Legal Aid Society
OF THE DISTRICT OF COLUMBIA

VIA FIRST CLASS AND ELECTRONIC MAIL

April 15, 2011

Stephen Taylor, General Counsel
Department of Insurance, Securities and Banking
810 First Street, NE Suite 701
Washington, DC 20002

Re: Proposed Regulations to Implement the Foreclosure Mediation Program Established by the Saving D.C. Homes from Foreclosure Amendment Act of 2010

Dear Mr. Taylor:

Pursuant to the Notice of Proposed Rulemaking published in the D.C. Register Vol. 58 No. 14 on April 8, 2011, the Legal Aid Society of the District of Columbia[1] ("Legal Aid") and the undersigned organizations and individuals submit the following comments to the proposed 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 commends DISB for its work in drafting these proposed regulations. Until recently, weak legal protections for homeowners in D.C. have resulted in a record number of foreclosures, causing devastation to homeowners, their families, their neighborhoods, and the District as a whole. Further, many of these foreclosures could have been prevented had the homeowners been able to navigate the loan modification process – a process that has become notorious for its barriers and shortcomings despite the enormous stakes for homeowners. DISB's proposed regulations to implement a mediation program that gives homeowners a meaningful chance of obtaining a loan modification or other workout option prior to foreclosure are a promising start to effectuating important safeguards for some of the most vulnerable individuals and families in the District facing foreclosure. **More specifically, we commend the agency for its excellent work in developing the following proposed rules**:

Good Faith Standard – Proposed Rule 2713.2. Legal Aid commends DISB for developing an objective standard by which to measure a lender's good faith participation in mediation. This will provide much needed guidance to all parties participating in the mediation, and will help steer the parties to adhere to consistent and meaningful standards. Without this, the mediators overseeing the mediation process would be left with a subjective and weak review.

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[1] The Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent person in civil law matters and to encourage measures by which the law my better protect and serve their needs." Over the last 79 years, tens of thousands of the District's neediest residents have been served by Legal Aid staff and volunteers. Legal Aid currently works in the areas of consumer law, housing, family law, and public benefits. It also has an appellate practice.

Cure Amount in Notice of Foreclosure – Proposed Rule 2727.2(i). Legal Aid also commends the agency for clarifying in this proposed rule that the cure amount in the notice of foreclosure should include the fees and costs required to cure, plus the date by which that amount must be paid. This will make the right to cure more meaningful, as Borrowers will know the actual amount necessary to stop a foreclosure, rather than being confronted with a moving and unclear target.

Deceased Borrowers – Proposed Rule 2712.5(g). Legal Aid commends DISB for tackling and developing a solution to the common problem of how to treat heirs of a deceased Borrower. Without this provision, surviving spouses, children, and other heirs of the deceased Borrower would be unable to represent their interests at mediation and heirs could easily lose the home without having had an opportunity to talk to the lender.

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However, there are also sections of the proposed rules that, unless changed, are likely to hinder the overall effectiveness and efficiency of the foreclosure mediation program and frustrate the original intent of the Act. **Thus, Legal Aid comments on the following four key issues/areas in the proposed regulations in need of change:**

1. **Preserve Mediation Efficiency and Effectiveness by Providing Borrower Access to Key Information and Preventing Abusive Cancellation of Mediation by Lenders**

Pre-Mediation Documents - Proposed Rule 2714.1. Under this section, five days prior to the mediation, the lender must provide the Mediator with documentation of its review of the Borrower's qualifications for a modification, as well as proof of its standing. *In order for a Borrower to properly prepare for mediation, the Borrower must also have access to these documents prior to the mediation.* Without such prior access, the first session of the mediation will not be fruitful, as the Borrower will need to spend most, if not all of the time allotted, towards reviewing the lender's documentation. Further, as the proposed regulations only allow for a total of two mediation sessions, this is not an efficient use of time. Additionally, not providing the Borrower with prior access to the lender's documentation severely undercuts the Act's requirement that the lender provide such documentation in the first place. From a practical perspective, most Borrowers will be pressured to begin the mediation from an uninformed position. *At a minimum, Borrowers should have access to this information by being able to review and copy the documents as necessary at DISB prior to the mediation. However, the logistics of requiring the borrowers to come to DISB to obtain these documents will be difficult for both borrowers and DISB, so the better solution is for the lender to provide these documents to the Borrower at the same time that it provides them to DISB.*

Lender Cancellation - Proposed Rule 2711.4. This section allows a lender to unilaterally cancel mediation. Although at first blush this would seem to benefit the borrower, because the lender will not be able to obtain a Mediation Certificate, and hence proceed towards foreclosure, this section also raises potential concerns for the Borrower. If the lender cancels because it does not have the required documentation of standing, for instance, and wants to re-file at a later date, the borrower would have to pay the mediation fee twice, and would also lose the opportunity that

they have paid for, to attempt a face-to-face resolution with the lender. Additionally, for a Borrower struggling to make payments, fees and interest would accrue during this period, ultimately making modification more difficult or more expensive for the Borrower. *We therefore favor eliminating this section. Should DISB choose to retain this section, we would suggest three amendments: 1) the Borrower should not have to repay the $50 fee if the lender submits a new notice of default within one year, 2) the lender should have to specify its reasons for the cancellation, and 3) the lender should be subject to fines by DISB should the reasons for the cancellation demonstrate lack of good faith participation as required by these regulations.*

