

# MEMORANDUM

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**DATE:** November 1, 2014

**TO:** Honorable Margaret Wood Hassan, Governor  
Honorable Terie Norelli, Speaker of the House  
Honorable Chuck W. Morse, President of the Senate  
Honorable Karen O. Wadsworth, House Clerk  
Honorable Tammy L. Wright, Senate Clerk  
Michael York, State Librarian

**FROM:** Senator David Pierce, Chairman

**SUBJECT:** Final Report on SB 306, Chapter 198, Laws of 2014

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Pursuant to SB 306, Chapter 198, Laws of 2014, enclosed please find the Final Report of the Commission to Study New Hampshire Mortgage Foreclosure Law, New Federal Regulations, and Fair Foreclosure Practices.

If you have any questions or comments regarding this report, please do not hesitate to contact me.

Enclosures

## **TABLE OF CONTENTS**

I.	Members.....	03
II.	Charge.....	03
III.	Incorporation by Reference.....	03
IV.	Information Gathering.....	03
V.	Proposals.....	15
VI.	Meeting Minutes and Exhibits.....	31

## **FINAL REPORT**

### **Commission to Study New Hampshire Mortgage Foreclosure Law, New Federal Regulations, and Fair Foreclosure Practices**

#### **Members**

Sen. David Pierce	New Hampshire Senate (Chair)
Stephanie Bray	New Hampshire Legal Assistance
Rep. Edward Butler	New Hampshire House of Representatives
Emelia Galdieri	New Hampshire Bank Commissioner Designee
Patrick Harrigan	New Hampshire Credit Union League
Susan Hollinger	New Hampshire Bankers Association
Kurt Strandson	Mortgage Bankers and Brokers Association of New Hampshire
Carol Vivian	New Hampshire Bankers Association
Marianne Voisine	AHEAD, Inc.
Debbie Wheeler	NeighborWorks Southern New Hampshire

#### **Charge**

The Commission to Study New Hampshire Mortgage Foreclosure Law, New Federal Regulations, and Fair Foreclosure Practices (the “Commission”) shall:

- (a) Study new and existing federal foreclosure regulations.
- (b) Recommend how to align New Hampshire laws with new federal foreclosure regulations so as to minimize cost and confusion and promote fairness for all parties.
- (c) Recommend other steps to promote fairness in foreclosures, including but not limited to timeframes for required notice sent to mortgagors, parties that shall accept service of petitions, and parties that must receive copies of relevant notices.

#### **Incorporation by Reference**

The Commission’s meeting minutes and attached exhibits associated with those minutes are incorporated into this report by reference.

#### **Information Gathering**

The Commission heard presentations on the following topics:

1. *CFPB Mortgage Servicing Regulations – Summary* by Patrick F. Harrigan for the New Hampshire Credit Union League

Effective January 10, 2014, the federal Consumer Financial Protection Bureau (CFPB) instituted regulations to implement the Dodd-Frank Wall Street Reform and Consumer

Protection Act provisions governing residential mortgage servicing, including provisions relating to mortgage delinquency and foreclosure. The regulations include amendments to Regulation X (10 CFR 1024), which implements the Real Estate Settlement Procedures Act, and Regulation Z (10 CFR 1026), which implements the Truth in Lending Act. For financial institutions with assets greater than \$10 billion, the CFPB enforces the regulations. For those financial institutions with less than \$10 billion in assets the regulations are enforced by the institution's primary regulator. For the New Hampshire chartered financial institutions, the New Hampshire Banking Department enforces the regulations.

The new Regulation X and Z rules governing mortgage servicing apply to New Hampshire residential mortgages and now provide the minimum servicing standards regarding delinquent mortgages and foreclosures. Regulation X section 1024.5(c) clarifies that while neither RESPA nor Regulation X preempt all state mortgage servicer and servicing regulations, state laws are preempted to the extent that the laws are otherwise inconsistent with the new regulations.

The new regulations have nine primary parts, which address the following subjects:

- i. Mortgage servicers must provide a periodic statement (following numerous requirements) to the borrower for each billing cycle.
- ii. Servicers must provide two notices in advance of an interest rate adjustment on an adjustable rate mortgage.
- iii. Servicers must credit payments from borrowers on the day of receipt.
- iv. Servicers must provide a 45 day notice before charging the borrower for force-placed property hazard insurance, and a second notice 30 days thereafter.
- v. Servicers are subject to specific procedural requirements for responding to a borrower's complaint or request for information related to a mortgage.
- vi. Servicers must establish procedures to access and provide accurate and timely information to borrowers; evaluate properly mortgage loss mitigation options; facilitate transfer of information when mortgages are transferred; and inform borrowers of written error resolution and information request procedures.
- vii. Servicers must establish early contact with delinquent borrowers (within 36 days of delinquency), and provide information on any available loss mitigation options.
- viii. Servicers must provide personnel to assist delinquent borrowers with loss mitigation options, including by phone (within 45 days of delinquency).
- ix. Servicers may not begin a foreclosure action if the borrower is less than 120 days delinquent or if the borrower is performing under a loss mitigation agreement, and servicers are subject to requirements related to processing loan modifications or loss mitigation options.

Note that the regulation exempts "small servicers," institutions servicing 5,000 mortgages or less, from numbers 1, 4, 6, 7, 8, and 9 (except that small servicers cannot start a foreclosure unless the borrower is 120 days late).

2. *Statutory Foreclosures in New Hampshire* by Susan Hollinger for the New Hampshire Bankers Association

Mortgage foreclosures in New Hampshire are governed by a state statutory process set forth in RSA Chapter 479. A mortgage in New Hampshire typically contains at least the statutory form mortgage elements set out in RSA 477:29. The statutory nonjudicial foreclosure process is set out in RSA 479:25. This statutory process is supplemented by a body of case law in New Hampshire informing how the foreclosure should be conducted and additional duties of a foreclosing mortgagee.

The following is a description of the some of the steps that banks typically take immediately prior to conducting a foreclosure.

## A. Pre- Foreclosure

### i. Review loan documents and file

- Determine the existence of "statutory power of sale" right in the mortgage.
- Evaluate default provisions and any cure periods. Be aware that Fannie Mae mortgages may have specific default, cure and demand provisions prior to accelerating payment under the note and foreclosing the mortgage.
- Evaluate notice and demand provisions.
- Determine if appraisal is current (within 6 months to 1 year) from date of foreclosure to address concerns raised by the Murphy<sup>1</sup> decision. The appraisal will give the foreclosing party a reasonable idea of the value of the property.
- Determine if there is a waiver of homestead
- Determine if there are any environmental issues. This is primarily an issue for commercial properties. If the property has obvious environmental problems, an environmental audit would be necessary to avoid the foreclosing party from becoming liable for the cleanup of the property.

ii. Perform Title Update – Prior to all foreclosures, an update of title must be conducted to determine the lienholders and other interested parties entitled to receive notice of the foreclosure. A title update will reveal liens of record.

## B. Commencing foreclosure

i. Legal Notice – The actual foreclosure process is commenced by sending a notice of foreclosure ("Notice") to the mortgagor and each lienholder of record, as well as by publishing in a newspaper of general circulation within the town or county in which the property is located. The statute sets forth the minimum requirements of the Notice in RSA 479:25, II. The Notice must contain

- The date, time and place of the foreclosure;
- The town, county, street and street number of the property;
- The date of the mortgage and its recording information;
- The terms of the foreclosure sale;

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<sup>1</sup> Murphy v. Fin. Dev. Corp., 126 NH 536 (1985) requires the foreclosing party to conduct the sale in a commercially reasonable fashion as the mortgagee has a fiduciary duty to protect the interests of the mortgagor through exercising good faith and due diligence.

