

Housing Stimulus Laws for 2009

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TABLE OF CONTENTS

I.	Introduction
II.	American Recovery and Reinvestment Act
	A. First-Time Homebuyer Tax Credit (Questions 1 to 20)
	B. FHA, FANNIE MAE, AND FREDDIE MAC Loan Limits (Questions 21 to 27)
	C. Other Provisions of the Recovery Act (Question 28)
III.	Making Home Affordable Program
	A. Home Affordable Refinance (Questions 29 to 40)
	B. Home Affordable Modification (Questions 41 to 58)
	C. Keeping Mortgage Rates Low (Question 59)
IV.	California's 2009-2010 State Budget
	A. New Home Tax Credit (Questions 60 to 82)
	B. 90-Day Extension to Foreclosure Process (Questions 83 to 98)
V.	Additional Information (Questions 99 to 100)

I. INTRODUCTION

It was a big week in February for the California REALTOR® who keeps watch over legislative change. On Tuesday, February 17, 2009, a \$787 billion economic stimulus package became law, including several important housing stimulus provisions. The next day, President Barack Obama announced a \$275 billion Homeowner Affordability and Stability Plan for restructuring and refinancing mortgage loans for at-risk homeowners. By Friday, February 20, 2009, California passed a state budget which also included new laws to stimulate housing.

The scale of the lawmakers' efforts in these three laws is massive. Both the federal and California government have enacted unprecedented measures aimed at stimulating the housing market and protecting homeowners from foreclosure.

What do these three laws mean for REALTORS® and their clients? This article will provide REALTORS® with legal guidelines to the 2009 housing stimulus laws. This article will also address practical issues facing REALTORS® as they assist their clients through the market downturn.

II. AMERICAN RECOVERY AND REINVESTMENT ACT

On February 17, 2009, President Barack Obama signed into law a \$787 billion economic stimulus package. This enormous 1,071-page legislation is called the American Recovery and Reinvestment Act of 2009 (ARRA) (H.R.1). It includes \$575 billion in government spending and

\$212 billion in tax cuts. It aims to, among other things, create and preserve millions of jobs, build infrastructures, redevelop communities, increase consumer spending, improve energy efficiency and science, invest in education, transportation, and health-care projects, and assist the unemployed.

A centerpiece of the Recovery Act is for the federal government to carry out the law in full transparency and accountability. To track the progress of the economic recovery under the Recovery Act, go to www.recovery.gov. This website also contains the full text of the Recovery Act.

The major housing stimulus provisions of the Recovery Act are, among other things, the first-time homebuyer tax credit (see Questions 1 to 20) and the increase in FHA, Fannie Mae, and Freddie Mac loan limits (see Questions 21 to 27). Although the primary thrust of the Recovery Act is stimulating employment not housing, the creation and preservation of jobs under the Recovery Act may help jumpstart the housing market. Job loss has caused homeowners to lose their homes in foreclosure and their neighborhoods to become distressed. Job loss and the mere fear of job loss have also hindered potential homebuyers from acquiring their piece of the American dream. Stimulating and stabilizing the employment sector can stimulate housing.

A. FIRST-TIME HOMEBUYER TAX CREDIT

Q 1. *What, in a nutshell, is the \$8,000 tax credit for first-time homebuyers under the new law?*

A A first-time homebuyer as defined may receive a refundable tax credit up to \$8,000 for purchasing a principal residence in the U.S. from January 1, 2009 to November 30, 2009, inclusive (see Questions 5 to 16). No repayment is required if the buyer owns and occupies the property for 36 months (see Question 17). This new law enhances the preexisting \$7,500 tax credit enacted in 2008 which still applies for purchases from April 9, 2008 to December 31, 2008 (see Questions 18 and 19).

Q 2. *How will the new \$8,000 tax credit affect REALTORS® and their clients?*

A The new \$8,000 tax credit provides a monetary incentive for first-time homebuyers to purchase homes. First time homebuyers represent a significant segment of U.S. homebuyers. According to the U.S. Department of the Treasury, nearly half of the homebuyers in 2008 were first-time homebuyers. Hence, the new tax credit for first-time homebuyers, along with affordable home prices and historically low mortgage rates, should help spur the housing market.

Q 3. *What is a tax credit?*

A A tax credit is a dollar-for-dollar reduction of tax owed. In contrast to a tax credit, a tax deduction is merely a reduction of taxable income. Hence, a tax credit is generally more valuable to the taxpayer than a tax deduction. To illustrate, an \$8,000 tax deduction for a taxpayer in a 25% tax bracket would only save the taxpayer \$2,000 in taxes, whereas an \$8,000 tax credit would save the taxpayer \$8,000 in taxes.

Q 4. *What is the significance of a “refundable” tax credit?*

A That a tax credit is “refundable” means that any credit amount not used to reduce the tax owed may be added to the taxpayer’s tax refund check. In other words, a taxpayer may receive a tax credit even if he or she has no tax liability to offset that credit.

As an example, let’s say a taxpayer filing his tax returns on April 15 would have owed \$2,000 to the IRS. If the taxpayer can now claim an \$8,000 refundable tax credit, he can expect to receive a refund check from the IRS for \$6,000.

Q 5. Who is eligible as a “first-time homebuyer” for the \$8,000 tax credit?

A For purposes of the \$8,000 tax credit, a “first-time homebuyer” is defined as any individual (or spouse) with no present ownership interest in a principal residence during the 3-year period ending on the date of the purchase of the principal residence to which the tax credit applies (26 U.S.C. § 36(c)(1)). For income restrictions, see Question 9.

As an example, an unmarried buyer who closes escrow on a purchase on June 30, 2009, would qualify as a “first-time homebuyer” as long as the buyer did not own a principal residence during the period from July 1, 2006 to June 30, 2009. Even if the taxpayer owned another principal residence in the past, he or she can still qualify as a “first-time homebuyer” as long as the taxpayer transferred off title to that other home over three years ago.

Q 6. What constitutes a “principal residence” under the \$8,000 tax credit?

A A “principal residence” is generally the home the taxpayer lives in most of the time (26 U.S.C. § 121). It can be a house, condominium, townhome, manufactured home, or similar type of property located in the U.S. To qualify for the federal \$8,000 tax credit, the property can be new construction or a resale. It cannot, however, be a vacation home or rental property.

Q 7. What constitutes a “purchase” to be eligible for the \$8,000 tax credit?

A A “purchase” for purposes of this tax credit is defined as any acquisition, except as set forth in Question 15 (26 U.S.C. § 36(c)(3)). For a home that the taxpayer constructs, the purchase date is the date the taxpayer first occupies the home (26 U.S.C. § 36(c)(3)(B)).

Because a purchase is defined as an acquisition, it generally occurs when escrow closes and title to the property transfers to the buyer, and not when the underlying purchase contract is signed. To illustrate, a buyer who enters into a contract to purchase a property on November 13, 2009, but closes escrow on December 23, 2009, would not qualify for the \$8,000 tax credit because, based on the law as it is currently written, acquisition does not occur before the law expires on November 30, 2009.

Q 8. How is the amount of the tax credit calculated?

