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PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION

TO THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

AND

THE HOUSE COMMITTEE ON JUDICIARY

TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2013

THURSDAY, MARCH 14, 2013
5:00 P.M.

TESTIMONY ON SENATE BILL NO. 1370, S.D. 2
RELATING TO MEDIATION AFFECTING JUDICIAL FORECLOSURE.

TO THE HONORABLE ANGUS L.K. MCKELVEY AND KARL RHOADS, CHAIRS, AND TO THE HONORABLE DEREK S.K. KAWAKAMI AND SHARON E. HAR, VICE CHAIRS, AND MEMBERS OF THE COMMITTEES:

The Department of Commerce and Consumer Affairs ("DCCA"), Office of Consumer Protection ("OCP") appreciates the opportunity to testify today and offer comments on Senate Bill No. 1370, S.D. 2, Relating to Mediation Affecting Judicial Foreclosure. My name is Bruce B. Kim and I am the Executive Director of OCP. OCP prefers House Draft 1 of House Bill No. 1417, which passed out of these same

committees, over Senate Bill No. 1370, S.D. 2 with certain amendments as set forth in this testimony.

As reflected in the findings and purpose section of S.D. 2, the legislature has repeatedly indicated in 2011 and again in 2012, its desire to make dispute resolution coupled with the assistance of a HUD-certified housing counselor available to homeowners facing foreclosure. As currently drafted, S.D. 2 does not do this. The S.D. 2 amendments require compliance with title 12 Code of Federal Regulations ("CFR") sections 1024.39 and 1024.41, and further exempt mortgagees from participation in the Mortgage Foreclosure Dispute Resolution Program ("MFDR") if they have complied with title 12 CFR 1024.41. These amendments are superfluous because federal law already mandates compliance with the new servicing regulations. Exempting **every** bank that complies with the Consumer Financial Protection Bureau's ("CFPB") new servicing rules from having to participate in pre-foreclosure dispute resolution effectively bars pre-foreclosure dispute resolution even though the homeowner wishes to participate.

This blanket exemption is troubling in the face of mounting evidence that the problems which led to the servicing reforms enacted in Hawaii and across the nation continue to persist. The most recent report of the Settlement Monitor, Joseph A. Smith, Jr., confirms that complaints from homeowners of significant servicing violations continue to flow in.

> Many of the same themes and areas of difficulty from the first two reports continue to be reported in the consumer narratives:

- Frustration and confusion about the loan modification process;
- Lack of adequate and timely follow-up by servicing personnel;
- Inconsistent explanations when discussing options or account information with different servicing personnel;
- Changes in assigned Single Point of Contact ("SPOC"), including lack of continuity and knowledge of borrower circumstances and account information;
- Borrowers being required to submit the same documentation multiple times;
- Frustration with successor servicers, such as being requested to restart the loan modification process when servicing is transferred;
- Questionable or undocumented fees being added to the total amount due; and
- Confusion regarding qualifications and eligibility for the Consumer
- Relief provisions under the Settlement, and related questions concerning coverage of related entities within a Servicer's corporate family."[1]

While alternate dispute resolution in a judicial foreclosure may be ordered in the discretion of the court, only the Third Circuit Court (the island of Hawaii) has adopted a dedicated foreclosure mediation program. The remaining Circuits do not have formal foreclosure mediation programs, although judges have the discretion to order it. By requiring pre-foreclosure dispute resolution at the option of the mortgagor, both mortgagees and mortgagors stand to benefit from the existing MFDR Program administered by the DCCA.

