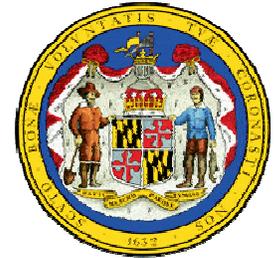




COMMISSIONER OF FINANCIAL REGULATION
ADVISORY NOTICE 2-09



Revised February 20, 2009

**LOSS MITIGATION CONSULTING, FORECLOSURE PREVENTION,
MORTGAGE LOAN MODIFICATION, AND SIMILAR SERVICES UNDER
THE MARYLAND CREDIT SERVICES BUSINESSES ACT (MCSBA) AND
THE PROTECTION OF HOMEOWNERS IN FORECLOSURE ACT (PHIFA)**

Purpose

This Revised Advisory is intended to alert consumers interested in, and those businesses offering, or contemplating offering, “loss mitigation consulting,” “foreclosure prevention,” “mortgage loan modification,” or similar services, that the Maryland Credit Services Businesses Act (“MCSBA”)¹ and the Protection of Homeowners in Foreclosure Act (“PHIFA”)² potentially apply to those services. The original Advisory, dated September 8, 2008, discussed situations in which PHIFA applies to such services. This Revised Advisory includes the same discussion, and further elaborates that the MCSBA will often apply to such services as well.

A New Business Model

A recent development in the ongoing subprime mortgage and foreclosure crisis is the emergence of a new type of business which purports to offer loss mitigation consulting, foreclosure prevention, mortgage loan modification, or similar services. The Commissioner of Financial Regulation (“Commissioner”) has seen an increasing number of advertisements, direct-mail solicitations and other marketing materials offering Maryland consumers assistance in negotiating resolutions of their delinquent residential mortgage loans with lenders and servicers, or assistance in negotiating lower mortgage loan rates, in exchange for up-front fees. These marketing materials suggest that these businesses will help delinquent borrowers obtain payment plans, loan modifications, and/or short sales and deeds in lieu of foreclosure. Mortgage brokers themselves have been targeted by these businesses in hopes of obtaining referrals. The Commissioner has begun to receive consumer complaints regarding fees paid to third parties providing these services. The Commissioner has also received inquiries from persons interested in entering these new types of businesses.

Maryland Credit Services Businesses Act

¹ MCSBA is codified in the Annotated Code of Maryland, Commercial Law Article (“CL”), § 14-1901 *et seq.*

² PHIFA is codified in the Annotated Code of Maryland, Real Property Article (“RP”), § 7-301 *et seq.*

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Applicability

Businesses which provide loss mitigation consulting, foreclosure prevention, mortgage loan modification, and/or similar services likely will be subject to the MCSBA. As the services provided by these businesses typically include the possibility of deferral of payment on consumers' mortgage loans, these businesses often will come under the definition of "credit services businesses" under the MCSBA. As such, they are required to be licensed as credit services businesses ("CSBs"), and they are subject to various investigatory, enforcement, and penalty provisions as licensees.^{3,4}

Consumer Protections

The MCSBA provides a number of important consumer protections, including, but not limited to, the following:

- **No Up-Front Fees:** Under the Act, a CSB may not charge or receive any up-front fees, or any other fees, before fully and completely performing all services on behalf of consumers.
- **Must Be Licensed:** Any individual or company offering credit repair services as described in the Act must be licensed by the Commissioner of Financial Regulation ("Commissioner").
- **Written Contract Required:** A CSB must enter into a written contract with each consumer. Among other provisions, such contracts must include a detailed description of the services to be performed and the results to be achieved by the CSB.
- **Written Disclosures Required:** A CSB must provide the consumer with a written information statement before entering into a contract and before receiving money or other valuable consideration. The information statement must include, among other things, specific statements related to the consumer's rights under the federal Fair Credit Reporting Act.
- **Right of Rescission:** The MCSBA provides that consumers have the right to cancel a contract with a CSB any time prior to midnight of the third business day after the date of the transaction.⁵

Other Important Provisions of the MCSBA

- A CSB may not create, or assist a consumer in creating, a new credit identity by obtaining and using a different name, address, telephone number, Social Security Number, or employer tax identification number.

³ Relevant statutes include, but are not limited to, the following: CL § 14-1903(b); Title 11, Subtitle 3 of the Financial Institutions Article; Title 2, Subtitle 1 of the Financial Institutions Article.

