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FISCAL IMPACT REPORT

ORIGINAL DATE 02/12/11
LAST UPDATED 03/03/11 **HB** _____

SPONSOR Sanchez, M.

SHORT TITLE Enact "Mortgage Fair Foreclosure Act" **SB** 406/aSJC

ANALYST Leger

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY11	FY12	FY13		
	NFI	NFI		

(Parenthesis () Indicate Revenue Decreases)

Relates to:

House Bill 174 – Foreclosure Fairness Act

House Bill 171- No Mortgage Foreclosure Deficiency Judgments

HB 573 – NM Mortgage Licensees Requirements

SB 411/SCORC – NM Mortgage Licensees Requirements

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Attorney General’s Office (AGO)

Regulation and Licensing Department (RLD)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee Amendment to Senate Bill 406 in Section 4, changes the written notice of intent to “must be received by debtor not less than 30 days” and includes “regular mail” as an option of notification. Subsection 12 of Section 4 broadens the contact information of the creditor or designated servicing department and allows them to request loss

mitigation. Stricken from this section is the requirement for “the name, address and telephone number of a person with the authority to modify or otherwise affect the debtor’s obligation under the subject security interest” – and renumbers accordingly.

Paragraph B of Section 6 is changed to state that upon a request by the debtor for loss mitigation, the creditor shall designate a person with the authority to modify the debtor’s obligation pursuant to the subject security interest “and shall provide the debtor the contact information, including name, address, telephone number, facsimile number and email address for the person designated”.

The conditions precedent to foreclosure in Paragraph D of Section 7 is now states “after commencement of a foreclosure proceeding, a debtor may request loss mitigation. Upon the debtor’s request for loss mitigation the court may, in its discretion, stay the foreclosure proceeding or the sale of the property until the loss mitigation is completed”.

Section 8 will no longer allow voiding the sale if a court finds material violations of the Act by a creditor or order any other relief provided by law.

Section 10 now includes a new paragraph labeled “C” to read “The Mortgage Fair Foreclosure Act shall not apply to a mortgage on which the default occurred prior to one hundred twenty days after the date on which the subject mortgage was executed” and reletters the succeeding subsection accordingly.

Synopsis of Original Bill

Senate Bill 406 enacts the “Mortgage Fair Foreclosure Act”; the legislature finds that homeowners should be given reasonable notice prior to the loss of their home and afforded a meaningful opportunity to participate in loss mitigation to prevent the loss of homeownership and to benefit the consumers and businesses operating in New Mexico to facilitate whenever possible the cure of any default on residential mortgage loans and thereby preserve homeownership. The bill contains an emergency clause.

Section 3 provides definitions relevant to the bill.

Section 4. Written Notice of Intent to Accelerate Loan or Foreclose:

- A. Requires notice to the debtor (homeowner), at least 45 days prior to commencing foreclosure or other legal action to take possession of the property, of intent to take such action.
- B. Requires notice to be in writing and provides for manner of service on debtor.
- C. Specifies the form of the written notice, requires that it be printed in English and Spanish, and enumerates the information to be provided in such notice, including identification of the property subject to foreclosure, the nature of the default, right to cure the default and the sum necessary to cure the default, the date by which the debtor must cure the default and the name, address and telephone number of a person to whom payment shall be made, the right of the creditor to initiate action to take possession, right of debtor to seek counsel, right of debtor to submit a loss mitigation application to the debtor and the list of documents and information required, a listing of HUD certified loss mitigation counselors in New Mexico, a

contact person affiliated with the creditor whom the debtor may contact to challenge the default or accuracy of the default information, contact person affiliated with the creditor with authority to modify the debtor's obligation, and , notice of redemption rights upon foreclosure.

- D. Creditor shall provide a copy of applicable loss mitigation application, procedure or guidelines to the debtor with the notice.
- E. Exempts creditor from providing such notice where the debtor voluntarily surrendered in writing the property.
- F. Makes obligations under this section independent of any other legal duty to give notice.

Section 5. Accounting:

Provides that the creditor send the debtor an accounting of all payments received and allocations of these payments under the mortgage obligation for the 12 months prior to the date of the alleged default.

Section 6. Pre-Foreclosure Loss Mitigation Obligations:

- A. Creditor shall make a good faith obligation to contact the debtor and afford the debtor the opportunity to participate in loss mitigation and evaluate whether an affordable and sustainable alternative to foreclosure is feasible.
- B. Provides that when a debtor requests loss mitigation, a person with authority to modify the debtor's obligation shall participate in good faith in loss mitigation efforts prior to commencing a foreclosure proceeding.
- C. Upon the debtor's request, a certified housing counsel, attorney or other authorized representative may assist in the loss mitigation process.
- D. Identifies a range of options or alternatives to foreclosure, consistent with the debtor's current financial circumstances and ability to pursue such alternatives, which may be considered, such as loan modification, forbearance, refinancing, short sale, deed in lieu or voluntary surrender of the home.
- E. When the creditor terminates loss mitigation, provides for notice to the debtor of the attempts to contact them, document the loss mitigation effort and summarize the information relied upon, the basis for the denial and the results of a net present value analysis, if performed.
- F. Requires notice to the debtor of any administrative, regulatory or internal review of a denial afforded by the creditor and a reasonable opportunity to pursue available review process.
- G. A review process provided by the creditor does not bar the debtor from challenging the foreclosure action or loss mitigation process in a court proceeding.
- H. Provides that the creditor maintain records of communications with the debtor until final sale of the property is completed and that such records are transmitted to a subsequent servicer in the event the loan is transferred to another servicer.

