



State Action Still Needed to Prevent Unnecessary Foreclosures

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States have yet to recover from the foreclosure crisis that has stripped trillions of dollars from homeowners and devastated local communities across the nation. Industry analysts estimate that 6 million borrowers remain at risk of foreclosure.¹ States are in a strong position to prevent unnecessary foreclosures, stabilize local housing markets and protect homeowners from mortgage servicing abuses. Through practical enhancements to the standards set by the Consumer Financial Protection Bureau (CFPB) and California's Homeowner Bill of Rights, states can help borrowers get full and fair consideration for loan modifications before losing their homes to foreclosure.

State Action Remains Necessary Following the CFPB Servicing Rules

On January 17, 2012, the CFPB issued final servicing rules that address loss mitigation and dual tracking, the practice by servicers of simultaneously pursuing foreclosure while working with a homeowner on a loan modification or other foreclosure alternative.² Although the CFPB rules will apply to servicers whether or not states adopt them,³ only by adopting the rules themselves can states give borrowers the ability to prevent foreclosure sales when servicers violate the rules. Hence, we provide recommendations on how to implement aspects of CFPB's national reforms. And although the CFPB rules are strong in many respects, there are key areas where the states can provide stronger protections for homeowners.

Recommended Dual Track Rules

- *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, under the rule, 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 the foreclosure sale date. 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 with timelines that are consistent and workable with 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 servicer errors related to denials, states should consider providing borrowers with broader appeal rights for borrowers who meet the state’s application deadlines.***
- *Procedural Rules regarding Borrower Outreach and Denial Letters:* The CFPB also requires outreach to borrowers about loss mitigation programs and denial notices. ***States should adopt the CFPB outreach procedures, but should consider adopting California’s more detailed denial notice, which provides greater transparency and information to borrowers.***

States Should Also Give Borrowers the Ability to Prevent Unlawful Foreclosures

- Dual track restrictions are intended to prevent unnecessary foreclosures. This goal cannot be effectuated fully by the CFPB rule alone, however, given that the law under which the rule was implemented, RESPA, does not allow borrowers to actually prevent a foreclosure sale when servicers violate the rule’s requirements.⁴ ***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. This protection ensures that borrowers receive the full benefit of the dual track restrictions to prevent unnecessary foreclosures.

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 provides a partial exemption for some “small servicers”. California and other states have similar carve-outs.

⁴ 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 stop 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 underwater, damages can be difficult to prove.