

State Action Still Needed to Prevent Unnecessary Foreclosures

Revised May 2013

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States have yet to recover from the foreclosure crisis which has stripped trillions of dollars from homeowners and devastated local communities across the nation. Despite recent advancements to protect borrowers from unnecessary foreclosures, without further state action millions of families remain poised to lose their homes, notwithstanding new CFPB protections that go into effect in January 2014.¹ States are in a strong position to stabilize local housing markets and protect homeowners from mortgage servicing abuses through practical, yet, crucial legislation that borrows from but adds in significant ways to the standards set by the Consumer Financial Protection Bureau (CFPB) and California's Homeowner Bill of Rights.

State Action Remains Necessary Following the CFPB Servicing Rules

On January 17, 2012, the CFPB issued final servicing rules which address loss mitigation and dual tracking.² Although these rules are strong in many respects, there are key areas where the states should still act in order to prevent unnecessary foreclosures against their homeowners.

CFPB Dual Track Rules Should Be Adopted With Modifications

States should consider adopting portions of the CFPB rules, modified to provide greater protection to their homeowners that will help avoid additional foreclosures.

- *Pre-Foreclosure Referral:* The CFPB rule provides that a mortgage servicer may not start the foreclosure process until a borrower is more than 120 days delinquent. Additionally, if a borrower submits a complete loss mitigation application before the servicer starts the foreclosure process, then the servicer may not begin the process while the application is pending. ***States should adopt this strong standard.***
- *Post-Foreclosure Referral:* Under the CFPB rule, if a servicer has already started the foreclosure process, it is prevented from moving for a judgment or order of sale or conducting a sale only if the borrower submits a complete loss mitigation application more than 37 days before a foreclosure sale. California law has no deadline. CRL had recommended that the CFPB adopt a shorter deadline of 15 days. ***States should consider giving borrowers more time to apply, and to provide timelines that are consistent and workable within their state's foreclosure timetables.***

- *Limited Right to Appeal:* The CFPB rule gives borrowers a right to appeal a denial only if a complete application is received by the servicer 90 days before a possible foreclosure sale date. California law allows a borrower to appeal a denial regardless of when the application was received. ***Given the evidence of widespread errors related to denials, states should consider providing borrowers with broader appeal rights by adopting the California rule.***
- *Rules regarding Borrower Outreach, Denial Letters, Points of Contact & Other Procedures:* The CFPB also requires outreach to borrowers about loss mitigation programs, denial notices and other related procedures. ***States should adopt such procedures and requirements to provide borrowers with a full opportunity to avoid foreclosure.***

States Should Give Borrowers the Right to Prevent an Unlawful Foreclosure Sale to More Effectively Prevent Unnecessary Foreclosures

- Dual track restrictions are intended to prevent unnecessary foreclosures. This goal cannot be effectuated fully by the CFPB rule alone, however, given that it does not allow borrowers to actually prevent a foreclosure sale when servicers violate the requirements.³ ***States, therefore, should adopt dual track rules (as outlined above), and then also provide borrowers with a right to seek an injunction (in non-judicial foreclosures) or raise a defense to foreclosure (in judicial foreclosures), for a violation of these rules.*** This will allow borrowers to put a pause on the process while the servicer considers the borrower for foreclosure prevention alternatives as required by the rules, which is essential to ensure that borrowers receive the full benefit of the dual track restrictions and to prevent unnecessary foreclosures.
- *Note:* Although the CFPB rules will apply whether or not states adopt them, the right of borrowers to prevent unlawful foreclosure sales under state law will not apply to violations of the CFPB rules, unless the rules are explicitly adopted by the states. Hence, we provide recommendations for where to adopt and where to modify the rules above.

¹ Amherst Securities estimated as of October 2012 that 6 million homes were at risk of defaulting. Document on file with Center for Responsible Lending.

² CFPB Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) - http://files.consumerfinance.gov/f/201301_cfpb_final-rule_servicing-respa.pdf.

³ The CFPB rule does provide a private right of action under RESPA, but for damages only. Under RESPA, the borrower is only provided actual damages, typically after a foreclosure sale has been completed. A borrower cannot bring an action to enjoin a foreclosure sale or raise a defense to foreclosure if the servicer fails to comply with the rules. . Moreover, with most borrowers delinquent in their payments and having homes that are under water, damages are extremely difficult to prove.