Date of Hearing: April 16, 2012

ASSEMBLY COMMITTEE ON BANKING AND FINANCE
Mike Eng, Chair
AB 1602 (Eng & Feuer) – As Amended: April 9, 2012

SUBJECT: Mortgages and deeds of trust: foreclosure.

SUMMARY: Establishes foreclosure guidelines and procedures for mortgage loan servicers, and provides a framework for borrowers seeking a modification of their mortgage loan. Specifically, this bill:

1) Requires that a notice of default (NOD) must include a declaration of the following (Section 1, all further references in this summary refer to the section in which these provisions appear in the bill):

   a) The borrower is not a service member, or dependent of a service member who is entitled to the benefits of the Servicemembers Civil Relief Act (SCRA);

   b) The mortgagee, beneficiary, or authorized agent is in possession of the note and evidence of its right to foreclose including documentation of any assignments and endorsements of the mortgage note or deed of trust. If proof is not attached, then a separate declaration is required signed by an individual having personal knowledge of the facts stated within the declaration;

   c) Facts sufficient to demonstrate the foreclosing parties right to enforce the note;

   d) A statement that the person is unable obtain possession of the note, if that is the case; and,

   e) A description of the terms of the note and any riders attached thereto, including the date of execution, parties to the note, amount of the loan, term of the loan and initial interest rate.

2) Provides for the following borrower notices:

   a) At least 14 days prior to the recordation of a NOD, a mortgagee, beneficiary or authorized agent must provide a written notice containing the following (Section 1):

      i) A statement that provides the facts supporting the right of the mortgagee, beneficiary or authorized agent to foreclose;

      ii) Notification that the borrower may receive, upon written request:

         (1) Copy of the most recent payment history;

(2) Copy of the borrower's loan note, and copies of any assignments of the note and the name of the investor that holds the borrower's loan note;

iii) An itemized account summary that includes:

(1) Total amount needed to bring the account current;

(2) Date through which the loan obligation is paid current;

(3) Date of last full payment;

(4) The current interest rate in effect for the loan;

(5) The date on which the interest rate may adjust or reset;

(6) The amount of any prepayment penalties;

(7) Description of any late payment fees.

(8) Contact information for any assigned single point of contact;

(9) Statement concerning the borrower's rights if they are a servicemember;

(10) A statement outlining the loss mitigation efforts that have already been undertaken; and

(11) The toll-free telephone number for the Office of Homeowner Protection (OHP).

b) Within five calendar days after recordation of a NOD, the borrower shall receive written communication of the following (Section 5):

i) The borrower can still be evaluated for alternatives to foreclosure;

ii) Whether an application is required to be submitted in order for the borrower to be considered for a foreclosure prevention alternative;

iii) The process and steps by which a borrower may obtain an application for a loan modification or any foreclosure prevention alternative.

3) Provides that if a borrower has submitted an application for a loan modification within 120 days of delinquency, a NOD shall not be recorded while the loan modification application is pending (Section 2). Under this scenario, the NOD may not be filed until either:

a) The borrower has been determined not to be eligible for a loan modification;

b) The borrower does not accept an offered modification; or

c) The borrower accepts the modification but later breaches the modification agreement.

4) Specifies, in the situation in #3, that if the loan modification is denied then the NOD may not be recorded until 30 days after the borrower is notified of the denial, or 15 days after the denial of an appeal.

5) Prohibits the recordation of a notice of sale (NOS) if a borrower has submitted a loan modification application within 60 days of the recording of a NOD, and the loan modification application is pending (Section 6). The NOS may not be recorded until one of the following occur:

   a) It has been determined that the borrower is not eligible for a loan modification; or

   b) The borrower does not accept an offered modification; or

   c) The borrower accepts the modification but later breaches the modification agreement.

6) Specifies, in the situation in #5, that if the loan modification is denied then the NOS may not be recorded until 30 days after the borrower is notified in writing of the denial or if the denial is appealed, then 15 days after the appeal.

7) Provides when a borrower submits an application for a loan modification less than 15 days prior to the recordation of a NOS, the NOS shall not be recorded until the borrower is evaluated for a loan modification (Section 7). The NOS shall not be recorded until one of the following occur:

   a) It has been determined the borrower is not eligible for a loan modification;

   b) The borrower does not accept an offered modification; or

   c) The borrower accepts the modification but later breaches the modification agreement.