2. **Remove Logistical and Scheduling Barriers to Effective Mediation**

Writing Requirement - Proposed Rule 2710.4-2710.5. This section of the proposed rules states that a mediation party must show "good cause in writing" for non-attendance or to reschedule a mediation session. For Borrowers with low-literacy or without access to a computer, or in case of emergency, the writing requirement is likely to create a barrier that unfairly affects those Borrowers with the greatest need to participate in foreclosure prevention mediation. *Instead, the regulations should allow for a mediation party to provide such good cause by phone, as well as in writing.*

Second Rescheduling Requests - Proposed Rule 2710.7. This section prohibits a mediation party from requesting a second rescheduling of a mediation without the consent of every other mediation party. A second request may be necessary due to emergency, illness, or some other legitimate reason. Further, this section could be interpreted to mean that if a Lender requests a rescheduling, that a Borrower could not subsequently request a rescheduling of the mediation (or vice versa). *The mediator should have the discretion to grant or deny a request based upon the specific circumstances. At a minimum, DISB should clarify this section to state that each party, or side, to a mediation has the right to request at least one rescheduling.*

Tolling - Proposed Rules 2710.15 and 2710.21. These provisions currently state that the mediation parties may agree to extend mediation for an additional thirty days beyond the ninety-day time limit, but that mediation may not exceed a total of two three-hour sessions. If these provisions are left unchanged, mediations may end abruptly and without any resolution (either a settlement agreement or a decision to proceed to foreclosure) if they reach the maximum two-session limit before a full review has been completed. Such result is inefficient and wasteful of resources for all parties involved. *Therefore, we recommend that the regulations should at a minimum allow for tolling of the time limit upon the agreement of all mediation parties. The regulations should also allow for a tolling of the time limit at the discretion of the mediator.*

3. **Provide Protections for Mediations Involving Multiple Borrowers**

Separate Borrower Election - Proposed Rule 2708.2(b)(3). The drafting of this section indicates that the mediation election requirements are the same for all Borrowers, even if multiple Borrowers wish to participate in the same mediation with respect to the same loan and the same property. This would mean that if a husband and wife both wish to elect mediation, both must separately fill out a mediation election form, loss mitigation form, and send in their own $50 fee. We disagree that this was the intent of the language in the Act. Further, requiring

duplicative fees and documentation for the same loan and household is counterintuitive and therefore likely to be confusing, leading to low compliance. Additional complications may arise if the Borrowers later develop conflicting interests and only one has formally elected to participate in mediation.

Cancellation by a Borrower - Proposed Rule 2711.3. Under this section, if only one of several Borrowers elects mediation, that single Borrower has the power to cancel mediation without the consent of the other Borrowers. This is problematic in the case of a schism between the Borrowers. It is also unclear as to whether this creates an inconsistency with proposed rule 2711.2, which appears to require all Borrowers to cancel a mediation in order for the cancellation to be effective. *We recommend clarifying that all Borrowers must consent to cancellation of mediation.*

Participation by Non-Electing Borrowers - Proposed Rule 2712.5(f). Under this section, a Borrower who did not elect to participate in mediation can only participate if another Borrower who *did* elect mediation requests the non-electing Borrower to participate. This again may be problematic if the first Borrower says that he/she is electing on behalf of all of the Borrowers, but subsequently decides to block the other Borrowers. The other Borrowers' participation will also be necessary in most cases to effectuate a loan modification agreement. *We recommend eliminating this section. It is also inconsistent with 2712.5(a), which indicates that any borrower may participate in a mediation.*

4. **Protect Against Lender Add-On Fees Resulting from Mediation**

Lender Fees - Proposed Rule 2703.8. This section of the proposed regulations states that the lender cannot pass on any costs of issuing a Notice of Default to a Borrower when the lender fails to pay the $300 fee. However, the language in the Act is much stronger, and states:

> The lender shall pay a fee of $300 for each notice of default on a residential mortgage issued. If the power of sale for a property is exercised, the lender may recover the $300 fee from the proceeds of sale if there is any amount remaining after the payment of all amounts due and owing by the borrower on the residential mortgage and the costs of the sale. The lender shall not be permitted to recover [the] mediation fee paid if there is a deficiency upon the sale of the foreclosed property.

