

Date of Hearing: April 30, 2012

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Mike Eng, Chair

AB 1745 (Torres) – As Amended: March 29, 2012

SUBJECT: Mortgages: notices of sale.

SUMMARY: Prohibits the filing of a notice of sale (NOS) if a mortgagee, trustee, beneficiary of authorized agent has provided a written approval of a short sale. Specifically, this bill:

- 1) Defines "short sale" as a transfer in which the trustor or mortgagor sells a property for a price less than the remaining amount of the indebtedness secured by the property at the time of sale.
- 2) Allows approval of a short sale to be withdrawn by the mortgagee, trustee, beneficiary, or authorized agent at any time if an underlying condition upon which approval was initially granted has changed.
- 3) Provides that, not less than three days prior to the withdrawal of approval, written notice shall be provided to the short sale seller and shall include an explanation of the change of condition that caused the withdrawal.

EXISTING LAW generally regulates mortgages and deeds of trust, including, among other things, recording mortgages and deeds of trust, disclosures in connection with mortgages and deeds of trust, and foreclosure procedures for mortgages and deeds of trust. (Civil Code section 2920 *et seq.*)

FISCAL EFFECT: None

COMMENTS:

AB 1745 seeks to remedy a problem related to short sale agreements in which a bank withdraws from a short sale agreement and continues the foreclosure process without informing the borrower.

A short sale is simply a situation where a borrower negotiates to sell their property to a subsequent buyer for less than the outstanding balance remaining on the loan. In order for a short sale to work, the holder of the indebtedness must agree to accept less than the remaining loan balance from a second buyer. The advantage for the bank is that a short sale prevents a home from going into the foreclosure and potentially being left vacant for an extended period. Additionally, usually the short sale price for a home exceeds what that same property would get in a foreclosure sale. For the borrower, a short sale allows them to extricate themselves from a home without facing the destructive consequences, both socially and financially, that come from a foreclosure.

While a bank may agree initially to a short sale, many factors can lead to a collapse of the short sale agreement. Many buyers walk away from the deal due to long delays from banks as initial offer acceptance may not always be immediately forthcoming, and subsequent negotiations take weeks and sometimes months. Another factor that complicates short sales is the existence of a second mortgage holder. A large proportion of mortgages originated over the last decade include a second mortgage. In the event of foreclosure the second lien holder is more than likely to face a complete

loss of their interest in the property as the value of the property is no longer equal to the total loan outstanding. In the priority of liens, the first lien holder, the primary mortgage holder, gets first take on any proceeds from the foreclosure sale. Due to low property values, a short sale is also likely to eliminate any value for the second lien holder. This creates an additional obstacle as second lien holders can refuse a short sale, and prevent the entire transaction. Some of these refusals on the part of second lien holders have occurred even when the second lien holder is offered some compensation. According to a California Association of Realtors member survey, 60% of short sale offers failed to result in a closed sale in 2011.

The Making Home Affordable (MHA) program, the centerpiece of the federal government's foreclosure response (announced in March of 2009), includes guidelines for eligible mortgages concerning the use of short sales as a loan modification alternative when a borrower does not qualify for a modification. This part of the MHA program is included under the Home Affordable Foreclosure Alternatives (HAFA) program. HAFA attempts to streamline the short sale process for loans serviced on behalf of Fannie Mae and Freddie Mac (Government Sponsored Entities) and in cases when the borrower has already been considered for a loan modification. In spite of efforts to standardize and streamline short sales under the HAFA program, it too has suffered from the same problems plaguing the larger short sale market. In response, the Federal Housing Finance Agency (FHFA), the acting conservator and oversight agency for the GSEs, recently announced new rules regarding short sales for GSE serviced loans. These new rules, going into effect June 1, 2012, require lenders to respond to short sale requests within 30 days and make final a decision within 60 days.

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 mortgage settlement provides for various changes to the foreclosure and loan modification processes of the signatory institutions. The provisions of the settlement that address short sales are contained in two sections within Exhibit A of the settlement documents.

The settlement provides that a foreclosure sale cannot proceed if a borrower has been approved for a short sale. Additionally, page 30-31 of Exhibit A provides for the following guidelines relating to short sales:

- 1) Servicer shall make publicly available information on general requirements for the short sale process.
- 2) Servicer shall consider appropriate monetary incentives to underwater borrowers to facilitate short sale options.

- 3) Servicer shall develop a cooperative short sale process which allows the borrower the opportunity to engage with servicer to pursue a short sale evaluation prior to putting home on the market.
- 4) Servicer shall send written confirmation of the borrower's first request for a short sale to the borrower or his or her agent within 10 business days of receipt of the request and proper written authorization from the borrower allowing servicer to communicate with the borrower's agent.
- 5) The confirmation shall include basic information about the short sale process and servicer's requirements, and will state clearly and conspicuously that the servicer may demand a deficiency payment if such deficiency claim is permitted by applicable law.
- 6) Servicer shall send borrower at borrower's address of record or to borrower's agent timely written notice of any missing required documents for consideration of short sale within 30 days of receiving borrower's request for a short sale.
- 7) Servicer shall review the short sale request submitted by borrower and communicate the disposition of borrower's request no later than 30 days after receipt of all required information and third party consents.
- 8) If the short sale request is accepted, servicer shall contemporaneously notify the borrower whether servicer or investor will demand a deficiency payment or related cash contribution and the approximate amount of that deficiency, if such deficiency obligation is permitted by applicable law. If the short sale request is denied, servicer shall provide reasons for the denial in the written notice. If Servicer waives a deficiency claim, it shall not sell or transfer such claim to a third-party debt collector or debt buyer for collection.

Clarification needed.

AB 1745 provides that the approval of the short sale may be withdrawn if "an underlying condition" upon which the approval was initially granted has changed. This language is somewhat vague and would be serviced by greater clarification and precision. Therefore staff recommends the following amendment:

Approval of a short sale may be withdrawn by the mortgagee, trustee, beneficiary, or authorized agent at any time if **the terms of the short sale agreement have** ~~an underlying condition upon which approval was initially granted has~~ changed. Not less than three days prior to the withdrawal of approval, written notice shall be provided to the short sale seller and shall include an explanation of the change of condition that caused the withdrawal.

REGISTERED SUPPORT / OPPOSITION:

Support

California Association of REALTORS - Sponsor

Opposition

None on file.

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