A The maximum tax credit for an individual first-time homebuyer is 10 percent of the purchase price, not to exceed \$8,000 (26 U.S.C. § 36(b)(1)(A)). For married individuals filing separate tax returns, the tax credit is capped at \$4,000 (26 U.S.C. § 36(b)(1)(B)).

For a purchase price over \$80,000, as is often the case in California, the first-time homebuyer tax credit will be capped off at \$8,000. "Purchase price" under this law is defined as the adjusted basis of the principal residence on the date such residence is purchased (26 U.S.C. § 36(c)(4)).

Q 9. *Is there an income restriction to be eligible for the \$8,000 tax credit?*

A Yes. The first-time homebuyer tax credit may be restricted by the taxpayer's income. The tax credit starts to phase out for an individual taxpayer with a modified adjusted gross income from \$75,001 to \$95,000 (or \$150,001 to \$170,000 for joint filers). The tax credit is eliminated entirely if an individual's modified adjusted gross income is over \$95,000 (or \$170,000 for joint filers). (26 U.S.C. § 36(b)(2).)

Q 10. *What is a modified adjusted gross income?*

A First, a modified adjusted gross income or MAGI is a taxpayer's adjusted gross income (AGI) plus certain items, such as IRA deductions, student loan deductions, higher education costs, foreign income, and foreign housing deductions, among other things. Second, an adjusted gross income (AGI) is a taxpayer's gross income minus certain deductions, which are often called "above the line" deductions. Most tax deductions are "above the line" deductions, except itemized deductions from Schedule A and personal exemptions.

Q 11. *When must a first-time homebuyer purchase a property to qualify for the \$8,000 tax credit?*

A To be eligible for the \$8,000 tax credit, a first-time homebuyer must purchase a principal residence from January 1, 2009 to November 30, 2009, inclusive (26 U.S.C. § 36(f) and (h)). The deadline is November 30, 2009, and not December 31, 2009. That the deadline is not at the end of the year may work as a trap for unwary buyers.

For the first-time homebuyer tax credit for acquisitions from April 9, 2008 to December 31, 2008, see Question 18.

Q 12. *When can a taxpayer claim the \$8,000 tax credit?*

A According to an IRS announcement on February 25, 2009, first-time homebuyers who qualify for the \$8,000 tax credit by purchasing a home before December 1, 2009 have a special option of claiming the tax credit on either their 2008 or 2009 tax returns (IR 2009 14).

Q 13. *Does a married person qualify for the \$8,000 tax credit if his or her spouse has owned a principal residence in the last three years?*

A No. For a married taxpayer to qualify for the \$8,000 tax credit, both spouses must be "first-time homebuyers" as defined in Question 5. In other words, neither spouse qualifies for the \$8,000 tax credit unless both of them have not owned a principal residence over the last three years.

Q 14. Are two unmarried individuals both eligible for the first-time homebuyer tax credit if they buy a house together?

A Yes. Two or more unmarried individuals can buy a principal residence together, but the maximum tax credit for all of them is only \$8,000. If all co-owners qualify as first-time homebuyers, they must allocate the \$8,000 tax credit between themselves in any reasonable manner. According to the IRS, a reasonable method is any method that does not allocate all or a part of the credit to a co-owner who is not eligible to claim that part of the credit (see IRS Form 5405).

Q 15. Who cannot claim the first-time homebuyer tax credit?

A The first-time homebuyer tax credit is not allowed under any of the following circumstances:

- The property is acquired from a related person as defined (26 U.S.C. § 36(c)(3)(A)) (see Question 16);
- The property is acquired by gift or inheritance (26 U.S.C. § 36(c)(3)(A));
- The buyer is a nonresident alien (26 U.S.C. § 36(d)(1)); or
- The buyer disposes of the property (or the property ceases to be the principal residence of the buyer and, if married, the buyer's spouse) before the end of such taxable year (26 U.S.C. § 36(d)(2)).

Q 16. What acquisitions from related persons do not qualify for the first-time homebuyer tax credit?

A A buyer is ineligible for the first-time homebuyer tax credit if the property is acquired from certain related persons, including, but not limited to, the following:

- The buyer's spouse, ancestors (such as parents and grandparents), or lineal descendants (such as children or grandchildren);
- A corporation in which the buyer owns more than 50% of the outstanding stock; or
- A partnership in which the buyer owns more than 50% interest.

(26 U.S.C. § 36(c)(3)(A) (citing §§ 267 and 707).)

Q 17. Is a first-time homebuyer required to repay the \$8,000 tax credit?

A No, the tax credit need not be repaid if the buyer owns and occupies the property for at least 36 months. If, however, the buyer disposes of the property or it ceases to be the buyer's principal residence within 36 months of purchase, the buyer may be required to repay the tax credit (26 U.S.C. § 36(f)(4)). This includes situations where the buyer sells the home, converts it into a

rental property or business, or the home is destroyed, condemned, or disposed of under threat of condemnation. In these situations, the tax credit must generally be repaid by including it as additional tax for the year the home ceases to be the buyer's principal residence (26 U.S.C. § 36(f)(4)(D)).

Q 18. What is the \$7,500 first-time homebuyer tax credit for a principal residence purchased in 2008?

A With certain exceptions, a first-time homebuyer may receive a 10% tax credit not to exceed \$7,500 for purchasing a principal residence from April 9, 2008 to December 31, 2008 (26 U.S.C. § 36(a) and (b)). This tax credit was enacted as part of the federal Housing and Economic Recovery Act of 2008. As with the \$8,000 tax credit discussed above, the \$7,500 tax credit phases out if an individual's modified adjusted gross income exceeds \$75,000 (or \$150,000 for joint filers) (26 U.S.C. § 36(b)(2)). The \$7,500 tax credit phases out completely if an individual's modified adjusted gross income exceeds \$95,000 (or 170,000 for joint filers) (26 U.S.C. § 36(b)(2)).

The \$7,500 tax credit must generally be repaid like an interest-free loan in equal annual installments over a 15-year period, or in full if the homebuyer sells the property for a gain (26 U.S.C. § 36(f)). For example, to repay a \$7,500 tax credit for 2008, about \$500 should be added to the buyer's income tax liability every year for 15 years starting 2010.

Q 19. What are the major differences between the new \$8,000 tax credit and the previous \$7,500 tax credit?

A The \$8,000 tax credit is \$500 more and applicable to first-time homebuyers who purchase a principal residence from January 1, 2009 to November 30, 2009. The \$8,000 tax credit need not be repaid if the buyer stays in the property for 36 months.

On the other hand, the \$7,500 tax credit applies to first-time homebuyers who purchased a principal residence from April 9, 2008 to December 31, 2008. The \$7,500 tax credit must generally be repaid over 15 years.

Q 20. How does a first-time homebuyer apply for the tax credit?

A A first-time buyer may claim the tax credit on their federal tax returns using IRS Form 5405, which is available at <http://www.irs.gov/pub/irs-pdf/f5405.pdf>.

B. FHA, FANNIE MAE, AND FREDDIE MAC LOAN LIMITS

Q 21. What are the loan limits under the Recovery Act?

