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Supreme Court Mortgage Foreclosure Committee
c/o Administrative Office of the Illinois Courts
3101 Old Jacksonville Road
Springfield, Illinois 62704

Re: Proposals on Recommended Elements of Foreclosure Mediation

Dear Members of the Committee:

The National Consumer Law Center, on behalf of its low income clients, is pleased to submit the following comments regarding the Committee's proposed elements of foreclosure mediation programs. NCLC has worked extensively in this area since 2008. We have studied the foreclosure mediation programs created under statutes and court rules that are now helping homeowners save their homes in twenty-four states. NCLC works regularly with attorneys representing homeowners in these programs. Our staff have conducted trainings for hundreds of foreclosure mediators in a half dozen states. Copies of our reports and data collections on foreclosure mediation can be found on our website.¹

In our most recent report, we described some of the current data showing the very positive impact of foreclosure mediation.² For example, as of March 2011, only 3.5% of the homeowners who participated in Philadelphia's foreclosure diversion program since mid-2008 have had their homes sold at foreclosure sale.³ Similar studies have shown the clear benefits from interventions such as work with housing counselors. Federal data now shows that when loan modifications are structured for affordability, as they have been under programs such as the HAMP initiative, these modifications seldom re-default. We now know for certain that many foreclosures are preventable. A loan modification with affordable payments is an alternative that is often in the best interests of all parties.

In our comments below we have tried to keep to the general outline in the Committee's Notice of Public Hearing for June 8, 2012. Where we thought it would be helpful, we amplified on some points related to your selected topics.

www.NCLC.org

Boston Headquarters:

7 Winthrop Square
Boston, MA 02110-1245
Phone: 617/542-8010
Fax: 617/542-8028

Washington Office:

1001 Connecticut Ave, NW
Suite 510
Washington, DC, 20036
Phone: 202/452-6252
Fax: 202/463-9462

¹ National Consumer Law Center, *Rebuilding America: How States Can Save Millions of Homes Through Foreclosure Mediation* (February 2012), available at: [nclc.org](http://www.nclc.org), and specifically at <http://www.nclc.org/foreclosures-and-mortgages/foreclosure-mediation-programs.html>

² <http://www.nclc.org/foreclosures-and-mortgages/rebuilding-america.html>.

³ The Reinvestment Fund, *Philadelphia Residential Mortgage Foreclosure Diversion Program: Initial Report and Findings* (June 2011), available at www.trfund.com/resource/downloads/policypubs/Foreclosure_Diversion_Initial_Report.pdf.

1. Outreach. Outreach is critically important to ensuring that as many homeowners as possible receive the benefits mediation has to offer. Several forces work against participation. Scammers offering expensive, useless, and outright harmful services routinely prey on homeowners in foreclosure. In many instances, unrepresented homeowners rely on vague promises from servicers that everything is going to be taken care of. Other homeowners agree to repayment options that they cannot afford, merely postponing foreclosure. Many homeowners facing foreclosure have never been involved in a legal proceeding before and do not seek help out of fear or embarrassment.

The most effective outreach presents the homeowners with information that is clearly identified as coming from the court. This information can come from the court in the form of letters, phone contact, or visits from authorized community groups. The experience under Indiana's supervised foreclosure mediation program shows the difference that early outreach clearly identified with the court can make. Earlier versions of the Indiana pilot program relied on mortgage servicers' attorneys to send notices to homeowners describing the availability of mediation. Under this practice, the rate of homeowner participation in mediations remained low, generally less than ten percent of eligible homeowners. However, when the courts began to send out the mediation notices themselves, participation rates increased significantly, to over fifty percent of eligible homeowners.⁴ Some Indiana courts supplement mailings to homeowners with direct phone calls from court staff.