- A specific statutory statement that notifies the mortgagor of the right to petition the superior court for an injunction against foreclosure.

The statute also requires that the Notice be sent to the mortgagor by registered or certified mail to his last known address at least 25 days before the foreclosure sale and to lienholders of record, provided their interest is recorded at least 30 days prior to the foreclosure sale. Lienholders must be sent notice at least 21 days prior to foreclosure. If the IRS has a lien of record, it is entitled to 25 days' notice, and special notice provisions apply.

ii. Publication – The Notice must be published in a newspaper of town-wide or county-wide circulation, the first publication to be at least 20 days prior to the date of foreclosure, calculated by excluding the date of sale and the date of publication, once a week for three successive weeks.

iii. Auctioneer – New Hampshire statutory law on statutory power of sale foreclosures does not require the use of an auctioneer. New Hampshire case law holds that complying with statutory requirements alone is not sufficient to satisfy the fiduciary duty owed by the mortgagee to the mortgagor. Thus, because of its Murphy duties to exercise good faith and due diligence, a prudent foreclosing party will use an auctioneer as part of its effort to obtain a fair and reasonable price for the property being foreclosed. Auctioneers will typically select the publications for placing advertisements of the sale, mailing brochures of the sale to its mailing lists, and generally work to generate interest in the foreclosure sale.

### C. Conducting foreclosure

On the day of foreclosure, the foreclosing party will typically check the bankruptcy court records to determine whether the mortgagor has filed for protection under the bankruptcy laws, thereby invoking the automatic stay which would prevent the foreclosure from taking place as scheduled. If no bankruptcy by the mortgagor has been filed, the foreclosure may be conducted, barring any injunctions. Per RSA 479:26, a foreclosure deed, a copy of the Notice and an affidavit of foreclosure (which must contain a statement about compliance with the Servicemembers Civil Relief Act) must be recorded within 60 days after the foreclosure sale. If the mortgagee files for bankruptcy after the foreclosure auction but before recording of the deed, per RSA 479:26, the time for recording the deed is extended up to 10 days after the removal of the stay in bankruptcy.

3. *Laws and Best Practices in Other States – Specifically: MD, NV, MA, RI, and CT* by Kurt Strandson for the Mortgage Bankers and Brokers Association of New Hampshire

Kurt Strandson presented statistics on delinquency rates and foreclosure rates. Delinquency rates for 1-4 units decreased to 6.11 all loans outstanding at the end of first quarter 2014. Percentage of loan in foreclosure at end of first quarter 2014 was 2.65% which was 90 basis points lower than previous year and 21 basis points lower than previous quarter. Percentage of loans which foreclosure actions were started during first quarter 2014 fell to lowest

level since second quarter 2006. Serious delinquency rate (>90 days or more past due or in process of foreclosure) was 5.04% first quarter 2014. This represents decrease of 135 basis points from first quarter 2013 (1 year prior). 75% of serious delinquent loans were originated in 2007 or earlier. 20% originated between 2008-2010. Loan originated in 2011 and later = 5% all serious delinquent loans. Judicial foreclosure states continue to account for a majority of loans in foreclosure representing 70% of loans in foreclosure while representing only 40% of loans serviced. Of the 17 states that had a higher foreclosure inventory rate than the national average, 15 of those were judicial states. Kurt Strandson provided a state analysis on the following items for the states of Maryland, Nevada, Connecticut, Massachusetts, Rhode Island and Arizona; common type of foreclosure process, time to respond, reinstatement of loan before sale, redemption after sale, special protections for high cost mortgages, deficiency judgments, notice to leave after house is sold. Also presented were comments from Norman Roos from CT MBA. Mr. Roos commented CT is top 5 slowest states to foreclose and mediation process source of ongoing delays. See all comments in attached slides. Kurt Strandson also provided an exhibit of foreclosure laws and procedures by state listing the following: state, judicial or non judicial, comment of most common, process period, publish sale days, redemption period and sale/notice to serve for all states. Kurt Strandson provided an article written by Paul Willen, Boston Fed economist "Housing bubble? What housing bubble?"

4. *Judicial v. Nonjudicial Foreclosure Proceedings – the Pros and Cons* by Stephanie Bray for New Hampshire Legal Assistance

#### **Pros of Judicial Foreclosure/Cons of Nonjudicial Foreclosure**

- Homeowners facing foreclosure deserve at least as much process as do tenants facing eviction, which is subject to judicial process
- Judicial foreclosure requires that the entity that intends to foreclose must demonstrate that it actually (1) owns the mortgage and (2) is entitled to enforce the promissory note
- Judicial foreclosure is the gateway to mediation
- Judicial foreclosure slows the process down enough to allow **both parties** to explore the benefits of loss mitigation

#### **Cons of Judicial Foreclosure/Pros of Nonjudicial Foreclosure**

- Additional time and expense on foreclosing entity
- Additional case load on courts

5. *New Hampshire Banking Department Statistics* by Emelia Galdieri for the New Hampshire Banking Department

Number of Active Mortgage-Related Licensees and Registrants  
as of September 3, 2014 by License/Registration Type:

Mortgage Banker	233
Mortgage Broker	76
Mortgage Servicer	56
Total	365

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Number of New Hampshire Chartered Banks:	17
Number of New Hampshire Chartered Credit Unions:	12

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Total Number of Mortgage-Related Enforcement Actions Taken by the New Hampshire Banking Department between January 1, 2013 and September 5, 2014:	12
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Approximate* Number of New Hampshire Licensed Mortgage Bankers and Registered Servicers Which Service More Than 5,000 Mortgages Nationwide:	68
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Approximate* Number of New Hampshire Licensed Mortgage Bankers and Registered Servicers Which Service Less Than 5,000 Mortgages Nationwide:	55
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\*These numbers are based upon data collected from mortgage call reports compiled by the Nationwide Mortgage Licensing System. Servicing entities report mortgages serviced based on each state's individual requirements for reporting. Not all states license mortgage servicers and not all states require that licensed companies report the total number of mortgages serviced.

\*\*The New Hampshire Banking Department does not collect data regarding how many loans are serviced by New Hampshire chartered banks and New Hampshire chartered credit unions.

Richard Arcand from the New Hampshire Banking Department also presented information about the types of phone calls which generally come in through the hotline run by the New Hampshire Banking Department.

6. *Foreclosure Mediation – Findings* by Debbie Wheeler for NeighborWorks Southern New Hampshire

The commission was charged with “study[ing] New Hampshire foreclosure law and new federal foreclosure regulations and to make recommendations on how to best align the laws and promote fair foreclosure practices for all parties” as well as “recommend[ing] other steps to promote fairness in foreclosures, including but not limited to timeframes for required notices sent to mortgagors, parties that shall accept service of petitions and parties that must receive copies of relevant notices.” As part of this charge, the study of foreclosure mediation programs throughout the United States was conducted.

It was determined that there are currently fifteen (15) statewide programs with mediation programs as well as twelve (12) states that have local, county or judicial mediation programs. Of the statewide programs, seven (7) states are non-judicial and eight (8) are judicial. Only two statewide programs implemented a “opt out” policy as well as twenty-nine (29) local, county or judicial mediation programs. The “opt out” policy requires all lender(s)/servicer(s) to participate in the program as well as the homeowner(s). In all “opt out” programs, the homeowner(s) must “opt out” of mediation rather than “opt in”. There is documented evidence that the “opt out” program results in greater homeowner(s) participation and more homes saved from foreclosure.

