

# Helping Your Clients Avoid Foreclosure after HAMP: A Refresher and Update on the California Homeowner Bill of Rights and Related Regulations and Programs

1

**Lisa Sitkin**

**National Housing Law Project**

**May 23, 2017**

**HOUSING JUSTICE**

National Housing Law Project

# Overview

2

- California's non-judicial foreclosure process
- Options for avoiding foreclosure
- Loss mitigation in a post-HAMP world
- Key problems in loss mitigation
- HBOR in 2017 and beyond
- New protections for successors-in-interest
- Federal loan servicing and loss mitigation regulations
- Resources

# CA Nonjudicial FC Timeline

3

Homeowner becomes delinquent

120 days (federal)



Notice of Default

90 days

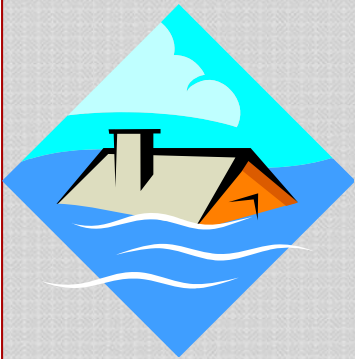


Notice of Trustee's Sale

20 days



Home sold at Trustee's Sale



# Options for Avoiding Foreclosure

4

- Reinstatement
- Repayment plan
- Refinance
- Loan Modification
- Forbearance (but only a temporary fix)
- Bankruptcy (delay and possible repayment plan)
- Litigation victory/settlement
- Sale of the house (if there is enough equity)
- Short sale/Deed-in-Lieu

# Expired Making Home Affordable Programs

5

- HAMP Tier 1 and HAMP Tier 2 (non-GSE and GSE)
- Streamline HAMP (*i.e., Tier 2 w/o documentation from borrower*)
- 2MP (second liens)
- UP (unemployment forbearance)
- HAFA (short sales, deeds in lieu)

# Mechanics of MHA Expiration

6

- MHA Supplemental Directives 16-02 and 16-03 available at [www.hmpadmin.com](http://www.hmpadmin.com)
- December 30, 2016 – deadline for HAMP applications and HAFA offers/pre-approvals/approvals
- March 17, 2017 – first lien reporting deadline for 2MP eligibility
- December 1, 2017
  - Latest possible effective date of a HAMP modification.
  - Latest possible effective date of a 2MP.
  - Latest possible completion date for a HAFA short sale or DIL.
  - Latest possible date for new MHA Help or HSC escalation (and must be resolved by May 1, 2018)

# Practice Tips for 2017

7

- Push back if servicer refused to review for HAMP after borrower submitted timely application as defined by HAMP rules.
- Monitor pending HAMP applications and trial plans closely to make sure they get converted to permanent modifications *before* December 1, 2017.
- For 2MP, keep after first lien servicers to make sure they report first lien HAMP mods promptly and press for discretionary 2MP after 3/17/17 reporting deadline.
- Use all available escalations systems, including complaints to the CFPB and California DBO, to force compliance with the remaining HAMP rules and timelines.
- ***Familiarize yourself with existing federal and state loss mitigation laws and regulations and agency programs, rules and guidelines.***

# Post-HAMP Options and Programs

8

Non-GSE, non-agency loans: proprietary loan modifications –  
One Mod?

TARGET	The largest economically positive payment reduction. OCC Data suggests that 20% is an appropriate benchmark.
STEP 1	Capitalize arrearages.
STEP 2	Reduce interest rate to the lower of market rate or current rate. For ARMs, convert to a 30 year term at market rate. For step-rate modifications, convert to the lower of the prior rate cap or the market rate.
STEP 3	Extend term to 480 months. <sup>3</sup> Provide consumer with amortization tables demonstrating how to payoff mortgage in different amounts of time.
STEP 4	Provide principal forbearance / forgiveness to 100% LTV (with a cap at 30% of UPB). <sup>2</sup>
	<b>Offer modification if the P&amp;I payment reduction is 20% or greater and HTI is less than 40%.</b>
STEP 5 (if necessary)	<b>If payment reduction is less than 20%<sup>3</sup> or HTI is greater than 40%, provide principal forbearance / forgiveness until either 80% LTV, 30% of UPB or the payment reduction of 20% and &lt;40% HTI requirement is achieved.</b>
STEP 6 (if necessary)	<b>Offer modification as long as post-modification payment is less than or equal to pre-modification payment.</b>

Pre 90+ DQ Steps

Pre 90+ DQ Steps and Post 90+ Streamline Steps

1. This presumes that 480 months is available as the maximum term. In situations where that is not currently available as a maximum term, a 360 month term should be utilized.
2. As noted above, forbearance **could be replaced** by principal forgiveness should an investor choose to do so. MBA would not suggest using principal forgiveness in instances where an investor or guarantor will not provide reimbursement.



