

Date of Hearing: April 19, 2010

ASSEMBLY COMMITTEE ON BANKING AND FINANCE
Mike Eng, Chair
AB 2678 (Fuentes) – As Amended: March 23, 2010

SUBJECT: Mortgages: Notice of sale.

SUMMARY: Makes changes related to a notice of sale during the foreclosure process. Specifically, this bill:

- 1) Prohibits a mortgagee, trustee, beneficiary, or authorized agent from giving notice of sale if the mortgagee, trustee, beneficiary, or authorized agent is currently in negotiations to modify the existing loan.
- 2) Provides that if sale proceedings have been postponed, the borrower shall receive a new notification of the notice of sale before the date of the actual sale.
- 3) Repeals a duplicative provision in law.

EXISTING FEDERAL GUIDANCE establishes the federal Making Home Affordable Program developed by the U.S. Department of the Treasury (Treasury), in an effort to help borrowers avoid foreclosure. The program includes several components, such as the Home Affordable Modification Program (HAMP), Home Affordable Refinancing Program (HARP), Second Lien Modification Program (2MP), and Home Affordable Foreclosure Alternatives (HAFA) Program.

EXISTING STATE 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 notice of default (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 (entities) 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 entities 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 an entity 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 entity 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 entity attempts to contact the borrower by telephone at least three times at different hours and on different days. [Section 2923g].
- 7) Requires an entity to maintain a toll-free number for borrowers that will provide access to a live representative during business hours and requires the entity 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 entity;
 - 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, an entity 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: None.

COMMENTS:

BACKGROUND: AB 2678 stems from an informational hearing conducted on December 14, 2009 by the Assembly Select Committee on the Safety and Protection of At-Risk Communities. This hearing examined the worsening mortgage loan and foreclosure crisis in California's underserved communities. During the hearing, a homeowner testified that her home was foreclosed upon and sold while her loan modification application was still pending. Following the hearing, the author concluded that more needs to be done to protect families from losing their homes.

The foreclosure crisis has raised a number of issues related to the loan modification and foreclosure process. This bill attempts to cure two issues which continue to be raised by homeowners. First, homeowners continually testify that following the notice of default and while in the loan modification process lenders and/or servicers move forward with notice of sale proceedings. While homeowners are actively attempting to stay in their home and receive help, they also receive notices that their home will be auctioned off in 20 days. AB 2678 states that if a borrower is in the process of trying to get a loan modified, the servicer can not move forward with foreclosure proceedings. The second issue involves notice of sale notifications. Often a notice of sale is postponed for various reasons. Under existing law, a homeowner must be notified 20 days before the notice of sale is set, but the law is unclear on whether this 20 day requirement applies if a notice of sale is postponed. While homeowners receive the initial notification of the notice of sale, it seems many do not receive another notification of the new notice of sale date and instead find out after the fact that their home has been auctioned off. This measure clarifies that a homeowner must receive a new notice of sale notification if a notice of sale is postponed making the homeowner aware of the new notice of sale date. This measure may prolong the foreclosure process if a notice of sale is postponed and another 20 days must lapse before a new notice of sale can be determined. Many would say the severity of this crisis

and the number of homeowners who have had their homes auctioned off without proper advance notice outweighs the additional 20 days a notice of sale postponement would cause. Under existing law, there may be a postponement or postponements of the sale proceedings, including a postponement upon instruction by the beneficiary to the trustee that the sale proceedings be postponed, at any time prior to the completion of the sale for any period of time not to exceed a total of 365 days from the date set forth in the notice of sale. The trustee can postpone the sale for any of the following reasons: upon the order of any court of competent jurisdiction; if stayed by operation of law; by mutual agreement, whether oral or in writing, of any trustor and any beneficiary or any mortgagor and any mortgagee; at the discretion of the trustee. While requiring additional notices if a notice of sale is postponed could further slow down the foreclosure process, considering current law allows for the postponement of a sale up to an additional 365 days without another notice requirement, AB 2678 will provide additional notices to homeowners who are going to lose their home in a timely manner.

AB 2678 seems to follow in line with the new federal guidelines under the federal Making Home Affordable Program. Servicers should not proceed with the foreclosure process if homeowners and servicers are actively seeking alternatives for homeowners to stay in their home. AB 2678 only applies post-NOD and only applies to homeowners who are negotiating a loan modification with their servicer. AB 2678 does not take into consideration homeowners who may be eligible for other alternatives such as: short sales, deed in lieu of foreclosure, or forbearance. AB 2678 also does not take into consideration the scenarios where homeowners are using a third party to help get a loan modification.

