 Consent Orders require the Independent Consultants (ICs) to make certain findings in conjunction with the Foreclosure Reviews and to prepare a report of their findings (“Foreclosure Report”).<sup>2</sup> The Consent Orders first require the IC to make a determination as to whether the servicer committed any “errors, misrepresentations, or other deficiencies” (as defined in Section II); and second, whether any such errors, misrepresentations, or other deficiencies “resulted in financial injury” to the borrower or mortgagee/owner of the mortgage loan. For this purpose, “financial injury” to the borrower or the mortgagee is defined as monetary harm directly caused by errors, misrepresentations or other deficiencies identified in the Foreclosure Review. Monetary harm does not include physical injury, pain and suffering, emotional distress or other non-financial harm or financial injury that did not result as a direct consequence of errors, misrepresentations or other deficiencies identified in the Foreclosure Review. However, financial injury does include monies actually expended by the borrower or mortgagee that directly relate to the foreclosure action, proceeding, or sale and otherwise would not have been required but for the error, misrepresentation or other deficiency by the servicer identified in the Foreclosure Review.

The Consent Orders require each institution to submit a plan, subject to approval by the OCC and/or FRB, to compensate or remediate financially injured borrowers, based on the findings contained in the IC’s Foreclosure Report. While the Consent Orders contemplate compensating harmed borrowers who have suffered financial injury, the Orders also contemplate remedial action other than, or in addition to, compensation in other appropriate circumstances. As such, for each file reviewed in the Foreclosure Review, the IC must first identify (and include in the Foreclosure Report) their findings regarding any servicer error, misrepresentation, or other deficiency. The IC must then identify (and also include in the Foreclosure Report) any financial injury that has been suffered by the borrower as a result of the identified error, misrepresentation, or other deficiency and any financial injury that may be suffered by the borrower absent action by the servicer to remediate or cure the identified error, misrepresentation, or other deficiency. The IC Foreclosure Report must include recommended remediation to be made and/or compensation to be paid by the institution to borrowers who the IC has identified as having suffered financial injury or who may suffer financial injury.

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<sup>2</sup> See Article VII paragraphs 3(a)-(g) and (4) for the OCC Consent Orders; Paragraphs 16(a)-(g) and 17 for the Consent Orders issued to the institutions that were previously subject to regulation by the OTS; and Paragraphs 3(a) and (b) for the FRB Consent Orders.



The following scenarios provide guidance as to what may constitute financial injury that requires compensation to the borrower or where other borrower remediation by the servicer may be required to avoid financial injury. These scenarios are not exhaustive, and should be viewed as setting forth the principles that ICs should apply when determining financial injury attributable to errors, omissions, or other deficiencies by the servicer. The IC's determination regarding the presence or absence of financial injury or whether compensation or other remediation is required must, of course, take into account and be based on the specific facts and circumstances surrounding each borrower's individual case.

#### **I. Financial Injury Present or Other Remediation Required**

Errors, misrepresentations, or other deficiencies that may result in financial injury and may require compensation to the borrower or action by the servicer to remediate or cure the error, misrepresentation, or deficiency, include the following. The OCC and FRB stress that this list is not intended to be exhaustive, but rather contains examples highlighting the principles that the ICs should use when assessing financial injury. In these examples, if a sale of the borrower's home already has occurred, the IC must determine whether the servicer should compensate the borrower for financial injury and if any other action by the servicer is required to remediate or cure the error, misrepresentation, or deficiency. If the sale has not yet occurred, the IC must also determine whether any payment to compensate for financial injury or other action by the servicer is required to remediate or cure the error, misrepresentation, or deficiency.

- 1) The borrower was not in default pursuant to the terms of the note and mortgage at the time the servicer initiated the foreclosure action.
- 2) The servicer initiated foreclosure or conducted a foreclosure sale in advance of the time allowed for foreclosure under the terms of the note and mortgage or applicable state law.
- 3) The borrower submitted payment to the servicer sufficient to cure the default pursuant to the terms of the note and mortgage, but the servicer returned the payment in contravention of the terms of the note or mortgage, state or federal law, or the servicer's stated policy covering payments when in default.
- 4) The servicer misapplied borrower payments, did not timely credit borrower payments (including failure to properly account for funds in suspense), or did not correctly calculate the amount actually due from the borrower, in contravention of the terms of the note and mortgage, state or federal law, investor requirements, or the servicer's stated policy covering application of payments.
- 5) The borrower paid a fee or penalty that was impermissible, as defined in Section II.



