Foreclosure as a Last Resort

States Can Stabilize the Housing Market by Preventing Unnecessary Foreclosures

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I. Summary

With the foreclosure crisis in the headlines for over two years now, it is easy to assume that it must be nearing the end. Unfortunately, this crisis is far from over. To date, 2.5 million homeowners have already lost their homes and another 5.7 million are at imminent risk of foreclosure.[1] Looking ahead, independent analysts have projected that between 10 and 13 million foreclosures will have occurred by the time the crisis abates.[2]

The reality is that many of these foreclosures can and should be avoided. All too often, troubled mortgages are sent to foreclosure, driven by a system biased in favor of foreclosure sales over sustainable loan modifications, even when foreclosure is more costly.

While states have been hit hard by the current crisis as foreclosures drain resources from already-strapped budgets, states are in a strong position to stabilize local housing markets. By exercising their exclusive control over foreclosure laws, states can adapt an existing industry standard, "mandatory loss mitigation," to require that servicers assess whether foreclosure is in the financial interest of the investor before proceeding to foreclosure. Although mandatory loss mitigation standards exist in many parts of the market now, lack of enforcement has diminished their impact. When inserted directly into state foreclosure laws, a mandatory loss mitigation standard will function as a low-cost, high-impact foreclosure prevention tool that ensures foreclosure is a last resort.[3]

In this report, we highlight the unique opportunity for states to level the playing field by imposing common sense standards on all foreclosing parties. While not every foreclosure can be avoided, states can ensure that all homeowners receive a good faith review by requiring that servicers evaluate the viability of foreclosure alternatives rather than proceeding directly to foreclosure. Rather than establishing a new set of requirements, states can easily and effectively adapt prevailing standards to restore transparency, fairness, and accountability to a process that has recently come under scrutiny.

We recommend that policymakers require all mortgage servicers to conduct a loss mitigation analysis at the earliest opportunity available prior to foreclosure. To be effective, a flexible mandatory loss mitigation standard should be combined with:

- A requirement that the foreclosing party provide homeowners with a loss mitigation application in tandem with any pre-foreclosure notice or pre-foreclosure communication;

- A requirement that the foreclosing party submit an affidavit disclosing the specific basis for the denial of a loan modification, including the inputs and outputs of any loss mitigation calculations;

- A defense to foreclosure (or equivalent right in non-judicial foreclosure states) based on failure of the foreclosing party to engage in a good faith review of foreclosure alternatives; and

- Public enforcement mechanisms to safeguard against systemic abuses.

In addition, states interested a pursuing a mediation program should consider adapting mediation programs to function as an appeal process when an adverse loss mitigation determination is made.[4]

Finally, while this paper focuses on efforts directed at state foreclosure laws, state authority to regulate and license mortgage servicers provides another opportunity to promote servicer accountability, as well as a means of incorporating a mandatory loss mitigation standard.[5]

We cannot afford to wait any longer for the housing market to stabilize itself. If implemented quickly, states can prevent unnecessary foreclosures before it is too late.

II. The Costs of the Foreclosure Crisis are Shared

As communities across the country know all too well, the families that lose their homes are not the only victims of foreclosures, as "spillover" costs extend throughout the neighborhood and the larger community. CRL estimates that by 2012, the foreclosure crisis will strip neighboring homeowners of $1.9 trillion as nearby foreclosures drain value from homes located near foreclosed properties.[6] As a result of depressed home values, nearly one out of every four borrowers is "underwater," owing more than the home is worth.[7]

> "Nearly three years into the foreclosure crisis, we find the more than 60% of homeowners with seriously delinquent loans are still not involved in any loss mitigation activity."
>
> - State Foreclosure Prevention Working Group, August 2010

Meanwhile, state and local governments continue to be hit hard by declining tax revenues coupled with increased demand for social services. In fact, the Urban Institute estimates that a single foreclosure costs $79,443 after aggregating the costs borne by financial institutions, investors, the homeowner, their neighbors, and local governments.[8] However, even this number understates the true cost, since it does not reflect the impact of the foreclosure epidemic on the nation's economy or the disparate impact on lower-

income and minority communities.[9]

With millions of foreclosures still on the horizon, there is an urgent need for policymakers to respond with measures to keep families in their homes and stabilize the housing market. State foreclosure laws offer an opportunity to build upon existing efforts, allowing state policymakers to apply common sense standards to any actor pursuing foreclosure.

III. States Have Exclusive Jurisdiction Over the Foreclosure Process

States are uniquely situated to build on and complement existing foreclosure prevention efforts by leveraging their exclusive control over the foreclosure process. Foreclosure laws — which are entirely under state control — provide a clear jurisdictional hook that enables states to level the playing field by enacting protections that apply to all actors, including national banks and mortgage servicers affiliated with national banks.

The federal government already has recognized the important role states can play in addressing the impact of foreclosures at the local level. The U.S. Treasury Department has now directed more than $7 billion in funds from the Troubled Asset Relief Program to support local foreclosure prevention efforts in 18 states and the District of Columbia.[10] While this federal funding contributes much-needed resources to support innovative foreclosure prevention strategies, when compared to the cost borne by states and their constituents, the funds allotted are relatively small.

The reality is that most states are themselves financially distressed and are looking for cost-effective ways to respond to increased demands on public resources. Persistent foreclosure backlogs suggest that judicial and administrative resources are strained as well, even in states with a non-judicial foreclosure process.

IV. Limitations of the Servicing Industry Response

In recent weeks, the servicing industry has been crippled by accusations and subsequent admissions of widespread negligence and fraud.[11] As a result, industry practices are perceived by many as at best deeply flawed, and at worst illegal.

Servicing employees have been signing foreclosure documents en masse, without appropriate verification and, in some cases, even without appropriate signatures. Servicers are foreclosing, therefore, without offering proof (1) that the lender is the holder of the note and therefore has the right to foreclose; and (2) that the borrower is even in default. Similar sloppy and fraudulent practices exist throughout the servicing process, from the posting of payments and charging of fees to the evaluation for loss mitigation.

