

Date of Hearing: April 19, 2010

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Mike Eng, Chair

AB 1639 (Nava, Lieu, Bass) – As Amended: April 12, 2010

SUBJECT: Mediated Mortgage Workout Program

SUMMARY: Establishes a Meditated Mortgage Workout Program (MMWP) for borrowers facing foreclosure whereby a borrower could request to participate in a mediation sessions with their lender to examine mortgage loan modification options or foreclosure alternatives.

Specifically, this bill:

- 1) Provides that a mortgagee, trustee, beneficiary, or authorized agent shall inform a borrower via certified mail accompanying a notice of delinquency that the borrower may request to participate in the MMWP. The notice shall include the telephone number, email address, and Internet Web site for the administrator.
- 2) Provides that the provisions of the MMWP apply to primary residences only.
- 3) Allows a borrower 30 days from the receipt of the delinquency notice to request participation in the MMWP.
- 4) Provides that if a borrower chooses to participate in the program prior to the filing of a notice of default (NOD) then the mortgagee, trustee, beneficiary, or authorized agent is not required to exercise other due diligence contact requirements as currently mandated under the law (See Civil Code 2923.5).
- 5) Specifies that when a NOD is filed, a separate notice shall be sent to the borrower informing them of their right to request participation in the MMWP printed in large bold type and printed in English, Spanish, Chinese, Tagalog and Korean.
- 6) Provides that if a borrower elects to participate in the MMW Program they must complete an election form either via internet website, email, telephone, or via mail service.
- 7) Requires within 10 days of requesting to participate in the MMWP, the borrower shall submit all of the following to the administrator:
  - a) Tax returns filed for the prior tax year, if the borrower was required to file a tax return for that year;
  - b) Payroll or other income verification for the previous two months; and,
  - c) If in the case of a borrower requesting to participate after a NOD has been filed, the first deposit of 50 percent of their current monthly mortgage payment as a good faith demonstration of readiness to participate in the program.
- 8) Requires that within 10 days of receiving notice that the borrower has elected to participate in the MMWP, the mortgagee, trustee, beneficiary, or authorized agent shall submit all of the

following documents to the program administrator:

- a) The applicable Pooling and Servicing Agreement, if any;
  - b) The loan application, loan origination documents, appraisal, and payment history;
  - c) The original note and assignments or certificate regarding a lost document;
  - d) Documentary evidence of current ownership of chain of custody of the mortgage note;  
and,
  - e) The net present value formula that the mortgage, trustee, beneficiary or authorized agent uses.
- 9) Provides that the foreclosure process is suspended during the time the borrower is participating in the program.
- 10) Requires the administrator to notify the mortgagee, trustee, beneficiary or authorized agent within 15 days of the borrower's election to participate in the program.
- 11) Provides that the mortgagee, trustee, beneficiary or authorized agent shall deposit an administrative fee of \$500 and a deposit of mediator's fees of \$600, as well as, all required documentation within 10 days of notification from the administrator of the borrower's request to participate in the program.
- 12) Specifies that a failure to deposit the require fees within 10 days, the foreclosure proceedings shall be delayed until such time as the fees are paid.
- 13) Prohibits continuance of the MMW program session(s) unless certain conditions are met.
- 14) The borrower and mortgagee, trustee, beneficiary, or authorized agent may agree on the terms of a loan modification which may include any or all of the following features:
- a) An interest rate reduction for a fixed term of at least five years;
  - b) An extension of the mortgage term, not to exceed 40 years from the original date of the loan;
  - c) Deferral of a portion of the principal amount of the unpaid principal balance until maturity of the loan;
  - d) Reduction of the principal balance;
  - e) Compliance with a federally mandated loan modification program;
  - f) Other alternatives that may reduce the borrower's monthly payment to 31 percent or less of the borrower's debt-to-income ratio and that are designed to meet long-term sustainability for the borrower.