The cost of outreach need not be substantial. The cost is extremely low in relation to the losses averaging nearly \$150,000 that investors incur in each residential foreclosure.⁵ Since mid-2008, the City of Philadelphia has run an extensive door-to-door outreach campaign in connection with its foreclosure mediation program. This outreach has played a major role in the program's high rate of homeowner participation. Between sixty and seventy percent of eligible Philadelphia homeowners participate in the foreclosure diversion process. The court's outreach workers make three attempts to reach every homeowner named in a foreclosure complaint. The budget for this outreach is about \$165,000 annually, with half the cost funded by the City and half by non-profit entities. During the sixteen months from June 2008 through September 2009, the Philadelphia outreach workers contacted 6,300 homeowners, at a cost of \$33 per property.⁶

2. Mandatory or Opt-In Participation. Foreclosure mediation programs that require homeowners to opt in, particularly when the homeowner must do so within a short time frame, tend to have very low participation rates. Mediation programs in non-judicial foreclosure states often limit access in this way. For example, programs in Maryland, Washington State, and Washington, D.C. set thirty-day time limits for homeowners to opt in. These programs have participation rates at less than ten percent of eligible homeowners. In Nevada, the rate is less than twenty percent.

⁴ For the period from April 1, 2010 through November 15, 2011, the Indiana courts automatically scheduled supervised conferences in 7,103 foreclosure cases. Homeowners participated in the initial conference in 3,927 of these cases and in full mediation sessions in 3009 of them. (Indiana Foreclosure Trial Court Assistance Project Report December 2011).

⁵ Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications*, 41 Conn. L. Rev. 1107 (2009).

⁶ Data from Carolyn R. Brown, Philadelphia Office of Housing and Community Development, Oct. 22, 2009)

In judicial foreclosure jurisdictions where courts automatically list all foreclosure cases for mediation or conferences, the participation rates have been much higher. In New York, over seventy percent of eligible homeowners participate in foreclosure conferences scheduled automatically with the filing of a request for foreclosure relief. A similar proportion of homeowners participate in Philadelphia's program, where all cases are referred to mediation. In Connecticut, all foreclosure cases are initially eligible for mediation, and over forty percent of homeowners participate.

With automatic referral of all foreclosure cases to mediation, it should not be necessary for homeowners to file an answer or motion in order to participate. All homeowners who appear for an initial pre-mediation hearing or scheduling conference should be permitted to participate.

3 & 4. Referring Homeowners to Housing Counselors and Legal Aid Attorneys.

The availability of housing counselors and attorney assistance for homeowners often comes down to a matter of funding. Mediation programs can cover their own costs as well as generate the funds to pay for other vital support for homeowners. Foreclosure mediation programs in Indiana, Maine, Maryland, Nevada, Vermont, Washington State and Washington, D.C. are financially self-supporting. The programs support their operations by adding fees, ranging from \$50 to \$350, to charges lenders must pay to file or record documents needed to foreclose. In the District of Columbia, Maryland, Nevada, and Washington, the filing surcharges produce more than sufficient revenue to fund mediation programs. The fees also produce surplus funds that pay for housing counseling and legal representation for homeowners. In Nevada, for example, a mere \$5 charge added to foreclosure filings generated \$200,000 for pro bono attorney support in the first year after the charge was instituted. In Indiana and in the District of Columbia, monetary sanctions imposed upon servicers who do not comply with the mediation program rules go toward covering the costs of the mediation program and related support for homeowners.

The foreclosure crisis has been ongoing for more than four years. Mortgage servicers continue to lose documents and ignore loss mitigation protocols as routinely now as they did four years ago. Servicers have had adequate time to hire and train staff to conduct loss mitigation reviews in a competent manner. They have chosen not to do this. Foreclosure mediation programs are essentially efforts by the government to take up the slack left by mortgage servicers' failure to manage their loss mitigation reviews effectively. This failure inflicts enormous damage on communities. It is reasonable to ask that servicers pay some modest fees to cover the costs of others doing their job for them.

