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Foreclosure Scams and the Foreclosure Consultant Law

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I. INTRODUCTION

REALTORS® commonly consider the filing of a notice of default as the beginning of the foreclosure process. However, it may also be the start of something sinister. The public recording of a notice of default can act as a beacon to unscrupulous people who, under the guise of offering assistance, seek to take advantage of homeowners in distress. To protect homeowners in foreclosure, California's foreclosure consultant law strictly regulates the activities of people who perform foreclosure-related services, including real estate agents to a limited extent.

This legal article discusses the issues surrounding foreclosure-related scams, with special attention given to the ways that REALTORS® and their clients can distinguish between legitimate and illegal enterprises. This article also provides REALTORS® with legal and practical guidelines for complying with the foreclosure consultant law.

II. FORECLOSURE-RELATED SCAMS

Q 1. *What is a foreclosure-related scam?*

A A foreclosure-related scam is a loose term for fraud, deceit, or trickery perpetrated against

homeowners facing foreclosure or others involved in the foreclosure process. With the rise in foreclosures in the mid-2000s, foreclosure-related scams have exploded onto the real estate scene. Some con artists offer to help homeowners in foreclosure, but in truth, merely intend to dupe the distressed homeowners out of their money or property (see, more specifically, Question 5). Other scams target real estate agents, investors, buyers, lenders, tenants, or other people involved in the foreclosure process.

Q 2. *How could someone fall victim to a foreclosure-related scam?*

A A scam artist generally knows which victims to target and which buttons to push. Homeowners facing foreclosure are highly vulnerable to scams. They are often unable to comprehend or get help for the complicated legal, financial, and tax issues surrounding foreclosures, short sales, loan modifications, and bankruptcies. Moreover, they often experience difficulty handling the stress and stigma of possibly losing their homes through foreclosure. Because homeowners are likely to consider purchasing a home as one of the most important things that they have ever done, the anxiety from possibly losing that home may cause them to make bad decisions. Some homeowners are specifically targeted by scam artists because they are perceived as easy prey, such as people who are elderly, have language barriers, have limited resources, or lack knowledge. Given all these circumstances, homeowners in foreclosure can easily succumb to a scam artist's lure of a quick fix. As a victim of the Community Home Savers scam discussed in Question 6 said, "When you're down and out you'll believe anything."

Aside from homeowners, real estate agents and others involved in the foreclosure process are also vulnerable to scams, especially given the financial strain brought about by a down real estate market. Some agents merely get caught in the crossfire between the scam artist and homeowner in foreclosure. Others are reeled in by design because their participation may facilitate or lend legitimacy to the fraudulent schemes. Agents are also targeted for their leads as they are often the first point of contact for a homeowner in distress, such as outfits that claim they will do short sale consulting. Agents may also get tricked into paying for bogus foreclosure related marketing tools, farming lists, training seminars, coaching services, and other products or services.

Q 3. *Is there a simple way to detect if someone is a scam artist?*

A No. Outwardly, scam artists do not act or appear dastardly. On the contrary, the typical scam artists look nice and clean-cut, and they seem kind, helpful, patient, and trustworthy. Their purported companies or organizations often have names that sound altruistic, such as Community Home Savers or Housing Assistance Services (see Question 6).

Scam artists commonly engage in "affinity marketing" tactics which means they attempt to lure people by being, or pretending to be, members of the same racial, religious, social, or other group as their victims. For example, a scam artist may claim to be in the military and use military terms and mannerisms in an attempt to befriend someone in the military. Or another scammer may join a church to gain the trust of other members of that church before attempting to defraud them. Scam artists may also use many other tactics, such as claiming to be conducting official business for a government entity, claiming to be a non-profit organization, or offering a money-back guarantee, just to name a few.

Q 4. *When dealing with someone, what are the red flags of a foreclosure-related scam to watch out for?*

A Homeowners in foreclosure and their real estate agents should be wary when dealing with someone who does any of the following:

- Asks for money upfront before providing any service;
- Asks for payment only in the form of cash, cashier's check, or wire transfer;
- Asks for a transfer of title or an interest in the property;
- Gives an unqualified promise to stop foreclosure or other assurances;
- Offers to buy a home for a price above its market value;
- Asks for something to be done immediately without delay;
- Asks for the homeowner to give a power of attorney;
- Asks for signatures on a grant deed or deed of trust;
- Asks for signatures without giving homeowner a lot of time to review the documents;
- Asks for signatures on a document that has lines left blank;
- Fails to provide copies of documents signed;
- Refuses or fails to provide an oral promise in writing;
- Instructs a homeowner to make mortgage payments to someone other than the lender; or
- Instructs a homeowner not to discuss the situation with the lender, housing counselor, accountant, attorney, family, friends, or others.

Additionally, for acts prohibited under the foreclosure consultant law, see Question 40. For things a person can do to take a proactive stance against scams, see Question 9.

Q 5. How does a foreclosure scam work?

A There are many different types of foreclosure-related scams, and new types of scams sprout up every day. These foreclosure-related scams can be loosely categorized as follows:

- **Phantom Help:** In this type of scam, the scam artist offers to negotiate with the lender or perform other foreclosure-related services for the homeowner in exchange for a fee. However, in reality, the scammer performs little or no service at all and eventually absconds with the money. Whatever services the scam artist does provide, the homeowner could have probably done on his or her own. The homeowner ends up not only losing the money, but often loses valuable time to make other arrangements to save his or her home from foreclosure.
- **Bail-Out:** This scam involves a con artist who offers some sort of plan or scheme to get the homeowner out of his or her predicament. One common example is the rent-to-buy scheme where the scam artist promises to take title to the property, cure the default, and rent the property back to the homeowners until they get back on their feet again and buy back the property. What in fact happens is that the scam artist reneges on these promises by, for example, not curing the default, not honoring the rent-back agreement, or selling the property to an unsuspecting buyer.
- **Bait-and-Switch:** This is another common type of scam where, for example, the scam artist tells the homeowner to sign one thing, but the homeowner ends up signing something else altogether, such as the grant deed to the property.

In addition to the above categories, there are many other types of foreclosure-related scams, including forgeries, theft, identity theft, property flipping scams, loan fraud, predatory lending practices, pyramid schemes, ponzi schemes, bankruptcy fraud, landlord-tenant fraud, short sale consulting fraud, and bank-owned property or REO fraud. A scam can be a highly elaborate scheme or as crude and simple as a "We Buy Homes" or "Stop Foreclosure Now" sign on a telephone pole at the side of a road. For real-life examples of foreclosure scams, see Questions 6 and 7.

Q 6. What are some real-life examples of foreclosure-related scams that target homeowners?

A Here are some real-life examples of foreclosure-related scams perpetrated in California:

- **Housing Assistance Services in Garden Grove, California:** Marc Sheckler's company, Housing Assistance Services, Inc. (HAS), targeted homeowners in Orange County when they received notices of default. HAS mass marketed official-looking "Fresh Start Program" letters in the mail offering to provide counseling on the options for avoiding foreclosure and to negotiate loan modifications with the lenders. To sign up, a homeowner paid an upfront basic fee of \$750 to \$1,250 and agreed to pay additional fees for credit reports, "docusave" services, processing reinstatements, monitoring repayment plans, and financial education materials. HAS representatives instructed homeowners not to talk to their mortgage lenders. Whenever homeowners voiced concern about the impending foreclosure sale, HAS reassured the homeowners that things would be worked out. The California Attorney General's Office received numerous complaints from consumers who paid the fees, but claimed that HAS never provided the services as promised. In 2004, California Attorney General Bill Lockyer filed a \$2 million lawsuit against HAS and obtained a court order freezing HAS's assets.

