Dear Assemblymember / Senator:

My name is \_\_\_, and I am a constituent and a participant in the real estate finance industry**. I write to you asking that you vote against SB 1323** (Archuleta), relating to real property foreclosures, passed by the Assembly Judiciary Committee and on its way to the Assembly Appropriations Committee. Despite hours of discussion with the author, staff and sponsors by interested parties, industry organizations and stakeholders, opponents to SB 1323 have failed to reach agreement on the radical proposals contained in the bill. Unfortunately, recent amendments included prior to the hearing make the bill more worthy of opposition, not less.

SB 1323 seeks to upend nearly 100 years of law relating to nonjudicial foreclosure which has been carefully designed as a fair, open, public, and efficient process for lenders to recover their security in the event of default. The provisions of the bill create numerous uncertainties and contradictions, both legal and practical; the result will be litigation both over the design of the bill and its application to specific foreclosures. We have great concern that the bill will also result in higher borrowing costs for California consumers, and a turn to the use of judicial foreclosures, an avenue which is already available to lenders but will benefit no one given the higher costs and lengthy process that would further clog our courts’ already severely delayed dockets.

SB 1323 upends existing statutory protections afforded to borrowers that are in foreclosure and mandates a process that can be triggered without their knowledge or consent.

In essence, SB 1323 proposes a second path during the nonjudicial foreclosure process, where in addition to complying with the longstanding and very specific requirements of the California Civil Code, foreclosure trustees would also first be required to obtain an appraisal of the property. If the appraisal reveals that the owner has 10% or more equity in the property (the vast majority of all residential properties in California would meet this standard at the present time), the trustee would be required to engage a “realtor”, accept and evaluate purchase offers, and actually sell the property, ***with no involvement whatsoever by the actual owner of the property.***

We are opposed to SB 1323 for the following reasons:

**SB 1323 Ignores Fundamental Rights of the Property Owner**: Simply stated, the property owner owns the property until the nonjudicial foreclosure process is concluded. Contrary to popular belief, the strong majority of property owners who experience a default in their obligations do not ultimately lose their properties to foreclosure. These owners have a variety of options available to them, including reinstatement by obtaining funds from friends, family and others; refinancing the obligation; working with lenders on loan modifications or other foreclosure prevention alternatives using the processes made available under the California Homeowners Bill of Rights; listing the property for sale themselves; and/or making a federal bankruptcy filing. What if the owner has already listed the property with another agent? What if the owner is planning to submit a complete application for a loan modification up until 5 days before the sale, as is their current statutory right? None of these rights are recognized by SB 1323, which would apply even if the owner has already listed the property for sale with his or her own realtor or is engaged in (or plans to request) loss mitigation assistance. A high percentage of payoffs, reinstatements, loan modifications, and other foreclosure prevention alternatives occur during the final sale stage of a non-judicial foreclosure. SB 1323 actually limits and upends these statutory protections provided to borrowers under the California Homeowners Bill of Rights.

**Who Exactly is the Client When the Realtor is Engaged?**: Real estate brokers have agency responsibilities to their clients, known as “principals”, and must disclose in their engagements who they are representing. We have asked a number of times, but have not received a clear response regarding: (1) who is the client of the realtor; (2) to whom does the real estate agent owe a fiduciary duty? Presumably it is not the property owner, who did not select the agent, is not part of any contract and is accorded no role in making decisions. Is it the trustee, whose contractual role in the deed of trust is strictly limited to only two duties: reconveying the obligation if the loan is paid off, and commencing foreclosure at the direction of the lender in the event of default? Is the agent’s only obligation to the buyer, and if so, who is to respond to questions about inspections, financing, removing contingencies, etc.? The Bill as drafted provides no answers to these important questions, and realtors/agents will not be able to fulfill their statutory obligations under the Business and Professions Code if they are thrust into this ambiguous role.

**Where is the Trustee’s Authority to Sell the Property?** When a buyer purchases a property involving financing, a deed of trust is executed and recorded. The deed of trust is a contract between the borrower, lender and trustee. Nowhere in any currently-existing deed of trust is the trustee given the right to step into the shoes of the borrower to sell the property in an arms-length transaction without a public auction. In fact, deed of trust provisions expressly require the property to be sold by the trustee at public auction for cash. We believe that SB 1323 will be subject to significant legal challenge on this point and many others.

**SB 1323 Requires Trustees to Perform Duties They are Not Qualified to Perform**: The voluntary (non-auction) sales process contemplated by SB 1323 is replete with discretionary acts not addressed under a trustee’s existing contractual and limited statutory authority. For example, under SB 1323 the trustee is required to select a “realtor” for a “reasonable commission.” Television advertisements alone demonstrate the vast disparity in commissions available to consumers now, from as low as 1% to the standard historical commission of 6%. What is a reasonable commission, and will the trustee be subject to second-guessing on this point? Who will select the escrow company to handle the transaction and answer the myriad questions arising throughout the transaction? How about the purchase of title insurance? How can the trustee be expected to act on behalf of the current owner of the property to evaluate and select the “best” offer taking into consideration the various factors including purchase price, closing date, financing contingency, property inspection and condition, etc. when the trustee has never seen the property, has no personal knowledge regarding the condition, and has no express authority in the deed of trust to sell the property without a public auction for cash? This bill not only puts the trustee in a position that they are not equipped to handle, but it creates significant legal risk for trustees and all parties involved.

