

October 22, 2012

Joseph A. Smith
Office of Mortgage Settlement Oversight
301 Fayetteville St., Suite 1801
Raleigh, NC 27601

Via electronic mail

Dear Mr. Smith:

Thank you again for speaking with members of the Foreclosure Working Group of Americans for Financial Reform. We would like to reiterate our thanks to you and your office for releasing the *First Take* progress report, and for providing an initial glimpse at how the nation's five largest mortgage servicers are implementing the national settlement agreement over unlawful foreclosure practices.

Federal and state authorities announced this agreement with the promise that it could help end mortgage servicing abuses and prevent unnecessary foreclosures. In exchange for waivers of liability on substantial legal claims, the settling banks promised to invest billions of dollars toward alleviating the nation's foreclosure crisis. Transparency and effective oversight are needed to enforce these promises. We look forward to working together as partners to provide that accountability to the American people.

As your reporting has shown, the foreclosure crisis affects households throughout the nation. Communities of color have been especially hard hit, due to the predatory lending practices that fueled the subprime bubble and subsequent financial industry collapse. Unfortunately, we are seeing signs that these communities and families will once again be left behind.

The housing counselors and legal advocates with whom our organizations work have been reporting far fewer signs of relief than we had hoped to see by now. We are especially concerned because the settlement encourages banks to provide the bulk of their consumer relief in the first year of the agreement, which is more than halfway over. We are also worried by reports that the settling banks are only providing relief to homeowners with loans in their own portfolios – even though many of the most abusive and predatory loans made during the subprime lending boom are now held by investors in securitized trusts.

We urge you to use your authority to ensure that the banks who signed this agreement provide the nation's hardest-hit communities with their fair share of relief. **Specifically, you should request and report detailed geographic and demographic data on the households being helped under the settlement agreement – including by adding a new Metric to measure fair lending compliance.**

The terms of the settlement agreement prohibit banks from discriminating against any geographic community or protected class of borrowers.¹ Unfortunately, reports suggest that such discrimination may be taking place.

We have already heard that banks are failing to reach out to homeowners with settlement-related offers in any language other than English. This failure is consistent with a study by the Connecticut Fair Housing Center showing that loan servicers seldom communicate in writing to borrowers in languages other than English, and that loan servicers seldom make it easy for borrowers to speak to them in languages other than English or Spanish. As a result, non-English speaking homeowners are at risk of missing out on opportunities for consumer relief.

Some servicers are refusing to provide any relief to homeowners whose loans are held in mortgage-backed securities. This practice raises substantial fair lending concerns – particularly against the growing backdrop of lawsuits that illustrate how risky and unfair practices fueled the mortgage securitization industry during the subprime lending boom, and how homeowners in communities of color paid a disproportionate price when Residential Mortgage Backed Securities went bust.²

News reports also allege that banks are using the settlement to clear out their backlog of short sales, and even to write off debt that has already been discharged in bankruptcy,³ rather than to alleviate the damage done by unaffordable and predatory lending. Full transparency is needed to ensure that the billions of dollars in homeowner relief owed under the settlement are distributed fairly and in compliance with the law.

First: One of the three additional Metrics expressly authorized by the settlement agreement should be used to address these fair lending concerns.

The language of the settlement agreement states that a new Metric added pursuant to this authority

must either (i) be outcomes-based (but no outcome-based Metric shall be added with respect to any Mandatory Relief Requirement) or (ii) require the existence of policies and procedures implementing any of the Mandatory Relief Requirements or any material term of the Servicing Standards, in a manner similar to Metrics 5.B-E, and . . . must be distinct from, and not overlap with, any other Metric or Metrics.⁴

Even assuming that this language is intended only to authorize a new “process-based” Metric, there is plenty of opportunity for the Monitor to demand meaningful data through this provision. The nation’s foreclosure crisis has had a disparate impact on certain communities; the settling servicers must

¹ See Exhibit E, ¶ C.12 (citing Servicers’ obligation “to implement the Framework requirements through policies that are not intended to disfavor a specific geography within or among states that are a party to the Consent Judgment or discriminate against any protected class of borrowers”).

² See Jessica Silver-Greenberg, “ACLU Sues Morgan Stanley Over Mortgage Loans,” *New York Times* (Oct. 15, 2012); Gretchen Morgenson, “JP Morgan Unit Is Sued Over Mortgage Securities Pools,” *New York Times* (Oct. 1, 2012).