For the purposes of the report, we will high-light the Nevada mediation program as it is a statewide program in a non-judicial state like our own. The Nevada Mediation Program was created by the Nevada General Assembly in 2009 through Assembly Bill 149 (AB 149). The bill was passed with virtually no resources in place; however, the program was operating effectively within 120 days with money for startup being returned to the state.

When a homeowner defaults on a mortgage in the state of Nevada, the lender/servicer must file a Notice in the Registry of Deeds. A copy of the Notice is sent to the Homeowner via certified or registered mail with instructions for completing mediation request forms attached. The homeowner must complete the Election/Waiver of Mediation Form, Financial Statement and Housing Affordability Form to participate in the program and send all documents with a \$200 fee to the Foreclosure Mediation Program (FMP) within 30 days of the Notice and send a copy of all documents to the Trustee. The Administrative Office of the Court administers the program. The Mediation Administrator is charged with keeping statistics on the program and reporting them online.

The FMP notifies the Trustee of the homeowner’s election for mediation and requests the Trustees’ Information Form, a recorded copy of the Notice of Default and the \$200 fee from the lender/servicer. The Trustee Notifies the lender and other interested parties of the request for mediation. The lender and homeowner must exchange documents at least 10 days prior to the mediation. The Mediator issues a Mediator’s Statement and Agreement to the parties and files the originals with the FMP. The FMP then determines whether a Certificate to proceed to foreclosure should be issued. The lender or homeowner may file a Petition for Judicial Review with the District Court 30 days after a mediator statement is signed or 30 days after the end date of an agreement or vacate date if the parties agree the homeowner will relinquish the home.

In the 17,105 cases that participated in mediation between September 14, 2009 and March 31, 2012, there were 6,491 Agreements with 4,190 homeowners retaining their home. This translates into a 25% home retention rate of cases mediated. Without the mediation program it is possible that those homes would have been lost to foreclosure and another 4,190 families would have been displaced.

The U.S. Department of Housing and Urban Development (HUD) together with The U.S. Department of Justice (DOJ) in a published report on effective foreclosure mediation programs and state, “Almost all mediation programs provide homeowners with notice of the availability of free housing counselors and sometimes legal assistance ...” . In fact, 50% of mediation programs require the use of a housing counselor. This step helps organize and prepare the homeowner for the mediation session and may result in an agreement with the lender/servicer prior to mediation.

The structure and process of a typical foreclosure mediation program has been described as a “funnel,” narrowing down eligible borrowers through a series of steps. The following is an outline of best practices in foreclosure mediation by Heather Scheiwe Kulp, a Skadden Fellow and Staff Attorney for Resolution Systems Institute.

- 1) Notice: a borrower in foreclosure is informed by a court or government agency that mediation is available.
- 2) Mediation Selected: in the case of an “opt-out” program a borrower is scheduled for mediation unless the borrower elects not to enroll. In the case of an “opt-in” program a borrower has an opportunity to request mediation.
- 3) Eligibility Screening: the entity overseeing the mediation program screens the borrower to ensure that the case is eligible for mediation, and may require the borrower to submit financial paperwork. Eligibility criteria may be based on the borrower’s employment status, whether the home is the borrower’s primary residence, and other factors.
- 4) Mediation Session(s): if a borrower is not screened out of the foreclosure mediation program, the borrower and lender meet in a mediation session with a mediator, with the goal of reaching an agreement or resolution. Documents are typically exchanged before or at the mediation session. At the mediation session, the mediator facilitates a discussion between the borrower and a representative from the lender or loan servicer. Depending on the discussion, the parties may schedule a further session or sessions, proceed to foreclosure, exchange additional documents, or pursue foreclosure alternatives
- 5) Resolution: the mediation session(s) may conclude with one of several resolutions:
  - a) Agreement: agreement can span a range of options, including relinquishment of the property (including through a short sale or deed-in-lieu of foreclosure) or retaining the property (including through a mortgage modification).
  - b) Partial Agreement: partial agreement can also span a range of options, including scheduling further mediation sessions, or a temporary loan modification with the possibility of a permanent modification after a period of time.
  - c) No Agreement

There have been numerous studies conducted on the best practice for establishing an effective mediation program. The report and manuals published by Resolution Systems Institute have been used and improved by a number of programs and is outlined here.

- Set Goals and Define Success
- Establish a Clear Process that Achieves Goals
- Set Up Monitoring and Evaluation Systems to Give Regular Feedback
- Conduct Extensive Personalized Outreach to Borrowers
- Ensure Borrowers Have a Support System
- Provide Screening to Ensure Cases Appropriate for Mediation
- Charge Reasonable Fees
- Allow Multiple Sessions and Communication Between Sessions
- Provide Judicial Enforcement Mechanism for Not Complying with Program Requirements

In summary, it is correct to conclude that foreclosure mediation programs can be effective in helping homeowners reach a resolution preventing foreclosure. Most programs show a home retention rate of 25% and in “opt-out” programs the rate is higher, such as Connecticut’s program that shows a 67% home retention rate of cases mediated. In New Hampshire, there were 260 auction notices filed in July of 2014. If a “opt out” mediation program were implemented, it could mean 174 homes were saved and homeowners not displaced. Using the same cost structure as Nevada to support the program charging \$400/case split between the homeowner(s) and lender/servicer, \$104,000.00 in revenue would have been raised in July 2014 alone to support the program.

7. *Mortgage Defaults – New Reasons Beginning in 2014* by Debbie Wheeler for NeighborWorks Southern New Hampshire

Prior to the decline in the housing market in 2007, completed foreclosures averaged 21,000 per month nationwide between 2000 and 2006. Completed foreclosures are an indication of the total number of homes actually lost to foreclosure. Since the financial crisis began in September 2008, there have been approximately 4.2 million completed foreclosures in the United States, an average of 49,000 per month. In May 2014, there were 47,000 National Foreclosures, up 3.8% from April 2014.

The primary reason for defaults beginning in 2007/2008 were the resets on subprime loans. Credit Suisse reported 35 billion in mortgages were due to reset on subprime loans during 2007 through the beginning of 2009 and option arm rate loans were peaked to reset during 2009 through 2012 adding to the number of troubled loans.

Another common reason for defaults during this time period was the loss of jobs, reduction in hours worked, or reduced revenue with small businesses and sole proprietors.

The Treasury Department program, “Making Home Affordable” has modified 1.3 million loans on the program “Home Affordable Modification Program” (HAMP) Tier 1 and 61 million on HAMP Tier 2. The program has also allowed 156 million “Principal Reduction Alternative”

(PRA) and 137 million second loan program (2MP) modifications. There are servicers/investors who mirror Treasury's program on their own private portfolios. The HAMP program set industry standards and uniformity in the industry.

Defaults have lowered from the peak of 2009/2010, however, we have some new reasons that may result in default concerns. I will briefly outline four (4) new reasons for mortgage defaults beginning in 2014.

- A. HAMP step-up begins. The HAMP program reduces the fixed interest rate for the life of the loan but temporarily subsidizes the rate for the first five years to as low as 2%. This year will be the first year the program will see a 1% increase causing a median increase of \$94/month. Other investors mirror the program, therefore, in-house programs will also see step-up interest rate increases.
- B. HELOCs re-cast or mature. The number of home equity line of credits that are due to re-cast or mature are significant enough to call together the Federal Reserve, OCC, FDIC, NCUA and the Conference of State Bank Supervisors to acknowledge the problem and set for strategies for managing. The collaborative agencies established Risk Management Principals and Guidance but there are no regulatory requirements at this time.
- C. Middle Class Squeeze. The U.S. Census Bureau Report shows the median income has decreased since the high of 2005 while prices on fuel, food, utilities and health care continue to climb upward.
- D. Attitude of Homeownership has changed. A recent study by the Joint Center of Housing Studies, Harvard, shows the number of homeowners falling with the greatest decrease with 35-44 year olds (buying up) followed by 25-34 year olds (first time homebuyers). This affects the overall health of the housing economy slowing down the recovery. Many homeowners would sell to get out of debt but the sale would be short and the deficiency a potential tax liability.

