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## United States Senate

COMMITTEE ON BANKING, HOUSING, AND  
URBAN AFFAIRS

WASHINGTON, DC 20510-6075

DWIGHT FETTIG, STAFF DIRECTOR  
WILLIAM D. DUHNKE, REPUBLICAN STAFF DIRECTOR

December 21, 2011

Ms. Alys Cohen  
Staff Attorney  
National Consumer Law Center  
1001 Connecticut Avenue, NW, Suite 510,  
Washington, DC, 20036

Dear Ms. Cohen:

Thank you for testifying before the Committee on Banking, Housing, and Urban Affairs Subcommittee on Housing, Transportation, and Community Development at our December 13, 2011 hearing entitled *Helping Homeowners Harmed by Foreclosures: Ensuring Accountability and Transparency in Foreclosure Reviews*. In order to complete the hearing record, the deadline for responses is January 11, 2012. When formatting your response, please repeat the question, then your answer, single spacing both question and answer. Please do not use all capitals.

Send your reply to Ms. Dawn L. Ratliff, the Committee's Chief Clerk. She will transmit copies to the appropriate offices, including the Committee's publications office. Due to current procedures regarding Senate mail, it is recommended that you send replies via e-mail in a MS Word, WordPerfect or .pdf attachment to [Dawn\\_Ratliff@banking.senate.gov](mailto:Dawn_Ratliff@banking.senate.gov).

If you have any questions about this letter, please contact Ms. Ratliff at (202)224-3043.

Sincerely,

Tim Johnson  
Chairman

TJ/dr

**“Helping Homeowners Harmed by Foreclosures: Ensuring Accountability and  
Transparency in Foreclosure Reviews”  
December 13, 2011**

**Questions for Ms. Alys Cohen, Staff Attorney, National Consumer Law Center, from  
Senator Corker:**

1. Are we permanently scaring off investors by telling them that when they buy an American mortgage security they have to deal with not only federal regulations but 50 state AGs? I talk to countless investors who are telling me they are “on strike,” so to speak, and they will stay on strike until they have clarity over the rules for foreclosures and loss mitigation. Basically we are scaring away investors with these laws suits, which seems to me to be a problem given that all of the evidence thus far suggests that these were homeowners who were not paying their mortgages. Would anyone care to address this risk? Do any of you share these concerns?
  
2. Do we need a uniform PSA to govern loss mitigation? I have a bill that directs the FHFA to work with industry participants to craft a PSA that would give investors and homeowners clarity on the rules of the road for loan modifications and loss mitigation. Do you all think this is a worthwhile idea?
  
3. Do we need to codify into law, and regulate with clarity, proper registration of mortgages? Our bill calls for a new platform to serve as the source of electronic registration for mortgage ownership, which would be regulated by FHFA and overseen by the Congress. Would this be a helpful step in ensuring we have 21<sup>st</sup> century infrastructure to go along with a 21<sup>st</sup> century capital markets regime?

**“Helping Homeowners Harmed by Foreclosures: Ensuring Accountability and  
Transparency in Foreclosure Reviews”  
December 13, 2011**

**Questions for Ms. Alys Cohen, Staff Attorney, National Consumer Law Center, from  
Senator Menendez:**

You voiced several concerns regarding the outreach process, including complexity, inability to access forms, and many others. What specific suggestions for improvement can you offer the OCC, servicers, and consultants to implement?

The foreclosure review application requests that applicants check boxes for the types of harm (from a very narrow list) which correlate with the harm they have suffered. However, their application will only be reviewed for the types of harm checked. If the homeowner submits the form and checks no boxes, they will be reviewed for all of the types of harm listed, which is still limited. What solutions do you suggestion for this issue?

You mentioned in your testimony two types of harm not listed in the OCC’s list of 22 examples. Are there any other types of harm that should be considered as well that are not covered by the OCC’s examples?

You stated in testimony that the servicers’ general counsel’s offices appeared to have been involved in drafting the engagement letters for the third party consultants, and expressed concern about whether that was being done to create attorney-client privilege. Can you elaborate on that?

**JANUARY 10, 2012**

Follow-up answers (in Italics) from National Consumer Law Center Staff Attorney Alys Cohen re: U.S. Senate Committee on Banking, Housing, and Urban Affairs Subcommittee on Housing, Transportation, and Community Development December 13, 2011 hearing entitled *Helping Homeowners Harmed by Foreclosures: Ensuring Accountability and Transparency in Foreclosure Reviews*

**Questions for Ms. Alys Cohen, Staff Attorney, National Consumer Law Center, from Senator Corker:**

1. Are we permanently scaring off investors by telling them that when they buy an American mortgage security they have to deal with not only federal regulations but 50 state AGs? I talk to countless investors who are telling me they are “on strike,” so to speak, and they will stay on strike until they have clarity over the rules for foreclosures and loss mitigation. Basically we are scaring away investors with these laws suits, which seems to me to be a problem given that all of the evidence thus far suggests that these were homeowners who were not paying their mortgages. Would anyone care to address this risk? Do any of you share these concerns?