8) States that the requirement to consider a loan modification application, and to delay the recording of a NOS shall not apply if the servicer has previously denied the borrower for modification and the new application does not reflect a material change in circumstances.

9) Requires that when a borrower submits a loan modification application or any document in connection with a loan modification application the mortgagee, trustee, beneficiary or authorized agent shall do the following (Section 8):

   a) Provide written acknowledgement of the receipt of the documentation within three business days of receipt. This initial acknowledgement shall include a description of the loan modification process, including deadlines and the toll-free number of the OHP.

   b) Notify the borrower of any deficiency in the borrower's loan modification application no later than five business days after receipt.

10) Provides that if a loan modification application is denied, the borrower shall have 30 days from the denial to appeal the denial (Section 8).

11) Following the denial of a loan modification, the servicer must send a denial notice to the borrower that includes specified information.

12) Notwithstanding the previous provisions, prohibits the recording of a NOS under the following circumstances (Section 9):

    a) The borrower is in compliance with a trial or permanent loan modification.

    b) A short sale or deed-in-lieu of foreclosure has been approved by all parties.

13) States that if a borrower has accepted a loan modification offer, then the servicer shall provide a copy of the fully executed loan modification agreement following the receipt of the executed copy from the borrower. If the modification offer was not made in writing, then the servicer shall provide a summary of its terms as soon as possible after approval of the modification (Section 9).

14) If a permanent loan modification has been executed the servicer shall record a recision of the NOD (Section 9).

15) Requires servicers to make publicly available information on their qualification processes, all required documentation and information necessary for a complete loan modification application and key eligibility factors for all proprietary loan modifications (Section 9).

16) Requires servicers to track outcomes and maintain records regarding characteristics of proprietary loan modifications. Additionally, requires the posting of modification "waterfalls" eligibility criteria, and modification terms on the servicers website (Section 9).

17) Prohibits a servicer from charging any application, processing or other fee related to a proprietary loan modification, as well as, any late fees while a loan modification is under consideration (Section 9).

18) Provides for remedies if a servicer fails to comply with following requirements(Section 10):

    a) Section 2923.5-Pre-NOD due diligence and contact requirements;

    b) Section 2923.6-if borrower has submitted loan modification application within 120 days after delinquency and the notice has not be recorded then the servicer may not record the NOD until specific conditions have been met.

    c) Section 2924- Requirements for the proper filing of NOD.

    d) 2924.9-Borrower notice within 5 days after filing of NOD.

    e) 2924.10- if borrower has submitted loan modification application within 60 days after filing of NOD then the servicer may not record the NOS until specific conditions have

been met.

f) 2924.11- if borrower has submitted a loan modification application within 15 days before trustee sale, then the sale may not go forward until specific conditions have been met.

g) 2924.12- Requires written acknowledgement of the loan modification and associated and subsequent documents. Additionally, requires that a loan modification denial notice must include specified information.

h) 2924.13-Provides prohibitions on when a NOS may be filed.

i) 2924f-Specifes the conditions and terms of trustee sales, including notice requirements.

19) Provides for the following remedies:

a) A borrower may seek an injunction to prevent a trustee sale if the borrower reasonably believes that the requirements in #18a-I have not been met. The injunction would remain in place until the provisions are complied with.

b) If a trustee sale occurs and the borrower reasonably believes that the mortgagee, trustee, beneficiary, or authorized agent failed to comply with provisions in #18a-i.

c) A court may award a borrower the greater of treble damages or statutory damages of $50,000, plus attorney's fees and costs if it finds a violation of the specific provisions was intentional or reckless or resulted from willful misconduct.

20) Clarifies that a borrower may not obtain relief for violations that are technical or de minimis in a nature such that it did not impact the borrower's ability to pursue alternatives to foreclosure.

21) A violation shall not affect the validity of a sale to a bona fide purchaser and any of its encumbrances.

22) Provides that a signatory to the Multi-State Mortgage Settlement may use compliance with the consent judgment, while it's in effect, as an affirmative defense to any liability for violation of the provisions.