- 6) A deficiency judgment was obtained against the borrower that included the assessment of a fee or penalty that was impermissible, as defined in Section II.
- 7) The servicer placed an escrow account on the borrower's mortgage and the placement resulted in monies paid by the borrower into escrow in contravention of the terms of the note or mortgage, state or federal law, or the servicer's stated policy covering escrow accounts.
- 8) The servicer placed insurance on the borrower's mortgage and the placement resulted in monies paid by the borrower towards insurance in contravention of the terms of the note or mortgage, state or federal law, or the servicer's stated policy covering placed insurance.
- 9) The servicer miscalculated the amount due on the mortgage and secured a judgment against the borrower for an amount greater than the borrower owed.
- 10) A borrower's remittance of funds to a third party acting on behalf of the servicer (e.g. law firm) was not credited to the borrower's account.
- 11) The borrower was performing under the terms of an approved trial loan modification or an approved permanent loan modification, but the servicer proceeded to foreclosure in contravention of the terms of the modification offered by the servicer to the borrower.<sup>3</sup>
- 12) A borrower was denied a modification in contravention of the terms of the governing modification program or the servicer's stated policy covering modifications.
- 13) There is evidence that the borrower provided or made efforts to provide complete documentation necessary to qualify for a modification within the period such documentation was required to be provided by the governing modification program and the servicer denied the loan modification in contravention of the terms of the governing modification program or the servicer's stated policy covering modifications.
- 14) The servicer initiated foreclosure or completed a foreclosure sale without providing adequate notice as required under applicable state law.

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<sup>3</sup> The requirement for the Independent Consultants, pursuant to this Guidance in connection with the Consent Order Foreclosure Review, to evaluate and make determinations regarding financial injury in circumstances where a borrower is denied a federal or proprietary loan modification is not intended to suggest that the borrower has a legal right or entitlement to receive a loan modification from the servicer.



- 15) The servicer foreclosed on or sold real property owned by an active military servicemember in violation of the Servicemembers Civil Relief Act (SCRA). (This provision applies to loans originated before the servicemember's active military service and prohibits foreclosures and foreclosure sales of such property at any time during the borrower's period of active military service and for 9 months thereafter, unless an exception applies pursuant to the SCRA).
- 16) The servicer did not lower the interest rate in accordance with the requirements of the SCRA on a mortgage loan entered into by a military servicemember, or by the servicemember and his or her spouse jointly. (This provision applies where the borrower provided written notice of military service pursuant to the SCRA for loans originated before the borrower entered into military service; the effective rate on the loan must be lowered to a rate not in excess of 6% per year during the borrower's period of military service and for 1 year thereafter, unless an exception applies pursuant to the SCRA).
- 17) The servicer failed to honor a borrower's bona fide efforts to redeem a sale under applicable state law during the redemption period.
- 18) The borrower was protected by the automatic stay under the bankruptcy code and a court had not granted a request for relief from the automatic stay or other appropriate exception under the bankruptcy code.
- 19) The borrower was making timely pre-petition arrearage payments required under an approved bankruptcy plan and was current with their post-petition payments.
- 20) The borrower: 1) purchased a borrower payment protection plan; 2) was or should have been receiving benefits under the plan; and 3) those benefits were **not applied pursuant to the contract terms**.
- 21) The servicer was not the proper party, or authorized to act on behalf of the proper party, under the applicable state law to foreclose on the borrower's home and this resulted in or may result in multiple foreclosure actions or proceedings.
- 22) The servicer failed to comply with applicable legal requirements, including those governing the form and content of affidavits, pleadings or other foreclosure-related documents (to include improperly notarized documents or the practice of "robo-signing" generally), where such failure directly contributed to: (1) the borrower paying fees, charges, or costs, or making other expenditures that otherwise would not have been paid or made; or (2) the initiation of a foreclosure action or proceeding against a borrower who





otherwise would not have met the requirements for initiating such an action or proceeding.

