



VIA FIRST CLASS AND ELECTRONIC MAIL

Thomas M. Glassic, General Counsel  
Department of Insurance, Securities and Banking  
810 First Street, NE Suite 701  
Washington, DC 20002

October 24, 2011

**RE: Comments on Regulations to Implement the Foreclosure Mediation Program  
Established by the Saving D.C. Homes from Foreclosure Amendment Act of 2010**

Dear Mr. Glassic:

Pursuant to the Notice of Emergency and Proposed Rulemaking published in the D.C. Register Vol. 58 No. 38 on September 23, 2011, the Legal Aid Society of the District of Columbia ("Legal Aid") and the undersigned organizations and individuals submit the following comments to the regulations issued by the Department of Insurance, Securities and Banking ("DISB") to implement the foreclosure mediation program established by the Saving D.C. Homes from Foreclosure Amendment Act of 2010 ("the Act").

Legal Aid previously submitted comments in response to the Notice of Proposed Rulemaking from April 8<sup>th</sup> and appreciates the changes made by DISB in the Emergency and Proposed Rulemaking reflecting those comments. Further, Legal Aid commends the steps DISB has taken to include various stakeholders in discussions regarding necessary changes to the regulations to increase the efficiency and effectiveness of the District's mediation program.

Still more can be done to ensure that the regulations best promote the District's goal of creating a foreclosure mediation program that affords homeowners and borrowers (referred to collectively as "Borrowers") meaningful opportunities to pursue alternatives to foreclosure. Accordingly, Legal Aid submits these comments for review and recommends further improvements and changes to the regulations as outlined below.

**1. Eliminate "Conclusive Evidence" Language in Section 2718.4 -- Or, At a Minimum, Provide a Review Period Before the Issuance or Effective Date of a Mediation Certificate.**

Section 2718.4 of the regulations currently states that, with only few enumerated exceptions, "a Mediation Certificate shall serve as *conclusive evidence*" that all the provisions of the Act and chapter have been complied with. (Emphasis added). Legal Aid believes that this language is not only unnecessary, but is also extreme, overbroad, and harmful to the very Borrowers that the mediation legislation was intended to protect. It is our understanding that the language was added in response to a demand from members of the title insurance industry, who stated that they would refuse to provide lenders with title insurance on foreclosed properties unless such

language were included because the mediation law would otherwise make completed foreclosure sales vulnerable to challenge by former homeowners.

However, to our knowledge no other jurisdictions with foreclosure mediation programs have incorporated such an extreme provision catering to the interests of title insurers, and in fact several jurisdictions have adopted provisions with the exact opposite effect – explicitly providing Borrowers with new causes of action based on noncompliance with mediation requirements, rather than foreclosing homeowners from bringing challenges. Further, while the “conclusive evidence” language may have been introduced under pressure to protect bona fide purchasers of foreclosed properties, the actual and unintended effect of such language is that the risk of liability is likely to simply shift from lenders to the District government. In other words, a foreclosed Borrower claiming that a lender did not mediate in good faith (but unable to challenge the lender directly, because of the “conclusive evidence” language) may have no choice but to bring an action against DISB, arguing that the agency should not have issued a Mediation Certificate under the circumstances. It is lenders, not the District government, who should be held accountable for the good faith and related requirements in the mediation law.

Based on the above, Legal Aid urges DISB to remove section 2718.4 altogether or to change the “conclusive evidence” language to provide for a more reasonable rebuttable presumption standard. However, while we feel strongly that elimination or modification of the “conclusive proof” provision is necessary, we also acknowledge that the same language appears in the underlying legislation and therefore cannot be resolved through comments and agency action alone. Therefore, if DISB and the D.C. Council are unable to make this critical change, we propose an alternative change to the regulations that would at least provide a short review period prior to the issuance or effective date of a Mediation Certificate.

