

Dear [mortgage servicer]:

I wish to call your attention to section 1403 of the new housing bill (HERA) that was signed into law on July 30, 2008 (HR 3221, the Housing and Economic Recovery Act of 2008, P.L. 110-289):

SEC. 1403. FIDUCIARY DUTY OF SERVICERS OF POOLED RESIDENTIAL MORTGAGE LOANS.

The Truth in Lending Act (15 U.S.C. 1601 et seq.) is amended by inserting after section 129 the following new section:

“SEC. 129A. FIDUCIARY DUTY OF SERVICERS OF POOLED RESIDENTIAL MORTGAGES.

“(a) IN GENERAL.—Except as may be established in any investment contract between a servicer of pooled residential mortgages and an investor, a servicer of pooled residential mortgages—

“(1) owes any duty to maximize the net present value of the pooled mortgages in an investment to all investors and parties having a direct or indirect interest in such investment, not to any individual party or group of parties; and

“(2) shall be deemed to act in the best interests of all such investors and parties if the servicer agrees to or implements a modification or workout plan, including any modification or refinancing undertaken pursuant to the HOPE for Homeowners Act of 2008, for a residential mortgage or a class of residential mortgages that constitute a part or all of the pooled mortgages in such investment, provided that any mortgage so modified meets the following criteria:

“(A) Default on the payment of such mortgage has occurred or is reasonably foreseeable.

“(B) The property securing such mortgage is occupied by the mortgagor of such mortgage.

“(C) The anticipated recovery on the principal outstanding obligation of the mortgage under the modification
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or workout plan exceeds, on a net present value basis, the anticipated recovery on the principal outstanding obligation of the mortgage through foreclosure.

“(b) DEFINITION.—As used in this section, the term ‘servicer’ means the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan).”.

Additionally, I wish to call your attention to these two recent IRS Revenue Procedures:

- http://www.irs.gov/irb/2008-31_IRB/ar13.html - Revenue Procedure 2008-47
- <http://www.irs.gov/pub/irs-drop/rp-08-28.pdf> - Revenue Procedure 2008-28

Further, in the event that you are a member of the American Securitization Forum (ASF), I call your attention to your obligations to comply with the ASF guidelines, including, but not limited to the Streamlined Foreclosure and Loss Avoidance Framework for Securitized Subprime Adjustable Rate Mortgage Loans:

<http://www.americansecuritization.com/uploadedFiles/ASFStreamlinedFramework7.8.08.pdf>

Finally, if my loan is owned by Fannie Mae, I wish to call your attention to Fannie Mae's new policy stating that I do not have to actually be late on my payments in order to qualify for a loan modification:

Announcement 08-31 - <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2008/0831.pdf>

Here is an excerpt from the actual language of Fannie Mae's new policy (emphasis added below is my own):

“Effective immediately, a servicer may begin loss mitigation efforts for any mortgage loan when a payment default is reasonably foreseeable (imminent default) rather than waiting for an actual payment default. Accordingly, a servicer may agree to one or more appropriate and permitted loss mitigation alternatives (*e.g.*, forbearance, a combination of forbearance and a repayment plan, and an Early Workout (discussed in the following section)), if the servicer has determined that a payment default is reasonably foreseeable, and a concession to the borrower in the payment terms is advisable. In determining whether a payment default is reasonably foreseeable, the servicer must evaluate the borrower's financial condition as well as the condition of and circumstances affecting the property securing the mortgage loan. The servicer also must document the basis on which it makes a determination that a payment default is reasonably foreseeable. **This new rule allowing earlier intervention applies to all MBS mortgage loans and all whole loans held in Fannie Mae's portfolio.**

Pre-foreclosure sales, acceptance of deeds-in-lieu of foreclosure, and short payoffs (accepting a payoff for less than the amount owed), will not be permitted loss mitigation alternatives for use with borrowers whose loans are current but are determined to be in imminent default.

Following is a list of examples of the types of factors the servicer may consider when evaluating whether or not a payment default is reasonably foreseeable. Factors for consideration include, but are not limited to:

- Information received from the borrower (for example, changes in employment and other income sources, or family medical status);

- The payment history of the borrower(s) (as reported by a credit bureau) on other indebtedness;
- The loan-to-value (LTV) ratio of the mortgage loan when it was originated;
- An estimate of the current LTV ratio;
- Whether the monthly debt service under the mortgage loan has recently changed or will soon change;
- The credit score of the borrower(s); and
- The occurrence of a natural disaster (such as a tornado, hurricane, or flood), terrorist attack or other catastrophe caused by either nature or a person other than the borrower that:
 - the servicer reasonably believes adversely affects the value or habitability of a mortgaged property; or
 - the servicer reasonably believes adversely affects the borrower’s ability to make further payments or payment in full on the mortgage loan.

A default is reasonably foreseeable when the servicer is notified or otherwise becomes aware of an event or factors (including those listed above) that is or are expected to cause the borrower to be in default in the near future, generally within 90 days.”

According to Section 1403 of HERA that is effective immediately, you have a legal obligation to modify the terms of my loan if the net present value you expect to receive (and pass on to your investors) from the modified loan terms exceeds the value you would expect to receive through foreclosure. Also, according to the recent IRS revenue procedures listed above, the tax status of your investors (if they are REMICs or REITs) may not be adversely impacted by modifying my loan provided that certain conditions are met (as outlined by the IRS). According to Fannie Mae Announcement 08-31, you have the authority to modify my loan once I notify you and prove that default is reasonably foreseeable. With these things in mind, I am hereby notifying you and requesting that you modify the terms of my loan so that I can avoid foreclosure and so that you can fulfill your fiduciary obligation to your investors.

I have enclosed a hardship letter outlining the details of my present situation and how the current mortgage terms are obviously unaffordable for me. Unless you modify the terms of my mortgage, default and foreclosure will be my only remaining option. Therefore, foreclosure is “reasonably foreseeable” as outlined in the wording of Section 1403 of HERA.

I have also enclosed financial statements, tax returns, employment records and bank statements that demonstrate how, under my present financial circumstances, I would be able to afford the following terms:

_____ % = Proposed Fixed Interest Rate

\$ _____ = Proposed Mortgage Balance

\$ _____ = Proposed monthly payment based on _____ months to pay off the loan

Further, I have attached supporting appraisals/comparable sales from my neighborhood demonstrating that my home is likely only worth approx. \$_____ and you will probably only recover \$_____ before fees and real estate commissions if you were to foreclose on my home and try to sell it under current market conditions. With these things in mind, I request that you modify the terms of my mortgage loan as required by law. If you fail to comply with this request, I will have no other choice than to pursue all remedies available under the law in order to save my home from foreclosure.

Respectfully,

Important Information about this Sample Letter:

© 2008 Gibran Nicholas. This letter may be copied, modified, reproduced and used by any home owner, provided that any such use is made without charge or compensation. All home owners are also advised to contact a Certified Mortgage Planning Specialist (CMPS®) in your area for more information regarding specific mortgage refinancing or other options that may be available to you. You can find a CMPS® professional in your area by visiting www.CMPSInstitute.org.

This letter is simply being provided as a sample and does not constitute legal, tax or investment advice. You are hereby advised to consult with properly licensed legal and tax advisors for specific advice pertaining to your individual situation. This letter is not to be used to avoid or evade the payment of any amount or the performance of any obligation under your loan documents. You must comply with the request of your mortgage loan servicer for additional documentation, even if the same information is provided to the mortgage loan servicer with this letter. Use of this letter may not result in the loan modification that you request.

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