HOME AFFORDABLE MODIFICATION PROGRAM (HAMP): On February 18th, 2009, President Barack Obama announced a multi-pronged approach to deal with the foreclosure crisis through the use of mortgage refinancing and mortgage modification.

To be eligible under HAMP, a servicer must verify all the following criteria are met: the mortgage loan is a first lien mortgage loan originated on or before January 1, 2009; the mortgage loan has not been previously modified under the HAMP; the mortgage loan is delinquent or default is reasonably foreseeable; loans currently in foreclosure are eligible; the mortgage loan is secured by a one- to four-unit property, one unit of which is the borrower's principal residence. Cooperative share mortgages and mortgage loans secured by condominium units are eligible for the HAMP. Loans secured by manufactured housing units are eligible for the HAMP; the property securing the mortgage loan must not be vacant or condemned; the borrower documents a financial hardship and represents that (s)he does not have sufficient liquid assets to make the monthly mortgage payments by completing a HAMP Hardship Affidavit and provides the required income documentation. The documentation supporting income may not be more than 90 days old (as of the date the servicer is determining HAMP eligibility); the borrower has a monthly mortgage payment ratio of greater than 31 percent; a borrower in active litigation regarding the mortgage loan is eligible for the HAMP; the servicer may not require a borrower to waive legal rights as a condition of the HAMP; a borrower actively involved in a bankruptcy proceeding is eligible for the HAMP at the servicer's discretion. Borrowers who have received a Chapter 7 bankruptcy discharge in a case involving the first lien mortgage who did not reaffirm the mortgage debt under applicable law are eligible, provided the Home Affordable Modification Trial Period Plan and Home Affordable Modification Agreement are revised as outlined in the *Acceptable Revisions to HAMP Documents* section of this Supplemental Directive; the borrower agrees to set up an escrow account for taxes and hazard and flood insurance prior to the beginning of the trial period if one does not currently exist, borrowers may be accepted into the

program if a fully executed Home Affordable Modification Trial Period Plan is in the servicer's possession on December 31, 2012.

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 as of February, 2010. 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.

Servicer guidance on the implementation of HAMP is governed by Supplemental Directives issued by the Treasury Department.

The most recent changes to HAMP, announced on March 26, 2010 involves program changes intended to address unemployed borrowers, negative equity and the concurrent pursuant of a foreclosure while a loan is being reviewed for modification. According 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 principle reductions for loans that are over 115% 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 HAMP supplemental directives clarified that those borrowers who are currently at risk of foreclosure should have the opportunity to apply for the HAMP. Servicers should not proceed with a foreclosure sale until the borrower has been evaluated for the program and, if eligible, an offer to participate in the HAMP has been made. Servicers must use reasonable efforts to contact borrowers facing foreclosure to determine their eligibility for the HAMP, including in-person contacts at the servicer's discretion. Servicers must not conduct foreclosure sales on loans previously referred to foreclosure or refer new loans to foreclosure during the 30-day period that the borrower has to submit documents evidencing an intent to accept the Trial Period Plan offer. Any foreclosure sale will be suspended for the duration of the Trial Period Plan, including any period of time between the borrower's execution of the Trial Period Plan and the Trial Period Plan effective date. Although it seems, the federal government has issued orders for servicers to not proceed with the foreclosure process during the period of a homeowner trying to receive a loan modification, AB 2678 further reinstates in state law that these actions should not be tolerated.

RELATED LEGISLATION:

AB 1720 (Galgiani), The Buyer's Choice Act prohibits a mortgagee who acquired title to residential real property at a foreclosure sale from requiring, as a condition of selling the property, that the buyer purchase title insurance or escrow services in connection with the sale from a particular title insurer or escrow agent. The bill would prohibit a seller from conditioning

approval of the sale of residential real property that is in foreclosure on the selection made by the buyer as indicated on the notification form.

AB 2024 (Blumenfeld) 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.

AB 2043 (Torrico), redefines the term "redevelopment" to include the provision of loan assistance to qualified homeowners participating in the federal Home Affordable Modification Program. Authorizes a redevelopment agency to use redevelopment funds to issue loans, up to a maximum of \$75,000, to reduce the principal mortgage balance of a borrower that has received a mortgage modification under the federal Home Affordable Modification Program and meets other specified requirements.

