BILL ANALYSIS

SENATE BANKING & FINANCIAL INSTITUTIONS COMMITTEE
Senator Juan Vargas, Chair

SB 1470 (Leno et al.) Hearing Date: April 18, 2012

As Amended: April 10, 2012
Fiscal: Yes
Urgency: No

SUMMARY Would enact several changes to the rules governing the nonjudicial foreclosure process for residential real property, establish an Office of Homeowner Protection to help respond to borrower inquiries about and complaints regarding compliance with the new rules, and provide for enforcement mechanisms, as specified.

DESCRIPTION

OFFICE OF HOMEOWNER PROTECTION

1. Would create an Office of Homeowner Protection, and state legislative intent that the Office be funded through payments made available to the Attorney General via the Special Deposit Fund (a fund created pursuant to the nationwide mortgage settlement, into which approximately $370 million is expected to be deposited for use by the Attorney General for purposes specified in the settlement; page B2-3 of the settlement). Would give the Office of Homeowner Protection responsibility for all of the following:

   a. Responding to inquiries and complaints from individuals about the provisions of the bill.

   b. Attempting to seek compliance by mortgagees, trustees, beneficiaries, and authorized agents with the provisions of the bill.

   c. Maintaining an Internet Web site that is capable of receiving inquiries and complaints from individuals, and that provides information to the public about publicly available resources intended to help individuals avoid foreclosure.

   d. Providing an annual report to the Legislature,

summarizing its activities during the prior year.

BORROWER NOTIFICATIONS

2. Would delete the sunset date on the provisions of existing law known colloquially as "SB 1137," and expand the mortgages and deeds of trust to which that law applies by deleting the limitation restricting SB 1137 to mortgages and deeds of trust recorded from January 1, 2003 through December 31, 2007. Would also require two additional items of information to be provided by mortgagees, trustees, beneficiaries, or authorized agents when they initiate contact with borrowers in the manner required by SB 1137: a) the phone number for the Office of Homeowner Protection, and b) if applicable, the deadline by which a borrower must submit an initial application for a loan modification.

3. Would require several additional items of information to be included in the declaration that must be included with notices of default recorded on owner-occupied, single family residential real property pursuant to SB 1137. In addition to the items already required to be included in the declaration, the declaration would have to include statements that:

   a. The borrower is not a servicemember or the dependent of a servicemember who is entitled to the benefits of the Servicemembers Civil Relief Act (This requirement is based on provisions of the settlement, which require servicers to determine whether borrowers may be eligible for the protections of the Servicemembers Civil Relief Act and for additional servicemember protections available pursuant to the terms of the settlement; page A-32).

   b. The mortgagee, beneficiary, or authorized agent has possession of the note and mortgage or deed of trust and evidence of its right to foreclose, including documentation of any assignments and endorsements of the mortgage note or deed of trust. This evidence must be attached to or specifically described in the declaration. (The settlement requires servicers to ensure that they have reviewed competent and reliable evidence to substantiate the borrower's default and right to

foreclose Ýpage A-1]; it also requires servicers to implement processes to ensure that the servicer or the foreclosing entity has a documented enforceable interest in the promissory note and mortgage or deed of trust under applicable state law Ýpage A-8]).

If proof of the foreclosing entity's right to foreclose cannot be located, the mortgagee, trustee, beneficiary, or authorized agent must include a separate declaration signed either by an individual with personal knowledge of the facts in the declaration, or by an individual with authority to bind the mortgagee, trustee, beneficiary, or

authorized agent, who certifies that the declaration is based upon records that were made in the regular course of business at or near the time of the events, and which states all of the following:

i. Facts sufficient to show that the mortgagee, trustee, beneficiary, or authorized agent has the right to enforce the note.

ii. A statement that the person cannot reasonably obtain possession of the note, and a description of the reasonable efforts made to obtain the note.

iii. A description of the terms of the note and any of its riders, including all of the following about the note, at a minimum: the date of execution, the parties, the principal amount, the amortization period, the initial interest rate and, if applicable, the initial date and frequency of any adjustments to the interest rate, and the index and margin used to calculate the interest rate at the time of any scheduled adjustment; and the expiration of any interest only period, as applicable.

(The settlement defers to state law regarding lost notes, but differs from this bill in that the settlement refers only to notes lost while in the servicer's control. It states that if the original note is lost or otherwise unavailable, servicers must comply with applicable law in an attempt to establish ownership of the note and the right to enforcement. In the event that servicers prepare or cause to be prepared a lost note or lost assignment affidavit with respect to an original note or assignment lost while in the

servicer's control, the servicer must use good faith efforts to obtain or locate the note or assignment in accordance with its procedures; page A-8. This bill appears to cover situations in which notes are lost prior to the servicer taking control, in addition to situations under the servicer's control).

4. Would prohibit a notice of default from being recorded, unless the mortgagee, beneficiary, or authorized agent sends a separate written notice to the borrower, which includes all of the following, at least 14 days prior to recording the notice of default:

a. A statement setting forth facts supporting the right of the mortgagee, beneficiary, or authorized agent to foreclose on the borrower's loan note. (This language is based on the settlement, which requires servicers to set forth the information establishing the foreclosing party's right to foreclose, at least 14 days prior to referring a loan to foreclosure; pages A-4 and A-8).

b. Notification that the borrower may receive, upon

written request to the mortgagee, beneficiary, or authorized agent, or to any assigned single point of contact, a copy of the borrower's payment history since the borrower was last less than 60 days past due, a copy of the borrower's loan note, copies of any assignments of the note and of the mortgage or deed of trust that would evidence a right to foreclose on the borrower's property, and, if applicable, the name of the investor that holds the borrower's loan note (This language is based on the settlement; pages A-4 and A-6).

c. An itemized plain language account summary setting forth specified information about the terms of the loan and the date on which the last full payment was made; providing contact information for use by the borrower to obtain information about the mortgage; a statement that if the borrower is a servicemember or a servicemember's dependent, he or she may be entitled to certain additional protections; a summary of the loss mitigation efforts that have already been undertaken with respect to the borrower and, if no loss mitigation efforts were offered or undertaken, a statement, if applicable, giving the reason why the borrower is ineligible for a loan modification or other loss mitigation option; and the

phone number for the Office of Homeowner Protection. (This language is based on the settlement, pages A-4, A-7 and A-21).

5. Would require a mortgagee, trustee, beneficiary, or authorized agent to send a written communication to the borrower within five calendar days after recording a notice of default, in which the borrower is informed that he or she may still be evaluated for alternatives to foreclosure, and is provided with information regarding the way in which that borrower would go about applying for such an alternative. (This language is based on the settlement; page A-24).

