

PROPOSED CONFERENCE REPORT NO. 1 - June 27, 2012

AB 278 (Eng, Feuer, Mitchell and John A Pérez)

&

SB 900 (Leno, Evans, Corbett, DeSaulnier, Pavley, Steinberg)

SUMMARY: Makes changes to California's non-judicial foreclosure process. Specifically, the conference committee amendments

- 1) Declare that the purpose of the act is ensure that as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure. Additionally, provides that nothing in the act shall be interpreted to require a particular result of that process.
- 2) Define the following terms:
 - a) "Mortgage servicer" means a person or entity who directly services a loan, or who is responsible for interacting with the borrower, managing the loan account on a daily basis including collecting and crediting periodic loan payments, managing any escrow account, or enforcing the note and security instrument, either as the current owner of the promissory note or as the current owner's authorized agent. Clarifies that a servicer does not include a trustee.
 - b) "Foreclosure prevention alternative" means a first lien loan modification or another available loss mitigation.
 - c) "Borrower" means any natural person who is a mortgagor or trustor and who is potentially eligible for any federal, state, or proprietary foreclosure prevention alternative program offered by, or through his or her mortgage servicer. States that borrower does not include:
 - i) An individual who has surrendered the secured property as evidenced by either a letter confirming the surrender or delivery of the keys to the property to the MTBA;
 - ii) An individual who has contracted with an organization, person, or entity whose primary business is advising people who have decided to leave their homes on how to extend the foreclosure process and avoid their contractual obligations to mortgagees or beneficiaries; or
 - iii) An individual who has filed a case under Chapter 7, 11, 12, or 13 of the bankruptcy code and the bankruptcy court has not entered an order closing or dismissing the bankruptcy case.

- 3) Limit scope of application to only mortgages or deeds of trust that are secured by owner-occupied residential real property containing no more than four dwelling units. "Owner-occupied" means that the property is the principal residence of the borrower.
- 4) Limit the scope of loss mitigation requirements and activities to first lien mortgages.
- 5) Make clarifying and conforming changes to existing law requirements concerning the contact of borrowers prior to the recording of notice of default (NOD).
- 6) Require, in addition to existing requirements for contacting borrowers prior to NOD, the servicer must also send the following to the borrower in writing at least 30 days prior to recoding NOD:
 - a) A statement that if the borrower is a servicemember, or dependent of a servicemember, he or she may be entitled to certain protections under the federal Servicemembers Civil Relief Act; and
 - b) A statement that the borrower may request the following:
 - i) A copy of the borrower's promissory note or other evidence of indebtedness;
 - ii) A copy of the borrower's deed of trust or mortgage;
 - iii) A copy of any assignment, if applicable, of the borrower's mortgage or deed of trust required to demonstrate the right of the mortgage servicer to foreclosure; and
 - iv) A copy of the borrower's payment history since the borrower was last less than 60 days past due.
- 7) Establish the following processes for borrowers to request loss mitigation assistance.
 - a) If a borrower submits a complete application for a first-lien loan modification the servicer shall not record a NOD or NOS, or conduct a trustee's sale while the application is pending.
 - b) The servicer may not record the NOD or NOS until any one of the following occur:
 - i) The mortgage servicer makes a written determination that the borrower is not eligible for a first-lien loan modification, and any appeal period has expired.
 - ii) The borrower does not accept an offered first-lien loan modification within 14 days of offer.
 - iii) The borrower accepts a written first-lien loan modification, but defaults on the loan modification or otherwise breaches the borrowers obligation under the first-lien loan modification alternative.
 - c) If the borrower's application is denied they shall have at least 30 days from the date of the denial to appeal the denial and provide evidence to the servicer that the determination

was in error.

- d) If the borrower's application are denied, then the mortgage servicer shall not record a NOD, NOS or conduct a trustee sale until the later of:
 - i) Thirty-one days after the borrower is notified in writing of the denial; or
 - ii) If the borrower appeals the denial, the later of 15 days after denial of the appeal, or 14 days after a first-lien loan modification is offered, but declined by the borrower.
 - e) Following the denial of the modification, the mortgage servicer shall send written notice to the borrower identifying the reasons for the denial, including the following:
 - i) The amount of time from the date of the denial letter in which the borrower may request an appeal of the denial and instructions on how to appeal the denial.
 - ii) The specific reason for an investor denial, if applicable.
 - iii) If the denial was a result of a net present value (NPV) calculation, the monthly gross income and property value used to calculate the NPB and a statement that the borrower may request, in writing, the inputs used to calculate the NVP.
 - iv) If applicable, a finding the borrower was previously offered a loan modification and failed to successfully make payments under the terms of the modified loans.
 - v) If applicable, a description of other foreclosure alternatives for which the borrower may be eligible.
 - f) Specifies that in order to minimize the risk of borrowers submitting multiple applications for first-lien loan modification for purpose of delay, a servicer shall not be obligated to evaluate applications from borrowers who have already been evaluated unless there has been a material change in the borrower's financial circumstances since the date of the borrower's previous application and the change is documented by the borrower.
 - g) Provides that an application is "complete" when a borrower has supplied the mortgage servicer with all the documents required by the servicer within the reasonable timeframes specified by the mortgage servicer.
- 8) Specify that certain entities that meet a specified performance metric (as described in #29) follow a process different than outlined in #7. Specifically, these entities would be prohibited from filing a NOD or NOS, or conduct a trustee sale while a borrower's application for first-lien loan modification is pending. If the application is approved, then the NOD or NOS may not be recorded and a trustee sale may not be conducted if the borrower is in compliance with the terms of a loan modification, forbearance or repayment plan, or a foreclosure prevention alternative has been approved by all parties.
- 9) Provide for a borrower that requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact (SPOC) and provide one or more means of communication with the SPOC. Additionally, requires SPOC to responsible for the