⁴ For a list of individuals and entities which are excluded from being considered "credit services businesses" under the MCSBA, and which are thus exempt from the licensing and other MCSBA requirements, *see* CL § 14-1901(e)(3). Note that under subparagraph (e)(3)(vi), an individual admitted to the Bar of the Court of Appeals of Maryland is exempt only "when the individual renders services within the course and scope of practice by the individual as a lawyer and does not engage in the credit services business on a regular and continuing basis."

⁵ If PHIFA is also implicated by particular loan modification services, PHIFA's "unlimited right of rescission" will apply instead (*see* discussion of PHIFA below).

- A CSB may not make, assist, or advise a consumer to make, any statement or other representation that is false or misleading to a consumer reporting agency, government agency, or person to whom the consumer applies or intends to apply for an extension of credit, regarding their creditworthiness, credit standing, credit capacity, or true identity.
- A CSB may not make or use any false or misleading representations in their offer of services to consumers.

Penalties for Violation

Anyone violating the MCSBA may be subject to significant administrative, civil, and criminal penalties, including, but not limited to, fines up to \$5,000 or imprisonment up to 3 years, or both.

Review the MCSBA Carefully, including Licensing Requirements

This Advisory Notice is not a comprehensive analysis of the applicability of the MCSBA to persons offering loss mitigation consulting, foreclosure prevention, mortgage loan modification, or similar services. All persons who may be, or who are contemplating, providing such services are urged to carefully review the MCSBA (including all licensing requirements) with their counsel to ensure compliance.

Protection of Homeowners in Foreclosure Act

PHIFA Prohibits Up-Front Fees and Certain Other Payments

PHIFA prohibits foreclosure consultants (defined below) from engaging in a number of different activities. Thus, among other things, foreclosure consultants are prohibited from the following:

- Claiming, demanding, charging, collecting, or receiving any compensation *until after the foreclosure consultant has fully performed each and every service the foreclosure consultant contracted to perform or represented that the foreclosure consultant would perform*;
- Claiming, demanding, charging, collecting, or receiving any interest or any other compensation for any loan that the foreclosure consultant makes to the homeowner that exceeds 8% per year;
- Receiving any consideration from any third party in connection with foreclosure consulting services provided to a homeowner unless the consideration:
 1. Is first fully disclosed in writing to the homeowner;
 2. Is clearly listed on any settlement documents; and
 3. Is not in violation of any provision of PHIFA;
- Receiving a commission, regardless of how described, for the sale of a residence in default that exceeds 8% of the sales price; and/or
- Receiving any money to be held in escrow or on a contingent basis on behalf of the homeowner.

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Who is a “Foreclosure Consultant”?

If a person offers the services described below to a mortgage borrower who is at least sixty days in default, it is likely that the person will be a “foreclosure consultant” under PHIFA.⁶ Thus a homeowner need not be in foreclosure for PHIFA to apply.

- “Foreclosure consultant” is defined under PHIFA as a person who:
 1. Solicits or contacts a homeowner in writing, in person, or through any electronic or telecommunications medium and directly or indirectly makes a representation or offer to perform any service involving any of the following:
 - a. Stopping, enjoining, delaying, voiding setting aside, annulling, staying, or postponing a foreclosure sale;
 - b. Obtaining forbearance from any servicer, beneficiary, or mortgagee;
 - c. Assisting the homeowner in exercising a right of reinstatement provided in the loan documents, or in refinancing a loan in foreclosure and for which notice of foreclosure proceedings has been published;
 - d. Obtaining an extension of the period within which the homeowner may reinstate the homeowner’s obligation or extend the deadline to object to the ratification;
 - e. Obtaining waiver of an acceleration clause contained in the mortgage on a residence in default or in any promissory note or contract secured by the mortgage;
 - f. Assisting the homeowner to obtain a loan or advance of funds;
 - g. Avoiding or ameliorating the impairment of the homeowner’s credit resulting from certain events related to the foreclosure;
 - h. Saving the homeowner’s residence from foreclosure;
 - i. Purchasing or obtaining an option to purchase the homeowner’s residence within 20 days of an advertised or docketed foreclosure sale; or
 - j. Arranging for the homeowner to become a lessee or renter entitled to continue to reside in the homeowner’s residence after a sale or transfer; or
 2. Systematically contacts owners of *residences in default* to offer *foreclosure consulting services*.
- “Residence in default” is defined, in part, as residential real property located in Maryland on which the mortgage is at least 60 days in default.
- “Foreclosure consulting service” includes any of the following:
 1. Receiving money for the purpose of distributing it to creditors in payment or partial payment of any obligation secured by a lien on a residence in default;
 2. Contacting creditors on behalf of a homeowner;

⁶ For a list of individuals and entities exempt from the provisions of PHIFA, see RP § 7-302.