# Post-HAMP Options and Programs

9

- GSE loans: “Flex Modification”
  - ✦ Fannie Mae Lender Letter LL-2016-06
  - ✦ Freddie Mac Bulletin 2016-22 and 2017-01
- FHA: FHA-HAMP retained as only mod option
  - ✦ Mortgagee Letter 2016-14 (eff. 12/1/16)
  - ✦ Watch for expense documentation problems
- VA: “VAAM” (Circular 26-17-10, issued 4/17/10, eff. 10/1/17)
- RHS: no new info at present. *See* 7 C.F.R. § 3555.304.
- Hardest Hit Funds (e.g., Keep Your Home CA)

# Keep Your Home California

10

- [www.keepyourhomecalifornia.org](http://www.keepyourhomecalifornia.org)
- Recently extended through 2020 (or until funds are exhausted)
- Programs
  - ✦ Principal Reduction Program
  - ✦ Mortgage Reinstatement Program
  - ✦ Unemployment Assistance
  - ✦ Transition Assistance
  - ✦ REV-MAP (for reverse mortgages with property tax and/or insurance defaults)

# Keep Your Home California Practice Tips

11

- Use website tool and/or program information available online to pre-assess clients' eligibility
- Identifying and documenting the hardship
- Notarized third party authorization form required
- Initial intake process
- Income documentation
- Interaction with servicer loss mitigation programs
- Monitoring servicer implementation

# Key (Enduring) Loss Mitigation Problems

12

- Servicing transfer errors
- Misapplication of payments
- Errors related to escrow accounts
- Errors after a “resolution”
- Loss mitigation and bankruptcy
- Dual tracking violations
- Successor-in-interest issues

# HBOR in 2017 and Beyond

13

- Detailed HBOR primers, including past webinars, available at [www.calhbor.org](http://www.calhbor.org)
- Major provisions
  - Pre-foreclosure outreach and communications
  - SPOC requirements
  - Dual tracking restrictions
  - Remedies for “material” violations of key provisions
  - Attorneys fees available for prevailing party
    - ✦ Fees for TROs?

# HBOR–Key Limitations

14

- Only applies to first liens on owner-occupied, 1-4 unit properties
- Borrowers in active bankruptcy are not protected
- Limited dual-tracking protections for borrowers who have been reviewed for assistance before
- No substantive right to loan modification
- Lesser requirements for servicers that conducted fewer than 175 foreclosures in the prior year
- No post-foreclosure injunctive relief
- Many important provisions will sunset as of 1/1/18

# HBOR – Small Servicers

15

- **Lesser requirements**
  - Less information required during pre-NOD outreach
  - No SPOC requirement
  - No acknowledgement notice required
  - No guidelines for content of denial notices
  - No appeal required after denial or additional postponement of FC sale date while appeal pending
- **Investigating and proving a servicer's foreclosure volume**
  - Verify licensing status at <http://www.dbo.ca.gov/fsd/licensees/> or <http://www.bre.ca.gov/> or <https://www.occ.gov/topics/licensing/national-banks-fed-savings-assoc-lists/index-active-bank-lists.html>
  - DBO listing appears to be out of date → FOIA to DBO?

# HBOR – Provisions Scheduled to Sunset

16

- **Communications**
  - Pre-NOD communications re. SCRA and loan/account info
  - Post-NOD outreach
  - Notice acknowledging application w/in 5 days of receipt by servicer
  - Notice of postponement of FC sale date
  - NPV inputs and investor info in denial notice (“upon request”)
- **Important aspects of dual-tracking restrictions**
  - Right of appeal
  - Postponements of FC sale date after denial and during and after appeal
- **Other provisions**
  - Successive application provisions
  - Mandatory provision of executed agreements and NOD rescission
  - Prohibition on fees for loss mitigation and late fees during review
  - Transferee servicer obligations





# Problems Faced by Successors

18

- Servicer refuses to communicate with non-borrower
- Servicer fails to provide information about loan status, payoff amount, foreclosure avoidance status
- Servicer refuses to acknowledge status based on joint tenancy or successor trustee documentation
- Servicer refuses to consider for loss mitigation
- *Lack of estate planning and/or probate representation*

# Survivor Bill of Rights – How it Works

19

- **Verification of successor status**
  - Non-borrower notifies servicer of borrower's death
  - Servicer must give the non-borrower:
    - ✦ At least 30 days to provide reasonable documentation of death
    - ✦ At least 90 days to provide reasonable documentation of successor status
  - Servicer may not record a Notice of Default during these time periods
  - Servicer must deem claimant a “successor” upon receipt of specified documentation
- **Once successor status is verified, servicer must**
  - Provide specified information in writing w/in 10 days
  - Consider for loss mitigation and/or assumption when available
  - Follow HBOR dual-tracking restrictions
- **SBOR remedies track HBOR remedies**

