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## FISCAL IMPACT REPORT

ORIGINAL DATE 03/01/13

SPONSOR SCORC LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Mortgage Fair Foreclosure Act SB 1/SCORCS

ANALYST Daly

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	NFI	NFI	NFI			

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General's Office (AGO)  
 Regulation & Licensing Department (RLD)  
 New Mexico Mortgage Finance Authority (MFA)

### SUMMARY

#### Synopsis of Bill

The Senate Corporations and Transportation Committee Substitute for Senate Bill 1 enacts the Mortgage Fair Foreclosure Act (MFFA). It requires the creditor to give the debtor (a holder of a mortgage lien for a primary residence) written notice no later than the forty-fifth day of delinquency unless the debtor has voluntarily surrendered the dwelling in writing. The notice shall provide the debtor with an accounting of the mortgage loan obligation covering the twelve month period prior to the date of the alleged default and a statement explaining the debtor's right to submit a loss mitigation request or application. It shall also include information concerning available foreclosure hotlines, the right to and availability of counsel for the debtor, and loss mitigation housing counselors in New Mexico. When filing to foreclose on a dwelling, the creditor shall certify compliance with the notice requirements of the MFFA and applicable federal laws or guidelines and that the debtor has not requested loss mitigation or, if requested, the creditor has negotiated loss mitigation in good faith, but loss mitigation was terminated on a specified date.

Before entering a judgment of foreclosure, a court must find the creditor has met all requirements of the MFFA, has notified all interested parties, and: 1) the debtor has voluntarily relinquished the dwelling in return for valuable consideration; 2) no loss mitigation is pending; 3) the debtor

is at least ninety days in default on an agreed to loan modification and no subsequent loss mitigation efforts are pending; or 4) the home has been abandoned and the debtor is in default or has not taken any action to request loss mitigation.

A debtor may request loss mitigation after a foreclosure proceeding has been commenced, and a court, in its discretion and for good cause shown, may stay those proceedings or sale of the dwelling until that loss mitigation is completed. If a court finds that a creditor has violated any provision of the MFFA, it may dismiss the action, impose sanctions, assess attorney costs and other any other relief as provided by law.

CS/SB 1 does not apply to real estate contracts and reverse mortgages that are otherwise binding under New Mexico law. And the definition of a loan servicer excludes a person or entity whose business is strictly limited to collecting and distributing payments without contractual obligations to perform any other requirements of the mortgage loan.

CS/SB 1 contains a severability provision and an emergency clause making the bill effective upon signature of the Governor.

## **FISCAL IMPLICATIONS**

No fiscal impact on state agencies is anticipated.

## **SIGNIFICANT ISSUES**

The AGO cites data provided by the New Mexico Administrative Office of the Courts (AOC) indicating new foreclosure filings in New Mexico continue to be on the rise. In 2010, 8,612 new foreclosure cases were filed in 2011; 8,520 were filed; as of November 7, 2012, 7,909 cases were filed. Based on filing patterns to date, the AGO projects that in the 2012 calendar year approximately 9,282 new foreclosure filings will be recorded. If foreclosure filings keep pace in the final quarter of 2012, the number of new filings will have increased by 9 percent from the prior calendar year. Additionally, the AGO reports, based on data from RealtyTrac and the AOC, that Bernalillo County has the highest incidence of foreclosure activity in the state, followed by Sandoval, Santa Fe, Dona Ana and Valencia counties.

As a result, the AGO believes it is in the public interest to stabilize local housing markets and advises that states have exclusive jurisdiction over the foreclosure process. While creditors should be able to proceed in an efficient and timely manner when a homeowner has defaulted, walked away or surrendered a home, the AGO advises that New Mexico may enact legislation like CS/SB 1, which requires lenders provide New Mexico-specific information to homeowners about available housing counseling, legal representation resources, and information about loss mitigation, which ensures that homeowners with the financial capacity to avoid foreclosure may do so, thus stabilizing the housing market.

CS/SB 1 also prevents a process known as “dual tracking”. As the AGO explains, except where the servicer is one of the five banks named in the national mortgage settlement (see Other Substantive Issues below), currently a homeowner may be working with a servicer for loss mitigation while at the same time the creditor initiates foreclosure proceedings. Because of the dual track of loss mitigation and foreclosure, the cost to the homeowner increases and the homeowner is at greater risk of foreclosure: there is a conflict between the ongoing loss

mitigation efforts by one agent of the creditor (the servicer) and the foreclosure proceeding initiated by another of its agents, its attorney.