³ Gretchen Morgenson, “How to Erase a Debt that Isn’t There,” *New York Times* (Sept. 29, 2012), available at <http://www.nytimes.com/2012/09/30/business/when-banks-erase-a-debt-that-isnt-there.html>.

⁴ Exhibit E, ¶ C.12

implement policies to ensure that those communities receive their fair share of relief. Our proposed Fair Lending Metric (which follows as Exhibit A) is modeled on the existing Metrics per the language of the settlement agreement, and would allow the Monitor to ensure that the settling servicers:

- Implement policies and procedures (including employee training and oversight) to provide effective outreach and reasonable accommodations to borrowers with limited English language proficiency, disabilities and other needs.
- Track and review the race, gender, nationality and address of borrowers receiving relief under the settlement, in order to prevent discrimination against any geographic community or protected class of borrowers.
- Review the loans owned by the servicer in its own portfolio and the loans it services for investors, and ensure that its policies for spreading consumer relief across portfolio and investor-owned loans do not have a disparate impact on any geographic community or protected class of borrowers.
- Implement consistent standards for maintaining and marketing REO properties, and take other necessary measures to prevent blight in communities with the highest foreclosure rates.

It is critical that the settling banks establish procedures to ensure that borrowers have equal access to relief, regardless of their race, ethnicity, gender, language, disability or where they live. It is equally important that the banks and the Monitor review the effectiveness of these procedures to guard against fair lending violations. This reporting will provide important information about whether the settling banks are complying with their obligations under the settlement agreement, as well as the Equal Credit Opportunity Act (ECOA). See, e.g., *Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 538 (7th Cir. 2011) (explaining that ECOA's protections against discrimination apply to loan modification offers).

In addition to adding this Metric, the Monitor should make specific recommendations to prevent fair lending violations from happening in the first place. For example, it is unacceptable for any homeowner to lose an opportunity for an affordable modification or principal reduction because he or she does not understand the offer. The Monitor should immediately demand that the servicers translate documents into languages other than English to prevent discrimination based on language access.

Second: the banks must report – and the Monitor should make public – demographic and geographic data on homeowner relief (through Schedule Y or elsewhere) to permit adequate oversight of settlement compliance.

The process-based data described above will be very important, but it is no substitute for a clear portrait of where the settlement money is going. Therefore, we reiterate our recommendation (from our letter of June 4, 2012, attached as Exhibit B) for detailed loan-level and aggregate reporting on consumer relief provided as a result of the Consent Judgments. In addition to a thorough financial portrait of the consumer relief being provided, the Monitor should demand data on the race, ethnicity, gender and zip code/census tract of the borrowers who receive relief. Lenders already report this data under the federal Home Affordable Modification Program, and there is no basis for the banks to decline to report similar information here as well.

To ensure adequate transparency and compliance, we recommend that the Monitor collect loan-level data, first stripping out personally identifiable borrower information. Deidentified loan-level data should include the fields outlined in the attached letter, and should be made public in electronic formats that are easy to access and use.

In addition, it is extremely important that the Monitor also provide public aggregate reporting, including servicer-specific reports, based on that loan-level data. This aggregate reporting should occur on a regular basis – ideally, every month.

As discussed on our call, we are still waiting for clarity around the requirements of Schedule Y, which will dictate the banks' data reporting requirements to the states and monitoring committee. We urge the parties to use our June 4, 2012 letter as the basis for Schedule Y reporting, to ensure adequate transparency.

Only such detailed data will suffice to show that the banks are complying with their obligation to provide homeowners and communities with the relief envisioned by the settlement. And only such data will satisfy – to the public and the federal and state parties to the settlement – that the banks are complying with their fair lending obligations under the law.

Third: the Monitor must review fair lending compliance in its audit of consumer relief activities.

The Consent Decree vests substantial authority in the Monitor's office. In addition to the Metrics, the Monitor may request additional information if there is reason to believe that a servicer is failing to comply with any of the servicing standards or mandatory relief requirements.⁵ Those requirements include the obligation to provide consumer relief without "(i) disfavor[ing] a specific geography within or among states that are a party to the Consent Judgment or (ii) discriminat[ing] against any protected class of borrowers."⁶ The Monitor should use its authority to demand sufficient information to prove that the servicers are complying with this legal obligation under the Decree.

In addition, the Monitor must thoroughly audit all of the servicers' relief activities. This audit should not merely determine whether the parties' submissions are accurate and add up the servicers' credits under the Consent Decree's formulas. The Monitor should use its audit to examine where the relief money has gone, and to make sure that the servicers are distributing relief in a fair and equitable fashion. The Monitor should not discharge the servicers' obligations until the Consent Decree's requirement of non-discriminatory relief has been met.