- **Rodriguez in Downey, California:** From 2003 to 2005, Martha Rodriguez and others ran a foreclosure rescue scam in Southern California. They located their victims using computerized lists of properties going into foreclosure. The defrauders promised to help homeowners refinance their loans and save their credit, but what they did in reality was arrange for straw buyers to buy the homes. By the time the defrauders were finally caught by the authorities, they had victimized over 100 homeowners and amassed over \$12 million. Rodriguez ran this scam while awaiting sentencing on another loan fraud scheme. In February 2007, she pleaded guilty to criminal charges for the foreclosure rescue scam and faces a possible sentence of 40 years in federal prison.

- **Rice in Orange County, California:** In 1990, Evelyn Onofrio's home was in foreclosure when Marshall Rice paid her a house call. He offered to help her but did not give her a written foreclosure consultant contract. He arranged a secured loan for her, but at 35% interest payable to Rice's own wife. When Onofrio defaulted on the loan, Rice and his wife commenced foreclosure proceedings and acquired the property at the trustee's sale. Onofrio sued Rice for, among other things, violating the foreclosure consultant law and breaching his fiduciary duties as a real estate broker. Rice violated the foreclosure consultant law by, among other things, acquiring an interest in the property and failing to provide a written foreclosure consultant contract. The court awarded Onofrio monetary damages, attorneys' fees, and costs, and cancelled not only the transfer of title to Rice, but the relevant deeds of trust as well. This case is *Onofrio v. Rice* (1997) 55 Cal .App. 4th 413.

- **Alburez and Silva in Alameda, California:** Sonia Alburez and Verena Silva went by several names, such as Community Home Savers and California Home Saver Program. They used lists of homes in default from the county recorder's office to send out mailers to homeowners in foreclosure. They allegedly told homeowners that, for an upfront fee plus additional monthly payments, they could save their homes from foreclosure. In reality, Alburez and Silva merely transferred a fractional interest of a home to a sham corporation. The sham corporation would then file bankruptcy, but as soon as the foreclosing lender challenged the bankruptcy, the sham would be

uncovered and the foreclosure would resume. Alburez and Silva were arrested in Alameda County in March 2008.

• **Hutchings in San Diego, California:** William Hutchings and his cohorts ran a foreclosure rescue scam in San Diego for over two years, and duped hundreds of homeowners out of their homes and money. Targeting mostly non-English-speaking homeowners, Hutchings held seminars on how he could help homeowners stop foreclosures by transferring title to their homes to his company. He claimed he could file a governmental land grant on their behalf which would extinguish their mortgages in four years, at which time the homeowners could reacquire their homes from Hutchings free and clear. He bolstered his claims by using visual aids, such as antiquated maps and land surveys. In reality, the last legitimate use of a land grant was in 1848 when Mexico ceded property to the U.S. at the end of the Mexican-American War. Yet, someone who attended one of Hutchings' seminars observed that, when the seminar concluded, the homeowners would flood to the back of the room to stand in line to sign up for the program by signing over their properties and paying up to \$10,000 upfront. Hutchings and the others were arrested in May 2008 and face over 100 felony charges.

Q 7. *What are some real-life examples of foreclosure-related scams that target people other than homeowners?*

A Many people other than homeowners may be victimized by foreclosure-related scams, including real estate agents, investors, buyers, lenders, tenants, and others. Some real-life examples of this type of foreclosure-related scams in California are as follows:

• **Standefor in Pasadena, California:** Jeanetta Standefor of Accelerated Funding Group operated a fraudulent foreclosure reinstatement scheme for over two years. She convinced over 600 people to invest a total of \$18 million by claiming the funds would be used to cure defaults for distressed properties and promising a return of 50 percent in one month. What Standefor was actually doing was operating a ponzi-like scheme using the money from new investors to pay previous investors. She also used \$1.9 million of the funds for her own lavish wedding, cars, jewelry, and other personal expenses. In 2008, Standefor was charged with both civil and criminal fraud and securities violations, and faces a statutory maximum sentence of 180 years in federal prison.

• **Davis of Tiburon, California:** Mark Allen Davis placed over 100 newspaper ads around the country from 2004 to 2007 offering callers a list of government foreclosures in their areas for a one-time fee of \$83 to \$93. Customers were told to call a toll-free phone number, and then instructed to leave their names and bank account information for verification purposes. Davis never sent the lists. Instead, he withdrew \$126 to \$185 from the accounts of 800 people, totaling over \$400,000. When caught, Davis was fined over \$328,000 and sentenced to 81 months in federal prison for identity theft, mail fraud, and wire fraud.

Q 8. *What are the legal remedies for a victim of foreclosure-related scams?*

A In theory, there are various legal remedies for a victim of foreclosure-related scams, but in reality, the legal remedies may leave a lot to be desired. As in the real-life examples mentioned above, one legal remedy for a foreclosure-related scam is criminal prosecution. A fraud victim may pursue criminal prosecution by reporting the offense to local, state, and federal law enforcement authorities. However, law enforcement authorities have a broad discretion for which crimes to investigate and prosecute, and they often devote their limited resources towards pursuing other crimes, such as murder, robbery, and drug violations.

A foreclosure-related scam is also a civil offense. In addition to pursuing a criminal offense, a fraud victim may file a civil lawsuit to obtain a monetary judgment for damages suffered or other relief as appropriate. However, the typical fraud victim's obstacles to filing a lawsuit for fraud include, without

limitation, locating the defrauder's whereabouts, locating the defrauder's assets, proving the elements of fraud, and having the resources to hire and pay for an attorney if needed.

Depending on the circumstances, a foreclosure-related scam may also be the subject matter of a complaint to a governmental agency, such as the California Department of Real Estate (DRE) or Department of Corporations (DOC). The DRE or DOC may issue an order to stop unlicensed activity. However, the function of the DRE, DOC, or even criminal prosecutors is to stop violations of the law, not necessarily to get fraud victims their money back or other relief sought. Nevertheless, the actions of the governmental agencies may occasionally result in recovery for the individual fraud victim as well.

A list of government enforcement agencies and other organizations for reporting fraud activities is set forth in Question 48. Some of these agencies and organizations are also good resources for obtaining more information about foreclosure-related fraud.

Q 9. *What should homeowners and others do to protect themselves against foreclosure-related scams?*

A The basic rule is "if it sounds too good to be true, it probably is." Other measures to take to protect against scams include, but are not limited to, the following:

- Do not panic. Do not make any rash decisions. It's precisely when our chips are down that we must keep a clear head.
- Before entering into any agreement or other arrangement with anyone, understand every aspect of what it entails. Read documents carefully and thoroughly before signing. If you cannot understand a document, seek the advice of an attorney or other professional as appropriate. If you do not speak the same language as the person you're negotiating with, don't use that person's interpreter or translator -- bring your own instead.
- Do not sign your name to any false statements or documents with spaces left blank, especially if you're told that signing will be harmless or inconsequential.
- Get as much information as you possibly can before making a decision. Ask questions. Conduct as much research and investigation as you can upfront (see Question 10). Do your best to understand the legal, financial, and tax consequences of your situation. Look into different options. Ask for advice and help from trusted family, friends, and professionals if appropriate.
- Always try to stay a step ahead of scam artists. As society comes to know to watch out for one type of scam, con artists attempt to catch their victims off guard by devising new schemes. For example, with greater public awareness that a "foreclosure consultant" representative must, among other things, be licensed and bonded (see Question 42), scam artists may start presenting themselves as something else, such as loan mediators, loan facilitators, legal officers, and so on.