Pre-foreclosure dispute resolution through the MFDR program will also reduce

[1] https://www.mortgageoversight.com/wp-content/uploads/2013/02/Ongoing-Implementation.pdf

delays and conserve valuable judicial resources. There is emerging evidence that dispute resolution programs in foreclosure do work to help distressed homeowners enter into various loss mitigation remedies with their lender and avoid foreclosure. A December 2011 report by the U.S. Department of Justice, Access to Justice Initiative, found that "[f]oreclosure mediation is an important intervention that, if well conceived and carefully implemented, can have overwhelmingly positive impacts on homeowners, lenders and investors, and communities."[2] There is also ample evidence that HUD-certified housing counselors are successful in the majority of cases in getting some form of help to distressed homeowners and avoiding foreclosure.

In light of the issues discussed above, OCP prefers House Draft 1 of House Bill No. 1417, which passed out of these same committees, over Senate Bill No. 1370, S.D. 2, and would suggest that it replace the text of Senate Bill No. 1370, S.D. 2, with one amendment. On pages 20 through 22, section 15 of House Bill No. 1417, H.D.1, there is a retroactivity section for judicial foreclosures that have been filed, but have not yet had a hearing. While it is not OCP's wish to deprive any mortgagor of the ability to avail themselves of a structured dispute resolution process, the retroactive nature of section 15 may cause considerable confusion among mortgagees and mortgagors, and may even result in additional litigation. Therefore, OCP would like to suggest the following text replace the entirety of section 15:

This Act shall not apply to mortgagees who have filed a judicial foreclosure

[2] http://www.justice.gov/atj/foreclosure-mediation.pdf

action under part IA of chapter 667, Hawaii Revised Statutes, at any time prior to July 1, 2013.

Thank you for the opportunity to testify on Senate Bill No. 1370, S.D. 2. I will be happy to answer any questions that the members of the Committee may have.

Hawaii Bankers Association

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Presentation To
Committee on Consumer Protection and Commerce (CPC)
Committee on Judiciary (JUD)
March 14, 2013, 2013 at 5:00 pm
State Capitol Conference Room 325

**Testimony in <u>OPPOSITION</u> to Bill S. B. 1370, SD2**

TO: The Honorable Angus L. K. McKelvey, Chair – CPC
The Honorable Derek S. K. Kawakami, Vice Chair – CPC
Members of CPC

The Honorable Karl Rhoads, Chair – JUD
The Honorable Sharon E. Har, Vice Chair – JUD
Members of JUD

My name is Neal Okabayashi and I am testifying for the Hawaii Bankers Association (HBA). HBA is the trade association representing all FDIC insured depository institutions with branch offices in the State of Hawaii.

The Hawaii Bankers Association believes that SB 1370, SD 2 is unnecessary because it duplicates both the rules of the Consumer Financial Protection Bureau (a federal regulatory agency whose mission is to protect consumers) and the National Mortgage Settlement of 2012, which was negotiated among state attorney generals (except for the Oklahoma attorney general), the U.S. Department of Justice, and five major lenders/servicers. As noted by the Consumer Financial Protection Bureau (CFPB), the five largest servicers service 53% of mortgage loans in the country, and those five are already subject to the National Mortgage Settlement.

In promulgating its mortgage servicing rules, the CFPB observed there is difference between the servicing practices of the large servicers and more community oriented servicers. The CFPB noted: "The mortgage servicing industry, however, is not monolithic. Some servicers provide high levels of customer service. . . . Other servicers provide high levels of customer service because they are servicing loans of their own retail customers within their local community or (in the case of credit unions) membership base. These servicers seek to provide other products and services to consumers – and to others within the community or membership base – and thus have an interest in preserving their reputations and relationships with their consumers."

The CFPB said that certain servicers who are essentially local servicers have different incentives than the large national servicers because the local servicers have "an interest in maintaining a relationship with borrower as a customer of the bank or thrift or member of the credit union to provide other banking services. Further such servicers must be conscientious of reputational consequences within a community or member base." Earlier the CFPB said it was "not aware of

any evidence indicating the performance of these types of institutions in servicing the mortgage loans they originate or own generally results in substantial consumer harm."