DUAL TRACK

6. Would establish the following rules for borrowers who submit an application for a loan modification within 120 days after becoming delinquent, and before a notice of default has been recorded:

a. A mortgagee, trustee, beneficiary, or authorized agent may not record a notice of default while the loan modification application is pending, and until either: i) it makes a determination that the borrower is ineligible for a loan modification, or ii) if a borrower does not accept an offered trial or permanent loan modification or other foreclosure prevention alternative, the earlier of the date on which the borrower declines or the borrower's deadline for accepting the offer, as specified.

b. If a borrower accepts an offered trial or permanent

loan modification, the mortgagee, trustee, beneficiary, or authorized agent may not record a notice of default until the borrower fails to timely submit the first payment or otherwise breaches the terms of the offer.

c. If the loan modification requested by a borrower is denied, the mortgagee, trustee, beneficiary, or authorized agent may not record a notice of default until the later of: i) 30 days after the borrower is notified in writing of the denial; or ii) if the borrower appeals the denial, the later of 15 days after denial of the appeal or 14 days after a post-appeal offer is declined by the borrower, or iii) if the appeal leads to the offer of a trial or permanent loan modification, until the

borrower timely fails to submit the first payment or otherwise breaches the terms of the offer.

(These timelines are based on the settlement Ýpage A-17], but the settlement applies these timelines to complete loan modification applications, while the bill applies the timelines to any loan modification application submitted by a borrower, whether or not it has been deemed complete by the servicer).

7. Would establish the following rules for borrowers who submit an application for a loan modification within 60 days following the recordation of a notice of default, and before the recordation of a notice of sale:

a. A mortgagee, trustee, beneficiary, or authorized agent may not record a notice of sale, until either: i) it makes a determination that the borrower is ineligible for a loan modification, or ii) if a borrower does not accept an offered trial or permanent loan modification or other foreclosure prevention alternative, the earlier of the date on which the borrower declines or the borrower's deadline for accepting the offer, as specified.

b. If a borrower accepts an offered trial or permanent loan modification, the mortgagee, trustee, beneficiary, or authorized agent may not record a notice of sale until the borrower fails to timely submit the first payment or otherwise breaches the terms of the offer.

c. If the loan modification requested by a borrower is denied, the mortgagee, trustee, beneficiary, or authorized agent may not record a notice of sale until the later of: i) 30 days after the borrower is notified in writing of the denial; or ii) if the borrower appeals the denial, the later of 15 days after denial of the appeal or 14 days after a post-appeal offer is declined by the borrower, or iii) if the appeal leads to the offer of a trial or permanent loan modification, until the borrower timely fails to submit the first payment or otherwise breaches the terms of the offer.

(These timelines are based on the settlement Ýpage A-18], but, as described above, the settlement applies these timelines to complete loan modification applications, while the bill applies the timelines to any loan modification

application submitted by a borrower, whether or not it has been deemed complete by the servicer).

8. Would establish the following rules for borrowers who submit an application for a loan modification less than fifteen days before a notice of sale may be recorded:

   a. A mortgagee, trustee, beneficiary, or authorized agent may not record a notice of sale, until either: i) it makes a determination that the borrower is ineligible for a loan modification, or ii) it notifies the borrower whether it can conduct an expedited review of the loan modification application, or, if not, the reasons it cannot complete the review of the loan modification application.

   b. If a borrower accepts an offered trial or permanent loan modification, the mortgagee, trustee, beneficiary, or authorized agent may not record a notice of sale until the borrower fails to timely submit the first payment or otherwise breaches the terms of the offer.

   (These timelines are based on the settlement; pages A-19 and A-20. However, the settlement language on this topic states that if a servicer receives a complete loan modification application less than 15 days before a scheduled foreclosure sale, the servicer must notify the borrower before the sale date regarding its determination Ýif its review was completed] or its inability to complete its review).

9. Would provide that, if a borrower utilizes the process described in Number 6 above, he or she may not reapply for relief using the process described in Numbers 7 or 8 above, unless the borrower's application reflects a material change in the borrower's financial circumstances since the date of the borrower's previous application. Similarly, if a borrower utilizes the process described in Number 7 above, he or she may not reapply for relief using the process described in Number 8 above, unless the borrower's application reflects a material change in the borrower's financial circumstances since the date of the borrower's previous application.

(This language differs from the language of the settlement; page A-29. The settlement expressly states that its provisions in this area are intended "to minimize the risk

of borrowers submitting multiple loss mitigation requests for the purpose of delay." The bill contains no such language.

Additionally, the settlement's language relieves servicers of obligations to evaluate requests for loss mitigation options from: a) borrowers who were already evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of the Making Home Affordable Modification program or proprietary modification programs prior to the implementation date of the settlement, and b) borrowers who were evaluated after the implementation date of the settlement, consistent with the settlement, unless there was a material change in the borrower's financial circumstances that is documented by the borrower and submitted to the servicer. This bill contains language similar to "b" but does not contain language similar to "a." Thus, unlike the settlement, this bill appears to require servicers to re-evaluate borrowers who were previously evaluated pursuant to HAMP or a proprietary loan modification program, prior to the bill's implementation date).

10. Would prohibit a mortgagee, trustee, beneficiary, or authorized agent from recording a notice of sale under any of the following circumstances:

    a. The borrower is in compliance with the terms of a trial or permanent loan modification, forbearance, or repayment plan (This language comes directly from the settlement; page A-20).

    b. A short sale or deed-in-lieu of foreclosure has been approved by all parties, including the first lien investor, the junior lienholder, and the mortgage insurer, as applicable, and proof of funds or financing has been provided to the mortgagee, trustee, beneficiary, or authorized agent (This language comes directly from the settlement; page A-20).

11. Would require a mortgagee, trustee, beneficiary, or authorized agent to record a rescission of a notice of default, when a borrower executes a permanent loan modification. (This language is not in the settlement).

DOCUMENTATION AND RECORDKEEPING REQUIREMENTS

12. Would establish timelines that must be followed by mortgagees, trustees, beneficiaries, and authorized agents with respect to acknowledging the receipt of written information, providing information about application deadlines, providing deadlines for submitting missing documentation, identifying expiration dates for submitted documents, documenting nonapproval of a loan modification

application, and processing appeals from borrowers resulting from nonapproval of loan modification applications, as specified. (This language closely tracks the language of the settlement; pages A-25 through A-28, except that the settlement applies these requirements to first-lien modifications only, while this bill is not similarly limited in its application).

13. Would require the mortgagee, trustee, beneficiary, or authorized agent to provide the borrower with a copy of the fully executed loan modification agreement, when a borrower accepts an offered loan modification in writing. Would require the mortgagee, trustee, beneficiary, or authorized agent to provide the borrower with a written summary of the terms of a proffered loan modification, if the modification was not made in writing. (This language is based on the terms of the settlement; pages A-28 and A-29. The settlement requires these documents to be provided within 45 days. The bill requires them to be provided as soon as possible).

14. Would prohibit a mortgagee, trustee, beneficiary, or authorized agent from charging any application, processing, or other fee for a proprietary loan modification (based on language in the settlement; page A-29), and from collecting any late fees for periods during which a complete loan modification is under consideration or a denial is being appealed, the borrower is making timely trial or permanent modification payments, or a short sale offer is being evaluated (similar to language in the settlement, but the settlement does not expressly prohibit the imposition of late fees while a denial is being appealed; page A-36).

15. Would require a mortgagee, trustee, beneficiary, or authorized agent to make information about its qualification processes, all required documentation and information necessary for a complete loan modification application, and key eligibility factors for all proprietary loan modifications publicly available (based on the terms of the

settlement that apply to first- and second-lien proprietary loan modifications; pages A-29 and A-30. The bill does not limit this provision to proprietary loan modifications, as does the settlement).

