



We make home possible<sup>SM</sup>

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Federal Trade Commission  
Office of the Secretary  
Room H-135 (Annex T)  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Re: Mortgage Acts and Practices Rulemaking, Rule No. R911004

Dear Sir or Madam:

Freddie Mac appreciates the opportunity to comment on the Federal Trade Commission's (FTC) Advance Notice of Proposed Rulemaking on Mortgage Acts and Practices<sup>1</sup> (ANPR) regarding unfair and deceptive practices of non-bank financial companies. Freddie Mac supports the efforts of the FTC to protect borrowers from unfair, deceptive, and abusive mortgage practices.

Freddie Mac does not originate loans in the primary residential mortgage market. We fulfill our mission by purchasing mortgages in the secondary market and securitizing them into mortgage-related securities that can be sold to investors. Banks and non-bank financial companies typically service the mortgages that we own in accordance with the requirements set forth in our Single-Family Seller/Servicer Guide (the "Guide"), which is our master servicing contract.<sup>2</sup> We work closely with experienced mortgage servicers to help keep families in their homes. Our comments on the ANPR are drawn from our extensive experience with mortgage servicing and loss mitigation alternatives and practices.

Our comments provide some guiding principles regarding mortgage servicing that the FTC may wish to consider when developing regulations regarding unfair and deceptive servicing acts and practices. We are providing specific responses to Question 20 regarding loan performance and foreclosure prevention issues.

**Freddie Mac Foreclosure Prevention**

Freddie Mac, through our mortgage servicers, is continuing to help families avoid mortgage foreclosures. Active management of delinquent mortgages enables Freddie

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<sup>1</sup> 74 *Fed. Reg.* 26118 (June 1, 2009).

<sup>2</sup> The *Single-Family Seller/Servicer Guide* is one of the Purchase Documents that is incorporated by reference into, and constitutes a part of, each Purchase Contract with a seller/servicer. A Seller is required to service all mortgages that the Seller has sold to Freddie Mac and has assented to service for Freddie Mac in accordance with the standards set forth in the Seller's Purchase Documents. If a Servicer who services Mortgages for Freddie Mac is not also the Seller of the Mortgages to Freddie Mac, the Servicer must also service Mortgages for Freddie Mac in accordance with the Guide.

Mac and its servicers to help keep borrowers in their homes through foreclosure alternatives, including loan modifications, repayment plans, and forbearance plans. We customarily require our Seller/Servicers to comply with foreclosure prevention efforts in our Guide. Our Guide is designed to promote responsible lending and servicing practices and requires our servicers to follow a sequential process of loss mitigation requirements when it comes to dealing with borrowers who are in default or in imminent danger of default.

Specifically, our Guide requires servicers to collect and properly document mortgage payments and keep all borrowers well informed of payment activity. When a borrower is late on a mortgage payment, the servicer must immediately contact the borrower to determine why the borrower missed the payment and make arrangements to collect the amount owed. If a borrower is experiencing financial difficulty in making his mortgage payment such that the mortgage is in default or in imminent danger of default, the servicer must work with the borrower to find a sustainable foreclosure prevention strategy. Before foreclosing on a property, our servicers must consider foreclosure alternatives, such as repayment plans, loan modifications, refinancings, and forbearance plans. Servicers also must consider deeds-in-lieu of foreclosure and short payoffs as foreclosure alternatives if the borrower is unable to retain the property. The Guide also limits the amount of fees that a servicer can charge borrowers. For delinquent loans, late fees are capped at 5% of monthly principal and interest payments that are received after the 15<sup>th</sup> day of the month. We also require our servicers to waive late fees for borrowers who have executed loan modifications.

We also measure our servicers' performance under the Guide against monthly performance benchmarks, which include helping delinquent borrowers avoid foreclosure and minimizing credit losses. We provide financial incentives to servicers who help families avoid foreclosure – through per loan fees for completing repayment plans, modifications, and other foreclosure alternatives. Servicer incentives encourage servicers to engage in loan modifications and other workout options that avoid foreclosure.

Freddie Mac continues to help sustain homeownership by playing a major role in the implementation of President Obama's Making Home Affordable Program. In response to the President's Plan, we initiated the Making Home Affordable Modification Program and the Relief Refinance Mortgage designed to keep more families in homes they can afford and to stabilize communities. These programs supplement our existing foreclosure prevention efforts.