Just as it is recognized that the local banks and credit unions have not caused servicing issues, the CFPB has also recognized there is a distinction between servicers operating in a discrete jurisdiction (and there can be nothing more discrete than an isolated island state) and national servicers that operate in many jurisdictions. The national servicers have no ties to Hawaii and thus lack the same motivation local lenders have regarding their customers.

Since the concern is really about national servicers, the National Mortgage Settlement applies to the national servicers that service 53% of the loans in the country, including Bank of America, and such settlement addresses any concerns of untoward behavior. The CFPB rules take effect on January 10, 2014 but since the CFPB takes into account the terms of the national mortgage settlement, the time gap should be of no concern. After January 10, 2014, the national servicers will be subject to both the national mortgage settlement and the CFPB rules.

It should be noted that under the National Mortgage Settlement, a monitor was appointed. The monitor is Joseph Smith, former North Carolina banking commissioner. He recently (February 21, 2012) submitted a report covering the period from March 1, 2012 to December 31, 2012. Please note that part of this period is prior to the effective date of the settlement, April 5, 2012.

In the monitor's report, for the state of Hawaii during this period, there were 1,468 borrowers who received what the monitor calls consumer relief, including 1,094 Bank of America borrowers. The aggregate amount was $158,149,364, or an average of $107,731 per borrower. All of this occurred without benefit of mediation.

In January of this year, the CFPB introduced voluminous changes to the rules governing mortgage serving, including foreclosures. Among other things, the lender cannot file for foreclosure until the loan is 120 days (4 months) delinquent because, in the words of the CFPB, "This will give borrowers reasonable time to submit modification applications."

Lenders must not only reach out to delinquent borrowers, they must also provide the borrower with written examples of loan modification options. One rule requires the lender to notify the borrower orally by the 36$^{th}$ day after delinquency of available loan modification options. This is to be followed by a written notice to the borrower by the 45$^{th}$ day of loan modification options including credit counseling contact information. In recognition of the fact that the investor, not the lender, approves loan modifications, the CFPB requires that the lender be aware of the investor's loan modification programs so the borrower can be evaluated for all alternatives.

Thus, before foreclosure is filed, there has been a thorough review of the borrower's current financial condition to determine if loan modification is possible. If the request is denied, the borrower is informed of the reasons for denial and appeal possibilities.

The CFPB also requires that even after foreclosure is initiated, if a borrower applies for loan modification, the application must be evaluated. Since dual tracking is prohibited, in essence the foreclosure process is suspended at such time.

A loan modification process is similar to a loan application underwriting decision based on the debt and income; in other words the ability to repay the loan obligation. This is an important concept embodied in the new "ability to repay" rules required by the Dodd-Frank Act.

A required state mediation process would merely repeat the loan modification process with no different end result, since the same financial picture will be presented. The CFPB rules require the servicer consider any loan mitigation application submitted 37 days before the sale, thus there is ample protection throughout to address a change of circumstance. The only result is delay, which results in a greater loss for the lender and possibly a condominium association.

It should be pointed out that while credit counselors have been effective in some situations, that effectiveness is only applicable when the intervention is early. All the data demonstrates that the longer a loan has been delinquent, the harder it is to craft a successful loan modification agreement. It should be realized that success is not measured by reaching agreement, but rather by the sustainability of the agreement. In a study by HUD on foreclosure counseling, released May 12, 2012, the success rate of counseling when the loan was six or more months delinquent was only 30% and that the claimed 70% figure was reached when counseling was provided prior to delinquency. Because of the CFPB, the loan will likely be six or more months delinquent before the visit to the credit counselor and thus the claims of a high success rate are highly unlikely to be replicated.

When a judicial foreclosure action is brought against a borrower, the court's oversight over the proceedings also provides added protection for the borrower. The court then becomes the independent third party, which can serve in place of the mediation process, and courts have the inherent power to order mediation when appropriate. In fact, there is an ongoing judicial foreclosure mediation program on the Big Island, and we understand there are mediation programs of varying procedures in each circuit.

