



State of Washington

DEPARTMENT OF FINANCIAL INSTITUTIONS
DIVISION OF CONSUMER SERVICES

INTERPRETIVE STATEMENT

MORTGAGE BROKER PRACTICES ACT (MBPA IS-2009-01)

CONSUMER LOAN ACT (CLA IS-2009-01)

DATE: April 10, 2009

FROM: Deborah Bortner, Director, Division of Consumer Services

RE: Loan Modification Services – License Required under the MBPA or CLA

QUESTION PRESENTED: Must loan modification service providers be licensed in Washington to offer services to Washington residents involving their Washington real property?

BRIEF ANSWER: Yes, companies and individuals offering loan modification services to Washington residents involving their Washington real property must be licensed under the Mortgage Broker Practices Act (MBPA), chapter 19.146 RCW, or Consumer Loan Act (CLA), chapter 31.04 RCW, unless otherwise exempt under the language of those Acts.

DISCUSSION: The Division has received many inquiries regarding the regulation of loan modification services. According to callers, individuals are communicating directly with borrowers and brokers offering to provide loan modifications services. Many callers inquire about what restrictions are applicable to loan modification services.

For purposes of this Interpretive Statement, “loan modification” means a change in one or more of the loan conditions. Loan modification includes forbearances, repayment plans, a change in interest rates, loan terms (length), or loan types, the capitalization of arrearages, and principal reductions. “Loan modification” does not include services that result in the refinance of a residential mortgage loan.

The MBPA and CLA define a mortgage broker as any person who for compensation or gain, or in the expectation of compensation or gain (a) assists a person in obtaining or applying to obtain a residential mortgage loan or (b) holds himself or herself out as being able to assist a person in obtaining or applying to obtain a residential mortgage loan. See RCW 19.146.010.

Under the MBPA a loan originator is a natural person who (a) takes a residential mortgage loan application for a mortgage broker, or (b) offers or negotiates terms of a mortgage loan, for direct or indirect compensation or gain, or in the expectation of direct or indirect compensation or gain.

"Loan originator" also includes a person who holds themselves out to the public as able to perform any of these activities. See RCW 19.146.010.

It is the Director's position that individuals and companies taking the borrower's name, monthly income, Social Security number, property address, estimate of the value of the property, and any other information deemed necessary to provide a loan modification or negotiating residential mortgage loan terms are acting as mortgage brokers or loan originators and must be licensed under the MBPA or CLA unless specifically exempt from those Acts.

Attorneys who represent Washington residents in matters involving real property in Washington must be licensed to practice law in Washington. Additionally, the attorney exemption from the MBPA is limited. The exemption applies only to attorneys licensed in Washington "not principally engaged in the business of negotiating residential mortgage loans." Finally, a company that hires or is hired by an attorney does not itself avoid the requirement for licensing if providing loan modification services.

Real estate brokers or salespersons are not exempt from either act for providing loan modification services.

FEES: While the Mortgage Broker Practices Act generally prohibits taking a fee upfront, a licensee performing a loan modification may charge fees upfront for services to be provided.

Licensees that charge a fee for loan modification services in advance of the services being provided must obtain a signed fee agreement for loan modification services from the borrower. Any fees paid in advance of services provided must go into the company's trust account prior to disbursement, or be submitted to an independent escrow or title company to be held until disbursed at the instruction of the parties consistent with the fee agreement. Licensees are prohibited from collecting fees via direct access to a borrower's bank account or via use of the borrower's credit card.

A loan modification normally begins with a hardship analysis which is an examination of the borrower's current mortgage, income, expenses, and ability to repay. The hardship analysis includes meetings or conversations with the borrower(s) and a determination of the borrower's eligibility for a modification based on the particular lender's eligibility requirements or the eligibility requirements of a federal modification program. The hardship analysis, sometimes referred to as "Phase I services," should take no more than five hours to complete. The usual or customary fee for a hardship analysis of an owner-occupied first lien mortgage and second lien, if applicable, is \$750 or less.

Phase II services include communications with the lender or servicing company, negotiating loan terms or conditions on behalf of the borrower, reviewing proposed loan modification documents, meetings or conversations with the borrower, and ensuring the borrower has copies of all executed documents. A usual or customary fee for completing "Phase II services" is \$750 or less, anticipating that a significant portion of this amount is usually refunded to the borrower if a successful loan modification is not obtained.

If the borrower's loan modification requires extraordinary effort and time, the fee agreement must be amended in writing to document the extra services justifying the higher fee. Without

adequate justification, fees exceeding the usual and customary fees described above may be considered unearned and in violation of the Acts. Additionally, loan modification providers are encourage to charge the borrower less than the usual or customary fee if the work involved does not warrant a higher fee.

In order to qualify for a fee, the successful loan modification must result in a net tangible benefit to the borrower. For purposes of this interpretation only, a net tangible benefit includes: bringing the borrower out of default into a current status if the existing mortgage meets the borrower's ability to repay, reducing the principal and interest payment by a minimum of ten percent, changing the loan type from adjustable to fixed; lowering the interest rate to be consistent with prevailing market rates but by no less than a 100 basis point reduction; principal reduction that results in an 80 percent CLTV, based on current market evaluation; or other interest rate or principal reduction that results in a DTI ratio of no more than 31 percent.

DISCLOSURES: Any person providing loan modification services must provide the borrower, for their agreement and signature, a fee agreement that includes specific fee and activity information. Persons providing loan modification services must also conspicuously disclose to the borrower(s) that free HUD approved housing counseling is available and that the borrower may obtain a loan modification by contacting the lender or servicer directly. The disclosure must include HUD's counseling telephone number and website link to the Washington counselors.

DFI may develop model disclosures to accompany these interpretations.

POWERS AND PROHIBITED PRACTICES:

In addition to any applicable licensing requirements under either the MBPA or CLA, all individuals who offer or negotiate loan terms for borrowers are prohibited from directly or indirectly employing any scheme, device, or artifice to defraud or mislead borrowers or lenders or to defraud any person; engaging in any unfair or deceptive practice toward any person; obtaining property by fraud or misrepresentation; soliciting or entering into a contract with a borrower that provides in substance that the mortgage broker or loan originator may earn a fee or commission through "best efforts" to obtain a loan modification even though no loan modification is actually obtained for the borrower.

The Director's position on this matter shall not be construed to include employees of nonprofit HUD-approved housing counseling agencies or employees of lenders or servicers as long as such individuals are acting in the course of their employment.

Noncompliance may result in the imposition of any of sanctions including, but not limited to injunctions, fines, restitution to the borrower, refusal to renew a license, refusal to grant a license, or license revocation.

CONCLUSION: Loan modification services fall under the jurisdiction of the Mortgage Broker Practices Act and Consumer Loan Act. A mortgage broker or loan originator license, or a license under the Consumer Loan Act is required to conduct loan modifications for Washington residents involving their Washington real property.

Prepared by: Cindy Fazio, Staff Attorney

STATUTES AND RULES RELIED UPON: Chapter 19.146 RCW, chapter 31.04 RCW.