16. Would require a mortgagee, trustee, beneficiary, and authorized agent to track outcomes and maintain records regarding characteristics, as specified, and performance of proprietary loan modifications, and to provide a description of modification waterfalls, eligibility criteria, and modification terms on a publicly available Internet Web site (based on language in the settlement, which covers information that must be provided about first-lien proprietary loan modifications; page A-30. The bill does not limit this requirement to proprietary first-lien modifications).

TRUSTEE SALE POSTPONEMENTS

17. Would require homeowners to be informed in writing, as specified, whenever the trustee sale date set for the sale of their property is postponed by ten calendar days or more. (This is not based on the settlement).

REMEDIES (not based on the settlement)

18. Would authorize a borrower, who reasonably believes that a mortgagee, trustee, beneficiary, or authorized agent has failed to comply with the requirements of the bill, to seek an order to enjoin any pending trustee's sale in any court having jurisdiction, if a notice of sale has been recorded. Would entitle borrowers who obtain injunctions to reasonable attorneys' fees and costs, and would provide that any injunction must remain in place until the mortgagee, trustee, beneficiary, or authorized agent has complied with the provisions of the bill. Would not allow a borrower to obtain relief for any violation that is technical or de minimis in nature, such that it did not impact the borrower's ability to pursue an alternative to foreclosure.

19. Following a trustee's sale, would authorize a borrower, who reasonably believes that a mortgagee, trustee, beneficiary, or authorized agent has failed to comply with the requirements of the bill, to seek to recover the greater of actual damages or $10,000, plus reasonable attorneys' fees and costs, in any court of competent jurisdiction. Would

authorize a court to award a borrower the greater of treble actual damages or statutory damages of $50,000, plus attorneys' fees and costs, if it finds that a violation of the bill was intentional, reckless, or resulted from willful misconduct by a mortgagee, trustee, beneficiary, or authorized agent. Would not allow a borrower to obtain relief for any violation that is technical or de minimis in nature, such that it did not impact the borrower's ability to pursue an alternative to foreclosure.

20. Would provide that a violation of the provisions of the bill shall not affect the validity of a sale in favor of a bona fide purchaser and any of its encumbrancers for value without notice (i.e., that arms' length sales of foreclosed properties to third party purchasers will not be deemed invalid as a result of any violation of the bill, and that the interests of parties who hold liens secured by those properties, following the sales of those properties to bona fide third party purchasers, will not be invalidated).

21. Would provide an affirmative defense to liability for violations of the bill to signatories to the settlement agreement, which are in compliance with that agreement, as specified.

EXISTING LAW

1. Prescribes rules that govern the nonjudicial foreclosure process in California (Civil Code Section 2924 et seq.). A layman's description of the portions of the process that are relevant to this bill follows immediately below. Modifications that were made to this process by SB 1137 (Chapter 69, Statutes of 2008) are described in Number 2, immediately below. SB 1137 will sunset on January 1, 2013, unless its provisions are extended.

   a. The nonjudicial foreclosure process begins with the recordation of a notice of default by a mortgagee, trustee, beneficiary, or authorized agent. The notice of default must be recorded in the county in which the property securing the defaulted loan is located, and must be mailed to specified persons with a financial interest in the property, including the property owner. Existing law does not prescribe the minimum amount of time that must pass between a delinquency and the recordation of a notice of default, although notices

   of default are commonly recorded only after a borrower is at least 90 days delinquent on his or her mortgage loan.

   b. At least three months must pass after recordation of a notice of default, before the mortgagee, trustee, beneficiary, or authorized agent may record a notice of sale. Notices of sale must be recorded in the county in which the property securing the defaulted loan is located, mailed to the property owner and other specified persons with a financial interest in the property, published in a newspaper of general circulation, and posted on the property that is the subject of the sale.

   c. At least 20 days must pass after recordation of a notice of sale, before a property may be sold. However, sale dates may be, and often are, postponed. Under existing law, a sale date may be postponed for any of the following reasons: 1) upon the order of any court of competent jurisdiction; 2) if stayed by operation of law; 3) by mutual agreement, whether oral or in writing, of any trustor and any beneficiary or any mortgagor and any mortgagee (i.e., by mutual agreement between a borrower and his or her lender); and/or 4) at the discretion of the trustee. A new notice of sale must be recorded, if a postponement or postponements delay the sale for more than 365 days following the first scheduled sale date.

   d. Effective April 1, 2012, each notice of trustee sale must include the following language, pursuant to SB 4 (Calderon and Vargas, Chapter 229, Statutes of 2011): "NOTICE TO PROPERTY OWNER: The sale date shown on this notice of sale may be postponed one or more times by the mortgagee, beneficiary, trustee, or a court, pursuant to Section 2924g of the California Civil Code. The law requires that information about trustee sale postponements be made available to you and to the public, as a courtesy to those not present at the sale. If you wish to learn whether your

sale date has been postponed, and, if applicable, the rescheduled time and date for the sale of this property, you may call Ý telephone number] for information regarding the trustee's sale or visit Ý this Internet Web site address] for information regarding the sale of this property, using the file number assigned to this case Ý case file number]. Information about postponements that are very short in duration or that occur close in time to the scheduled sale may not immediately be reflected in the telephone information

or on the Internet Web site. The best way to verify postponement information is to attend the scheduled sale."

The wording of the notice immediately above was facilitated by other provisions of SB 4, which require that trustees make postponement information available via an Internet Web site, telephone recording that is accessible 24 hours a day, seven days a week, or via any other means that allows 24/7 no-cost access to updated information about postponements.

2. Pursuant to SB 1137 (Chapter 69, Statutes of 2008), the following is required, before a notice of default may be recorded on a mortgage or deed of trust, which was recorded between January 1, 2003 and December 31, 2007, and was secured by single-family, owner-occupied residential real property:

a. A mortgagee, beneficiary, or authorized agent (i.e., the mortgage lender or its representative) must contact the borrower in person or by telephone, in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. Contact (or attempted contact, if a borrower is unreachable) must be made telephonically and in writing, as specified. During the initial contact, the mortgagee, beneficiary, or authorized agent must advise the borrower that he or she has the right to request a subsequent meeting, which, if requested, must occur within 14 days of request. The mortgagee, beneficiary, or authorized agent must also provide the borrower with a toll-free telephone number that can be used by the borrower to contact a U.S. Department of Housing and Urban Development -certified housing counseling agency.

b. A mortgagee, beneficiary, or authorized agent must wait at least 30 days after making initial contact with a borrower, or satisfying specified due diligence requirements to make contact, before it can record a notice of default on a loan covered by SB 1137.

c. Each notice of default that is recorded on a loan covered by SB 1137 must include a declaration stating that the mortgagee, beneficiary, or authorized agent contacted the borrower, tried with due diligence to contact the borrower, or that no contact was required, because one of the exemptions applied. Exemptions from SB 1137's contact requirements are provided, in cases where a borrower has already surrendered the property, contracted with an

organization or other entity that advises borrowers on how to "game" the foreclosure process, or filed for a bankruptcy that is still before a court.