23) Establishes the OHP which will have the following responsibilities (Section 12):

a) Responding to inquiries and complaints from individuals regarding provisions of this bill;

b) Attempting to seek servicer compliance with the provisions of this bill;

c) Maintain an internet website to receive inquires and complaints;

d) Provide an annual report to the Legislature, summarizing its activities;

24) Specifies that funding for the OHP shall come from payments made to the Attorney General via the Special Deposit Fund created via the Multi-State Mortgage Settlement.

25) Requires that a borrower must be provided written notice within five calendar days after the postponement of a foreclosure sale and that the notice shall include the new sale date and time.

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 NOS 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 NOS, 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 U.S. 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 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) Requires that upon posting of a NOS, 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].

11) Provides that a NOS 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]

12) 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 NOS. [Section 2924g]

FISCAL EFFECT: Unknown

COMMENTS:

This bill would codify provisions of the National Mortgage Settlement approved by the United States District Court of the District of Columbia on April 5, 2012, for mortgage loan servicers servicing mortgage loans in California.

On April 6th, a federal judge signed-off on the $25-billion foreclosure settlement, first announced in February of 2012, between banks (Citi, Wells Fargo, Bank of America, Chase and Ally), federal agencies, and the state attorneys general from 49 states and the District of Columbia. The investigation began in October of 2010 as media stories highlighted widespread allegations regarding the use of "robo-signed" documents used in foreclosure proceedings around the country. The attorneys general formed working groups to investigate the widespread allegations, however, further investigation led to a larger discussion with the five largest mortgage loan servicers regarding various facets of the foreclosure and loan modification process. While conducting their investigation the attorneys general identified deceptive practices regarding loan modifications, foreclosures occurring due to the servicer's failure to properly process paperwork, and the use of incomplete paperwork to process foreclosures in both judicial and non-judicial foreclosure cases.

The complaint filed by the attorneys general, provided a detailed list of allegations concerning several key areas related to foreclosure and servicing practices. The specific allegations include:

- Unfair, deceptive, and unlawful servicing process;
- Unfair, deceptive, and unlawful loan modification and loss mitigation processes;
- Wrongful conduct related to foreclosures;
- Unfair and deceptive origination practices; and
- Violation of the Servicemembers Civil Relief Act.

In resolving the aforementioned claims, the settlement provides for relief for borrowers in the form of modifications, mortgage loan servicing reforms, increased compliance monitoring and enforcement.

The settlement requires a total of $17 billion to be allocated to facilitate loan modifications to borrowers with the intent and ability to stay in their homes. Of the $17 billion, 60% must be allocated to principal reduction modifications. Additionally, banks must offer refinance programs through the use of $3 billion to assist borrowers with negative equity whom otherwise would be unable to refinance. Additional settlement monies are dedicated to borrowers who

were wrongfully foreclosed on after January 1, 2008 (Aprox $1.5 billion in relief), and another $2.5 billion to the states for foreclosure relief and housing programs.

The settlement also requires major changes concerning servicing of the five banks party to the settlement. These changes include:

- Information in foreclosure affidavits must be personally reviewed and based on competent evidence.
- Holders of loans and their legal standing to foreclose must be documented and disclosed to borrowers.
- Borrowers must be sent a pre-foreclosure notice that will include a summary of loss mitigation options offered, an account summary, description of facts supporting lender's right to foreclose, and a notice that the borrower may request a copy of the loan note and the identity of the investor holding the loan.
- Borrowers must be thoroughly evaluated for all available loss mitigation options before foreclosure referral, and banks must act on loss mitigation applications before referring loans to foreclosure; i.e. "dual tracking" will be restricted.
- Denials of loss mitigation relief must be automatically reviewed, with a right to appeal for borrowers.
- Banks must implement procedures to ensure accuracy of accounts and default fees, including regular audits, detailed monthly billing statements and enhanced billing dispute rights for borrowers.
- Banks are required to adopt procedures to oversee foreclosure firms, trustees and other agents.
- Banks will have specific loss mitigation obligations, including customer outreach and communications, time lines to respond to loss mitigation applications, and e-portals for borrowers to keep informed of loan modification status.
- Banks are required to designate an employee as a continuing single point of contact to assist borrowers seeking loss mitigation assistance.
- Military personnel who are covered by the SCRA will have enhanced protections.
- Banks must maintain adequate trained staff to handle the demand for loss mitigation relief.
- Application and qualification information for proprietary loan modifications must be publicly available.
- Servicers are required to expedite and facilitate short sales of distressed properties.
- Restrictions are imposed on default fees, late fees, third-party fees, and force-placed insurance.

