

LEGAL UPDATE

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**2011 STATE CONVENTION
MAINE ASSOCIATION OF REALTORS®**

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LEGAL UPDATE

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Effective Date: September 28, 2011 (unless otherwise noted)

1. **Chapter 4:** “*An Act to Clarify the Method of Creating or Severing Joint Tenancy*”. The bill revises the joint tenancy statute to provide that the intent to create a joint tenancy may be stated by appropriate language anywhere in a deed. It provides that a deed to an owner or an owner and another or others is effective and not a nullity. It also provides that a joint tenancy may be severed by a deed to an owner or to an owner and another or others.
2. **Chapter 26:** “*An Act to Improve the Sewer District Rate Collection Procedures*”. The bill provides qualified sewer districts with the same authority as sanitary districts to place a lien on real estate served or benefited by the district's sewers for nonpayment of rates. The procedures for foreclosing the lien are the same as for sanitary district liens. A qualified sewer district is a district whose charter does not establish, or authorize the district to establish, a lien on real estate served by the district and that has been approved to exercise the lien provisions of the law by the voters of the district voting in a referendum. The law was passed as an emergency enactment and took effect on April 11, 2011.
3. **Chapter 41:** “*An Act to Clarify Joint Tenancy Reinstatement*”. The bill clarifies that property held in joint tenancy taken by a taxing or assessing authority by foreclosure that is conveyed back to the owners reinstates the joint tenancy that existed at the time of the taking even if the deed is silent on the form of tenancy. The bill applies to conveyances made on or after January 1, 2012.
4. **Chapter 63:** “*An Act to Provide Certainty to Businesses and Development*”. The bill provides that a municipality may not nullify or amend a municipal land use permit by the subsequent enactment, amendment or repeal of a local ordinance after a period of 45 days has passed after the permit has received its lawful final approval and, if required, a public hearing was held on the permit. A municipal land use permit may not be nullified or amended by the nullification or amendment of another municipal permit. The law specifies that this provision does not affect any municipal ordinance that provides for a lapse of the permit or authority granted pursuant to the permit after a certain period of time.
5. **Chapter 64:** “*An Act to Amend the Natural Resources Protection Act Regarding Coastal Sand Dune Systems*”. The bill allows expansion of an existing residential or commercial building in a coastal sand dune system without a NRPA permit if the footprint of the expansion is contained within an existing impervious area and is no further seaward than the existing building; the height of the expansion is within the height restriction of any applicable law or ordinance; and the expansion conforms to the mandatory shoreland zoning law standards for expansion of a building.

6. **Chapter 84:** *“An Act to Require the Efficiency Maine Trust To More Effectively Administer Funds”*. The bill amends the definition of "energy savings improvement" under the PACE Act to clarify that the term includes heating equipment that meets or exceeds standards established or approved by the trust.
7. **Chapter 89:** *“An Act to Amend the Informed Growth Act”*. The bill makes the following changes to the Informed Growth Act: i) provides that the provisions of the Act do not apply to a municipality unless the municipality adopts an ordinance that adopts the Act by reference; ii) provides that municipalities that are subject to the Act by the adoption of such an ordinance receive the fee directly from the developer for the comprehensive economic impact study, rather than through the SPO, and determine the amount of the fee; iii) amends the definition of "undue adverse impact" to mean that the estimated overall negative effects outweigh the positive effects and removes the requirement that the estimated negative effects of at least two of the factors considered in the study outweigh the positive effects on those factors; iv) provides that the municipality may determine which factors are considered in the economic impact study.
8. **Chapter 93:** *“An Act to Make Technical Changes to Aquaculture Laws”*. The bill makes the following changes to the procedures for leasing coastal water areas for scientific research or aquaculture: i) provides that submitting a renewal application to DMR is sufficient to extend an existing lease until a decision is reached on the renewal; ii) removes the requirement that DMR hold a public hearing before deciding whether to renew a limited-purpose lease for scientific research; iii) clarifies that submitting an application for a standard lease for an area or a portion of an area already covered by a limited-purpose lease before the limited-purpose lease expires is sufficient to extend the limited-purpose lease pending a decision on the new application; iv) extends from 60 days to 6 months the time within which the holder of an emergency lease can apply for a standard lease and thus allows the emergency lease to continue in effect while the standard lease application is processed.
9. **Chapter 96:** *“An Act to Eliminate Duplication of Paint Disclosure and Radon Requirements”*. The bill eliminates the duplication of state and federal lead-based paint disclosure requirements and amends the law requiring radon testing of residential buildings to exempt buildings used exclusively for short-term or seasonal rentals of less than 100 days.
10. **Chapter 97:** *“An Act to Amend the Lien Process for Unpaid Water Rates”*. The bill gives to private water companies the lien powers that consumer-owned water utilities and consumer-owned sanitary districts have: the authority to impose a lien on any real estate served to secure payment of unpaid rates; the authority, in the case of multi-unit rental property, to include in the lien on the rental property interest on the unpaid rate; and the authority to create a mortgage lien on the real estate and to foreclose that mortgage without court action.
11. **Chapter 104:** *“An Act to Allow Treasurers To Process Tax Lien Discharge and Sanitary District Sewer Lien Documents Using Facsimile Signatures”*. The bill allows municipal treasurers to use facsimile signatures in filing and processing tax lien documents and extends the use of facsimile signatures in the processing of sanitary district sewer liens.

12. **Chapter 121:** “*An Act to Amend the Law Concerning Overboard Discharge Systems*”. The bill makes several changes to the law that requires parties to a transfer of property containing an overboard discharge system, prior to transferring ownership, to determine the feasibility of technologically proven alternatives to the overboard discharge system and install an alternative system if one is identified. The change allows a transferee with an annual income of less than \$25,000 to request a waiver from the requirement to install an alternative system. It increases the time frame, from 90 days of property transfer or significant action to 180 days, within which an alternative system to the overboard discharge must be installed. It also clarifies that an application for transfer of an overboard discharge license must be made no later than 2 weeks after the transfer of ownership.

13. **Chapter 122:** “*An Act to Provide a Remedy to Property Owners When a Tenant Defaults on a Lease*”. The Law Court has historically held that when a residential lease does not contain termination language the landlord may not use the tenancy at will provisions of state law to terminate the lease. In those cases, the only remedy available to a landlord when there is nonpayment of rent by the tenant is to use a forcible entry and detainer action. The bill allows a landlord, after providing notice and service, and with cause as provided in the tenancy at will statute, to terminate a lease that does not contain termination, default or forfeiture language. The law also allows the tenant to terminate such a lease or contract by providing the landlord with seven days' notice in the event of a substantial breach of a provision of the lease or contract.

14. **Chapter 124:** “*An Act to Amend the Laws Dealing with Limitation of Actions*”. The bill establishes a period of 20 years as the statute of limitations for an action on a breach of covenants in any instrument conveying real estate. It satisfies the due process requirements of the Constitution of Maine by providing an opportunity for persons with a vested interest in an expired 6-year limitations period (grantors of unsealed deeds executed between 1991 and 2005) to retain the benefit of that period by providing notice to current owners and requiring a prompt declaratory judgment action if the limitations period is disputed.

15. **Chapter 127:** “*An Act to Permit Disposal of Abandoned Manufactured Housing*”. The bill provides mobile home park owners and operators a process for the disposal of abandoned manufactured housing, based on the current process for the disposal of personal property abandoned by a tenant. For purposes of the law, "manufactured housing" is defined to include a mobile home or a modular home on leased land. The law was passed as an emergency enactment and took effect on May 23, 2011.

16. **Chapter 144:** “*An Act to Update the Radon Registration Act*”. The bill amends the Radon Registration Act by making new construction comply with the Maine Uniform Building and Energy Code.

17. **Chapter 146:** “*An Act to Require a Mortgagee To Provide the Original Release of Mortgage to the Mortgagor after the Release Is Recorded*”. The bill requires a mortgagee, within 30 days of receipt of a recorded discharge, to send it by first class mail to the mortgagor's address listed in the mortgage or to an address specified by the mortgagor for this purpose. A mortgagee who fails to provide the release to the mortgagor in the manner specified is liable to an aggrieved party for damages equal to exemplary damages of \$500.

18. **Chapter 157:** “*An Act to Delay the Implementation of the Rental Housing Radon Testing Requirement*”. Current law requires the owners of residential rental property to begin testing the air in that rental property for the presence of radon by 2012. The bill extends the date by which testing must be done to March 1, 2014.

19. **Chapter 194:** “*An Act to Review State Water Quality Standards*”. The bill requires DEP to use a 1 in 10,000 risk level when calculating ambient water quality criteria for inorganic arsenic.

20. **Chapter 199:** “*An Act to Improve Awareness of Smoking Policies in Maine Rental Housing*”. The bill requires that landlords disclose the policy pertaining to smoking on the premises to all tenants or potential tenants either as part of a written lease agreement or through a separate written notice to those tenants or potential tenants entering into a tenancy at will agreement. The law clarifies that the failure by a landlord to provide disclosure of the smoking policy as required does not create grounds for a private cause of action by a tenant against a landlord and also clarifies that a tenant may not use a violation of a smoking policy by another tenant as the basis for a private cause of action against a landlord.