Q 10. *How does someone check on the legitimacy of a foreclosure consultant or other foreclosure-related business?*

A There are many ways to check the legitimacy of a foreclosure consultant or other foreclosure-related business. Before doing business with anyone, ask for references and check out those references. Also check someone's background, credentials, and reputation. Check with licensing agencies, trade groups, friends, family, and other people you trust. However, even if someone has the proper credentials or comes highly recommended, the risk of a scam is less, but is not

eliminated entirely.

Some of the resources for checking licensing and registration include the following:

- To check whether a corporation or limited liability company (LLC) is registered with the California Secretary of State, go to its Web site at <http://kepler.sos.ca.gov/list.html>.
- To check whether a fictitious business names is registered, check with the local county recorder's office.
- For real estate licensed activities, to check whether someone has a real estate license, go to the California Department of Real Estate (DRE) Web site at <http://www2.dre.ca.gov/PublicASP/pplinfo.asp>. To check whether someone is licensed with the DRE, the Office of Real Estate Appraisers, the Department of Corporations, or the Department of Financial Institutions, go to http://www.dre.ca.gov/gen_lic_info.html. Short sale consultants and representatives of foreclosure consultants should generally be real estate licensees (see Question 43).
- For legal services, to check whether someone is licensed to practice law in California, go to the State Bar of California Web site at <http://members.calbar.ca.gov/search/member.aspx>.

Q 11. *Where can homeowners find legitimate help for foreclosure-related matters?*

A The conventional wisdom is for homeowners facing foreclosure to contact their lender immediately. Homeowners may also seek the advice of a reputable housing, financial or credit counselor, attorney, or other qualified professional. The U.S. Department of Housing and Urban Development (HUD) has a Guide to Avoiding Foreclosure on its Web site at www.hud.gov/foreclosure/index.cfm. For a list of HUD-approved housing counseling agencies in California, go to <http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm?&webListAction=search&searchstate=CA>. Also, the non-profit organization Homeownership Preservation Foundation has a 24/7 toll-free Homeowner's HOPE Hotline at (999) 995-HOPE or visit its Web site at <http://www.995hope.org>.

III. FORECLOSURE CONSULTANT LAW

California has very stringent rules for foreclosure consultants who offer to perform certain foreclosure-related services, such as stopping or postponing a foreclosure sale or assisting a homeowner in foreclosure in obtaining a loan. The foreclosure consultant law is a very complicated body of law. However, knowing these rules helps REALTORS® and their clients distinguish between legitimate and illegal enterprises.

A. GENERAL OVERVIEW OF THE FORECLOSURE CONSULTANT LAW

Q 12. *What, in a nutshell, is the foreclosure consultant law?*

A The foreclosure consultant law generally regulates the activities of people who provide, or offer to provide, foreclosure-related consultation services, such as helping a homeowner stop or postpone a foreclosure sale. This law requires that foreclosure consultant contracts to be in writing in the manner specified (see Questions 33 to 35). It also provides other safeguards for homeowners in foreclosure (see Questions 31 and 32). Most notably, it prohibits a foreclosure consultant from collecting an upfront fee (see Question 40). The law requires representatives of a foreclosure consultant to be bonded real estate licensees (see Questions 41 and 42). Effective July 1, 2009, a foreclosure consultant must also be bonded and registered with the California Department of Justice

(see Questions 44 and 45).

Real estate agents are generally exempt from the foreclosure consultant law except when engaging in certain activities, such as acquiring an interest in the property or making a direct loan. The applicability of this law to REALTORS® is discussed in Questions 19 to 25.

Q 13. *Is this a new law?*

A No. The foreclosure consultant law is not a new law. It was originally enacted in 1979. However, on September 25, 2008, the California legislature enacted major revisions to the law with the passage of Assembly Bill 180 (see Question 32).

Q 14. *Where can I find the foreclosure consultant law?*

A This law is called the "Mortgage Foreclosure Consultant Law" (but is referred to in this article as foreclosure consultant law) and can be found in section 2945 to 2945.45 of the California Civil Code, available at www.leginfo.ca.gov. References in this legal article are made to the foreclosure consultant law as revised in 2008 and effective July 1, 2009, unless otherwise indicated.

Q 15. *What is the purpose of the foreclosure consultant law?*

A The purpose of the foreclosure consultant law is to safeguard the public against unscrupulous foreclosure consultants. According to the California legislature, homeowners in foreclosure are susceptible to fraud, deception, harassment, and unfair dealings. Scam artists who offer to help in fact want to take advantage of the homeowners' predicament. These so-called foreclosure consultants may charge exorbitant fees, and even secure payment by a deed of trust on the home in foreclosure, yet ultimately perform no worthwhile service at all. Homeowners relying on their foreclosure consultants' promises of help may take no other action to stop the foreclosure process. As a result, they may end up losing their homes and their equity, sometimes to the foreclosure consultants who buy the homes at a fraction of their true value. The California legislature intends for the foreclosure consultant law to be liberally construed to prevent these unscrupulous practices. (Cal. Civ. Code § 2945.)

Q 16. *Is the foreclosure consultant law different from the home equity sales contracts law for buyers who are investors?*

A Yes. The foreclosure consultant law and home equity sales contracts law are similar to each other, but different bodies of law. Both laws pertain to "residences in foreclosure" as defined (see Question 17). However, the foreclosure consultant law generally regulates people who offer to perform foreclosure-related consultation services for residences in foreclosure, whereas the home equity sales contracts law generally regulates investors who offer to buy residences in foreclosure.

More specifically, the home equity sales contracts law imposes certain requirements when all four of the following conditions are met:

- The existing owner occupies the property as a principal residence;
- The property is one-to-four family dwelling units;
- There is an outstanding notice of default recorded against the property; and
- The buyer will not use the property as a personal residence.

(Cal. Civ. Code § 1695.1(b).)

When these four conditions are met and no exemption applies, the law requires a sales contract to provide the seller with a right to cancel within five business days (or by 8 a.m. of the day of the trustee's sale if sooner) (Cal. Civ. Code § 1695.4). The contract must also be in 10-point bold font and in the same language principally used by the parties to negotiate the sale (Cal. Civ. Code § 1695.2). Furthermore, under the home equity sales contract law, the buyer's representative must provide proof of a real estate license (Cal. Civ. Code § 1695.17).

To comport with these and other requirements, C.A.R. offers a standard form *Notice of Default Purchase Agreement* (Form NODPA) and two attachments, the *Notice of Cancellation of Notice of Default Purchase Agreement* (Form HENC) and the *Declaration and Proof of Real Estate License* (Form DPL). For more information about home equity sales contracts, REALTORS® may refer to C.A.R.'s legal article [NOD and Investor-Buyer Transactions: Home Equity Sales Contracts](#).

B. APPLICABILITY OF FORECLOSURE CONSULTANT LAW

Q 17. Under what circumstances does the foreclosure consultant law apply?

A The foreclosure consultant law generally applies when someone performs, or offers to perform, foreclosure-related services for compensation for a "residence in foreclosure" (see Question 18). A "residence in foreclosure" is defined as follows:

- The owner occupies the property as a principal residence;
- The property is one to four family dwelling units; and
- There is an outstanding notice of default recorded against the property.