**SB 1323 Random Selection of Real Estate Agents is a Perverse Method to Select a Sales Professional**: The most recent amendments to the bill require the trustee to use a random selection method to identify a real estate agent for each property. However, it is difficult to imagine a less meaningful way to select a real estate agent than random selection. The bill defines the random selection as “that which occurs by *mere chance* indicating an unplanned sequence of selection where each realtor has substantially equal probability of being selected.”(italics added) This definition may describe a statistically valid method of conducting a lottery, but it is hardly suited to select a real estate professional, whose training, experience, familiarity with given neighborhoods, contact with other agents, and other factors vary tremendously. In addition, real estate agents are licensed to conduct a variety of activities, including mortgage lending, property management, commercial leasing, and more. The random selection process could often lead to the selection of inexperienced agents who are willing to accept a listing for a low commission but who are not knowledgeable and competent to sell a specific property.

**The Agent Selection Process and the Listing Process in SB 1323 Could Lead to Interminable Delays in** **Foreclosures**: With respect to the agent selection process, the bill requires the trustee to randomly select agents in a database, contact the agent and wait five days for the agent to respond. If the agent fails to respond or declines the assignment, the trustee is to repeat the process for *each agent in the database*, and if no agent accepts the assignment from a given ZIP code, the trustee is to next repeat the process for adjacent ZIP codes. In high population ZIP codes, it will not be uncommon for 100 or more agents to service the area. Simple arithmetic suggests that this process could go on for weeks or months, or even longer.

With respect to the listing process, the bill indicates that the listing is to begin at the appraised value of the property. If no qualifying offer is received at this price within 30 days, the trustee is authorized to reduce the list price four times after a period of 30 days elapses each time. This process alone could add 120 days to the foreclosure process. Parties who typically participate in live foreclosure auctions under the existing process will simply wait until the third or last price reduction and submit an offer at that price, ensuring lengthy delays. During this time the property can sit vacant, contributing to blight. Or if the borrower is still living in the property it can cause additional stress as they will not know the status of the equity sale and whether they will be given additional time to cure the default if the equity sale does not occur and the preexisting auction process is used instead.

**Title Insurance May Not be Available for SB 1323 Transactions**: The California Land Title Association has warned that the risks inherent in the SB 1323 process could make title insurance unavailable to buyers and lenders. Title companies are in the business of managing risks through a careful search of property records, but much of the risk in SB 1323 relates to off-record events, which by their very nature cannot be underwritten. Buyers will be understandably reluctant to purchase properties where their title cannot be insured, and lenders will refuse to lend in transactions where the priority of their liens cannot be protected. If buyers cannot purchase title insurance or obtain financing, the only purchasers will be those which do not care about title insurance or need mortgages to finance transactions. That will tend to limit the pool of buyers to institutional investors which will convert the homes to rental property, exactly the types of buyers the legislature has been seeking to discourage (see below).

**SB 1323 Will Eviscerate the SB 1079 Process**: In 2020, the legislature enacted SB 1079 (Skinner), which was designed to give tenants, prospective owner-occupants, and nonprofits a fighting chance to obtain houses that have been foreclosed, against the superior cash buying power of giant institutional investors. The legislature noted that entire neighborhoods were being converted into rental markets, with young families unable to compete. SB 1079 created a process for these worthy buyers to bid on properties following foreclosure sales, but this process will be rendered a nullity under SB 1323. In this bill, “the qualifying offer with the highest dollar value shall be accepted.” Thus, the very buyers identified in SB 1079 will once again be shut out of the process. Most notably, the SB 1079 process was implemented after the foreclosure auction, when the borrower has already been afforded all of their statutory and contractual rights. SB 1323 would be implemented during the foreclosure process and would cut-off those same rights from borrowers in default.

**In conclusion**, SB 1323 is a well-intentioned but ill-considered proposal which will do potentially irreparable harm to California’s nonjudicial foreclosure process. SB 1323’s opponents have proposed a sound alternative, based upon the belief that no defaulting homeowner who is in a position to sell their property should see it sold in a foreclosure sale. Opponents have proposed several changes to the currently proposed law, including: providing additional notices posted on the property and served on borrowers notifying them about the equity in their property and their right to sell to cure their default, postponing trustee’s sales for 30 days if the borrower has listed the property for sale on the MLS, and postponing an additional 30 days if the home is under contract to be sold. All of these options are intended to educate the borrower of their rights and to let them make an informed decision about their property. Opponents have also proposed a minimum bid price for trustee’s sale auctions, based upon a similar law in Ohio.

Although these alternatives target the precise issues SB 1323 is designed to remedy in a much less complex and more straightforward fashion, so far, none of these suggestions have been considered. As a result of the unwillingness to work together on this proposed legislation, we are opposing the bill outright and for the reasons set forth above, ask that you vote against SB 1323.

Thank you for your time. I apologize for the length of this communication, but there are so many problems with SB 1323 that needed to be highlighted. I am happy to answer any questions or discuss the matter on the phone.