21. **Chapter 200:** “*An Act to Provide That Private Transfer Fee Obligations on Real Property Are Void and Unenforceable*”. The bill provides that private transfer fee obligations on real property are void and unenforceable. Private transfer fee obligations are defined as an obligation arising under a declaration or covenant recorded against the title to real property or under any other contractual agreement or promise, whether or not recorded, that requires or purports to require the payment of a transfer fee upon a subsequent transfer of an interest in the real property.

22. **Chapter 205:** “*An Act to Restore Exemptions in the Natural Resources Protection Act*”. The bill amends the exemption for certain maintenance and repair activities in the NRPA to exempt repair and maintenance and replacement of existing crossings provided it does not block fish passage, is properly designed and installed and proper erosion control measures are taken. It also requires that DEP, IF&W, DMR and DOT present the final draft of a statewide aquatic conservation and restoration strategy plan to the joint standing committee of the Legislature having jurisdiction over natural resources by January 31, 2013.

23. **Chapter 225:** “*An Act to Eliminate Certain Restrictions on the Installation of Chimneys and Equipment*”. The bill retains provisions in current law governing the continued use of an existing connection of a solid fuel burning appliance to a chimney flue to which another appliance burning oil or solid fuel is connected for any chimney existing and in use prior to February 2, 1998 as long as sufficient draft is available for each appliance, the chimney is lined and structurally intact and a carbon monoxide detector is installed in the building near a bedroom. It adds two additional requirements for chimneys existing and in use on or after February 2, 1998: i) the appliance has been listed by Underwriters Laboratories or other testing laboratory, and ii) the solid fuel burning appliance is installed in accordance with the manufacturer's installation specifications.

24. **Chapter 228:** “*An Act to Modify the Requirement To Replace Trees Cut Down in Violation of Local Laws*”. Under current law, except for timber harvesting, when a person cuts down a tree or understory vegetation in violation of the shoreland zoning laws, that person is required to replace it with a tree of substantially similar size and species to the extent available and feasible. The bill requires the replacement of each tree cut with a tree or trees of varying size and species such that the visual impact from the cutting will be remediated, the tree canopy that was cut will be restored within a reasonable time period and a total basal area equal to at least 50% of the basal area cut will be replanted. It requires the replacement of understory vegetation with vegetation of substantially similar size and species to the extent reasonably available and feasible. It requires a 5-year management plan to be developed, which must address how the replacement trees must be maintained to enable them to grow to a healthy, mature height.

25. **Chapter 231:** “*An Act to Exclude Cupolas from the Measurement of Height for Structures in the Shoreland Zone*”. The bill provides that a municipal ordinance may exempt a cupola, dome, widow's walk or similar feature added to a legally existing conforming structure if the structure is not located in a Resource Protection District or a stream protection district and the cupola, dome, widow's walk or similar feature: i) does not extend beyond the exterior walls of the existing structure; ii) has a floor area of 53 square feet or less; and iii) does not increase the height of the existing structure by more than 7 feet.

26. **Chapter 245:** “*An Act Concerning the Recording of Plans for Subdivisions*”. The bill requires a municipality to allow at least 90 days for recording a subdivision plan, plat or document after municipal approval.

27. **Chapter 272:** “*An Act to Exempt Persons Performing Simple Electrical Repairs from Licensing Requirements*”. The bill exempts regular employees of an owner or a lessee of real property doing incidental electrical work on that property or incidental electrical work by a person whose occupation involves miscellaneous jobs of manual labor from the electrician licensing requirements. "Incidental electrical work" means minor electrical work, limited to light fixtures and switches that does not require electrical installation calculations.

28. **Chapter 276:** “*An Act to Extend the Use of Underground Storage Tanks*”. The bill provides that a double-walled tank may continue in service up to 10 years beyond the expiration of the warranty if precision tests are undertaken to determine the integrity of the tank. It extends from 12 months to 24 months the time period after which underground oil storage tanks taken out of service must be properly abandoned. It prohibits single-walled underground oil storage tanks that have been out of service for a period of more than 24 months from being brought back into service and it prohibits double-walled underground oil storage tanks that have been out of service for a period of more than 24 months from being brought back into service without the written approval of DEP. It directs DEP to report to the Fund Insurance Review Board data and associated information related to incidents of leaks or spills resulting from the double-walled underground oil storage tank exception to the otherwise mandatory replacement upon the expiration of the manufacturer's warranty. It directs DEP to amend its rules to allow the retrofitting of single-walled underground storage tanks with secondary containment systems prior to the expiration of the tank manufacturer's warranty and to allow the upgrading of related piping.

29. **Chapter 285:** “*An Act to Amend the Tax Laws*”. Current law allows a person whose only sales tax collection responsibility is the collection of sales tax on casual rentals, and whose casual rental sales tax liability is expected to be less than \$2,000, to report and pay that sales tax on their individual income tax return. This bill restricts that provision to individual taxpayers.

30. **Chapter 286:** “*An Act to Update Professional and Occupational Licensing Statutes*”. The bill makes the following changes to the professional and occupational licensing statutes: i) clarifies that a broker’s home office does not have to be licensed as a branch office if it is not advertised as a location where the public may contact the agency; ii) requires that a brokerage agreement between a real estate brokerage agency and a client must include a statement that the agreement creates an agency-client relationship; iii) clarifies that an individual who engages in any activity that requires a license, without first obtaining a license, commits a civil violation of unlicensed practice; iv) authorizes an office, board or commission to assess a licensee who appeals a board decision for the cost of reproducing and transcribing the hearing record; and v) changes the name of the Office of Licensing and Registration in the Department of Professional and Financial Regulation to the Office of Professional and Occupational Regulation.

31. **Chapter 289:** “*An Act to Amend the Maine Secure and Fair Enforcement for Mortgage Licensing Act of 2009*”. The bill amends Maine’s SAFE Act to add an exemption from licensing for those individuals who engage in a number of residential mortgage loan transactions per year not in excess of the limit set forth in regulations adopted by HUD or any successor regulatory agency. The bill also adds a definition of “credit sale” and clarifies that credit extended by a property owner to the buyer when the property is sold is not subject to licensing. The law also clarifies that the enforceability of mortgage loans is not affected by a good faith failure to comply with the terms of the Act. The revisions apply retroactively to January 1, 2011, the original effective date of Maine’s SAFE Act.

32. **Chapter 292:** “*An Act to Modify the Laws Regarding Status as an Independent Contractor*”. The bill defines services provided by an individual to be employment subject to the unemployment compensation laws unless the individual is free from control or direction in performing the services and either: i) the service is outside the usual course of business or is performed outside of the place of business; or ii) the individual is engaged in an independently established trade or occupation. The presumption that services performed by an individual for remuneration are considered employment unless certain conditions are met is repealed on December 31, 2012 (the statutory exclusion from “employment” for service performed as a real estate broker or sales representative if performed for remuneration solely by way of commission is not affected by this repeal). The bill creates a stakeholder group of interested parties to develop an employment test that can be used across all occupations and in the administration of unemployment compensation law, workers' compensation law and labor standards programs. The law was passed as an emergency enactment and took effect on June 10, 2011.

33. **Chapter 312:** “*An Act to Clarify Rights-of-way Laws*”. The bill clarifies the ownership rights to proposed, unaccepted ways which are part of a subdivision and shown on a recorded plan. It provides that a person who owns land in a subdivision that abuts a proposed, unaccepted way owns the entire width of the way if the land on the opposite side of the way is not part of the subdivision and title to the way had not been expressly reserved.

34. **Chapter 314:** “*An Act to Provide Rebates for Renewable Energy Technologies*”. The bill adds rebates for renewable energy technologies as an eligible activity for funding from the Voluntary Renewable Resource Fund. It requires the Efficiency Maine Trust to adopt rules regarding the selection and qualification criteria for the use of monies in the Fund. The law was passed as an emergency enactment and took effect on June 13, 2011.

35. **Chapter 332:** “*An Act to Revise Notification Requirements for Pesticide Application*”. The bill repeals the laws that govern the development and maintenance of a citizen's registry of properties used to notify residents, lessees and property owners of registered properties in advance of the outdoor application of pesticides using aircraft or air-carrier equipment. It directs the Pesticides Control Board to amend its rules governing the process for requesting notification of outdoor applications of pesticides to establish a distance from an aerial application of pesticides within which a person is entitled to receive notification of the application. The rule must further specify that an owner, lessee or other legal occupant of a sensitive area receive notification of aerial applications of pesticides made within 1,000 feet of the sensitive area.

36. **Chapter 350:** “*An Act to Create a 6-year Statute of Limitations for Environmental Violations*”. The bill establishes a 6-year statute of limitations for actions for civil penalties for violations of laws administered by DEP. An action must be commenced within 6 years of when DEP or the AG discovers the act or omission giving rise to the violation or identifies the party responsible for the violation, or of the last day of a continuing violation, whichever occurs latest. Commencing an action tolls the statute of limitations. An enforcement action is “commenced” when any of the following occurs: i) the commissioner proposes an administrative consent agreement in writing to the violator; ii) the commissioner schedules an enforcement hearing on the alleged violation; iii) the commissioner, with the prior approval of the AG, files a complaint in District Court; or iv) the AG files a complaint in District Court or Superior Court.