following:

- a) Communicating the process by which a borrower may apply for an available foreclosure prevention alternative and the deadline for any required submission to be considered for the options.
 - b) Coordinating receipt of all documents associated with available foreclosure prevention alternatives and notifying the borrower of any missing documents necessary to complete the application.
 - c) Having access to current information and personnel sufficient to inform the borrower of the status of their foreclosure prevention alternative.
 - d) Ensure that a borrower is considered for all foreclosure prevention alternatives offered, by or through the mortgage servicer.
- 10) Require the SPOC to remain assigned to a borrower's account until the servicer determines that all loss mitigation options have been exhausted, or the borrower's account becomes current.
- 11) Define "SPOC" as an individual or team of personnel each of whom has the ability and authority to perform the responsibilities in a) through d) above. Provides that the servicer shall ensure that each team member is knowledgeable about the borrower's financial situation and current status in the foreclosure prevention process.
- 12) Require that until January 1, 2018 whenever a trustee sale is postponed for at least 10 business days, the borrower shall be provided written notice, at least 5 business days after postponement, regarding the new trustee sale date and time.
- 13) Clarify that no entity shall initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust. Additionally, no agent of the holder of the beneficial interest may commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest.
- 14) Specify that unless a borrower has previously exhausted the foreclosure avoidance process, within five business days after recording NOD, a mortgage servicer shall send a written communication to the borrower that includes the following:
- a) That the borrower may be evaluated for a foreclosure prevention alternative;
 - b) Whether an application is required to be considered for a foreclosure prevention alternative;
 - c) The means and process by which a borrower may obtain an application for a foreclosure prevention alternative.
- 15) Require a servicer to provide written acknowledgment of receipt of any borrower documentation within five business days of receipt. Provides that the servicer, in its initial acknowledgment of receipt of the loan modification application shall include the following

information:

- a) A description of the loan modification process.
 - b) Any deadlines required to submit missing documentation that would effect processing of a loan modification application.
 - c) Any expiration date of documents.
 - d) Any deficiency in the borrower's loan modification application.
- 16) Prohibit the recording of a NOD if the borrower is in compliance with the terms of a written modification, forbearance, or repayment plan, or the foreclosure prevention alternative has been approved in writing by all parties.
 - 17) Provide that if a foreclosure prevention alternative is approved in writing after recordation of NOD, the servicer shall not record the NOS or conduct a trustee's sale if the borrower is in compliance with the terms of a written modification, forbearance, or repayment plan, or the foreclosure prevention alternative has been approved in writing by all parties.
 - 18) Require the mortgage servicer to provide a borrower, who accepts an offered loan modification, a copy of the fully executed loan modification agreement.
 - 19) Specify that upon the borrower executing a permanent first-lien loan modification alternative, the mortgagee, beneficiary or authorized agent shall record a rescission of a NOD or cancel a pending trustee's sale, if applicable.
 - 20) Prohibit the servicer from charging any application, processing or other fee for a modification or other foreclosure prevention alternative.
 - 21) Prohibit the servicer from collecting any late fees for periods during which a complete loan modification application is under consideration, a denial is being appealed, the borrower is making timely modification payments, or a foreclosure prevention alternative is being evaluated or exercised.
 - 22) Provide that if a borrower has been approved in writing for a first lien loan modification or other foreclosure prevention alternative, and the servicing of that borrower's loan is transferred or sold to another mortgage servicer, the subsequent mortgage servicer shall continue to honor the approved loan modification or other foreclosure prevention alternative.
 - 23) Specifies that beginning January 1, 2018 that servicers may not record a NOS or conduct a trustee sale under certain circumstances. Specifically, prevents the recordation of the NOS or conducting the trustee sale until the borrower has been provided a written determination regarding the borrower's eligibility for a foreclosure prevention alternative. If the modification is denied then the servicer must send the borrower a notice identifying the reasons for the denial.
 - 24) State that beginning January 1, 2018, if a foreclosure prevention alternative is approved in writing prior the filing of a NOD the servicer may not record an NOD, or if the alternative

was approved after NOD, then the servicer may not record the NOS under the following circumstances:

- a) The borrower is in compliance with the terms of a written trial or permanent loan modification, forbearance or repayment plan; or
 - b) A foreclosure prevention alternative has been approved in writing by all parties.
- 25) Require that documents required to initiate or complete the foreclosure process shall be accurate and complete and supported by competent and reliable evidence. Additionally, specifies prior to recording or filing foreclosure documents the mortgage servicer shall ensure it has reviewed competent and reliable evince to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information. Provide that for repeated and multiple violations of #23 above, an entity shall be liable for a civil penalty of \$7,500 per mortgage or deed of trust.
- 26) Provide for the following remedies and enforcement:
- a) A borrower may bring an action for injunctive relief for a material violation if the trustee's deed has not been recorded. The injunction would remain in place, and any trustee's sale enjoined, until a court determines that the violation has been corrected and remedied. An enjoined entity may move to dissolve an injunction based on a showing that the material violation has been corrected and remedied.
 - b) After a trustee's deed has been recorded, the mortgage servicer or mortgagee, trustee, beneficiary or authorized shall be liable for actual economic damages resulting from a material violation that is not corrected and remedied prior to the recordation of the trustee's deed.
 - c) If the violation was intentional or reckless, or resulted from willful misconduct by a mortgage servicer or MTBA the court may award the borrower the greater of treble damages or statutory damages of \$50,000.
 - d) Specifies that a mortgage servicer or MTBA shall not be liable for a violation that has been corrected and remedied prior to recordation of the trustee's deed.
 - e) A violation by a person licensed by the Department of Corporations (DOC), Department of Financial Institutions (DFI), or Department of Real Estate (DRE) shall be deemed to be a violation of that person's licensing law.
 - f) No violation shall effect the validity of a sale in favor of a bona fide purchaser.
- 27) State that a signatory to the national mortgage settlement that is in compliance with the relevant terms for the Settlement Term Sheet of that consent judgment with respect to the borrower who brought an action while the consent judgment is in effect shall have no liability for a violation.

- 28) Allow a court to award a prevailing borrower reasonable attorney's fees and costs in an action.
- 29) Provide that a depository institution chartered under state or federal law, a person licensed as a California Finance Lender or under the Residential Mortgage Lending Act or a licensed real estate broker, acting as a servicer, that during its immediately preceding annual reporting period, foreclosed on 175 or fewer residential properties located in California shall only have to comply with specific sections. Under this performance metric, an entity with less than 175 foreclosures in the previous year would not need to comply with the following sections:
- a) Section 2923.55: Requires, in addition to existing requirements for attempting contact with borrowers at 30 days prior to default, that a servicer send a notice to the borrower including information regarding loss mitigation and documents that can be requested.
 - b) Section 2923.6: Prohibitions on foreclosure filing while loan modification is pending. This section also established appeal process and deadlines and requires a detailed denial notice.
 - c) Section 2923.7: SPOC
 - d) Section 2924.9: Requirement that within five days of recordation of NOD, servicer must send borrower notice of their loss mitigation options.
 - e) Section 2924.10: Requirement that servicer respond within 5 days to borrower's written communication.
- 30) In relation to #31 above, entities with less than 175 foreclosures must comply with the following:
- a) Existing legal requirements under 2923.5, established via SB 1137 (Perata) of 2008, which requires due diligence on the part of servicers to contact borrowers at least 30 days prior to filing NOD.
 - b) Section 2924: Contains requirement that postponements of trustee sale of at least 10 days must be noticed to the borrower within 5 days and that an entity cannot record NOD unless it is the holder of the beneficial interest of the deed of trust.
 - c) Section 2924.17: Prohibition on the use of foreclosure documents that are unverified or not supported by competent reliable evidence.
 - d) Section 2924.18: Provides a general ban on initiating or continuing the foreclosure process when a borrower's request for loss mitigation is under consideration, or a foreclosure prevention alternative is approved in writing.
- 31) Sunset various provisions on January 1, 2018. Specifically sunsets the following provisions:
- a) Existing legal requirements under 2923.5, established via SB 1137 (Perata) of 2008, which requires due diligence on the part of servicers to contact borrowers at least 30 days

prior to filing NOD, that includes new notice provision.

- b) Section 2923.6: Prohibitions on foreclosure filing while loan modification is pending. This section also established appeal process and deadlines and requires a detailed denial notice.
 - c) Section 2924: Sunset on provision that requires notice of postponement of trustee sale.
 - d) Section 2924.9: Five day post NOD notice.
 - e) Section 2924.10: Requirement that servicers respond in writing to borrower communications.
 - f) Section 2924.11: additional ban on continuation of foreclosure process while borrower has pending modification.
 - g) Remedies provisions relating to sections that sunset.
- 32) Provides authority to DOC, DFI and DRE to promulgate regulations to carry out purposes of the act.