



April 12, 2012

TO: The Honorable Darrell Steinberg, President pro Tem, California State Senate
The Honorable Mark Leno, Member, California State Senate
The Honorable Fran Pavley, Member, California State Senate
The Honorable Mike Eng, Member, California State Assembly
The Honorable Mike Feuer, Member, California State Assembly

FROM: 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
Securities Industry and Financial Markets Association
United Trustees Association

RE: Senate Bill 1470 (Leno, Pavley & Steinberg) and Assembly Bill 1602 (Eng & Feuer): Impediments to Non-Judicial Foreclosure and Encouragement of Litigation

The trade associations listed above OPPOSE your Senate Bill 1470 and Assembly Bill 1602, measures that impose significant new duties for mortgage servicers and that ultimately insert quasi-judicial oversight into the non-judicial foreclosure process. We appreciate the initial meetings focused on these measures and the time that interested parties have devoted to reviewing them, not only for their impact on delinquent borrowers but also new homebuyers who will seek access to credit in the future. We reiterate our commitment to being part of the legislative conversation.

However, we remain concerned with legislation that results in a de-facto moratorium on foreclosures harming various industries involved in the transfer, sale or refinancing of real property. In addition, these measures result in further erosion of property taxes for local governments, perpetuate community blight for longer periods, act as disincentives for capital investments and forestall economic recovery. Should state laws with respect to loan origination and collateral recovery become too onerous, private capital will be reluctant to invest or will only invest at a significant risk-based premium, resulting in higher costs for consumers.

To the extent that home retention efforts fail, foreclosure is an unfortunate but necessary process as set forth in the deed of trust that each borrower agreed to when they sought a mortgage from a lender. We agree that this process must be lawful, fair and respectful of the rights of borrowers, but at the same time, legal devices should not be used to unduly delay the inevitable when other options have been exhausted. As the legal and compliance risk involved in transactions increases, inventory that ultimately could be sold to bona fide purchasers can remain in limbo under clouded titles, continuing to depress property values.

Furthermore, as collateral recovery becomes less certain, investors in mortgage products will be less inclined to employ their investment capital in mortgage assets. This will have the effect of reducing the availability of credit, as lenders restrict their origination to higher credit quality borrowers (where foreclosure is deemed less likely) and investors demand higher returns on their investments, to compensate for increased risk.

We preliminarily understood that certain measures within the California Attorney General's legislative package were intended to codify elements of the national mortgage settlement and apply its requirements to all mortgage servicers. The movement to codify without sufficient experiences to analyze the benefits and demerits of the settlement will lock a set of procedures inflexibly in statute that may need to be repealed or significantly amended later. Even if adhered to precisely, it's unclear whether such an application to all mortgage servicers is wise policy.

▪ **Measures are unnecessarily complex and riddled with procedural traps**

While we endeavor to understand the intricacies of these measures and their impact, these bills exemplify an overly complicated formula which will further frustrate and prolong existing foreclosure and loss mitigation efforts. These measures result in adding to the complexity of navigating these processes for loan servicers creating a series of procedural traps that will lead to ever increasing litigation.

Unlike previous foreclosure avoidance legislative efforts, these measures propose permanent changes to law that are extraordinarily restrictive and draconian. In fact, the temporary nature of the foreclosure crisis was acknowledged in the recent national mortgage settlement reached between 49 state attorneys general and five mortgage servicers. While that agreement was deliberately designed to be temporary, these measures result in permanent changes to California laws that are unjustified.

▪ **Actions by federal regulators and state attorneys general may overlap and contradict**

Recent enforcement actions by federal regulators seek to address concerns with mortgage loan servicing. This effort should not be confused with the recent national mortgage settlement reached between 49 state attorneys general and five mortgage servicers. This should also not be confused with the recent announcement by the Consumer Financial Protection Bureau of national mortgage servicing standards that are to be promulgated this summer and that are intended to be finalized by January 2013.

▪ **Promotes strategic defaults negatively impacting communities**

These measures fail to narrowly target at-risk borrowers and apply broadly, including to the increasing population of borrowers that strategically default. In these circumstances, the borrower has the ability to pay their mortgage, but because their property has lost value, the borrower ceases payments and uses the foreclosure process and its timeline as a means to build savings. It is unfortunate that the measures extend aid to these fraudulent borrowers and diverts resources from borrowers who truly wish to avoid foreclosure and want to stay in their home.

▪ **Allows investors and speculators to crowd-out borrowers with financial hardships**

These measures allow investors and speculators to take advantage of their provisions distracting mortgage servicers from helping those borrowers experiencing financial hardships. Even the national mortgage settlement made it clear that it was applicable to “owner-occupied properties that serve as the primary residence of the borrower.” It’s unclear why investors and speculators who own multiple properties, for which they do not reside, are granted the relief provided for in these measures.

▪ **Fails to require tender by borrowers as a symbol of good faith**

The measures fail to require borrowers to tender any portion of their monthly mortgage payment or arrears as a good faith effort demonstrating their desire to remain in the property and result in borrowers taking advantage of the measures’ convoluted processes. For borrowers who strategically default and have no intent to remain in their homes, this legislation will be used as a delay and a leveraging tactic.

▪ **Invites litigation through inclusion of private rights of action**

The national settlement anticipated error rates and afforded a right to cure mistakes. Yet, these measures impose strict liability with no right to cure and impose multiple, layered individual lawsuits with accompanying statutory, actual, treble and punitive damages. Exposing entities and individuals to excessive litigation risk will not attract and encourage creditors and investors to inject the capital necessary to revive California’s residential housing marketplace.

Among other enforcement remedies, these measures grant a private right of action to seek an injunction prior to a foreclosure sale as a means to further forestall the foreclosure process and provide remedies post foreclosure sale with an award for damages to borrowers irrespective of whether they have experienced real harm. The remedies extended to borrowers under these measures are not narrowly focused on circumstances where the lender has ignored or failed to respond to the borrower, but grants remedies for failing to adequately complete documents in the very precise manner proscribed by the bill.

As the economy in California and the nation is improving, this legislation must be carefully considered as it will directly influence our recovery and is likely to hinder emerging improvements in the housing sector. Well-intentioned efforts to help distressed borrowers may further restrict access to credit in the future and have a real impact on viable new homebuyers seeking to achieve the American dream. Advancing legislation that creates additional procedural hurdles or conflicting layers of bureaucracy for loan servicers, without addressing the borrower's underlying financial condition, may ultimately miss the mark of resolving core economic issues, and will ultimately prove unsuccessful at solving this complex problem.

Notwithstanding the foregoing, we will continue to seek reasonable solutions that provide meaningful consumer protections that avoid long-term damage to the marketplace, cause industry to exit residential lending and increase the cost of credit. The people of California require a full service home mortgage finance system that is accessible, affordable, transparent, prudent and effective. These measures would not further the achievement of that.

Thank you.

cc: Anthony Williams, Policy Director, Senate President pro Tem Darrell Steinberg
Fredericka McGee, Legislative Counsel, Speaker of the Assembly, John A. Perez
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