Thank you again for the opportunity to submit these recommendations, and for your efforts to provide transparency and accountability to this settlement process. We look forward to continued discussions, and to working together to ensure that the national mortgage settlement effectively assists American homeowners, promotes fair lending practices, and helps get our economy and communities back on

⁵ See Exhibit E, ¶¶ C.16-21.

⁶ See Exhibit D (Consumer Relief Requirements).

track. Please contact Mark Ladov of the Brennan Center for Justice at mark.ladov@nyu.edu or by phone at 646-292-8354 with any questions, or if you would like to follow up on these suggestions with the working group.

Sincerely,

The Members of the Foreclosure Working Group of Americans for Financial Reform

cc: Members of the Monitoring Committee

EXHIBIT A: Fair Lending Compliance Metric

As explained in the attached letter, this proposed metric is based on the existing settlement agreement framework. It is designed to ensure that the settling banks implement policies and effective review procedures to prevent discrimination against any geographic community or protected class of borrowers.

Metric: Fair Lending Compliance

Measurements: Providing principal reduction and other consumer relief fairly to communities with high foreclosure rates, and through policies that do not discriminate against any protected class of borrowers.

Loan Level Tolerance for Error: Y/N

Threshold Error Rate: N

Test Loan Population: Monthly review of consumer relief to ensure compliance with fair lending principles, and that communities with above-average rates of foreclosure receive appropriate levels of principal reduction and other consumer relief.

Error Definition: Failure on any one of the test questions for this metric.

Test Questions:

- a. Is the servicer reasonably accommodating and providing sufficient outreach to borrowers with limited English language proficiency, disabilities or other needs?
 1. Is the servicer translating settlement outreach documents, so that borrowers may receive relief regardless of their English language proficiency?
 2. Does the servicer have in place policies and procedures that allow borrowers with limited English proficiency to submit documents in their native language?
 3. Does the servicer have in place policies and procedures for how its employees should respond to reasonable requests for accommodation that may be made by borrowers with disabilities, including but not limited to providing large type documents to borrowers with vision impairments, TTY or relay access and written instructions or written versions of oral communications to borrowers with hearing impairments?
- b. Is the servicer preventing discrimination against any geographic community or against any protected class of borrowers?
 1. Is the servicer maintaining and reviewing data regarding race, gender, nationality and location (zip code or census tract) to ensure that its relief activities are reaching a representative pool of borrowers and that there is no disparate impact against any geographic region or protected class of borrowers?
 2. Has the servicer conducted an analysis of the racial, gender and ethnic characteristics of the borrowers for loans it holds in portfolio and those that it

services for others in order to ensure that its plans for offering consumer relief will not discriminate based on any protected class?

3. Is the servicer reviewing its outreach procedures and success rates to ensure that there is no disparate impact in relief based on race, ethnicity, nationality, gender, language access, disability or any other protected characteristic?
 4. Is the servicer maintaining and reviewing data regarding the type of loan being modified to ensure that communities who received a disproportionate percentage of high-risk or subprime loans and are suffering from a disproportionately high foreclosure rate are receiving adequate relief under the settlement?
- c. Is the servicer providing adequate training and monitoring employee compliance with its policies and procedures?
1. Has the servicer provided training to its employees regarding its non-discrimination policies and procedures, including providing reasonable accommodations to persons with disabilities and borrowers with limited English proficiency?
 2. Is the servicer monitoring employee compliance with its non-discrimination policies and procedures?
- d. Does the servicer have in place effective mechanisms to monitor the status and condition of its REO properties to ensure that they are being maintained and marketed according to a consistent standard in all communities, regardless of racial or ethnic composition of the community, so as not to cause blight?

EXHIBIT B

Recommendations from the
Foreclosure Working Group of Americans for Financial Reform
to the Office of Mortgage Settlement Oversight
on Data Collection Related to the AG Settlement

June 4, 2012

Recommendations from the Foreclosure Working Group of Americans for Financial Reform
to the Office of Mortgage Settlement Oversight
on Data Collection Related to the AG Settlement

June 4, 2012

Consumer Relief Requirement Compliance

In order to have a transparent process, there must be detailed reporting on consumer relief provided as a result of the Consent Judgments. To fulfill this transparency obligation, we recommend that the Monitor collect loan-level data, first stripping out personally identifiable borrower information. De-identified loan-level data should include the below fields and should be made public in electronic formats that are easy to access and use.