COMMENTS

1. Purpose: The author states, "California is the midst of a major crisis in homeownership. It is estimated that 500,000 more homes will be subject to foreclosure in the next year to eighteen months. According to the Attorney General, there are wide-spread problems in the mortgage servicing industry involving distressed homeowners pursuing loan modification discussions with a bank while at the same time the bank is pursuing foreclosure on a separate track. This is known as "dual tracking." As a result, discussions that in many cases will lead to a successful loan modification are cut off by a foreclosure sale. In some instances, borrowers have even made modified loan payments for a period of months, as agreed upon with the bank, when the foreclosure sale occurs.

Under the recently-concluded National Mortgage Settlement, the five largest banks have entered into consent judgment under which dual tracking will be stopped. All Californians are entitled to expect the same fair treatment.

The bill also contemplates the establishment of an Office of Homeowner Protection that would act as an ombudsperson to facilitate the resolution of borrower-servicer disputes and reduce the need for litigation. This would be funded with proceeds from the National Mortgage Settlement."

2. Background and Discussion: On March 12, 2012, the United States Department of Justice, U.S. Department of Housing and Urban Development, and 49 state Attorneys General, including California's Attorney General Kamala Harris, announced the filing of a settlement agreement with the nation's five largest mortgage servicers (Ally/GMAC, Bank of America, Citi, JPMorgan Chase, and Wells Fargo). As part of the settlement, six documents were filed with the court: a complaint, which details the bad acts alleged by the plaintiffs to have been committed by the servicers, and five separate consent judgments (one for each of the servicers), in which the terms of the agreement between each servicer and the plaintiffs is detailed. All of these documents can be downloaded from www.nationalmortgagesettlement.com .

Although the terms of each of the five consent judgments are

slightly different, each of the judgments shares many similarities. Three elements of the judgments which are identical, and which are relevant for purposes of this analysis, include the settlement term sheet (referenced in each of the settlements as Exhibit A), the enforcement provisions (Exhibits E and E-1), and the releases from prosecution that were granted to the servicers (Exhibits F and G). Other key elements of the judgments, which will not be discussed further in this analysis, include discussions of how much money each of the servicers must pay in connection with the settlement, how that money is allocated among states, how credit toward servicers' monetary obligations is calculated under the settlement (different types of consumer relief count differently toward servicers' monetary obligations), and how servicemembers and their dependents are covered by the settlement.

The settlement term sheet formed the basis for many of the provisions of this bill and its companion, SB 1471, and is widely expected to form the basis for national servicing standards that the federal Consumer Financial Protection Bureau is expected to propose sometime this summer.

3. How will the settlement be enforced/How does the settlement handle private rights of action? Responsibility for enforcing the terms of the settlement agreement rests with a federal enforcement monitor (Joseph Smith, former banking commissioner of North Carolina) and a Monitoring Committee, which consists of state attorneys general, state financial regulators, the U.S. Department of Justice, and the U.S. Department of Housing and Urban Development. This Monitoring Committee or any party to the consent judgments are the only entities that may bring actions to enforce the judgments. All actions must be brought in the U.S. District Court for the District of Columbia. Actions may only be brought if the time to cure a potential violation (see discussion below) has expired.

When people assert that the settlement preserves private rights of action, they are not referring to private rights to enforce the provisions of the settlement. Instead, they are referring to the fact that the state and federal releases in the settlement preserve individuals' ability to file suit for violations of residential mortgage loan origination and

servicing laws, and for violations of residential foreclosure practices. The releases from prosecution contained in the settlement prohibit any of the 49 state attorneys general, any other state government entities in any of the 49 states signing the agreement, or the federal government from prosecuting civil claims related to the residential mortgage loan servicing, residential mortgage loan origination practices, and residential foreclosure practices of the signatories prior to the date of the settlement. Because these releases did not cover individual claims, individuals may continue to sue the signatories for violating state or federal law governing residential

mortgage loan servicing, residential mortgage loan origination practices, or residential foreclosure practices. It is these private rights of action that the settlement preserved, not private rights of action to enforce the terms of the settlement.

If individuals can't enforce the provisions of the settlement agreement, how will it be enforced? As noted immediately above, the terms of the settlement are enforced by the federal enforcement monitor and the Monitoring Committee. Attorney General Harris has also appointed Irvine Law School Professor Katherine Porter to assist her in monitoring servicers' commitments to California.

Under the terms of the settlement, only two types of relief may be granted by the court (page E-15):

a. Non-monetary equitable relief, which may include injunctive relief, direct certain specific actions be taken under the terms of the consent judgment, or comprise other non-monetary corrective action; and

b. Civil penalties of not more than $1 million per uncured violation ($5 million in the event of a second uncured violation, when the first uncured violation involves widespread noncompliance). Civil penalties are distributed either to the United States, the state that prosecuted the violation, or to all states in proportion to their payouts under the terms of the settlement, depending on the nature of the violation.

Identifying Potential Violations: Each servicer is

required to establish an internal quality control (QC) group that is independent from the line of business whose performance is being measured under the terms of the consent judgment. The settlement contains a series of metrics, each of which must be measured by these internal QC groups and reported upon quarterly to the monitor (page E-3).

These metrics cover all stages of the loss mitigation and foreclosure process, from initial contact through loan modification review, decision, and appeal, through foreclosure sale, as well as other topics of the consent judgment outside of the foreclosure process, such as the calculation of fees and imposition of force-placed insurance. Generally speaking, the metrics are designed to numerically evaluate servicers' performance across all aspects of the consent judgment. Small error rates require remediation, but do not trigger official violations. Error rates in excess of the threshold error rates identified in the consent judgment trigger official violations (what the settlement defines as potential violations; Exhibit E-1).

Servicer Right to Cure: Whenever a potential violation occurs (i.e., whenever a servicer exceeds the threshold error rate for a given metric in a given quarter), the servicer must meet and confer with the Monitoring Committee within 15 days of the submission of a report showing the violation. Servicers have a right to cure any potential violation. Potential violations are deemed cured if: a) a corrective action plan approved by the monitor is determined by the monitor to have been successfully completed, b) a quarterly report covering the cure period shows that the threshold error rate has not been exceeded for that same metric during that period, and c) the monitor confirms the accuracy of that quarterly report (pages E-11 and E-12).

In addition to a servicer's obligation to cure a potential violation via a corrective action plan, servicers must remediate any material harm to particular borrowers identified through work performed by the servicer. Furthermore, if a servicer has a potential violation so far in excess of the threshold error rate that the monitor concludes the error is widespread, the servicer must identify other borrowers who may have been harmed by such noncompliance and remediate all such harms (page E-12).