37. **Chapter 359:** “*An Act to Foster Economic Development by Improving Administration of the Laws Governing Site Location of Development and Storm Water Management*”. The bill: i) exempts trail management activities from review under the laws governing storm water management on snowmobile trails developed as part of the Maine Trails System; ii) provides that rules adopted by DEP after January 1, 2010 pursuant to the laws governing storm water management and related to standards for development pursuant to the laws governing site location of development are major substantive rules (except for standards for blasting and wind energy development or offshore wind power projects); iii) requires DEP to apply the standards adopted in rule pursuant to the NRPA for significant vernal pool habitat to significant vernal pool habitat reviewed under the laws governing the site location of development; iv) prohibits DEP from requiring a buffer strip adjacent to significant vernal pool habitat under the laws governing site location of development unless the buffer strip is established for another protected natural resource; and v) directs DEP to adopt rules to allow activities in, on or over high and moderate value waterfowl and wading bird habitat to be eligible for permit by rule under the NRPA.

38. **Chapter 362:** “*An Act to Amend the Laws Governing Significant Wildlife Habitat*”. The bill directs DEP to amend its rules to: i) provide that if a vernal pool depression is bisected by a property boundary, only that portion of the vernal pool depression located on the property of the landowner proposing to cause an impact may be considered in determining whether the vernal pool is significant; ii) provide that an artificial vernal pool is exempt from regulation as long as the vernal pool was not created in connection with a compensation project; and iii) remove seasonal precipitation as a factor in determining that a vernal pool habitat is not significant.

39. **Chapter 365:** “*An Act to Amend the Laws Governing the Enforcement of Statewide Uniform Building Codes*”. The bill makes the following changes to the Maine Uniform Building and Energy Code: i) allows a municipality to adopt the portions of the 2009 International Residential Code containing swimming pool safety fencing standards; ii) amends exceptions to include warehouses or silos used to store harvested crops; iii) provides that the requirements of the 2009 edition of the International Energy Conservation Code within the Maine UBEC do not apply to seasonally restricted cottages until June 15, 2012; iv) requires the Technical Building Codes and Standards Board to adopt the 2006 International Energy Conservation Code standards for residential basement wall insulation; v) clarifies that a certificate of occupancy demonstrating compliance with the Code is required only of buildings located in municipalities with more than 2,000 inhabitants; vi) removes a vague requirement that inspections for the purpose of issuing an occupancy permit be conducted to ensure that a building is "safe from fire"; vii) clarifies that appeals may be taken to either the municipal officers or a local board of appeals and that municipal employees may not take enforcement action without authorization by the employing municipality; and viii) allows a building official to serve as a 3rd-party inspector as long as they are providing that service outside of the official's geographic jurisdiction as a building official. The law was passed as an emergency enactment and took effect on June 16, 2011.

40. **Chapter 368:** “*An Act to Amend the Maine Condominium Act*”. The bill amends the Condominium Act as follows: i) allows an Association to assign its right to future income, including receipt of assessments, but only if a majority of the unit owners have approved; ii) revises the recordkeeping requirements for Associations and requires that the records must be available for examination and copying by a unit owner or the owner's authorized agent; iii) provides that assessments for common expenses accrue, free from a lien of a foreclosing first mortgagee, from and after the date of the foreclosure sale of a unit; iv) gives an Association the power to suspend any right or privilege of a unit owner that fails to pay an assessment, but it may not deny access or withhold services if it would endanger the health, safety or property of any person; v) requires an Association's Board to provide notice of its meetings and clarifies that unit owners have the right to attend its meetings, except during executive sessions.

41. **Chapter 378:** “*An Act Concerning Fees for Users of County Registries of Deeds*”. The bill sets the fees that may be collected by a register of deeds. The fees are \$5 per page for making paper abstracts and copies of plans, \$1 per page for other paper abstracts and copies, 50¢ per page for digital abstracts and copies and 5¢ per page for copies of 1,000 or more digital abstracts and copies of consecutive records. This law applies retroactively to September 1, 2009. The fees set in this law are repealed on July 31, 2012 and the current fee provisions are restored. The law was passed as an emergency enactment and took effect on June 16, 2011.

42. **Chapter 400:** “*An Act to Improve Maine's Energy Security*”. The bill establishes targets for the Office of Energy Independence and Security to reduce the State's consumption of oil by at least 30% from 2007 levels by 2030 and at least 50% from 2007 levels by 2050. It requires OEIS to develop a plan to achieve those targets and to submit it to the Legislature by December 1, 2012. It requires the biennial comprehensive state energy plan to include a section regarding the State's progress in meeting the oil dependence reduction targets.

43. **Chapter 405:** “*An Act to Reduce Regulations for Residential Rental Property Owners*”. The bill amends the landlord/tenant laws to: i) provide that there must be a reasonable basis for a fair housing complaint for it to be a defense to an eviction and provides that the presumption of retaliation does not apply if the complaint was filed after the tenant was served with an eviction notice; ii) provides that a tenant may raise the affirmative defense in a forcible entry and detainer action of failure of the landlord to provide a reasonable accommodation unless it is determined that the landlord does not have a duty to offer a reasonable accommodation or has, in fact, offered it or there is no causal link between the accommodation requested and the conduct that is the subject of the forcible entry and detainer action; iii) provides that if an action for forcible entry and detainer is brought for failure to pay rent or causing substantial damages, there is no presumption of retaliation unless the tenant has asserted that tenant's rights to offset rent with expenditures made by the tenant for repairs or heating costs; iv) provides that the tenant must attach an affidavit to a notice of appeal stating that the tenant has complied with the law in order to stay the issuance of a writ of possession pending an appeal; v) provides that a lease or tenancy at will may permit a landlord to dispose of property abandoned by the tenant without liability as long as the landlord complies with the applicable notice requirements; vi) reduces the time to respond to a notice to dispose of the tenant's property being stored by the landlord from 14 days to 7 days and reduces the time a landlord must continue to store the property if the tenant responds to the notice within the required time frame from 24 days to 14 days; vii) repeals the law that requires a landlord to provide financial assistance to tenants to control bed bugs but requires landlords to disclose the cost of the tenant's compliance with the requested inspection or bed bug control measures and allows a landlord to provide financial assistance in preparing the unit for bed bug treatment and provides that the landlord is not liable to provide the tenant with alternate lodging or to replace the tenant's personal property; viii) provides that the presumption of retaliation only applies if the tenant complained about the bed bugs prior to being served with the eviction notice and the presumption of retaliation does not apply if the action for forcible entry and detainer was brought for failure to pay rent or causing substantial damages to the premises; ix) provides that a prospective tenant who would be paying for a utility has the right to obtain from the regulated utility or the vendor the amount of consumption for the prior 12 months; x) requires the landlord to provide an energy efficiency disclosure statement to the tenant or lessee who is paying for an energy supply for the unit or upon the request of a tenant or lessee and allows a landlord to either place a disclosure of the tenant's right to obtain the energy use history of the rental unit in the application or give the tenant the energy efficiency disclosure statement. It removes the requirement that the landlord post the disclosure statement in a prominent location in the property that is being offered for rent or lease and reduces the time a landlord must retain the statement signed by the tenant from a minimum of 7 years to 3 years.

44. **Chapter 408:** *“An Act to Provide Options to Municipalities Concerning the Maine Uniform Building and Energy Code”*. The bill changes the threshold for municipalities that must adopt the Code from those with more than 2,000 residents to those with more than 4,000. It requires the Technical Building Codes and Standards Board to create an individual uniform statewide building code and energy code that municipalities up to 4,000 residents may choose to adopt. If a municipality with up to 4,000 residents chooses to adopt a building code or an energy code it must adopt the statewide version adopted by the Board or it may adopt the entire Code. A municipality with up to 4,000 residents may choose to have no code.

45. **Chapter 427:** *“An Act to Amend the Maine Consumer Credit Code To Conform with Federal Law”*. The bill repeals Article 8 of the Maine Consumer Credit Code and enacts Article 8-A, which requires creditors to comply with federal truth-in-lending laws and regulations. The law retains current state law that provides more protection for consumers than federal law and makes those provisions applicable only to non-depository lenders. The retained provisions are not applicable to state-chartered financial institutions and credit unions and the Maine State Housing Authority. It also amends the Code relating to the registration of loan officers, since those provisions have been supplanted by new statutes governing the licensing of mortgage loan originators, and permits adjustments in the licensing process for nonbank supervised lenders and loan brokers to allow regulators to continue to adopt the nationwide mortgage licensing system program for those entities. It also requires the Bureau of Consumer Credit Protection to facilitate meetings and other communications among interested parties to evaluate and determine the ways in which the State's foreclosure prevention outreach and housing counseling program may be streamlined and made more efficient.