(Cal. Civ. Code § 2945.1(f) (citing Cal. Civ. Code § 1695.1).)

Q 18. What types of activities fall within the scope of the foreclosure consultant law?

A A very broad range of activities fall within the scope of the foreclosure consultant law. In brief, a foreclosure consultant is someone who assists a homeowner with an impending foreclosure. More specifically, the law defines a "foreclosure consultant" as someone who, for compensation, performs or offers to perform any of the following services for an owner of a residence in foreclosure:

- Stopping or postponing the foreclosure sale (Cal. Civ. Code § 2945.1(a)(1));
- Obtaining a forbearance from a lender (Cal. Civ. Code § 2945.1(a)(2));
- Saving the owner's residence from foreclosure (Cal. Civ. Code § 2945.1(a)(8));
- Helping the owner obtain a loan or advance of funds (Cal. Civ. Code § 2945.1(a)(6));
- Avoiding or ameliorating the impairment of the owner's credit resulting from the notice of default or foreclosure sale (Cal. Civ. Code § 2945.1(a)(7));
- Assisting the owner in exercising the right of reinstatement under section 2924c of the California Civil Code (Cal. Civ. Code § 2945.1(a)(3));
- Obtaining an extension for the owner to reinstate his or her obligation (Cal. Civ. Code § 2945.1(a)(4));

- Obtaining a waiver of an acceleration clause contained in a mortgage loan secured by a residence in foreclosure (Cal. Civ. Code § 2945.1(a)(5)); or
- Assisting the owner in obtaining, from the lender or trustee under a power of sale, the remaining proceeds from the foreclosure sale of the owner's residence (Cal. Civ. Code § 2945.1(a)(9)).

Under the foreclosure consultant law, an "offer to perform" these foreclosure-related services includes any solicitation or representation to perform these services (Cal. Civ. Code § 2945.1(a)).

Foreclosure consultant services also include, but are not limited to, the following:

- Providing debt, budget, or financial counseling of any type (Cal. Civ. Code § 2945.1(e)(1));
- Giving any advice or explanation on curing a default, reinstating an obligation, fully satisfying an obligation, postponing a trustee's sale, or avoiding a trustee sale (Cal. Civ. Code § 2945.1(e)(7));
- Contacting creditors on the owner's behalf (Cal. Civ. Code § 2945.1(e)(3));
- Arranging or attempting to arrange for any delay or postponement of a foreclosure sale (Cal. Civ. Code § 2945.1(e)(5));
- Arranging or attempting to arrange for an extension for owner to cure a default and reinstate an obligation under section 2924c of the California Civil Code (Cal. Civ. Code § 2945.1(e)(4));
- Receiving money to pay a creditor of any obligation secured by a lien on the residence in foreclosure (Cal. Civ. Code § 2945.1(e)(2));
- Advising on, or assisting in preparing, any document for filing with a bankruptcy court (Cal. Civ. Code § 2945.1(e)(6)); or
- Arranging or attempting to arrange for the payment by the lender or trustee under power of sale of the remaining proceeds of a foreclosure sale of the owner's residence, including instances where the owner transfers or assigns such right to the foreclosure consultant or the foreclosure consultant's designee (Cal. Civ. Code § 2945.1(e)(8)).

Q 19. *Is a real estate agent exempt from the foreclosure consultant law?*

A In most cases, yes. As a general rule of thumb, a real estate agent who engages in typical real estate licensed activities is exempt from the foreclosure consultant law (but see Question 20). For example, the foreclosure consultant law is unlikely to apply in the typical situation where a listing agent takes a listing for a residence in foreclosure, markets the property for sale, and represents the seller in a subsequent sale. The foreclosure consultant law is also unlikely to apply in the typical situation where a buyer's agent represents the buyer in purchasing a residence in foreclosure (but see, in contrast, the home equity sales contract law discussed in Question 16). The foreclosure consultant law is also unlikely to apply if a real estate licensee helps a homeowner in foreclosure to modify an existing loan or refinance with a third-party lender.

More specifically, a real estate licensee engaging in licensed activities is exempt from the foreclosure consultant law when making a direct loan as specified (see Question 22) or when all of the following conditions are met:

- The licensee engages in acts whose performance requires a real estate license;
- The licensee is entitled to compensation for the acts performed for selling a residence in foreclosure, or arranging a loan secured by a lien a residence in foreclosure;
- The licensee does not claim, charge, or receive any compensation until the acts have been performed, or cannot be performed because of an owner's own failure to: (1) disclose any outstanding liens of record or the correct current vested title (under California Business & Professions Code section 10243); or (2) accept an offer to buy or make a loan on the residence in foreclosure from a ready, willing, and able buyer or lender based on the terms in a listing or a loan agreement;
- The licensee does not acquire any interest in a residence in foreclosure directly from the owner other than as a trustee or beneficiary under a deed of trust given to secure the payment of a loan or that compensation; and
- The licensee does not assist the owner in obtaining, from the lender or trustee under a power of a sale, the remaining proceeds from the foreclosure sale of the owner's residence.

(Cal. Civ. Code § 2945.1(b)(3) and (c).)

Q 20. Under what circumstances could the foreclosure consultant law apply to a real estate agent?

A A real estate agent may implicate the foreclosure consultant law when engaging in any of the following four activities. Stated another way, even though the law is complex, a simple way for REALTORS® to ensure that they do not implicate the foreclosure consultant law is to avoid engaging in any of the following four activities:

- **Direct Loan:** Making a direct loan for a residence in foreclosure (Cal. Civ. Code § 2945.1(b)(3)) (see Questions 22 and 23);
- **Property Interest:** Acquiring an interest in a residence in foreclosure (Cal. Civ. Code § 2945.1(b)(3)(D)) (see Question 24);
- **Advance Fee:** Claiming or receiving any compensation before performing real estate services for a residence in foreclosure (Cal. Civ. Code § 2945.1(b)(3)(C)) (see Questions 25 to 27); or
- **Foreclosure Proceeds:** Assisting an owner in obtaining the remaining proceeds if any from the foreclosure sale of an owner's residence (Cal. Civ. Code § 2945.1(c)).

Q 21. In practical terms, what are some examples of situations where the foreclosure consultant law may apply to a real estate agent?

A Let's say, for example, a listing broker offers to lend his or her own money to a homeowner in an exchange for obtaining a listing on a residence in foreclosure. Perhaps the listing broker offers the money to help the homeowner pay to fix up the property for sale or to get the homeowner out of foreclosure. In this situation where the broker makes a direct loan, the foreclosure consultant law may be implicated. For more information about making a direct loan, see Question 22.

As another example, a broker seeks to obtain a listing of a residence in foreclosure. The broker promises the homeowner that, if the broker cannot get the property sold by the date of an upcoming foreclosure sale, the broker will personally buy the property from the seller to avoid foreclosure. This scenario involving the broker acquiring an interest in the residence in foreclosure may implicate the

foreclosure consultant law. For more information about acquiring an interest in a residence in foreclosure, see Question 24.

As another example, a couple is not only in foreclosure, but also upside down on their loan. A real estate broker offers to help modify their existing loan with more favorable terms. The broker, however, wants to collect an upfront fee to make sure that he or she gets paid, regardless of whether the lender agrees to the loan modification. This scenario involving an advance fee may implicate the foreclosure consultant law. For more information about advance fees, see Questions 25 and 26.