- 15) Provides that nothing shall be construed to prevent a creditor from offering or accepting alternatives in writing to foreclosure, such as a short sale or deed-in-lieu of foreclosure, but only if the borrower requests these alternatives, rejects a loan modification offered pursuant to this section, or does not qualify for a loan modification pursuant to this section.
- 16) Specifies that if a borrower fails to meaningfully participate in the MMWP, the program shall be suspended, unless the borrower cures noncompliance within 10 days.
- 17) Specifies that the mortgagee, trustee, beneficiary or authorized agent fails to meaningfully participate, foreclosure actions shall be suspended until such time that the mortgagee, trustee, beneficiary or authorized agent cures noncompliance.
- 18) Defines "meaningful participation" as the following:
  - a) Attendance at all mediation sessions; and,
  - b) Presentation of all required documents and payment of all required fees.
- 19) Provides that the mortgagee, trustee, beneficiary or authorized agent shall not report negative credit information about the borrower to a credit reporting agency if the borrower successfully completes the MMWP and that during the MMWP the borrower shall not be assessed late fees or other charges.
- 20) Requires the administrator to report quarterly to the Legislature regarding the performance of the MMWP, including all of the following information:
  - a) The number of homeowners who attend mediation prior to NOD;
  - b) The number of homeowners who attend mediation after receiving a NOD;
  - c) The number of mediations suspended because of lack of meaningful participation by the borrower;
  - d) The number of mediations suspended because of lack of meaningful participation on the part of the mortgagee, trustee, beneficiary, or authorized agent;
  - e) The number of mediations that result in a loan modification; and,
  - f) The number of mediations that result in a solution other than a loan modification.
- 21) Each mortgagee, trustee, beneficiary, or authorized agent participating in the MMWP shall post public data reports on a quarterly basis on its Internet Web site detailing the following:
  - a) The number of loans that have been modified through the MMWP and the type of modification;
  - b) The final disposition of loans that were in the MMWP but not modified;

- c) The final disposition of loans that did not go through in the MMWP;
- d) The type of loans in a portfolio serviced by others, delineated by prime, subprime, and nontraditional;
- e) The loans in a portfolio or serviced by others that are securitized;
- f) The number of home retention actions;
- g) Re-default rates for portfolio loans and loans serviced for others;
- h) The default rates for portfolio loans and loans serviced for others;
- i) The default rates of loans modified in 2008 by changes in payment;
- j) Newly initiated home retention actions compared with foreclosure actions;
- k) Completed foreclosures and other home forfeiture actions;
- l) The overall portfolio performance by percentage;
- m) The performance of government guaranteed loans, by percentage;
- n) The performance of government sponsored enterprise loans, by percentage;
- o) Seriously delinquent mortgages, by percentage;
- p) HAMP actions by investor and risk category;
- q) Changes in loan terms made by modifications during 2009;
- r) Changes in monthly principal and interest payments owing to modification, by the number of modifications;
- s) The number of modified loans, 30 or more days delinquent;
- t) The number of modified loans, 60 or more days delinquent; and,
- u) The number of modified loans, 90 or more days delinquent.

22) Provides that the administrator shall:

- a) Implement rules and standards for choosing qualified mediators;
- b) Implement rules and standards for removal of mediators;
- c) Develop standards and rules for forms and reports;

- d) Require additional training for mediators to meet the goals of the MMWP; and,
  - e) Collect all fees as required.
- 23) Provides that an Administrator of the MMWP shall be appointed by the Governor and confirmed by the Senate.
- 24) Requires that a mediator shall use all reasonable efforts to ensure that each MMWP session is completed within 60 calendar days of the mediator's appointment.
- 25) Requires the mediator to issue a report to the Administrator upon completion of the mediation that shall state whether the parties reached a mutually acceptable resolution.

EXISTING LAW

- 1) Regulates the non-judicial foreclosure process pursuant to the power of sale contained within a mortgage contract, and provides that in order to commence the process, a trustee, mortgagee, or beneficiary must record a NOD and allow three months to lapse before setting a notice of sale for the property. [Civil Code Section 2924, all further references are to the Civil Code].
- 2) Provides that the mortgagee, trustee or other person authorized to make the sale must give notice of sale, and requires notice of the sale to be made, as specified, at least 20 days prior to the date of sale. [Section 2924f].
- 3) Provides that a mortgage, trustee, beneficiary, or authorized agent may not file a NOD until 30 days after contact has been made with the borrower who is in default. [Section 2923.5a1].
- 4) Requires the mortgagee, trustee, beneficiary or authorized agent to contact a borrower in default in person or by telephone and inform them of their right to a subsequent meeting, and telephone number of the United States Department of Housing and Urban Development (HUD) to find a HUD certified housing counselor. [Section 2923.5a2].
- 5) Allows a borrower to assign a HUD-certified counselor, attorney or other advisor to discuss with the entities options for the borrower to avoid foreclosure. [Section 2923f].
- 6) Provides that a NOD may be filed when the mortgagee, trustee, beneficiary or authorized agent has not contacted the borrower provided that the failure to contact the borrower occurred despite reasonable due diligence on the part of the entity and that "due diligence" means and requires the following:
  - a) The mortgagee, trustee, beneficiary or authorized agent sends a first class letter that includes the toll-free number available for the borrower to find a HUD-certified housing counseling agency; and,
  - b) Subsequent to the sending of the letter the mortgagee, trustee, beneficiary or authorized agent attempts to contact the borrower by telephone at least three times at different hours and on different days. [Section 2923g].