*Real estate investments have always been subject to state law. In the years leading up to the crash, investigations and enforcement actions by state officials did not deter investment in real-estate secured loans. Instead, investors have relied on representations and warranties by originators and servicers as to compliance with applicable state laws. If investors are scared off now, it is because originators and servicers have failed to make good on those representations and warranties to investors.*

*Additionally, investors suffer significant losses when homes are foreclosed on. These losses far exceed the losses when loans are modified. Unsurprisingly then, many investors have expressed an interest in seeing the same result as sought by the 50 state AGs: greater efficiency in the processing of loan modifications and increased numbers of loan modifications, including principal reductions.*

*Servicers' failure to meet their legal and fiduciary obligations to investors and homeowners is a leading cause of the current crisis. Servicers must be held accountable in order to restore confidence in our real estate and investment markets. State and federal enforcement actions are one key mechanism for changing abusive behavior. Establishment of strong, minimum national servicing standards will provide clarity to industry while ensuring fairness and efficiency to homeowners and the market.*

2. Do we need a uniform PSA to govern loss mitigation? I have a bill that directs the FHFA to work with industry participants to craft a PSA that would give investors and homeowners clarity on the rules of the road for loan modifications and loss mitigation. Do you all think this is a worthwhile idea?

*Strong minimum standards—with room for parties or states to require more as dictated by their circumstances—are essential to establishing an efficient and fair mortgage servicing market. While such standards could be developed in a uniform PSA, investors, homeowners, and regulators have struggled to hold servicers to the standards in existing PSAs. The accountability mechanisms in PSAs typically allow servicers to evade or delay meaningful compliance. Moreover, the provision of minimal national servicing standards by law or regulation would be less intrusive of the free marketplace, by allowing contracting parties to design their PSAs to suit their individual circumstances. The provision of national servicing standards might result in greater uniformity in some PSA standards, but would be more targeted, less invasive, and more enforceable. While a set of minimum PSA provisions may be advisable for a variety of reasons, the government has not typically dictated the provisions of private contracts, but provided ground rules for competition.*

3. Do we need to codify into law, and regulate with clarity, proper registration of mortgages? Our bill calls for a new platform to serve as the source of electronic registration for mortgage ownership, which would be regulated by FHFA and overseen by the Congress. Would this be a helpful step in ensuring we have 21<sup>st</sup> century infrastructure to go along with a 21<sup>st</sup> century capital markets regime?

*The key issue regarding registration of mortgages is whether legal compliance and transparency are satisfied. The current MERS system provides neither and therefore creates huge roadblocks for homeowners defending foreclosures. Homeowners know neither the identity of the party seeking to foreclose on them nor whether the legal requirements regarding transfers of ownership, a pre-requisite to a foreclosure, have been satisfied. Any electronic registration system must be implemented in a manner that preserves the approach required under law and affords full transparency to homeowners and the American public rather than being used as a means to circumvent it.*

**Questions for Ms. Alys Cohen, Staff Attorney, National Consumer Law Center, from Senator Menendez:**

You voiced several concerns regarding the outreach process, including complexity, inability to access forms, and many others. What specific suggestions for improvement can you offer the OCC, servicers, and consultants to implement?

*Any marketing changes that are made will only be useful if the reviews themselves are both thorough and fair. With regard to outreach, key changes to be made include: sending a letter to homeowners that is understandable and that properly highlights the scope of harm covered by the reviews; advertising must be done in order to reach affected populations including communities of color; materials and assistance must be done with language access needs met; and the deadline for submission of claims should be extended to allow for improvement to the outreach process. Everything about the outreach process, including letters, should be made public in order to ensure accountability. Finally, homeowners and the public need to know that the review process will be thorough and fair and provide adequate compensation without inappropriate waivers of legal rights; without these assurances, homeowners are unlikely to and should not trust the process. Glossy outreach without substance is merely another name for fraud.*

The foreclosure review application requests that applicants check boxes for the types of harm (from a very narrow list) which correlate with the harm they have suffered. However, their application will only be reviewed for the types of harm checked. If the homeowner submits the form and checks no boxes, they will be reviewed for all of the types of harm listed, which is still limited. What solutions do you suggestion for this issue?