> "This is not simply about a glitch in paperwork. It's also about some companies violating the law and many people losing their homes."
>
> -Iowa Attorney General Tom Miller, October 2010

This practice of rubber-stamping foreclosure documents, which has been a common practice for years, recently grabbed the public's attention following media coverage of a case brought by a homeowner in Maine, who was wrongfully foreclosed upon due to servicing errors.[12] Admissions during depositions in this case suggested that the problem of falsifying documents was throughout the industry. Since then, several large servicers including GMAC, JPMorgan Chase and Bank of America, responding to pressure from state and federal officials, agreed to review their internal policies and procedures related to the foreclosure process and, in many cases, temporarily halted foreclosure sales in some or all states.

Additionally, Attorneys General from all 50 states and the District of Columbia are conducting a joint investigation into the matter and the Department of Justice has launched a probe to further examine allegations of foreclosure fraud. Meanwhile, national civil rights groups have called for an immediate national moratorium on foreclosures until servicers demonstrate that they are complying with all existing laws, regulations, and contractual guidelines related to foreclosure and loss mitigation.

These accounts are a disturbing reminder of the systemic problems facing the servicing industry and highlight the extent to which the industry continues to be willfully ill-equipped to handle the volume of borrowers at risk of losing their homes. In fact, the foreclosure crisis has given rise to a sea change for the servicing industry. Loan servicing has traditionally been a high-volume, high-efficiency business, relying heavily on a relatively low volume of delinquent borrowers. Typically, loss mitigation staff with specialized training and one-on-one borrower communication skills was a relatively small portion of the overall staff.[13]

> "Even though investors continue to suffer very large losses and would benefit from more aggressive loss mitigation measures, current foreclosure prevention efforts have failed to develop efficient and sustainable work-outs for homeowners."
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> - State Foreclosure Prevention Working Group, January 2010

The drastic increase in the number of delinquent borrowers has required servicers to scramble to hire and train new staff. Not surprisingly, industry observers have noted that this strain on servicing capacity has coincided not just with problems related to the foreclosure process described above, but also with a surge in borrower complaints related to the loss mitigation process and servicer communications.

A recent survey of foreclosure-intervention counselors found a multitude of servicer obstacles to successful loan modifications, including lack of qualified personnel and communication inefficiencies that confuse and even drive borrowers away.[14] These inefficiencies include the borrower being directed to a multitude of servicing staff that are often incapable of offering appropriate assistance, lost paperwork, and inadequate follow-up during the evaluation process.

Borrowers seeking a loan modification are often told that they have been denied due to “investor restrictions.” However, as a recent CRL research report points out, modification

is more often than not a win-win for the investor and the borrower.[15] Borrowers and borrower advocates are not alone in their frustration. In fact, investors themselves often claim that they are not preventing modifications from proceeding and have voiced concern that servicers are not acting in *their* best interest either.[16]

Many have asked whether servicer compensation has driven this slow response. A recent study from the National Consumer Law Center illustrates that the traditional operating structure of the servicing industry generally favors foreclosure over modification. Servicers generate their profits through default-related fees that they do not earn through successful foreclosure avoidance. These incentives are compounded by the industry practice of compensating foreclosure lawyers based on the number of foreclosures they complete. In addition, loan modifications require that servicers take on additional costs, including the hiring of highly skilled staff and the advancing of monthly interest to investors.[17]

> "Investors are … dismayed, saying servicers are not acting in their best interests. 'This is one of those rare alliances where investors and borrowers are on the same page,' according to Laurie Goodman, Senior Managing Director at Amherst Securities, a brokerage firm that specializes in mortgage securities. She says investors have 'zero vote' in determining individual loan modifications and, instead of foreclosures, prefer sustainable modifications that lower homeowners' total debt."
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> - ProPublica, July 23, 2010

As discussed more fully in the next section, federal foreclosure prevention efforts have relied on incentive payments to promote loan modifications, attempting to align the interests of servicers and investors. However, results so far suggest that government incentives are not enough to motivate the servicing industry to invest in the infrastructure needed for such a substantial paradigm shift. Unless servicers are held accountable, millions of homeowners will likely be casualties, with negative results spilling over to communities, the states and our national economy.

V. Limitations of the Federal Response

The Administration's Home Affordable Modification Program (HAMP) was designed to use up to $50 billion in TARP funds to help homeowners at risk of foreclosure modify their mortgages to reduce monthly mortgage payments. Directing a variety of incentives at investors, servicers and borrowers, the voluntary HAMP program utilizes a Net Present Value (NPV) formula to determine whether foreclosure or modification will best serve the financial interest of the investor.[18] One of the most valuable contributions of HAMP has been to impose this requirement prior to foreclosure, requiring this analysis be performed for all homeowners who are 60 days delinquent or at imminent risk of default.

While Treasury initially projected that HAMP would "help up to 3 to 4 million homeowners avoid foreclosure . . . by reducing monthly payments to sustainable levels," Treasury has since stated that its 3-to-4 million homeowner goal was related to the number of homeowners that would receive *offers* of a loan modification, not the number that would receive sustainable relief.[19] Even under this revised metric, HAMP has not

effectively responded to the "the need to help families keep their homes and to stabilize communities."[20]

To be sure, the HAMP modification program has increased foreclosure prevention efforts. However, a lack of capacity in the servicing industry along with the inability of consumers and policymakers to hold servicers accountable has resulted in a slow and stunted response from industry. As a result, an arduous learn-as-you-go policymaking process has accompanied the program as the Administration has struggled to analyze the reasons for the slow uptake by industry and adjust its incentive policies accordingly. The result has been a patchwork of policies and procedures (see Appendix 1).