## II. Other Definitions

**“Certain residential foreclosure actions”** – The term “certain residential foreclosure actions” means foreclosure actions initiated or completed on owner-occupied, 1-4 family dwellings by divisions of the institution that process first lien mortgage foreclosures. This term includes mortgages secured by individual condominium dwelling units and individual cooperative housing units. This term also includes mobile homes, house boats, and other owner-occupied dwellings that are treated as “real estate” or “real property” under applicable state law pertaining to foreclosure.

**“Impermissible”** – The term “impermissible” as applied to a fee and/or penalty charged to a borrower’s account, means a fee or penalty that is any one or more of the following:

- 1) Exceeds the limits established by applicable state law, federal law or the borrower’s mortgage instruments, including as to type, amount, or sum of fees and/or penalties.
- 2) In the case of the OCC Consent Orders, is not **“reasonable and customary,”** or a fee that is assessed at an **“excessive”** frequency. The term **“reasonable and customary”** as applied to a fee and/or penalty charged to a delinquent borrower’s account means that institutions may only assess a fee for services actually rendered, and may only assess a fee or collect a monetary penalty that does not exceed the lesser of (a) any fee limitation or allowable amount for service under applicable state or federal law; (b) any published, pre-established fee limitation or allowable amount for the service under the guidelines for the applicable government-sponsored enterprise investing in the loan or the government agency insuring the loan; and (c) the market rate for the service (as defined under the amount or rate that is **“customarily charged in the market for such fee or penalty”** below). The term **“excessive”** means any fee that exceeds the amount permitted by the borrower’s loan documents, by applicable state or federal law, or investor requirements. Excessive frequency of a fee means the same or a similar fee that is more than necessary or appropriate for completion of the underlying service.
- 3) In the case of the FRB Consent Orders, is **“otherwise unreasonable.”** A fee or penalty is **“otherwise unreasonable”** if it was assessed: (a) for the purpose of protecting the secured party’s interest in the mortgaged property, and the fee or penalty was assessed at a frequency or rate, was of a type or amount, or was for a purpose that was in fact not needed to protect the secured party’s interest; (b) for



services performed and the fee charged was substantially in excess of the fair market value of the service; (c) for services performed, and the services were not actually performed; or (d) at an amount or rate that exceeds what is customarily charged in the market for such a fee or penalty, and the mortgage instruments or other documents executed by the borrower did not disclose the amount or rate that the lender or servicer would charge for such a fee or penalty.

- i) A fee charged for services performed is not **“substantially in excess of the fair market value of the service”** if it exceeds by no more than 10 percent the maximum allowable fee under the **“applicable investor guide”** or, if there is no **“applicable investor guide”**, the guide published by Fannie Mae or Freddie Mac that would apply if Fannie Mae or Freddie Mac were the investor.
- ii) A fee or penalty does not **“exceed”** the amount or rate that is **“customarily charged in the market for such fee or penalty”** if the fee or penalty does not exceed the maximum allowable fee under the **“applicable investor guide”** or, if there is no **“applicable investor guide”**, the guide published by Fannie Mae or Freddie Mac that would apply if Fannie Mae or Freddie Mac were the investor.
- iii) **“Applicable investor guide”** means investor guides issued by Fannie Mae, Freddie Mac, the Veterans Administration, and the Department of Housing and Urban Development.

**“Errors, misrepresentations, or other deficiencies.”** The terms “errors, misrepresentations, or other deficiencies” means those matters discovered during the Foreclosure Review as set forth in Article VII(3)(a)-(g) of the OCC’s Orders, OTS Order paragraph 16(a)-(g), and Paragraphs 3(a)(i)-(vii) of the Board’s Orders. “Errors” includes miscalculation of fees or other charges, where the total aggregate miscalculated fees or charges applied to the borrower exceeds \$99.00.

## Appendix A: Organizations on Whose Behalf Testimony Submitted

**Community Legal Services of Philadelphia** (CLS) was created by the Philadelphia Bar Association in 1966 and is widely recognized as one of the most sophisticated, respected legal services programs in the nation.