# Survivor Bill of Rights

## “Reasonable Documentation”

20

- What counts as “reasonable documentation”?
  - Death of borrower – death certificate or “other written evidence of the death...deemed sufficient by the mortgage servicer.”
  - Successor status – depends on specific situation.
    - ✦ *See Civ. Code §2920.7(i)(3) for list of required documents*
    - ✦ If specified documents are not available, can submit “other written evidence of the person’s status as successor in interest ... deemed sufficient by the mortgage servicer.”
    - ✦ Examples:
      - Deed reflecting joint tenancy and/or aff. of death of joint tenant
      - Living trust or will (for trustee and/or beneficiary)
      - Transfer on death deed

# Survivor Bill of Rights – Limitations

21

- Only protects a successor who can establish that s/he
  - ✦ is a spouse, domestic partner, joint tenant as evidenced by grant deed, parent, grandparent, adult child, adult grandchild, or adult sibling of the deceased borrower;
  - ✦ occupied the property as his or her principal residence within the last six continuous months prior to the deceased borrower's death; and
  - ✦ currently resides in the property.

# Survivor Bill of Rights – Limitations

22

- **Property and loan characteristics**
  - 1-4 unit, owner-occupied (deceased borrower and successor)
  - First liens only – does not cover second or other junior liens
  - Does not cover reverse mortgages
- **Qualifying as a “successor” under the statute**
  - Must have one of the specified relationships to borrower or property
  - Residency requirements (before and after borrower’s death)
  - Exclusion for parties involved in pending legal disputes
- **Diminished dual-tracking protections post-NOD**
- **Small servicers exempt**
- **Sunsets 1/1/20 + subject to sunsets of HBOR provisions**
- **Safe harbor for compliance with forthcoming federal regs.**

# Federal Protections for Successors

23

- RESPA and Regulation X -- 12 C.F.R. §1024.38(b)(1)(vi); CFPB Bulletin 2013-12 (Oct. 15, 2013)
  - Policies and procedures
  - There is currently no private right of action for violations of these provisions
  - New, beefed-up protections for successors with PRA go into effect in February 2018.
- Qualified written requests—split in the courts re. whether a successor is entitled to a response under the RFI/NOE rules.

# Garn St. Germain and Loan Assumption

24

- The Garn-St. Germain Act, 12 U.S.C. §1701j-3 et seq., prohibits enforcement of a due-on-sale clause when an interest in real property is transferred in certain specified ways, including via devise, descent, or operation of law upon death of a joint tenant; to a relative after borrower's death; to a spouse or child of borrower; or to a spouse under a divorce decree or separation agreement.
- Mancini and Cohen, *Surviving the Borrower: Assumption, Modification, and Access to Mortgage Information After a Death or Divorce* (2016), 43 Pepperdine L. Rev. 345



# Representing a Successor – Practice Tips

25

- Do not delay! If at all possible, notify servicer of borrower's death pre-NOD.
- Make sure the successor's documentation is in order.
  - Watch out for letters of administration with limited powers
  - Watch out for living trusts that do not have title to the property
  - Consult with a qualified estates and trusts/probate attorney
- Request information about any pending or prior loan modifications, trial modifications, repayment or forbearance plans to get a complete picture.

# Representing a Successor – Practice Tips (2)

26

- Keep in mind that “reasonable documentation” for purposes of SBOR may not be sufficient to qualify for assumption and/or loan modification. Successor may need to do more to perfect title.
- Submit complaints about non-compliance with SBOR and with the CFPB successor regulations to state and federal regulators.
  - <https://www.consumerfinance.gov/complaint/>
  - [http://www.dbo.ca.gov/Consumers/consumer\\_services.asp](http://www.dbo.ca.gov/Consumers/consumer_services.asp)
- Consider an application to Keep Your Home California.

