

ASSEMBLY BILL NO. 308—ASSEMBLYMEN CONKLIN, KIRKPATRICK, SMITH, ATKINSON; BUSTAMANTE ADAMS, CARRILLO, DALY, DONDERO LOOP, FRIERSON, MASTROLUCA, OCEGUERA AND SEGERBLOM

MARCH 17, 2011

Referred to Committee on Commerce and Labor

SUMMARY—Revises provisions governing the regulation of mortgage lending. (BDR 54-183)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: Yes.

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EXPLANATION – Matter in **bolded italics** is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to mortgage lending; revising provisions governing certain mortgage lending professionals to be consistent with certain federal law governing the provision of mortgage assistance relief services; providing a penalty; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law regulates the activities of certain mortgage lending professionals who provide counseling, assistance and advice to homeowners whose homes are subject to an outstanding notice of the pendency of an action for foreclosure. (NRS 645F.300-645F.450) The Federal Trade Commission similarly regulates the activities of persons who provide mortgage assistance relief services. (16 C.F.R. Part 322) This bill revises Nevada law to provide protections for homeowners consistent with the protections provided pursuant to the regulations adopted by the Federal Trade Commission.

Section 2 of this bill prohibits a person who performs any covered service for compensation, a foreclosure consultant or a loan modification consultant from requesting or receiving any compensation before a homeowner executes a written agreement that incorporates an offer of mortgage assistance.

Section 3 of this bill requires a person who performs any covered service for compensation, a foreclosure consultant or a loan modification consultant to maintain certain records for not less than 24 months. **Section 3** provides that such records are subject to inspection and audit by the Commissioner of Mortgage Lending. **Section 3** also requires a person who performs any covered service for compensation, a foreclosure consultant or a loan modification consultant to take reasonable steps to ensure that any of his or her employees or independent



contractors comply with the laws and regulations governing persons who perform covered services for compensation, foreclosure consultants and loan modification consultants.

Section 4 of this bill requires a person who performs any covered service for compensation, a foreclosure consultant or a loan modification consultant to make certain disclosures in connection with any commercial communication relating to the provision of any covered service.

Section 5 of this bill requires a person who performs any covered service for compensation, a foreclosure consultant or a loan modification consultant to provide certain notices to a homeowner at the time the homeowner is presented with a written agreement incorporating an offer of mortgage assistance obtained from the homeowner's lender or servicer.

Section 6 of this bill prohibits a person who knows or reasonably should know that a person who performs any covered service for compensation, a foreclosure consultant or a loan modification consultant is not in compliance with the laws and regulations governing covered services from providing substantial assistance or support to the person who performs any covered service for compensation, the foreclosure consultant or the loan modification consultant.

Section 9 of this bill prohibits a person who performs any covered service for compensation, a foreclosure consultant or a loan modification consultant from making certain express or implied representations relating to the provision of covered services, including any representation that: (1) a homeowner cannot or should not contact or communicate with his or her lender; or (2) the covered service is affiliated with or endorsed by the Federal Government, the State of Nevada or any department, agency or political subdivision thereof. **Section 9** also prohibits a person who performs any covered service, a foreclosure consultant or a loan modification consultant from obtaining or attempting to obtain from a homeowner a waiver of any provision of this bill or existing law. Any such waiver is void and unenforceable. A violation of any provision of **section 9** constitutes mortgage lending fraud and is punishable as a category C felony.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 645F of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 6, inclusive, of this act.

Sec. 2. *A person who performs any covered service for compensation, a foreclosure consultant and a loan modification consultant shall not claim, demand, charge, collect or receive any compensation before a homeowner has executed a written agreement with the lender or servicer incorporating the offer of mortgage assistance obtained from the lender or servicer by the person who performs any covered service for compensation, the foreclosure consultant or the loan modification consultant.*

Sec. 3. 1. *A person who performs any covered service for compensation, a foreclosure consultant and a loan modification consultant shall keep each of the following records for a period of not less than 24 months after the date the record is created:*



1 (a) Each contract or other agreement between the person who
2 performs any covered service for compensation, foreclosure
3 consultant or loan modification consultant and a homeowner.

4 (b) A copy of each written communication between the person
5 who performs any covered service for compensation, foreclosure
6 consultant or loan modification consultant and a homeowner
7 which occurred before the date on which the homeowner entered
8 into a contract for covered services.

9 (c) A copy of every document or telephone recording created in
10 connection with the requirements of subsection 2.

11 (d) The file of each homeowner, which must include, without
12 limitation, the name of the homeowner, his or her telephone
13 number, the amount of money paid by the homeowner and a
14 description of the covered services purchased by the homeowner.