- 7) Requires the mortgagee, trustee, beneficiary or authorized agent to maintain a toll-free number for borrowers that will provide access to a live representative during business hours and requires the mortgagee, trustee, beneficiary or authorized agent to maintain a link on the main page of its Internet Web site containing the following information:
  - a) Options that may be available to borrowers who are unable to afford their mortgage payments and who wish to avoid foreclose, and instructions to borrowers advising them on steps to take to explore these options; and,
  - b) A list of documents borrowers should collect and be prepared to submit when discussing options to avoid foreclosure. [Section 2923g (5)].
- 8) Specifies that the notice and contact requirements do not apply in the following circumstances:
  - a) The borrower has surrendered the property as evidenced via a letter or delivery of keys to the property to the mortgagee, trustee, beneficiary or authorized agent ;
  - b) The borrower has contacted a person or organization whose primary business is advising people who have decided to leave their homes on how to extend the foreclosure process and avoid the contractual obligations; or,
  - c) The borrower has filed for bankruptcy. [Section 2923h].
- 9) Makes a legislative findings and declarations that a loan servicer acts in the best interest of all parties if it agrees to, or implements a loan modification or workout plan in one of the following circumstances:
  - a) The loan is in payment default, or payment default is reasonably foreseeable; or,
  - b) Anticipated recovery under the loan modification or workout plan exceeds the anticipated recovery through foreclosure on a net present value basis. [Section 2923.6].
- 10) Provides that a notice of sale may not be given for 90 days in order for parties to pursue a loan modification. [Section 2923.52].
- 11) Specifies that a servicer can get an exemption from the 90-day foreclosure moratorium if they demonstrate proof of a comprehensive modification program. [Section 2923.53]
- 12) Requires that upon posting of a notice of sale, the mortgagee, trustee, beneficiary or authorized agent shall mail to the borrower a notice in English and Spanish, Chinese, Tagalog, Vietnamese, or Korean that states:

"Foreclosure process has begun on this property, which may affect your right to continue to live in this property. Twenty days or more after the date of this notice, this property may be sold at foreclosure. If you are renting this property, the new property owner may either give you a new lease or rental agreement or provide you with a 60-day eviction notice. However, other laws may prohibit an eviction in this circumstance or provide you with a longer notice before eviction. You may wish to

contact a lawyer or your local legal aid or housing counseling agency to discuss any rights you may have." [Section 2924.8].

13) Provides that a notice of sale postponement may occur at any time prior to the completion of a sale for any period of time not to exceed a total of 365 days from the date set in the notice of sale. [Section 2924g]

14) Specifies that if sale proceedings are postponed for a period totaling more than 365 days, the scheduling of any further proceedings shall be preceded by giving a new notice of sale. [Section 2924g]

FISCAL EFFECT: Unknown

COMMENTS:

How would the MMWP operate? A borrower would have two separate opportunities (amendments are needed to clarify this) to request mediation under the program. First, when the servicer notifies the borrower that they are delinquent on their mortgage the letter would include notification that the borrower has a right to request mediation, as well as, the contact information for the Administrator of the program. From the point of receiving the letter the borrower would have 30 days to request to participate in the program. In the event a borrower has not yet requested mediation and becomes in default, the notice of default would include an additional opportunity to request mediation. After requesting mediation, the borrower would have 10 days to submit the required documentation to the administrator and in the event of a request occurring after an NOD has been filed; the borrower would also have to deposit 50 percent of his monthly mortgage payment with the administrator as a sign of good faith. Once mediation is requested, the foreclosure process stops until the mediation sessions are either, concluded, or the borrower fails to meaningfully participate in the program. After a servicer receives notice that the borrower has elected to participate in the program, the servicer has 10 days to submit the following documentation, as well as, required fees to the administrator such as,

- 1) The applicable Pooling and Service Agreement, if any;
- 2) The loan application, loan origination documents, appraisal, and payment history;
- 3) The original note and assignments or certificate regarding a lost document;
- 4) Documentary evidence of current ownership or chain of custody of the mortgage note; and,
- 5) The net present value formula that the mortgagee, trustee, beneficiary, or authorized agent uses.

