To: Dan Smith, Freddie Mac

From: Jeff Lischer, NAR
Steve Gottheim, ALTA

Subject: Concerns Re: Freddie Mac Policy re Short Sale Affidavits

Date: October 7, 2011

We are writing to raise concerns raised by the members of NAR and ALTA about Section B65.40 of the Freddie Mac Servicing Guide. This section requires servicers to obtain an affidavit from various individuals involved in a short sale transaction. The policy requires the borrower(s), purchaser(s), real estate brokers representing any of the parties, the escrow/closing agent performing the closing, and the transaction facilitator to make various certifications. For example, they all must certify that the transaction is an "arm's length" transaction, there are no side agreements, neither the borrower nor the purchaser will receive any funds or commissions connected with the sale, and the signatories agree to indemnify the servicer and Freddie Mac for any losses resulting from any negligent or intentional misrepresentations made in the affidavit.

The affidavit required by Section B65.40, both by its own terms and as implemented by various servicers, appears to impose an unreasonable and unfair burden on the signatories. The policy requires joint and several liability, so each signatory is fully responsible for false certifications by any other party, regardless of whether the signatory knew or even could have known there was a false certification. In addition, real estate brokers and agents and closing agents are not parties to the sales agreement, but this is implied. Requiring a single affidavit makes it difficult for servicers to draft a form that clearly separates the various roles of those involved in the sale as buyer/seller, real estate broker/agent, closing agent, or transaction facilitator. These serious concerns have been raised by members of ALTA and REALTORS® and representatives of REALTOR® associations in Arizona, California, Florida, and Rhode Island. The others are or soon will be similarly concerned. Unreasonable requirements will deter participation by individuals in short sale transactions, to the detriment of all involved, including Freddie Mac.

Accordingly, we request that Freddie Mac amend Section B65.40 to address the following specific concerns:

**1. Knowledge Standard.** The certification should include a knowledge standard, so it is made "to the best of their actual knowledge and belief."

**2. Indemnification Requirement.** The standard in paragraph (f) should be revised. Paragraph (f) states:

> "Each signatory agrees to indemnify the Servicer and Freddie Mac for any and all loss resulting from any negligent or intentional misrepresentation made in the affidavit including, but not limited to, repayment of the amount of the reduced pay off of the Mortgage."

This paragraph raises a number of concerns.

- If there is a situation where more than one signatory makes a false certification, any liability should be shared based on the relative importance of that person's false certification.

- The "negligent or intentional misrepresentation" standard is perceived by our members as allowing Freddie Mac to pursue indemnification based on differences of opinion on what can be alleged to be negligent. This will raise red flags and deter participation. One alternative standard is "grossly negligent or intentional misrepresentation," which while still vague and uncertain is less likely to deter participation in short sales. Another possibility is "intentional misrepresentation or representation made with willful disregard for the facts disclosed by the parties to the transaction." This would protect signatories who participate in the short sale based on reasonable business practices, without having to aggressively investigate and challenge the motives and plans of each of the others involved in the short sale. If the standard is left unchanged, it is likely to deter participation of the most qualified individuals in short sales and increase your REO inventory.

- Paragraph (f) allows indemnification for unspecified other amounts, beyond repayment of the difference between the outstanding principal balance of the mortgage and the short sale proceeds. This open-ended, unspecified liability will deter participation and Freddie policy should limit indemnification, to it or to the servicers, to the amount of deficiency.

**3. Single Affidavit Requirement.** Section B65.40 requires the servicer to obtain "an affidavit wherein the parties to the transaction attest" the sale is an arm's length transaction. The paragraph after the list of certification refers to a single affidavit and states it "may be included with the sales contract, an addendum, or other . . . documents . . . ."

These provisions should allow separate affidavits since that would simplify accurate description of the roles of the various signatories. In many (and possibly all) states, the real estate licensees and the closing agents are not parties to the sales contract and the affidavit by a real estate licensee should not be an addendum to that contract. We request that your policy be amended to make clear that the affidavit that covers the real estate licensees or closing agent may not be an addendum to the sales contract. We have no objection to a separate affidavit for buyers and sellers being an addendum. This important line must be maintained to avoid inadvertently changing the legal rights and responsibilities of the buyer, the seller, and the real estate licensees. The Freddie policy blurs it by requiring one affidavit and by referring to all signatories as parties. For example, this blurring is clear in paragraph (a) which includes the following certification:

> (a) The sale of the Mortgages Premises is an "arm's length" transaction, between parties who are unrelated and unaffiliated by family, marriage, or commercial enterprise . . . .