While successful HAMP modifications are on the rise, and servicer participation in the HAMP program has increased significantly with over 110 servicers of privately owned mortgages now participating,[21] the number of homeowners in need of assistance continues to overwhelm the number of borrowers who have received a permanent loan modification by ten to one (see Figure 1). Additionally, industry actors are still choosing proprietary (or non-HAMP) modifications— those underwritten outside of the HAMP program—at a rate of two-to-one.[22]

Despite the prevalence of non-HAMP modifications, HAMP has clearly informed the way industry actors approach loan modifications.[23] The reality is that proprietary (non-HAMP) modification programs have been significantly influenced by HAMP. Similarly, the HAMP program and its continued evolution provide a rich set of experiences on which states can draw in combating foreclosures in their communities.

What is a Net Present Value Test?

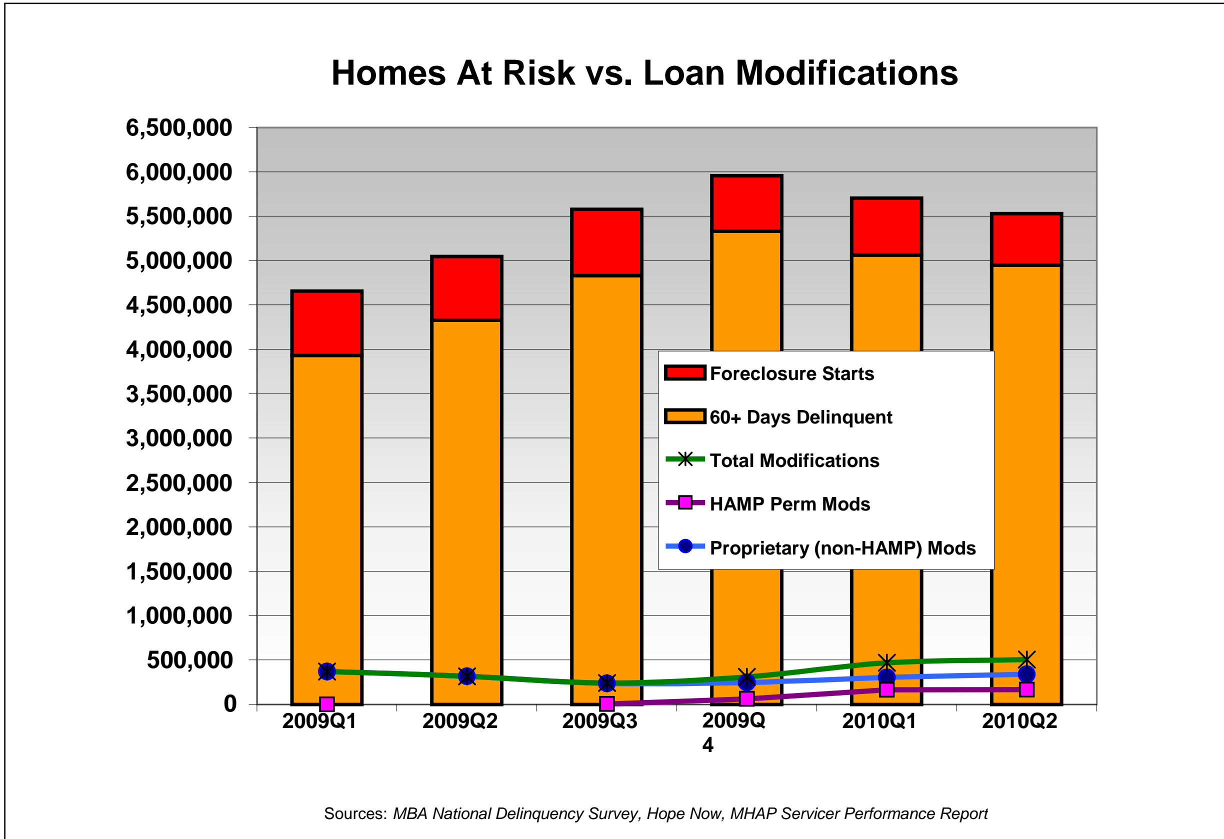
A net present value test compares the financial outcome of foreclosure against a loan modification by calculating the expected cash flows to determine which is in the best interest of the investor. The financial outcome is measured by the NPV of the expected cash flows

Key factors that impact results of an NPV test include:

- Likelihood the borrower will foreclose if no loss mitigation action is taken
- The likelihood the borrower will default after the loan has been modified
- The cost of foreclosure
- Expected future price of the home
- The reduced cash flow from payment reduction

Rather than create a foreclosure prevention scheme from scratch, states should consider extending standards that are consistent with prevailing loss mitigation programs, including HAMP, incorporating directives regarding the modification process as well as benchmarks that promote sustainable loans.

Figure 1. Demand for Relief Continues to Outpace Loan Modifications



VI. Mandatory Loss Mitigation as a Flexible but Effective Tool for States

Like the net present value test required by HAMP, a mandatory loss mitigation standard would require that servicers weigh the investor's cost of foreclosure against the investor's anticipated cash flow from future modified mortgage payments.[24] By mandating this additional step, which is in the best interest of both investors and homeowners, states can impose uniform standards, which promote fairness and transparency, across all mortgage servicers and financial institutions, regardless of their charter or affiliation.