Q 22. *Can a real estate broker make a direct loan without implicating the foreclosure consultant law?*

A Yes, if certain requirements are met. A real estate broker can make a direct loan without implicating the foreclosure consultant law, but only if all of the following conditions are met:

- The real estate broker makes a loan of the real estate broker's own funds;
- The loan is secured by a deed of trust on the residence in foreclosure;
- The broker does not acquire any interest in the residence in foreclosure directly from the owner other than as a beneficiary under the deed of trust;
- The broker makes a good faith attempt to assign the loan and deed of trust to a lender for an amount at least sufficient to cure all of the defaults on obligations which are then subject to a recorded notice of default;
- Any foreclosure sale of the deed of trust must be conducted by a disinterested party. More specifically, the law states that "if a foreclosure sale is conducted with respect to the deed of trust, the person conducting the foreclosure sale [must have] no interest in the residence in foreclosure or in the outcome of the sale and is not owned, controlled, or managed by the lending broker;" and
- The loan is not made for the purpose or effect of avoiding or evading the provisions of this law.

(Cal. Civ. Code § 2945.1(b)(3).)

The foreclosure consultant law does not specifically define what constitutes a "good faith attempt" to assign the loan and deed of trust to a lender.

Q 23. *Can a real estate salesperson make a direct loan without implicating the foreclosure consultant law?*

A Apparently not. According to the plain reading of the law, the exemption to the foreclosure consultant law for making a direct loan pertains to a real estate broker's own funds, not real estate salesperson (Cal. Civ. Code § 2945.1(b)(3)).

Q 24. *Can a real estate agent acquire an interest in a residence in foreclosure without implicating the foreclosure consultant law?*

A Probably not. A real estate agent engaging in licensed activities who acquires an interest in a residence in foreclosure implicates the foreclosure consultant law, unless such acquisition is as a

trustee or beneficiary under a deed of trust given to secure the payment of a loan or the agent's compensation (Cal. Civ. Code § 2945.1(b)(3)). To be prudent, any loan made by a real estate agent should comply with the direct loan requirements set forth in Question 22 above.

Q 25. Can a real estate agent collect an advance fee from a homeowner in foreclosure without implicating the foreclosure consultant law?

A No, in most cases. It's a double-edged sword. A real estate agent generally cannot collect an advance fee without implicating the foreclosure consultant law (Cal. Civ. Code § 2945.1(b)(3)(C)). Furthermore, if the foreclosure consultant law is implicated, it prohibits a foreclosure consultant from collecting any compensation until after the foreclosure consultant has fully performed the services as agreed (Cal. Civ. Code § 2945.4(a)).

More specifically, the law does not exempt a real estate agent from the foreclosure consultant law if he or she claims or collects any compensation before the licensed activities have been performed or cannot be performed because the owner fails to: (1) accept an offer from a buyer or lender who is ready, willing and able to buy or lend on terms set forth in a listing or loan agreement; or (2) make loan disclosures under section 10243 of the California Business and Professions Code (Cal. Civ. Code § 2945.1(b)(3)(C)).

Even if the foreclosure consultant law prohibits a real estate agent from collecting an advance fee, it is problematic for an agent to collect an advance fee anyway under general real estate licensing rules (see Question 26). Moreover, even if the foreclosure consultant law generally prohibits a real estate agent from collecting an advance fee, an agent can collect a fee upon performance of the agreed-upon services (see Question 27).

Q 26. What are the requirements for a real estate broker to collect an advance fee under general real estate licensing law?

A A real estate broker cannot collect an advance fee unless certain requirements are met. An advance fee is a fee charged upfront for services not yet performed. An advance fee is broadly defined to include a fee claimed, demanded, charged, received, collected or contracted from a principal for listing real property or negotiating real estate loans (Cal. Bus. & Prof. Code § 10026). Among other things, no less than ten calendar days before collecting an advance fee, a real estate broker must submit to the California Department of Real Estate (DRE) for approval the advance fee agreement and all other materials to be used for advertising, promoting, soliciting, or negotiating the advance fee (10 Cal. Code Reg. § 2970). Furthermore, a broker who collects an advance fee must deposit it into a trust account with a bank or other recognized depository, because the funds are not the broker's funds (Cal. Bus. & Prof. Code § 10146). Amounts may not be withdrawn on the broker's behalf until actually expended for the benefit of the principal or five days after a specified accounting is mailed to the principal (10 Cal. Code Reg. § 2972).

For a list of real estate brokers who have received "no objection" letters for their advance fee agreements, go to the DRE Web site at http://www.dre.ca.gov/mlb_adv_fees_list.html.

Q 27. If I do not collect an advance fee, how can I make sure that I get paid when I perform counseling, loan modification, or other real estate services for homeowners in foreclosure?

A Instead of collecting an advance fee, a real estate broker may collect a fee from a homeowner after performing a service that the broker has agreed to provide. The parties may agree in writing that the broker will perform certain services and charge the homeowner a fee upon performance of each distinct service. For loan modification services, a broker and homeowner may agree, for example, that the homeowner will pay a certain dollar amount after the broker provides an initial

consultation, another dollar amount after the broker prepares and submits a loan modification package to the lender, and another dollar amount after the broker has negotiated the loan modification with the homeowner's lender. Alternatively, the broker and homeowner may agree that the broker will charge a certain hourly rate for services rendered, and that the broker will collect that fee after performing each hour of work.

In sharp contrast, a foreclosure consultant falling within the foreclosure consultant law is prohibited from claiming or collecting any compensation until after the foreclosure consultant has fully performed each and every service foreclosure consultant contracted to perform or represented he or she would perform (Cal. Civ. Code § 2945.4(a)).

Q 28. *Aside from real estate agents, are there any other exceptions to the foreclosure consultant law?*

A Yes. Aside from real estate agents, the following is a list of other exemptions to the foreclosure consultant law. Other than an owner's attorney, however, anyone who assists the owner in obtaining from the lender the remaining proceeds from a foreclosure sale of the owner's residence is deemed to be a foreclosure consultant (Cal. Civ. Code § 2945.1(c)).

- An attorney rendering legal services who is licensed to practice law in California;
- A licensed accountant (under Cal. Fin. Code §§ 5000 *et seq.*);
- A person or his or her agent acting under the authority of the Department of Housing and Urban Development (HUD) or other federal or state agency;
- A person doing business under federal or state laws relating to banks, trust companies, savings and loan associations, industrial loan companies, pension trusts, credit unions, insurance companies, title company, escrow company, or HUD-approved mortgagee;
- A finance lender or broker licensed under the California Finance Lenders Law (at Cal. Bus. & Prof. Code §§ 22000 *et seq.*). The Commissioner of Corporations, however, has the authority to terminate this exclusion, after notice and hearing, for any licensee who has defrauded, deceived, harassed or unfairly dealt with a homeowner in foreclosure;
- A person licensed as a residential mortgage lender or servicer under the California Residential Mortgage Lending Act (at Cal. Fin. Code §§ 50000 *et seq.*);
- A person who holds or is owed an obligation secured by a lien on any residence in foreclosure when the person performs services in connection with this obligation or lien; or
- A prorater as defined under Cal. Fin. Code §§ 12000 *et seq.* A prorater is a person who, for compensation, engages in the business of receiving money or evidence of money for the purpose of distribution among creditors to pay a debtor's obligations (Cal. Fin. Code § 12002.1).

(Cal. Civ. Code § 2945.1(b).)