For a detailed look at the complaint and resulting settlement, a full list of documents can be found at http://www.nationalmortgagesettlement.com/.

Background.

Foreclosures blight neighborhoods, put financial pressure on families and drive down local real estate values. And consumers, made more cautious by a crippled housing market, spend less freely, curbing the economy's growth. Distressed borrowers are certainly among the hardest hit. But as communities across the country know all too well, families that lose their homes are not the only victims of foreclosures. Even homeowners who have never missed a payment on their loans have suffered as "spillover" costs extend throughout the neighborhood and the larger community. By some estimates the foreclosure crisis will strip neighboring homeowners of $1.9 trillion in equity as foreclosures drain value from homes located near foreclosed properties by 2012. As a result of depressed home values, nearly one out of every four borrowers is "underwater," owing more than the home is worth. Meanwhile, state and local governments continue to be hit hard by declining tax revenues coupled with increased demand for social services. In fact, the Urban Institute estimates that a single foreclosure costs $79,443 after aggregating the costs borne by financial institutions, investors, the homeowner, their neighbors, and local governments. However, even this number may understate the true cost, since it does not reflect the impact of the foreclosure epidemic on the nation's economy or the disparate impact on lower-income and minority communities.

When a borrower is in danger of defaulting, a commonsense approach under a traditional mortgage would be for the lender and borrower to mutually agree to modify the terms of the loan, or for the bank to agree to allow the borrower to sell the home in a "short sale" for an amount that equals or approximates the outstanding balance on the loan to save the lender the time and costs of foreclosure. Moreover, in a declining real estate market, the amount obtained by the lender in a foreclosure sale may be less than the amount owed on the loan.
Despite the apparent mutual interest of loan holders and borrowers, many distressed homeowners report obstacles when trying to obtain a loan modification or short-sale approval. (*See e.g.* "Loan Modifications Elude Local Homeowners," *Sacramento Bee*, January 17, 2011.) Part of the answer may be that the mortgage industry has become more complex. Rarely does a modern mortgage involve only two players, a lender and a borrower, with a common interest in avoiding default and the capacity to communicate directly. Instead, the modern mortgage industry typically involves at least four players: (1) the original lender (or originator); (2) a loan servicer (who may or may not be affiliated with the originator) who collects from the borrower and remits to the mortgage holder; (3) an investor who has purchased an interest in the mortgage (or more likely an interest in the stream of income from a pool of mortgages); and (4) a borrower. Under this more complex arrangement, it is the servicer – not the loan originator or the investor holding an interest in the mortgage – who collects payments and has the power to either bring a foreclosure or approve a loan modification or a short sale if the borrower fails to make timely payments.

In some cases, difficulty obtaining investor approval is cited as the primary obstacle. Critics contend, however, that servicers' financial incentives are the true explanation. Whatever the explanation, virtually all observers agree that federal and state programs implemented to promote loan modifications and short sales have, at best, failed to live up to initial promises.

Some analysts and leading economists have cited a failure by banks to provide loan modifications as a single reason that the foreclosure crisis continues to drag on. Another obstacle to loan modifications arises if borrowers have second liens, like home equity loans, on their properties. These liens are often held by lenders who are also servicers on the first mortgage. They, too, have little interest in seeing any modification because it would harm the value of their holdings and reduce their income from fees. ("A Mortgage Nightmare's Happy Ending," New York Times (Dec. 25, 2010).)

Difficulties in achieving an equitable foreclosure and loan modification process predate the multi-state settlement.

The nationwide mortgage settlement is not the beginning of this story. Borrower frustration with the loan modification process and their ability to communicate with their loan servicer dates back to 2006-2007 as newspapers, magazines, blogs, and television news broadcasts have all detailed borrower difficulties concerning the loan modification and foreclosure process. In 2010 the problems became highlighted due to reviews of the various federal foreclosure relief programs.