In summary, we believe this bill is rendered moot by the attorney general's settlement and the Consumer Financial Protection Bureau regulations.

Thank you for the opportunity to submit this testimony and please let us know if we can provide further information.

Neal Okabayashi
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*Mortgage Bankers Association of Hawaii*
***P.O. Box 4129, Honolulu, Hawaii 96812***

March 13, 2013

The Honorable Angus McKelvey, Chair
The Honorable Derek Kawakami, Vice Chair
Members of House Committee on Consumer Protection and Commerce
State Capitol, Room 325
Honolulu, Hawaii 96813

The Honorable Karl Rhoads, Chair
The Honorable Sharon Har, Vice Chair
Members of the House Committee on Judiciary
State Capitol, Room 325
Honolulu, Hawaii 96813

Re: Senate Bill 1370, SD 2 Relating to Mediation Affecting Judicial Foreclosure

Chair McKelvey, Chair Rhoads, Vice Chair Kawakami, Vice Chair Har, Members of the House Committee on Consumer Protection and Commerce, and Members of the House Committee on Judiciary:

I am Linda Nakamura, representing the Mortgage Bankers Association of Hawaii ("MBAH"). The MBAH is a voluntary organization of real estate lenders in Hawaii. Our membership consists of employees of banks, savings institutions, mortgage bankers, mortgage brokers, and other financial institutions. The members of the MBAH originate the vast majority of residential and commercial real estate mortgage loans in Hawaii. When, and if, the MBAH testifies on legislation, it is related only to mortgage lending.

The MBAH opposes the bill and agrees with the testimony submitted by the Hawaii Bankers Association.

As we had stated in our previous testimony, servicers already provide many opportunities to delinquent borrowers for a loan modification, short sale or a deed in lieu of foreclosure prior to filing the foreclosure and even during the foreclosure process, the borrowers continue to have the opportunity to request for available loss mitigation options.

On January 10, 2014, the new Consumer Financial Protection Bureau (CFPB) servicing rules become effective. The new rules require servicers to provide loss mitigation options to delinquent borrowers prior to foreclosure and cannot foreclose until the mortgage is 120 days past due. Servicers will be required to make live contact or make a good faith attempt with the delinquent borrower by the 36$^{th}$ day of delinquency and provide the borrower with the available loss mitigation options. Servicers will be required to send out a written notice of the available loss mitigation options by the 45$^{th}$ day of delinquency. Servicers will be required to provide the borrower with continuity of

contact and be accessible to the borrower by phone; have access to all the information the borrower provided; and be able to assist the borrower when they call. Servicers will be required to establish and follow loss mitigation procedures. These procedures must acknowledge a borrower's application for loss mitigation options within 5 business days of receipt of an application. If the application is not complete, the borrower must be provided with a list of information or documentation that is required to complete the application. Servicers are required to evaluate a borrower for loss mitigation options if the loss mitigation application is received 37 days before a scheduled foreclosure sale date and complete the loss mitigation evaluation within 30 days of receipt of a complete loss mitigation application and provide the borrower with a written decision. A borrower is able to appeal a denial of a loss mitigation request if the appeal is received at minimum 90 days prior to a scheduled foreclosure date. Servicers will not be allowed to "dual track," whereby the servicer simultaneously evaluates a loan for loss mitigation options at the same time the foreclosure is in process.

Requiring mediation prior to filing a judicial foreclosure will repeat the process servicers will be required to comply with under the new CFPB rules.

Thank you for the opportunity to present this testimony.