46. **Chapter 453:** *“An Act to Amend the Maine Historic Preservation Tax Credit”*. The bill extends the sunset date for the historic preservation credit to 2023. It is funded through the next biennium using a portion of the revenue that normally would be deposited in MSHA's HOME Fund. It requires Maine Historic Preservation Commission to report specific recommendations for future funding of the credit to the Taxation Committee by January 15, 2013 and to report every 2 years, beginning January 15, 2015, on the use and funding of the credit.

47. **Resolves, Chapter 27:** *“Resolve, Regarding Legislative Review of Portions of Chapter 305: Permit by Rule Standards, Section 16, Activities in Coastal Dunes, a Major Substantive Rule of the Department of Environmental Protection”*. The resolve authorizes the adoption of portions of DEP's Chapter 305: Permit by Rule Standards, Section 16, Activities in Coastal Dunes, if: "Cobble" and "cobble-trapping fence" are defined; and a cobble-trapping fence is allowed to be in place year-round, is allowed only if the fence is landward of an existing seawall in a developed area and is not required to be placed 15 feet or less in front of a building. The resolve was passed as an emergency enactment and took effect on April 26, 2011.

48. **Resolves, Chapter 46:** *“Resolve, Directing the Department of Environmental Protection To Amend Its Rules Governing the Length of Time Certain Permits Are Valid”*. The resolve directs DEP to amend its rules to provide that permits issued under the NRPA and laws governing site location of development and storm water are valid for 4 years after issuance and that a person who holds such a permit has 7 years to complete a project pursuant to that permit.

49. **Resolves, Chapter 86:** “*Resolve, Directing the Department of Administrative and Financial Services, Bureau of Revenue Services To Review the Farm and Open Space Tax Law*”. The resolve requires Maine Revenue Services to work with the Department of Agriculture, Food and Rural Resources to evaluate land used for agricultural activities enrolled in the farm and open space tax law. It requires the review to consider the method for the valuation of such lands under a current use valuation methodology and an assessment of the thresholds for acreage and income that allows farmland to be assessed at current use. It requires the participation of representatives from municipalities and a statewide farming association and the submission of a report with recommendations and suggested legislation to Legislature.

50. **Resolves, Chapter 108:** “*Resolve, To Establish the Blue Ribbon Commission on Affordable Housing*”. The resolve establishes the Blue Ribbon Commission on Affordable Housing and directs the commission to conduct a study of affordable housing policy, review the status of housing and make recommendations to maximize the investment of available resources and best meet the housing needs of the people of Maine. It requires the commission to seek outside funding to fulfill the commission's duties and to submit a report for presentation to the Joint Standing Committee on Labor, Commerce, Research and Economic Development by February 15, 2012.

51. **Resolves, Chapter 111:** “*Resolve, To Review Issues Dealing with Regulatory Takings*”. The resolve establishes the Committee to Review Issues Dealing with Regulatory Takings. The committee consists of 11 members including five Legislators as well as representatives of various interested groups, appointed by the President of the Senate and the Speaker of the House, and the AG or the AG's designee. The committee will study issues associated with property rights and the public welfare and report to the Joint Standing Committee on Judiciary by December 7, 2011. The resolve was passed as an emergency enactment and took effect on July 8, 2011.

CARRYOVER BILLS TO 2012

1. **LD 145:** *“An Act To Protect Homeowners Subject to Foreclosure by Requiring the Foreclosing Entity To Provide the Court with Original Documents”*.
2. **LD 305:** *“RESOLUTION, Proposing an Amendment to the Constitution of Maine To Allow Land and Buildings To Be Assessed Differently”*.
3. **LD 323:** *“An Act To Implement a Coordinated Strategy To Attract New Businesses, Expand Existing Businesses and Develop a Consistent and Recognizable Maine Brand”*.
4. **LD 543:** *“An Act To Protect Legislative Intent in Rulemaking”*.
5. **LD 769:** *“An Act To Review the Functions of the State Planning Office”*.
6. **LD 849:** *“An Act To Provide Tax Relief for Maine's Citizens by Reducing Income Taxes”*.
7. **LD 876:** *“An Act To Convert Vacant Commercial Property to Occupied Commercial Property”*.
8. **LD 882:** *“An Act To Limit Health Care Mandates”*.
9. **LD 919:** *“An Act To Authorize a General Fund Bond Issue To Weatherize and Upgrade the Energy Efficiency of Maine Homes and Businesses and To Provide for a Trained Workforce for Maine's Energy Future”*.
10. **LD 948:** *“An Act To Authorize a General Fund Bond Issue To Create Jobs through Energy Efficiency”*.
11. **LD 1138:** *“An Act To Prevent Unnecessary Expulsion of Landowners from the Maine Tree Growth Tax Law Program”*.
12. **LD 1314:** *“An Act To Standardize the Definition of "Independent Contractor”*”.
13. **LD 1470:** *“An Act To Ensure Harvesting of Timber on Land Taxed under the Maine Tree Growth Tax Law”*.
14. **LD 1550:** *“An Act To Change Document Filing Fees for County Registries of Deeds”*.

COURT DECISIONS

MAINE LAW COURT

1. The Law Court has ruled in a prescriptive easement case where the benefited and burdened properties were owned in the same family that use of the easement will be assumed to be by accommodation or permission. In order to successfully claim a prescriptive easement, the plaintiff must show 1) continuous use for at least 20 years; 2) under a claim of right adverse to the owner; 3) with the owner's knowledge and acquiescence, or with a use so open, notorious and visible that knowledge/acquiescence will be presumed. In this case, two abutting parcels were owned for decades by members of the same extended family. Defendant had used a shore path across plaintiff's land, which had now been conveyed outside the family. The court found that the first and third elements of prescriptive use had been met. Prior cases had held that when the first and third elements were established, a presumption arises that the use was under a claim of right adverse to the owner which defendant sought to rely on. The court ruled, however, that such presumption was inappropriate where the dominant and servient estates were owned in the same family. The law will infer that such use by family members is by accommodation or permission and does not have the requisite adversity to support imposition of a prescriptive easement. Since no presumption was raised in favor of defendant's use, and defendant had failed to meet the burden of proof on the second element, the judgment finding no prescriptive easement existed was upheld. Androkites v. White, et al., 2010 ME 133 (December 21, 2010).

2. The Law Court has upheld a summary judgment in a foreclosure action where the plaintiff cured a defect in standing between the filing of the complaint and the request for summary judgment. When the plaintiff lender filed the complaint for foreclosure it was the holder of the promissory note but did not yet hold the mortgage. The complaint indicated that the mortgage was assigned to the plaintiff "by assignment to be recorded". In fact, the assignment was dated over a month after the complaint was filed and recorded over two months after the complaint was filed. The Court noted that plaintiff would have been vulnerable to a motion challenging the ability to foreclose at the inception of the action but the issue was not raised until after plaintiff had cured the defect by recording the mortgage assignment. A timely objection to plaintiff's standing would not have resulted in automatic dismissal of the action. Plaintiff would have been given a reasonable time to cure the defect. Since at the time the summary judgment was considered, plaintiff was the holder of both the note and mortgage, the Court upheld the judgment in favor of plaintiff. JP Morgan Chase Bank v. Harp, 2011 ME 5 (January 6, 2011).

3. The Law Court has upheld an injunction enforcing a deed restriction against commercial or business activity. Defendant owned lots that were subject to a deed restriction that the lots shall be "used only for single-family residential purposes and no commercial or business activity shall be conducted". Defendant constructed several roads and engaged in a substantial timber harvesting operation on the lots. The Court found the deed restriction to be unambiguous. The lots were being used as a working commercial forest and there was no residential use of the property within the foreseeable future. The Court held that this violated the deed restriction and defendant would be enjoined from any further timber harvesting or road construction that is not directly and immediately related to a specific residential use of the property. Sanseverino, et al., v. Meadows and Mountains Trust, et al., 2011 ME 8 (January 6, 2011).

4. The Law Court has interpreted the Wharves and Weirs Act to require removal of a portion of wharf extending across an abutter's shore frontage. Plaintiff owned a shorefront property in York. Defendant owned parcels on either side of Plaintiff and had a wharf on both, one of which extended across plaintiff's frontage leaving only 41 feet to navigate through. The Court reviewed the law of tidal shoreline properties. The upland zone is owned by the property owner. The intertidal zone (shore and flats), the area between high- and low-water marks, belongs to the upland property owner subject to certain public rights. The submerged land below low-water mark is owned by the State. The Wharves and Weirs Act allows municipal officers to issue permits for wharves and weirs in the intertidal zone. The act prohibits the maintenance of a wharf in front of the shore or flats of another landowner unless they either consent or do not suffer any injury to the enjoyment of their rights. In this case, no consent had been given. The Court held that the proximity of the wharf to the low-water mark in front of plaintiff's property and the configuration of the two wharves allowing such a limited area of navigation amounted to a sufficient injury to enjoyment that would require removal of the portion of the wharf extending across plaintiff's frontage. Britton, et al., v. Donnell, et al., 2011 ME 16 (February 8, 2011).