A report released by the Congressional Oversight Panel in December 2010 reviewing these programs, found

> *Although Treasury oversees servicers and encourages compliance, there is little real accountability for servicers that fail to adhere to program standards, lose borrower submitted paperwork, unnecessarily delay the process, or otherwise don't make modifications...The Panel has previously noted that servicers need to face 'meaningful monetary penalties' for noncompliance with servicer participation agreements and denial of modification for an unexplained reason, a breach of their contractual obligations under HAMP servicer participation agreements. However, Treasury has seemed reluctant to do more than vaguely threaten the potential for clawbacks of HAMP payments.*

Then in April of 2011, Federal regulators (Office of Comptroller of Currency, Office of Thrift Supervision, and Federal Reserve System) issued enforcement orders against Ally Bank/GMAC, Aurora Bank, Bank of America, Citibank, EverBank, HSBC, JPMChase, MetLife, OneWest, PNC, Sovereign Bank, SunTrust, US Bank, and Wells Fargo. These orders were based on a review conducted by the regulators of the foreclosure policies and practices of these servicers. In their report, *Interagency Review of Foreclosure Policies and Practices,* April 2011 the federal regulators found,

> *The reviews found critical weaknesses in servicers' foreclosure governance processes, foreclosure document preparation processes, and oversight and monitoring of third-party vendors, including foreclosure attorneys. While it is important to note that findings varied across institutions, the weaknesses at each servicer, individually or collectively, resulted in unsafe and unsound practices and violations of applicable federal and state law and requirements. The results elevated the agencies' concern that widespread risks may be presented—to consumers, communities, various market participants, and the overall mortgage market. The servicers included in this review represent more than two-thirds of the servicing market. Thus, the agencies consider problems cited within this report to have widespread consequences for the national housing market and borrowers.*

And,

> *Foreclosure governance processes of the servicers were underdeveloped and insufficient to manage and control operational, compliance, legal, and reputational risk associated with an increasing volume of foreclosures. Weaknesses included:*
>
> - *inadequate policies, procedures, and independent control infrastructure covering all aspects of the foreclosure process;*
> - *inadequate monitoring and controls to oversee foreclosure activities conducted on behalf of servicers by external law firms or other third-party vendors;*
> - *lack of sufficient audit trails to show how information set out in the affidavits (amount of indebtedness, fees, penalties, etc.) was linked to the servicers' internal records at the time the affidavits were executed;*
> - *inadequate quality control and audit reviews to ensure compliance with legal requirements, policies and procedures, as well as the maintenance of sound operating environments; and*
> - *inadequate identification of financial, reputational, and legal risks, and absence of internal communication about those risks among boards of directors and senior management.*

And,

> *Weaknesses in foreclosure processes and controls present the risk of foreclosing with inaccurate documentation, or foreclosing when another intervening circumstance should intercede. Even if a foreclosure action can be completed properly, deficiencies can result (and have resulted) in violations of state foreclosure laws designed to protect consumers. Such weaknesses may also result in inaccurate fees and charges assessed against the borrower or property, which may make it more difficult for borrowers to bring their loans current. In addition, borrowers can find their loss-mitigation options curtailed because of dual-track processes that result in foreclosures even when a borrower has been approved for a loan modification. The risks presented by weaknesses in foreclosure processes are more acute when those processes are aimed at speed and quantity instead of quality and accuracy.*

The consent order resulting from the investigations required the creation of an independent foreclosure review process. This process was created in order to allow borrowers who are denied foreclosure mitigation to appeal that decision to a third party for a review. A year after these enforcement orders, only 3% of eligible borrowers have requested a review of their loan file, and no servicer that was party to the enforcement order has faced a penalty for actions uncovered during the investigation, nor have any borrowers received compensation for wrongful acts (*Just 3% of Eligible Borrowers Apply for Foreclosure Review*, Wall Street Journal, April 3, 2012).