LINDA NAKAMURA
President, Mortgage Bankers Association of Hawaii

# HAWAII FINANCIAL SERVICES ASSOCIATION
**c/o Marvin S.C. Dang, Attorney-at-Law**
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March 14, 2013

Rep. Angus L.K. McKelvey, Chair
and members of the House Committee on Consumer Protection &Commerce
Rep. Karl Rhoads, Chair
and members of the House Committee on Judiciary
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **Senate Bill 1370, S.D. 2 (Mediation Affecting Judicial Foreclosure)**
**Hearing Date/Time: Thursday, March 14, 2013, 5:00 p.m.**

I am Marvin Dang, the attorney for the **Hawaii Financial Services Association** ("HFSA"). The HFSA is a trade association for Hawaii's consumer credit industry. Its members include Hawaii financial services loan companies (which make mortgage loans and other loans, and which are regulated by the Hawaii Commissioner of Financial Institutions), mortgage lenders, and financial institutions.

**The HFSA opposes this Bill.**

The purposes of this Bill are to: (1) expand the application of mandatory mortgage foreclosure dispute resolution by requiring mortgagees, at the mortgagor's election, to participate in mediation to avoid foreclosure or mitigate damages from foreclosure prior to filing a judicial foreclosure action for property that has been the mortgagor's primary residence for a specified period, (2) apply the dispute resolution requirement to judicial foreclosure actions filed prior to the effective date of this bill and pending an initial court hearing, (3) exempt the dispute resolution requirement to judicial foreclosure actions if the mortgagee engages in loss mitigation procedures with the mortgagor, (4) establish notification requirements for a mortgagee to notify a mortgagor with respect to loss mitigation options, and (5) require that an attorney affirm that a mortgagee engaged in loss mitigation procedures with the mortgagor when filing for a judicial foreclosure action.

This Bill attempts to address issues related to servicing delinquent loans.

It should be noted that a foreclosure action is the last resort for a lender when a borrower's mortgage loan is delinquent. Before commencing a foreclosure action (whether judicial or nonjudicial), a lender will consider many pre-foreclosure options such as a loan modification, a short sale, or a deed in lieu of foreclosure. Furthermore, five major national lenders/servicers are subject to the court-approved National Mortgage Settlement of 2012 with 49 state Attorneys General (including Hawaii's Attorney General) and the U.S. Department of Justice.

Additionally, beginning on January 10, 2014, the mortgage servicing rules of the federal Consumer Financial Protection Bureau ("CFPB") will be effective. As stated in the testimony of the Mortgage Bankers Association of Hawaii in opposition to this Bill:

> "The new rules require servicers to provide loss mitigation options to delinquent borrowers prior to foreclosure and cannot foreclose until the mortgage is 120 days past due. Servicers will be required to make live contact or make a good faith attempt with the delinquent borrower by the 36th day of delinquency and provide the borrower with the available loss mitigation options. Servicers will be required to send out a written notice of the available loss mitigation

> options by the 45th day of delinquency. Servicers will be required to provide the borrower with continuity of contact and be accessible to the borrower by phone; have access to all the information the borrower provided; and be able to assist the borrower when they call. Servicers will be required to establish and follow loss mitigation procedures. These procedures must acknowledge a borrower's application for loss mitigation options within 5 business days of receipt of an application. If the application is not complete, the borrower must be provided with a list of information or documentation that is required to complete the application. Servicers are required to evaluate a borrower for loss mitigation options if the loss mitigation application is received 37 days before a scheduled foreclosure sale date and complete the loss mitigation evaluation within 30 days of receipt of a complete loss mitigation application and provide the borrower with a written decision. A borrower is able to appeal a denial of a loss mitigation request if the appeal is received at minimum 90 days prior to a scheduled foreclosure date. Servicers will not be allowed to "dual track," whereby the servicer simultaneously evaluates a loan for loss mitigation options at the same time the foreclosure is in process."

The provisions in this Bill unnecessarily duplicate the existing practices of lenders and servicers, the terms of the National Mortgage Settlement, and the requirements in the CFPB rules. Accordingly, this Bill should be held at this time.

Thank you for considering our testimony.

Marvin S. C. Dang

MARVIN S.C. DANG
Attorney for Hawaii Financial Services Association

(MSCD/hfsa)