4. Summary of Arguments in Support:

a. Attorney General Kamala Harris is sponsoring SB 1470, and sees the bill as an important part of her Homeowner Bill of Rights legislative package. The Attorney General took the first step in addressing the mortgage crisis by signing the National Mortgage Settlement, which includes mortgage servicing standards that are designed to return integrity to the foreclosure process. The next step is reforming California's laws to ensure that these protections are made permanent, and apply to other banks and servicers to re-establish integrity and uniformity to the state's foreclosure process. SB 1470 will accomplish these goals. The bill will resolve the problem of dual-tracking and will require servicers to provide documentation demonstrating their right to foreclose, before the foreclosure process may begin. The bill provides a private right of action that will allow for meaningful enforcement when the bill's provisions have been violated in a way that prejudices the ability of homeowners to secure a loan modification. These provisions will help ensure home ownership for thousands of Californians who are able to make payments under modified loan terms over the long term, if given a chance.

b. The Center for Responsible Lending (CRL) observes that an average of more than 500 California families have lost their home every day since the fourth quarter of 2007, and that, although foreclosure activity has retreated from peak levels, delinquencies and

foreclosures far exceed pre-crisis housing market levels. Research by CRL suggests that California is barely halfway through the foreclosure crisis. Among Californians who received mortgage loans between 2004 and 2008, 9.3% have already lost their homes to foreclosure, and another 8.9% are in default and at immediate, serious risk of losing their homes.

Systemic servicing and foreclosure process problems continue to lead to unnecessary foreclosures. Too many California families are unnecessarily losing their homes when they could have qualified for a mortgage modification that would have saved their home, improved returns for the owner of the mortgage, and avoided costs

on neighbors, local governments, and California's economy as a whole. SB 1470 would put into place measures to promote transparency and fairness in the foreclosure and loan modification process.

Consumers' Union echoes the support expressed by CRL and adds that SB 1470 will create a much-needed help struggling California homeowners avoid foreclosure, if they qualify for a cost-effective loan modification. Preventing unnecessary foreclosures at the earliest stage possible is in everyone's best interest. The protections in SB 1470 are seriously needed.

The California Public Interest Research Group adds, "It is clear that the current system - proceeding with foreclosure concurrent to any foreclosure-avoidance discussions - is not working. No one benefits - not the servicer, not the investors, not the homeowners, not the community, and not the California economy, when a home that is in the process of being saved through a loan modification, is sold in foreclosure."

c. Numerous other consumer advocacy organizations, religious organizations, and unions expressed support for reasons similar to those summarized above.

d. The California Reinvestment Coalition and 57 of its member organizations wish to be reflected as in support of the bill, only if it is amended to strengthen its private rights of action, and clearly apply the private rights of action in the bill to settlement signatories. These groups are not listed in the support section at the bottom of this analysis, because they are technically not in support at this time; they will only support of the bill, if amendments are made, which are not currently in the bill before this Committee.

5. Summary of Arguments in Opposition:

a. A coalition of trade associations representing the financial services industry and the secondary mortgage market raised several concerns in their letter of

opposition. The coalition is concerned about legislation that will result in a de-facto moratorium on foreclosures, as such a moratorium will result in a further erosion of property taxes for local governments,

perpetuate community blight for longer periods, act as a disincentive for capital investments, and forestall economic recovery. 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 originations to higher credit quality borrowers, where foreclosure is deemed less likely, and investors demand higher returns on their investments, to compensate for increased risk.

A few of the specific concerns cited in the coalition's letter are summarized below.

i. SB 1470 exemplifies an overly complicated formula, which will further frustrate and prolong existing foreclosure and loss mitigation efforts. The bill will add to the complexity of navigating the nonjudicial foreclosure process by servicers, creating a series of procedural traps that will lead to ever increasing litigation.

ii. A temporary situation does not require a permanent solution. SB 1470 proposes permanent changes to law that are extraordinarily restrictive and draconian. The nationwide mortgage settlement has a sunset date, and SB 1470 should, as well.

iii. SB 1470 fails to narrowly target at-risk borrowers, and applies too broadly. It promotes strategic defaults, allows investors and speculators to crowd out borrowers with financial hardship, and fails to require tender by borrowers as a symbol of good faith. For borrowers who strategically default and have no intention of remaining in their homes, the bill will be used as a delay and a leveraging tactic.

iv. SB 1470 will invite litigation through the inclusion of private rights of action. 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.

a. The California Land Title Association (CLTA) acknowledges that the inclusion of language intended to protect bona fide purchasers and bona fide encumbrancers will provide them with an affirmative defense against claims asserting the invalidity of title transfer. CLTA notes, however, that this defense must be asserted by a new homebuyer/BFP after he or she is sued, and will do nothing to dissuade delinquent borrowers and their attorneys from naming BFPs in litigation that is likely to flow from the enactment of SB 1470. These new homebuyers will be saddled with legal costs in the thousands of dollars, simply to hire attorneys to file motions to dismiss based on the BFP protections in the bill. Homebuyers fortunate enough to have purchased a homeowner's title policy following a foreclosure sale will be able to have their title insurer defend them, but they will have to pay a significant premium to obtain their new title policies for that reason.

CLTA observes that SB 1470 will have a negative impact on California's real estate economy and the secondary market. Currently, lender's title policies (i.e., policies to protect the lender's security interest in a home) attach to a borrower's loan and follow that loan, if it is sold into the secondary market. SB 1470 will introduce several new risks to title and will likely cause the title industry to reevaluate what coverage it will be able to offer to lenders. The likelihood that lenders will be unable to obtain title policies that limit their potential for risk and loss will translate to diminished secondary market interest in the loans these lenders make. Secondary market buyers seeking to assemble securitized pools of loans will look less favorably on loans that carry a potential for risk and loss due to title challenges.

b. The California Association of Realtors (CAR) is concerned that SB 1470 will reduce the availability of mortgage credit and increase the cost of funds for legitimate, qualified borrowers attempting to participate in the emerging recovery of the California real estate market. CAR believes that it is premature to lock into California statute some version of the settlement before it has been proven in the market. To the extent the settlement is to be incorporated into California law, CAR suggests it be done so in a way that creates more

uniformity for all lenders and servicers rather than less, and recommends that the bill track the settlement, except as needed to modify terms to be consistent with California's statutory usage.

c. The California Chamber of Commerce labels SB 1470 a job-killer bill, because it will impede California's

housing market recovery by allowing all borrowers, including strategic defaulters and investors, to interrupt the foreclosure process to forestall legitimate foreclosures. SB 1470 will continue a trend of delaying or stretching out the foreclosure process. The measure fails to narrowly target at-risk borrowers, and applies broadly, allowing a borrower to apply for a loan modification multiple times during the foreclosure process, with each application adding a month or more to the process.

The enforcement provisions of SB 1470 will incent litigation by imposing strict liability with no right to cure, and inflicting statutory, actual, treble, and punitive damages. The measure will likely limit future access to credit, discourage investment capital for the purposes of residential mortgage lending, or impose a significant risk-based premium, resulting in higher costs for consumers. Forestalling the foreclosure process will further frustrate local governments struggling with properties in disrepair during the foreclosure process, continue in the trend of reduced property tax revenue for local governments, and artificially sustain depressed property values.

d. The Civil Justice Association of California believes that SB 1470 will force nonjudicial foreclosures into court. The bill creates expansive, new obligations that are enforceable with lucrative penalties, statutory damages, and attorney's fees. The bill's requirements and prohibitions are outside of the carefully negotiated national mortgage settlement. California's foreclosure process is already highly regulated. There is no need to insert lawyers and lawsuits into the process.

