(Statutory authority: Banking Law Article 6-f)

Sec.

§82-2.1 Scope and application of this Part

Section 6-f of the Banking Law authorizes the Superintendent to adopt rules and regulations relating to Shared Appreciation Mortgages (certain terms used in this Part are defined in section 82-2x.2 of this Part). Accordingly, these regulations permit banks, trust companies, foreign banking corporations licensed to maintain a branch or agency in this state, savings banks, savings and loan associations, credit unions, national bank, federal savings bank and persons and entities engaging in the business described in section 590 of the Banking Law ("Lender"), to make residential mortgage loans, which provide for the Lender, or its assignee (together with Lender, hereinafter defined as "Holder") to receive a share in the future appreciation of the property serving as security for the loan.

Section 6-f provides that a Holder may enter into a written agreement with a Mortgagor under which the Holder conditionally reduces an amount of principal of the then outstanding Mortgage Loan in order to assist a Mortgagor at risk of foreclosure. The written agreement may permit the Holder to share in the Appreciation of the Market Value of the Residential Property securing such loan.

§82-2.2 Definitions.

For purposes of this Part:

(a) *"Appraised Value"* means the dollar value determined by an independent and impartial analysis of the nature, quality, market value or utility of a piece of residential property conducted by an independent Licensed Appraiser.

(b) *"Appraisal report"* means any written or electronic communication of an Appraised Value, including all relevant facts and analyses utilized in determining the value.

(c) *"Capital Improvement"* means any addition or alteration to real property that meets **all three** of the following conditions:

- It substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property;

- It becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and
- It is intended to become a permanent installation.

(d) *"Gross Sales Proceeds"* means the "Contract Price" as stated on the final HUD-1 Settlement issued pursuant to the sale or transfer of the Residential Real Property that is the subject of the Shared Appreciation Mortgage Modification Agreement.

(e) "*Holder"* means a servicer, as defined by 3 NYCRR, Section 418.3, a Lender, or any person or entity who holds the Mortgage Loan as an asset and has the ability to negotiate terms thereof.

(f) *"Interest Arrears"* means any interest past due for 30 days or more.

(g) *"Licensed Appraiser"* means a person licensed under Article 6-E of the Executive Law of New York who performs appraisals in conformity with the Uniform Standards of Professional Appraisal Practice.

(h) "*Modified Mortgage Loan*" means a Mortgage Loan entered into in connection with a Shared Appreciation Agreement.

(i) "*Mortgage Loan*" means a loan to a natural person made primarily for personal, family or household use, secured by either a mortgage, deed of trust or other equivalent consensual security interest on a dwelling (as defined in section 1203(v) of the Truth in Lending Act) or residential property or any certificate of stock or other evidence of ownership in, and proprietary lease from, a corporation or partnership formed for the purpose of cooperative ownership of residential real property and shall include any refinance or modification of any such existing loan.

(j) *"Mortgagor"* means a natural person obligated to repay the Mortgage Loan secured by the Residential Property that is the subject of the Shared Appreciation Mortgage Modification Agreement.

(k) *"Net appreciated value"* means the difference, if positive, between the gross sales proceeds from the sale of the property securing the Mortgage Loan, net of any reasonable real estate commission, and the market value of the property at the time of closing of the shared appreciation mortgage on such property, as determined by an Independent New York State Licensed Real Estate Appraiser.

(l) "*Owner Occupied"* when used in conjunction with the term *Residential Property*, means that the owner of the underlying Residential Property occupies at least one unit of the Residential Property as a principal residence.

(m) "*Relative"* is a person connected with another by blood or affinity.

(n) "*Residential Property*" means real property located in this state improved by a one-to-four family residence or by a residential unit in a building used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons, but shall not refer to unimproved real property upon which such residence is to be constructed.