If the servicer does not submit the required documentation or fees, the mediation program is suspended until such items are in compliance. Additionally, neither the foreclosure process, nor the mediation session shall continue until the servicer provides the required documents.

Once the case is officially in mediation, the first mediation must be scheduled within 15 days. The mediator is required to ensure that the MMWP will be completed within 60 days. Once the mediation session(s) are finished the mediator is required to issue a report to the Administrator

stating whether the parties reached a mutually acceptable solution. A key concept present in this process is that the mediator can't compel the parties to any specific result. Additionally, the bill requires that the Administrator must report to the legislature on the progress of the mediation program.

Assembly Banking and Finance conducted two oversight hearings specific to loan modifications and mediation on October 13, 2009 and November 12, 2009 (documents from those hearings may be found at <http://asm.ca.gov/acs/newcomframeset.asp?committee=3>). Those hearings examined the potential use of mediation as a solution to foreclosures.

Testimony provided at these hearings provided numerous insight into the foreclosure issue from the perspective of servicers, housing counselors, community groups and individual borrowers. The common thread of complaints among community groups and individual borrowers has been a lack of response from servicers regarding loan modification requests. While, the numbers have slightly improved since the committee conducted those hearings, borrowers and community groups continue to raise these issues. Based on the information gathered at those hearings the authors of AB 1639 decided to move forward with a foreclosure mediation bill. Additionally, in preparation for the aforementioned hearings, Committee staff was contacted by several borrowers with stories of delay, lost paperwork, frustration with servicer call centers and other obstacles to receiving help. In one particular case a borrower submitted documentation that they had received three different modification offers each one different and in conflict with the other, and the servicer's contact person changed four times. Finally, even while receiving numerous modification offers, the foreclosure process continued. The authors of this bill contend that a foreclosure mediation process would provide an avenue for borrowers to reach some type of mutual agreement with their servicers. AB 1639 does not mandate loan modifications, but encourages both parties to reach a resolution. Additionally, the authors find that a mediation process can help distinguish between those borrowers who really need and can be assisted versus those borrowers that can not be helped by modification but are perhaps given false hope through the continuing contention that federal programs will offer assistance.

Nevada, Connecticut, New Jersey, Florida, Maine and Illinois have all instituted some form of foreclosure mediation programs over the last year. On April 13, 2010 the Maryland legislature approved a bill that established a foreclosure mediation program. Additionally, local jurisdictions are also engaging in mandatory mediation programs such as the cities of Philadelphia and Milwaukee. The majority of these foreclosure mediation programs are less than one year old so data regarding their performance is limited. At this point, Nevada has data for the first six months of their program:

- Notices of Default filed: 29,242 (July through October)
- Requests for mediation: 3,446
- Mediations conducted: 372
- Mediations scheduled: 805
- Cases scheduled 1,402



On April 14, 2010, the Congressional Oversight Panel (COP) for the Troubled Asset Relief Program (TARP) issued its April report "Evaluating Progress of TARP Foreclosure Mitigation Programs." The COP report reveals that "Treasury's response continues to lag well behind the pace of the crisis." Overall, the report points out that Treasury did not establish performance standards for servicers, and that no remedies exist when services do not fulfill the requirements of programs such as HAMP. Other findings and conclusions from the report include:

"The Panel adopted this report with a 3-1 vote on April 13, 2010. Treasury's response continues to lag well behind the pace of the crisis. As of February 2010, only 168,708 homeowners have received final, five-year loan modifications – a small fraction of the 6 million borrowers who are presently 60+ days delinquent on their loans. For every borrower who avoided foreclosure through HAMP last year, another 10 families lost their homes. It now seems clear that Treasury's programs, even when they are fully operational, will not reach the overwhelming majority of homeowners in trouble. Treasury's stated goal is for HAMP to offer loan modifications to 3 to 4 million borrowers, but only some of these offers will result in temporary modifications, and only some of those modifications will convert to final, five-year status. Even among borrowers who receive five-year modifications, some will eventually fall behind on their payments and once again face foreclosure. In the final reckoning, the goal itself seems small in comparison to the magnitude of the problem...