In other words, the Act indicates that the lender may only recover the fee if it proceeds to sale and there is no deficiency. The regulations seem to suggest the opposite - that the lender can recover the costs unless it fails to pay the fee. This is contrary to the spirit and the language of the regulations and, if unchanged, may result in increased costs to Borrowers and have an adverse effect on their eligibility for loan modification. *Thus, this proposed rule should be amended to state that a lender may not recover the $300 fee unless the lender has proceeded to sale and there is no deficiency.*

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Finally, Legal Aid submits the following comments regarding necessary changes to the proposed regulations to bring them into accordance with the language of the Act, and clarifications necessary to ensure effective implementation of the foreclosure mediation program.

Required Changes for Consistency with the Act

1. **Use of the term "Borrower."** The term "borrower" as used throughout the regulations should be capitalized ("Borrower") to be consistent with the definition in the regulations and the Act, and to clarify that when the term is used, it invokes the definition in the regulations.

2. **Principal Place of Abode - Proposed Rule 2726.1**. This section should be amended to conform to the definition in the Act, to clarify that a dwelling can be the principal place of abode of a Borrower when it is occupied by a member of his/her immediate family. *The language could read "The principal place of abode of an individual is the place where an individual [or a member of his or her immediate family] lives . . . ."*

3. **Notice of Foreclosure Form FM-5 - Cure Amount**. As noted above, we commend DISB for clarifying the Notice of Foreclosure should state the total amount required to cure the default, including costs and fees. However, the Notice of Foreclosure Form, FM-5, must be amended to reflect this clarification. *The Second to last line should read "Minimum balance required to cure default . . . $_____, due on note; $_____ in costs; $_____ in attorney fees. In order to cure this default, Borrower must therefore pay a total of $_____, by _____ (date). After this date the amount to cure the default will increase due to anticipated auction fees of $_____, publication fees of $_____, attorneys fees of $_____, and additional costs of $_____. Also, on the notice of foreclosure form, the certification only states that the noteholder or agent sent the notice by certified mail. The Act and the Regulations require mailing by certified and regular mail.*

Required Clarifications

1. **Obligation to Mediate in Good Faith – Proposed Rule 2713.2, and 2713.3** As previously noted, we believe that this section will greatly improve the quality of the mediations, but would suggest some further language in light of the changing federal landscape for loan modifications. Specifically, although the FDIC is currently publishing standards for loan modifications, this function could be taken over by the new Consumer Financial Protection Bureau. *We would therefore suggest that DISB insert a semicolon after the word "lender" in line five of subsection (a), and add the words "and other applicable government standards and programs" after the last semicolon in subsection (a). Additionally, DISB should amend subsection (c) to clarify that the lender's demonstration of the net present value test requires that the lender share its analysis, not just its results. DISB should therefore add the words "by offering an analysis of its position" after the words "shall demonstrate" in line 2, so that the sentence would read "If the lender does not reach a settlement with the borrower(s) during a mediation, the*

lender shall demonstrate, by offering an analysis of its position, that the net present value . . . "

DISB should add the phrase "which includes an analysis of applicable government standards and programs," to the end of section 2713.3, for the reasons stated above.

2. **Borrower Documentation - Proposed Rule 2714.3**. This section requires a Borrower to bring to the mediation documentation of income that the Borrower has already supplied in his/her Loss Mitigation Application. The Borrower's notice that he/she has to bring this duplicative documentation has not yet been provided by DISB. However, we have concerns, given the number of documents that the Borrower will receive in the packet from the lender, that this notice will not be prominent enough to alert borrowers to this requirement. The problem here is that if the Borrower does not bring this duplicative documentation, it can be deemed to be a lack of good faith under 2710.13. *DISB should simply eliminate this provision or only include the second clause of this section – requiring the Borrower to bring information requested by the Mediation Administrator.*

3. **Mediation Results Data - Proposed Rule 2715**. It would be helpful to clarify that although the financial information of the Borrower should be kept confidential, that the results of the mediation should not be confidential. Such information would be valuable in ascertaining the effectiveness of the foreclosure mediation program to see how many modifications or other solutions have resulted from the mediations. Additionally, assuming that the purpose of the regulation is to foster communication during the negotiations, and not to hinder any rights that the parties otherwise have, DISB should add an additional section 2715.5 that would read: *This section shall not be construed to hinder a Borrower's ability to use information obtained in mediation for any legal purpose. Such information includes but is not limited to loan modification calculations and input data that has not been determined to be privileged by a court of law.*

4. **"Filing" Requirement - Proposed Rule 2719.2**. This proposed rule states that a Borrower should "file" an application for Order to Perform Due to Breach, with the Mediation Administrator. This term is used throughout the regulations, but it is unclear whether a mailing constitutes a filing or whether a party needs to do something else, such as deliver a copy of the document to DISB. The word "file" is used within sections 2709, 2710, 2711, 2719, 2720 and 2727. *We recommend that the word "file" as used throughout the regulations should be clarified to mean "mailed to DISB, delivered to DISB, or submitted to DISB via email."*

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For the above reasons, we support DISB's proposed regulations to implement the foreclosure mediation program with the recommended changes. We thank you for the opportunity to submit our comments.

Sincerely,

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