### **Guiding Principles**

The purpose of Section 5 of the FTC Act is to prohibit unfair and deceptive acts and practices that are likely to expose the borrower to material or substantial injury. Recognizing this important purpose, we believe the FTC should develop a regulation governing mortgage servicing and foreclosure prevention based on the following principles.

First, we believe that servicers should be encouraged to contact borrowers and offer counseling and workout options in the early stages of the delinquency. Freddie Mac requires servicers to begin contacting borrowers early in the delinquency and to consider counseling and workout options if the borrower is unable to make monthly mortgage payments. Second, servicers should aggressively pursue viable foreclosure alternatives designed to help borrowers.

And finally, servicers should have the flexibility to implement innovative foreclosure prevention programs that take into account specific and unique circumstances of the borrower. Our Guide requires servicers to treat each delinquency individually and consider and implement workout options suited to the individual circumstances of the borrower, such as current financial situation, reason for the delinquency, and the condition and value of the property.

As the FTC considers its options to promulgate a regulation affecting servicing, we would suggest that the FTC balance the need for a uniform standard with the fact that a foreclosure prevention option is typically negotiated on a case-by-case basis after evaluating the specific and unique circumstances of each borrower. Creating a rule that is too restrictive with respect to servicing delinquent mortgages may have unintended consequences on borrowers and mortgage servicers. For example, imposing specific restrictions on workouts could stifle streamlined and innovative workout programs by servicers or even limit the number of borrowers who may qualify for current loss mitigation programs.

#### **Response to Question 20**

***Q: Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices related to how mortgage servicers handle loan performance and loss mitigation issues, such as:***

- a) taking foreclosure action without first verifying loan information and investigating any disputes;***
- b) taking foreclosure action without first giving the consumer an opportunity to attend foreclosure counseling or mediation;***
- c) requiring consumers to release all claims (or other requirements, such as requiring binding arbitration agreements) in connection with loan modifications or other workout agreements/repayment plans; or***
- d) making loan modifications or other workout agreements/repayment plans without regard to the consumer's ability to repay?***

***1. Taking foreclosure action without first giving the consumer an opportunity to attend foreclosure counseling or mediation:*** The FTC asks whether taking foreclosure action without first giving the borrower an opportunity to attend foreclosure counseling or mediation should be defined as an unfair and deceptive trade practice.

We believe that the FTC should adopt a rule that encourages servicers to contact borrowers and pursue counseling and workout options in the early stages of the delinquency. This encouragement should be preferable to adopting a blanket rule that makes it an unfair or deceptive practice for a party to take foreclosure action without giving the borrower an opportunity to attend foreclosure counseling or mediation.

Freddie Mac believes that a focus on early intervention, which incorporates providing the consumer with information about the loss mitigation process and options, is more effective for consumers than mandating foreclosure counseling. Freddie Mac recognizes that there may be instances where a borrower may benefit from counseling, such as when the cause of their financial strain is not the housing payment but the ancillary consumer debt, but a strict requirement may not be the best way to support the borrower.

Mediation and counseling may not be an effective foreclosure prevention strategy for all borrowers. For example, mediation and counseling might not be appropriate for borrowers who have already engaged in workout discussions with the servicer or for borrowers who no longer have an interest in keeping their homes. In such cases, mediation or counseling will not benefit the consumer, but will significantly delay foreclosure proceedings resulting in greater losses to the consumer and the community. Prolonged timelines add to the impact already felt in these markets as properties fall in further disrepair, compounded by continued depreciating property values, in addition to borrowers incurring increased mortgage arrearages and other fees associated with foreclosure.

Based on our experience, curing a delinquency early in the process could significantly benefit the borrower because it quickly brings the borrower's account current before the arrearage becomes unsustainable and the borrower's credit rating is severely affected. Borrowers also avoid incurring the expenses associated with foreclosure. Currently, we require our servicers to begin contacting borrowers early in the delinquency in order to make arrangements to collect unpaid mortgage payments. We have learned that borrowers who work with servicers early in the delinquency are more likely to avoid foreclosure than those who do not. If a servicer has not attempted to contact the borrower to engage in early intervention – unlike Freddie Mac servicers – then there may be a basis to mandate such counseling. But, as a general matter, we recommend that the FTC focus on early intervention.