...The long delay in dealing effectively with foreclosures underscores the need for Treasury to get its new initiatives up and running quickly, but it also underscores the need for Treasury to get these programs right. Even if Treasury's recently announced programs succeed, their impact will not be felt until early 2011 – almost two years after the foreclosure mitigation program was first launched – and more than three years after the first foreclosure mitigation program was undertaken."

Where have we been, where are we now, where are we going?

According to the latest report from the Office of the Inspector General for the Troubled Asset Relief Program (SIGTARP) issued March 25, 2010, 2.8 million Americans received a foreclosure filing in 2009 and millions more are expected to receive a filing in 2010.

The first major legislative effort in California to tackle the growing foreclosure crisis was the introduction of Senate Bill 1137 (Perata, Corbett, Machado) Chapter 69, Statutes of 2009. The intent of SB 1137 was to ensure that servicers contact borrowers prior to the first filing of the foreclosure process, at least 30 days prior to filing a notice of default NOD, servicers must either make contact to borrowers or satisfy due diligence requirements. Contact with the borrower must be in person or by telephone "in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." The borrower must be advised that he or she has the right to request a subsequent meeting, and if requested, the meeting must be scheduled to occur within 14 days. The borrower must be provided with the toll-free telephone number made available by the United States Department of Housing and Urban Development to find a HUD-certified housing counseling agency. Servicers could then file a NOD if, with the filing, they certify that they have made efforts to contact the borrower. Early, after the passage of SB 1137 the filing of NODs dropped significantly for a few months, but eventually climbed back up as servicers started to understand the steps needed for compliance.

On February 20, 2009 the Governor signed the California Foreclosure Prevention Act (CFPA) as an urgency statute. Implementation of the CFPA occurred 90 days after the signing of the bill and subsequent to California's three mortgage regulators (DFI, DOC and DRE) drafting emergency regulations, culminating on June 1, 2009. The CFPA modified the foreclosure process by providing for a delay of 90-days to give borrowers an opportunity to work with their servicers on a loan modification. However, a 90-day delay in foreclosure proceedings does not apply in those cases where a mortgage loan servicer has received an exemption based on the existence of a comprehensive loan modification program. In addition to the specific characteristics a comprehensive program as outlined in the legislation, participation in the Home Affordable Modification Program (HAMP) was deemed sufficient to receive an exemption from the moratorium. The majority of mortgage loan servicers operating in the state have received an exemption from the 90-day foreclosure moratorium (More information on those who have received exemptions can be found at <http://www.corp.ca.gov/FSD/CFP/default.asp>). The CFPA does not require an individual to receive a modification, only that a servicer has a program in place.

On February 18<sup>th</sup>, 2009, President Obama announced a multi-pronged approach to deal with the foreclosure crisis through the use of mortgage refinancing and mortgage modification.

The Making Home Affordable Program (MHAP) is part of the Obama Administration's broad, comprehensive strategy to get the economy and the housing market back on track. MHAP offers two different potential solutions for borrowers: (1) refinancing mortgage loans, through the Home Affordable Refinance Program (HARP), and (2) modifying mortgage loans, through HAMP. HAMP is the tip of the spear in the government's attempt to mitigate foreclosures.

How does HAMP work? In order to be eligible for HAMP, the borrower must be in default (60 or more days late) or be at risk of imminent default. The property must be owner-occupied and have a maximum unpaid principal balance of \$729,750 and the mortgage must have been originated by January 1, 2009. Once the mortgage meets the criteria the servicer undertakes a net present value test (NPV) to determine whether modification, foreclosure, or foreclosure alternatives are in the best interest of the mortgage holder. If the model generates a positive value for modification, meaning that loss to the owner of the mortgage would be less than foreclosure then HAMP participating servicers are required to offer a modification so long as modification is not prohibited by investors. Once the aforementioned criteria are met the servicer follows HAMP's "waterfall" formula in order to design a modification that will result in a front end (meaning costs of housing, property taxes, property insurance and HOA dues) debt to income (DTI) ratio of 31 percent. The "waterfall" is a series of steps that go in order until the DTI is close to 31 percent as possible. The following are the "waterfall" steps:

- 1) Capitalize all outstanding interest, escrow advances and third party fees, and waive late fees for borrowers who meet trial modification guidelines.
- 2) Reduce mortgage interest rate in increments of .125 percent with a floor of two percent.
- 3) Extend term of mortgage up to 480 months (40 years) from the modification date.
- 4) Provide non-interest bearing and non-amortizing principal forbearance.