(o) *"Shared Appreciation Agreement"* means an agreement between the Mortgagor and the Holder that provides for the Holder to share in the appreciation of the market value of the property upon sale of the property. A Shared Appreciation Agreement is not valid without the execution of a Shared Appreciation Mortgage Modification Agreement.

(p) *"Shared Appreciation Mortgage Modification Agreement"* means an agreement by which a Mortgage Loan Holder reduces the principal amount of the Mortgage Loan in order to assist a Mortgagor at risk of foreclosure to avoid such foreclosure.

§82-2.3 Eligibility Requirements for Shared Appreciation Mortgage Modification

(a) Mortgage Loans Eligible for a Shared Appreciation Mortgage Modification: A Holder of a Mortgage Loan may enter into a Shared Appreciation Agreement with a Mortgagor if the following conditions are met:

1. The Mortgage Loan is*:*

   i. A first lien Mortgage Loan with an unpaid principal balance (described below in §82-2.4) that exceeds the Appraised Value of the Residential Property based on an Appraisal Report prepared no more than ninety days before the execution of a Shared Appreciation Mortgage Modification and Shared Appreciation Agreement;

   ii. A junior lien Mortgage Loan satisfying the same criteria set forth in subparagraph (i) above; or

   iii. A combination of a first and junior lien Mortgage Loan, both held by the same Holder, which satisfies the criteria set forth in subparagraph (i) above; and

2. The Mortgagor is 90 or more days past due on the Mortgage Loan, or the Mortgage Loan is the subject of an active foreclosure action; and

3. The Mortgagor is ineligible for any of the following alternatives to foreclosures:

   i. A modification under the federal Home Affordable Modification Program ("HAMP");

   ii. A modification offered under the Government Sponsored Enterprises' ("GSE") HAMP programs or proprietary modification programs, if the loan is owned by the GSE;

   iii. A modification offered by the Federal Housing Administration;

   iv. A proprietary modification offered by the Holder, including a proprietary mortgage that includes a principal reduction, principal forbearance and/or principal forgiveness feature without a shared appreciation component; or

   v. Traditional refinance, streamlined refinance or refinance under the Home Affordable Refinance Program ("HARP") and the Federal Housing Administration refinance program.

§82-2.4 Calculation of Unpaid Principal Balance and Principal Reduction

(a) *Unpaid Principal Balance:* For the purpose of this part, the unpaid principal balance, including the principal amount that would conditionally be reduced at the time of consummation of the Shared Appreciation Mortgage Modification, shall be calculated as follows:

1. Outstanding principal balance of the mortgage loan after application of the Mortgagor's most recent contractual payment;

2. Less:

   The sum of all partial payments received, including unapplied partial payments held by the Holder in any suspense account;

3. Plus:

   i. Interest arrears calculated at the note rate that would have been in effect if the loan was performing;

   ii. Escrow Advances for real estate taxes, insurance premiums and other assessments paid on the Mortgagor's behalf to any third party; and

iii. Reasonable and customary third-party attorney fees and other third-party expenses, including appraisals, broker price opinions incurred by the Holder in connection the mortgage loan. In order for the Holder to include third-party fees in the calculation of unpaid principal balance, the Holder must maintain proper documentation to demonstrate compliance with subsection 419.10(b) and (c) of Part 419 of the Superintendent's Regulations.

(b) *Debt-to-Income Ratio ("DTI")* For purpose of this Part, the Mortgagor's DTI shall be calculated as follows:

The Mortgagor's monthly DTI shall be calculated by dividing the Mortgagor's monthly housing payment (principal, interest, taxes and insurance) by the Mortgagor's gross monthly income. Gross monthly income shall be that amount of income, which is documented and can be verified.

§82-2.5 Sharing of Appreciation.