*Every claim submitted by a homeowner should receive a full review for all types of harm based on the servicer's file, the claim and necessary follow up, including consumer interviews where applicable. Homeowners often are not in a position to know whether they were overcharged or were otherwise denied proper loss mitigation. While it has been suggested that homeowners should be told that reviews are dictated by what the consumer identifies, this disclosure is unlikely to be understandable to most consumers and thus would not be an adequate protection against a faulty review. Moreover, such a disclosure does not change the fact that homeowners will not be able to identify all of the harms they have suffered.*

You mentioned in your testimony two types of harm not listed in the OCC's list of 22 examples. Are there any other types of harm that should be considered as well that are not covered by the OCC's examples?

*The consent orders and the documents connected with the foreclosure reviews fail to cover all foreseeable economic damage in the definition of financial injury and omit common examples of significant financial harm to consumers. The OCC's narrow definition of financial harm is at conflict with long settled and well-established rules about available damages and undermines*

homeowners' rights. It will leave many homeowners uncompensated for harm they have suffered at the servicers' hands.

Among the harms that should be considered are the following:

- *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.*
- *Being improperly placed into a non-HAMP modification is costly for homeowners. The interest rate may reset sooner, may not be reduced as low, legal rights may be waived, additional costs may be capitalized, the waterfall may extend the term before lowering the interest rate (costing average homeowners tens of thousands of dollars), or the terms may be less advantageous in other ways. Homeowners in proprietary modifications lose the benefit of the HAMP borrower incentive payments and face a higher risk of a subsequent foreclosure.<sup>1</sup> The increased risk of redefault is a quantifiable economic harm, but it does not appear compensable under the OCC metric.*
- *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. Homeowners should be compensated for all time and out-of-pocket expenses incurred in correcting the servicer's malfeasance.*
- *Children who suffer dislocation due to foreclosure may lose educational opportunities and experience poor health. Families should be compensated for these economic harms.*
- *Families are often torn apart by a foreclosure; compensation should be offered for all the psychological and social damage done by a wrongful foreclosure.*
- *Any waiver demanded by the servicer must be offset by full compensation for all legally cognizable harm and limited to a waiver of claims related to the scope of the waiver. Otherwise, homeowners will be further injured by servicers without redress.*

You stated in testimony that the servicers' general counsel's offices appeared to have been involved in drafting the engagement letters for the third party consultants, and expressed concern about whether that was being done to create attorney-client privilege. Can you elaborate on that?

*In many cases, the "project leads" of the foreclosure reviews are the servicers' own general counsel office and in all cases the engagement letters that have been released reveal that the*

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<sup>1</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)

*servicer's general counsel's office is the point of contact for the review.<sup>2</sup> The following excerpt from the recent article highlighting these issues elaborates on this:*

One tricky area for the consultants and legal counsel is attorney-client privilege. The engagement letters include boilerplate language that emphasizes the OCC is the primary director of the engagement at each servicer. However, the level of emphasis of this fine point in the final versions varies.

Some of the engagement letters invoke attorney-client privilege and attorney work product privilege over the whole process and confidential treatment of engagement letter itself. It appears all the servicers used their general counsel's office to engage the consultants and outside counsel and some name their general counsel as project lead. Some servicers engaged additional outside legal counsel for the review directly rather than through the primary consultant.<sup>3</sup>

*Whether or not this creates problems regarding access for public officials, it certainly appears to be an effort to keep the process and outcomes of these reviews out of the public eye. Moreover, it makes clear that, despite boilerplate language to the contrary, the consultants are working for the servicers. The use of attorney-client privilege by the servicers could prevent homeowners and the public at large from ever knowing the scope or results of the reviews. Servicers could invoke attorney-client privilege to prevent homeowners from presenting to courts evidence of the servicers' wrongdoing, if that evidence was in any way touched on during the foreclosure review. This leaves homeowners in a catch-22: compensation they receive from the foreclosure review process is uncertain and likely coupled with a waiver of all legal claims, but attempts to vindicate their rights outside of the foreclosure review process are likely to be met by stonewalling on the part of the servicer.*

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<sup>2</sup> See Francine McKenna, *OCC Foreclosure Review Disclosures Still Disappoint*, Am. Banker, Dec. 6, 2011, available at <http://www.americanbanker.com/bankthink/OCC-foreclosure-review-disclosures-still-disappoint-waters-1044628-1.html?zkPrintable=true>.

<sup>3</sup> *Id.*