5. The Law Court has ruled that the mere recording of a plan by the servient estate does not effectively relocate an easement existing on the face of the earth. Plaintiff owned a property burdened by an easement to cross the property to get to the shore across "the traveled way as it now exists". The deeds creating the easement reserved the right to relocate the easement in which case the rights would shift to the new location. A predecessor owner of Plaintiff's parcel had recorded a plan showing a new location for the easement. The benefitted property owners were not notified of this plan and no actual relocation on the face of the earth had occurred. When a servient estate owner possesses the unilateral right to relocate an easement, that relocation must not significantly lessen the utility of the easement, increase the burden on the easement holders or frustrate the purpose for which the easement was created. If the servient estate owner does not relocate the easement on the face of the earth, it is impossible to determine whether the relocation meets these requirements. Therefore, the Court held that merely recording a plan showing a new easement location will not act to shift the location of the legal easement rights previously conveyed. McCormick v. Lachance, et al., 2011 ME 44 (April 7, 2011).

6. The Law Court has overturned a summary judgment entered in a foreclosure action based on a finding that the affidavits submitted in support of the summary judgment motion were "inherently untrustworthy". In residential mortgage foreclosure actions, certain minimum facts must be included in a mortgage holder's statement of material facts on summary judgment. A party's assertion of material facts must be supported by record references to evidence that is of a quality that would be admissible at trial. This qualitative requirement is particularly important when considering affidavits in foreclosure actions because the information supplied is largely derivative, drawn from a business's records, not from the affiant's personal observation of events. In this case, the affidavits provided contained numerous errors and inconsistencies. In some, they purported to certify to information not available until months after the date of the signature of the affiant. In another, the affiant certified to the recording of a document that did not occur until after the date of the affidavit. In some cases, the same affiant was identified on different affidavits as being an officer with different entities as of the same date. In another instance, the notary's jurat was dated prior to the date of the signature of the affiant. In most of

the affidavits, the signature and notary jurat appear on a separate page from the body of the affidavit. Based on all these errors and inconsistencies, the Court held that the supporting affidavits were inherently untrustworthy and could not support entry of summary judgment. The judgment was vacated and the case remanded. HSBC Mortgage Services, Inc. v. Murphy, 2011 ME 59 (May 19, 2011).

7. The Law Court has overturned a summary judgment entered in a foreclosure action based on a finding that the affidavit submitted by an employee of the mortgagee's servicer in support of the summary judgment motion was hearsay and did not qualify for the business records exception to the hearsay rule. Under the Maine Rules of Evidence, a business's record of acts or events is admissible as an exception to the hearsay rule if the necessary foundation is established by the testimony of the custodian or other qualified witness. A witness must be supplied whose knowledge of business practices for production and retention of the record is sufficient to ensure the reliability and trustworthiness of the record. For that person to be a non-employee, the affiant must demonstrate knowledge that: i) the producer of the record at issue employed regular business practices for creating and maintaining the records accepted by the receiving business; ii) the producer of the record employed regular business practices for transmitting them to the receiving business; iii) the receiving business integrated the records into its own records; iv) the record at issue was, in fact, among the receiving business's own records; and v) the receiving business relied on these records in its day-to-day operations. In this case, no affidavit was provided in support of the motion for summary judgment from the mortgagee establishing the proper foundation for relying solely on information provided by the mortgage servicer. The only affidavit relied on by the lower court in granting the summary judgment was from an employee of the servicer simply claiming that they had "personal knowledge of this account and of the records of this account". The Court held that this supporting affidavit could not be relied upon to establish the fundamental elements entitling the mortgagee to summary judgment in its foreclosure action. The summary judgment was vacated and the case remanded. Beneficial Maine, Inc. v. Carter, et al., 2011 ME 77 (July 7, 2011).

8. The Law Court has ruled that Maine common law allows the public to walk across intertidal lands to reach the ocean in order to scuba dive. Plaintiffs owned the intertidal land (the "wet sand area" between low and high tide lines) in front of their neighbors' property. The neighbors were crossing their intertidal land to take clients scuba diving as part of a commercial business. Plaintiffs sued to enjoin this activity claiming that the public's right to the intertidal lands was limited to "fishing, fowling and navigation" which did not include scuba diving. All six Justices found that scuba diving was an allowable purpose for crossing the intertidal land but divided on the legal justification. Three of the Justices argued that scuba diving fit within the definition of "navigation", a long-recognized allowable purpose for accessing the ocean. They argued that the terms "fishing, fowling and navigation" should be broadly interpreted, an approach that accounts for ever-changing circumstances of society. "Navigation" simply means "passing freely over and through the water without any use of the land underneath" which clearly includes scuba diving. The other three Justices rejected the "warping and straining" of the definitions to include modern uses. They argued that the common law precedents involved a balancing of the rights of private ownership and the public's right to use these lands and found that crossing this area to access the ocean for scuba diving met this balancing test as an allowable use of the intertidal land. McGarvey, et al., v. Whittredge, et al., 2011 ME 97 (August 25, 2011).

MAINE SUPERIOR COURT

1. A Superior Court Justice has upheld the denial of a building permit and ruled that a nonconforming vacant lot held in common ownership with a non-conforming improved lot shall be merged. Plaintiffs owned a house lot and a contiguous vacant lot in common ownership. Both lots were dimensionally nonconforming under current zoning. They tried to obtain a building permit to build on the vacant lot and were denied. On appeal, the court upheld the denial interpreting the merger language in the local ordinance to apply to any vacant lot owned in common regardless of whether the abutting lot was improved or vacant. Driscoll, et al. v. City of Saco, York Dkt. No. AP-09-047 (October 5, 2010).

2. A Superior Court Justice has ruled that the division of a single parcel into three separate parcels by a personal representative as part of the distribution of a decedent's estate did not create a subdivision. In general, any division of a parcel of land into 3 or more lots in a five year period creates a subdivision requiring municipal approval. The subdivision statute has an exemption for divisions created by devise. In this case, the will simply said that decedent's estate was left in equal shares to her three children. A parcel of land owned by the decedent was then divided into three parcels, one of which was then deeded by the personal representative to each of the three children. Plaintiff argued that this did not constitute a division by devise since the will did not specify that each devisee was to receive their own lot, only that the three children would receive equal shares of the estate. The court held that since the will and the probate code gave the personal representative broad discretion in dividing the estate, the decision to divide the parcel and deed separate lots to each child was still considered to be a division by devise and therefore no subdivision requiring municipal review was created. Marquis v. Town of Kennebunk, et al., York Dkt. No. CV-08-226 (September 30, 2010).

3. A Superior Court Justice has ruled that a deed restriction allowing "one detached, single family dwelling" was a building restriction, rather than a use restriction, and adding a second unit on the property was a violation regardless of how it was used. Plaintiff had converted a detached garage into a second residential unit in order to care for an elderly relative. A permit had been issued for the construction on the condition that the second unit only be used by members of the applicant's family. Upon the death of the elderly family member the unit had been rented out. The court held that the restriction allowing only one single family dwelling on the property had been violated when the second unit was created regardless of its use by family members. Zahares, et al. v. Town of Old Orchard Beach, et al., York Dkt. No. AP-08-26 (March 14, 2011).

OTHER JURISDICTIONS

1. A California court has found no breach of fiduciary duty by a disclosed dual agent who provided information to the buyers regarding a nonconforming use of a rental property. Sellers were selling a 14-unit residential property. The listing broker had performed some research years earlier when the sellers purchased the property finding that the property had been built prior to current rules and had been told by municipal officials that any nonconformity would likely be grandfathered. The broker, acting as a dual agent, informed the buyers about the information obtained in the prior investigation and encouraged the buyers to further investigate. They did not and after closing had to eliminate some of the units because of code violations. The court found that the broker had provided the buyers with all of the information he had obtained from the prior transaction, had warned the buyers that the issue was not resolved and had encouraged the buyers to further investigate. The court ruled that the broker had fulfilled his fiduciary duty to the buyers. Van Nguyen v. Alan Van De Vort & Assoc., 2010 WL 2225510 (Cal. Ct. App., June 4, 2010).

2. A New Jersey court has ruled that the obligation on brokers to arbitrate all disputes arising out of their relationship as REALTORS® compels arbitration even when the matter includes punitive damage claims. A brokerage and a prior salesperson were involved in a dispute over a commission in connection with a transaction that closed after the salesperson had left the brokerage. The salesperson filed for arbitration. The brokerage filed suit claiming interference with a contractual right and sought punitive damages. The trial court ruled that the case was properly brought holding that this dispute could not be arbitrated because it involved tort claims rather than a strictly contractual dispute. The appellate court ruled that claims for punitive damages would not eliminate the obligation to arbitrate. Since all of the allegations in this matter revolve around whether the brokerage had a contractual right to a portion of the commission, arbitration was the proper venue. (NAR Note: notwithstanding this ruling, NAR rules do not allow for the award of punitive damages in most arbitration proceedings.) Island Realty v. Caton, (N.J. Super. Ct. App. Div., August 31, 2010).