(a) Shared Appreciation Agreements may provide that the Mortgagor shall share, in accordance with §82-2.6, any appreciation in the Residential Property with the Holder in the event of a sale or transfer of the Residential Property or any interest therein, whether by deed, contract for deed or otherwise; including the following cases:

(i) an arms-length sale for fair market value that exceeds the outstanding principal balance of the Modified Mortgage Loan;

(ii) taking of the Residential Property by eminent domain where payment is made for the full value of the property; or

(iii) casualty loss where the proceeds of the claim are for the purpose of prepaying the principal of the Modified Mortgage Loan.

(b) The following cases do not necessitate a sharing, nor do they extinguish a Holder's claim to a share of the appreciation upon a subsequent non-exempted sale or transfer:

(i) the creation of a lien or other encumbrance subordinate to the Holder's security instrument, which does not relate to a transfer of rights of occupancy in the Residential Property;

(ii) the creation of a purchase money security interest for household appliances;

(iii) a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;

(iv) the granting of a leasehold interest; provided, however, the leasehold interest is not for a period longer than the period permitted to pay off the Modified Mortgage Loan, and the lease does not provide the lessee with an option to purchase;

(v) a transfer to a Relative resulting from the death of a Mortgagor;

(vi) a transfer where the spouse or children of the Mortgagor become an owner of the Residential Property;

(vii) a transfer resulting from a decree of dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse or former spouse of the Mortgagor becomes an owner of the Residential Property;

(viii) a transfer into an inter vivos trust in which the Mortgagor is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the Residential Property; or

(ix) any other transfer or disposition permissible under by federal regulation as not triggering a due-on-sale clause.

(c) The following cases do not limit a Holder to sharing in any appreciation; instead, each entitles the Holder to collect the aggregate principal balance, including the principal reduction and interest thereon, calculated at the modified note rate from the date of the Shared Appreciation Agreement to the date of consummation of the transaction:

(i) a refinancing or other satisfaction in full of the Modified Mortgage Loan, which is not in connection with a sale or transfer of the Residential Property or any interest therein; or

(ii) a sale or transfer of the Residential Property or any interest therein, which occurs within one (1) year of the execution of the Modified Mortgage Loan.

§82-2.6 Calculation of Holder's Share of Appreciation

(a) *Calculation of Appreciation in Market Value:* Appreciation in Market Value of the Residential Property shall be:

1. Gross Sales Proceeds received from the arms-length, fair market value sale of the Residential Property, or in the case of a qualifying transfer or sale that is not at arms-length and for fair market value, the Appraised Value of the Residential Property at or around the time of such sale;
2. Less:
    a. Reasonable Real Estate Commissions; and
    b. The Appraised Value of the Residential Property determined on a date no earlier than 90 days prior to the date the parties entered into the Shared Appreciation Agreement.

(b) *Limitation on Holder's Share of Appreciation:* The Holder's share of the Appreciation in Market Value shall be limited to the lesser of:

1. The amount of the reduction in principal (deferred principal), plus interest on such amount calculated from the date of the Shared Appreciation Agreement to the date of payment based on a rate that is applicable to the Modified Mortgage Loan; or
2. Fifty percent of the amount of Appreciation in Market Value.

(c) *Reasonable real estate commissions:* A real estate commission is considered reasonable if it is customary for the services performed in the market area of the property being sold or transferred and calculated at rates generally used to determine such fees within the market area or such fee is calculated in compliance with rates established by state or federal laws and regulations for calculating such fees.

§82-2.7 Disclosures

(a) *Disclosures required prior to transactions:* Prior to entering into a Shared Appreciation Agreement a Holder must provide the Mortgagor with a notice with a heading in bold, fourteen-point type stating that "IMPORTANT DISCLOSURES ABOUT THE CONTRACT IN WHICH YOU AGREE TO GIVE AWAY SOME OR ALL OF ANY FUTURE INCREASE IN VALUE OF YOUR HOME. PLEASE READ CAREFULLY." The notice must include the following disclosures:

1. A Statement that the Holder will be entitled to receive a share of the appreciation in market value of the mortgaged property that occurs between the time of the loan modification and the time the property is sold or transferred.