Q 29. *Does the foreclosure consultant law apply to a short sale consultant?*

A It depends. A short sale consultant is generally someone who counsels and helps a homeowner sell a property by negotiating with the homeowner's lender to accept a loan payoff of less than the balance owed. A short sale may or may not involve a residence in foreclosure. If the short sale does involve a residence in foreclosure, and the short sale consultant offers to, for compensation,

help the owner by, among other things, stopping or postponing a foreclosure sale, saving the home from foreclosure, or giving advice on satisfying an obligation, the foreclosure consultant law may be implicated (unless one of the exemptions applies). For more information about short sales, C.A.R. offers its members a legal article, [Short Sales](#).

Q 30. Does the foreclosure consultant law apply to a buyer who is a real estate licensee?

A It depends. If a buyer who is a real estate licensee acts on his or her own behalf in an arms-length transaction with a homeowner in foreclosure, the foreclosure consultant law should not apply. A prudent licensee acting as a buyer should not only use C.A.R.'s standard form *Seller Non-Agency Agreement* (Form SNA) to document the lack of an agency relationship, but should also refrain from acting as the seller's agent. On the other hand, if a buyer offers to, for example, help the homeowner in an impending foreclosure, the foreclosure consultant law may be implicated depending on the specific circumstances. For applicability of the home equity sales contracts law to buyers who are investors, see Question 16.

C. REQUIREMENTS OF THE FORECLOSURE CONSULTANT LAW

Q 31. What is currently required under the foreclosure consultant law?

A The following is a summary of the current requirements under the foreclosure consultant law:

- **Written Contract:** Anyone who engages in activities that fall within the scope of the foreclosure consultant law must enter into a written contract with the homeowner in foreclosure in the manner specified (Cal. Civ. Code § 2945.3(a)) (see Questions 33 to 35).
- **Notice of Cancellation:** The foreclosure consultant must provide the homeowner with a copy of the contract and attached Notice of Cancellation (Cal. Civ. Code § 2945.3(g)) (see Question 37).
- **Owner's Right to Cancel:** A homeowner may cancel a foreclosure consultant contract if the foreclosure consultant does not provide a written contract in the manner prescribed by law (Cal. Civ. Code § 2945.3(h)). Furthermore, until June 30, 2009, a homeowner has the right to cancel a contract within three business days after signing. Starting July 1, 2009, a homeowner has the right to cancel with five business days after signing (Cal. Civ. Code § 2945.2(a)). See Questions 38 and 39.
- **Prohibited Acts:** A foreclosure consultant is also prohibited from engaging in certain acts as set forth in Question 40.
- **Representatives:** A representative of the foreclosure consultant must provide both a written statement and proof that the representative is a bonded real estate licensee (Cal. Civ. Code § 2945.11) (see Questions 41 and 42).

Q 32. What will be required under the recent 2008 amendment to the foreclosure consultant law?

A On September 25, 2008, the California legislature enacted Assembly Bill 180 which includes major revisions to the foreclosure consultant law. The new requirements, effective July 1, 2009, are in addition to the existing requirements set forth in Question 31.

Highlights of the new revisions effective July 1, 2009 are as follows:

- **Certificate of Registration:** A foreclosure consultant must register with the California Department of Justice (Cal. Civ. Code § 2945.45(a)(1)) (see Question 44);
- **Surety Bond:** A foreclosure consultant must obtain and maintain a \$100,000 surety bond (Cal. Civ. Code § 2945.45(a)(2)) (see Question 45);
- **Other Languages:** A foreclosure consultant must, depending on the circumstances, provide the homeowner with a copy of the foreclosure consultant contract in certain languages (Cal. Civ. Code § 2945.3(c)) (see Question 37);
- **Owner's Right to Cancel:** The new law extends the homeowner's right to cancel from three business days to five business days after signing a foreclosure consultant contract (Cal. Civ. Code § 2945.2(a)) (see Question 38). The new law also clarifies that notice of cancellation may be given by mail, fax, or e-mail (Cal. Civ. Code § 2945.2(b)) (see Question 39).
- **No Power of Attorney:** A foreclosure consultant cannot take a power of attorney from the homeowner for any purpose (Cal. Civ. Code § 2945.4(f)).
- **No Surplus Funds Contract:** A foreclosure consultant cannot enter into an agreement to arrange or assist the homeowner in arranging for the release of surplus funds from a trustee's sale (Cal. Civ. Code § 2945.4(h)) (see Question 40).

Q 33. What are the requirements of a foreclosure consultant contract?

A A foreclosure consultant contract must meet all the following requirements:

- Must be in writing (Cal. Civ. Code § 2945.3(a)).
- Must fully disclose the exact nature of the foreclosure consultant's services (Cal. Civ. Code § 2945.3(a)).
- Must fully disclose the total amount and terms of the foreclosure consultant's compensation (Cal. Civ. Code § 2945.3(a)).
- Until June 30, 2009, the first page of the contract must contain, in a type size no smaller than that generally used in the body of the document, the name and address of the foreclosure consultant to whom a notice of cancellation is to be mailed. Effective July 1, 2009, the first page of the contract must contain, in a type size no smaller than that generally used in the body of the document, the name, mailing address, e-mail address and fax number of the foreclosure consultant to whom a notice of cancellation is to be sent. (Cal. Civ. Code § 2945.3(e).)
- Must contain, on the first page of the contract, in a type size no smaller than that generally used in the body of the document, the date the homeowner signed the contract (Cal. Civ. Code § 2945.3(e)).
- Must contain certain language as set forth in Questions 34 and 35.
- Must be dated and signed by the owner (Cal. Civ. Code § 2945.3(d)).
- Any provision in a contract which attempts to require arbitration of any dispute arising under the foreclosure consultant law shall be void, at the owner's option, on the same grounds as contract revocation (Cal. Civ. Code § 2945.10(a)).

Q 34. What is the exact wording required in a foreclosure consultant contract?

A A foreclosure consultant contract must contain the language set forth in the table below with the blank spaces completed (Cal. Civ. Code § 2945.3). The formatting requirements for these contractual provisions are set forth in Question 35.

Part A

NOTICE REQUIRED BY CALIFORNIA LAW

_____ (Name) or anyone working for him or her CANNOT:

- (1) Take any money from you or ask you for money until _____
 (Name) has completely finished doing everything he or she said he or she would do; and
 (2) Ask you to sign or have you sign any lien, deed of trust, or deed.

Part B

You, the owner, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

Attachment A (Effective Until June 30, 2009)

NOTICE OF CANCELLATION

_____ (Enter date of transaction) (Date)

You may cancel this transaction, without any penalty or obligation, within three business days from the above date.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, or send a telegram to

_____ (Name of mortgage foreclosure consultant)

at

_____ (Address of mortgage
 foreclosure consultant's place of business)

NOT LATER THAN MIDNIGHT OF _____ (Date)

I hereby cancel this transaction

_____ (Date)

_____ (Owner's signature)

[Please Note: Effective July 1, 2009, the above statutorily-required language changes. The words "third" and "three" must be replaced by "fifth" or "five" respectively, and the Addendum must include some additional language.]

Addendum A (Effective July 1, 2009)

NOTICE OF CANCELLATION

 (Enter date of transaction) (Date)

You may cancel this transaction, without any penalty or obligation, within five business days from the above date.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, or send a telegram,

to _____
 (Name of foreclosure consultant)

at _____
 (Address of foreclosure consultant's place of business)

You may also cancel by sending a facsimile (fax) of a signed and dated copy of this cancellation notice, or any other written notice, to the following number:

 (Facsimile telephone number of foreclosure consultant's place of business)

You may also cancel by sending an e-mail canceling this transaction to the following e-mail address:

 (E-mail address of foreclosure consultant's business)

I hereby cancel this transaction

 (Date)

 (Owner's signature)

Q 35. What are the formatting requirements for the language in Question 34?