The **Connecticut Fair Housing Center** is a statewide non-profit organization dedicated to ensuring that individual choice, and not discrimination, determines where people live in Connecticut.

**Consumer Action** has been a champion of underrepresented consumers since 1971. A national, nonprofit 501(c)3 organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change particularly in the fields of credit, banking, housing, privacy, insurance and utilities. [www.consumer-action.org](http://www.consumer-action.org)

**Consumers Union** (CU) is an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. The organization was founded in 1936.

**Empire Justice Center** is a New York statewide legal services organization with offices in Albany, Rochester, White Plains and Central Islip (Long Island). Empire Justice provides support and training to legal services and other community-based organizations, undertakes policy research and analysis, and engages in legislative and administrative advocacy, in addition to representing low-income individuals in a wide range of poverty law areas including consumer law. Empire Justice is a steering committee member of New Yorkers for Responsible Lending (NYRL), a statewide coalition promoting access to fair and affordable financial services and the preservation of assets for all New Yorkers and their communities

The **Financial Protection Law Center** (FPLC) is a 501c3 public interest not-for-profit law firm. It is devoted to fighting predatory lending and to defending families from foreclosure of predatory loans. FPLC is located in Wilmington, North Carolina and works throughout North Carolina and occasionally in other states.

**Housing and Economic Rights Advocates** (HERA) is a California statewide, not-for-profit legal service and advocacy organization. HERA's mission is to ensure that all people are protected from discrimination and economic abuses, especially in the realm of housing. We focus particularly on the needs of those who are most vulnerable, which includes lower-income people, the elderly, immigrants, people of color and people with disabilities.



The **Legal Aid Center of Southern Nevada, Inc.** is a private, non-profit (501 (c) (3)) corporation which is a charitable organization dedicated to providing free community legal services to those in need. We have been providing free legal aid for Clark County's low income residents since 1958.

The **Michigan Foreclosure Task Force** represents a close to 200 members, covering a broad array of interests engaged in the front lines of foreclosure work in Michigan—from banks to legal services, housing counselors to local government. MFTF supports efforts to put resources on the front lines of the foreclosure crisis in Michigan to assist homeowners and communities battle against foreclosure, vacant homes, and falling property values.

The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

The **National Council of La Raza** (NCLR)—the largest national Hispanic civil rights and advocacy organization in the United States—works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations, NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. To achieve its mission, NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective in five key areas—assets/investments, civil rights/immigration, education, employment and economic status, and health. In addition, it provides capacity-building assistance to its Affiliates who work at the state and local level to advance opportunities for individuals and families.

The **National Community Reinvestment Coalition** (NCRC) was formed in 1990 by national, regional, and local organizations to develop and harness the collective energies of community reinvestment organizations from across the country so as to increase the flow of private capital into traditionally underserved communities. NCRC has grown to an association of more than 600 community-based organizations that promote access to basic banking services including credit and savings, to create and sustain affordable housing, job development and vibrant communities for America's working families.

The **National Fair Housing Alliance** (NFHA), founded in 1988 and headquartered in Washington, DC, is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. Through comprehensive education, advocacy and enforcement programs, NFHA protects and promotes residential integration and equal access to apartments, houses, mortgage loans and insurance policies for all residents of the nation.

**National People's Action** (NPA) is a national network of grassroots organizations working to advance economic and racial justice. NPA consists of 26 organizations across the country that reaches from farmers in rural Iowa to youth in the South Bronx. NPA has affiliate organizations in

14 states with remote network offices in Washington D.C., California, New York and a central office in Chicago.

**Neighborhood Economic Development Advocacy Project (NEDAP)** is a resource and advocacy center that works with community groups in New York City's low and moderate income neighborhoods. NEDAP's mission is to promote community economic justice and to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty. NEDAP employs multiple strategies – including community outreach and education, advocacy, policy research and analysis, and direct legal services – to ensure that communities have access to fair and affordable credit and financial services, and to address inequities in the financial services system.

The **North Carolina Justice Center** is the state's leading progressive advocacy and research organization. Its mission is to end poverty in North Carolina by ensuring that every household has access to the resources, services and fair treatment it needs to achieve economic security.