2. The limitation of the appreciation in accordance with Section 82-2.6.
3. The methodology the Holder is required to use in calculating the appreciation in the market value.
4. At least three illustrations of how the appreciation will be shared at the time the Mortgagor sells or transfers the property, or pays off the Modified Mortgage Loan at maturity. Such examples to include (A) no appreciation in the value of the mortgaged property; (B) appreciation of twenty percent; and (c) appreciation of fifty percent;
5. A statement or notice to like effect: YOU SHOULD SEEK INDEPENDENT COUNSELING FROM A LAWYER, A HUD-CERTIFIED MORTGAGE COUNSELOR OR A TAX ADVISOR REGARDING:
    a. THE TRADE-OFF BETWEEN A CURRENT REDUCTION IN THE SIZE OF THE MORTGAGE AND THE PROMISE TO GIVE UP PART OF THE FUTURE INCREASE (APPRECIATION) IN THE VALUE OF YOUR HOME;
    b. THE TAX CONSEQUENCES OF THE PRINCIPAL FORGIVENESS AND SHARED APPRECIATION AGREEMENT;
    c. YOU SHOULD CONSULT WITH OTHER MORTGAGE LIEN HOLDERS OF THE RESIDENTIAL PROPERTY AS TO WHETHER SUCH LIENS CONTAIN CLAUSES WHICH COULD ACCELERATE THE LOAN AS A RESULT OF YOUR EXECUTION OF THE SHARED APPRECIATION AGREEMENT; and
    d. THE ONLY ASSET WHICH MAY BE USED BY THE LENDER OR HOLDER TO SATISFY THE SHARED APPRECIATION AGREEMENT IS THE PROPERTY SECURING THE MODIFIED MORTGAGE.
6. A list of the names and contact information of five HUD-certified mortgage counselors in the county where the Residential Property is located or, if there are fewer than five such counselors in that county, the list may include counselors in one or more neighboring counties.
7. A statement on the potential effect of the shared appreciation agreement on any future refinancing of the Modified Mortgage Loan and the potential effect of any prepayment or refinancing of the Modified Mortgage Loan on the Shared Appreciation Agreement.

(b) At or prior to accepting an application for a Shared Appreciation Agreement, a Holder must disclose in writing or via electronic media to each Mortgagor, in one or more documents, and in plain language, the terms of the transaction sought by the Mortgagor. Disclosure statement(s) provided to a Mortgagor shall include at a minimum the following information:

1. All fees, costs and payments, if any, the Mortgagor must pay to the Holder prior to or simultaneously with the execution of the Shared Appreciation Agreement or Modified Mortgage Loan documents; Such amounts can include, but is not limited to, upfront payment of fees which the Holder may not capitalize under state or federal law, the first month's modified payment, hazard insurance, title insurance, mortgage recording or lien release fees;
2. The events that would terminate or accelerate the Shared Appreciation Agreement and an explicit warning regarding the consequences of defaulting on the Modified Mortgage Loan or breaching the Shared Appreciation Agreement;
3. A full explanation of how the unpaid principal balance on the pre-Modified Mortgage Loan will be calculated, including a detail breakdown and listing of all capitalized third-party fees and advances paid for taxes and insurance.
4. The amount of the monthly payment the Mortgagor will be required to pay on the Modified Mortgage Loan, amortization period on which payments are calculated and an explanation of the Holder's amortization schedule for the Modified Mortgage Loan, including how the Holder determines both the amount of each payment and the proportion of each payment which will be

credited to interest. If the monthly payment is expected to change at any time during the term of the loan, Holder must also provide an illustrative example of the effects that the increase may have on such payments;