6. Amendments:

a. This bill requires both clarification and correction, to provide more clarity regarding the types

of mortgages and deeds of trust to which its requirements apply. Section 1 of this bill applies to mortgages and deeds of trust secured by owner-occupied, residential real property. Sections 2 through 9 of this bill apply to mortgages and deeds of trust secured by single family, residential real property (i.e., they lack the owner-occupancy requirement).

The bill also contains language (likely inadvertent) which limits Civil Code Section 2924 and 2924f (both of which are sections of general applicability to all types of nonjudicial foreclosures) to foreclosures on single family, residential real property.

The provisions of the mortgage settlement that relate to mortgage servicing apply to loans secured by owner-occupied properties that serve as the principal

residence of the borrower.

To improve the clarity of the bill, and to ensure that it does not unintentionally narrow certain sections of the Civil Code which broadly apply to nonjudicial foreclosures on all types of property, staff suggests the following amendments. These amendments are drafted in a manner intended to conform the bill to the owner-occupied, residential real property scope of SB 1137 and the settlement. If the authors and sponsor wish to select a different scope, they need only substitute different language for the following:

Delete the language on page 19, lines 16 through 21, and insert the following language on page 10, between lines 36 and 37; page 13, between lines 32 and 33; page 14, between lines 34 and 35; page 15, between lines 22 and 23; page 17, between lines 2 and 3; and page 18, between lines 7 and 8: "This section shall apply only to mortgages and deeds of trust that are secured by owner-occupied residential real property containing no more than four dwelling units. For purposes of this section, "owner-occupied" means that the residence is the principal residence of the borrower as indicated to the lender in loan documents."

b. Language creating and referring to the Office of Homeowner Protection would also benefit from clarification and amendment.

i. Some have questioned whether the Office will have regulatory or enforcement authority. Although the bill is silent on both of these topics, it is staff's understanding that neither regulatory nor enforcement authority were contemplated by the authors or sponsor. Instead, the Office was envisioned as an ombudsman's office and an information clearinghouse.

If the authors and sponsor wish to clarify these points, staff suggests adding a new subdivision (b) on page 19, between lines 36 and 37, as follows: "(b) The Office shall not have the authority to promulgate regulations or bring enforcement actions."

ii. In several places, the bill contains language that requires mortgagees, trustees, beneficiaries, and authorized agents to provide "the toll-free telephone number made available by the Office of Homeowner Protection." This language is intended to require the provision of a phone number, which can be used by borrowers to reach the Office of Homeowner Protection. The following amendments are necessary to clarify this point, and to require the Office of Homeowner Protection to establish a

toll-free number at which it can be reached.

On Page 7, lines 21 and 22; page 9, lines 1 and 2; Page 13, lines 31 and 32; Page 16, lines 6 and 7; page 16, lines 37 and 38; and in any other place the language appears, strike "The toll-free number made available by the Office of Homeowner Protection" and insert "A toll-free phone number that can be used to reach the Office of Homeowner Protection."

Page 8, lines 18 and 19, strike "the office of Homeowner Protection and" and insert the following on page 8, line 20, after the first comma: "a toll-free phone number that can be used to reach the Office of Homeowner Protection,"

Page 19, between lines 30 and 31, insert a new paragraph (3): "Establishing a toll-free telephone number for use by borrowers to contact the Office."

iii. As drafted, the section describing the responsibilities of the Office requires it to respond to inquiries and complaints regarding, and attempt to seek compliance with "this article." "This article" is titled "Mortgages in General," and includes rules governing nonjudicial foreclosures on all types of properties. It is staff's understanding that the sponsor and authors want the Office of Homeowner Protection to act as an ombudsman only related to the provisions of this bill, SB 1471 (DeSaulnier and Pavley), and SB 1137. If they wish to narrow the responsibilities of the Office in that manner, staff suggests the following:

Page 19, line 27 and page 19, line 30, strike "article" and insert: "act" and add a conforming amendment to SB 1471, which gives the Office of Homeowner Protection authority to enforce provisions of that act, as well. These conforming amendments can be handled at the same time the double-jointing amendments recommended later in this analysis are made.

iv. To reflect formal approval of the settlement by the United States District Court of Appeal on April 5, 2012:

Page 20, line 2, strike the blank and insert: April 5, 2012.

v. A technical amendment is required on page 19, line 29. Strike "or" and insert: and

c. This bill contains three different provisions that appear to address the same topic, but do so in different

ways, and are confusing as drafted. Clarifying their meaning will be critical, if California wishes to ensure that implementation of these provisions will be able to occur, without significant court involvement.

i. As proposed to be amended Section 2923.5(b)(3) (page 4, lines 27 through 34) prohibits a notice of default from being recorded, without the inclusion of a declaration in which the mortgagee,

beneficiary, or authorized agent must declare that it "has possession of the note and mortgage or deed of trust and evidence of its right to foreclose, including documentation of any assignments and endorsements of the mortgage note or deed of trust." The bill further requires that this evidence either be attached to or described in the declaration.

It is unclear whether the word "any" in this requirement is intended to mean "all." Representatives of the sponsor have indicated that if any assignments exist, their intent is that all assignments be documented (and either attached to declaration accompanying the notice of default or described in that declaration). At a minimum, the wording of this section should be clarified so that the sponsor's intent is clear. However, staff notes that a related provision proposed by this bill's sponsor in SB 1471, which required every assignment of a mortgage or deed of trust to be recorded, was deleted by the April 10th, 2012 amendments to SB 1471, because it was deemed to be problematic on a number of different levels. If a virtually identical requirement was deleted from SB 1471 because of its problematic nature, the authors and sponsor may wish to delete it from SB 1470, as well (page 4, lines 27 through 34).

ii. Regardless of whether this language is deleted or merely clarified, an amendment will be required on page 4, line 35. That line refers to "proof," while the lines above relate to "evidence." Page 4, line 35: strike "proof" and insert: evidence.

iii. A few lines later, the bill provides direction to mortgagees, beneficiaries, or authorized agents who are unable to comply with the provisions on page 4, lines 27 through 34. In lieu of recording a declaration in which one of these entities states that it "has possession of the note and mortgage or deed of trust and evidence of its right to foreclose, including documentation of any assignments and endorsements of the mortgage note or deed of trust," the entity may include a separate declaration that includes "facts sufficient to show

that the mortgagee, trustee, beneficiary, or authorized agent has the right to enforce the note." (page 5, lines 3 and 4). It is unclear what documents or information would represent "facts sufficient to show that a party has the right to enforce the note," if that party lacks documentation of all assignments and endorsements. Failure to clarify this language in statute is likely to lead to significant litigation over its meaning.

iv. Once this language is clarified, a nearby, related section may be unnecessary. If an entity is able to provide facts sufficient to show that it has the right to enforce the note, why would that entity also have to record a lengthy description of the terms of that note (Section 2923.5(b)(3)(C); page 5, lines 8 through 18)? Is the language on page 5, lines 8 through 18 necessary?

d. Language in this bill intended to prevent borrowers from submitting multiple loan modification applications for the purpose of delay differs significantly from the settlement language on this topic. As previously discussed, the settlement expressly states that its provisions in this area are intended to minimize the risk of borrowers submitting multiple loss mitigation requests for the purpose of delay. This bill lacks such language.