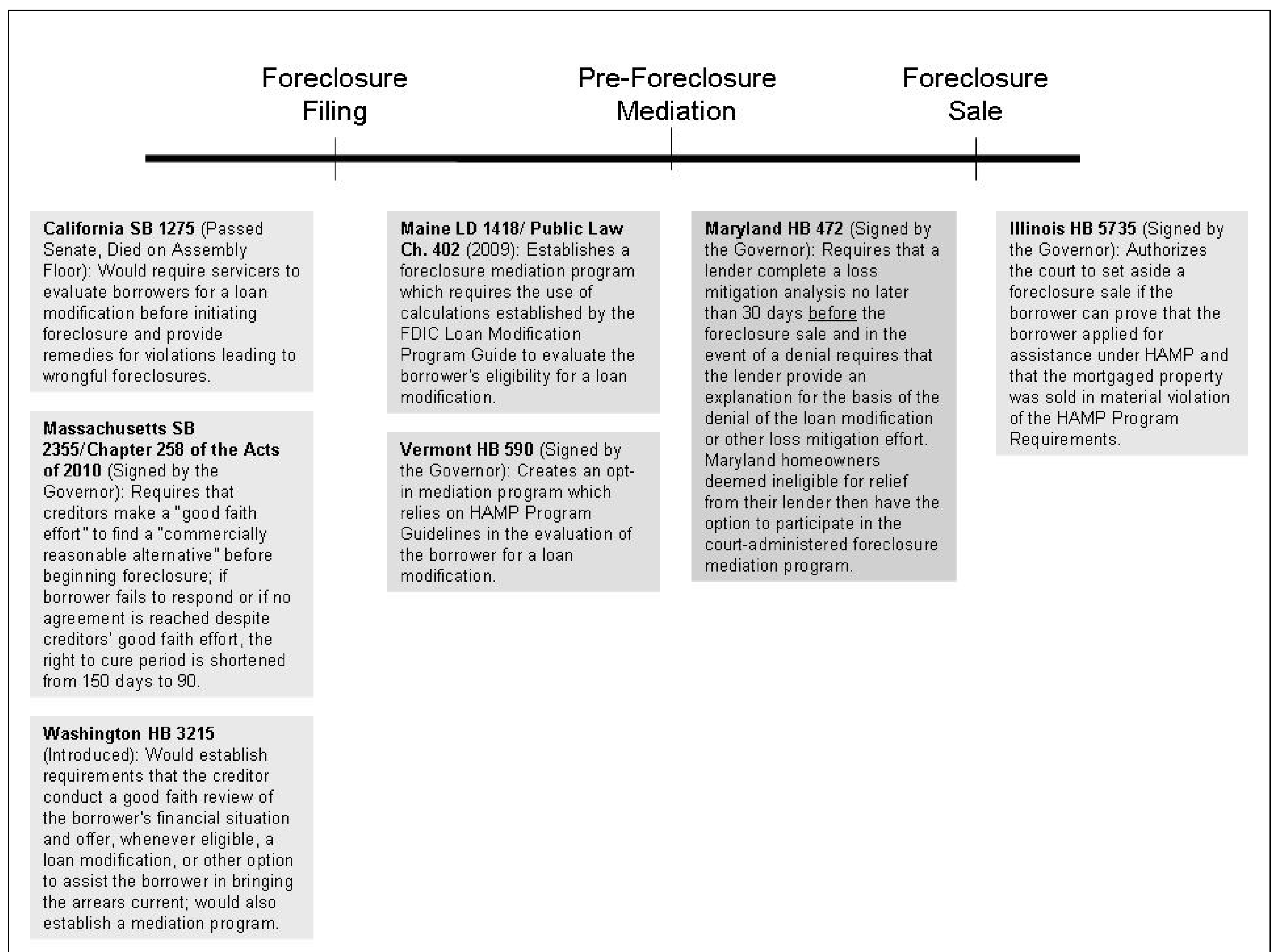
While ideally states would require servicers to perform a loss mitigation analysis prior to filing for foreclosure, existing laws have incorporated elements of a mandatory loss mitigation standard at various stages of the foreclosure process (See Figure 2). There are four ways in which a loss mitigation component has been integrated into state foreclosure laws, either implicitly or explicitly: (1) as a pre-condition to foreclosure filing; (2) as part of a foreclosure mediation program; (3) as a pre-condition to foreclosure sale; and (4) as the basis for a challenge post-foreclosure sale.

This range of approaches demonstrates the extent to which a loss mitigation standard can be adapted to any foreclosure process. Because not all foreclosures are preventable, the implementation of this standard will not limit the right of creditors to foreclose on a

property where appropriate, but would ensure that the foreclosure sale is a last resort, after all other foreclosure prevention strategies have been considered.

States can promote transparency and accountability by combining a mandatory loss mitigation standard with basic disclosures of the inputs used in the NPV calculation and the results of the calculation, which can be contested by appeal. The HAMP qualification process has repeatedly been criticized for its lack of transparency by both borrowers and their advocates. In fact, no mechanism currently exists to provide borrowers with a standardized and meaningful explanation for the reasons they are denied a modification. Without a standardized modification denial process with possibility of appeal, borrowers are unable to know whether their modification application was denied based on accurate information.

Figure 2. State Foreclosure Prevention Strategies Incorporating Loss Mitigation



VII. Policy Recommendations

By exercising their exclusive jurisdiction over the foreclosure process, states can ensure that foreclosure is a last resort, while promoting fairness, transparency, and accountability. Following are the key components of a comprehensive state approach to foreclosure prevention, which together will effectively incorporate mandatory loss mitigation into any state's foreclosure process:

> *Pre-Foreclosure Loss Mitigation Application.* Because a meaningful evaluation will require that the homeowner provide some basic information related to income and debts, states should consider requiring servicers to include a loss mitigation application with any pre-foreclosure notice or other official communication at the earliest possible opportunity.[25] A pre-foreclosure loss mitigation application is not a substitute for other efforts to contact the homeowner, but would help services to perform a good faith review of the homeowner's eligibility for a foreclosure alternative.
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> *Mandatory Loss Mitigation Requirement.* Policymakers should ensure that only unavoidable foreclosures proceed to sale by requiring that all servicers conduct a loss mitigation analysis prior to foreclosure sale. While this standard can be integrated at various points in the foreclosure process, by imposing it at the earliest opportunity possible, all parties are assured a more positive outcome. Rather than imposing a new standard developed from scratch, states should incorporate existing loss mitigation standards to which servicers are already subject to by virtue of participation in any federal program or a federal guarantee.[26] This approach would provide servicers with a tiered set of permissible loss mitigation calculations, integrating HAMP Guidelines,[27] as well as FHA, VA, USDA, Fannie Mae, Freddie Mac, and FDIC Guidelines for servicers not currently participating in HAMP. Use of prevailing loss mitigation standards will ease the burden of compliance for servicers while positioning state laws to evolve in tandem with these existing standards.
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> *Loss Mitigation Affidavit.* It is imperative to provide homeowners with a clear understanding of why they do—or don't—qualify for a loan modification. Because homeowners and their advocates currently lack access to the basis for loss mitigation assessments, they are unable to determine whether servicers have effectively and accurately evaluated the homeowner's qualifications. Disclosure of the inputs used in the determination will enable homeowners to verify the accuracy of the information and as a result the accuracy of the determination. Requiring this disclosure in the form of an affidavit also provides an opportunity for judicial intervention, which may be particularly valuable in states with a non-judicial foreclosure process. Maryland recently amended its foreclosure statute to require that the foreclosing party submit a loss mitigation affidavit stating either (1) that a loss mitigation review was performed, along with the reasons for denial, or (2) that the review could not be completed despite repeated attempts.[28] Even absent a change to state foreclosure laws, some state courts like the Superior Court of

Connecticut have unilaterally exercised the authority to impose additional requirements, including affidavits of this kind.[29]

Mediation as an Appeals Mechanism. States that are interested in mediation as a foreclosure prevention strategy should consider pairing these efforts with a loss mitigation standard to construct an appeals process that uses the contents of the loss mitigation affidavit to guide the mediation session. By creating a presumption that borrowers denied a foreclosure alternative are entitled to mediation, which can only be rebutted by a showing of good cause by the foreclosing party, states can preserve mediation resources for the borrowers that would benefit most.[30]

Servicer Accountability. Without robust enforcement mechanisms, any standards imposed by states will be purely voluntary. Enforcement mechanisms should be layered to ensure that servicers are held accountable both to the borrower and the public at large: (1) a servicer's failure to engage in a good-faith review should, at a minimum, constitute a defense to foreclosure (or equivalent in non-judicial foreclosure states); (2) states should consider authorizing the courts to set aside foreclosure sales in the event that the homeowner can prove that the servicer deviated from the good-faith review requirement; (3) states should incorporate mechanisms that will permit the courts or regulators to monitor loan modification efforts;[31] (4) states must provide public enforcement authorities mechanisms necessary to safeguard against systemic abuses; and (5) policymakers can further ensure that the interests of homeowners and servicers are properly aligned by exercising their authority to license and regulate servicers.[32]

By requiring loss mitigation analysis prior to foreclosure, states can leverage existing efforts while ensuring that all homeowners have access to a good-faith review of foreclosure alternatives, prevent unnecessary foreclosures, and stabilize the housing market.

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[1] Debbie Gruenstein Bocian, Wei Li, and Keith S. Ernst, Center for Responsible Lending, *Foreclosures by Race and Ethnicity: The Demographics of a Crisis*, at 3 (June 18, 2010), available at http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf.
[2] Hatzius, Jan & Marschoun, Michael A. Goldman Sachs Global ECS Research, *Home Prices and Credit Losses: Projections and Policy Options* (2009).
[3] U.S. Department of Housing and Urban Development, Mortgagee Letter 2010-04, Loss Mitigation for Imminent Default (January 22, 2010), available at http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/10-04ml.pdf ("Loss Mitigation is critical to both borrowers and FHA because it works to fulfill the goal of helping borrowers retain homeownership while protecting the FHA Insurance Fund from unnecessary losses. By establishing early contact with the borrower to discuss the reason for the default and the available reinstatement options, the servicer increases the likelihood that the default will be cured and the borrower will be able to retain homeownership.")
[4] E.g., Maryland HB 472 (2010), available at http://mlis.state.md.us/2010rs/bills/hb/hb0472f.pdf (Maryland homeowners deemed ineligible for relief from their lender then have the option to participate in the court-administered foreclosure mediation program.).