5. A statement that the Shared Appreciation Agreement requires the maintenance of an escrow account and an explanation of the purpose for requiring escrow payments and how such payments are calculated;
6. The prevailing and initial interest rate and, if applicable, a statement of the intervals at which the Holder may change the interest rate on the loan, including identification of the indexes/indices to be used and how the index values may be obtained by the Mortgagor;
7. A statement that the loan may be prepaid prior to final maturity without penalty. The Holder must also specify the Mortgagor's repayment obligation under the Shared Appreciation Agreement at prepayment of the loan;
8. The Holder's toll-free number and the name of a person to whom a Mortgagor may address questions, comments or complaints.
9. A notice that the Mortgagor can submit written complaints to the New York State Department of Financial Services online at www.dfs.ny.gov/consumer.)

(c) With regard to the electronic transmission of notices, a hard-copy of such notice shall be mailed to the Mortgagor who indicates that he or she does not have the computer capacity to down-load and print such notice. In those instances in which a hard copy of the notice is not mailed to the Mortgagor, the Holder must be able to demonstrate that information was obtained as to the Mortgagor's computer capacity to down-load and print such notice.

§82-2.8 Statement on Shared Appreciation Agreement

Each Shared Appreciation Agreement executed pursuant to the provisions of section 6-f of the Banking Law must contain a conspicuous legend at the top of the agreement printed in at least fourteen-point (14) type, consisting of substantially the following language: "IN THIS AGREEMENT, YOU ARE GIVING AWAY SOME OF ANY FUTURE APPRECIATION IN THE VALUE OF YOUR HOME. PLEASE READ CAREFULLY."

82-2.9 Loss Mitigation Notification

Every Holder that engages in the business of offering Modified Mortgage Loans shall adopt policies and procedures as are appropriate with respect to the notification process employed by such Holder to inform Mortgagors at risk of foreclosure about the existence of a Modified Mortgage Loan. Such policies and procedures shall be subject to the superintendent's periodic review.

§82-2.10 Fees, Charges and Interest Rate

(a) Holders may charge at closing, simultaneously with the execution of the Shared Appreciation Agreement, the following fees, costs and payments; provided, however, that the Holder discloses same pursuant to subsection 82-2.7(b)(1) of this Part and, provided, further that the costs or payments are actually paid or will actually be paid by the Holder to a third-party provider:

1. The appraisal fee for the Appraisal Report of the Residential Property; provided, however that the Holder only collects the cost actually paid for the Appraisal Report. If circumstances requires the Holder to obtain a second Appraisal Report on the Residential Property, the cost of the second Appraisal Report shall not be charged to the Mortgagor;
2. Fees or charges relating to any transfer, mortgage recording or related tax associated with the Shared Appreciation Mortgage Modification and Shared Appreciation Agreement;
3. Fees or premiums for title examination, abstract of title, title insurance or similar purposes;

4. The cost of tax search for tax liens existing at the time of closing if such search is not included in the title examination;
5. The cost of a credit report, flood zone search and purchasing mortgage insurance;
6. Attorney fees, which is reasonable and customary; and
7. Such other fees as may be specifically authorized by state or federal laws and regulations governing the origination of mortgage loan or loan modification.

(b) *Interest Rate determination:* The rate or rates of interest that a Holder may charge or receive on a Modified Mortgage Loan shall be the rate or rates agreed upon by the Holder and the Mortgagor, provided, however: (i) that such rate or rates do not exceed the rate or rates in the original pre-modified mortgage loan; (ii) that such pricing does not discriminate or result in disparity; (iii) the Holder maintains documentation supporting the interest rate pricing, including rate sheets and pricing charts detailing the market rates and margin applied to determine the interest rate for modification purposes; and (iv) the rate or rates is/are permissible under applicable law.

§82-2.11 Prohibitions.