5. Pre-Mediation Process and the Importance of Initial Mediation Orders. Very little happens at actual mediation sessions. The benefit of a mediation program comes from the structure it provides for the oversight of document exchanges and loss mitigation reviews. In the most effective mediation programs, the court issues an initial order directing the parties to produce documentation needed for a loss mitigation review. Courts in New York and Indiana issue these orders on a routine basis. In Pennsylvania and Connecticut the courts also play a role in overseeing basic document exchanges and loss mitigation review protocols. Judges need not be directly involved in these routine matters. Court clerks and other personnel become familiar with the basic loss mitigation documentation requirements over time. They can supervise document exchanges and check to see that servicers provide timely responses. These personnel

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make referrals for judicial intervention in the relatively few cases where it is needed. It is the threat of judicial intervention, and particularly the authority of the court to impose sanctions, that effectively moves the process along.

What Documents Should the Initial Order Direct the Parties to Produce? An initial mediation order should clearly identify the documents to be exchanged, provide a time frame in which the exchange must take place, and indicate that the court may impose sanctions for non-compliance. The documents that parties should produce include:

A Net Present Value Test Analysis. About ninety percent of residential mortgages in foreclosure today are subject to the rules of the federal HAMP program. HAMP requires that, before proceeding with a foreclosure, the mortgage servicer must conduct a net present value analysis. This analysis compares the long-term value to investors from an affordable loan modification with the likely recovery investors will receive from immediate foreclosure. The HAMP guidelines require that a participating servicer implement the loan modification whenever the net present value test shows the value of the modification to be greater for investors than immediate foreclosure.

With the HAMP program now extended to the end of 2013, mediations should focus on ensuring that homeowners see the results of this net present value test in all cases in which it is required. As a consequence of provisions of the Dodd-Frank Act, the HAMP net present value test calculation tool is now publicly available. This net present value test can now be the focus for nearly all mediations. The foreclosure mediation programs in Vermont, Maine, and the District of Columbia include this requirement for all HAMP-covered mortgages. Such a requirement merely has servicers do something that their contracts with Fannie Mae and the Treasury Department already require that they must do in every foreclosure case. For loans not covered by HAMP, the FDIC loan modification calculator is a publicly available alternative net present value test that performs the same function.

Recent experience in the State of Washington has shown the importance of judicial supervision over a net present value test disclosure requirement. Washington is a non-judicial foreclosure state. The state's foreclosure mediation statute requires that servicers participating in HAMP provide the net present value test documentation for all mediations. After training mediators at the program's inception in July 2011, NCLC found that during the first six months of the Washington mediation law's operation, not a single servicer complied with the requirement to perform and produce this HAMP net present value test. Servicers' attorneys routinely refused to perform the test in mediations, simply declaring that homeowners were not eligible for HAMP. The lack of access to the courts rendered the requirement of the Washington statute ineffective and essentially useless. In judicial foreclosures, the courts can impose consequences for this kind of routine refusal to comply with a basic mediation rule.

Other Documents: Appraisal, Pooling and Servicing Agreement, Payment History, and Loss Mitigation Guidelines. An initial pre-conference order should direct the servicer to produce the property appraisal it relies upon in making loss mitigation decisions. Given current market conditions, older appraisals may reflect an erroneously high value, and this negatively affects the

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net present value test. Homeowners must have the opportunity to dispute the servicer's appraisal in mediations.

Servicers sometimes refuse to approve loan modifications because they claim "investors" will not allow modifications. The pooling and servicing agreement is the contract between the servicer and the investors/owners of pooled mortgage loans. The agreement describes when the servicer may modify a loan included in the pool. Generally, these agreements permit modifications. In any case in which a servicer claims in mediation that investors will not allow a modification, the servicer should produce the evidence of this prohibition and document its efforts to obtain an exception, as the HAMP rules require.

The initial mediation order should also require that the servicer produce the borrower's payment history, including an itemization and description of costs and fees claimed, and the reinstatement amount. Finally, the order should require production of the servicer's loss mitigation guidelines applicable to the loan. The servicer should document the outcome of its review under these guidelines and provide evidence of the reasons for any denial of a loss mitigation option.

