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FISCAL IMPACT REPORT

ORIGINAL DATE 02/14/13

SPONSOR Cook LAST UPDATED _____ HB 420

SHORT TITLE Home Loan Protection Act Foreclosures SB _____

ANALYST Martinez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		NFI				

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Regulation and Licensing Department (RLD)

Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

House Bill 420 (HB 420) amends Section 58-21A-6 NMSA 1978 to add a creditor or creditor's assignee of a home loan that has the legal right to foreclose shall use judicial foreclosure procedures provided by law "or the nonjudicial foreclosure procedures provided in the Deed of Trust Act."

SIGNIFICANT ISSUES

The RLD provides the following assessment:

A Mortgage consists of two parties, the lender and the borrower. The Deed of Trust involves three parties; a lender, a borrower and a trustee. The Deed of Trust conveys title to the trustee who in turn holds title until the loan is paid off.

The second difference between the two instruments is the foreclosure process. When a mortgage is used to secure a transaction, the judicial process is required to foreclose on a property. When a Deed of trust is used for securitization, the non-judicial process is utilized. Through this process, when a borrower defaults on a loan, the lender delivers the Deed of Trust to the trustee who will

then sell the property upon all the notices and rules outlined in the Deed of Trust Act § 48-10-1 NMSA 1978 et seq. have been completed.

In 2006, legislation was enacted in New Mexico amending the Deed of Trust Act. The amendment permitted the use of the Deed of Trust instrument in financing transactions on all properties. Prior to the amendment, the Deed of Trust Act only allowed the use of the Deed of Trust on commercial loans of \$500,000 or more. In response to this change, in 2008, Fannie Mae and Freddie Mac revised the security instrument used in New Mexico from a Mortgage to a Deed of Trust. In 2009, The Federal Housing Administration (FHA) issued a mortgagee letter (rule update letter) implementing the same change. Currently, all mortgages sold on the secondary market that are originated in this state utilize the Deed of Trust.

The AGO provides the following assessment:

Under the New Mexico Loan Protection Act (NMHLPA) a creditor or assignee, upon an initial determination of default, must take a two step-process for formal judicial foreclosure:

(1) Before an action is filed for foreclosure, the creditor or assignee must deliver to the borrower “a notice of the right to cure the default”. This is a preliminary step before foreclosure can be initiated and it gives the home loan borrower the ability to cure the default. See Section 58-21A-6-(A)1-5; and

(2) The creditor or creditor’s assignee is required to use the judicial foreclosure procedures provided by law at Section 58-21A-6(E) of the NMHLPA.

Under current law, therefore, the financially strapped borrower of a home loan is given the opportunity to cure any default and then is given his or her day in court before a formal foreclosure action may proceed to the sale of the residence secured by the loan.

HB 420 proposes to evade the foreclosure procedure and allow a creditor or a creditor’s assignee of home loans to use “the nonjudicial foreclosures” as provided in the NM Deed of Trust Act (NMDTA). Under the provisions of the NMDTA, the creditor or the creditor’s assignee is not required to send a notice to cure the default: only a notice of sale is to be recorded, published and mailed to the borrower. A nonjudicial foreclosure under the NMDTA gives the trustee the “power of sale” and the home loan can be foreclosed without a notice to cure. Nonjudicial foreclosure can occur immediately after 90 days of the recording of the notice of sale, absent an adjudication of default, and resulting in the sale of borrower’s home.

In contrast, judicial foreclosures, which are under the scrutiny of the judiciary, must follow strict requirements of “due process” for all civil trials before the adjudication of default and more importantly, before the sale of the property in question.

Given the recent and significant settlements with major national banks involving the States’ Attorneys General, including New Mexico, in dealing with unfair and improper foreclosures, such as robo-signing, The AGO believes it more logical and consistent to reinforce and strengthen the present foreclosure procedures, rather than to weaken or evade them altogether.

PERFORMANCE IMPLICATIONS

The Deed of Trust Act outlines the requirements of conducting a trustee sale using the “non-judicial” process. With this proposed amendment, lending institutions will no longer have nonperforming assets on their books for an indeterminate amount of time resulting in a “drag” on earnings and capital. Currently, New Mexico has one of the lengthiest foreclosure timelines in the United States. This prolonged timeline can result in our financial institutions maintaining toxic assets on their books that ultimately threaten the overall health of the institution.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP WITH BILLS INTRODUCED THIS SESSION

The AGO Comments:

Fannie Mae and Freddie Mac have published Form 3032 for use in a residential deed of trust. Paragraph 22 of Form 3032 allows the lender at its option to use either and non-judicial or judicial foreclosure procedure. This is stated as such because it applies to all states and a minority of states allows nonjudicial foreclosures. Form 3032 clearly states at paragraph 22 that, in the event of inconsistency between Form 3032 and the NMHLPA, the NMHLPA is controlling. The NMHLPA does not give the lender that option for home loans; rather it requires first a right to cure and then a formal judicial foreclosure procedure as discussed above. Under the guidelines of Fannie Mae and Freddie Mac, the provisions of the NMHLPA with respect to default, notice, right to cure, method of foreclosures and/or other issues remain applicable to protect home buyers. The amendments proposed by HB 420 are inconsistent and undermine the more expansive protections provided by the NMHLPA which the guidelines of Fannie Mae and Freddie Mac have implicitly supported.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The RLD Comments:

Without the amended language, there will continue to be conflict between the uses of the “judicial process” versus the “non-judicial process”.

RM/svb