

Legal analysis to guide the mortgage industry and protect its interests.

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New Legislation -- Helping Families Save Their Home Act by Meghan E. Ryan

On May 20, 2009, President Obama signed into law the Helping Families Save Their Homes Act of 2009. The Act contains a number of provisions pertinent to mortgage servicers. The Act provides a safe harbor for servicers to override contractual obligations in Pooling & Servicing Agreements that currently restrict servicers from modifying mortgages. The legislation appears to be directed at encouraging servicers to participate in mortgage modifications (such as those under the Hope for Homeowners Program), without the fear that investors will bring lawsuits challenging the investor's ability to modify the mortgages. The Act also makes certain changes to the Hope for Homeowners Program, including lowering program fees, easing borrower certification requirements, and allowing HUD to make incentive payments to servicers and originators that participate in the program.

The safe harbor provision is contained in Title II of the Act and shields servicers from liability for implementing mortgage loan modifications or loss mitigation plans if the servicers are in compliance with the fiduciary duties required by TILA. This is accomplished by amending § 129A of TILA to add the safe harbor provision. The servicer is deemed to have satisfied its duty to its investors to maximize the net present value of the mortgages if the servicer implements a qualified loss mitigation plan. Servicers that engage in loss mitigation plans under § 129A are obligated to regularly report to the Secretary of the Treasury the extent, scope and results of the servicer's modification activities.

Title II further imposes limitations on the participation in origination for FHA-insured loans. The Act limits participation in the FHA program to originators approved by the FHA. The FHA cannot approve any originator whose officers, partners, directors, principals, managers, supervisors, loan processors, loan underwriters or loan originators are currently suspended or otherwise restricted. Approved originators must notify the Treasury Secretary immediately of any sanctions to it or any of its personnel.

Title III of the Act establishes the Nationwide Mortgage Fraud Task Force Act of 2009 as a part of the Justice Department. The Task Force will 1) establish federal, state and local coordinating entities to organize mortgage fraud initiatives; 2) provide mortgage fraud training to federal, state and local law enforcement; and 3) collect and distribute mortgage fraud data. The task force is authorized to initiate federal mortgage fraud investigations and coordinate with state and local investigations. A mortgage-fraud-reporting hotline is to be established, as well as a database with information about the suspensions and revocations of licenses and certifications of participants in the mortgage industry.

Title IV of the Act contains provisions regarding a moratorium on foreclosures, and it states that servicers should not initiate foreclosure proceedings before foreclosure mitigation provisions, such as HOPE for Homeowners and the President's "Homeowner Affordability and Stability Plan," have been implemented and determined to be operational. The moratorium only applies to first mortgages on a borrower's principal residence. Borrowers who benefit from the moratorium have a duty to maintain the property and to respond to reasonable inquiries from the servicer.

Title IV also imposes new notification provisions under TILA. Under § 404, TILA is amended to require a "Notice of New Creditor." Notices must be sent within 30 days after the date of the sale or other transfer or assignment of a mortgage loan to a third party. The new creditor would be required to notify the borrower of 1) its identity, address and telephone number; 2) the date of the transfer; 3) how to reach a party that has the authority to act on behalf of the new creditor; and 4) the location where the record of the transfer of the loan is kept. The Act provides for a private right of action for a creditor's failure to comply with the new notice provisions by imposing similar civil liability as currently imposed for the failure to provide notice of the right of rescission.

Title VII of the Act, entitled "Protecting Tenants at Foreclosure Act," limits a servicer's ability to evict tenants from foreclosed properties. A purchaser of residential property at a foreclosure sale will take the property subject to 1) providing the tenant at least a 90-day notice to vacate, and 2) the rights of the tenant under a bona fide lease to occupy the property through the term of the lease. A tenant may, however, be evicted if the property is sold to a purchaser who would occupy the unit as his primary residence, as long as the tenant receives a 90-day notice to vacate. Tenants that do not have a lease must receive a 90-day notice to vacate.

The Act does not include "cramdown" provisions, which would have allowed bankruptcy judges to modify mortgage terms for borrowers in bankruptcy. A similar version of the Act, which did include such provisions, was considered by the House of Representatives in March; however, the version signed by the President did not include these provisions.