A The Recovery Act has increased the maximum conforming loan limit from \$625,500 to \$729,750 for FHA, Fannie Mae and Freddie Mac loans. These higher loan limits are intended to ease the mortgage crisis of the late 2000s by helping homeowners and homebuyers get more affordable mortgage loans.

As background, the \$729,750 loan limit was originally established in 2008, but dropped down to \$625,500 on January 1, 2009. The new law reinstates the conforming loan limit to 125% of the 2008 local area median home price, not to exceed \$729,750.

Q 22. *What are the FHA loan limits in California?*

A The new FHA loan limit is 125% of the 2008 local area median home price or \$271,050, whichever is greater, but not to exceed \$729,750 for one-unit properties. The higher FHA loan limit will assist REALTORS® and their clients to obtain safe mortgage loans with fixed interest rates, low down payment requirements, and other affordable terms.

Counties in California at the maximum FHA loan limit of \$729,750 are Alameda, Contra Costa, Los Angeles, Marin, Monterey, Napa, Orange, San Benito, San Francisco, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, and Ventura. The FHA loan limits for the other counties in California range from \$271,050 to \$679,500. For FHA's Mortgage Limits List, go to <https://entp.hud.gov/idapp/html/hicost1.cfm>.

The Secretary of the Department of Housing and Urban Development (HUD) has the discretionary authority to increase the FHA loan limit for any sub-area smaller than a county if the median home price in that sub-area warrants a higher loan limit.

Q 23. *Which loans qualify for the new FHA loan limits?*

A The new FHA loan limits apply to loans for which credit is approved for the borrower in the calendar year 2009 (until December 31, 2009).

Q 24. *Where can I obtain more information about FHA loans?*

A For more information about FHA loans, go to HUD's website at <http://www.hud.gov/fha/choosefha.cfm> or the FHA's website at http://portal.hud.gov/portal/page?_pageid=73,1&_dad=portal&_schema=PORTAL.

Q 25. *What are the Fannie Mae and Freddie Mac loan limits in California?*

A The new Fannie Mae and Freddie Mac conforming loan limit is 125% of the median home price or \$417,000, whichever is greater, but not to exceed \$729,750. Counties in California that are at the maximum loan limit of \$729,750 are Alameda, Contra Costa, Los Angeles, Marin, Monterey, Napa, Orange, San Benito, San Francisco, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, and Ventura. The loan limits for the other counties in California range from \$417,000 to \$679,500.

For more information about Fannie Mae and Freddie Mac, including lookup tables for the loan limits for specific counties and high-cost areas in California, go to the website of the Office of Federal Housing Enterprise Oversight at <http://www.ofheo.gov/regulations.aspx?nav=128>.

The director of the Federal Housing Finance Agency (FHFA) has the discretionary authority to increase the Fannie Mae or Freddie Mac loan limit for any sub-area smaller than a county if the median home price in that sub-area warrants a higher loan limit.

Q 26. Which loans qualify for the new Fannie Mae and Freddie Mac loan limits?

A The new Fannie Mae and Freddie Mac loan limits apply to all loans originated in 2009. They also apply to loans purchased in 2009 that were originated from July 1, 2007 through December 31, 2008.

Q 27. Where can I obtain more information about Fannie Mae and Freddie Mac loans?

A For more information about Fannie Mae and Freddie Mac, go to the website of the Federal Housing Finance Agency at <http://www.fhfa.gov/>. Fannie Mae's website is <http://www.fanniemae.com/index.jhtml>. Freddie Mac's website is <http://www.freddie.com/>.

C. OTHER PROVISIONS OF THE RECOVERY ACT

Q 28. What are the other housing stimulus provisions or provisions of interest in the Recovery Act?

A A brief summary of some of the remaining provisions of the Recovery Act that stimulate housing or may otherwise be of interest to REALTORS® are as follows:

- **Making Work Pay Credit:** Both wage earners and self-employed workers will receive a work credit of 6.2% of earned income or \$400, whichever is less, for individuals earning up to \$75,000 (or \$800 for married couples earning up to \$150,000). Wage earners will generally receive about \$8 to \$13 per week more on their paychecks as a result of a reduction in their FICA withholdings. Self employed workers can receive this work credit by claiming it on their tax returns. This program ends on December 31, 2010.
- **Neighborhood Stabilization Program:** \$2 billion will be added to the Neighborhood Stabilization Program. This program provides funds to state and local governments for stabilizing and reviving distressed neighborhoods, rehabilitating affordable housing, improving public facilities, and other community development efforts.
- **Net Operating Loss Carryback for Businesses:** This provision allows eligible businesses with a net operating loss for 2008 to carry back the loss to offset profits earned over the past 5 years.
- **Bonus Depreciation for Businesses:** This provision allows businesses to deduct a 50% first-year bonus depreciation for new equipment purchased in 2009.
- **Vehicle Sales Tax Deduction:** Taxpayers may deduct state, local, and excises taxes on the purchase of a new car, light truck, or other vehicles in 2009 for individuals earning less than \$150,000 (or \$250,000 for joint filers). The deduction cannot exceed the tax for the first \$49,500 of the vehicle's purchase price.

- Energy-Efficient Homes and Buildings: Clean-energy provisions include \$16 billion to make homes and buildings more energy efficient, such as a 30% tax credit to homeowners who purchase new furnaces, windows, and insulation.
- Rural Housing Service: \$500 million will be used to fund federal loan programs for rural housing.
- Lead Hazard Reduction: About \$100 million has been allocated for HUD's lead based paint and hazard reduction and remediation activities.
- Section 8 Assistance: \$2 billion will be used to fund Section 8 project-based housing contracts for 12 months.
- Emergency Shelter for Homeless: \$1.5 billion has been earmarked to help homeless persons and families in shelters.

III. MAKING HOME AFFORDABLE PROGRAM

On February 18, 2009, President Obama unveiled a \$275 billion Making Home Affordable Program (previously known as the Homeowner Affordability and Stability Plan) to help 9 million homeowners avoid foreclosure by refinancing or restructuring their mortgage loans. This plan also aims to protect neighborhoods and communities from the devastating effects of falling home values, failing local businesses, and lost jobs. The three major components of the Making Home Affordable Program are as follows:

- Home Affordable Refinance (see Questions 29 to 40)
- Home Affordable Modification (see Questions 41 to 58)
- Keeping Mortgage Rates Low (see Question 59)

For more information about the Making Home Affordable Program including the full text of the program, go to www.financialstability.gov/.

A. HOME AFFORDABLE REFINANCE

Q 29. *What is the Home Affordable Refinance program?*

A The Obama Administration aims to help 4 to 5 million homeowners who are unable to refinance due to falling home values. The new program will help owner-occupied borrowers with conforming Fannie Mae or Freddie Mac loans to refinance up to 105 percent of the current market value of their properties.

Q 30. *What is the purpose of the Home Affordable Refinance program?*

A The purpose of the Home Affordable Refinance program is to help homeowners who are unable to take advantage of lower interest rates because of falling property values.

As background, a homeowner seeking to refinance is generally limited to a loan amount of not more than 80 percent of the appraised value. Yet, during the housing market downturn of the late

2000s, home values have dropped. As a result, many homeowners are unable to refinance to take advantage of historically low mortgage rates.