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.

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.

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.

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.

PREVIOUS LEGISLATION:

AB 69 (Lieu), Debt management and settlement: credit counselors: This requires mortgage lenders to report to their respective regulatory agency information regarding loan loss mitigation efforts.

Status: Chaptered by Secretary of State, Chapter 277, Statutes of 2008.

AB 529 (Torrico), Mortgages: adjustable interest rates: notification: This bill requires a borrower to receive notice if their loan is scheduled to switch from an initial fixed rate to an adjustable rate, or set to reset to a fully amortizing loan. This notification must occur between 90 and 120 days before the loan is scheduled to switch or reset. The notice must include the current payment, the month and year the loan will change, an example of the potentially monthly payment after reset, and a number the borrower may contact for more information about the terms of the loan.

Status: Vetoed by the Governor.

AB 2187 (Caballero), Mortgages: foreclosure: This bill imposes certain requirements on mortgage lenders that are foreclosing on property. AB 2187 requires a lender foreclosing on real estate property to include with the notice of default a foreclosure statement of rights, which specifies the process of foreclosure and sets forth the rights of the borrower regarding contracts with mortgage foreclosure consultants. Also, requires that the foreclosure notice be provided in the language of the borrower. Provides, until January 1, 2013, a mortgage lender or other person acquiring a property through the foreclosure process maintain the exterior of vacant residential property. This bill authorizes governmental entities to levy fines of up to \$1,000 per day for violations. However, it requires the governmental entity to provide the owner with notice of the claimed violation and an opportunity to correct the violation within 30 days prior to levying the fine.

Status: Died in Assembly Appropriation Committee.

SB 1137 (Perata), Residential mortgage loans: foreclosure procedures: This bill enacts changes related the foreclosure process in response to the subprime lending/foreclosure crisis. Requires face-to-face contact with a borrower at least 30 days before the filing of a notice of default. Gives tenants of foreclosure property additional time to vacate the property after it has been sold at a foreclosure auction.

Status: Chaptered by Secretary of State, Chapter 69, Statutes of 2008.

SB 1448 (Scott), Real estate brokers and salespersons: fines: This bill increases the maximum fine for an unlicensed person acting or advertising themselves as a real estate broker or a real estate salesperson from \$10,000 to \$20,000 and for an unlicensed corporation from \$50,000 to \$60,000, and requires any fine collected in excess of \$10,000 from an individual or in excess of \$50,000 from a corporation be deposited into the Real Estate Fraud Prosecution Trust fund if one exists in the county where the conviction occurs.

Status: Chaptered by Secretary of State, Chapter 156, Statutes of 2008.

ABXX 7 (Lieu) & SB 7XX (Corbett), Residential mortgage loans: foreclosure. Required loan servicers to provide evidence of a comprehensive loan modification plan that meets specific criteria. A servicer that does not have a comprehensive loan modification plan would have to delay foreclosure on specified properties for 90 days.

Status: Chaptered by Secretary of State, Chapter 5, Statutes of 2009 – 2010 Extraordinary Session

RECOMMENDED AMENDMENTS:

- 1) These amendments are recommended to clear up a policy question- as written, the legislation includes the word "negotiations" but the process of a loan modification is not a negotiation process, a borrower either qualifies or does not qualify under specified criteria. The amendment will clarify that the notice of sale proceedings shall not start until a loan modification has been denied.

On page 5, line 22, following, 2924f, "delete lines 22-25, and insert:

"If a trustor or mortgagor applied for a loan modification on an existing loan from the mortgagee, trustee, beneficiary or authorized agent; the mortgagee, trustee, beneficiary or authorized agent shall not give notice of sale until the loan modification request has been denied."

- 2) The measure raises an alarming issue of homeowners not knowing when their home will actually be sold due to notice of sale postponements. Current law is vague as to whether or not a homeowner must be notified again following a postponement unless it is 365 days past the original sale date. The recommended amendments make technical changes.

On page 7, on line 27, delete "borrower" on page 7, line 28, delete "shall receive a new notification", and insert:

"trustor or mortgagor shall receive a new notice of sale notification"

REGISTERED SUPPORT / OPPOSITION:

Support

None on file.

Opposition

California Bankers Association
California Chamber of Commerce
California Credit Union League
California Financial Services Association
California Independent Bankers
California Land Title Association
California Mortgage Association
California Mortgage Bankers Association
United Trustees Association

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