The arrival of the multi-state settlement must be viewed in context. As demonstrated in this analysis, the issues and concerns raised by the settlement are not new, and appear to have not yet been resolved. At a national level, it seems that these combined efforts demonstrate that borrowers with a legitimate chance to stay in their home have fallen through the cracks. The issues may even be more pronounced in California as foreclosures are processed via a non-judicial foreclosure process. California's foreclosure process relies on all parties carrying out the foreclosure to meet their statutory deadlines without independent oversight. This process also assumes that a borrower facing foreclosure is aware of their rights, and has the ability and knowledge to challenge their foreclosure in the proper venue. Under normal circumstances, this process works and can via its certainty benefit the overall housing and lending markets. However, in the extraordinary circumstances currently facing California, it is a system that places an overwhelming amount of authority and judgment in the hands of servicers, many of whom have admitted to being overwhelmed with the volume of foreclosure activity since 2007.

Mortgage Settlement vs. AB 1602.

1) AB 1602 requires a pre-NOD notice to borrowers, as well as, a declaration included with the NOD that includes facts that demonstrate the right of the foreclosing party to foreclosure. Additionally, these notices require certain account information and rights and responsibilities should be disclosed to the borrower. The settlement contains these requirements located in Settlement Exhibits A, pages 4,6, 7,8,24 (Future references will refer to exhibit A and the associated pages).

2) AB 1602 requires pre-foreclosure contact with a borrower outlining their loss mitigation options. The settlement also requires this pre-foreclosure contact (A-16).

3) AB 1602 contains provisions applicable depending on stage of foreclosure, that require the foreclosure process to halt until the borrower can be evaluated for loss mitigation options. If a borrower is denied, the foreclosure process may not continue until 30 days have expired, or until 15 days after an appeal of a denial. Settlement language provides similar prohibitions on dual track and similar timelines (A-17, A-18, A-20)

4) AB 1602 requires servicers to provide written acknowledgement when they receive a loan modification application or associated documents. The settlement includes this requirement (A-25).

5) AB 1602 requires that loan modification denial letters contain specific information informing the borrower of the reasons for the denial. The requirement to issue a denial letter is included in the settlement (A-27).

6) AB 1602 provides that if a borrower has previously sought out a loan modification and is applying for additional consideration, that the servicer does not have to delay the foreclosure process unless the borrower's application contains a material change in their financial circumstances. This exception is included in the settlement (A-29).

7) AB1602 requires servicers to make publicly available information on the qualification process necessary for a proprietary loan modifications. The settlement includes this

requirement (A-29).

8) AB 1602 requires servicers to track outcomes and maintain records concerning the characteristics of loan modifications. The settlement includes this requirement (A-30).

9) AB 1602 prohibits the collection of late fees for periods when a loan modification application is under consideration, or if the borrower is making timely payments under a trial modification. The settlement prohibits these same fees (A-36).

10) AB 1602 provides for individual remedies for aggrieved borrowers, and OHP to assist with compliance. The settlement creates a third party monitor, the Office of Mortgage Settlement, created to ensure servicers who are party to the settlement comply with its terms. Additionally, the settlement requires ongoing compliance with various servicing standard metrics. Ensuring compliance with the settlement is vital but even the third party monitor, Joseph Smith has admitted that individual borrower complaints will not the focus of his oversight, "Smith said that his office will not investigate those complaints — it will instead provide homeowners with information about how to get help from other organizations — but it will use the data it collects as part of its job of monitoring compliance with the settlement." (*Joe Smith Lays Out Path Forward for Mortgage Settlement*, American Banker. April 9, 2012)

11) The provisions of AB 1602 will remain in effect indefinitely, or until it is repealed by future legislation. The terms of the settlement are in effect for three years.

Timelines.

The following is a simplified guide to the timelines in AB 1602 that require various actions to take place. This list is only meant to be descriptive. The timelines are not cumulative, and vary depending on stage of the foreclosure process and status of loan modification request.

1) **60 days** prior to recording of NOD, written communication must be sent to the borrower that outlines their loan modification options.

2) **60 days** prior to the recordation of NOS, written communication must be sent to the borrower that outlines their loan modification options.

3) At least **14 days** prior to recordation of NOD, borrower must be notified of the facts supporting the basis for foreclosures, an account summary, contact information for any assigned point of contact, the telephone number for the OHP, and a statement outlining previous loss mitigation efforts.