In addition, it is extremely important that the Monitor also provide public aggregate reporting, including servicer-specific reports, based on that loan-level data. This aggregate reporting should occur on a regular basis – ideally, every month.

Consumer Relief Action and Related Information

- Application date for consumer relief
- Lender or borrower initiated application
- Type of consumer relief applied for/reviewed by servicer (i.e., First lien principal forgiveness modification, forgiveness of forbearance amounts on existing modifications, second lien portfolio modification on performing second lien, etc.)
- Action date for application
- Outcome of consumer relief application (i.e., Denied, approved, approved but not accepted, in part denied and in part approved)
 - If denied, the following information concerning the application denial:
 - Type of consumer relief action denied (i.e., principal reduction, interest rate reduction, forbearance)
 - Why denied? (i.e., Borrower lack of documentation; investor denial of consumer relief)
 - If approved, the following information concerning the consumer relief action:
 - Type of consumer relief action approved (i.e., principal reduction, interest rate reduction, forbearance)
 - Modified terms and outcomes of consumer relief action (i.e., interest rate, term, CLTV)
- Investor type for mortgage (i.e. Portfolio, PLS)
- Name of investor
- Name of servicer
- Number of days/months delinquent at application
- Mortgage already modified at time of application?
 - If yes, date of modification, type of modification, and terms of modification.
- Borrower being helped by third party?

- If yes, who? (i.e., housing counselor, attorney)
- Amount of settlement “credit” received for each consumer relief action.

Loan Performance

- Loan performance status
 - Performance at application for consumer relief
 - Performance at point of denial or approval of application for consumer relief
 - Ongoing loan performance after denial or approval of application for consumer relief (i.e., current, # days delinquent, in foreclosure, foreclosed, short sale)

Loan Characteristics

- Date of origination
- Loan purpose (i.e., Purchase, rate-term refinance, cash-out refinance)
- Loan term (i.e., 30 year, 15 year)
- Loan type (i.e., fixed rate, ARM, conversion, interest only, payment option ARM, balloon (and # months/years))
- Appraisal
 - Appraised value at origination
 - Type of appraisal (full appraisal, BPO, AVM)
 - Appraised or AVM value used for purposes of consumer relief application
- LTV
 - CLTV at origination
 - Current CLTV (at application and subsequently)
- Status of documentation & verification at origination (i.e., no doc, limited doc)
- Loan balance
 - Origination balance
 - Balance at application
- Prepayment penalty
 - If yes, term and amount
- Interest rates
 - Initial loan interest terms
 - Initial interest rate at origination
 - Interest rate at application
- Census tract of property

Borrower Characteristics and Location Information

- Race of applicant and co-applicant
- Ethnicity of applicant and co-applicant
- Sex of applicant and co-applicant
- Age or age range of applicant and co-applicant
- Income at origination
- Current income at application
- Reason for hardship (i.e., Job loss, increased interest rate)

- Credit Score
 - Type
 - Credit score at origination
 - Updated credit score used in reviewing application for consumer relief
- Back end debt to income ratio
 - At origination
 - At application for consumer relief

Business Practice Compliance

We encourage the Monitor to require reporting on business practices and arrangements provided for in the Consent Judgments. This reporting should include the following data:

- Staffing levels for servicing compliance
- Number of servicer staff trainings held and number of staff attending
- Overview of notary activity, including number and names of individuals providing notary services
- Information on servicer contracts and relationships with third parties, including the following:
 - Names and locations of businesses providing free of charge document assistance to borrowers
 - Names of businesses developing online loan portals for borrowers and housing counselors
 - Name of Settlement Administrator
 - Amounts spent in each reporting cycle on each third party service
- Third party information re: Monitor
 - Accounting firms or other firms with similar capabilities
- Case levels for single points of contact
- Number of servicer reports of conflicts between the Agreement and the Applicable Requirements
- Membership on Monitoring Committee
- Membership of Internal Review Groups

Compliance Metrics

In addition, we recommend disclosing the metrics and data produced through the Compliance Metrics process.

Complaint Data

We also recommend that the Monitor disclose information concerning complaints made directly to the Monitor and to the servicers.

- Receiver of the complaint (i.e., Monitor, name of servicer)
- Who made the complaint (i.e., homeowner, attorney, housing counselor)
- Type of complaint
- Zip code/Census Tract of affected property
- Resolution outcome of complaint