8. *Foreclosure – Sharing the Consumer's Experience from the Housing Counselor's Perspective* by Mari Voisine for AHEAD, Inc.

This presentation has been prepared in an effort to help all on the committee understand what the consumer facing foreclosure experiences and hopefully help each member to empathize with them. After all, foreclosure laws are in place to not only protect the lending institutions, but also the borrower/consumer.

When borrowers face foreclosure many have little or no understanding of what they may be up against. They are quite often afraid and lost. During this time, a housing counselor from a HUD approved counseling agency may be their greatest resource. The borrower will benefit from assistance with navigating this very difficult trial. A housing counselor provides guidance, education, and hands on assistance. They possess a thorough knowledge of the foreclosure process, government programs and processes, and foreclosure alternatives. The housing counselor provides credibility and valuable partnerships.

Borrowers facing foreclosure have the option of requesting mortgage assistance from their lenders, but many of them have no understanding of the process and when attempting to

navigate the process on their own experience many hurdles and road blocks. A survey of NH HUD approved counseling agencies showed that the eight most common responses housing counselors hear from these clients sound something like this:

- i. "Help! This is my third attempt at getting assistance."
- ii. "They have lost my paperwork again!"
- iii. "I never get to speak with the same person."
- iv. "My lender/servicer said I had to be in default before they would help."
- v. "I was only give five days to respond and missed the deadline."
- vi. "I don't know why I was denied."
- vii. "I have a foreclosure auction in three days."
- viii. "I don't even know where to start."

Although housing counselors are well trained, they also face difficulties assisting borrowers with securing mortgage assistance or other work-out solutions. Counselors of NH HUD approved counseling agencies were surveyed and provided the following five most common hindrances to their efforts:

- i. Lender/Servicer's lack of compliance to regulation
- ii. Lender/Servicer's lack of communication
- iii. Government and Lender/Servicer's changing programs and processes
- iv. Lender/Servicer's haphazard review practices
- v. Lender/Servicer's incompetent, uneducated staff

A foreclosure timeline for the state of New Hampshire is provided as Exhibit A [See Housing Counselor's Experience from the Housing Counselor's Perspective PowerPoint]. It addresses the non-judicial foreclosure process and includes reference to the Consumer Financial Protection Bureau Guidelines.

There are changes that could be made to New Hampshire state laws as they apply to foreclosure that may help the borrower/consumer substantially. Four of them were specifically presented:

- i. Define time lines to stop pre-mature foreclosure. Have New Hampshire law mirror the CFPB regulation requiring a borrower to be 120 days in arrears prior to initiation of foreclosure.
- ii. Require lender/servicers to review requests for mortgage assistance prior to initiating foreclosure (elimination of dual tracking).
- iii. Require initial foreclosure notice (Attorney's letter informing borrower of scheduled auction date) to be received by borrower at least 40 days prior to the auction date.
- iv. Accommodation of a shorter, specific timeframe for lenders to pursue a deficiency suite after foreclosure.

9. *Protecting Tenants at Foreclosure Act* by Stephanie Bray for New Hampshire Legal Assistance

**I. Why Do We Need It?**

Tenants, unlike homeowners, generally have no idea that foreclosure is about to happen

Folks need at least 90 days to find alternatives

In most Protecting Tenants at Foreclosure Act (“PTFA”) situations, where the foreclosed property is multi-family, it is going to be re-sold to another investor, who will need tenants

**II. Effective Dates**

Went into effect May 20, 2009

After several extensions, will “sunset” on December 31, 2014

**III. Notice Requirements to “Bona Fide Tenants”**

If no lease: 90 day minimum

If lease: Remaining term of lease, or 90 days, whichever is longer

Exception: If new owner will occupy as primary residence

**IV. Who Benefits**

Residential tenant ONLY

“Bona Fide Tenant.” This means:

Must Not Be: Parent, child or spouse of landlord

Must Be: Arm’s length transaction

Must Not Be: Rent substantially below FMV, unless subsidized

**V. What About Section 8?**

Foreclosure is not good cause for terminating a Section 8 lease. New owner cannot terminate sec 8 lease unless the owner will occupy as primary residence and gives 90 day notice

New owner post-foreclosure steps into lease and HAP contract

**VI. What About All the Other Landlord Tenant Law?**

A tenant with a lease who violates the lease can be evicted as in any other breach of lease case, before the lease expires.

## 10. *HomeHelpNH* by New Hampshire Housing Finance Authority

Representatives from New Hampshire Housing Finance Authority presented information about HomeHelpNH. See handouts provided by New Hampshire Housing Finance Authority.

### **Proposals**

After discussion of the above-noted information, the Commission considered the following proposals.

#### **Proposal by New Hampshire Banking Department**

The Commission finds the need for improved clarity regarding licensure requirements and expectations for entities which service mortgage loans and are licensed under RSA Chapter 397-A and RSA Chapter 397-B. Consequently, the New Hampshire Banking Department will work with stakeholders to propose revisions to RSA Chapter 397-A and RSA Chapter 397-B by September 1, 2015 that promote consistency and fairness in the regulation of entities which service mortgage loans.

The Commission does not recommend any specific legislation with regard to RSA Chapter 397-A and RSA 397-B due to the New Hampshire Banking Department's commitment to bring forward legislation next year.

*Vote:*

Passed by unanimous vote

#### **Proposals by the Housing Counselors**

The Housing Counselors submitted two proposals not related to RSA 508 that were withdrawn. Please see meeting minutes for details on these two proposals.

The Housing Counselors also submitted the following proposal with associated background facts, summary, and justification:

“Amend RSA 508:2 and 508:6 to provide for a six (6) year statute of limitations on the collection of mortgage deficiencies, consistent with RSA 382-A:3-118.

#### **Background Facts:**

1. Current NH Statute under Title LII, Actions, Process, and Service of Process, Chapter 508 – Limitation of Actions, Section 508:2 reads:

“508:2 Real Actions –

- I. No action for the recovery of real estate shall be brought after 20 years from the time the right to recover first accrued to the party claiming it or to some persons under whom the party claims.
  - II. No action for the recovery of real estate pursuant to rights based on a possibility of reverter, right of re-entry, or executory interest shall be brought after 5 years from the time the right to recover possession or the right of re-entry first accrued to the party claiming it or to some persons under whom the party claims.”
2. Current NH Statute under Title LII, Actions, Process, and Service of Process, Chapter 508 – Limitations of Actions, Section 508:6 reads:

“508:6 Mortgage Notes – Actions upon notes secured by a mortgage of real estate may be brought so long as the plaintiff is entitled to bring an action upon the mortgage.”