In order to encourage participation in the program, Treasury pays incentives using Troubled Asset Relief Program (TARP) funds. If a servicer makes modification to get the homeowner down to a 38 percent DTI, Treasury will provide 50 percent of the costs of the modification to get the loan modified to the target 31 percent DTI. Payments are made only after the modification becomes permanent and last for up to five years, or until the loan is paid off, whichever is earlier. HAMP also includes the following incentive programs:

- 1) Servicers will receive an up-front incentive payment of \$1000 for each permanent modification. They will also receive pay for success payments as the borrower stays in the program, of up to \$1000 each year for up to three years.
- 2) Borrowers are eligible to receive a pay-for-performance success payment that goes straight toward reducing the principle balance on the mortgage loan of up to \$1000 per monthly payment for up to five years.
- 3) One-time bonus incentive payments of \$1,500 to investors and \$500 to servicers will be provided for modifications made while the borrower is still current on mortgage payments, but in danger of imminent default.

Principle forgiveness is not required under HAMP, however recent changes to HAMP address this issue and will be discussed later in this analysis.

Over a year after its implementation the reviews are mixed as over a million trial modifications have been offered, yet only 169,000 have been made permanent. Several factors have contributed to this performance such as program guidelines that have changed many times. A major change just recently announced is the requirement of income verification at the time of starting the trial modification, which is set to begin mid-April of 2010. Prior to this change, servicers were allowed to use undocumented income declarations from the borrower to make a determination for a trial modification. During the three month trial period servicers attempt to verify income through proper documentation. This process may have been a contributing factor to the low permanent loan modification numbers thus far.

A report, "Factors Affecting Implementation of the Home Affordable Modification Program", issued March 25, 2010 by SIGTARP reveals several obstacles and difficulties that plague HAMP even a year after its inception. Since HAMP started, it has undergone 11 program changes and updated directives and an additional 9 changes to its NPV model. The following are a few of the issues identified by SIGTARP:

- 1) Five of the HAMP servicers visited by SIGTARP for the audit covered in the report, mentioned that they lacked guidance on identifying and determining eligibility for borrowers at imminent risk of default on privately owned mortgages (Non-GSE).
- 2) Some servicers have told borrowers that they must be in default to be considered for a modification even though HAMP provides help for those facing default.
- 3) Servicers are still undergoing challenges in maintaining and training staff to handle modifications.

- 4) Marketing of the availability of HAMP as an option has been limited by a lack of guidance from Treasury and servicer specific delays.
- 5) Treasury informed SIGTARP that potentially only 50-66 percent of estimated three million trial modifications will convert to permanent status.

In testimony before the U.S. House Committee on Oversight and Government Reform (March 25, 2010), the Acting Comptroller General of the United States, Gene L. Dodaro testified to the difficulties faced by the HAMP program based on findings from the Government Accountability Office (GAO). The following are some of the HAMP issues highlighted by the GAO:

- 1) Treasury has not yet finalized remedies or penalties for servicers who are not in compliance with HAMP guidelines.
- 2) Each major program change has required servicers to update computer systems, adjust business practices and retrain servicing staff.
- 3) Ten servicers contacted by GAO had 7 different sets of criteria for determining whether borrowers who were not yet 60 days delinquent qualified for HAMP.
- 4) Although Treasury guidelines state that servicers must provide borrowers with information designed to help them understand the modification process and must respond to HAMP inquiries in a timely manner, the HAMP servicers contacted by GAO varied widely in the timeliness and content of their initial communications with borrowers about HAMP. Some servicers contacted borrowers about HAMP as soon as payment was 30 day delinquent, and other servicers did not inform borrowers until they were at least 60 days delinquent.
- 5) Treasury has not developed standards to evaluate servicers' performance in communicating with borrowers or penalties for servicers that do not meet Treasury's requirements.
- 6) Servicers do not have a systematic process for tracking HAMP complaints.