As an example, consider a couple who purchased a home a few years ago for \$260,000. They took out a \$208,000 mortgage loan at 6.5% for 30 years. Today, they owe \$200,000 on the loan. However, if the home values in their neighborhood have dropped 15%, their property may currently only be worth \$221,000. If a lender requires an 80% loan-to-value ratio for a refinance, the borrowers could only finance \$176,800, even though they owe \$200,000. Yet, if the couple could avail themselves of the current going interest rate of, let's say, 5 percent, they could save roughly \$2,400 per year in mortgage payments.

Q 31. *When does the Home Affordable Refinance program take effect?*

A Fannie Mae and Freddie Mac are issuing guidelines to originating lenders that will allow them to begin offering the Home Affordable Refinance immediately. The Home Affordable Refinance will sunset on December 31, 2012.

Q 32. *What are the eligibility requirements for a Home Affordable Refinance?*

A The eligibility requirements for a Home Affordable Refinance is as follows:

- Current loan is owned or guaranteed by Fannie Mae or Freddie Mac (see Questions 33 to 35);
- Owner occupied, one-to-four unit home;
- Maximum refinance loan amount is 105% of the current market value of the property;
- Borrower must have sufficient income to support the new mortgage debt; and
- Borrower must have an acceptable mortgage payment history.

Q 33. *Which loans qualify for a Home Affordable Refinance?*

A The Home Affordable Refinance is available for first trust deed loans owned or guaranteed by Fannie Mae or Freddie Mac. This includes loans that Fannie Mae and Freddie Mac hold in their portfolios or that they placed in mortgage-back securities.

The principal balance of the existing loan cannot exceed 105% of the current market value of the property. For example, a borrower who owes \$210,000 on a mortgage loan that has been sold in the secondary market to Fannie Mae would qualify under the refinance program, even though the property is currently worth only \$200,000.

Q 34. *How do homeowners determine whether they qualify for a Home Affordable Refinance?*

A A self-assessment tool is available for homeowners to determine whether they are eligible

for a Home Affordable Refinance or Modification at <http://www.financialstability.gov/makinghomeaffordable/>.

Q 35. How does a REALTOR® or borrower determine whether a loan is owned or guaranteed by Fannie Mae or Freddie Mac?

A Both Fannie Mae and Freddie Mac have established toll-free telephone numbers and web access to make this information available. Borrowers will provide or enter information to determine if either agency owns or securitized the loan. The information, however, is not a guarantee of eligibility for the Home Affordable Refinance.

For Fannie Mae's Resource Center, the telephone number is 1-800-7FANNIE or 1 800 732 6643 (8 a.m. to 8 p.m. EST) or inquire online at www.fanniemae.com/homepath/homeaffordable.jhtml.

For Freddie Mac, the telephone number is 1-800-FREDDIE or 1-800 373 3343 (8 a.m. to 8 p.m. EST) or inquire online at www.freddiemac.com/corporate/buyown/english/avoiding_foreclosure/avoiding_foreclosure_form.html.

Alternatively, a borrower may contact the lender or loan servicer to inquire as to whether the underlying loan is owned or guaranteed by Fannie Mae or Freddie Mac.

To provide some background, a mortgage loan is typically funded with a financial institution and then sold in the secondary market to government-sponsored enterprises Fannie Mae or Freddie Mac. Oftentimes, the financial institution continues to collect the monthly mortgage payments and service the loan, which is why the borrower may not be aware that the loan has been sold to Fannie Mae or Freddie Mac.

Q 36. Are loans other than Fannie Mae or Freddie Mac loans also eligible for a Home Affordable Refinance?

A No. A Home Affordable Refinance is only available for conforming loans owned or securitized by Fannie Mae and Freddie Mac. However, loans not owned or securitized by Fannie Mae or Freddie Mac may qualify for a Home Affordable Modification (see Question 42).

Q 37. Can a borrower with both a first and second trust deed obtain a Home Affordable Refinance?

A Yes. A borrower with more than one mortgage loan can refinance the first trust deed if the principal balance is less than 105% of the current property value. However, the borrower must obtain an approval from the second trust deed lender to subordinate or remain in a second position.

Q 38. What are the terms of a Home Affordable Refinance loan?

A A loan refinanced under the Home Affordable Refinance program will be a fixed rate loan for 15 or 30 years. The interest rate will be based on market rates at the time of the refinance and

associated points and fees. The refinance loans will have no prepayment penalties or balloon payments.

The principal balance of a mortgage loan will not be reduced under the Home Affordable Refinance program. The objective of the new refinance program is to provide borrowers with safe and affordable mortgage loans.

Q 39. *Can a borrower who is currently delinquent qualify for a Home Affordable Refinance?*

A No. Borrowers currently delinquent on their mortgage loans will not qualify for a Home Affordable Refinance. Borrowers must be current on their mortgage payments, meaning they have not been more than 30-days late in the last 12 months.

Q 40. *Can a borrower take cash out in a Home Affordable Refinance?*

A No. Only the transaction costs may be added to the loan amount of a Home Affordable Refinance.

B. HOME AFFORDABLE MODIFICATION

Q 41. *What is a Home Affordable Modification?*

A The Home Affordable Modification is a component of the Making Home Affordable Program of the Obama Administration. This \$75 billion program aims to help 3 to 4 million homeowners who are at risk of foreclosure modify their loans. It provides financial incentives for both lenders and borrower to modify existing first trust deeds. \$50 billion for the program will come from the remaining \$350 billion in Troubled Asset Relief Program (TARP) funds and the remaining \$25 billion will come from Fannie Mae and Freddie Mac.

Q 42. *How does a Home Affordable Modification work?*

A The Home Affordable Modification program is a government subsidy for loan modifications. First, a participating lender must voluntarily agree to modify the loan terms for a first trust deed so that the borrower's monthly mortgage payment does not exceed 38 percent of his or her income. Next, the federal government will match what the lender did dollar-for-dollar to reduce the debt-to-income ratio down to 31 percent.

The borrower will be put on a trial modification at the new payment and terms for three months. If a borrower is current at the end of the trial modification period, the loan servicer will execute a modification agreement, including an impound account for taxes and insurance

As an example, assume a borrower pays 45% of her monthly income for her mortgage payment on a \$220,000 loan. If her lender voluntarily agrees to reduce her mortgage payment down to 38% of her income, the federal government will match that, dollar-for-dollar, to bring her debt-to-income ratio further down to 31%. The loan modification could save the borrower over \$400 per month on her mortgage payments.

Q 43. What is the purpose of the Home Affordable Modification program?

A The purpose of the Home Affordable Modification program is to prevent foreclosures by making mortgage payments more affordable for working homeowners who are struggling to keep their homes. The program is not intended to replace lost equity. However, if the program prevents avoidable foreclosures, it will stabilize property values which will benefit all homeowners.

Q 44. When does the Home Affordable Modification program take effect?

A The intent is for Home Affordable Modifications to begin immediately. However, the contracts that the Treasury Department will require participating loan servicers to enter into are not expected to be available until April 2009. Once contracts with servicers and investors are signed, a list of participating lenders will be made available to the public at www.financialstability.gov.

Q 45. What are the eligibility requirements for a Home Affordable Modification?