***2. Making loan modifications or other workout agreements/repayment plans without regard to the consumer's ability to repay.*** The FTC asks whether making loan modifications or other workout agreement/repayment plans without regard to a borrower's ability to repay should be defined as an unfair and deceptive trade practice.

We believe the FTC should permit servicers to perform loan modifications and workout options without directing servicers as to how they should determine a borrower's repayment ability. In order to create a sustainable solution for a borrower, we believe that servicers should have the flexibility to verify and document repayment ability to align with each borrower's specific and unique circumstance. We recognize that repayment ability is a factor to consider when pursuing sustainable loan modifications and that any FTC regulation governing repayment ability should be flexible enough to avoid limiting loan modification options. There are many possible ways to review the ability to repay – income to expense analysis, income alone, cash reserves, possible future income – none of which should be absolutely precluded. For example, a relatively high income borrower with a large mortgage payment may have an "unacceptably" poor debt-to-income ratio ("DTI") under a standard test and yet be fully able to make the mortgage payment and succeed with other expenses of life with his or her residual income.

Conversely, a lower income borrower with a small mortgage payment may have a lower DTI but still have difficulty making mortgage payments and paying for other living expenses.

Imposing stringent regulatory requirements may prevent the development of streamlined modification programs, which are beneficial to borrowers because they provide a much faster, efficient way of modifying loans and keeping families in their homes – particularly when a foreclosure sale date is imminent. If servicers have flexibility in establishing repayment ability standards, a larger number of borrowers would probably qualify for loan modifications and avoid foreclosure. These servicers, for example, would be able to reach borrowers who would not have otherwise qualified for loan modifications or refinancings under federal foreclosure prevention programs, like the Making Home Affordable Program.

Furthermore, servicers must consider a variety of factors – in addition to repayment ability – when deciding whether or not to modify a loan, such as litigation risks, risks to investors and borrowers, and reasons for the default. Because of these complexities, the underwriting of a loan modification is typically treated differently than a loan origination. In order to address the complex issues of loan modifications, servicers must have flexible documentation and verification requirements and other income standards to align with each borrower's specific and unique circumstance. This will also allow servicers to reach more borrowers.

**3. Taking foreclosure action without first investigating disputes:** The FTC asks whether taking foreclosure action without first investigating disputes should be defined as an unfair and deceptive trade practice.

We believe the FTC should adopt rules that limit foreclosure action only when there is a legitimate pending investigation of a dispute that relates to the foreclosure action. A broadly drafted proposal that requires the investigation of non-material disputes prior to foreclosure could unreasonably delay foreclosure actions. For example, a foreclosure action should not be delayed to allow an investigation of whether a \$15.00 inspection fee was wrongfully posted to a borrower's account. Regulations should not permit borrowers to unilaterally delay a foreclosure with immaterial or frivolous disputes.

**4. Requiring consumers to release all claims (or other requirements, such as requiring binding arbitration agreements) in connection with loan modifications or other workout agreements/repayment plans:** The FTC asks whether requiring borrowers to release all claims in connection with loan modifications or other workout agreements and repayment plans should be defined as an unfair and deceptive trade practice.

The FTC should not determine that requiring borrowers to release all claims in order to qualify for a loan modification or other workout option is an unfair or deceptive act or practice. The FTC should also refrain from prohibiting claim releases by borrowers where servicers are providing loan modifications or other workout options. Servicers must have the flexibility to negotiate claim releases during loan modifications on a case-

by-case basis to limit exposure to lawsuits and other claims. Prohibiting or restricting the release of claims could delay loan modifications or serve as a disincentive for servicers to implement innovative foreclosure prevention programs.

### **Conclusion**

Freddie Mac believes that adopting regulations based upon the guiding principles described above would give servicers the flexibility to continue to implement innovative foreclosure prevention programs that take into account specific and unique circumstances of the borrower, while providing borrowers with an opportunity to refinance or modify into affordable and sustainable loans.

Thank you for considering Freddie Mac's views. Please contact us if you have any questions or if we can provide you with any additional information.

Sincerely, /

Robert E. Bostrom