A The required language of a foreclosure consultant contract, as indicated in the answer to Question 34, must be formatted in the following manner:

- Part A must be completed and printed in at least 14-point boldface type immediately above Part B (Cal. Civ. Code § 2945.3(b)).
- Part B must be a conspicuous statement in at least 10-point bold type and in immediate proximity to the space reserved for the owner's signature (Cal. Civ. Code § 2945.3(c)).
- Attachment A must be completed in duplicate and captioned "Notice of Cancellation." It must be in at least 10-point type and attached to the contract, but easily detachable. It must be written in the same language as used in the contract. (Cal. Civ. Code § 2945.3(f)).

Q 36. Does C.A.R. offer a standard form foreclosure consultant agreement?

A No. C.A.R. does not currently offer a standard form agreement that comports with the requirements of the foreclosure consultant law.

Q 37. What are the requirements for delivering a foreclosure consultant contract to the homeowner?

A The foreclosure consultant must provide the homeowner with a copy of the contract and the attached notice of cancellation (Cal. Civ. Code § 2945.3(g)). Also, the foreclosure consultant contract must be written in the same language as principally used by the foreclosure consultant to describe his or her services or to negotiate the contract (Cal. Civ. Code § 2945.3(c)).

Additionally, effective July 1, 2009, the homeowner must, before signing the foreclosure consultant contract, be given a copy of a completed contract written in any other language used in any communication between the foreclosure consultant and homeowner (Cal. Civ. Code § 2945.3(c)). Also effective July 1, 2009, if the foreclosure consultant principally uses English to describe his or her services or to negotiate the contract, the foreclosure consultant must notify the homeowner orally and in writing before the homeowner signs the contract that the owner has the right to ask for a completed copy of the contract in Spanish, Chinese, Tagalog, Vietnamese, or Korean (Cal. Civ. Code § 2945.3(c)).

Q 38. *What is a homeowner's right to cancel a foreclosure consultant contract?*

A Until June 30, 2009, a homeowner has the right to cancel a foreclosure consultant contract until midnight of the third business day after the owner signs the contract. Starting July 1, 2009, a homeowner has the right to cancel until midnight of the fifth business day after the owner signs the contract (Cal. Civ. Code § 2945.2(a)). For the purpose of this law, a "business day" is defined as any calendar day except Sunday or the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day (Cal. Civ. Code § 1689.5).

Q 39. *What constitutes a proper cancellation under the owner's right to rescind?*

A Until June 30, 2009, cancellation occurs when the owner gives written notice of cancellation to the foreclosure consultant at the address specified in the foreclosure consultant contract. The owner's notice of cancellation need not take the particular form as provided with the contract. However expressed, the owner's notice of cancellation is effective if it indicates the owner's intent not to be bound by the contract. If the notice of cancellation is given by mail, it is effective when deposited in the mail properly addressed with postage prepaid.

Starting July 1, 2009, cancellation occurs when the owner gives written notice of cancellation to the foreclosure consultant by mail at the address specified in the contract, or by fax or e-mail at the number or address identified in the contract. The owner's notice of cancellation need not take the particular form as provided with the contract. However expressed, the owner's notice of cancellation is effective if it indicates the owner's intent not to be bound by the contract. If notice of cancellation is given by mail, it is effective when deposited in the mail properly addressed with postage prepaid. If given by fax or e-mail, the notice of cancellation is effective when successfully transmitted. (Cal. Civ. Code § 2945.2.)

Q 40. *What is a foreclosure consultant prohibited from doing?*

A A foreclosure consultant is prohibited from, among other things, engaging in any of the following activities:

- **No Advance Fees:** A foreclosure consultant cannot claim, demand, charge, collect, or receive any compensation until after the foreclosure consultant has fully performed each and every service the foreclosure consultant contracted to perform or represented he or she would perform (Cal. Civ. Code § 2945.4(a)).
- **No Interest in Subject Property:** A foreclosure consultant cannot acquire any interest in a

residence in foreclosure from an owner with whom the foreclosure consultant has contracted. Any such interest acquired is voidable, except as against a bona fide purchaser or encumbrancer for value and without notice of a violation of this article. Knowing that the property was "residential real property in foreclosure" does not constitute notice of a violation of this article. This rule does not abrogate any duty of inquiry which exists as to rights or interests of persons in possession of residential real property in foreclosure. (Cal. Civ. Code § 2945.4 (e).)

- **No Secured Payment:** A foreclosure consultant cannot take any wage assignment, real property lien, personal property lien, or other security for the payment of compensation. Any such security shall be void and unenforceable. (Cal. Civ. Code § 2945.4(c).)
- **No Mortgage Broker Fee Over 10%:** A foreclosure consultant cannot claim, demand, charge, collect, or receive any fee, interest, or other compensation for any reason which exceeds 10% per annum of the amount of any loan which the foreclosure consultant may make to the owner (Cal. Civ. Code § 2945.4(b)).
- **No Undisclosed Fees:** A foreclosure consultant cannot receive any consideration from any third party in connection with services rendered to an owner unless that consideration is fully disclosed to the owner (Cal. Civ. Code § 2945.4(d)).
- **No Power of Attorney:** A power of attorney generally authorizes a person to act on another person's behalf. Until June 30, 2009, a foreclosure consultant cannot take any power of attorney from a homeowner, except to inspect documents as provided by law. Beginning July 1, 2009, a foreclosure consultant cannot take any power of attorney from an owner for any purpose whatsoever. (Cal. Civ. Code § 2945.4(f).)
- **No Invalid Contract:** A foreclosure consultant cannot induce or attempt to induce any owner to enter into a contract which does not comply with the foreclosure consultant law (Cal. Civ. Code § 2945.4(g)).
- **No Surplus Funds Contract:** Until June 30, 2009, a foreclosure consultant cannot, within 65 days after a trustee's sale, enter into an agreement to arrange or assist the owner in arranging for the release of surplus funds (which are funds remaining after a trustee's sale). Moreover, such an agreement must comply with certain requirements. Effective July 1, 2009, a foreclosure consultant cannot, at any time, enter into an agreement to arrange or assist the owner in arranging for the release of surplus funds. (Cal. Civ. Code § 2945.4(h).)

Q 41. Who is a "representative" of the foreclosure consultant?

A A "representative" of the foreclosure consultant is a person who in any manner solicits, induces, or causes any homeowner to contract with a foreclosure consultant, to pay any consideration, or to transfer title to the residence in foreclosure to the foreclosure consultant. A representative is also someone who solicits, induces, or causes any member of the owner's family or household to induce or cause any owner to pay any consideration or transfer title to the residence in foreclosure to the foreclosure consultant. (Cal. Civ. Code § 2945.9.)

Q 42. What does the law require for representatives of a foreclosure consultant?

A Any representative (as defined in Question 41) deemed to be the agent or employee of the foreclosure consultant shall be required to do all of the following:

- Provide the homeowner with written proof that the representative has a valid current California Real Estate Sales License (Cal. Civ. Code § 2945.11(a)(1));

- Provide the homeowner with written proof that the representative is bonded by an admitted surety insurer in an amount equal to at least twice the fair market value of the real property that is the subject of the contract (Cal. Civ. Code § 2945.11(a)(1)); and
- Provide all parties to the contract (before transfer of any interest in the property) with a written statement, under penalty of perjury, that the representative has the required real estate license and bond, and has provided the owner with written proof of same (Cal. Civ. Code § 2945.11(a)(2)).