3. A California court has ruled that a listing agent was obligated to inform potential buyers that the contract price would result in a short sale. The property had been listed for sale at a price well below the total outstanding indebtedness on the property which was known to the listing agent. Buyers found out about this after they went under contract and after they sold their current home. They sued the broker for negligent misrepresentation for failing to disclose that the property could not be sold for the list price. The broker argued that they had a duty to their seller client to keep financial information confidential. The court held that California law requires licensees to disclose “all material facts affecting the value or desirability of a property that are known to them”. The court found that the licensee had a duty to disclose to the buyer that the seller would not be able to convey title at closing for the agreed upon price allowing the buyer to make an informed decision on whether to proceed with the purchase. Holmes v. Sumner, 2010 WL 3896726 (Cal. Ct. App., October 6, 2010). (Note: Maine law has a different legal standard: a seller agent shall “disclose in a timely manner to a prospective buyer all material defects pertaining to the physical condition of the property of which the seller agent knew or, acting in a reasonable manner, should have known”. Emphasis added.)

4. An Arizona court has upheld a disclaimer in a purchase and sale contract that any references to square footage of the property or the improvements were only estimates. The home had been advertised as containing 3,792 square feet when it was actually only 3,605 which was not discovered by buyer until after closing. The P&S contained a disclaimer that any such references were approximate and if square footage was a material matter to the buyer, it must be verified by buyer during the inspection period. The court held that the disclaimer prevented any representation by the seller or seller's broker from serving as a warranty and upheld dismissal of the buyer's suit. Elm Retirement Center, LP v. Callaway, 2010 WL 4312757 (Ariz. Ct. App., November 2, 2010).

5. A South Carolina court has reversed a trial court directed verdict in favor of a seller and remanded for further consideration as to whether seller's breach of obligations under the listing agreement prevented the broker from earning the commission. The listing agreement provided that a commission would be owed if the property was sold during the 6-month term or within 90 days after expiration if sold to someone introduced to the property during the term of the agreement. It also obligated the seller to refer all potential buyers to the listing agent. The property was sold after the 90-day protection period to a buyer who came forward during the listing agreement but who dealt directly with the seller. The seller did not inform the listing agent or refer the buyer. The court held that seller's breach of the agreement by not referring the buyer to the listing agent was material and could be held to have prevented the agent from earning the commission. The directed verdict was overturned and the case remanded. Maro v. Lewis, 697 S.E. 2d 684 (S.C. Ct. App., 2010).

6. A Kentucky court has reversed the dismissal of misrepresentation claims filed by a buyer against a listing broker for failure to disclose a history of flooding on the property. The court ruled that licensees in Kentucky have a duty to disclose known material facts to buyers which are not being disclosed by the sellers. The court stated that a licensee is not liable for a seller's fraud but has a duty to disclose known material facts if they know the seller is not accurately disclosing all material facts. The court sent the case back for further proceedings to determine if the brokerage had actual knowledge of the property's history of flooding. Waldrige v. Homeservices of Kentucky, Inc., 2011 WL 1598738 (Ky. Ct. App. April 29, 2011).

FEDERAL/STATE LAW ISSUES

I. Contract Review Committee.

The following changes to the MAR forms were approved by the Board of Directors at their August 10, 2011 meeting: Seller's Property Disclosure (clarify septic servicing versus pumping, disclosure of water in addition to moisture/leakage); Land Only Property Disclosure (conformed the General Information section to the standard disclosure document); Transaction Booklet (added Q&A regarding asbestos); Sale of Property Addendum – If Not Under Contract and Back-Up Addendum: (clarified that the deferral of performance deadlines would apply to the obligation to deliver earnest money if not already deposited at the time of the offer) and Clause Library (added a Proof of Funds clause to the library). Earlier in the year, the Broker Price Opinion Brokerage Agreement and the Non-Exclusive Buyer Representation Agreement had been modified to add the statement that the agreement creates an agency/client relationship which is now required under a statutory change in the Real Estate Brokerage License Act.

II. Mortgage Acts and Practices (MAP) Rule.

General: The Federal Trade Commission has issued its final Mortgage Acts and Practices (“MAP”) Rule, effective August 19, 2011, imposing requirements on persons who provide information about mortgage credit products to consumers by prohibiting misrepresentations during these communications and also imposing recordkeeping requirements. The Rule will impact real estate professionals who provide information about specific mortgage products to consumers. The Rule does not apply to purely informational communications not designed to cause the purchase of a good or service because these are not commercial communications. So, providing a consumer general information about market rates for different types of mortgages products will likely not be subject to the Rule because these are not related to a specific mortgage product. However, providing a consumer with the daily rates from a specific lender would trigger compliance with the Rule. Similarly, going through the prequalification process with a consumer in order to determine the range of properties that a consumer may be eligible to purchase will not require compliance. However, providing a consumer with the documentation needed to apply for a preapproval from a lender for a mortgage loan will be covered by the Rule.

Disclaimer: The Rule also implies that real estate professionals have to include a disclaimer when providing information to consumers about the terms of a mortgage credit product. The disclaimer will need to be prominent and separated from the other text in the covered statement. It also must be tailored to the type of information that you are providing to the consumer client. NAR has developed a model disclaimer that is attached to the materials as **Appendix A**.

Record Retention: If a real estate professional is subject to the Rule, the real estate professional is required to keep all covered commercial communications for 2 years from the date that the communication was made to the consumer.

III. Mortgage Assistance Relief Services (MARS) Rule.

Effective January 31, 2011, the Federal Trade Commission issued its final Mortgage Assistance Relief Services (“MARS”) Rule regulating those who represent clients involved in short sale transactions. While primarily directed at companies that offer loan modification services, negotiating a short sale with a lender would cause a real estate professional to fall within the requirements of MARS. On July 15, 2011, the FTC announced that it would cease enforcement of most provisions of its MARS Rule against real estate professionals who assist consumers in obtaining short sale approvals from their lenders or servicers. Effective as of that date, real estate professionals acting in their licensed capacity will no longer need to comply with the Rule’s requirements, including the required disclosures and the recordkeeping requirements. This forbearance of enforcement will only apply to real estate professionals who are:

1. Licensed and in good standing under applicable state law requirements;
2. In compliance with state laws governing the practices of real estate professionals; and
3. Assisting or attempting to assist a consumer in negotiating, obtaining or arranging a short sale of a dwelling in the course of completing the sale of the consumer’s home.

The FTC will still enforce the prohibition against misrepresentations made by a real estate professional while assisting a consumer in negotiating or obtaining a short sale. While the Consumer Financial Protection Bureau and state attorney generals can still enforce the Rule as written, it is expected that both will follow the FTC’s lead. (See NAR Q&A in **Appendix B.**)

IV. SAFE Act/Final HUD Rule.

The Secure and Fair Enforcement for Mortgage Licensing (SAFE) Act requires licensing of loan originators under state laws that meet minimum federal requirements. HUD published its final rule implementing the SAFE Act on June 30, 2011. HUD’s enforcement role under the SAFE Act transferred to the Consumer Financial Protection Bureau (CFPB) on July 21, 2011. The final rule adopts a standard that an individual engages in the “business of a loan originator” when they act as a loan originator with respect to financing that is “provided in a commercial context and with some degree of habitualness or repetition”. The absence of either a commercial context or a degree of habitualness or repetition means that the activity does not constitute the “business” of a loan originator and would not require licensure. While acknowledging that it did not have the legal authority to grant categorical exclusions or create a specific de minimis exception, HUD did indicate that “the sale and financing of one’s own residence, vacation home or property, or inherited property, such as through an installment contract, does not constitute engaging in the business of a loan originator” and therefore would not require licensure. This apparently leaves open to local interpretation the question of how many additional transactions an individual can be involved with before creating the “degree of habitualness or repetition” so as to be engaged in the business of loan originator and trigger the requirement to be licensed. (See NAR Guidance in **Appendix C.**)

V. Maine Uniform Building and Energy Board.

The Board meets monthly and is in the process of developing recommendations on several issues sent to them by Legislative committees. The Energy, Utilities and Technology Committee has asked the Board to review and make recommendations on proposals to require systems that turn off lights or otherwise help conserve energy in unoccupied rooms in hotels, motels and inns and systems such as motion sensors that may conserve energy consumed by escalators in commercial buildings. The Board has referred the issues to a Technical Advisory Group for their input. The Labor, Commerce, Research and Economic Development Committee referred a host of issues including a seasonal dwelling exemption, an agricultural building exemption, training opportunities for home builders, disposition of the Standards contained in MUBEC (radon and ventilation), residential basement wall insulation, and the issue of whether MUBEC should apply in LURC territory and tribal lands. The Board expects to make recommendations on these issues in the coming months. There will be a formal rulemaking process in 2012 for adoption of Code updates/amendments. The Board, through the Commissioner of Public Safety, will submit a bill in January to correct any problems created when two different committees in the legislature passed bills affecting MUBEC, most notably to clarify the intent that municipalities with less than 4000 people will not be required to issue certificates of occupancy unless they have voted to adopt the Code.