The GAO also reported that the numerous program changes to HAMP and often, a lack of clarity on certain provisions have made the program less effective than it could be.

Servicer guidance on the implementation of HAMP is governed by Supplemental Directives issued by the Treasury Department. These directives can be found at <https://www.hmpadmin.com/portal/programs/directives.html>.

The most recent change to HAMP, announced on March 26<sup>th</sup>, 2010 involves program changes intended to address unemployed borrowers, negative equity and the concurrent pursuit of a foreclosure while a loan is being reviewed for modification. According to the limited details released, the new enhancements will require servicers to provide 3-6 months of temporary forbearance for eligible unemployed borrowers, after which they will be evaluated for a HAMP modification. Second, servicers will be encouraged through various incentives to consider principal reductions for loans that are over 115 percent of current value of the property. Finally, guidance will be forthcoming on the issue of borrowers who continue to face the foreclosure process while under evaluation for a HAMP modification. These guidelines will provide

clarification on protections for borrowers from foreclosure actions who are under consideration for a modification.

The contention among some industry groups is that the federal response to foreclosures could be complicated or otherwise frustrated by implementing a statewide foreclosure mediation program. At this point, nothing in AB 1639 directly conflicts with ongoing loan modification efforts. Actually, getting borrowers and servicers in the same room with a neutral third party could expedite modifications under the HAMP program by ensuring that both parties communicate and possess all the necessary documentation to evaluate a need for modification. On the other hand, a mediation session would reveal very clearly to a lender whether a borrower has a realistic ability to pay their mortgage. Additionally, the design of the mediation program proposed in this bill follows current California law on mediation in that the result of the mediation cannot be compelled upon the parties. For example, a mediator can only assist the discussion and offer advice, but that assistance is non-binding.

Finally, an additional issue that has been raised are concerns "strategic default." Strategic default is when a borrower, who can otherwise afford their mortgage payment, is in a negative equity position and decides to go into default, either to walk away from the mortgage or compel the servicer to negotiate a loan modification. Studies on the issue of strategic default tend to examine previous downturns, or engage in surveys to gauge general attitudes about mortgage default and its interaction with negative equity positions. In a study from July of 2009, "Moral and Social Constraints to Strategic Default on Mortgages" the authors, while finding that when negative equity reaches the 50 percent mark, borrowers are 17 percent more likely to default, still found that, "It is difficult to study the strategic default decision, because it is de facto an unobservable event. While we do observe defaults, we cannot observe whether a default is strategic." This study attempted to reach correlations on strategic default even though by the authors own admission strategic defaults are not observable for the purposes of study. At this point, the additional evidence is mostly anecdotal as found in newspapers and other media outlets. Certainly, strategic default occurs, but to what extent, it is difficult to determine. Would AB 1639 provide more motivation for strategic default? It doesn't seem likely, as the borrower would have to produce for the mediator evidence of their financial situation.

#### Can face-to-face meetings work?

In research conducted thus far, it appears that face-to-face meetings between borrower and servicer can, and do work. For example, while credit unions have foreclosure rates below 1 percent, they have demonstrated success with assisting their borrowers on a case by case basis to assess their chances at modification. Additionally, many of the large banks/servicers conduct town hall meetings that encourage borrowers to show up with necessary documentation and conduct modification assessments on the spot. The benefit of a face-to-face interaction seems to be so beneficial that 27 of these types of events are officially scheduled over the next year in California.

#### Amendments and other issues.

If the committee wishes to see any amendments to this bill, they will have to be adopted after the bill leaves this committee due to the timing constraints policy committee hearings (Judiciary is schedule to hear this bill the following day).

The committee recommends that going forward the following questions and/or amendment suggestions are addressed:

- 1) Create language that provides that if a servicer has already met face-to-face with a borrower, or has documented evidence of a loan modification offer, then the servicer would be exempt from the requirement to participate.
- 2) Establish a sunset of January 1, 2014.
- 3) Clarify that borrowers who request mediation prior to the filing of a NOD may not request mediation subsequent to the filing.
- 4) Change a technical issue regarding fee reimbursement so that the borrower reimburses the servicer for 50 percent of the cost of the mediation sessions.
- 5) If necessary, adjust the timelines in the bill to ensure that resolution of the mediation sessions occur faster than currently proscribed. For example, the current timeframe requires that the mediation session(s) should be completed within 60 days. The authors may want to consider decreasing this time to 30 or 45 days.
- 6) Should servicers be allowed to request mediation with an unresponsive borrower? Under this approach, either party involved in the foreclosure can request mediation.