A The eligibility requirements for a Home Affordable Modification are as follows:

- Borrower occupies the property as a primary residence;
- Property is one-to-four units;
- Loan to be modified is a first trust deed;
- Borrower's monthly mortgage payment (including taxes, insurance, and homeowners association dues) exceeds 31% of the borrower's gross monthly income;
- Borrower has experienced a significant change in income or expense to the point that the current mortgage payment is no longer affordable;
- Unpaid principal balance is \$729,750 or less (for one unit properties and higher for two-to-four units); and
- Loan was originated before January 1, 2009.

In addition to the above, a borrower with a "back end" debt (i.e. monthly housing, credit card, and car payments) of 55% or more of his or her income will be required, as a condition for the modification, to enter into a HUD-certified consumer debt counseling program.

Q 46. How will a participating lender reduce a borrower's monthly payments?

A A participating lender may elect to reduce the interest rate on a loan down to a 2% minimum. If the borrower's debt-to-income ratio is still above 31%, the next step for the lender is to increase the amortization period up to 40 years. If the borrower's debt-to-income ratio is still more than 31% then the lender must forbear (defer) principal.

A lender may always elect to forgive principal rather than lower the interest rate, extend the amortization, or forbear on the principal balance. However, loan servicers are not required to offer permanent principal reductions.

If a lender reduces the interest rate under the Home Affordable Modification program, the interest rate must be a minimum of 2% and fixed for five years, after which the lender could gradually raise the interest rate no more than one percentage point per year until the note rate reaches the Freddie Mac Primary Mortgage Market Survey rate on the date the loan modification was executed. If the modified rate is higher than the Survey rate, the interest rate for the remaining loan term will be the modified rate.

Q 47. *How does a forbearance of principal work under a Home Affordable Modification?*

A If a participating lender agrees to forbear (defer) principal, the deferred principal will be owed when the house is sold or refinanced or the loan is otherwise paid off. The amount of the deferred principal will be a balloon payment, but it will not accrue interest. If the lender extends the amortization period without extending the loan term, the balloon payment may be even bigger.

Q 48. *How do homeowners determine whether they qualify for a Home Affordable Modification?*

A A self-assessment tool is available for homeowners to determine whether they are eligible for a Home Affordable Refinance or Modification at <http://www.financialstability.gov/makinghomeaffordable/>.

Q 49. *Are loans other than Fannie Mae or Freddie Mac loans eligible for a Home Affordable Modification?*

A Yes. Most conventional loans including prime, subprime, adjustable, loans owned by lenders, and loans in securities, are eligible for a Home Affordable Modification. FHA and VA loans are not eligible for a Home Affordable Modification, but these agencies may offer other modification programs to help borrowers stay in their homes.

Q 50. *Does a Home Affordable Modification cost anything for the borrower?*

A No. The borrower incurs no modification fee or charge for a Home Affordable Modification.

Q 51. *Does a borrower have to be delinquent on his or her mortgage payments to qualify for a Home Affordable Modification?*

A No. Borrowers who are delinquent or simply struggling to remain current on their mortgage payments may qualify for a Home Affordable Modification if they are at risk of imminent default. As an example, a couple may qualify because they have had or will soon have a significant increase in their mortgage payment that they cannot afford.

Q 52. Is a borrower with both a first and second trust deed eligible for a Home Affordable Modification?

A Yes. A borrower with both a first and second trust deed can still apply for a Home Affordable Modification, but only the first trust deed will be modified. The second trust deed lender will be required to subordinate to the modified loan. The Home Affordable Modification program provides an incentive payment of up to \$1,000 to pay off junior lien holders.

Q 53. Is a borrower eligible for a Home Affordable Modification if he or she is currently upside down on the property (i.e. owes more on the mortgage loan than the property is worth)?

A Yes, but a lender under this program is not required to reduce the principal balance.

Q 54. Is a lender required to modify a loan under the Home Affordable Modification program?

A No, in most cases. A mortgage lender may generally choose whether to participate in the Home Affordable Modification program. However, participation in the program is mandatory for any institution that accepts future funding from the Treasury's Financial Stability Program.

Once a lender participates in the program, it must screen any borrower who contacts the servicer and meet the minimum eligibility criteria to determine if he or she is at risk of imminent default. During this screening, the loan servicer must ascertain whether a borrower has had a change in circumstances that causes financial hardship or is facing a recent or imminent increase in the payment that is likely to create a financial hardship (payment shock). All loans that meet eligibility requirements must be modified, unless there is fraud or modification is prohibited by the loan servicing agreement.

Q 55. Are mortgage insurance companies required to participate in the Home Affordable Modification program?

A No. However, the major mortgage insurance firms have agreed to help prevent foreclosures by developing a procedure for them to make partial claims on modified loans where appropriate.

Q 56. What are the monetary incentives for a Home Affordable Modification?

A Monetary incentives will be given to loan servicers, lenders, and borrowers under the Home Affordable Modification program. Loan servicers will receive \$1,000 as an upfront fee for every eligible modification. They also will receive up to \$1,000 per year for three years as a "pay for success fee" awarded monthly if the borrower stays current on the loan. They will also receive \$500 and the mortgage holders will receive \$1,500 if they modify an at-risk loan before the borrower becomes delinquent. The loan servicer is also eligible to receive \$500 for efforts made to extinguish second liens on loans modified and an extra \$250 for obtaining a release of a valid second lien.

The Home Affordable Modification program also has monetary incentives for borrowers. After a 90-day trial period, borrowers with modified loans will receive \$1,000 per year for five years as success incentives to stay current on their mortgage loan. This incentive will be provided to a borrower in the form of a monthly reduction in the principal balance owed.

Q 57. *Are monetary incentives available for short sales and deeds in lieu of foreclosure?*

A Yes. Participating loan servicers will receive incentives to take alternatives to foreclosure, like short sales or deeds in lieu of foreclosure. Loan servicers will be eligible for a \$500 incentive and can make reimbursable payments up to \$1,000 to extinguish other liens. Borrowers are eligible for a payment of \$1,500 in relocation expenses if they effectuate short sales and deeds in lieu of foreclosure. These incentives for short sales and deeds in lieu of foreclosure are available to encourage families and loan servicers to avoid the costly foreclosure process and minimize the damage that foreclosure inflicts on lenders, borrowers, and communities.

Q 58. *What is the Home Price Decline Reserve Fund?*

A Under the Home Affordable Modification Program, the U.S. Treasury Department will establish a \$10 billion reserve fund to encourage lenders to modify loans. In a down market, lenders may opt to foreclose rather than restructure a loan when they fear that home values will fall later on. This insurance fund will encourage a lender to modify the loan instead by making an insurance payment to the lender in cash for any decline in a home price index for each modified loan.

C. KEEPING MORTGAGE RATES LOW

Q 59. *How will the Making Home Affordable program keep mortgage rates low?*

A The Making Home Affordable Program will ensure low mortgage rates by infusing into Fannie Mae and Freddie Mac an additional \$100 billion each in the form of Preferred Stock Purchase Agreements. The \$200 billion in funding commitments are being made under the Housing and Economic Recovery Act of 2008.