3. Current NH Statute under Title XXXIV-A, Uniform Commercial Code, Chapter 382-A – Uniform Commercial Code, Article 3 – Negotiable Instruments, Part 1 – General Provisions and Definitions, Section 382-A:3-118 reads:

“382-A:3-118 Statute of Limitations –

- (a) Except as provided in subsection (e), an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.
- (b) Except as provided in subsection (d) or (e), if demand for payment is made to the maker of the note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years.
- (c) Except as provided in subsection (d), an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within three years after dishonor of the draft or 10 years after the date of the draft, whichever period expires first.
- (d) An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller’s check, cashier’s check, or traveler’s check must be commenced within three years after demand for payment is made to the acceptor or issuer, as the case may be.
- (e) An action to enforce the obligation of a party to a certificate of deposit to pay the instrument must be commenced within six years after demand for payment is made to the maker, but if the instrument states a due date and the maker is not required to pay before that date, the six-year period begins when a demand for payment is in effect and the due date has passed.

(f) An action to enforce the obligation of a party to pay an accepted draft, other than a certified check, must be commenced (i) within six years after the due date or dates stated in the draft of acceptance if the obligation of the acceptor is payable at a definite time, or (ii) within six years after the date of the acceptance if the obligation of the acceptor is payable on demand.

(g) Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this Article and not governed by this section must be commenced within three years after the cause of action accrues.”

4. The following details were presented by Committee Member, Kurt W. Strandson, in his fact-gathering presentation entitled “Foreclosure Law By State & Analysis:”

STATE	STATUTE OF LIMITATIONS REGARDING MORTGAGE ACTIONS AFTER FORECLOSURE
Maryland	“Foreclosing party may request this of the supervising court after ratification of the auditor’s report.” Further research indicates Maryland allows <b>3 years</b> for action after foreclosure.
Nevada	“Not allowed if mortgage has not been refinanced, homeowner has resided in home continuously, and other criteria met. Otherwise, foreclosing party may obtain deficiency judgment by filing a separate lawsuit within <b>six months</b> of foreclosure sale. Amount of deficiency is limited to lesser of the difference between the total debt and fair market value of the home, or the difference between the total debt and the foreclosure sale price.
Connecticut	“May be obtained in a foreclosure by sale, and within <b>30 days</b> after the redemption period expires in a strict foreclosure.”
Massachusetts	“Can be obtained in separate lawsuit if a notice of intent to seek a deficiency is included in notice of sale, and the notice of sale is mailed 21 days prior to sale.” Further research indicates Massachusetts allows <b>2 years</b> for action after foreclosure.
Rhode Island	“Allowed if foreclosing party files separate lawsuit after sale.” Further research indicates Rhode Island allows <b>10 years</b> for action after foreclosure.
Arizona	“Not allowed after a non-judicial foreclosure if the property is less than 2 ½ acres and is a single or two-family residence. For other properties, allowed if lawsuit is filed within <b>90 days</b> of foreclosure sale.”

Additional New England States not included in Mr. Strandson’s presentation:

<b>STATE</b>	<b>STATUTE OF LIMITATIONS REGARDING MORTGAGE ACTIONS AFTER FORECLOSURE</b>
Maine	Maine allows <b>two years</b> for action after foreclosure.
Vermont	Vermont allows <b>one year</b> for action after foreclosure.

Summary & Justification:

New Hampshire’s statute of limitations regarding deficiency suits after foreclosure is substantially longer than all other New England states. Current law defines a 20 year statute of limitations for which a Mortgagee can pursue an action on a Note secured by a Mortgage (RSA 508:2 & 508:6). This means the Mortgagor who experiences foreclosure faces a 20-year period of uncertainty and limited options. When a Mortgagor faces foreclosure they are experiencing financial hardship and are often insolvent. Due to their financial condition, in and around the time of foreclosure, the Mortgagor may have options available to protect them from the liability of a suit for deficiency and the tax ramifications of mortgage debt forgiveness:

1. Chapter 7 Bankruptcy may be an option for the consumer. Because of their financial condition around the time of foreclosure and probable ability to qualify for a Chapter 7 Bankruptcy under the United States Bankruptcy Court’s Means Test Calculation (Official Bankruptcy Form 22A), consumer could secure relief through this means.
2. Because of possible insolvency around the time of foreclosure, if consumer receives an IRS Form 1099-C for mortgage debt forgiveness they may be able to prove insolvency and avoid tax liability.

It is truly unfortunate that after foreclosure, consumers face up to 20 years of uncertainty, never quite knowing when or if the Mortgagee will file a suit for deficiency or cancel the debt triggering mortgage debt forgiveness (IRS Form 1099-C). After losing a home, many folks work diligently, often for years, to overcome their financial hardship, gain adequate income, repair their credit, and begin saving for retirement. If a Mortgagee is permitted 20 years after foreclosure to determine what action they will take with regard to the note and mortgage, the consumer’s options become limited.

A mortgage deficiency collection suit is part of the foreclosure process and needs to be reviewed as part of this commission tasked with studying foreclosure law and fair foreclosure practices. Most other states (researched for this proposal) include within their foreclosure laws specific reference to statute of limitations for mortgage deficiency collection suits. This proposal follows the statutory framework of most other states in its request that the state of New Hampshire’s foreclosure laws reference a six year statute of limitations for the collection of mortgage deficiencies.”

The Commission considered the Housing Counselors' proposal and various floor amendments. Ultimately, the Commission voted on the following proposal.

*Proposal Voted on by Commission:*

Amend RSA 508:6 to provide for a six year statute of limitations on the collection of mortgage deficiencies related to properties that qualify as residential (owner occupied with four or less units).

*Vote:*

Favor = 5; Oppose = 4; Abstain = 1

*Majority Report:*

Housing Counselors shared that New Hampshire's twenty-year statute of limitations regarding deficiency suits after foreclosure, see RSA 508:2 and 508:6, is substantially longer than all other New England states. The average statute of limitations for the other New England states is three years. Nationally, most states have adopted statutes of limitations on this matter of ten years or less. But in New Hampshire, the Mortgagor faces a twenty-year period of uncertainty and limited options.

Representatives for New Hampshire Bankers Association indicated their concern in changing RSA 508:2 due to the historical reasoning that may have initially gone into the twenty year statute of limitations regarding Real Estate. The Housing Counselors presented that RSA 508:2 is specifically addressing actions on Real Estate where RSA 508:6 is specifically addressing actions on Notes secured by Mortgages. Although currently linked to RSA 508:2, RSA 508:6 could include an independent statute of limitation. An Amendment was proposed by Housing Counselors to amend 508:6 only and to include reference to residential application only. The Amendment passed. The Amended Proposal vote resulted in 5 yea and 4 no with one abstention.

The Majority believes that the proposal will provide consumers a more reasonable time frame after foreclosure to secure closure of the event, to understand what future liability they may be responsible for, and to begin repairing their credit and establishing financial stability. The Majority believes that Mortgagees will not be harmed if the statute of limitations is reduced from twenty years to six years.

*Minority Report:*

A proposal was made to recommend amending RSA 508:6 to change the statute of limitations for collecting on a 1-4 family residential mortgage debt, from the current 20 years to 6 years. This recommendation passed by a vote of 5-4, with one abstention.

This proposal is objected to because there was no substantive discussion about the reason for, or merits of, the 20 years in the current statute. This indicates that many parties in interest,

such as the NH real estate bar and debt collections constituency should be consulted first in order to fully understand the ramifications of limiting a property interest (i.e., ownership of a debt), by a 14 year change in the statute of limitations.