More significantly, the settlement contains language intended to ensure that if a borrower was evaluated for a loss mitigation option by a signatory prior to the date of the settlement agreement, that borrower need not be re-evaluated by the signatory pursuant to the settlement agreement, absent a material change in the borrower's financial circumstances. This bill is drafted in such a way that borrowers, who were evaluated for loss mitigation options prior to the effective date of the bill, are entitled to be reevaluated for loss mitigation options pursuant to the provisions of the bill, as if they had not previously applied for loss mitigation relief. This bill's limitation on submitting multiple applications only applies, after a borrower has applied for a loan modification or other foreclosure avoidance alternative pursuant to the terms of the bill.

If the authors and sponsor wish to more closely conform the

submission of multiple requests for the purpose of delay, they may wish to consider the following amendments:

Page 10, between lines 36 and 37, insert the following: To minimize the risk of borrowers submitting multiple loss mitigation requests for the purpose of delay, subdivisions (c), (d), and (e) of this section shall not apply, if the mortgagee, beneficiary, or authorized agent has previously determined that the borrower is not eligible for a modification of that loan, unless the borrower's application reflects a material change in the borrower's financial circumstances since the date of the borrower's previous application."

Page 14, line 29 and page 15, line 16, insert the following additional language at the start of the line: "To minimize the risk of borrowers submitting multiple loss mitigation requests for the purpose of delay,"

Page 14, lines 31 and 32, strike "pursuant to Section 2923.6"

Page 15, lines 18 and 19, strike "pursuant to Section 2923.6 or Section 2924.10"

e. The dual track language of this bill differs from the dual track language in the settlement, in that the latter refers to what must happen after a borrower submits a complete loan modification application to a servicer, while the bill speaks to what must happen after any type of loan modification application is submitted, complete or not.

If the authors and sponsor would like to more closely conform these provisions of the bill to the settlement language, the following amendments are suggested:

Page 10, line 1, strike "an" and insert: a complete

Page 13, line 34, strike "an" and insert: a complete

Page 14, line 36, strike "an" and insert: a complete

f. The dual track language of this bill that addresses the process which must be used to evaluate borrowers who submit loan modification applications very late in the process (less than 15 days before a notice of sale may be recorded; Section 2924.11 of the bill, beginning on page 14, line 35) would benefit from clarification to achieve the authors' and sponsor's intent. As drafted, it states that a mortgagee, trustee, beneficiary, or authorized agent may not record a notice of sale, until either: i) it makes a determination that the borrower is ineligible for a loan modification, or ii) it notifies the borrower whether it can conduct an expedited review of the loan

modification application, or, if not, the reasons it cannot complete the review of the loan modification application.

As the bill is drafted, a beneficiary could record a notice of sale, as long as it tells a borrower that it can conduct an expedited review of the borrower's application. This possible outcome is not desired by the authors or sponsor.

As noted earlier, the settlement language on this topic (page A-20) states that if a servicer receives a complete loan modification application less than 15 days before a scheduled foreclosure sale, the servicer must notify the borrower before the sale date regarding its determination (if its review was completed) or its inability to complete its review.

To further the authors' and sponsor's intent, and to conform the language of Section 2924.11 of the bill more closely to the settlement language, staff suggests the following clarifying amendment:

Page 15, strike lines 7 through 10 and insert: (2) The mortgagee, beneficiary, or authorized agent notifies the borrower regarding its determination, if its review was completed, or, if not, the reason or reasons it could not complete its review of the borrower's application.

g. The provision of this bill which requires borrowers to be informed in writing about trustee sale postponements that are longer than nine days in length requires technical and conforming amendments to achieve the authors' and sponsor's intent. As drafted, the bill

will change the long-standing rule, which ensures that official announcements of trustee sale postponements occur at the place, date, and time last set for the sale. It is important to ensure that official postponements continue to be announced at the place, date, and time last set for the sale, to ensure that persons who may wish to bid on the property are informed about the postponements. The following technical amendments are suggested, to achieve the authors' and sponsor's intent. Notwithstanding the suggestions below, it remains an open question before this Committee whether the trustee sale postponement provisions of this bill are necessary, given the changes enacted last year, pursuant to SB 4. As described earlier, that bill added language to the notice of sale, effective April 1, 2012, which gives homeowners an easy way to obtain information about the details of trustee sale postponements, at no cost to them.

i. Page 12, strike lines 12 through 20, and insert: "Whenever a sale date is postponed for a period of at least 10 calendar days pursuant to Section 2924g, a mortgagee, trustee, beneficiary, or

authorized agent shall provide written notice to a borrower regarding the new sale date and time, and if applicable, the new location, within five calendar days following the postponement. Information provided pursuant to this paragraph does not constitute the public declaration required by subdivision (d) of Section 2924g. Failure to comply with this paragraph shall not invalidate any sale that would otherwise be valid under Section 2924f."

ii. Page 21, line 2, after the period, insert: "A change in the location of the sale proceedings, if any, whether due to the requirement of a public entity, emergency, or other circumstances that preclude the use of the published location, shall be announced at the time of postponement."

iii. Page 21, line 18: Strike "for any postponement that does not", strike line 19, and strike "(a) of Section 2924" on line 20.

iv. Page 21, line 22: Strike "shall be the same place as originally fixed by the trustee"

and strike "for the sale" on line 23, and insert: may be other than the place originally fixed by the trustee or subsequently relocated by the trustee for the sale.

v. Add the following as the third sentence of the "NOTICE TO PROPERTY OWNER required in every notice of sale pursuant to Section 2924f, as follows: "Postponements of ten days or more must be communicated to you in writing." (This change will require that Section 2924f be added to this bill, and amended in the manner described in this paragraph).

h. The word "trustee" appears in multiple places in this bill, where it is inappropriate. In California, trustees perform ministerial tasks related to nonjudicial foreclosures, at the direction of mortgagees and/or beneficiaries; they do not evaluate borrowers for foreclosure prevention alternatives. The word "trustee" should be deleted from all of the following locations: Page 8, lines 22 and 26; page 10, line 8; page 14, line 3; page 15, lines 4, 7, 27, and 31; page 16, lines 16, 27, and 31; page 17, lines 15, 19, 25, 30, and 33; page 18, line 1.

i. The following are relatively technical wording changes, which were discussed with the sponsor prior to the hearing, and to which staff understands the sponsor has agreed. They are intended to further the authors' and sponsor's intent, remove unnecessary language, and clarify unclear terminology:

i. Page 5, strike lines 31 through 36, and insert: (B) The means and process by which a borrower may apply for a loan modification or other foreclosure prevention alternative, and the deadlines for any required submission to be timely processed.

ii. Page 6, strike lines 23 through 30, and insert: (2) Notification that the borrower may receive, upon written request to the mortgagee, beneficiary, or authorized agent, a copy of the borrower's payment history since the borrower was last less than 60 days past due, a

copy of the borrower's promissory note, copies of any assignments of the mortgage or deed of trust that would evidence a right to foreclose on the borrower's property, and, if applicable, the name of the investor or investment trust that holds the borrower's loan.

iii. Page 18, line 3, after "modification" insert: application

j. During interested party discussions with the authors and sponsor leading up to this committee hearing, several interested parties requested clarification regarding the extent to which this bill creates a right to a loan modification. Representatives of the sponsor indicated the bill was not intended to create such a right, and expressed a willingness to clarify the bill in that manner.