15 (e) For each covered service, a copy of every materially
16 different sales script, training material, commercial
17 communication or any other marketing material, including,
18 without limitation, any material published on an Internet website.

19 (f) A copy of each disclosure provided to a homeowner
20 pursuant to section 5 of this act.

21 2. A person who performs any covered service for
22 compensation, a foreclosure consultant and a loan modification
23 consultant shall:

24 (a) Take reasonable steps to ensure that all employees and
25 independent contractors of the person who performs any covered
26 service for compensation, foreclosure consultant or loan
27 modification consultant comply with the provisions of NRS
28 645F.300 to 645F.450, inclusive, and sections 2 to 6, inclusive, of
29 this act and any regulations adopted pursuant thereto.

30 (b) If the person who performs any covered service for
31 compensation, foreclosure consultant or loan modification
32 consultant is engaged in the telemarketing of covered services,
33 perform random, blind recording and testing of the oral
34 representations made by persons engaged in sales or other
35 customer service functions.

36 (c) Establish a procedure for receiving and responding to all
37 complaints of homeowners.

38 (d) Record the number and nature of complaints of
39 homeowners regarding transactions involving an employee or
40 independent contractor of the person who performs any covered
41 service for compensation, foreclosure consultant or loan
42 modification consultant.

43 (e) Investigate promptly and fully each complaint received
44 from a homeowner.



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(f) Take corrective action with respect to any employee or independent contractor whom the person who performs any covered service for compensation, foreclosure consultant or loan modification consultant determines is not complying with the provisions of NRS 645F.300 to 645F.450, inclusive, and sections 2 to 6, inclusive, of this act and any regulations adopted pursuant thereto.

(g) Maintain any information necessary to demonstrate compliance with the requirements of this subsection.

3. All records kept pursuant to this section are subject to inspection and audit by the Commissioner and authorized representatives of the Commissioner.

Sec. 4. 1. A person who performs any covered service for compensation, a foreclosure consultant and a loan modification consultant shall:

(a) Include with each general commercial communication for any covered service the following disclosures printed in at least 12-point type:

(1) "[Name of company] is not associated with the government, and our service is not approved by the government or your lender."

(2) In any case in which the person who performs any covered service for compensation, the foreclosure consultant or the loan modification consultant makes an express or implied representation that homeowners will receive covered services:

"Even if you accept this offer and use our service, your lender may not agree to change your loan."

(b) Include with each commercial communication which is specific to a homeowner the following disclosures printed in at least 12-point type:

(1) "You may stop doing business with us at any time. You may accept or reject the offer we obtain from your lender [or servicer]. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us [insert total amount or method of calculating the total amount] for our services."

(2) "[Name of company] is not associated with the government, and our service is not approved by the government or your lender."

(3) In any case in which the person who performs any covered service for compensation, the foreclosure consultant or the loan modification consultant makes an express or implied representation that the homeowner will receive covered services:

"Even if you accept this offer and use our service, your lender may not agree to change your loan."



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(c) Include with any commercial communication relating to a covered service in which the person who performs any covered service for compensation, foreclosure consultant or loan modification consultant represents expressly or by implication that a homeowner should temporarily or permanently discontinue payments, in whole or in part, on any mortgage or lien on a residence in foreclosure a clear and prominent statement, in close proximity to the express or implied representation and printed in at least 12-point type, which provides that:

"If you stop paying your mortgage, you could lose your home and damage your credit rating."

2. The disclosures required by paragraphs (a) and (b) of subsection 1 must be made in a clear and prominent manner and:

(a) In a written communication, the disclosures must appear together and be preceded by the heading "IMPORTANT NOTICE," printed in at least 14-point bold type; and

(b) In an oral communication, the audio component of the required disclosures must be preceded by the statement "Before using this service, consider the following information" and, if the oral communication is made by telephone, must be made at the beginning of the communication.

3. As used in this section, "total amount" means all amounts the homeowner must pay to purchase, receive and use all covered services that are subject to the contract for covered services, including, without limitation, all fees and charges.

Sec. 5. 1. A person who performs any covered service for compensation, a foreclosure consultant and a loan modification consultant shall, at the time the person who performs any covered service for compensation, the foreclosure consultant or the loan modification consultant provides a homeowner with a written agreement between the homeowner and the homeowner's lender or servicer incorporating the offer of mortgage assistance obtained from the homeowner's lender or servicer:

(a) Provide the following notice printed in at least 12-point type to the homeowner:

"This is an offer of mortgage assistance we obtained from your lender [or servicer]. You may accept or reject the offer. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us [insert total amount or method of calculating the total amount] for our services."