4) If a borrower submits an application for loan modification within **120 days** of delinquency the NOD may not be recorded, until the borrower has been evaluated for loss mitigation.

5) **30 days**-Time after borrower is notified of denied loan modification that foreclosure process may resume.

6) **15 days**-time after denial of appeal of a denied loan modification at which time foreclosure process may resume.

7) Within **5 days** after NOD filing, borrower must receive notice of any loss mitigations options that may be available.

8) **15 days** prior to NOS borrower may request a loan modification, but borrower would not be able to appeal any denial so close to NOS.

9) **3 days**-Length of time a servicer has to acknowledge receipt of a loan modification request, and/or any other documents relating to the request.

10) **30 days**- Time that a borrower has to appeal a denial of a loan modification.

Consumer Financial Protection Bureau (CFPB) mortgage servicing standards.

Earlier this year CFPB announced that they would be developing national servicing standards later this year, with a draft of the standards available in the summer of 2012. Specific language of the proposal is not yet available, but CFPB did release a summary of the issues they are considering. These issues include:

1) Servicers would be required clear monthly mortgage statements.

2) Borrowers should receive a warning before interest rate adjustments.

3) Borrowers should be aware of options to avoid force-placed insurance.

4) Servicers would be required to contact borrowers prior to foreclosure to discuss loss mitigation options.

5) Payments should be immediately credited.

6) Servicer records should be up-to-date and accessible.

7) Servicers would be required to correct errors quickly.

8) Servicers should be required to maintain foreclosure prevention teams.

It is unclear how the final version of these concepts will look. As with any rule proposed by a federal regulatory body, the final version can often differ from the initial press release. However, if the final rules indeed reflect the initial summary, will these rules interfere or otherwise upset California's efforts to provide transparent rules for the loan modification process. In short, it doesn't appear that the rules prevent or otherwise frustrate current efforts. In fact, the creation of the CFPB included language in the Dodd-Frank Act that specifically provided the foundation for the interaction between CFPB and state laws. Section 1041 of the Dodd-Frank Act provides that in its administration of the federal laws transferred to it, the CFPB may not preempt state laws that are more protective than a federal consumer law counterpart. Specifically, Section 1041 states that a state's law may only be preempted if it is inconsistent

with a federal consumer protection law—but an inconsistency does not include providing greater protection to a consumer.

Technical and Clean-up issues:

The bill under consideration is a product of ongoing discussions between numerous stakeholders and the language currently under consideration is not the final conclusion of these discussions. While the general framework is clear, many provisions require clarification and greater specificity. As this proposal moves through the process the authors may want to clarify many of these issues and provide greater clean-up to the language overall.

Foreclosure by the numbers.

- The number of complete foreclosures from the 12 months ending in February of 2012 was a 154,000 in California (Corelogic). These are complete foreclosures and does not denote the number of properties in some stage of the foreclosure process.

- 48,422 California homes had a foreclosure filing during February 2012, representing 1 out of every 283 homes (RealtyTrac). If this trend continues half million California homes will face a foreclosure filing.

- Distressed property sales – the combination of foreclosure resales and "short sales" – continued to make up more than half of California's resale market (DQ News).

- Of the existing homes sold last month, 34.3 percent were properties that had been foreclosed on during the past year. That was unchanged from January and down from 40.1 percent in February a year ago. The high point for the current cycle was in February 2009 at 58.5 percent (DQ News).

- Short sales – transactions where the sale price fell short of what was owed on the property – made up an estimated 20.9 percent of the resale market last month. That was down from 21.2 percent the month before and up from 18.7 percent a year earlier. Two years ago short sales made up an estimated 17.5 percent of the resale market (DQ News).
- Most of the loans going into default are still from the 2005-2007 period: The median origination quarter for defaulted loans is still third-quarter 2006 (DQ News).

- Foreclosures remain far more concentrated in the California' most affordable neighborhoods. (DQ News).

Previous Legislation.

SB 1137. California's principal legislative response to the foreclosure crisis has been SB 1137 (Perata) of 2008. Until January 2013, this measure requires every lender or servicer to contact

borrowers for certain mortgages (first loans on a principal residence recorded between January 1, 2003 and January 1, 2008) in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. During the initial contact, the lender or servicer is to advise the borrower that he or she had a right to request a meeting and that the meeting, if requested, would have to occur within 14 days of the request. Failure to comply with these requirements prevents filing a notice of default (NOD) until 30 days after the lender or servicer complies.