[5] See, e.g., NYS Banking Department, Part 419 of the Superintendent's Regulations, at 419.11 (effective October 1, 2010), available at http://www.banking.state.ny.us/legal/adptregu.htm ("Servicers shall make reasonable and good faith efforts consistent with usual and customary industry standards and paragraph (b) of this section to engage in appropriate loss mitigation options, including loan modifications, to avoid foreclosure.").
[6] Center for Responsible Lending, Soaring Spillover: Accelerating Foreclosures to Cost Neighbors $502 Billion in 2009 Alone; 69.5 Million Homes Lose $7,200 on Average (2009).
[7] Ruth Simon & James R. Hagerty, Wall Street Journal, One in Four Borrowers is Underwater (November 24, 2009), available at http://online.wsj.com/article/NA_WSJ_PUB:SB125903489722661849.html
[8] Thomas G. Kingsley; Robin Smith, & David Price, The Urban Institute, *The Impact of Foreclosures on Families and Communities* (2009).
[9] Debbie Gruenstein Bocian, Wei Li, and Keith S. Ernst, Center for Responsible Lending, *Foreclosures by Race and Ethnicity: The Demographics of a Crisis*, at 3 (June 18, 2010), available at http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf.(June 18, 2010)("As the foreclosure crisis threatens the financial stability and mobility of families across the country, it will be particularly devastating to African-American and Latino families, who already lag their white counterparts in terms of income, wealth and educational attainment.")
[10] White House, Office of the Press Secretary, Help for the Hardest Hit Housing Markets, Press Release (February 19, 2010), available at http://www.whitehouse.gov/the-press-office/help-hardest-hit-housing-markets (States included in the first round of allocations for the Housing Finance Agency (HFA) Innovation Fund for the Hardest Hit Housing Markets (the "Hardest Hit Fund") included California, Florida, Arizona, Michigan, and Nevada.); U.S. Department of Treasury, Administration Announces Second Round of Assistance for Hardest-Hit Housing Markets, Press Release (March 29, 2010), available at http://www.ustreas.gov/press/releases/tg618.htm (Ohio, North Carolina, South Carolina, Oregon, and Rhode Island were identified in the second round of allocations.).
[11] See David Streitfeld, *From a Maine House, a National Foreclosure Freeze*, N.Y. Times, October 14, 2010, available at http://www.nytimes.com/2010/10/15/business/15maine.html?_r=1&hp.
[12] Id. (In documents filed with a Maine court, Tom Cox, an attorney with Pine Tree Legal Assistance, spelled out in what he learned in deposing Mr. Stephan, the limited signing officer (or "robo-signer") for GMAC: "When Stephan says in an affidavit that he has personal knowledge of the facts stated in his affidavits, he doesn't. When he says that he has custody and control of the loan documents, he doesn't. When he says that he is attaching 'a true and accurate' copy of a note or a mortgage, he has no idea if that is so, because he does not look at the exhibits. When he makes any other statement of fact, he has no idea if it is true. When the notary says that Stephan appeared before him or her, he didn't.")
[13] See, e.g., Wei Li, Sonia Garrison, and Keith S. Ernst, Center for Responsible Lending "Insights into Mortgage Modification Decisions: The Effect of Self-Cure and Re-default Rates on Net Present Value Analyses," Working Paper at 16 (2010).
[14] David A. Smith, Louise Perwien, & Janneke Ratcliffe, UNC Center for Community Capital, *Mortgage Servicers Response to Borrowers in Crisis: A Report from the Front Lines*, (2009).
[15] Wei Li, Sonia Garrison, and Keith S. Ernst, Center for Responsible Lending "Insights into Mortgage Modification Decisions: The Effect of Self-Cure and Re-default Rates on Net Present Value Analyses," Working Paper (2010).
[16] See Karen Weise, ProPublica, *When Denying Loan Mods, Loan Servicers Often Wrongly Blame Investor*s (July 27, 2010), available at http://www.propublica.org/article/when-denying-loan-mods-loan-servicers-often-blame-investors-wrongly. See also, Alys Cohen, National Consumer Law Center, Before the U.S. House Financial Services Subcommittee on Housing and Community Opportunity, *"Progress of the Making Home Affordable Program: What Are the Outcomes for Homeowners and What are the Obstacles to Success,"* at 18-19.
[17] Diane E. Thompson, National Consumer Law Center, *Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior: Servicer Compensation and its Consequences* (2009), available at http://www.nclc.org/images/pdf/pr-reports/report-servicers-modify.pdf
[18] Servicers participating in HAMP evaluate a homeowner's qualification for a loan modification primarily through an analysis of the Net Present Value ("NPV"), assessing whether the profits more from a loan modification or a foreclosure. The outcome of this analysis is driven by inputs that include the homeowner's income, FICO score, current default status, debt-to-income ratio, and property valuation, plus

factors relating to future value of the property and likely price at resale. Servicers that participate in HAMP are to apply an NPV analysis model to all homeowners who are 60 days delinquent and those at imminent risk of default. If the NPV analysis shows modification to be favorable, the program guidelines provide a "waterfall" of loan modification tools (Step One: capitalize all outstanding interest, escrow advances, and third party fees. Step Two: Reduce the mortgage interest rate in increments of 0.125 percent with a floor of two percent. Step Three: The term of the mortgage can be extended to 480 months from the modification effective date. Step Four: provide non-interest bearing and non-amortizing principal forbearance) designed to achieve a more affordable, sustainable loan.

[19] Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP), "Summary of Report SIGTARP-10-005: Factors Affecting Implementation of the Home Affordable Modification Program" (March 25, 2010).

[20] Emergency Economic Stabilization Act of 2008 (EESA), Division A of Pub.L. 110-343 (2008)(Congress made foreclosure prevention an express part of EESA, the statute that created the Trouble Asset Relief Program (TARP), the fund from which $50 billion was allocated to create HAMP. The preservation of homeownership was one of the explicit purposes of EESA. In evaluating whether the Secretary of the Treasury should exercise his authority under EESA, he must consider "the need to help keep families in their homes and to stabilize their communities.").

[21] Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP), "Factors Affecting Implementation of the Home Affordable Modification Program (March 25, 2010), at 10. See also, The United States Department of Treasury Office of Financial Stability provides financial incentives to servicers, borrowers, and mortgage holders or investors to modify loans that are not owned or guaranteed by the government sponsored enterprises (GSEs), Fannie Mae and Freddie Mac

[22] HOPE NOW Alliance, HOPE Now Industry Extrapolations and Metrics, August 2010, available at http://hopenow.com/industry-data/HOPE%20NOW%20Data%20Report%20(August)%2010-05-2010%20v2b.pdf

[23] U.S. Department of Treasury, Making Home Affordable, Home Affordable Modification Program Base Net Present Value (NPV) Model Specifications: Base NPV Model Overview, at 1, June 11, 2009, available at https://www.hmpadmin.com/portal/docs/hamp_servicer/npvoverview.pdf ("It is our expectation that servicers may use the Base NPV Model Documentation to customize the model based on their individual portfolio experience – all within the standardized guidelines put forward for the model under the program. The base NPV model will provide consistency in NPV calculations for the Home Affordable Modification Program and help the industry move toward a more standard process for evaluating the NPV of mortgages for purposes of making modifications.").

[24] Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP), "Factors Affecting Implementation of the Home Affordable Modification Program" (March 25, 2010), at 8 ("According to Treasury, the NPV model increases investors' confidence that the modifications under HAMP are in their best financial interests and helps ensure that borrowers are treated consistently under the program by providing a transparent and externally derived objective standard for all loan servicers to follow.").