## **Proposals by New Hampshire Legal Assistance**

### **1) Protecting Tenants at Foreclosure**

New Hampshire Legal Assistance made the following proposal regarding protecting tenants at foreclosure to the Commission:

“Unlike homeowners, tenants often get no prior notice of the foreclosure. After the foreclosure, tenants often receive only 30 days prior notice before the bank or new landlord can file a summary eviction action in court. This does not afford nearly enough time for displaced tenants to find decent, safe, affordable housing. In appreciation of this problem, in 2009 Congress enacted the Protecting Tenants at Foreclosure Act (“PTFA”), which in the majority of cases, gave tenants the right to remain in place until the later of 90 days, or the expiration of their leases. The act was extended in 2010. But as with so many other important issues, Congress has been unable to agree upon a further extension, and it appears that the PTFA will expire on December 31, 2014.

Notwithstanding the signs of recovery of the real estate market in New Hampshire, foreclosures on rental properties continue. The protections that up until now have been provided by the PTFA have enabled countless New Hampshire tenants to avoid the harshest consequences of foreclosure. Moreover, banks, mortgage companies, and other foreclosing mortgagees have become accustomed to complying with the PTFA. The Commission believes that it is strongly in the public interest to adopt on a state level the essential protections that tenants have enjoyed for the last six years, and therefore recommends the following amendments to RSA 479 and 540.

#### **An Act Providing Limited Protection for Tenants in Foreclosed Properties**

##### **Amend RSA Chapter 479**

1. Re-designating RSA 479:27-a as RSA 479:27-b; and
2. Adding the following new section:

RSA 479:27-a Tenants in Foreclosed properties. The eviction of pre-existing tenants in rental properties acquired through foreclosure shall be governed by RSA 540:2-a and the procedures set forth in RSA Chapter 540.

3. Amend RSA Chapter 540 by adding the following new section:

540:2-a. Eviction of Pre-Existing Tenants in Foreclosed Properties.

- I. The purchaser of a property at foreclosure may not terminate a bona fide tenancy prior to the later of:
  - 1) The expiration of the tenant’s lease; or

- 2) The expiration of an eviction notice which gives the tenant no less than 90 days to vacate the premises.
- II. For the purposes of this section:
- 1) the term “bona fide tenancy” means a tenancy in which all of the following apply:
    - i. the tenancy began prior to the issuance of a foreclosure notice to the tenant’s landlord pursuant to RSA 479:25;
    - ii. the mortgagor whose property was foreclosed upon was not the child, spouse, or parent of the tenant;
    - iii. the tenancy was the result of an arms-length transaction;
    - iv. the rent paid by the tenant immediately prior to the foreclosure is not substantially less than the fair market rent for the leased unit, or the rent for the unit is reduced or subsidized due to a federal, state , or local subsidy.
  - 2) the term “purchaser at foreclosure” includes any subsequent purchaser who acquires ownership of the foreclosed property from the party who purchased it at foreclosure sale, prior to the expiration of the tenant’s right of occupancy set forth in RSA 540:2-a, I.
- III. Notwithstanding any other provision of this section, a subsequent purchaser as defined in RSA 540:2-a, II (2) who will occupy the unit as his primary residence may terminate the tenancy in accordance with, and upon the notice required by, RSA 540:2, 3 and 5.
- IV. Nothing in this section shall preclude the purchaser at foreclosure from terminating a tenancy prior to the expiration of the tenant’s residency rights as set forth in RSA 540:2-a I, for any of the reasons set forth in RSA 540:2 (a), (b), (c), or (d), provided however that an action for non-payment of rent may only be based on the tenant’s failure to pay the amount of rent in effect at the time of the foreclosure sale, after demand by the purchaser at the foreclosure sale.
- V. This section shall become effective immediately upon passage, but only on the condition that the federal Protecting Tenants at Foreclosure Act of 2009, 123 Stat. 1632, 1660, Pub. Law 111-22 (May 20, 2009) has previously expired.”

The Commission considered New Hampshire Legal Assistance’s proposal and various floor amendments. Ultimately, the Commission voted on the following proposal:

“The Commission recommends that the General Court study the issue of residential tenancies in foreclosed properties.”

*Vote:*

Favor = 9; Abstain = 1

*Report:*

The Commission heard from NH Legal Assistance attorney Stephanie Bray concerning the plight of tenants in foreclosed properties, many of whom are punctual in paying rent, but who

are forced to leave their homes with little notice following a foreclosure. In 2009, Congress enacted a “Protecting Tenants at Foreclosure Act,” which, in the majority of cases, gave tenants the right to remain in place until the expiration of their leases, or for 90 days (whichever is later). The act was extended in 2010. But as with so many other important issues, Congress has been unable to agree upon a further extension, and it appears that the PTFA will expire on December 31, 2014. The attached proposal is substantially modeled on the federal law, and will take effect only if the federal statute expires. In this way, New Hampshire tenants remain protected.

An amendment was made that the Commission recommend that the General Court study the issue of residential tenancies in foreclosed properties, rather than propose specific legislation. A minority of the Commission believes that the problems of tenants in foreclosed properties are severe and immediate, and that the attached proposal is ready to submit to the General Court in its current form (see meeting minutes and associated handouts), without the need for further study. The amendment passed by a 5-4 vote, with one abstention. The proposal, so amended, was passed by nine yeas, with one abstention.

## **2) Proposed Amendments to RSA 479:25**

New Hampshire Legal Assistance made the following proposal regarding amending RSA 479:25 to the Commission:

“RSA 479:25, II requires that a mortgagee, prior to foreclosure, send a certified mail notice advising the homeowner of the auction date and the homeowner’s ability to seek judicial action to enjoin the sale. This notice, which may be sent as late as 25 days before the sale, is frequently the catalyst that causes the homeowner to seek outside help in the form of homeownership counselors or legal counsel. It is important that the notice contain the relevant information to allow a homeowner to seek housing counseling or legal assistance. If a homeowner is able to contact a homeownership counselor, then with the help of that counselor, the homeowner may apply to modify her loan. Recent regulations promulgated by the Consumer Financial Protection Bureau (CFPB) to implement the Real Estate Settlement Procedures Act provide that, if a complete package is submitted more than 37 days before the scheduled foreclosure sale, then mortgagee may not proceed with the foreclosure until it has completed the review process for that application.

However, this protection under CFPB is of limited value to homeowners in New Hampshire. A homeowner who is submitting a modification package in response to a 25-day foreclosure notice under RSA 479:25, II is, by definition, doing so fewer than 37 days prior to the scheduled foreclosure sale. Thus, the 25-day lead time sanctioned by RSA 479:25, II creates a gap in CFPB protection. The recourse left to the homeowner is to file a lawsuit in the Superior Court, which necessitates more time, effort and expense for all parties. To overcome these barriers, to provide homeowners with relevant information, and to make New Hampshire practice consistent with the protections afforded under the CFPB regulations, the Commission recommends the following amendments to RSA 479:25.

