April 12, 2012

TO: The Honorable Mark DeSaulnier, Member, California State Senate
The Honorable Fran Pavley, Member, California State Senate
The Honorable Holly Mitchell, 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 1471 (DeSaulnier & Pavley) and Assembly Bill 2425 (Mitchell): Undue Recordation and Documentation and Encouragement of Litigation

The trade associations listed above OPPOSE your Senate Bill 1471 and Assembly Bill 2425, measures that impose significant new duties for mortgage servicers. 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.

We 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the benefits and demerits of the settlement will lock a set of procedures inflexibly in statute that may need to be repealed or significantly amended later.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 codify inflammatory rhetoric**

These measures seek to import the term "robo-signing" into statute which was a criticism of states with judicial foreclosure. Nearly all residential one-to-four foreclosures in California are managed through non-judicial foreclosure. While it has been cited by proponents that they believe declarations required under the borrower outreach provisions of Civil Code Section 2923.5 were "robo-signed," this is in fact contrary to the appellate court decision in *Mabry v. Aurora Loan Services*. There, the court indicated that the declaration was not required to be under penalty of perjury and that such a requirement would be at odds with the way the statute was written. Consequently, assertions that these declarations were "robo-signed" are false.

Specifically, the court said, "the idea that this declaration must be made under oath must be rejected." The court went on to say that if the "Legislature wanted to say that the statement required in section 2923.5 be under penalty of perjury, it knew how to do so." Finally, the court indicated that the "way section 2923.5 is set up, too many people are necessarily involved in the process for any one person to likely be in the position where he or she could swear that all the requirements of the declaration" were met.

- **"Identical" measures aren't so identical requiring recordation of assignments**

Interested parties have been told by proponents on numerous occasions that the counterpart measures, one introduced in the Assembly and one introduced in Senate, will be identical throughout the legislative process. Specifically, Civil Code Section 2932.5 within SB 1471 will require recordation of assignments in order to exercise a power of sale. However, the same section in AB 2425 appears to not require recordation of assignments.

- **Temporary situation does not require a permanent solution**

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.

- **Appears to apply to commercial real property**

Not only do these measures allow investors, speculators, and those that strategically default to take advantage of their provisions, it does not appear that the measures are limited to residential one-to-four properties, nor is it limited to owner-occupied primary residences. As such, we must conclude that the measures inappropriately apply to commercial real estate.

- **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 results in borrowers taking advantage of the measures' convoluted process. 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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