The U.S. Treasury Department will also purchase Fannie Mae and Freddie Mac mortgage-backed securities to promote stability and liquidity in the mortgage market. The Treasury will also increase the allowable mortgage portfolio retained by Fannie Mae and Freddie Mac by \$50 billion to a total of \$900 billion.

IV. CALIFORNIA'S 2009-2010 STATE BUDGET

After many months of delay, California's lawmakers passed a 2009-2010 state budget into law on February 20, 2009. To help solve California's \$42 billion deficit, the new state budget calls for \$12.5 billion in tax hikes, including a one percent increase in sales tax, a 0.25% increase in income tax, and a 0.50% increase in vehicle license fees. On the spending side, the state budget has provisions to create jobs, improve the California business climate, and stimulate the economy.

As for housing stimulus provisions, the state budget has a \$10,000 tax credit to help encourage the purchase of new homes that have not been previously occupied (see Questions 60 to 82).

Also included in the state budget is a new law extending the foreclosure process by 90 days for lenders without comprehensive loan modification programs (see Questions 83 to 98).

A. NEW HOME TAX CREDIT

Q 60. *What, in a nutshell, is the \$10,000 new home tax credit?*

A For the period from March 1, 2009 to February 28, 2010, inclusive, a taxpayer who purchases a qualified principal residence that has never been occupied may receive a tax credit of 5% of the purchase price or \$10,000, whichever is less (see Questions 64 and 65). The total new home tax credit for all taxpayers is \$100 million (see Questions 72 to 74).

Q 61. *What is the purpose of this law?*

A The purpose of the new home credit is to help boost the sale of new-home purchases to stimulate the housing market and construction industry.

Q 62. *When is this law in effect?*

A The law pertaining to the new home credit was enacted on February 20, 2009 and went into effect immediately. The law will be repealed on December 1, 2013 (Cal. Rev. & Tax Code § 17059(h)). The time frame, however, for a buyer to purchase a qualified principal residence to receive the new home credit is March 1, 2009 to February 28, 2010, inclusive (Cal. Rev. & Tax Code § 17059(a)(1)).

Q 63. *What is a tax credit?*

A For general information about a tax credit, see Question 3.

Q 64. *What constitutes a “qualified principal residence” under the new home credit?*

A A qualified principal residence is a property purchased between March 1, 2009 and February 28, 2010, inclusive, that meets the following requirements:

- It is a single-family residence (attached or detached);
- It has never been occupied (see Question 71);
- It is purchased to be the principal residence of the taxpayer for at least two years immediately following the purchase date (see Question 81); and
- It is eligible for the homeowner’s exemption under section 218 of the California Taxation and Revenue Code.

(Cal. Rev. & Tax Code § 17059(b)(1) and (3).)

Q 65. *How is the new home credit calculated?*

A The new home credit is 5% of the purchase price or \$10,000, whichever is less (Cal. Rev. & Tax Code § 17059(a)(1)). For new homes purchased for \$200,000 or more, the new home credit will be capped off at \$10,000.

The new home credit shall be applied in equal amounts over the three successive taxable years starting with the taxable year of purchase (2009 or 2010) (Cal. Rev. & Tax Code § 17059(a)(1)). A taxpayer's maximum credit per year is \$3,333.

The new home credit shall be allowed as a credit against the net tax as defined in section 17039 of the California Revenue and Taxation Code (Cal. Rev. & Tax Code § 17059(a)(1)). The new home credit cannot reduce regular tax below the tentative minimum tax (TMT). If the available credit exceeds the current year net tax, the unused credit cannot be carried over to the following year. The credit is non-refundable (see Question 4 for explanation of a refundable tax credit).

Q 66. *Is there an income restriction to be eligible for the new home credit?*

A No. The new home credit is available to qualified buyers regardless of income.

Q 67. *Is a taxpayer who receives an \$8,000 federal tax credit as a first-time homebuyer also eligible for the \$10,000 new home credit under California law?*

A Yes. A first-time homebuyer as defined can potentially qualify for both the \$8,000 tax credit under federal law (see Question 1) as well as the \$10,000 new home credit under California law.

Q 68. *What is the "purchase date" for purposes of the new home credit?*

A According to the Franchise Tax Board (FTB), the "purchase date" is the date escrow closes. As an example, if a taxpayer enters into a contract to buy a qualified principal residence on February 25, 2010, but does not close escrow until April 10, 2010, the taxpayer will not qualify for the new home credit because, as the law is currently written, the new home credit expires on February 28, 2010.

Q 69. *What is the new home credit if a married couple buys a qualified principal residence?*

A The new home credit for a married couple or registered domestic partners is the same as for individual taxpayers or the lesser of 5% of the purchase price or \$10,000. If two taxpayers are married or registered domestic partners, but filing separate tax returns, the new home credit must be equally apportioned between the two of them even if their ownership percentages are not equal (Cal. Rev. & Tax Code § 17059(c)(1)).

Q 70. What is the new home credit if two or more people who are not married to each other buy a home together?

A The new home credit is 5% of the purchase price or \$10,000, whichever is less, even if more than one taxpayer purchases a qualified principal residence. The new home credit shall be allocated among the co-owners in the same manner as each taxpayer's percentage of ownership. The total amount of credits for all co-owners cannot exceed \$10,000. (Cal. Rev. & Tax Code § 17059(c)(2).)

Q 71. How does a taxpayer demonstrate to the Franchise Tax Board that a property has not been previously occupied?

A No credit shall be allowed unless the taxpayer's tax return includes a certification by the seller that the property has never been previously occupied (Cal. Rev. & Tax Code § 17059(b)(2)). This seller's certification must be provided by the seller to the taxpayer and the FTB within one week of the sale of the qualified principal residence (Cal. Rev. & Tax Code § 10759(b)(2)) (see Question 75). One week is seven calendar days.

Q 72. What is the \$100 million dollar limit to the new home credit?

A The total amount of new home credit for all taxpayers combined is \$100 million (Cal. Rev. & Tax Code § 17059(d)). The FTB will allocate the credit to taxpayers on a first-come, first-served basis (Cal. Rev. & Tax Code § 17059(e)(1)) (see Questions 73 and 74). Once \$100 million has been allocated, the new home credit will no longer be available. To check on the remaining credit available, go to the FTB website at http://www.ftb.ca.gov/individuals/New_Home_Credit.shtml.

Q 73. What is the authority of the Franchise Tax Board to allocate the new home credit?

A The law authorizes the FTB to allocate the new home credit to taxpayers on a first-come first-served basis based upon its receipt of a seller's certification that the home has never been previously occupied (Cal. Rev. & Tax Code § 17059(e)(1)) (see Question 74). The law also authorizes the FTB to determine the date a seller's certification is received (Cal. Rev. & Tax Code § 17059(e)(3)). The FTB's determination of the date and whether a return has been timely filed for purposes of this law is final in that it cannot be reviewed in any administrative or judicial proceeding (Cal. Rev. & Tax Code § 17059(e)(4)(A)).

Q 74. How is the Franchise Tax Board going to allocate the \$100 million in new home credit?

