

A CHALLENGE TO BANK OF AMERICA

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I am deeply grateful for this award. I revered Cushing, not only for the substance of her work but also for her Quaker commitment to finding the spark of divinity in every human being. I hope I have learned from her. We shall see. Cushing's work has been nobly carried on by the Coalition's board, its president, its staff, and its former president, Barry Zigas. The greatest compliment I can pay Sheila [Crowley] is that she is worthy to be Cushing's successor.

It's an honor for me to share this evening with Nan Roman, who's done great work against the man-made, totally unnecessary, disgraceful disaster of homelessness. I'm profoundly grateful to Patty [Mullahy Fugere] and Barbara [Samuels] for their comments, their friendship, their comradeship, and their magnificent work. I'm grateful to be part of the community of people in this room and elsewhere who are dedicated to the principle that housing is a human right, to the proposition that everyone is entitled to what we here enjoy: secure, comfortable, affordable, aesthetically pleasing homes from which to go forth and do our work in the world.

This brings me to our host, Bank of America. Bank of America does some good things, such as hosting this reception and making a substantial contribution to the Coalition last year – support I hope Bank of America will provide again this year and in the future. But generally, to tell the truth, Bank of America is reviled by homeowners, tenants, and their advocates. [While much of what I will say about Bank of America is true also of the other major banks in the United States, Bank of America is the largest and in many ways the worst offender of them all.] I want to challenge Bank of America to become an industry leader for good, to bring fair and just standards to the handling of foreclosures and mortgage modifications in the United States.

Since I have limited time, I will make only three points:

1. With respect to the much-publicized settlement proposed by the state attorneys general: most of the proposals with respect to mortgage modifications already were agreed to by Bank of

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^{*}These remarks were made when I accepted the Cushing Niles Dolbeare Award from the National Low Income Housing Coalition at a reception hosted by Bank of America. What I actually said differed slightly from what I had prepared to say. I have attempted here to reproduce what I actually said, and have used brackets to indicate prepared statements that I may have omitted and to clarify references to individuals by providing their surnames. I also have added footnotes to identify the sources of some of the statements.

America and other servicers in their contracts with the Treasury Department, when the banks accepted TARP money from Treasury. These requirements are very basic:

- To offer modifications to all eligible borrowers;
- To process modification applications accurately and promptly;
- To give borrowers timely and accurate information about their applications;¹
- Not to use a dual track – that is, not to institute foreclosures while modification applications are being considered;²
- To give borrowers a single point of contact – one person who has the information and authority necessary to resolve the dispute;
- To automatically grant trial modifications when the Net Present Value test is satisfied and to automatically grant permanent modifications to all who fulfill the requirements of their trial modifications;³
- For any who seem not to fulfill the requirements for a trial or permanent modification, to explain promptly and fully what the problems seem to be and to offer a review process; and
- To stop forced placement of insurance and escrow commitments.

That was point 1. You all will be pleased to know that points 2 and 3 are shorter.

2. When homeowners litigate against Bank of America, Bank of America does not address the substance of the homeowners' complaints. Instead, it raises technical legal defenses such as "no private right of action" or "no right to sue as a third party beneficiary of the contract with the Treasury Department." Instead of doing this, Bank of America should address the substance of every homeowner's challenge to foreclosure or failure to make a modification.

¹ See, e.g., written testimony of Diane E. Thompson, Esq., representing the National Consumer Law Center and the National Association of Consumer Advocates, before the U.S. Senate Committee on Banking, Housing, & Urban Affairs, Nov. 16, 2010 (hereinafter Thompson testimony, Nov. 16, 2010) at 8 (discussing a California case in which Bank of America "represented that a pooling and servicing agreement forbade all modifications, when, in fact, the Pooling and Servicing Agreement specifically provided for modifications in the event of the borrower's default. The Bank of America representative in that case went so far as to provide the homeowner's attorney with an electronic copy of the relevant sections of the PSA from which the clause permitting modifications in default had been excised, and a comma replaced with a period"). See also *id.* at 10-11.

² Foreclosures "frequently occur while homeowners are negotiating a loan modification, sometimes even after they have been approved for a loan modification." Thompson testimony, Nov. 16, 2010, at 29; *id.* at 10 (regarding the need to obey the HAMP requirement that foreclosure proceedings not be initiated while a homeowner is carrying out the terms of a modification); *id.* at 15 (urging lenders not to reject payments and then institute foreclosure); see also Paul Krugman, "Another Inside Job," *The New York Times*, March 13, 2011 (discussing the Nevada attorney general's complaint charging Bank of America with "'sending foreclosure notices, scheduling auction dates, and even selling consumers' homes while they waited for decisions'").

³ "Tens of thousands of homeowners have languished in trial modifications – facing growing loan principals and increasingly damaged credit – although they have met all requirements to obtain a permanent deal." Thompson testimony, Nov. 16, 2010, at 8; see also *id.* at 9-10 (discussing Bank of America delaying as long as 17 months).

3. When Bank of America acquired Countrywide in 2008, it “became the holder of the largest subprime mortgage portfolio” in the industry.⁴ These loans disproportionately targeted minority borrowers and minority neighborhoods, using high pressure tactics, misrepresentation, and fraud to secure signatures on new loans and refinancings. Very often, these loans imposed onerous, predatory terms on borrowers whose credit scores and histories would have entitled them to prime loans if they were white. Foreclosures now have disproportionately stripped equity from minority households and devastated minority neighborhoods.⁵ Bank of America should carefully review every one of these subprime loans and restructure those of borrowers who were cheated in the origination of loans that were inappropriate – if not illegal – when they were made. This restructuring definitely should include reductions of principal. Bank of America already has a small, in-house principal reduction program. It should make this program available for all of these loans. Bank of America should acknowledge the responsibility that it bears for soliciting, encouraging, making, purchasing, and securitizing those obviously irresponsible loans.

I hope that Bank of America will accept this challenge so that when we are at this conference next year we can join in saluting Bank of America for showing real industry leadership by modeling fair and just treatment of homeowners and tenants.

⁴Congressional Oversight Panel, Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation, November [2010] Oversight Report, Nov. 16, 2010 [hereinafter “November 2010 Oversight Report”] at 59 n.207.

⁵November 2010 Oversight Report at 75; see also *id.* at 75 n.276 (quoting testimony that one result is that “minority communities are disproportionately affected by foreclosures”; and “African American and Latino families are much more likely than whites to lose their homes. . .”).