↪ The notice must be made in a clear and prominent manner on a separate written page and be preceded by the heading "IMPORTANT NOTICE: BEFORE BUYING THIS SERVICE,



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1 **CONSIDER THE FOLLOWING INFORMATION” printed in at**
2 **least 14-point bold type.**

3 (b) Provide the homeowner with a notice printed in at least
4 12-point type from the homeowner’s lender or servicer which
5 includes a complete description of all material differences between
6 the terms, conditions and limitations which apply to the
7 homeowner’s current mortgage loan and the terms, conditions
8 and limitations which will apply to the homeowner’s mortgage
9 loan if he or she accepts the offer of the lender or servicer,
10 including, without limitation, the differences between the
11 mortgage loans with regard to the:

12 (1) Principal balance;

13 (2) Contract interest rate, including the maximum rate and
14 any adjustable rates;

15 (3) Amount and number of scheduled periodic payments;

16 (4) Monthly amounts owed for principal, interest, taxes and
17 mortgage insurance;

18 (5) Amount of any delinquent payments owing or
19 outstanding; and

20 (6) Term.

21 ➔ The notice required by this paragraph must be made in a clear
22 and prominent manner on a separate written page and be
23 preceded by the heading “IMPORTANT INFORMATION FROM
24 [name of lender or servicer] ABOUT THIS OFFER” printed in at
25 least 14-point bold type.

26 2. If the offer obtained from the lender or servicer by the
27 person who performs any covered service for compensation, the
28 foreclosure consultant or the loan modification consultant is a
29 trial mortgage loan modification, the notice required by paragraph
30 (b) of subsection 1 must include notice to the homeowner:

31 (a) That the homeowner may not qualify for a permanent
32 mortgage loan modification; and

33 (b) Setting forth the likely amount of scheduled periodic
34 payments and arrears, payments and fees the homeowner would
35 owe if the homeowner failed to qualify for a permanent mortgage
36 loan modification.

37 3. As used in this section, “total amount” has the meaning
38 ascribed to it in section 4 of this act.

39 **Sec. 6.** A person who knows or reasonably should know that
40 another person who performs any covered service for
41 compensation, a foreclosure consultant or a loan modification
42 consultant is in violation of any provision of NRS 645F.300 to
43 645F.450, inclusive, and sections 2 to 6, inclusive, of this act and
44 any regulations adopted pursuant thereto shall not provide
45 substantial assistance or support to the person who performs any



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1 *covered service for compensation, foreclosure consultant or loan*
2 *modification consultant.*

3 **Sec. 7.** NRS 645F.300 is hereby amended to read as follows:

4 645F.300 As used in NRS 645F.300 to 645F.450, inclusive,
5 *and sections 2 to 6, inclusive, of this act*, unless the context
6 otherwise requires, the words and terms defined in NRS 645F.310 to
7 645F.370, inclusive, have the meanings ascribed to them in those
8 sections.

9 **Sec. 8.** NRS 645F.380 is hereby amended to read as follows:

10 645F.380 The provisions of NRS 645F.300 to 645F.450,
11 inclusive, *and sections 2 to 6, inclusive, of this act* do not apply to,
12 and the terms "foreclosure consultant" and "foreclosure purchaser"
13 do not include:

14 1. An attorney at law rendering services in the performance of
15 his or her duties as an attorney at law, unless the attorney at law is
16 rendering those services in the course and scope of his or her
17 employment by or other affiliation with a ~~{mortgage broker or~~
18 ~~mortgage agent;}~~ *person who is licensed or required to be licensed*
19 *pursuant to NRS 645F.390;*

20 2. A provider of debt-management services registered pursuant
21 to chapter 676A of NRS while providing debt-management services
22 pursuant to chapter 676A of NRS;

23 3. A person or the authorized agent of a person acting under the
24 provisions of a program sponsored by the Federal Government, this
25 State or a local government, including, without limitation, the
26 Department of Housing and Urban Development, the Federal Home
27 Loan Mortgage Corporation, the Federal National Mortgage
28 Association or the Federal Home Loan Bank ~~System;~~

29 4. A person who holds or is owed an obligation secured by a
30 mortgage or other lien on a residence in foreclosure if the person
31 performs services in connection with this obligation or lien and the
32 obligation or lien did not arise as the result of or as part of a
33 proposed foreclosure reconveyance;