[25] E.g., Maryland HB 472 (2010), available at http://mlis.state.md.us/2010rs/bills/hb/hb0472f.pdf (Requires that an application for a loan modification or loss mitigation program, including any Federal loss mitigation program in which the secured party participates and, if the Federal program is inapplicable or unavailable, an application for any other loss mitigation program offered by the secured party, be sent to the borrower and record owner of a residential property at least 45 days before a foreclosure action is filed.).

[26] See, e.g., Washington SB 6648(2010)(proposed substitute)(§4(11)(c)"Any affordable loan modification calculation and net present value calculation when required under the federal home affordable modification program. If the loan is insured by the federal housing administration, subject to federal national mortgage association or federal home loan mortgage corporation guidelines, or insured by the veterans administration, then the calculations required by those agencies must be used. If such a calculation is not required, then the beneficiary must use the current calculations, assumptions, and forms that are established by the federal deposit insurance corporation and published in the federal deposit insurance corporation loan modification program guide.")

[27] Under HAMP, participating loan servicers evaluate a homeowner's qualification for a loan modification primarily through an analysis of the Net Present Value (NPV) Test, assessing whether the investor profits

more from a loan modification or a foreclosure. This calculation compares the cash flow anticipated from future mortgage payments to the cash flow anticipated from foreclosing on the property, based on inputs that include the homeowner's income, credit score, current payment status, debt-to-income ratio, and property value, plus factors relating to the property's future value and likely resale price. Servicers that participate in HAMP are to apply an NPV analysis model to all homeowners who are 60 days delinquent and those at imminent risk of default.

[28] Maryland HB 472 (2010).

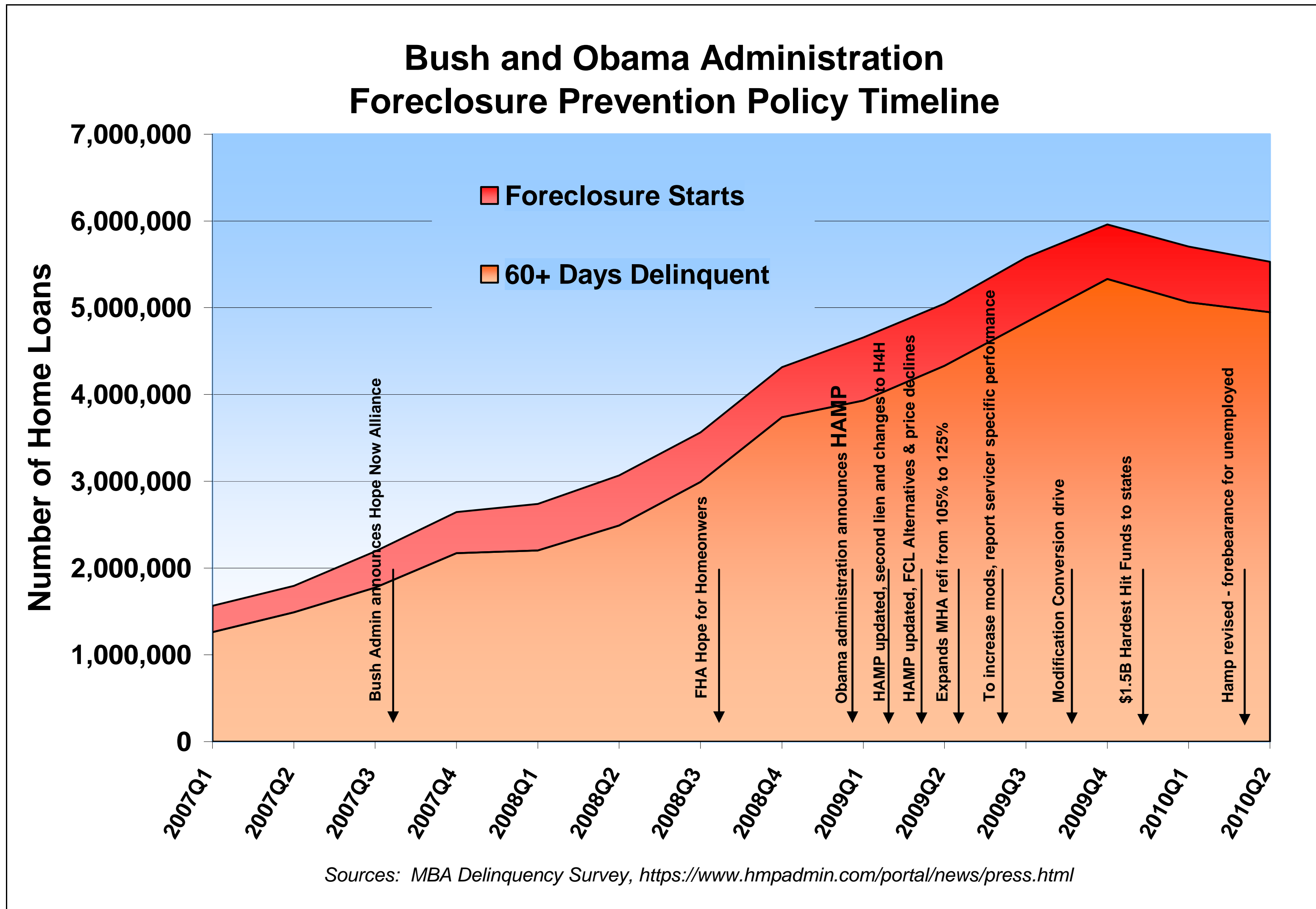
[29] See, e.g., Superior Court of Connecticut, Foreclosure Standing Order, Federal Loss Mitigation Programs, JD-CV-117 New 8/10 (August 4, 2010), available at www.jud.ct.gov ("The purpose of this standing order is to ensure that no foreclosure proceeding is initiated, no previously initiated proceeding goes to judgment, and no sale of a foreclosed residential property is approved pursuant to a judgment of foreclosure by sale, unless the defendant has had an opportunity, if the defendant is eligible, to apply for relief under a federal loss mitigation program including, but not limited to, the Home Affordable Modification Program (HAMP), the Second Lien Modification Program (2MP), the Home Affordable Unemployment Program (UP), and the Home Affordable Foreclosure Alternatives Program (HAFA)").