The AGO believes 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. As of January 2014, federal regulations adopted by the Consumer Financial Protection Bureau (CFPB) will prohibit dual tracking by most servicers but specifically excludes those servicers with fewer than 7,000 loans. While this exclusion does not allow protection against dual tracking for homeowners who have loans with smaller banks or servicers, CS/SB 1 does by requiring that all servicers proceeding to foreclosure certify to the court that there is no loss mitigation pending.

On the other hand, the RLD states that the passage of CS/SB 1 would greatly lengthen the time line of the foreclosure process since the homeowner is granted the right to request loss mitigation at any time during the foreclosure process up to the time ownership is transferred. This would be detrimental to mortgage lending banks in New Mexico as they would not be allowed to purge these nonperforming assets from their books, which would be detrimental to the creditor's asset quality and could cause the creditor to experience "drag" on earnings, which in turn would weaken its capital position, as earnings are a key augmentation to capital.

Further, the RLD indicates the loan is no longer accruing interest and the principal balance may be subject to a possible write down due to loss in asset value. Additional costs incurred by the creditor due to the prolonged foreclosure process will be ongoing legal fees, home owner association fees, maintenance and upkeep cost, unpaid taxes, unpaid insurance and any and all liens filed against the property, all of which continue to accrue and require payment. The homeowner may request loss mitigation at any time during the foreclosure process, up to and including the time ownership is transferred (subject to the court's discretion and for good cause shown). The homeowner can relinquish ownership of the property to the creditor for reasons such as grave illness, divorce and/or loss of employment, and still continue to request loss mitigation. Sometimes homeowners have abandoned the property and moved to another city, state or country. Creditors then have additional expenses related to publishing the appropriate foreclosure notices related to the inability to readily locate the homeowner.

The RLD additionally advises that increases in the foreclosure deadline may also result in an increase in the Guarantee Fee, the fee charged by mortgage-backed securities (MBS) providers such as Freddie Mac and Fannie Mae to lenders for bundling, servicing, selling and reporting MBS to investors. This fee increase has been established to offset high costs incurred in managing foreclosures in some states with lengthy foreclosure periods. Connecticut, New Jersey, New York, Florida and Illinois have already experienced an increase in these fees. New Mexico's foreclosure timeline is currently estimated at 450 days. The national foreclosure average is 396 days; New Mexico is more than 2 months longer than the national average.

Further, the RLD advises that the New Mexico Home Loan Protection Act (Chapter 58, Article 21A) already contains statutory remedies for homeowners and grants them judicial process and rights to cure defaults.

The MFA notes that the absence of pre-foreclosure loss mitigation obligations in this substitute avoids the potential for conflict between the MFFA and regulatory requirements of other investors, insurers, and other government-sponsored loan programs. In further points out that

CS/SB 1 does not address subordinate mortgage requirements.

### **OTHER SUBSTANTIVE ISSUES**

The AGO reports that in April, 2012, that office and 48 other Attorneys General, the U.S. Department of Justice and the U.S. Department of Housing and Urban Development brought a lawsuit against five the nation's largest mortgage lenders (Bank of America, Chase, Citi, GMAC/Ally and Wells Fargo), to address violations of law in their handling of foreclosure proceedings. It resulted in a \$25 billion dollar national settlement that addresses over 300 particular servicing standards and works to ensure that homeowners who have the ability to stay in their homes through loan modifications are allowed to do so. One of the most significant changes imposes restrictions on the practice of "dual-tracking". These servicing standards apply only to the five servicers named in the settlement and expire after 3 years.

The AGO adds that in addition to the prohibition against dual tracking and the exclusion for small servicers discussed earlier, the CFPB regulations require specific disclosures to homeowners no later than the 45<sup>th</sup> day of delinquency regarding loss mitigation options, loss mitigation standards and rights of appeal, and providing for a single point of contact. CS/SB 1 serves to: 1) include New Mexico-specific protections and information to be served with the notice provided to borrowers under the CFPB regulations; and 2) require all servicers seeking to foreclose on property in New Mexico certify that they have complied with its notice requirements and that if the borrower has sought loss mitigation that no loss mitigation efforts are pending when the foreclosure action is filed. CS/SB 1 is consistent with these new regulations but does not duplicate or conflict with them.

MD/blm