Section 7. Conditions Precedent to Foreclosure:

- A. Creditor shall certify in the initial foreclosure pleading that it has complied with this law, that the debtor has not requested loss mitigation, or, that after a good faith effort by the creditor, loss mitigation was terminated.
- B. Where the debtor has abandoned or voluntarily surrendered the property, the creditor should state that in the pleading.
- C. The Court must make specific findings prior to entry of judgment in a foreclosure action.
- D. Debtor may request loss mitigation up to seven days prior to sale of the property and such request stays the sale until it is completed.
- E. Creditor's failure to certify compliance with Section A or failure to comply with the Act shall be a defense to a foreclosure action.

Section 8. Violations – Sanctions:

If court finds material violation of Act, may dismiss the action, void the sale, impose sanctions or assess attorney fees and costs.

Section 9. Severability provision states that any part of application of the Act is held invalid, the remainder or its application to other situations or persons shall not be affected.

Section 10. Applicability:

- A. Provisions of the Act applies to foreclosure of all mortgages that have as their security a residence in New Mexico, provided that the dwelling has no more than 4 units; and, at the time of execution of the mortgage, the debtor or a member of the debtor's immediate family did or planned to occupy it as their primary residence.
- B. Provisions of the Act applies to foreclosure of any property used as a primary residence by debtor or immediate family within 12 months preceding the date of the initial notice of default.

FISCAL IMPLICATIONS

Senate Bill 406 does not impact the state revenue or operating budget.

SIGNIFICANT ISSUES

According to AGO:

It is in the public interest for the State of New Mexico to stabilize local housing markets. States have exclusive jurisdiction over the foreclosure process. While creditors should be able to proceed in an efficient and timely manner where the homeowner has defaulted, walked away or surrendered the home, New Mexico can enact legislation to ensure that all homeowners with the financial capacity to avoid foreclosure, through a loss mitigation alternative, be provided a good faith review to evaluate the viability of foreclosure alternatives rather than proceed directly to foreclosure. Currently, a homeowner may be proceeding through loss mitigation, while, at the same time, the creditor initiates foreclosure proceedings. This increases the cost to the homeowner and places the

homeowner at greater risk of foreclosure because of the “dual track” of loss mitigation and foreclosure – that is, there is a conflict between the ongoing loss mitigation efforts by one agent of the creditor (the servicer) and the foreclosure proceeding initiated by the creditor through its attorney. While creditors (including banks and servicers) claim that loss mitigation is not a defense to foreclosure, a reasonable and transparent effort to engage in loss mitigation *before* proceeding to foreclosure is in most cases financially advantageous to the homeowner *and* the investor/holder of the mortgage note. Additionally, adequate notice of the basis for the default and transparency of the decision making process in loss mitigation are consistent with fair, reasonable and good faith contractual obligations.

According to RLD:

Section 2 states in part, “homeowners should be given reasonable notice of the fact of and basis for an alleged default on their mortgage, apprised of all loss mitigation methods available to them in connection with their home loans prior to the loss of their home...”. This implies that lenders should know all loss mitigation programs and methods available in the marketplace or otherwise be in violation of the Mortgage Fair Foreclosure Act. The language should be reworded to state “all mitigation methods available from the lender or subsequent investors”.

Section 2 states in part, “Further, the legislature finds that it is the public policy of this state, and to the benefit of consumers and businesses operating in this state...”. The bill does not identify or describe the benefit to businesses operating in this state.

Depository institution lenders would encounter undeterminable delays in the conversion of nonperforming loans to viable assets due to delayed foreclosure proceedings, resulting in decreased earnings and increased loan losses, which are considered safety and soundness issues by federal and state regulatory agencies.

RELATIONSHIP

HB 174, the Foreclosure Fairness Act, provides for the recovery of attorney fees and costs to defendants who prevail in foreclosure actions.

HB 171, Prohibiting Deficiency Judgments in Certain Mortgages, prohibits deficiency judgments in a foreclosure action against a debtor who has occupied the real property as the debtor’s primary residence, provided that the debtor has occupied the home as a primary residence for no fewer than 120 days prior to the initiation of the foreclosure action.

HB 573, amends the Mortgage Loan Company Act calling for a mortgage loan company qualified manager to be a resident of the state, maintain a registered office in the state, ensure records are maintained in the office and in digital format, and adds a new section to the law of registered office required exemptions.

SB 411, amends the Mortgage Loan Company Act calling for a mortgage loan company qualified manager to be a resident of the state, maintain a registered office in the state, ensure records are maintained in the office and in digital format, and adds a new section to the law of registered office required exemptions.

TECHNICAL ISSUES

RLD proposes the following technical adjustments:

Page 2, Lines 20 and 23 – The term “financially sustainable loan modification” should be defined.

Page 3, Line 16 and Page 16 lines 12 and 16 – The term “immediate family” should be defined.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to the AGO:

The number of foreclosures has increased significantly in New Mexico as a result of the national mortgage crisis. Many homeowners offered loans with teaser rates, negative amortization or subprime interest rates and terms - known as “toxic” loans - have defaulted on these loan because they found themselves unable to maintain their mortgage payments, given the terms of the loan. Additionally, with the depression in the housing market, home prices dropped and homeowners now find that they owed more on their mortgage than their home is worth. The downturn in the economy, causing an increase in unemployment, has further put homeowners at risk of foreclosure and loss of the family home. If this bill is not enacted, homeowners who are trying to pursue alternatives to foreclosure to preserve their primary residence will continue to face obstacles to a fair and reasonable opportunity for loss mitigation.

JLL/mew