(a) *No waiver of legal claims and defenses:* A Holder shall not require that a Mortgagor waive his/her legal claim and/or defense as a condition of obtaining a Shared Appreciation Mortgage Modification Agreement, or entering into a Shared Appreciation Agreement;

(b) *No Modification or deferral fees:* The Holder may not charge a Mortgagor any fees to modify, renew, extend, or amend a High-cost home loan (as defined by Section 6-l of the Banking Law) or to defer any payment due under the terms of a High-cost home loan if, after the modification, renewal, extension or amendment, the loan is still a High-cost home loan or, if no longer a High-cost home loan, the annual percentage rate has not been decreased by at least two percentage points. For purposes of this paragraph, fees shall not include interest that is otherwise payable and consistent with the provisions of the loan documents;

(c) *No Unfair or Deceptive Business Practices:* The Holder shall not engage in any unfair or deceptive business practices, or misrepresent or omit any material information in connection with negotiation, execution or consummation of a Shared Appreciation Modification Mortgage Agreement or Shared Appreciation Agreement. Such practices include, but is not limited to, misrepresenting the amount of appreciation to which the Holder is legally entitled to receive, omitting material information on the upfront cost of the modified mortgage, or failing to adequately make any of the disclosures required under [§82-2.7];

(d) *Refusal to Communicate with Mortgagor's Representative:* The Holder of the Modified Mortgage Loan shall not refuse to communicate with an authorized representative of the Mortgagor after such representative has provided written authorization signed by the Mortgagor, provided that the Holder may establish procedures to verify that the representative is in fact authorized to act on behalf of the Mortgagor;

(e) *Collection of Appreciation in Violation of the Law:* No Shared Appreciation Agreement or Shared Appreciation Mortgage Modification Agreement document shall contain any term that grants the Holder of the Modified Mortgage Loan the right to receive a share of the Appreciation in Market Value other than that provided for in [§82-2.6];

(f) *Consummation of a Shared Appreciation Transaction without Counseling:* No Holder shall execute or consummate a Shared Appreciation Mortgage Modification Agreement or Shared Appreciation Agreement unless such Holder has obtained documentation, in writing, that the terms of the Shared Appreciation Mortgage Modification and Shared Appreciation Agreement have been explained to the Mortgagor by an attorney or a HUD-certified counselor.

(g) *Prepayment Penalty:* No Shared Appreciation Agreement shall include terms that require a Mortgagor to pay a penalty upon prepayment of the Modified Mortgage Loan;

(h) *Appraisal Independence:* No Holder shall engage in practices that unduly influences the independence of the Licensed Appraiser. For purposes of this subsection, such prohibited practice includes, but is not limited to:

1. Any action undertaken by the Holder, or any other person with an interest in the underlying transaction, to directly or indirectly compensate, coerce, extort, collude, instruct, bribe or intimidate a person or other entity conducting or involved in an appraisal, or attempts to compensate, coerce, extort, collude, instruct, induce, bribe or intimidate such person, for the purpose of causing the appraised value assigned under the appraisal to the property to be based on any factor other than the independent judgment of the Licensed Appraiser;
2. Mischaracterizing or suborning any mischaracterization of the Appraised Value of the property securing the extension of the Mortgage Loan;
3. Seeking to influence an appraiser or otherwise to encourage a targeted value in order to facilitate the making or pricing of the transaction; and
4. Withholding or threatening to withhold timely payment for an Appraisal Report when the Appraisal Report or services are provided for in accordance with the contract between the Holder and the Licensed Appraiser and/or his employer.

(i) *Principal Balance After Shared Appreciation Mortgage Modification:* Principal Balance of the Mortgage Loan after the Shared Appreciation Mortgage Modification shall be no greater than: (i) an amount which when combined with other modification factors, such as lower interest rate or term extension, results in monthly payments that are 31% or less of the Mortgagor's DTI; or (ii) 100% of the Appraised Value.

(j) *Capitalization of Late Fees:* The Holder of the Mortgage Loan shall not capitalize any late fees, but shall waive any such fees assessed against the Mortgagor for the period during when the Mortgage Loan was delinquent.