# Federal Mortgage Servicing Regulations

27

- Real Estate Settlement and Procedures Act (RESPA), 12 U.S.C. § 2601 et seq.
- Regulation X, 12 C.F.R. § 1024.30 et seq.
- Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq.
- Regulation Z, 12 C.F.R. § 1026.20, 1026.36, 1026.41
- “Help for Homeowners” CFPB guide
- CFPB website (incl. e-regulations):

[www.consumerfinance.gov](http://www.consumerfinance.gov)

# Federal Loss Mitigation Regulations

28

- Outreach and communications
  - early intervention
  - information about options
  - continuity of contact
- Basic idea: reasonable opportunity to be reviewed – but no entitlement to a loan modification or other workout
- Dual tracking restrictions
  - Servicer may not initiate foreclosure process until borrower is more than 120 days delinquent
    - ✦ Watch out for rolling delinquencies
  - Borrowers who submit application within certain timeframes get further dual tracking protections

# Federal Dual-Tracking Protections

29

- **Level of protection depends on when borrower submits the application:**
  - 90 or more days before a scheduled foreclosure sale date → letter acknowledging receipt of application and list of any missing documents; full evaluation once application complete; written notice of decision; opportunity to appeal adverse decisions.
  - 45-89 days before a scheduled foreclosure sale date → letter acknowledging receipt of application and list of any missing documents; full evaluation once application complete; written notice of decision.
  - 37-44 days before a scheduled foreclosure sale date and the application is complete → full evaluation; written notice of decision.
  - Less than 37 days before a scheduled sale date → no requirement that servicer review the application or delay or suspend foreclosure activity (though other rules or laws may require review and/or suspension of foreclosure activity).

# Accessing Loan Servicing Information

30

- Monthly statements
- Escrow account statements
- Identity of investor — 15 U.S.C. § 1641(f) and 12 C.F.R. § 1024.36(d)
- Qualified written request procedures
  - Notice of error
  - Request for information

# Notice of Error

31

- *See Reg. X – 12 C.F.R. § 1024.35*
- **Broad coverage, including “catch-all” that covers loss mitigation errors, such as:**
  - Failure to provide accurate or complete info re loss mitigation options and FC
  - Failure to transfer accurate and timely loss mitigation information to new servicer
  - Violating dual tracking restrictions – NOE must be received >7 days before FC sale date
- **Types of errors not covered:**
  - Origination, underwriting, securitization, transfer of ownership
  - Duplicative, overbroad or untimely requests

# Request for Information

32

- *See Reg. X – 12 C.F.R. § 1024.36*
  - Broad coverage – “any information w/ respect to the borrower’s loan”
  - Not covered:
    - ✦ Duplicative, overbroad or unduly burdensome requests
    - ✦ Confidential, proprietary or “irrelevant” information
    - ✦ Untimely requests (more than 1 year after loan discharged or servicing transferred from that servicer)



# NOE and RFI Procedures

33

- Borrower or borrower's attorney/authorized agent (with written authorization) may submit
- Must be in writing and ***sent to designated address***
- Servicer may not charge a fee to respond
- Standard timeline:
  - Servicer must acknowledge w/in 5 biz days after receipt
  - Servicer must respond w/in 30 biz days after receipt (and after conducting a reasonable investigation)
- Standard timeline exceptions
  - 7 biz days for NOE re failure to provide accurate payoff statement
  - 10 biz days for request for identity of investor
  - Before FC sale for timely NOE re. dual tracking violation
  - Servicer may add 15 day extension by notifying borrower of the delay and reason for delay, except for timely NOE re. dual tracking violation or request for identify of investor

# Coming Soon(ish): Updates to Federal Loss Mitigation Rules

34

- Removal of the “one bite at the apple” rule (effective 10/19/17)
- Notice of complete application requirement (effective 10/19/17)
- Servicing transfers and loss mitigation updates (effective 10/19/17)
- Updated successor-in-interest rules (effective 3/19/18)

# Remember to Consider Common Law and Other Causes of Action

35

- HBOR provides: “The rights, remedies, and procedures provided by this section are in addition to and independent of any other rights, remedies, or procedures under any other law. Nothing in this section shall be construed to alter, limit, or negate any other rights, remedies, or procedures provided by law.” (Cal. Civ. Code § 2924.12(h)).
- Federal loan servicing regulations are also intended as a floor, and state laws “that give greater protection to consumers are not inconsistent with and are not preempted by **RESPA** or Regulation X.” See Supplement to 12 CFR § 1024.5(c)(1).
- Look for updates on common law and other legal theories in our upcoming newsletter and foreclosure defense guide update.

# Resources

36

- **NHLP**
  - [lsitkin@nhlp.org](mailto:lsitkin@nhlp.org)
  - [www.calhbor.org](http://www.calhbor.org) website (stay tuned for a makeover in coming weeks!)
- CEB “California Mortgages, Deeds of Trust, and Foreclosure Litigation” practice guide
- National Consumer Law Center “Foreclosures and Mortgage Servicing” manual
- CFPB website: [www.consumerfinance.gov](http://www.consumerfinance.gov)
- Keep Your Home CA website  
[www.keepyourhomecalifornia.org](http://www.keepyourhomecalifornia.org)