SB 1137 requires the lender or servicer to make a "diligent" effort to contact covered borrowers, without expressly stating what that might entail. The law does not require the lender or servicer to actually offer the borrower a loan modification, only to contact the borrower to discuss the borrower's options. If the lender or servicer did not have a loan modification program, or if the borrower did not meet the requirements for a modification, the lender or servicer had no obligation to negotiate with the borrower, much less reach an agreement on a modification. It is not known whether these requirements have been effective. The law does not specify what should occur at the meeting or provide any clear enforcement mechanism if the holder or servicer does not offer any meaningful workout options or negotiate in good faith. The law does not add any process for court or some third-party review to the dominant non-judicial foreclosure process in California if the borrower is dissatisfied with the outcome.

In September of 2010, the Attorney General issued a letter to all lenders and servicers operating in California asking them to suspend foreclosures until they could confirm that they comply with California's contact requirements under SB 1137. While some lenders did temporarily suspend foreclosure actions at about this time, these lenders have since resumed foreclosures, and it is unclear whether or how any lenders and servicers responded to the Attorney General's request to provide evidence of compliance with the requirements of SB 1137.

ABX2 7 (Lieu) of 2009. This bill also sought to encourage loan modifications by requiring the lender or servicer to wait 90 days after a default before filing a notice of sale on a foreclosed property; however, an exemption to this additional 90-day delay could be obtained for lenders and servicers who had implemented a "comprehensive loan modification program." The purpose of this legislation was to either encourage lenders or servicers to develop loan modification programs (and thereby be exempted from the additional 90-day delay) or, where no programs had been developed, to give the borrower additional time to cure the default or negotiate a modification.

AB 1639 (Nava, Bass, Lieu). This bill would have established a foreclosure mediation program that would allow borrowers to request a mediation session with their servicers in order to reach an agreement on loss mitigation options. This bill failed passage on the Assembly floor.

REGISTERED SUPPORT / OPPOSITION:

Support

Department of Justice Attorney General (Sponsor)
AFL-CIO
American Federation of State, County and Municipal Employees (AFSCME)
Asian & Pacific Islanders California Action Network (APIsCAN)
Asian Law Caucus (ALC)
California Church IMPACT
California Council of the Service Employees International Union (SEIU)
California Labor Federation
California Nurses Association
California School Employees Association
Cambridge Credit Counseling
Center for Responsible Lending
ClearPoint Financial Services
Coalition for Quality Credit Counseling
Consumer Credit Counseling Service of Orange County
Consumer Credit Counseling Service of San Francisco
Consumer Credit Counseling Service of the North Coast
Consumer Credit Counseling Service of the Twin Cities
Contra Costa Interfaith Supporting Community Organization (CCISCO)
East Los Angeles Community Corporation (ELACC)
Green Lining Institute
GreenPath
Home Strong USA
InCharge
International Federation of Professional & Technical Engineers Local 21
Korean Churches for Community Development (KCCD)
Lutheran Office of Public Policy- California
Money Management International
Montebello Housing Development Corporation
National Asian American Coalition
National Chinese Welfare Council, Los Angeles Chapter
National council of La Raza – California
Novadebt
PICO – California
Service Employees International Union, (SEIU) Local 1000
Springboard Nonprofit Consumer Credit Management
State Building and Construction Trades
SurePath Financial Solutions
Thai Community Development Center (Thai CDC)
The County of Santa Cruz, Board of Supervisors
United Democratic Club of Monterey Park

Individuals – 1

Support if Amended

The California Reinvestment Coalition on behalf of 57 organizations writes that they will support the bill if the private right of action provisions are strengthened and clarified.

Opposition

California Bankers Association
California Chamber of Commerce (CalChamber)
California Credit Union League
California Financial Services Association
California Independent Bankers
California Land Title Association
California Mortgage Association
California Mortgage Bankers Association
Securities Industry and Financial Markets Association
United Trustees Association

Analysis Prepared by: Mark Farouk / B. & F. / (916) 319-3081