More specifically, because the legislation and regulations currently do not allow for any review of Mediation Administrator decisions to issue a Mediation Certificate (which then allows lenders to foreclose), it is essential that Borrowers and their advocates at least have a chance to request reconsideration if they have grounds to believe that mediation was not conducted in good faith and disagree with the Mediation Administrator’s decision to issue a certificate.<sup>1</sup> We propose two potential ways in which DISB could provide Borrowers with this basic protection:

- Rather than immediately issuing a Mediation Certificate after reviewing a mediator’s report and recommendation, the Mediation Administrator could instead issue a “Letter of Intent to Issue Mediation Certificate” which would be sent to the parties and provide a fifteen-day period during which the Borrower could make a request for reconsideration. Upon receipt of a request for reconsideration, the Mediation Administrator could decide

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<sup>1</sup> It is our position that providing *judicial review* of a Mediation Certificate would be the best way to ensure that all parties have complied with mediation requirements prior to foreclosure and that mediation is effective in its goal of preventing unnecessary foreclosures wherever possible; however, like the “conclusive evidence” issue described above, we recognize that making this type of a change would require changes to the underlying legislation. Therefore, our comments regarding this issue mainly address alternative ways in which DISB could provide an administrative-level review through changes to the regulations.

to re-assign the case to a new mediator for review; on the other hand, if after the fifteen days the Borrower makes no request, or DISB believes the request is without merit, the Mediation Administrator could move forward and issue the Mediation Certificate.

- Alternatively, after receiving the mediator's report and recommendation, the Mediation Administrator could issue the Mediation Certificate but provide a fifteen-day waiting period during which the Borrower could make a request for reconsideration before the lender is allowed to record the certificate and move forward with foreclosure. Upon receipt of a request for reconsideration, the Mediation Administrator could decide to set aside the Mediation Certificate, issue a stay for further review, or decline to make any change, thus allowing the lender to record the certificate and move forward with foreclosure proceedings.

We believe both of these options are wholly consistent with the intent of the legislation to prevent avoidable foreclosures, and we would be happy to work with DISB to draft specific language or to discuss other potential ways to build in this essential protection. In addition, we note that while our primary concern is providing Borrowers a chance to request reconsideration of the Mediation Administrator's decision to issue a Mediation Certificate allowing the lender to foreclose, the request for reconsideration need not be limited to Borrowers alone – in other words, lenders could also request reconsideration of the Mediation Administrator's decision *not* to issue a Mediation Certificate.

**2. Provide Borrowers with Prompt Access to Chain of Title Documents Supplied by Lenders to DISB and Mandate that Lenders Supply Chain of Title Documents as an Element of the Obligation to Mediate in Good Faith.**

**Documentation Included with Notice of Default – Proposed Rule 2703.10.** According to the latest iteration of the proposed regulations, a lender must send specific documents demonstrating proof of its standing to act on the Note and mortgage to DISB at the same time it files a Notice of Default with the agency. Legal Aid strongly supports this requirement and commends its inclusion in the regulations. Providing chain of title documents early in the process will assist all parties by providing more time before mediation sessions begin to determine complex issues of legal standing. However, this benefit cannot be fully utilized unless DISB provides a means for Borrowers to examine the documents with minimal delay once they have been received by DISB, and Borrowers would be unduly disadvantaged if required to proceed to mediation without an opportunity to analyze a lender's standing in advance. Therefore, Legal Aid encourages DISB to develop and articulate a procedure for providing Borrowers with access to the documents soon after DISB has received them. For example, DISB could add text on the Notice of Default or provide an additional notice explaining to Borrowers that the documents are available from DISB upon request, and providing detailed instructions on how to make such a request. As an alternative, DISB could amend the regulations to require that lenders send the documents directly to Borrowers at the same time that the documents are submitted to DISB.

**Failure to Mediate in Good Faith – Proposed Rule 2713.4.** While Legal Aid commends DISB's addition of the chain of title documentation requirements to section 2703.10 (thus

requiring that lenders provide such documents earlier in the mediation process), its simultaneous removal of that list of documents from section 2714.1 also appears to have separated the documentation requirement from the list of obligations in 2713.4 defining the parameters of the good faith requirement. It is essential that the lender's obligation to provide chain of title documents be included among the list of provisions that a lender must comply with to mediate in good faith.

