

LENDERS UPDATE™

A MONTHLY SERVICE TO THE MORTGAGE LENDING INDUSTRY

AN ALT & ASSOCIATES NEWSLETTER

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The purpose of the Lenders Update is to provide a “heads-up” of new legislation and other matters affecting the mortgage lending industry. We provide summaries of these issues so our readers can judge whether the subject impacts their operations. We recommend that our readers review the entire new statute, regulation or other material in detail where it is relevant to them. For convenience, the applicable matter can be easily identified in the summary, and, where possible, a link is provided.

The Update includes information available to Alt & Associates as of December 4, 2008.

LOAN MODIFICATIONS COMPANIES IN CALIFORNIA

We have had an opportunity over the last year and a half to advise numerous individuals and companies who represent borrowers in obtaining loan modifications. To say that this has become a popular substitute for a dormant mortgage lending market would be an understatement.

Companies offering Loan Modifications in California have to deal with several significant issues:

1. Is a company in California which offers loan modifications services required to be licensed by the Department of Real Estate?
2. If a license is required by the Department of Real Estate, a contract between borrower and company in which fees are paid up front, must be approved by the Department of Real Estate as Advance Fee Agreements. The DRE applies specific and exacting criteria to judge these proposed agreements. In our judgment, these criteria have been evolving. What are the current standards?

3. **The Mortgage Foreclosure Consultants Act, California Civil Code Section 2945 et. seq. governs non exempt entities which perform services for borrowers in foreclosure. Are Department of Real Estate licensees exempt from this act?**
4. **Attorneys who are rendering legal services to a client in the normal course of their practice are exempt from the provisions of the statutes licensing and regulating Real Estate Brokers and also from the Mortgage Consultant Act, if they are not actively and principally engaged in the business of negotiating loans secured by real property and the attorney is rendering services in the course of his or her practice as an attorney. To what extent, can non-attorneys affiliate with attorneys and perhaps avoid the ramifications of both Department of Real Estate licensing requirements and the Foreclosure Consultant Act?**

For a long period of time in the course of Spring, Summer and early Fall, the Department of Real Estate has largely been publically silent as to these issues. However, clear direction from the Department early on could well have ended some of the confusion and provided clear direction to companies handling loan modifications. In the Fall 2008 Mortgage Loan Bulletin, which was recently published, DRE provided its answers to many of these issues. The Bulletin can be found on the home page of the Department of Real Estate at www.dre.ca.gov/ by clicking the box to the far right at the top of the screen at Mortgage Loan Bulletin, 2008 Fall Bulletin.

The Bulletin clearly sets out the following answers to these questions.

1. **Real Estate licenses are required to solicit, market, or provide loan modification, short sale and other loss mitigation services to borrowers. In our opinion, this position is substantially supported by law.**
2. **Advance Fee Agreements must be submitted to the Department of Real Estate for review and licensees cannot collect any fees until a “no objection” letter is obtained.**
3. **The required content of Advance Fee Agreements is very specific. There are several disclosures which the Department of Real Estate requires as well as specific disclosure as to fees. This can lead to complications in a company’s business model. For example in our experience, if the fee to be charged and collected from the borrower is changed, this constitutes a new agreement in the judgment of the DRE, which in turn requires a new approval from the Department of Real Estate. An onerous delay of two to three weeks results.**
4. **Relationships between attorneys and DRE licensees or other parties are severely restricted. The non-attorney parties, such as “marketing consultants”, if unlicensed, must make sure that they are not performing services which require a real estate license and are not performing legal services or sharing fees with attorneys.**

Attorney's have, on the other hand, ethical obligations which this firm has confirmed with appropriate representatives of the California Bar Association which again prohibit fee splitting or sharing with non-attorney's. Further, attorneys working for a company providing loan modifications services do not and cannot represent the clients of that company. The attorney client relationship is between the attorney and its employer. This proscription is significant and provides insurmountable barriers to a number of the proposed relationships this office has seen or has advised on between the loan modification company and attorneys. The attorney employed by the loan modification company can not represent the borrower.

We strongly recommend that you review the new Bulletin. It would also be advisable if you would also review www.dre.ca.gov/gen_new_flash.html for further information regarding additional required content for Advance Fee Agreements.

Finally clients have also inquired about the possibility of using another California license such as a California Finance Lenders License or a Residential Mortgage Lenders License to perform loan modification services. Generally, neither license, for practical and legal reasons, serves as an appropriate or enabling license to provide any wide scale loan modification services.

Please remember that all of the above applies only to loan modification services in the state of California. The requirements for doing business in other states are unique and vary with each state.

We also expect DRE to soon publish more information, perhaps even a model Advance Fee Agreement.

Our monthly Lenders Update is published via e-mail as a complimentary service to our friends and clients in the financial industry throughout California and the United States. Only those persons who have requested this newsletter are on our mailing list. Should you have colleagues who wish to receive this complimentary service, please have them e-mail us at

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ALT & ASSOCIATES provides regulatory, compliance, operational advice and transactional assistance, as well as litigation representation, to the financial services industry. Over the past two decades, members of the firm have represented Institutional Lenders and Mortgage Bankers and Brokers in all aspects of their operations. If you have any questions please contact:

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