VI. Tax Reform.

The Taxation Committee has been meeting to consider undertaking a meaningful reform of taxes in Maine. The Committee has expressed a goal of a top income tax rate between 4% and 4.5%, but is a long way from determining if that is achievable. Discussions include an increase in consumption tax and elimination of all deductions through implementation of a flat tax. The committee has invited a number of experts (CPAs, economists, tax attorneys, business people) to meet with them and share ideas. The committee's progress is being monitored but it is likely to be quite a while before a definitive plan emerges.

VII. Maine State Housing Authority.

MSHA recently adopted a one-year Qualified Allocation Plan for allocating and administering federal low income housing tax credits in Maine. Contracts are awarded to developers on a competitive point basis which is delineated in the QAP. Generally the QAP is for two years, but there are two working groups meeting to recommend revisions to the QAP next year. One group is looking at the issue of cost containment, while the other is considering changes to the design and construction manual and MSHA's green building standards. In other MSHA news, the Governor has nominated four individuals to replace Commissioners whose terms have expired: John C. Turner, Lincoln J. Merrill, Jr., Donald F. Capoldo, Jr., and Peter Anastos. REALTOR® Sherry Gregory has served as a Commissioner since 2002 and her current term expires in 2014.

VIII. Shoreland Zoning Stakeholder Group.

The Environment and Natural Resources Committee has directed DEP to convene a stakeholder group to find ways to make shoreland zoning guidelines more "user friendly" for municipalities and landowners. The group has met three times and has spent significant time discussing non-conforming structures, striving to find ways to increase the consistency in interpretation of the guidelines by CEOs, while maintaining some flexibility. Separate from the stakeholder group, it is anticipated that DEP will initiate rulemaking soon to remove wading bird and waterfowl habitats from resource protection in shoreland zoning.

IX. Site Location of Development Law.

The Environment and Natural Resources Committee has directed the creation of a stakeholder group to discuss threshold triggers for application of site location of development law which imposes a state process for permitting projects of regional or statewide significance. Current triggers include general developments of 5 or more lots, structures of 3 or more acres, and residential developments of 15 or more lots. A bill presented last session would have increased the thresholds in an effort to avoid the duplication of effort, cost, and time caused by the state adding another layer of permitting when municipalities already reviews subdivisions. Stakeholders include Maine Municipal Association, MAR, MEREDA, environmental groups, and others. The goal is to find ways to make the permitting process more efficient in terms of time and cost.

X. Maine Real Estate Commission.

These are recent discussions/decisions by the Maine Real Estate Commission:

1. The change of license form (moving from one agency to another) gives licensees a choice in the effective date of the change, either a date specific, or immediate upon receipt of the change form by the Commission. This has caused some confusion for licensees who have misinterpreted "immediate upon receipt" to mean immediate upon execution of the form. The Commissioners decided to remove the choice and require the licensee to fill in an effective date of the change to a new agency.
2. The Commissioners discussed the issue of updating seller disclosure forms as new information is discovered during a sale pending time period. During the pendency, updated information must be given to the buyer who has the property under agreement. [MREIS Reminder: updating the disclosure information in the MLS provides accurate information for appraisers and for the historical record].
3. The Commissioners reviewed a request that property disclosure requirements be amended to include existing or proposed wind developments located near the property. The Commission restated its position that property disclosure requirements are limited to the physical elements of the property and do not include surrounding areas.

4. The Commissioners reviewed a recent letter to financial institutions from the Superintendent of the Bureau of Financial Institutions in which he advises them not to enter into Marketing Service Agreements with real estate brokers as these agreements may be in violation of Section 8 of RESPA (copy attached as **Appendix D**). The Commissioners discussed the importance of communicating this to the brokerage community to inform agencies about the potential risks in these agreements until there is further guidance now that RESPA administration/enforcement is shifting from HUD to the Consumer Financial Protection Bureau.
5. The Director expressed concerns about the financial security of the Commission. License fees of \$100 per biennium are at their statutory cap and the number of licensees has declined. Over the past few years, a total of \$710,000 has been swept from the Commission into the General Fund for budgetary reasons. Legislation may have to be introduced to increase the license fee cap.
6. The topic of the next Core Course was discussed. Suggestions included a course on Fair Housing or perhaps another course on Agency. No final decision has been made yet.

Appendix A: MAP Rule Disclaimer Language

Appendix B: NAR Q&A on Stay of FTC MARS Rule

Appendix C: NAR Guidance on SAFE Act Rule

Appendix D: Bureau of Financial Institutions Letter re: Marketing Services Agreements

APPENDIX A

FTC Mortgage Acts and Practices (MAP) Rule Model Disclaimer Language

“This communication is provided to you for informational purposes only and should not be relied upon by you. _____ [Name of brokerage] is not a mortgage lender and so you should contact _____ [entity providing mortgage product(s) identified] directly to learn more about its mortgage products and your eligibility for such products.”

(NOTE: The disclaimer has to be provided in text at least as large as the body text and should be placed in a location so that the disclaimer is readily apparent to the consumer receiving the mortgage information.)

APPENDIX B

NAR Q&A on the FTC Stay of MARS Rule

On July 15, 2011, the Federal Trade Commission (“FTC”) announced it has decided not to enforce most provisions of its Mortgage Assistance Relief Services (“MARS”) Rule against real estate professionals who are acting in their licensed capacity while assisting sellers to obtain a short sale for their residence. The FTC will still enforce the Rule against real estate professionals who make misrepresentations during the course of obtaining a short sale for their clients.

The FTC’s action is an important step in clarifying the application of the Rule to real estate professionals, as compliance with the Rule had caused a great deal of confusion. While the Consumer Financial Protection Bureau (“CFPB”) and state attorneys general will have the ability to enforce the Rule, both groups are expected to follow the lead of the FTC and not enforce the Rule against real estate professionals, except as noted above. NAR will continue to work with the CFPB to further clarify the application of the Rule to real estate professionals.

Below are some Q&A’s further explaining the FTC’s decision.

1. FTC Stay

1.1 What does the FTC’s action mean for real estate licensees?

The FTC’s stay will remove the need for real estate professionals to comply with most of the Rule’s requirements, including the required disclosures, advance fee ban, and recordkeeping requirements, while acting in their licensed capacity to obtain a short sale for their clients. The FTC will still enforce the Rule against real estate professionals if a misrepresentation is made to a client during the course of assisting the client to obtain a short sales transaction.

1.2 Why did the FTC take this action?

When drafting the Rule, the FTC used very broad language to define who was covered by the Rule, including those who provided assistance to a consumer in negotiating a short sale. The FTC has acknowledged that the agency didn’t realize the number of real estate professionals who would need to comply with the Rule as written. Also, the language contained in the MARS disclosures didn’t make sense in the real estate brokerage context and the other prohibitions in the Rule had an unintended consequence when applied to real estate professionals. Therefore, the FTC decided not to enforce of the Rule against real estate professionals. Due to the fact that the rulemaking authority for MARS is switching to the CFPB, the FTC did not have time to conduct a rulemaking to amend the Rule itself.

2. Eligibility for Stay

2.1 When will a real estate professional qualify for the FTC’s “forbearance of enforcement”?

A real estate professional will need to meet the following conditions in order to qualify for the FTC’s stay:

1. Must be properly licensed and in good standing pursuant to any applicable state law requirements;
2. In compliance with state laws governing the practices of real estate professionals; and
3. Assisting or attempting to assist a consumer in negotiating, obtaining or arranging a short sale of a dwelling in the course of securing the sale of the consumer's home.

The stay applies to both brokers and salespeople associated with the broker. So, if a salesperson assists a broker with a client's short sale and meets the criteria listed above, the salesperson will also fall under the terms of the FTC's stay.

2.2 Does the stay apply to short sale negotiators with a real estate license?

No, the stay will only cover activities undertaken pursuant to the individual's real estate license to assist a client obtain a short sale of their residence. Other types mortgage assistance services provided by a real estate licensee, such as a short sale negotiation service, will need to comply with all of the requirements of the MARS Rule.

3. How the MARS Rule will apply to Real Estate Professionals.

3.1 What part of the MARS Rule will the FTC continue to enforce?

The FTC will continue to enforce the misrepresentation provisions in Rule against any real estate professional who makes a misrepresentation while assisting consumers in the obtaining of a short sale.

3.2 What would constitute a misrepresentation in the FTC's eyes?

The FTC considers a "misrepresentation" to be a misleading or deceptive act in or affecting commerce. Examples of acts by a real estate professional that the FTC would likely view as a misrepresentation: promising the consumer that the real estate professional could obtain a certain price for a short sale; misrepresenting the types of services that the real estate professional will provide, such as claiming an expertise in short sales when this is not true; and otherwise misrepresenting the results that the real estate professional may obtain for the consumer, such as promising a consumers that they will not have any deficiencies from the short sale when there is no basis for the statement.

3.3 If a misrepresentation is made by a real estate professional, will the real estate professional need to comply with the entire Rule, such as making the required disclosures?

Since a real estate professional who makes a misrepresentation during the course of representing a client during a short sale will likely no longer be in compliance with his/her state license law, the real estate professional will need to comply with all of the provisions of the Rule, such as making the required disclosures to consumers. Certainly, real estate professionals should always

be careful about not making misrepresentations to their clients, but they should be especially careful in a short sale transaction to avoid being swept into having to comply with all of the MARS Rule's requirements. Therefore, real estate professionals need to make realistic statements to their clients and also market their services accurately, as failing to do either could be seen as a misrepresentation.