If the authors and sponsor are amenable to including such language, staff suggests that the remedies section of the bill would be a likely place to add it (page 18, beginning at line 9).

aa. The private rights of action authorized by this bill would benefit from clarification (page 18, lines 9 through 34 and 38 through 40, and page 19, lines 1 and 2). As drafted, they allow a borrower to seek an order to enjoin a trustee sale, or an order seeking damages, if the borrower has a reasonable belief that a mortgagee, trustee, beneficiary, or authorized agent failed to comply with specified provisions of the bill. The bill implies, but does not expressly direct the court to find that a violation has occurred, before issuing an injunction or awarding damages. The bill also contains language intended to protect servicers from lawsuits over violations of the bill that were technical or de minimis in nature, and which did not impact a borrower's ability to pursue an alternative to foreclosure, but this language appears in a separate subdivision as the private rights, and is unclear regarding what constitutes an "ability to pursue an alternative to foreclosure."

The following language is suggested, in lieu of the existing language of 2924.14(a) (page 18, lines 9 through 20), to ensure that: i) an injunction or awarding of

damages only occurs after a court finds that a violation has occurred, and ii) a borrower is only entitled to relief, if that violation resulted in that borrower being denied approval for a foreclosure avoidance alternative for which he or she applied:

"A court of competent jurisdiction may enjoin a pending trustee's sale, if a notice of sale has been recorded, and a borrower presents evidence satisfactory to the court, regarding the existence of a violation of Section 2923.5, 2923.6, 2924, 2924.9, 2024.10, 2924.11, 2924.12, 2924.13, or 2924g by a mortgagee, trustee, beneficiary, or authorized agent, which resulted in the borrower being denied approval for a foreclosure avoidance alternative for which that borrower applied. Any injunction shall remain in place until the mortgagee, trustee, beneficiary, or authorized agent has complied with the requirements of the section or sections that were violated. A borrower who obtains an injunction shall be entitled to reasonable attorneys' fees and costs."

The following is suggested in lieu of the existing language of 2924.14(b) (page 18, lines 21 through 34): "A court of competent jurisdiction may award a borrower the greater of actual damages or ten thousand dollars ($10,000), plus reasonable attorney's fees and costs, if a trustee's sale has been concluded, and a borrower presents evidence satisfactory to the court regarding the existence of a violation of Section 2923.5, 2923.6, 2924, 2924.9, 2024.10, 2924.11, 2924.12, 2924.13, or 2924g by a mortgagee, trustee, beneficiary, or authorized agent, which resulted in the borrower being denied approval for a foreclosure avoidance alternative for which that borrower applied."

If these amendments are accepted, the text on page 18, lines 38 through 40, and page 19, lines 1 and 2 should be deleted.

bb. This bill is silent on whether it intends to authorize class action lawsuits to enforce its provisions. Staff understands that neither the sponsor nor this bill's authors intend class actions. The following language is suggested as an addition to Section 10 of the bill (Civil Code Section 2924.14) to clarify this intent:

Page 19, between lines 34 and 35, insert: (c) The provisions of this act shall not be enforceable through a class action lawsuit. No court shall have authority to certify a class of plaintiffs in a class action lawsuit brought to enforce the provisions of this bill.

cc. The provision which provides signatories to the settlement with an affirmative defense to liability for violations of the bill under certain circumstances is unclear as to its intent and its effect (page 19, lines 3 through 10). It also incorrectly refers to the settlement agreement (it only references the agreement reached with Bank of America, and not the agreements reached with the other four signatories). Substitute language is not suggested at this time, because discussions between the signatories and the authors and sponsor on this topic are still preliminary.

Staff observes, however, that while a compromise on this language is currently unclear, the existing disagreement on this issue is quite clear. The signatories favor language that would exempt them from the provisions of the bill that are based on the settlement, during the pendency of the settlement. Their argument is based on the fact that the settlement already contains enforcement mechanisms. The settlement does not authorize individuals to bring suit against the signatories for violations of the settlement, and they do not believe it is appropriate for California law to authorize such suits.

Those who would like to see the signatories subject to private rights of action for violations of this bill believe that signatories and non-signatories alike should be answerable for their compliance (or noncompliance) with this bill. They are concerned that individuals do not have redress against servicers who violate the settlement, and view this bill as a way to provide such redress.

dd. Should this bill have a delayed operative date? A delayed operative date for all of the bill's provisions other than the establishment of the Office of Homeowner Protection would allow servicers time in which to adopt policies and procedures for use in complying with the

provisions of the bill. This time would also be valuable to allow the Office of Homeowner Protection to be established and staffed, and for its staff to be trained, before the Office begins receiving calls from homeowners. Staff suggests a July 1, 2013 operative date for all of the sections of the bill other than Section 12 (which creates the Office of Homeowner Protection), and a

January 1, 2013 operative date for the provision of the bill creating the Office.

ee. Should this bill have a sunset date? Virtually all of the problems it is trying to address occurred as a result of the foreclosure crisis, a lengthy period of economic stagnation which will eventually end. Will the requirements of this bill still be appropriate, after California's housing market has returned to the position of strength it has traditionally held within California's economy, and once foreclosures occur most frequently on properties that hold more value than is owed to the foreclosing beneficiary?

ff. Both this bill and SB 1471 amend Section 2924 of the Civil Code, but do so in different ways. The sponsor of both this bill and SB 1471 also envision having the Office of Homeowner Protection handle borrower questions and complaints regarding the provisions of both bills. Double-jointing amendments will be necessary, and contingent enactment may be advisable, once the bills are closer to their final forms.

7. Related Legislation:

a. AB 1602 (Eng and Feuer), 2011-12 Legislative Session: Identical to this bill. Pending a hearing in the Assembly Banking and Finance Committee.

b. SB 1471 (DeSaulnier and Pavley) and AB 2425 (Mitchell): Both identical to each other, these bills would prohibit the recordation of robosigned mortgage documents, as defined, require certain borrowers to be assigned a single point of contact by their servicers for loss mitigation-related communication, and would make related changes. SB 1471 is pending a hearing in this Committee. AB 2425 is pending a hearing in the Assembly Banking and Finance Committee.

LIST OF REGISTERED SUPPORT/OPPOSITION

Support

Attorney General Kamala Harris (sponsor)
AFSCME
California Church Impact
California Labor Federation
California Nurses Association
California Professional Firefighters
California Public Interest Research Group
Cambridge Credit Counseling Corporation
Center for Responsible Lending
ClearPoint Financial Solutions, Inc.
Consumers Union
East Los Angeles Community Corporation
Green Path

Greenlining Institute
HomeStrong USA
International Federatio of Professional & Technical Engineers
Local 21
Lutheran Office of Public Policy -- California
National Asian American Coalition
National Council of La Raza - California
Nova Debt
PICO-California
SEIU
SEIU Local 1000
State Building and Construction Trades

Opposition

California Association of Realtors
California Bankers Association
California Chamber of Commerce
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
Civil Justice Association of California
Securities Industry and Financial Markets Association
United Trustees Association

Consultant: Eileen Newhall (916) 651-4102