**Amend RSA 479:25, II to read as follows:**

II. A copy of said notice shall be served upon the mortgagor or sent by registered or certified mail to his or her last known address or to such person as may be agreed upon in the mortgage at least 25 days before the sale. *Notwithstanding the foregoing, where the mortgaged premises consists of restricted property as defined in subsection V, a copy of said notice shall be served upon the mortgagor or sent by registered or certified mail to his or her last known address or to such person as may be agreed upon in the mortgage at least 60 days before the sale.* The term "mortgagor" shall include the mortgagor and any grantee, assignee, devisee or heir of the mortgagor holding a recorded interest in the mortgaged premises subordinate to the lien of the mortgage, provided that such interest is recorded, at least 30 days, *or, in the case of restricted property, 65 days* before the date of the sale, in the registry of deeds for the county in which the mortgaged premises are situated. Like notice shall be sent to any person having a lien of record on the mortgaged premises, provided that the lien is recorded at least 30 days, *or, in the case of restricted property, 65 days* before the date of the sale in the registry of deeds. The notice shall be sent not less than 21 days before the sale. Such notice of sale shall be sufficient if it fully sets forth the date, time, and place of sale; the town, county, street or highway and street number, if any, of the mortgaged premises; the date of the mortgage; the volume and page of the recording of the mortgage; and the terms of the sale. Any mortgagor or record lienholder who refuses to accept or claim mailed or served notice or who frustrates attempts by the mortgagee to give notice of the sale by failing to give or leave a forwarding address or by other act or omission shall be deemed to be notified of the sale, provided that such mortgagee shall have made a good faith effort to provide such notice. *Notice of the sale as served on or mailed to the mortgagor shall include, for owner-occupied dwellings of four or fewer dwelling units: (a) the address of*

*the mortgagee for service of process and the name of the mortgagee's agent for service of process; and (b) contact information for the New Hampshire Banking Department.* Notice of the sale as served on or mailed to the mortgagor shall *also in all cases* include the following language:

"You are hereby notified that you have a right to petition the superior court for the county in which the mortgaged premises are situated, with service upon the mortgagee, and upon such bond as the court may require, to enjoin the scheduled foreclosure sale." Failure to institute such petition and complete service upon the foreclosing party, or his agent, conducting the sale prior to sale shall thereafter bar any action or right of action of the mortgagor based on the validity of the foreclosure.

***Amend RSA 479:25 by adding the following new paragraph:***

***V. For the purposes of this section, "restricted property" means an owner-occupied dwelling of four or fewer units, except where the mortgagee or assignee seeking to conduct the foreclosure is one or more of the following:***

***(a) a New Hampshire chartered financial institution, bank, or credit union;***

***(b) a financial institution, bank, or credit union with its principal place of business in New Hampshire;***

***(c) a financial institution, bank, or credit union that maintains a physical office or offices exclusively in New Hampshire from which office or offices it carries out full-service mortgage operations, including the acceptance and processing of mortgage payments and the provision of New Hampshire customer service and mortgage servicing, including the authority to approve mortgage loan restructuring and other loss mitigation strategies; or,***

***(d) an entity that qualifies for the "small servicer" exemption under the federal Consumer Financial Protection Bureau's regulation implementing the Real Estate Settlement Procedures Act, as may be amended."***

The Commission considered New Hampshire Legal Assistance's proposal and various floor amendments. Ultimately, the Commission voted on the following proposals:

**Amend RSA 479:25, II to read as follows:**

II. A copy of said notice shall be served upon the mortgagor or sent by registered or certified mail to his *or her* last known address or to such person as may be agreed upon in the mortgage at least 25 days before the sale. The term "mortgagor" shall include the mortgagor and any grantee, assignee, devisee or heir of the mortgagor holding a recorded interest in the mortgaged premises subordinate to the lien of the mortgage, provided that such interest is recorded, at least 30 days before the date of the sale, in the registry of deeds for the county in which the mortgaged premises are situated. Like notice shall be sent to any person having a lien of record on the mortgaged premises, provided that the lien is recorded at least 30 days before the date of the sale in the registry of deeds. The notice shall be sent not less than 21 days before the sale. Such notice of sale shall be sufficient if it fully sets forth the date, time, and place of sale; the town, county, street or highway and street number, if any, of the mortgaged premises; the date of the mortgage; the volume and page of the recording of the mortgage; and the terms of the sale. Any mortgagor or record lienholder who refuses to accept or claim mailed or served notice or who frustrates attempts by the mortgagee to give notice of the sale by failing to give or leave a forwarding address or by other act or omission shall be deemed to be notified of the sale, provided that such mortgagee shall have made a good faith effort to provide such notice. *Notice of the sale as served on or mailed to the mortgagor shall include, for owner-occupied dwellings of four or fewer dwelling units: (a) the address of the mortgagee for service of process and the name of the mortgagee's agent for service of process; and (b) contact information for the New Hampshire Banking Department, in order for the consumer to obtain information concerning*

*housing assistance and legal counseling*. Notice of the sale as served on or mailed to the mortgagor shall *also in all cases* include the following language:

"You are hereby notified that you have a right to petition the superior court for the county in which the mortgaged premises are situated, with service upon the mortgagee, and upon such bond as the court may require, to enjoin the scheduled foreclosure sale." Failure to institute such petition and complete service upon the foreclosing party, or his agent, conducting the sale prior to sale shall thereafter bar any action or right of action of the mortgagor based on the validity of the foreclosure.

*Vote:*

Favor = 9; Abstain = 1

*Report:*

The Commission heard from Carol Vivian of Claremont Savings Bank and from Patrick Harrigan of the NH Credit Union League concerning contact information that CFPB now requires servicers to provide to borrowers in monthly statements and in certain post-delinquency contacts. The Commission also heard from housing counselors Deb Wheeler and Mari Voisine, and from NH Legal Assistance attorney Stephanie Bray, concerning the difficulty that residential borrowers have in using generic contact information to make effective contact with housing counselors or legal counsel, or to properly effect service of process.

The proposal gives homeowners additional timely and effective access to information and services that can help them cure deficiencies or modify their loans, at no significant cost to lenders and servicers. Therefore, the Commission recommends, with nine yeas and one abstention, that the General Court amend RSA 479:25, II as reflected above.

**Amend RSA 479:25, II to read as follows:**

II. A copy of said notice shall be served upon the mortgagor or sent by registered or certified mail to his *or her* last known address or to such person as may be agreed upon in the mortgage at least 25 days before the sale. *Notwithstanding the foregoing, where the mortgaged premises consists of restricted property as defined in subsection V, a copy of said notice shall be served upon the mortgagor or sent by registered or certified mail to his or her last known address or*

*to such person as may be agreed upon in the mortgage at least 60 days before the sale.* The term "mortgagor" shall include the mortgagor and any grantee, assignee, devisee or heir of the mortgagor holding a recorded interest in the mortgaged premises subordinate to the lien of the mortgage, provided that such interest is recorded, at least 30 days, *or, in the case of restricted property, 65 days* before the date of the sale, in the registry of deeds for the county in which the mortgaged premises are situated. Like notice shall be sent to any person having a lien of record on the mortgaged premises, provided that the lien is recorded at least 30 days, *or, in the case of restricted property, 65 days* before the date of the sale in the registry of deeds. The notice shall be sent not less than 21 days before the sale. Such notice of sale shall be sufficient if it fully sets forth the date, time, and place of sale; the town, county, street or highway and street number, if any, of the mortgaged premises; the date of the mortgage; the volume and page of the recording of the mortgage; and the terms of the sale. Any mortgagor or record lienholder who refuses to accept or claim mailed or served notice or who frustrates attempts by the mortgagee to give notice of the sale by failing to give or leave a forwarding address or by other act or omission shall be deemed to be notified of the sale, provided that such mortgagee shall have made a good faith effort to provide such notice. Notice of the sale as served on or mailed to the mortgagor shall include the following language:

"You are hereby notified that you have a right to petition the superior court for the county in which the mortgaged premises are situated, with service upon the mortgagee, and upon such bond as the court may require, to enjoin the scheduled foreclosure sale." Failure to institute such petition and complete service upon the foreclosing party, or his agent, conducting the sale prior to sale shall thereafter bar any action or right of action of the mortgagor based on the validity of the foreclosure.