Your arm's length policy applies to the role of real estate licensees and closing agents, but the certification indicates it is only to the parties, which seems to refer to the parties to the sales contract. This and other provisions referring to parties should be reassessed and amended to avoid these issues.

**4. Real Estate Licensee.** The policy requires the real estate broker to make the certification. It appears to make more sense to have the real estate licensees representing the seller

and the buyer make the certification since they are the ones with the knowledge of the transaction. The licensee may be a broker or an agent.

**5. Prohibition against Receipt of Funds or Commissions.** Paragraph c includes the following certification:

> (c) Neither the Borrower(s) nor the purchaser(s) will receive any funds or commissions from the sale of the Mortgaged Premises.

Several large servicers are offering sellers cash as an incentive for the short sale. Assuming Freddie Mac allows these payments for mortgages owned or guarantees by Freddie, or may do so in the future, this paragraph should be amended to make clear such payments are allowable.

We understand Freddie Mac's need to protect itself in short sale transactions, and are happy to work with you to accomplish this goal.

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The following is a brief description of specific concerns keyed to the Freddie Mac Short Sale Addendum, which we understand is a Bank of America form based on your policy. These or similar concerns are likely to arise with the versions adopted by other servicers unless Freddie Mac provides more detailed guidance about its requirements.

1. Paragraph 13 is overbroad and obligates the seller's agent, buyer's agent, and escrow/closing agents to ***indemnify*** an unnamed "servicer" and Freddie Mac from negligent or intentional misrepresentation made in the "affidavit" (it probably intends to refer to the Addendum, not a different document), even if the negligent or intentional misrepresentation were outside the broker's and closing agent's control or knowledge. This provision, based on the Freddie Mac Servicer Guide, has the effect—we hope inadvertently—of imposing joint and several liability upon the seller, buyer, brokers, closing agents, and transaction facilitator for actions/inactions of any one of the signatories, whether or not they had actual knowledge of the wrongful acts and even if the wrongful act was outside of their control. This is totally unfair and, we hope, simply a matter of confusing drafting.

REALTOR® and closing agent E&O insurance carriers have stated that if a real estate broker or a closing agent agrees to this provision, his or her E&O coverage will not protect them from liability associated with this section.

The broker and closing agent should not be deemed a "Party" to the contract, but even then, such a provision should be altered to limit the scope of liability to a more reasonable standard, to be assessed against the proper contract parties.

2. Paragraph 12 attempts to establish the purchase agreement and addendum as the only contracts involved in the transaction. From the broker/agent prospective. this language would seem to invalidate a listing agreement or, even worse, demand that no listing agreement even be allowed to exist, thus eliminating the legal right for any broker compensation to be paid. Part of the problem with this provision is that it attempts to deem the broker a "Party" to this purchase contract (see comment on paragraph 13, above). This provision seems more appropriate when aimed at the buyer

and seller only. A broker's legal right to compensation should not be affected in this manner. If allowed, a broker would have no legal recourse to enforce a breach of a compensation obligation.

3. Paragraph 10 creates a similar problem since it attempts to amend the listing agreement between the listing broker and the seller. We see no reason for Freddie Mac or servicers to seek to amend or impact the listing agreement between the broker and the seller.

4. The first paragraph, above the itemized sections, attempts to make a real estate agent (or agents) and closing agent parties to a purchase contract. Under Florida case law, and we believe other state laws, the real estate agent is specifically deemed not a party, nor even a third-party beneficiary, of a real estate contract. Attempting to make the broker/agent(s) a party to the contract will have multiple ambiguous, unknowable, and unintended effects and create great confusion as to the proper parties to the contracts. Another problem is that paragraph B65.40 requires the real estate brokers to certify, but the form requires agents to certify.

5. In the heading of the form there is a section for: "Transaction Facilitator." This term appears in the first part of the form and is ambiguous. We think they are referring to a short sale mortgage rescue service provider, or a short sale negotiator, but it is unclear.

6. In paragraph 6, there are undefined terms that Freddie Mac may wish to define such as servicer and investor (not Freddie Mac?). There is also an undefined reference to affidavits. Which affidavits does this section refer to? (We think it is a reference to the certifications made in the Addendum, but cannot be sure.) There are other questions about the meaning of terms. For example, paragraph 9 states that the parties agree the transaction will not constitute flipping. The Freddie Mac policy allows the buyer to sell after 120 days (or sooner if the property has been substantially refurbished or had value added), but there could be many other understandings of what is flipping and what is an acceptable resale. This is just an example of inconsistencies or ambiguities between the Freddie Mac policy and the Addendum.