[30] See Center for Responsible Lending, *Maryland General Assembly Sets New Protections for Struggling Homeowners*, April 29, 2010 (Quoting Uriah King, Vice President of State Policy at CRL, who in describing the mediation appeals mechanism in Maryland HB 472 noted, "no other mediation program has this important component that efficiently guarantees homeowners facing foreclosure will be treated fairly.")

[31] See, e.g., N.C. Gen. Stat. § 45-100 et seq. (Emergency Program to Reduce Home Foreclosures; North Carolina Commissioner of Banks Foreclosure Red Flag Review Program).

[32] See, e.g., N.Y. Comp. Codes R. & Regs. tit. 3 § 419 (2010)(Servicing Mortgage Loans: Business Conduct Rules)(The new Part 419 of the Superintendent's Regulations addresses the business practices of mortgage loan servicers and establishes certain consumer protections for homeowners whose residential mortgage loans are being serviced. These regulations provide standards and procedures for servicers to follow in their course of dealings with borrowers, including the handling of borrower complaints and inquiries, payment of taxes and insurance premiums, crediting of borrower payments, provision of annual statements of the borrower's account, authorized fees, late charges and handling of loan delinquencies and loss mitigation. Part 419 also identifies certain business practices that are prohibited and imposes certain reporting and record-keeping requirements to enable the Superintendent to determine the servicer's compliance with applicable laws, its financial condition and the status of its servicing portfolio.).

Appendix 1. The Evolution of the Federal Response



Sources: MBA Delinquency Survey, https://www.hmpadmin.com/portal/news/press.html

Appendix 2. State Foreclosure Data

	State foreclosure projections (2009-2012)	State total past due (end Q2-2010)	Change in state foreclosure starts (Q3-2006 to Q1-2010)	Statewide lost home equity wealth due to nearby foreclosures (2009-2012)
Alabama	79,605	76,663	250%	$1,788,700,000
Alaska	5,595	5,928	11%	$621,300,000
Arizona	451,590	194,058	418%	$51,734,300,000
Arkansas	35,439	33,005	265%	$607,900,000
California	1,888,716	892,728	369%	$626,870,000,000
Colorado	140,223	91,861	56%	$15,732,500,000
Connecticut	80,031	64,400	144%	$7,718,300,000
Delaware	20,605	20,153	287%	$2,052,300,000
District of Columbia	14,390	10,253	142%	$22,848,600,000
Florida	1,482,279	863,336	614%	$331,351,000,000
Georgia	348,343	269,192	122%	$13,145,500,000
Hawaii	28,068	19,338	533%	$14,979,800,000
Idaho	44,438	29,020	143%	$1,774,800,000
Illinois	384,490	280,973	474%	$126,335,300,000
Indiana	170,829	125,546	104%	$6,041,500,000
Iowa	37,617	33,739	-28%	$1,197,700,000
Kansas	36,542	31,580	71%	$1,556,200,000
Kentucky	60,203	53,097	44%	$2,238,700,000
Louisiana	57,938	69,006	100%	$2,619,800,000
Maine	23,093	18,653	114%	$765,200,000
Maryland	163,479	148,367	326%	$31,265,800,000
Massachusetts	121,153	99,358	80%	$37,801,800,000
Michigan	325,917	220,655	62%	$20,337,900,000
Minnesota	150,332	88,569	111%	$12,866,700,000
Mississippi	40,867	42,581	76%	$647,400,000
Missouri	114,000	94,571	22%	$5,874,400,000
Montana	10,956	9,656	182%	$265,600,000
Nebraska	22,554	16,840	42%	$1,075,400,000
Nevada	281,901	127,921	1121%	$54,443,800,000
New Hampshire	29,739	21,358	107%	$1,114,300,000
New Jersey	235,881	193,503	178%	$66,266,900,000
New Mexico	29,864	30,027	194%	$2,102,700,000
New York	238,692	273,252	173%	$241,715,400,000
North Carolina	135,544	166,786	129%	$5,184,400,000
North Dakota	3,002	2,824	-16%	$173,300,000
Ohio	282,190	217,536	21%	$17,228,600,000
Oklahoma	50,340	46,866	39%	$1,889,600,000
Oregon	85,886	60,893	478%	$9,200,700,000
Pennsylvania	172,439	185,563	53%	$24,517,400,000
Rhode Island	31,192	19,519	98%	$5,624,100,000
South Carolina	98,732	87,773	94%	$3,512,300,000
South Dakota	6,583	5,283	7%	$150,200,000
Tennessee	121,324	110,949	59%	$3,860,000,000
Texas	349,292	356,402	35%	$19,987,800,000

	State foreclosure projections (2009-2012)	State total past due (end Q2-2010)	Change in state foreclosure starts (Q3-2006 to Q1-2010)	Statewide lost home equity wealth due to nearby foreclosures (2009-2012)
Utah	69,383	51,115	120%	$5,731,800,000
Vermont	6,238	5,932	211%	$142,500,000
Virginia	182,596	132,825	8%	$26,091,100,000
Washington	132,092	119,472	347%	$19,487,800,000
West Virginia	15,201	16,198	41%	$347,400,000
Wisconsin	93,279	71,346	53%	$5,660,500,000
Wyoming	4,658	4,911	104%	$139,000,000
United States	9,000,000	6,217,842	136%	$1,856,685,900,000