

# FINAL BILL REPORT

## 2SHB 1362

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C 58 L 11  
Synopsis as Enacted

**Brief Description:** Protecting and assisting homeowners from unnecessary foreclosures.

**Sponsors:** House Committee on Ways & Means (originally sponsored by Representatives Orwall, Hope, Rolfes, Moeller, Lias, Probst, Green, Darneille, Frockt, Kirby, Miloscia, Roberts, Hunt, Dickerson, Upthegrove, Fitzgibbon, Kagi, Eddy, Hasegawa, Pettigrew, Ormsby, Sells, Kenney, Cody, Hudgins, Lytton, Moscoso, Ryu, Appleton, Reykdal, Van De Wege, Carlyle, Dunshee, Santos, McCoy, Tharinger, Haigh, Goodman, Jinkins, Jacks, Takko, Sullivan, Blake, Seaquist, Billig, Stanford, Ladenburg, Finn and Pedersen).

**House Committee on Judiciary**

**House Committee on Ways & Means**

**Senate Committee on Financial Institutions, Housing & Insurance**

### **Background:**

#### Foreclosure Process for Deeds of Trust.

A deed of trust may be nonjudicially foreclosed if the borrower defaults on the loan obligation. The Deeds of Trust Act imposes certain requirements on beneficiaries and trustees during the foreclosure process.

To foreclose on a deed of trust, the beneficiary or trustee must send a notice of default to the borrower. Thirty days after the notice of default is sent, the trustee may record a notice of sale in the county auditor's office. The foreclosure sale may not occur until 90 days after the time the notice of foreclosure sale is recorded, and may not occur until at least 190 days from the date of default. Within that time frame, the borrower may, among other things, cure the default and discontinue the sale or bring a court action to enjoin the foreclosure.

#### Meet and Confer.

In 2008 legislation was enacted that amended the Deeds of Trust Act to require a beneficiary to contact a borrower by letter and telephone before issuing a notice of default in order to assess the borrower's financial situation. The beneficiary must give the borrower information for housing counseling agencies and must inform the borrower that he or she can request a subsequent meeting with the beneficiary to explore options to avoid foreclosure. This is referred to as the "meet and confer" requirement. The "meet and confer" requirement applies

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

to deeds of trust made from January 1, 2003, to December 31, 2007, on owner-occupied residential property and expires on December 31, 2012.

#### Real Estate Excise Tax.

The real estate excise tax does not apply when property is transferred by deed in lieu of foreclosure to satisfy a deed of trust and no additional money or thing of value (called "consideration") is given to the transferor. In some cases, a lender might provide a nominal amount of money to the borrower as an incentive for the borrower to transfer the property in a deed in lieu of foreclosure transaction and to assist the borrower in relocation costs (sometimes referred to as "cash for keys"). That money could be "consideration" and may be subject to the real estate excise tax.

#### **Summary:**

#### Meet and Confer.

The "meet and confer" requirement is amended to allow for an additional 60 days before the notice of default may be issued, if the borrower responds within 30 days of the initial contact. The beneficiary makes initial contact by sending a form letter, which must contain model language developed by the Department of Commerce (COM). The letter must urge the borrower to contact a housing counselor or attorney as soon as possible. If the borrower requests a meeting with the beneficiary, the meeting must be in person unless waived by the borrower. A person authorized to make decisions for the beneficiary may participate by phone. The "meet and confer" requirement is made applicable to all deeds of trust and the expiration date is repealed.

#### Housing Counselors.

A housing counselor who is contacted by a borrower has a duty to act in good faith to attempt to reach a resolution within the time frame of the meet and confer process. A resolution may include, but is not limited to a loan modification, an agreement to conduct a short sale, a deed in lieu of foreclosure, or some other plan. Housing counselors are not liable for civil damages resulting from acts or omissions in providing assistance to borrowers, unless the acts or omissions constitute gross negligence or willful or wanton misconduct.

#### Mediation.

A foreclosure mediation process is established that applies to borrowers of deeds of trust on owner-occupied residential property who have been referred to mediation by a housing counselor or attorney. The housing counselor or attorney may refer a borrower to mediation if appropriate based on the individual circumstances and if a notice of sale has not yet been recorded. A referral to mediation does not preclude a trustee from issuing a notice of default. A financial institution that certifies to the COM that it was not a beneficiary in more than 250 foreclosure sales in a calendar year is exempt from the mediation provisions.