Any failure to comply with these requirements for representatives of the foreclosure consultant shall, at the option of the owner, render the contract void and the foreclosure consultant shall be liable to the owner for all damages proximately caused by noncompliance (Cal. Civ. Code § 2945.11(b)). A foreclosure consultant is also generally liable for damages resulting from any statement made or acts committed by his or her representative (Cal. Civ. Code § 2945.9).

Any provision in a contract which attempts to limit the foreclosure consultant's liability for these requirements pertaining to representatives shall be void and, at the owner's option, render the contract void. The foreclosure consultant shall be liable to the owner for damages proximately caused by that limitation of liability provision. (Cal. Civ. Code § 2945.10(a).)

Q 43. Does a foreclosure consultant have to be a real estate licensee?

A Possibly so. Although the foreclosure consultant law specifically requires a representative of the foreclosure consultant to have a real estate license, it does not specifically state that the foreclosure consultant must have a real estate license. In any event, under general licensing laws, a real estate broker's license is required for anyone who, for compensation or in expectation of compensation, does or negotiates to do certain activities for another (Cal. Bus. & Prof. Code § 10131). Such activities include, among other things, negotiating loans or performing services for borrowers or lenders in connection with loans secured by real property (Cal. Bus. & Prof. Code § 10131(d)). If a foreclosure consultant falls within these parameters and undertakes any of these tasks, and no exemption applies, a real estate license is required.

Q 44. What is the new registration requirement for a foreclosure consultant?

A Effective July 1, 2009, a person must not take any action as a foreclosure consultant unless the person registers with the California Department of Justice and is issued and maintains a certificate of registration. The registration must include, without limitation, the following:

- All the names, addresses, telephone numbers, Internet Web sites, and e-mail addresses used or proposed to be used for foreclosure consulting;
- Statement that the person has not been convicted of (or pled nolo contendere to) any crime involving fraud, misrepresentation, dishonesty, or a violation of the foreclosure consultant law;
- Statement that the person has not been held liable in a civil judgment for fraud, misrepresentation, violation of the foreclosure consultant law, unfair competition (Cal. Bus. & Prof. Code § 17200), or false or misleading advertising (Cal. Bus. & Prof. Code § 17500);
- Copies of all advertising and promotional materials, including print, electronic, telephone scripts, broadcasts, and other statements used or proposed to be used for foreclosure consulting; and
- Copy of the requisite bond (see Question 45).

Furthermore, a foreclosure consultant must file with the Department of Justice an update of certain material changes to the registration information (Cal. Civ. Code § 2945.45(a)(1)).

The Department of Justice may refuse to issue or revoke a certificate of registration if someone does any of following:

- Makes any misstatement in the registration form;
- Is held liable for fraud, misrepresentation, unfair competition, or false or misleading advertising;
- Commits any violation of the foreclosure consultant law; or
- Fails to maintain the requisite bond (see Question 45).

(Cal. Civ. Code § 2945.45(c).)

Q 45. *What is the new bond requirement for a foreclosure consultant?*

A Effective July 1, 2009, a foreclosure consultant must obtain and maintain a \$100,000 surety bond from a corporate surety admitted to do business in California. The bond shall be made in favor of the State of California for the benefit of homeowners for damages caused by the foreclosure consultant. The bond must be filed with the Department of Justice and the Secretary of State. (Cal. Civ. Code § 2945.45(a)(2).)

Q 46. *Can an owner waive any of the requirements of the foreclosure consultant law?*

A No. Any waiver by an owner of the provisions of the foreclosure consultant law shall be deemed void and unenforceable as contrary to public policy. Any attempt by the foreclosure consultant to induce an owner to waive his or her rights is a violation of this law. (Cal. Civ. Code § 2945.5.)

Q 47. *What is the potential liability for violating the foreclosure consultant law?*

A An owner may, among other things, bring a civil action against a foreclosure consultant who violates the foreclosure consultant law. The owner may recover actual damages, reasonable attorneys' fees and costs, and appropriate equitable relief. Furthermore, a court not only has the discretion to award exemplary damages, but for certain violations, the court must award exemplary damages equal to three times the compensation received by the foreclosure consultant (or actual damages suffered by the owner). The violations for which a court must award exemplary damages are those pertaining to improper advance fees (§ 2945.4(a)), exorbitant mortgage broker fees (§ 2945.4(b)), and undisclosed fees (§ 2945.4(d)) (see Question 40). An owner has four years from the date of the alleged violation to bring such action. (Cal. Civ. Code § 2945.6.)

Furthermore, any person who violates the provisions set forth in the answer to Question 40 above may be criminally punished by one year imprisonment, plus a fine of \$10,000 (Cal. Civ. Code § 2945.7).

Additionally, effective July 1, 2009, a person who fails to comply with the certificate of registration and surety bond requirements may be punished by a fine up to \$25,000 for each violation, plus one-year imprisonment.

IV. ADDITIONAL INFORMATION

Q 48. Where does someone report a foreclosure-related scam?

A The following is a list of government enforcement agencies and other organizations for reporting fraud activities. Some of these agencies and organizations are also excellent resources for obtaining more information about foreclosure-related fraud.

Office of the Attorney General
California Department of Justice
Attn. Public Inquiry Unit
P. O. Box 944255
Sacramento, California 94244-2550
(916) 322-3360
(800) 952-5225 (in California only)
<http://ag.ca.gov/consumers/mailform.htm> (Consumer complaints)

California Department of Real Estate
P. O. Box 187000
Sacramento, California 95818-7000
(916) 227-0864
http://www.dre.ca.gov/cons_complaint.html (Consumer complaints)

Federal Bureau of Investigation (FBI) Headquarters
J. Edgar Hoover Building
935 Pennsylvania Avenue, NW
Washington, D.C. 20535-0001
(202) 324-3000
Or contact your local FBI field office
<https://tips.fbi.gov/> (FBI tips and public leads)

Department of Housing and Urban Development (HUD) Headquarters
HUD Office of Inspector General Hotline (GFI)
451 7th Street, SW
Washington, D.C. 20410
(800) 347-3735
Or contact your local HUD field office
<http://www.hud.gov/offices/oig/hotline/> (Office of Inspector General hotline)

Federal Trade Commission
Consumer Response Center
600 Pennsylvania Avenue, NW
Washington, D.C. 20580
(877) 382-4357
<http://www.ftc.gov/ftc/contact.shtm>

Better Business Bureau
The Council of Better Business Bureaus
4200 Wilson Boulevard, Suite 800
Arlington, Virginia 22203-1838
Contact your local bureau
<http://www.bbb.org/>

Q 49. Where can I obtain more information about foreclosure scams?

A Some of these agencies and organizations listed in Question 48 are good resources of

foreclosure-related scams. Another commonly cited resource is the National Consumer Law Center's publication "Dreams Foreclosed: The Rampant Theft of Americans' Homes Through Equity-Stripping Foreclosure 'Rescue' Scams," available at <http://www.consumerlaw.org/news/ForeclosureReportFinal.pdf>.

Q 50. *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

The information contained herein is believed accurate as of October 30, 2008. It is intended to provide general answers to general questions and is not intended as a substitute for individual legal advice. Advice in specific situations may differ depending upon a wide variety of factors. Therefore, readers with specific legal questions should seek the advice of an attorney.