**Amend RSA 479:25 by adding the following new paragraph:**

***V. For the purposes of this section, “restricted property” means an owner-occupied dwelling of four or fewer units, except where the mortgagee or assignee seeking to conduct the foreclosure is one or more of the following:***

***(a) a New Hampshire chartered financial institution, bank, or credit union;***

***(b) a financial institution, bank, or credit union with its principal place of business in New Hampshire, or the New Hampshire Housing Finance Authority;***

***(c) a financial institution, bank, or credit union that maintains a physical office or offices exclusively in New Hampshire from which office or offices it carries out full-service mortgage operations, including the acceptance and processing of mortgage payments and the provision of New Hampshire customer service and mortgage servicing, including the authority to approve mortgage loan restructuring and other loss mitigation strategies; or,***

***(d) an entity that qualifies for the “small servicer” exemption under the federal Consumer Financial Protection Bureau’s regulation implementing the Real Estate Settlement Procedures Act, as may be amended.***

*Vote:*

Favor = 5; Oppose = 4; Abstain = 1;

*Majority Report:*

The Commission heard from housing counselors Deb Wheeler and Mari Voisine, and from NH Legal Assistance attorney Stephanie Bray, that the notice required by RSA 479:25, II is frequently the catalyst that causes homeowners to seek outside assistance in dealing with their lenders and servicers. Extending the notice time to 60 days will allow homeowners to contact housing counselors and legal counsel, with the goal of applying for modifications of their loans. The borrower must submit a complete application for loan modification at least 37 days prior to the scheduled foreclosure sale, in order to take advantage of the CFPB’s foreclosure-halting provisions. The current 25 day notice does not afford the homeowner this opportunity, and is inconsistent with the mission of the CFPB.

There was discussion that communications between homeowners and large, geographically distant servicers can be difficult. In many cases, progress cannot realistically be made until the homeowner receives the notice required by RSA 479:25, II and commences legal action. Therefore, the extended notice period is not applicable to certain New Hampshire-based entities. The exempted entities (who will still provide the 25 day notice) include banks, credit unions and financial institutions that are chartered in, or have principal offices in, New Hampshire, or who meet the CFPB’s definition of “small servicer.” By amendment that passed with nine yeas and one abstention, New Hampshire Housing Finance Authority was added to the entities exempted from longer notice requirements.

The Commission's final vote on this amended proposal following reconsideration was 5-4, with one abstention. The majority recommends this proposal as a careful balancing of interests between homeowners seeking a chance to modify home loans that are no longer affordable, and lenders and servicers who desire prompt resolution of delinquent loans.

*Minority Report:*

The financial services industry is concerned with the possibility that the state would extend the foreclosure notice period from 25 days to 60 days. There is understandable concern about a discrepancy between federal and state law that a lender must halt foreclosure action if a borrower requests a loan modification 37 days before a foreclosure auction date. However, it should be remembered that Consumer Financial Protections Bureau's new rules, in effect for less than a year at this time, have improved the notice requirements to borrowers both on periodic statements and on past due notices as well as extended the time period that must elapse before lenders can begin the foreclosure process. Under the new rules a past due borrower will receive a minimum of 4 monthly statements and 2 late notice contacts with information about how to contact the Servicer and how to access CFPB and HUD websites to obtain contact information for homeownership counseling organizations. A lender must make initial contact with the past due borrower no more than 35 days following delinquency and this combined with the new 120 day waiting period to foreclose provides past due borrowers a minimum of 85 days to contact the Servicer or a Homeownership Counselor to take action to ensure their property doesn't go to foreclosure.

The CFPB also requires lenders to wait 120 days following a delinquency before beginning the foreclosure process. The 60-day foreclosure notice proposal being contemplated by the Commission would result in an additional 35 days of notice, when our industry is still assessing the impact of the new 120-day requirement. We have significant concern the additional delays will ultimately harm consumers and result in increased foreclosures. With the extended time period before foreclosure starts, borrowers are more likely to put off efforts to bring their loan back into current status. They then run the danger of falling so far behind they cannot recover and foreclosure becomes a certainty. Since the CFPB's 120-day rule, some lenders have already seen their foreclosure cases increase. The proposed extension on top of the CFPB's new rules will become extremely burdensome for lenders, and likely result in more borrowers falling into irreversible default.

The commission also was provided data provided from a Federal Housing Finance Authority (FHFA) analysis (FHFA is an independent regulatory agency responsible for the oversight of vital components of the secondary mortgage markets—the housing government sponsored enterprises of Fannie Mae, Freddie Mac and the Federal Home Loan Bank System. Combined these entities provide more than \$5.5 trillion in funding for the U.S. mortgage markets and financial institutions. Additionally, FHFA is the conservator of Fannie Mae and Freddie Mac). FHFA concluded “that borrowers in judicial states are not more likely to cure or renegotiate their loans”...”on the contrary, the delays common in judicial states lead to a build-up of persistently delinquent borrowers, the vast majority of whom eventually lose their homes. Additionally, the “right-to-cure” law adopted in Massachusetts in 2008 lengthens foreclosure

timelines but does not lead to better outcomes for borrowers than occur in neighboring states that did not adopt similar laws. Further, another recent study determined that the key to minimizing the costs of foreclosures to communities would be to minimize the time that properties spend in the foreclosure process”. [Internal Citations Omitted – See State-Level Guarantee Fee Analysis Handout.] “FHFA believes that new state laws and other changes in foreclosure practices in recent years were made with the best intentions, yet they have not been without costs. Those costs are borne by the mortgage investor, who incurs expenses during the foreclosure process for property taxes, insurance, legal fees, property maintenance, and capital funding. At present, the American taxpayer is the largest investor in single-family mortgages, through the U.S Department of the Treasury’s financial support of the Enterprises and through extensive Federal Reserve purchases of mortgage-backed securities. Because Enterprise profits and losses directly affect payments received by the Treasury pursuant to each Enterprise’s Senior Preferred Stock Purchase Agreement with the Treasury, taxpayers bear the costs to the Enterprises of carrying defaulted mortgages on their books for longer periods.

The minority feels that New Hampshire has fared far above average during the foreclosure crisis and that the new CFPB rules that are a mere 9 months old have and will continue to properly address problems or issues with servicers that may or may not exist. The minority feels that the evidence provided to support the proposal was all hearsay anecdotal evidence provided to housing counselors by distressed homeowners and input from other stakeholders related to their individual circumstances was not gathered. In addition, New Hampshire stakeholders including but not limited to the Banking Department, Attorney General’s Office, Legislature and other regulators took appropriate action including forming Home Help NH. As reported by New Hampshire Housing, Home Help NH has had over 60% positive outcomes with homeowners who participated. The program has been far more successful than other states such as Connecticut which is a judicial state with mediation process that had roughly 25% of homeowners become re-delinquent and in the foreclosure process again. In addition, Maine’s mediation process had over a 75% failure rate. New Hampshire’s current process is working and is not in need of changes.

Subsequent to submission of the minority report, the Commission reopened the vote on this proposal by a vote of 5-4. Discussion continued on the FHFA analysis noted above and the Minority continued to object to its adoption due to (i) the FHFA analysis showing that lengthening the foreclosure process leads to a build-up of delinquent borrowers and more, not less foreclosures, hampers economic recovery by depressing home prices, and leads to higher borrowing costs; (ii) Banks are facing an increasing and staggering regulatory burden requiring them to devote significant resources to legal, compliance, training, and software investments especially in light of the increasing liability risks presented by Dodd-Frank, instead of devoting resources to day to day business; (iii) the proposal only adds to this burden and is redundant because the CFPB requires loss mitigation efforts, with early warnings of foreclosure if delinquency continues; and (iv) the carve out is likely unconstitutional because there is no compelling reason to benefit in-state economic interests by burdening out-of-state competitors.