A housing counselor or attorney referring a borrower to mediation must send a notice form to the COM. Within 10 days of receiving the notice, the COM must select a mediator and notify the parties. The mediator must convene an in-person mediation session within 45 days after being selected, unless the parties agree in writing to extend the time. Provisions are established to address when the mediator must send the parties notice of the mediation session, what documents and information the parties must provide to the mediator, and what

factors the parties must consider during mediation. The parties must mediate in person, but a decision-maker on behalf of the beneficiary may participate by phone.

Parties in mediation have a duty to act in good faith. A party may violate of the duty to act in good faith by failing to timely participate in mediation without good cause, failing to provide certain information to the other party, failing to pay its portion of the mediator's fees, or engaging in other conduct set forth in the act.

Within seven days of the conclusion of the mediation, the mediator must certify to the COM the outcome of mediation and whether the parties acted in good faith. A certification that the beneficiary violated the duty to act in good faith constitutes a defense to the foreclosure, but not to any future foreclosure action. A certification that the borrower violated the duty to act in good faith authorizes the beneficiary to proceed with the foreclosure.

If an agreement was not reached and the mediator's certification shows that the net present value of a modified loan exceeds the anticipated net recovery at foreclosure, the showing constitutes a basis for the borrower to enjoin the foreclosure.

The mediator's fees must not exceed \$400 for a three-hour session and must be paid for equally by the borrower and beneficiary. The COM must maintain a list of approved foreclosure mediators and may establish a training program for mediators. The COM must make annual reports to the Legislature on the results of the mediation program.

#### Funding.

Beginning October 1, 2011, and every quarter thereafter, beneficiaries must: (1) report to the COM the number of owner-occupied residential real properties for which the beneficiary has issued notices of default during the previous quarter; and (2) remit to the COM a lump sum payment of \$250 per property. No later than 30 days after the effective date of this provision, the beneficiaries must remit to the COM a lump sum payment of \$250 per owner-occupied residential real property for which the beneficiary has issued a notice of default during the three months prior to the effective date of this provision. This reporting and remitting requirement does not apply to financial institutions and loan servicers that have issued fewer than 250 notices of default in the preceding year, or to association beneficiaries.

The funds are to be deposited into the newly created Foreclosure Fairness Account, which is a non-appropriated account administered by the COM. The funds must be distributed as follows: no less than 80 percent to fund housing counselors; the greater of up to 6 percent, or \$655,000 per biennium, to the Consumer Protection Division of the Office of the Attorney General (AGO); up to 2 percent to the Office of Civil Legal Aid for purposes of contracting with legal aid programs for representation of homeowners in matters relating to foreclosure; the greater of up to 9 percent, or \$451,000 per biennium, to the COM to implement the Foreclosure Fairness Act; and up to 3 percent to the Department of Financial Institutions to conduct homeowner outreach and education programs. The amount specified to fund housing counselors may be less than 80 percent if necessary to meet the level of funding specified for the AGO and the COM.

#### Consumer Protection Act.

It is a Consumer Protection Act violation for any person or entity to: (1) violate the duty of good faith in the mediation requirement; (2) fail to initiate contact with the borrower and exercise due diligence under the "meet and confer" requirement; or (3) fail to comply with the reporting and remitting requirements to the COM.

Servicer's Duty.

A servicer's duty to maximize net present value under a pooling and servicing agreement is a duty that is owed to all parties in a deed of trust pool, not to a particular party, and the servicer acts in the best interests of all parties if it agrees to a modification where default on the loan is reasonably imminent and anticipated recovery under a modification is more than the anticipated recovery through foreclosure.

Real Estate Excise Tax.

For the purpose of the real estate excise tax, "total consideration" does not include the amount of any relocation assistance provided to the transferor when a transfer is made by deed in lieu of foreclosure to satisfy a deed of trust.

**Votes on Final Passage:**

House	83	13	
Senate	36	11	(Senate amended)
House	78	15	(House concurred)

**Effective:** July 22, 2011  
April 14, 2011 (Sections 11, 12, and 16)