Submit Documents Through a Third Party. Servicers frequently claim non-receipt of borrowers' income and expense documents as the reason for a refusal to modify a loan. Borrowers often dispute these claims, asserting that they have sent the servicer the same documents multiple times. Pre-Mediation procedures can designate personnel to manage checklists indicating when borrowers submitted documents. This practice can prevent many disputes. Mediation programs in Indiana and in some bankruptcy courts use on-line portals to accept and retain these documents. If freely available to homeowners, these portals can prevent all disputes over document transfers.

Sanctions for Non-Compliance with the Initial Mediation Order. The potential for sanctions deters a party from engaging in a pattern of flaunting mediation requirements. Most foreclosure mediation programs went through a period in which servicers disregarded program rules until courts began to impose meaningful sanctions for non-compliance. If a homeowner fails to comply with program rules, the homeowner's participation in mediation can be ended and the foreclosure allowed to proceed. Dismissal of the foreclosure action upon servicer non-compliance is a potential sanction, but may not help the homeowner in the long run. Dismissal may lead to long-term accrual of unpaid interest and fees, making any home retention solution impossible.

Courts overseeing foreclosure mediations in New York, Connecticut, and Maine have developed effective approaches to sanctions. Upon substantial non-compliance with mediation rules, the courts have ordered the tolling of accrual of interest and fees until servicers comply. In these states and others, including Indiana, courts also impose monetary sanction on servicers who fail to comply with mediation orders. The courts do not have to impose these sanctions often, as a few examples set a tone favoring compliance in the future.

Stay all Proceedings Pending Compliance with the Initial Mediation Order. Where the pre-mediation order sets out clear obligations, court personnel can monitor compliance. It is

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critical that proceedings, including the filing of dispositive motions, be stayed pending the parties' compliance with the order. Mediation programs in Connecticut and Indiana recently amended their rules to impose this type of stay. In New York, the court will not decide dispositive motions until mediation has concluded.

Once courts have created an environment in which compliance with rules is expected, mediations do not cause undue delays in foreclosures. For example, a recent study of the Philadelphia Foreclosure Diversion Program found that the program did not delay foreclosures beyond the typical time frame that existed before the diversion program began.⁷ Cases stayed in the diversion program on average fifty-three days. In sixty-three percent of the mediation cases, the court needed to enter an order only once.

6. Trained Mediators. Mediation in foreclosure cases levels the playing field. Otherwise, unrepresented homeowners are left to interact with lenders' attorneys and trained servicer staff in isolation. In these circumstances the potential for unrepresented homeowners to misunderstand or be misled is great. Mediators need to be trained thoroughly in the major loss mitigation and loan modification protocols, including HAMP and the guidelines applicable to loans insured by Fannie Mae, Freddie Mac, and the federal guaranty agencies, FHA, RHS, and the VA. Most mediation programs do not require that mediators be formally certified under general court mediation guidelines. The programs seldom have difficulty finding an adequate number of attorneys willing to serve as mediators in foreclosure cases. Mediators will be most effective when the homeowners have access to housing counselors and their own attorneys. The homeowner's attorney can take the necessary steps to bring to the court's attention incidents of non-compliance with program rules and orders.

Other issues: *Appearance by Lender Representative.* All effective foreclosure mediation programs require a servicer representative, typically an attorney, to appear in person at some point in order to explain the servicer's position. If this attorney does not have authority to approve a loss mitigation option, he or she must be in phone contact with someone who does. When significant problems arise, courts retain the authority to require the servicer's authorized staff member to appear personally.

Sincerely,



Geoff Walsh
Staff Attorney

⁷ The Reinvestment Fund, *Philadelphia Residential Mortgage Foreclosure Diversion Program: Initial Report and Findings* (June 2011), available at www.trfund.com/resource/downloads/policypubs/Foreclosure_Diversion_Initial_Report.pdf.