34 5. Any person doing business under the laws of this State or of
35 the United States relating to banks, trust companies, savings and
36 loan associations, industrial loan and thrift companies, regulated
37 lenders, credit unions, insurance companies, or a mortgagee which
38 is a United States Department of Housing and Urban Development
39 approved mortgagee and any subsidiary or affiliate of those persons,
40 and any agent or employee of those persons while engaged in the
41 business of those persons;

42 6. A person, other than a person who is licensed pursuant to
43 NRS 645F.390, who is licensed pursuant to chapter 692A or any
44 chapter of title 54 of NRS while acting under the authority of the
45 license;



1 7. A nonprofit agency or organization that offers credit
2 counseling or advice to a homeowner of a residence in foreclosure
3 or a person in default on a loan; or

4 8. A judgment creditor of the homeowner whose claim accrued
5 before the recording of the notice of the pendency of an action for
6 foreclosure against the homeowner pursuant to NRS 14.010 or the
7 recording of the notice of default and election to sell pursuant to
8 NRS 107.080.

9 **Sec. 9.** NRS 645F.400 is hereby amended to read as follows:

10 645F.400 1. A person who performs any covered service, a
11 foreclosure consultant and a loan modification consultant shall not:

12 (a) Claim, demand, charge, collect or receive any compensation
13 except in accordance with ~~[NRS 645F.394.]~~ *the terms of a contract*
14 *for covered services.*

15 (b) Claim, demand, charge, collect or receive any fee, interest or
16 other compensation for any reason which is not fully disclosed to
17 the homeowner.

18 (c) Take *or acquire, directly or indirectly,* any wage
19 assignment, lien on real or personal property, assignment of a
20 homeowner's equity ~~for other~~ *, any* interest in a residence ~~in~~
21 ~~foreclosure~~ or other security for the payment of compensation. Any
22 such *assignment or* security is void and unenforceable.

23 (d) Receive any consideration from any third party in connection
24 with a covered service provided to a homeowner unless the
25 consideration is first fully disclosed to the homeowner.

26 (e) ~~[Acquire, directly or indirectly, any interest in the residence~~
27 ~~in foreclosure of a homeowner with whom the foreclosure~~
28 ~~consultant has contracted to perform a covered service.~~

29 ~~—(f)]~~ Accept a power of attorney from a homeowner for any
30 purpose, other than to inspect documents as provided by law.

31 (f) *Make any representation, express or implied, that a*
32 *homeowner cannot or should not contact or communicate with his*
33 *or her lender or servicer.*

34 (g) *Misrepresent any aspect of any covered service.*

35 (h) *Make any representation, express or implied, that a*
36 *covered service is affiliated with, associated with or endorsed or*
37 *approved by:*

38 (1) *The Federal Government, the State of Nevada or any*
39 *department, agency or political subdivision thereof;*

40 (2) *Any governmental plan for homeowner assistance;*

41 (3) *Any nonprofit housing counselor agency or program;*

42 (4) *The maker, holder or servicer of a homeowner's*
43 *mortgage loan; or*

44 (5) *Any other person, entity or program.*



(i) *Make any representation, express or implied, about the benefits, performance or efficacy of any covered service unless, at the time the representation is made, the person who performs any covered service, the foreclosure consultant or the loan modification consultant possesses and relies upon competent and reliable evidence which substantiates that the representation is true. As used in this paragraph, "competent and reliable evidence" means tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area that have been conducted and evaluated in an objective manner by persons qualified to do so using procedures generally accepted in the profession to yield accurate and reliable results.*

(j) *Obtain or attempt to obtain any waiver of the provisions of NRS 645F.300 to 645F.450, inclusive, and sections 2 to 6, inclusive, of this act or any regulations adopted pursuant thereto. Any such waiver is void and unenforceable.*

2. In addition to any other penalty, a violation of any provision of this section shall be deemed to constitute mortgage lending fraud for the purposes of NRS 205.372.

Sec. 10. NRS 645F.430 is hereby amended to read as follows:

645F.430 A foreclosure purchaser who engages in any conduct that operates as a fraud or deceit upon a homeowner in connection with a transaction that is subject to the provisions of NRS 645F.300 to 645F.450, inclusive, *and sections 2 to 6, inclusive, of this act*, including, without limitation, a foreclosure reconveyance, is guilty of a gross misdemeanor and shall be punished by imprisonment in the county jail for not more than 1 year, or by a fine of not more than \$50,000, or by both fine and imprisonment.