Related State Legislation.

AB 2024 (Blumenfield), Provides that any lender or servicer that rejects a loan modification request shall respond to the borrower making the request within 7 days via certified mail with the specific reasons why the request was rejected. Additionally requires that the response must comply with certain language translation requirements.

Status: In Assembly Banking & Finance Committee

AB 2236 (Monning), requires a mortgagee, trustee, or beneficiary, or an authorized agent of that person, to include on all notices informing a borrower that he or she has either failed to make a required minimum payment or failed to make a payment when due, the name and the contact information, including the address and telephone number, of the mortgagee, trustee, beneficiary, or authorized agent who has the authority pursuant to state and federal law to modify the terms and conditions of the borrower's loan.

Status: In Assembly Banking & Finance Committee.

AB 2189 (Ma), requires a loan modification agreement to be translated into one of five non-English languages if the original mortgage was negotiated in that language.

Status: In Assembly Banking & Finance Committee

AB 2678 (Fuentes), prohibits a notice of sale from being issued, if the mortgagee, trustee, beneficiary or authorized agent is currently in negotiations with a borrower on a loan modification.

Status: In Assembly Banking & Finance Committee.

SB 1275 (Leno, Steinberg), requires a mortgagee, trustee, beneficiary, or authorized agent, prior to the filing of a notice of default, to provide the borrower with an application for a loan modification and other foreclosure avoidance options and a specified notice regarding the borrower's rights during the foreclosure process. Prohibits the mortgagee, beneficiary, or authorized agent from combining collections activity with communication with the borrower about foreclosure avoidance options. Deletes the requirement that the notices of default contain a specified declaration, and would instead require the mortgagee, beneficiary, or authorized agent to, concurrently with the filing of a notice of default, record a declaration of compliance that attests to specified facts, and mail the borrower a notice stating that these requirements have been met. Provides that failure to record a declaration of compliance, or recordation of a declaration of compliance that fails to meet the specified requirements, would constitute grounds for the borrower to bring an action to void the foreclosure, or to recover either treble damages or statutory damages in the amount of \$10,000, whichever is greater, from the mortgagee, trustee, beneficiary, or authorized agent.

Status: In Senate Banking, Finance & Insurance Committee.

SB 1427 (Price), requires a notice of default to include a statement that identifies the name, address, telephone, and e-mail address of any person or entity that is designated to be responsible for the maintenance of the property for which the deed of trust is recorded. Existing law requires a legal owner to maintain vacant residential property purchased at a foreclosure sale, or acquired by that owner through foreclosure under a mortgage or deed of trust; authorizes a governmental entity to impose civil fines and penalties for failure to maintain that property of up to \$1,000 per day for a violation; and provides that these statutory provisions do not preempt any local ordinances and prohibits a governmental entity from imposing fines on a legal owner under both these provisions and a local ordinance. This bill would provide that these statutory provisions preempt any local ordinance and provides that any fines or penalties imposed for failure to maintain a property are the obligation of the legal owner and that these fines would be treated as a lien against the property in a foreclosure sale.

Status: In Senate Judiciary Committee

#### Related Federal Legislation.

Both H.R. 4635 (Fudge et al.) and S. 2912 (Nelson) provides that prior to beginning the foreclosure process the foreclosing entity must participate in a mediation session consistent with any state or local foreclosure mediation programs.

#### REGISTERED SUPPORT / OPPOSITION:

##### Support

The City of Los Angeles , Mayor Antonio Villaraigosa (Sponsor)  
California Dispute Resolution Council  
Consumers Union

##### Opposition

California Bankers Association  
California Building Industry Association  
California Chamber of Commerce

California Credit Union League (CCUL)  
California Financial Services Association  
California Independent Bankers  
California Land Title Association  
California Mortgage Bankers Association  
Securities Industry and Financial Markets Association  
The Civil Justice Association of California (CJAC)  
United Trust Association

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