The chain of title documents now required in section 2703.10 rather than in section 2714.1 are vital to identifying whether a lender has authority to initiate a foreclosure, let alone participate in mediation. Lenders who mediate without providing proof of their legal standing cannot be described as mediating in good faith because they have not demonstrated a right at the outset to mediate at all. Accordingly, Legal Aid urges DISB to add the following language to Rule 2713.4: “A mediation party fails to mediate in good faith if the party: . . . (e) Fails to provide documents and information required by subsections 2703.10 and 2703.11.”

**3. Clarify that Borrowers Are Not Required to Pay the \$50 Opt-In Fee Again if an Additional Notice of Default is Issued Due to Lender Error.**

**Mediation Fee – Proposed Rules 2708.2(b)(3) and 2711.5.** Legal Aid believes that DISB's intent has always been and continues to be that a Borrower who pays the \$50 Mediation Election Fee should not have to pay the fee again in the event that a Notice of Default is canceled and re-filed, unless the reason is the Borrower's cancellation or a new default by the Borrower. However, section 2708.2(b)(3) of the proposed regulations no longer includes language regarding this issue. Further, while the current language in section 2711.5 appears to partially address the issue by stating that Borrowers do not need to pay an additional election fee when a Lender cancels mediation and files again, is not sufficiently broad to cover all the circumstances in which a Notice of Default might be filed again on the same residential mortgage due to no fault of the Borrower. For example, in the event that DISB cancels a Notice of Default due to an error with the notice and a lender subsequently files a revised notice, Rule 2711.5 would not be triggered. For this reason, Legal Aid recommends that DISB add language to sections 2708.2(b)(3) and 2711.5 to clarify that a Borrower is not required to pay the \$50 Mediation Election Fee multiple times in the case of any error by an entity other than the Borrower – not just lender cancellation.

**4. Remove Unnecessary Impediments to Effective Mediation Sessions.**

**Length of Time Devoted to Mediation Session – Proposed Rule 2710.21.** Legal Aid believes that the proposed maximum length of time for each mediation session of two (2) hours is insufficient to thoroughly and effectively analyze Borrowers' eligibility for alternatives to foreclosure. Discussions regarding lenders' legal standing and Borrowers' qualifications for various loan modification programs and other workout options will consume two hours very easily, and in many cases two hours will be insufficient to conduct a thorough analysis. Given the high stakes of foreclosure mediation and the underlying purpose of the mediation program to find alternatives to foreclosure and avoid the loss of homes whenever possible, Legal Aid urges

DISB to reinstate the original three (3) hour time limit, which was the policy that DISB had adopted in all previous versions of the proposed regulations.

**Requirements on Borrowers to Supply W2s and Tax Returns – Proposed Rule 2714.3.** In addition to increasing the maximum time for mediation sessions, Legal Aid recommends that DISB remove unnecessary barriers to Borrowers opting in to mediation. Proposed rule 2714.3 currently requires Borrowers to send copies of their W2s and most recent tax returns in order to apply for loss mitigation and attend mediation. However, the requirement to produce these documents places an unnecessary burden on Borrowers because the documents reflect prior income levels, whereas a loss mitigation analysis focuses on current and future income. In fact, applying for a modification under the federal government’s Home Affordable Modification Program requires no more than filing a Form 4506T, which authorizes the IRS to release a transcript of a filer’s tax return. Further, because many low-income individuals (for example those whose income derives solely from non-taxable benefits) may not have W2s or tax returns at all, the mediation regulations as currently drafted in section 2714.7 would require them to provide a written explanation as to why the documents are missing or inapplicable, adding an unnecessary burden for a significant number of cases in which the documents are not even relevant. Such requirements are likely to disproportionately harm low-income Borrowers as well as unnecessarily complicate and slow the mediation process – when instead, mediation fairness, efficiency, and effectiveness should be the top priorities. Finally, because mediators already possess the power under Rule 2714.4 to request additional documentation necessary to supplement review, removing the explicit requirement for W2s and tax returns in Rule 2714.3 would only serve to eliminate a preliminary burden rather than suppressing the information. Accordingly, Legal Aid encourages DISB to strike W2s and tax returns from the list of documents required under Rule 2714.3.

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For the above reasons, Legal Aid supports DISB’s proposed regulations to implement the foreclosure mediation program with recommended changes. We thank you for the opportunity to submit our comments and for your consideration.

Sincerely,



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