Sec. 11. NRS 645F.440 is hereby amended to read as follows:

645F.440 1. In addition to the penalty provided in NRS 645F.430 and except as otherwise provided in subsection 5, if a foreclosure purchaser engages in any conduct that operates as a fraud or deceit upon a homeowner in connection with a transaction that is subject to the provisions of NRS 645F.300 to 645F.450, inclusive, *and sections 2 to 6, inclusive, of this act*, including, without limitation, a foreclosure reconveyance, the transaction in which the foreclosure purchaser acquired title to the residence in foreclosure may be rescinded by the homeowner within 2 years after the date of the recording of the conveyance.

2. To rescind a transaction pursuant to subsection 1, the homeowner must give written notice to the foreclosure purchaser and a successor in interest to the foreclosure purchaser, if the successor in interest is not a bona fide purchaser, and record that notice with the recorder of the county in which the property is located. The notice of rescission must contain:



(a) The name of the homeowner, the foreclosure purchaser and any successor in interest who holds title to the property; and

(b) A description of the property.

3. Within 20 days after receiving notice pursuant to subsection 2:

(a) The foreclosure purchaser and the successor in interest, if the successor in interest is not a bona fide purchaser, shall reconvey to the homeowner title to the property free and clear of encumbrances which were created subsequent to the rescinded transaction and which are due to the actions of the foreclosure purchaser; and

(b) The homeowner shall return to the foreclosure purchaser any consideration received from the foreclosure purchaser in exchange for the property.

4. If the foreclosure purchaser has not reconveyed to the homeowner title to the property within the period described in subsection 3, the homeowner may bring an action to enforce the rescission in the district court of the county in which the property is located.

5. A transaction may not be rescinded pursuant to this section if the foreclosure purchaser has transferred the property to a bona fide purchaser.

6. As used in this section, "bona fide purchaser" means any person who purchases an interest in a residence in foreclosure from a foreclosure purchaser in good faith and for valuable consideration and who does not know or have reasonable cause to believe that the foreclosure purchaser engaged in conduct which violates subsection 1.

Sec. 12. NRS 645F.450 is hereby amended to read as follows:

645F.450 The rights, remedies and penalties provided pursuant to the provisions of NRS 645F.300 to 645F.450, inclusive, *and sections 2 to 6, inclusive, of this act* are cumulative and do not abrogate and are in addition to any other rights, remedies and penalties that may exist at law or in equity, including, without limitation, any criminal penalty that may be imposed pursuant to NRS 645F.430.

Sec. 13. NRS 645F.394 is hereby repealed.

Sec. 14. This act becomes effective on July 1, 2011.



TEXT OF REPEALED SECTION

645F.394 Foreclosure consultants, loan modification consultants and persons performing covered services for compensation: Deposits and trust accounts; commingling; records; inspection and audit.

1. All money paid to a person who performs any covered service for compensation, a foreclosure consultant or a loan modification consultant by a person in full or partial payment of covered services to be performed:

(a) Must be deposited in a separate checking account located in a federally insured depository financial institution or credit union in this State which must be designated a trust account;

(b) Must be kept separate from money belonging to the person who performs any covered service for compensation, the foreclosure consultant or the loan modification consultant; and

(c) Must not be withdrawn by the person who performs any covered service for compensation, foreclosure consultant or loan modification consultant until the completion of every covered service as agreed upon in the contract for covered services.

2. The person who performs any covered service for compensation, the foreclosure consultant or the loan modification consultant shall keep records of all money deposited in a trust account pursuant to subsection 1. The records must clearly indicate the date and from whom he or she received money, the date deposited, the dates of withdrawals, and other pertinent information concerning the transaction, and must show clearly for whose account the money is deposited and to whom the money belongs. The person who performs any covered service for compensation, the foreclosure consultant or the loan modification consultant shall balance each separate trust account at least monthly and provide to the Commissioner, on a form provided by the Commissioner, an annual accounting which shows an annual reconciliation of each separate trust account. All such records and money are subject to inspection and audit by the Commissioner and authorized representatives of the Commissioner.

3. Each person who performs any covered service for compensation, each foreclosure consultant and each loan modification consultant shall notify the Commissioner of the names of the banks and credit unions in which he or she maintains trust



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accounts and specify the names of the accounts on forms provided by the Commissioner.

4. As used in this section, “completion of every covered service” means:

(a) Successful results with respect to what the performance of each covered service was intended to yield for the homeowner, as described in the contract for covered services; or

(b) If the performance of one or more covered service has an unsuccessful result with respect to what the performance of that covered service was intended to yield for the homeowner, a showing that every reasonable effort was made, under the particular circumstances, to obtain successful results,

↳ as verified in a written statement provided to the homeowner.

