

# SENATE BILL REPORT

## ESHB 1108

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As of March 11, 2021

**Title:** An act relating to maintaining funding and assistance for homeowners navigating the foreclosure process.

**Brief Description:** Maintaining funding and assistance for homeowners navigating the foreclosure process.

**Sponsors:** House Committee on Civil Rights & Judiciary (originally sponsored by Representatives Orwall, Ortiz-Self, Kloba, Hackney, Chopp, Santos, Macri, Pollet and Harris-Talley).

**Brief History:** Passed House: 1/29/21, 96-0.

**Committee Activity:** Business, Financial Services & Trade: 3/11/21.

### Brief Summary of Bill

- Shifts the remittance requirement and remittance payment amount to be based on notices of default rather than notices of trustee sales.
- Modifies remittance payment from \$325 for a notice of trustee sale to \$250 for a notice of default (NOD).
- Expands applicability of the Foreclosure Fairness Act (FFA) to non-owner occupied residential real property up to four units.
- Directs beneficiaries to report quarterly to the Department of Commerce on NODs issued with exceptions.
- Modifies the mediation exemption under the FFA for the 2021 and 2022 calendar years to provide that whether or not a beneficiary must participate in mediation is determined by the number of the beneficiary's trustee sales that occurred in 2019.
- Modifies the remittance requirement under the FFA for the 2021 and 2022 calendar years to provide that whether or not a beneficiary must

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remit a fee is determined by the number of notices of trustee's sale that were recorded on its behalf in 2019.

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## SENATE COMMITTEE ON BUSINESS, FINANCIAL SERVICES & TRADE

**Staff:** Clinton McCarthy (786-7319)

**Background:** Residential Foreclosures. Unlike a mortgage, which requires judicial foreclosure, a deed of trust may be nonjudicially foreclosed if the borrower defaults on the loan obligation. The Deeds of Trust Act establishes procedures for foreclosure and imposes certain requirements on beneficiaries and trustees.

Foreclosure Fairness Act. In 2011, the Legislature enacted the Foreclosure Fairness Act (FFA). FFA is designed to help homeowners and their lenders explore possible alternatives to foreclosure and reach a resolution when possible. Lenders must notify borrowers prior to initiating the foreclosure of the availability of foreclosure counseling and the potential for foreclosure mediation. Homeowners are eligible for mediation after a notice of default (NOD) is issued. The Department of Commerce (Commerce) administers the foreclosure mediation program. Both the lender and homeowner pay for the mediation services. Lenders and servicers conducting more than 250 foreclosures in Washington State in the previous year pay \$250 for each NOD issued. The fee provides funding for free home ownership counseling, attorneys to prosecute violations of the Washington Consumer Protection Act, foreclosure prevention outreach, and the administration of the program.

Notice of Default and Notice of Trustee's Sale. Sixty days after a borrower misses a payment, a beneficiary may issue a NOD. At least 30 days before notice of trustee's sale may be recorded, a borrower must be provided with a NOD that contains specified information, including a description of the property, a concise statement of the alleged default, an itemized account of the amount in arrears, and statement that failure to cure default within a certain timeframe may lead to the property being sold at public auction. If the property is owner-occupied residential real property, a NOD must also include a prominent statement providing specific information about the foreclosure process and the options a homeowner may have available, including housing counseling, mediation, and legal help.

Federal and State Actions Relating to Foreclosure During the COVID-19 Pandemic. In response to the COVID-19 pandemic, the federal government has taken a series of actions relating to mortgage borrowers and foreclosure. Starting March 18, 2020, the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act imposed a 60-day foreclosure moratorium, a temporary halt in the initiation or continuation of foreclosure proceedings, for certain federally backed mortgage loans.

Before the CARES Act moratorium was scheduled to expire, the relevant federal agencies that regulate, insure, or guarantee mortgage loans extended the moratorium for their respective loans. These extensions were renewed further several times during 2020, resulting in the continued foreclosure moratorium for federally backed mortgage loans through the end of the year.

The federal foreclosure moratorium is currently set to expire on June 30, 2021.

At the state level, on March 20, 2020, the Department of Financial Institutions (DFI) issued guidance for state-regulated and exempt residential mortgage loan servicers and requested, but did not require, that residential mortgage loan servicers postpone foreclosures for 90 days. DFI subsequently extended its guidance and the requested foreclosure moratorium through the end of 2020, with the current guidance effective through the end of the state of emergency.