3.4 Will the FTC go after real estate professionals for noncompliance with MARS prior to the stay?

The FTC has said that it will enforce the Rule against a real estate professional for any misrepresentations made to a client during the course of obtaining a short sale for the client. While the FTC retains the ability to prosecute real estate professionals who may not have fully complied with other provisions within the MARS Rule prior to the issuance of the stay, NAR thinks it is extremely unlikely that the FTC will go after any real estate professionals for prior noncompliance with the Rule. FTC actions are designed to enforce compliance with the Rule, and so real estate professionals are unlikely targets at the present time so long as they are not making misrepresentations. The rule is aimed at foreclosure rescue scams, not real estate professionals helping homeowners sell their home as a short sale.

3.5 Can real estate professionals now receive an upfront fee for a short sale transaction?

Yes, real estate professionals can now receive an upfront fee for a short sale transaction, so long as they meet the criteria in Section 2.1 of this article. The ban on upfront fees is within the part of the Rule that will not be enforced by the FTC. Note that the non-enforcement only applies when the real estate professional is acting pursuant to his/her license, and so the real estate professional cannot receive an upfront for other mortgage assistance services.

3.6 Does a real estate professional need to comply with the Rule when he/she refers a client to a MARS provider?

A real estate professional can refer a consumer to a MARS provider without needing to comply with the Rule, but the real estate professional will need to be careful that he/she is not seen as "arranging" the short sale negotiations. If you "arrange" to have another person or entity conduct the MARS negotiations for a consumer, then you are still required to comply with the MARS rule. The MARS rule includes in the definition of MARS provider "any person that...arranges for others to provide any mortgage assistance relief service."

One possible way to avoid this problem is to offer the client a list of providers and allow the client to choose the MARS provider. Whether the real estate professional is seen as arranging the transaction will again be a factual determination, but allowing the client to choose the provider and making it clear that the client is not required to use the MARS providers offered by the real estate professional should eliminate the need for the real estate professional to comply with the MARS rule.

4. CFPB, State Attorneys General, and Private Right of Action

4.1 What is the CFPB's role with the Rule?

On July 21, 2011, the rulemaking authority for the Rule will switch from the FTC to the CFPB. CFPB can also enforce the Rule, in addition to the FTC and state attorneys general.

4.2 While the FTC has stayed most of its enforcement of the Rule, both the CFPB and state attorneys general can continue to enforce the Rule. Will those groups also stay enforcement of the Rule against real estate professionals?

NAR expects that both the CFPB and state attorneys general will follow the FTC's lead. The CFPB is a new agency and NAR believes that the agency will defer to the FTC, the federal agency that created the MARS Rule. The CFPB had published a statement that the "official commentary, guidance, and policy statements issued prior to July 21, 2011, by a transferor agency with exclusive rulemaking authority for the law in question...will be applied by the CFPB pending further CFPB action."

State attorneys general seeking to enforce the Rule will need to alert the FTC to these plans prior to filing any actions. If the FTC does not agree with the proposed state prosecution, the FTC can intervene in the state action and make its views about the action known to the court. All of this leads NAR to the conclusion that the FTC's action will have the effect of staying the Rule as described above against real estate professionals.

4.3 Can a consumer bring a civil lawsuit for alleged violations of the MARS Rule?

The Rule does not contain a private right of action for consumers who want to bring lawsuits for alleged violations of the MARS Rule.

5. Next Steps by NAR

5.1 How will NAR further clarify the application the Rule to real estate professionals?

NAR will contact the CFPB as soon as the Rule is transferred to the agency in order to seek further clarification. In addition, NAR will work to have the FTC's policy incorporated into the Rule by the CFPB to make it absolutely clear that real estate professionals do not have to comply with the Rule so long as they are acting within their licensed capacity and do not make any representations to their clients during the course of assisting a client in obtaining a short sale.

NATIONAL ASSOCIATION OF REALTORS®

SAFE Act Final Rule: Seller Financing and REOs

The SAFE Act requires licensing of loan originators under state laws that meet minimum federal requirements. HUD has established minimum standards in its final rule published in the Federal Register on June 30, 2011. HUD's overall responsibility for interpretation, implementation, and compliance transfers to the Consumer Financial Protection Bureau (CFPB) on July 21, 2011.

Who must be licensed as a loan originator?

The SAFE Act requires licensing of individuals who engage in the business of a loan originator. To trigger the licensing requirements under the SAFE Act, the financing must be primarily for personal, family, or household use. An individual engages in the business of a loan originator if the individual, in a commercial context and habitually or repeatedly, takes a residential mortgage loan application and offers or negotiates terms of a residential mortgage loan for compensation or gain.

How often does a seller have to provide seller financing to be subject to licensing?

HUD chose not to decide how frequently an individual may provide financing before reaching the requisite degree of habitualness. NAR expects CFPB to defer to reasonable state laws on the number of seller financing transactions that would trigger licensing, but only time will tell.

How can sellers financing the sale of their properties be sure to avoid licensing?

A seller financing the sale of his or her own property would completely avoid the issue of licensing by retaining the services of a licensed loan originator.

What about the sale of your own residence, a vacation home, or inherited property?

HUD advises that, "absent evidence to the contrary, the sale and financing the sale of one's own residence, vacation home or property, or inherited property" is not likely to be considered to be engaging in the business of a loan originator.

Are real estate brokerage activities exempt?

Brokers and agents are exempt from loan originator licensing, to the extent they are performing only real estate brokerage activities and not compensated by a lender or loan originator (or their agents). In cases where a real estate broker/agent receives a commission from the lender for the sale of a property owned by the lender (including an REO), individuals must only be licensed as

a loan originator if they engage in the business of a loan originator. Brokers/agents rarely, if ever, take an application or offer to negotiate terms of a residential mortgage loan for such transactions and typically would not have to be licensed as loan originators.

When do the rules go into effect?

State laws requiring licensing are all already in effect. HUD issued earlier guidance and a model statute to assist the states in connection with enactment of their laws. HUD's final rule took effect on August 29, 2011.



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Lloyd P. LaFountain III
SUPERINTENDENT

June 3, 2011

Re: Marketing Services Agreements with Real Estate Brokers

Dear

Financial institutions and other creditors are required to comply with the provisions of the federal Real Estate Settlement Procedures Act (RESPA) codified at 12 U.S.C. Chapter 27 as implemented by the Department of Housing and Urban Development (HUD) at 24 C.F.R. Part 3500 (Regulation X). This obligation is further enforced by Title 9-A M.R.S.A. Section 3-316.

RESPA prohibits kickbacks and unearned fees at 12 U.S.C. Section 2607, also known as Section 8 of RESPA. Essentially, Section 8 prohibits a person from paying or receiving fees for the referral of settlement services or from splitting fees and charges, except for services actually performed.

Recently, the Maine Bureau of Financial Institutions (Bureau) was informed that a real estate brokerage firm asked a financial institution to sign an agreement in which the financial institution will pay the real estate brokerage firm a monthly fee for the real estate broker to market the financial institution's loan products to clients of the real estate brokerage firm. The Bureau obtained a copy of the agreement, entitled "Marketing Services Agreement (MSA)," which indicates that marketing services include promoting the financial institution as a "preferred partner" of the real estate brokerage firm, posting advertisements and marketing material in the real estate brokerage firm's offices, distributing the creditor's marketing materials to clients at the firm's seminars, and posting the creditor's marketing materials on the real estate brokerage firm's website. The MSA also implies that the arrangement with the creditor is not necessarily exclusive and the monthly fee is adjustable at the discretion of the creditor, presumably based on volume, but without explicitly stating so.

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June 3, 2011


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The MSA purports to structure a compensation arrangement between a creditor and real estate brokerage firm in such a way that does not violate Section 8 of RESPA. The Bureau shared a copy of the agreement with officials at the Federal Reserve Bank of Boston, the New York Region of the Federal Deposit Insurance Corporation, and HUD to determine if these agencies are familiar with such agreements, and if they had determined if such agreements are or are not compliant with Section 8 of RESPA. HUD was the only agency with knowledge of such agreements. HUD officials indicated that they had yet to take a formal position on whether or not such agreements are compliant with Section 8 of RESPA, but they expressed concern about the practice and are reviewing these types of agreements. However, because of the impending transfer of RESPA administration and enforcement to the Consumer Financial Protection Bureau, review of these types of agreements will likely not be complete until after the transfer and reorganization.

Because of the uncertainty that such agreements are compliant with Section 8 of RESPA, the Bureau strongly advises financial institutions not to enter into such agreements while this uncertainty exists. If your institution has entered into such an agreement, please provide the Bureau a copy of the signed agreement and any written, legal opinion that the institution obtained relevant to the agreement.

If you have any questions, please contact Deputy Superintendent John Barr at 624-8561 or Deputy Superintendent Donald Groves at 624-8577.

Very truly yours,



Lloyd P. LaFountain III
Superintendent