3. Arranging or attempting to arrange for an extension of the period within which a homeowner may cure the homeowner's default and reinstate the homeowner's obligation;
4. Arranging or attempting to arrange for any delay or postponement of the sale of a residence in default;
5. Arranging or facilitating the purchase of a homeowner's equity of redemption or legal or equitable title.
6. Arranging or facilitation the sale of a homeowner's resident or the transfer of legal title, in any form, to another party as an alternative to foreclosure; or
7. Arranging for or facilitating a homeowner remaining in the homeowner's residence after a sale or transfer as a tenant, renter, or lessee under terms provided in a written lease.

Therefore, if a service provider systematically contacts owners of Maryland residences whose mortgage loans are at least 60 days in default or in foreclosure for the purpose of offering to contact creditors on their behalf, the service provider is acting as a foreclosure consultant under PHIFA. This will cover many persons offering loss mitigation consulting, foreclosure prevention, mortgage loan modification, or similar services.

Likewise, if for a fee a person refers an owner of a residence at least 60 days in default or in foreclosure to a third party foreclosure consultant who ends up violating PHIFA, the referring party may also be found liable for the violation because of the referrer's involvement as an accomplice in the transaction giving rise to the violation.

Homeowners' Rights of Rescission under PHIFA

In addition to any other legal rights regarding cancellation or rescission of a contract, PHIFA provides homeowners with various rights of rescission,⁷ including, but not limited to, the following:

- The right to rescind a foreclosure consulting contract at any time (i.e. an "unlimited right of rescission").
- The right to rescind a contract for the sale or transfer of the residence in default within 5 days after the execution of the contract.

Civil and Criminal Penalties

A person who violates PHIFA is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 3 years or a fine not exceeding \$10,000, or both.

The Attorney General or the Commissioner may seek an injunction to prohibit a person who has engaged or is engaging in a violation of PHIFA from engaging or continuing to engage in the violation. Additionally, the court may enter any order or judgment necessary to:

1. Prevent the use of any prohibited practice by a person;

⁷ Under PHIFA, homeowners will continue to maintain certain debts and other financial obligations even after rescission, although their rights of rescission cannot be conditioned on the repayment of any funds.

2. Restore any money or real or personal property acquired by means of any prohibited practice to an injured person; or
3. Appoint a receiver in case of willful violation of PHIFA.

In any action brought by the Attorney General or the Commissioner under PHIFA, the Attorney General or Commissioner is entitled to recover the costs of the action for the use of the State.

A violation of PHIFA is an unfair and deceptive trade practice within the meaning of Title 13 of the Commercial Law Article, and is subject to the enforcement and penalty provisions contained therein.

Moreover, PHIFA provides for a private right of action. Therefore, in addition to any action by the Attorney General or the Commissioner, a homeowner may bring an action for damages incurred as the result of a practice prohibited by PHIFA. A homeowner who brings an action under PHIFA and who is awarded damages may also seek, and the court may award, reasonable attorney's fees. If the court finds that the defendant willfully or knowingly violated PHIFA, the court may award damages equal to three times the amount of actual damages.

Review PHIFA Carefully

This Advisory Notice is not a comprehensive analysis of the applicability of PHIFA to persons offering loss mitigation consulting, foreclosure prevention, mortgage loan modification, or similar services. In addition to the prohibition on up-front fees, PHIFA contains many other consumer protections. Such requirements and restrictions relate to issues such as foreclosure consulting contracts, mandatory written disclosures, and a general prohibition on activities known as "foreclosure rescue transactions."

All persons who may be, or who are contemplating, providing loss mitigation consulting, foreclosure prevention, mortgage loan modification, or similar services are urged to carefully review PHIFA with their counsel to ensure compliance.

The Commissioner Will Investigate Complaints Regarding the MCSBA or PHIFA

The Commissioner will investigate complaints alleging MCSBA and/or PHIFA violations relating to persons offering loss mitigation consulting, foreclosure prevention, mortgage loan modification, or similar services, and will pursue appropriate remedies. Consumers who wish to file a complaint with the Commissioner may call **888-784-0136** or **410-230-6097**.