DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–3079/P3dn
PJK&ARG:kjf:md

August 14, 2009

This redraft does the following:

1. Changes the sunset date to December 31, 2012.

2. Adds HUD–approved credit counseling agencies to those a borrower may contact.

3. Adds to the notice to the borrower that loss mitigation strategies other than loan modification are not prohibited.

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In addition to the three items above, this redraft adds the definition of "rate ceiling" in created s. 846.015 (1) (g) and the second sentence of created s. 846.015 (7) (a). These changes are based on the Treasury Department language provided to me. I omitted a portion of this Treasury Department language that seems to me internally inconsistent. The Federal Home Loan Mortgage Corporation, a government–sponsored enterprise commonly known as Freddie Mac, was placed in conservatorship in 2008 by the newly created Federal Housing Finance Administration (formerly OFHEO). According to the financial press, many believe that Freddie Mac will ultimately be dissolved, although it is unclear when, if at all, this might occur. If it does occur, the provision in the attached draft relating to Freddie Mac's mortgage market survey rate will no longer work, but this may not be a problem since the bill's provisions will not apply after December 31, 2012.

As you know, the drafter prepared this draft based on three Michigan bills provided to him. It is unclear to me exactly what this draft requires of lenders with respect to loan modifications. Created s. 846.015 (7) requires the mortgagee negotiator to "suggest one or more of the following" loan modifications to the borrower. Does the bill require the lender to in fact propose loan modifications, or does it simply require the lender to open a dialogue? Under created s. 846.015 (9), I am similarly uncertain what it means to be "eligible for a modification" and, feeding back into my comment regarding sub. (7), when the requirement that the "mortgagee negotiator has in good faith offered the

borrower a mortgage modification agreement" comes into play. The answers to these questions impact the assessment of whether portions of the draft might be preempted by federal law. The lending practices of national banks and other federally chartered financial institutions are largely governed by federal law. However, there is a body of federal law, stemming from a U.S. Supreme Court case, finding that national banks can be governed by state law when it comes to the mortgage foreclosure process. Yet, to the extent that this bill is interpreted as imposing state law requirements beyond the foreclosure process, and actually requires a lender to offer a borrower a loan modification, the bill might be found to be preempted by federal law as applied to national banks and other federally chartered financial institutions. In addition, because the modification of a mortgage loan is actually a modification of the contract terms of a promissory note, if the bill is construed to require lenders to offer loan modifications to borrowers, arguments might be made that mandating loan modifications violates the Contracts Clause of the federal and state constitutions.

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