A The FTB requires that the seller and buyer complete FTB Form 3582 A, Application for New Home Credit, and that the escrow company delivers the completed form to the FTB by fax at (916) 845-9754. Fax is the only delivery method that will be accepted for consideration for the new home credit because the date and time stamp on the fax will determine the order in which the new home credit is allocated.

Q 75. What is the procedure for completing and submitting Form FTB 3528 A, Application for New Home Credit?

A The procedure for completing and submitting Form FTB 3528-A, Application for New Home Credit, to apply for the new home credit is as follows:

- Part I – Seller's Certification: Within one week (7 calendar days) after close of escrow, the seller must complete this section to certify that the home has never been occupied, and provide a copy of the form to the buyer.
- Part II and III – Escrow and Qualified Buyer's Information: The buyer must complete these two sections and submit the form to escrow.
- Fax Transmission: Within one week (7 calendar days) after close of escrow, the escrow person acting on behalf of the seller and buyer must fax the completed Form FTB 3528 A to the FTB at (916) 845 9754 and provide a copy to the buyer.

Q 76. What are the FTB's instructions for faxing Form FTB 3528-A, Application of New Home Credit?

A The FTB has provided the following instructions for faxing FTB 3528-A, Application of New Home Credit to (916) 845 9754:

- Fax only one completed application per residence with all qualified buyers listed. Do not include information on nonqualified buyers. An incomplete application may delay or prevent credit allocation.
- Do not fax the application to the FTB before escrow closes.
- Do not fax the application to the FTB more than once.
- Do not fax to any other FTB fax number.
- Escrow should send only one application per fax transmission.
- Applications will be processed in the order received.

Once \$100 million in new home credit has been allocated, the FTB will post a notice on its website as well as disconnect the (916) 845 9754 fax number.

Q 77. Can the Form FTB 3528-A, Application for New Home Credit, be mailed to the Franchise Tax Board?

A No. The application should not be mailed to the FTB. Fax is the only acceptable delivery method. The FTB intends to use the date and time stamp on the fax to determine the first-come, first-served order for allocating the \$100 million in new home credit to taxpayers.

Q 78. Will a buyer receive a notification of credit allocation from the Franchise Tax Board?

A Yes. The FTB will provide the buyer with confirmation certifying the allocation of tax credit. An allocation of credit, however, may not be issued under any of the following circumstances:

- The home has been previously occupied.
- The application is not received within one week after close of escrow.
- The application is received after the \$100 million total credits available have already been allocated to other people.

The FTB may request other documentation to ensure buyers have complied with the requirements of the new home credit.

Q 79. How does a taxpayer claim the new home credit?

A A taxpayer shall claim the credit on timely filed original tax returns, including returns filed on extension (see Cal. Rev. & Tax Code § 17059(e)(2)). No credit shall be allowed unless the taxpayer's tax return includes a certification by the seller that the property has never been previously occupied (Cal. Rev. & Tax Code § 17059(b)(2)).

Furthermore, according to the FTB, the buyer must receive an allocation of credit from the FTB to claim the credit. The credit allocation letter will state the amount the buyer can claim listed by tax year.

FTB will issue Publication 3528 for instructions on claiming the new home credit (to be published by December 2009).

Q 80. What happens if a taxpayer claims the new home credit on his or her tax returns not realizing that \$100 million dollar has already been allocated?

A If a credit is disallowed because, among other things, the \$100 million limit has been met, the FTB will treat the tax return as containing a mathematical error and assess the appropriate tax if any (Cal. Rev. & Tax Code § 17059(e)(4)(B)).

Q 81. What happens if a taxpayer fails to occupy the property as a principal residence for two years after purchase?

A If a taxpayer fails to occupy the property for at least two years immediately following the purchase, the credit shall be cancelled and the taxpayer must repay any credit allowed on previous tax returns (Cal. Rev. & Tax Code § 17059(b)(3)).

Q 82. Where can I get more information about the new home tax credit?

A This law pertaining to the new home tax credit is set forth at section 17059 of the California Revenue and Taxation Code. The full text of this law is available at the California Legislative Counsel website at www.leginfo.ca.gov.

The Franchise Tax Board may prescribe rules, guidelines to carry out the purposes of this law (Cal. Rev. & Tax Code § 17059(f)). It provides additional information on its website at www.ftb.ca.gov/individuals/New_Home_Credit.shtml. Instructions are also available on the “Instructions for 3528 A” attached to Form FTB 3528 A, Application for New Home Credit. The FTB will also issue a Publication 3528 for instructions on claiming the new home credit (to be published by December 2009).

B. 90-DAY EXTENSION TO FORECLOSURE PROCESS

Q 83. *What, in a nutshell, is the new law extending the foreclosure process by 90 days?*

A Under the new California Foreclosure Prevention Act, lenders foreclosing on certain loans are prohibited from giving a notice of sale until the lapse of at least 3 months plus 90 days after the filing of the notice of default (see Question 88). A loan servicer can obtain an exemption from this requirement by demonstrating that it has a comprehensive loan modification program (see Questions 89 to 94).

Q 84. *What is the purpose of this law?*

A The purpose of this law is to try to stem the tide of foreclosures and their adverse consequences by providing additional time for lenders to work out loan modifications with borrowers as well as creating an incentive for lenders to establish comprehensive loan modification programs.

Q 85. *When will this law be in effect?*

A This bill, which was enacted into law on February 20, 2009 along with the state budget, will go into effect 90 days thereafter which will be on or about May 22, 2009. The appropriate commissioners must adopt regulations to carry out this law no more than 10 days after the date this law takes effect (Cal. Civil Code § 2923.53(d)). The law becomes operative 14 days after the issuance of such regulations (Cal. Civil Code § 2923.52(d)).

This law will stay in effect only until January 1, 2011 at which time it will be repealed, unless it is deleted or extended by statute (Cal. Civil Code § 2923.52(d)).

Q 86. *How does this new law affect the foreclosure timeline?*

A Under preexisting law, a lender who files a notice of default in the foreclosure process must wait at least 3 months before giving a notice of sale (Cal. Civil Code § 2924). The new law extends that 3-month period by an additional 90 days.

Also under preexisting law, the general rule of thumb is that the entire foreclosure process takes a minimum of 4 months from the filing of a notice of default until the final trustee's sale. Under the new law, that general rule of thumb is extended by 90 more days for a total of about 7 months, unless the lender is exempt. For more information about the foreclosure process, C.A.R. offers a legal article entitled [Foreclosure Timeline](#).

Q 87. Under the new law, is the minimum time frame from the filing of a notice of default to the notice of sale a total of 6 months or 180 days?

A Neither. The way the law is written, the minimum time frame from the filing of the notice of default to the notice of sale is technically "3 months plus 90 days."

Q 88. What type of loan falls under the new law extending the foreclosure process by 90 days?

A Unless otherwise exempt, the 90-day extension to the foreclosure process applies to loans that meet all of the following requirements:

- The loan was recorded from January 1, 2003 to January 1, 2008, inclusive;
- The loan is secured by a first deed of trust for residential real property;
- The borrower occupied the property as a principal residence at the time the loan became delinquent; and
- A notice of default has been recorded on the property.

(Cal. Civil Code § 2923.52(a).)