**Summary of Bill:** The bill as referred to committee not considered.

**Summary of Bill (Proposed Striking Amendment):** Transitioning from Notices of Trustee Sales to Notices of Default as the Basis for Remittance into the Foreclosure Fairness Account. Beginning January 1, 2022, and every quarter thereafter, every beneficiary issuing NODs on residential real property must:

- report to Commerce the total number of residential real properties for which the beneficiary has issued a notice of default during the previous quarter;
- remit \$250 to Commerce for the Foreclosure Fairness Account; and
- report and update beneficiary contact information for entities responsible for compliance with the FFA, which is due within 45 days of each quarter.

Beginning January 1, 2023, a federally insured depository institution may certify it has not issued more than 250 trustee NODs on residential real property during the preceding calendar year, to be exempt from the remittance and reporting requirements.

Statutes that specify the process for remitting the \$325 fee in the Foreclosure Fairness Account from notices of trustee sales are repealed. However, the repeal of these statutes does not affect any existing right acquired, or liability or obligation incurred under the section being repealed.

Any entity that is unfair or deceptive in the implementation of making NODs as the basis for remittance is subject to the Consumer Protection Act.

Expanding the Definition of Residential Real Property in the Foreclosure Fairness Act. The definition of residential real property is expanded by removing the condition of owner occupancy for residential real property up to four units. The definition of residential real property in the chapters of law concerning deeds of trust and NODs are clarified to include up to four units irrespective of owner occupancy.

Exemptions for Federally Insured Depository Institutions Making Deposits into the Foreclosure Fairness Account. For 2021 and 2022, federally insured depository institutions that can certify having fewer than 50 notices of trustee's sale were recorded on its behalf in 2019, are eligible to be exempt from depositing \$325 for each notice of trustee sale. The requirement for beneficiaries to pay a fee based on a notice of trustee sale activity not captured by the immediate transition from basing fees on the notices of trustee sale to NODs in 2021.

Exemptions From the Foreclosure Mediation Program. The requirements of the Foreclosure Mediation Program do not apply to deeds of trust where the grantor is:

- in a partnership, corporation, or limited liability company; or
- where property is vested in a partnership, corporation, or limited liability company at the time a NOD is issued.

Temporary rules for determining the eligibility of federally insured depository institutions to be exempt from the Foreclosure Mediation Program are implemented. The mediation exemption is modified for the 2021 and 2022 calendar years to provide that whether or not a beneficiary must participate in mediation is determined by the number of the beneficiary's trustee sales that occurred in 2019. Beginning January 1, 2023, a federally insured depository institution may certify it was not the beneficiary of more than 250 trustee sales of residential real property during the preceding calendar year to be exempt from the Foreclosure Mediation Program.

Public Records Act. Information obtained by Commerce that reveals personal information of the borrower is exempt from disclosure from the Public Records Act.

Exceptions to the Emergency Clause. The sections of the bill that are exempt from the emergency clause are the sections that implement NODs as the basis for remittance.

**Appropriation:** None.

**Fiscal Note:** Available. New fiscal note requested on March 9, 2021.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** The bill contains several effective dates. Please refer to the bill.

**Staff Summary of Public Testimony on Proposed Striking Amendment:** PRO: We are all worried about what is going to happen when forbearance ends. With forbearance, it has removed the funding mechanism for the program. The funding mechanism is changed to NOD rather than the notice of trustee sale. This bill creates a mechanism to track how many NODs there are. Under current law, NODs are not recorded. Without action this

bill, the foreclosure safety net will collapse when its services are needed most. This process should be made easier to keep tenants and landlords in their homes. We need to support the people who keep people in their homes. There is no visibility into NOD—there has been an honor system. The reporting requirement will help make the NODs. The state has provided over \$7 million in federal funds—no income from the last year has come from notice of trustee sales since 90 percent of mortgages covered by the foreclosure moratorium. There are long term funding challenges for this program.

OTHER: The FFA has allowed people to keep their homes. This bill expands eligibility. There are ongoing issues with the funding mechanism. Foreclosure does not get the same attention that landlord tenant issues do in this state.

**Persons Testifying:** PRO: Representative Tina Orwall, Prime Sponsor; Denise Rodriguez, Washington Homeownership Resource Center; Nathan Peppin, Department of Commerce; Raelene Schifano, HOAFightClub.

OTHER: Joseph Jordan.

**Persons Signed In To Testify But Not Testifying:** No one.