Q 89. What are the exceptions to the new law extending the foreclosure process by 90 days?

A Most notably, a loan servicer is exempt from the 90-day extension to the foreclosure process if the loan servicer has obtained an order of exemption based on the implementation of a comprehensive loan modification program (Cal. Civil Code § 2923.53(a)) (see Questions 89 to 94). The order of exemption must be current and valid at the time the notice of sale is given (Cal. Civil Code § 2923.52(b)).

Other exceptions to the 90-day extension include the following:

- Certain state or local public housing agency loans (Cal. Civil Code § 2923.52(c)).
- When a borrower has surrendered the property as evidenced by a letter confirming the surrender or delivery of the keys to the property to the lender or authorized agent (Cal. Civil Code § 2923.55(a)).
- When a borrower has contracted with any person or entity whose primary business is advising people who have decided to leave their homes on how to extend the foreclosure process and avoid their contractual obligations to the lenders (Cal. Civil Code § 2923.55(b)).

- When a borrower has filed a bankruptcy case and the court has not entered an order closing or dismissing the case or granting relief from a stay of foreclosure (Cal. Civil Code § 2923.55(c)).

Q 90. *What constitutes a comprehensive loan modification program?*

A A comprehensive loan modification program that may exempt the loan servicer from the 90-day extension to the foreclosure process includes all of the following features:

- The loan modification program is intended to keep borrowers whose principal residences are located in California in those homes when the anticipated recovery under loan modification exceeds the anticipated recovery through foreclosure on a net present value basis (Cal. Civil Code § 2923.53(a)).
- It targets a 38 percent or less ratio of the borrower's housing-related debt to the borrower's gross income (Cal. Civil Code § 2923.53(a)). Housing-related debt is debt that includes loan principal, interest, property taxes, hazard insurance, flood insurance, mortgage insurance and homeowner association fees (Cal. Civil Code § 2923.53(k)(2)).
- It includes some combination of loan modifications terms as specified (Cal. Civil Code § 2923.53(a)) (see Question 91).
- The loan servicer seeks long-term sustainability for the borrower (Cal. Civil Code § 2923.53(a)).

Q 91. *What are the loan modification terms that must be included in a comprehensive loan modification program?*

A A comprehensive loan modification program that may qualify for exemption from the new law extending the foreclosure process by 90 days must include some combination of the following features:

- An interest rate reduction, as needed, for a fixed term of at least five years;
- An extension of the amortization period for the loan term to no more than 40 years from the original date of the loan;
- Deferral of some portion of the unpaid principal balance until loan maturity;
- Principal reduction;
- Compliance with a federally mandated loan modification program; or
- Other factors that the appropriate commissioner determines.

(Cal. Civil Code § 2923.53(a)(3).) See also Question 92.

Q 92. *Does a loan servicer have to modify loans to get an exemption from the 90 day extension to the foreclosure process?*

A No. A loan servicer is not required to modify a loan for a borrower who is not willing or able to pay under the modification. Furthermore, a loan servicer is not required to violate any contractor agreement for investor-owned loans. (Cal. Civil Code § 2923.53(i).)

Q 93. How does a loan servicer obtain an order of exemption from the new law extending the foreclosure process by 90 days?

A A loan servicer may apply to the appropriate commissioner (see Question 94) for an order exempting loans that it services from the new law extending the foreclosure process by 90 days (Cal. Civil Code § 2923.53(b)(1)). Upon receipt of an initial application for exemption, the commissioner must issue a temporary order exempting the mortgage loan servicer from the 90-day extension to the foreclosure process (Cal. Civil Code § 2923.53(b)(2)). Within 30 days of receipt of the application, the commissioner must make a final determination by issuing a final order exempting the loan servicer or denying the application (Cal. Civil Code § 2923.53(b)(3)). If the application is denied, the temporary order of exemption shall expire 30 days after the date of denial (Cal. Civil Code § 2923.53(b)(1)).

Q 94. To which commissioner does a loan servicer apply for exemption?

A A lender or loan servicer would apply for an exemption to the following commissioner as appropriate:

- Commissioner of the Department of Financial Institutions for commercial and industrial banks, savings associations, and credit unions organized in California to service mortgage loans;
- Commissioner of the Department of Real Estate for licensed real estate brokers servicing mortgage loans; and
- Commissioner of the Department of Corporations for licensed residential mortgage lenders and servicers, licensed finance lenders and brokers, and any other entities servicing mortgage loans not regulated by the Department of Financial Institutions or Department of Real Estate.

(Cal. Civil Code § 2923.53(k)(1).)

Q 95. How does a homeowner ascertain whether his or her loan servicer is exempt from the 90-day extension to the foreclosure process?

A The Secretary of Business, Transportation and Housing must maintain a publicly-available Internet website disclosing the final orders granting exemptions, the date of each order, and a link to Internet websites describing the loan modification programs (Cal. Civil Code § 2923.52(f)) (see also Question 96).

Q 96. Does a loan servicer have to inform the borrower as to whether the loan servicer is exempt from the longer foreclosure timeframe?

A Yes. A notice of sale must include a declaration from the loan servicer stating both of the following:

- Whether the loan servicer has obtained a final or temporary order of exemption from the 90-day extension to the foreclosure process that is current and valid on the date the notice of sale is filed; and
- Whether the 90-day extension to the foreclosure process under the new law does not apply.

The law requires the loan servicer's declaration of exemption on the notice of sale, even though it may have been more helpful for the borrower if the declaration was on the notice of default. This requirement will stay in effect only until January 1, 2011 at which time it will be repealed, unless it is deleted or extended by statute. (Cal. Civil Code § 2923.54.)

Q 97. *What is the penalty for violating this law?*

A Anyone who violates this law shall be deemed to have violated his or her license law as it relates to these provisions (Cal. Civil Code § 2923.53(h)).

Q 98. *Where do I find this law?*

A This law is set forth at sections 2923.52 to 2923.55 of the California Civil Code. The full text of this law is available at the California Legislative Counsel website at www.leginfo.ca.gov.

V. ADDITIONAL INFORMATION

Q 99. *What should REALTORS® do if their clients ask for legal or tax advice?*

A REALTORS® should be careful not give legal or tax advice to their clients. Instead, REALTORS® should encourage their clients to seek the advice of an attorney, accountant, or other professional as appropriate.

Q 100. *Where can I obtain more information?*

A This legal article is just one of the many legal publications and services offered by C.A.R. to its members. For a complete listing of C.A.R.'s legal products and services, please visit C.A.R. Online at www.car.org.

Readers who require specific advice should consult an attorney. C.A.R. members requiring legal assistance may contact C.A.R.'s Member Legal Hotline at (213) 739 8282, Monday through Friday, 9:00 a.m. to 6:00 p.m. C.A.R. members who are broker-owners, office managers, or Designated REALTORS® may contact the Member Legal Hotline at (213) 739 8350 to receive expedited service. Members may also fax or e-mail inquiries to the Member Legal Hotline at 213.480.7724 or legal_hotline@car.org. Written correspondence should be addressed to:

CALIFORNIA ASSOCIATION OF REALTORS®
Member Legal Services
525 South Virgil Avenue
Los Angeles, California 90020

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