FARLEIGH WADA WITT
Attorneys

SPECIAL COMPLIANCE ALERT

May 9, 2011

WASHINGTON FORECLOSURE FAIRNESS ACT IMPOSES NEW FEES AND REQUIRES THIRD-PARTY MEDIATION IN CERTAIN CASES

The Washington legislature has enacted significant revisions to its residential foreclosure process. One portion of the bill will require immediate action by lenders. As detailed below, any lender that qualifies for exemption from the new **$250** per foreclosure fee must **file a certification with the Washington Department of Commerce on or before May 14, 2011**.

Governor Gregoire signed HB 1362 on April 14, 2011 enacting the Foreclosure Fairness Act. Although the majority of the act goes into effect on July 22, 2011, some provisions take effect immediately.

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MAJOR CHANGES

For Washington non-judicial foreclosures for trust deeds securing owner-occupied residential real property, the new law does the following:

- Lengthens the pre-foreclosure work-out process and extends the process to all trust deeds securing owner-occupied residential real property, not just those made between 2003 and 2007
- Creates a third party mediation program for lenders and federally-insured beneficiaries with high-volume foreclosures
- Creates a "foreclosure fairness fund" funded by a $250 per foreclosure fee

Federally insured financial institutions (i.e. banks and credit unions) are exempt from the third party mediation requirement and the $250 per foreclosure fee if they file a certification with the Washington Department of Commerce indicating that they initiated less than 250 foreclosures in the preceding year. The certification must be filed by May 14, 2011 in order to avoid paying a fee for foreclosures initiated between January 14, 2011 and April 14, 2011.

PRE-FORECLOSURE WORK-OUT PROCESS

- Prior to the new law, Washington law required the beneficiary to try to contact the borrower to discuss options for avoiding foreclosure.
- The new law prohibits the trustee from sending a notice of default until **90 days** after the beneficiary's initial contact with the borrower, if the borrower responds to the initial contact, instead of 30 days after the initial contact.

...any lender that qualifies for exemption from the new **$250** per foreclosure fee must **file a certification with the Washington Department of Commerce on or before May 14, 2011**.

WASHINGTON FORECLOSURE FAIRNESS ACT (CONT.)

- The new law requires the Washington State Department of Commerce ("Department") to develop a form letter that beneficiaries are required to send to borrowers prior to initiating foreclosure. This form should be available by no later than **May 14, 2011**.

- If the borrower or its housing counselor requests a meeting, the beneficiary must schedule the meeting to occur before the notice of default is issued. At the meeting (which must now be in person, unless the borrower or its representative waives the requirement in writing), the beneficiary must assess the borrower's financial ability to modify or restructure the loan obligations and a discussion of options.

- The new law requires the beneficiary to attempt to reach a resolution for the borrower within 90 days after the initial contact. The new law suggests that resolution could include a loan modification, an agreement to conduct a short sale, or a deed in lieu of foreclosure transaction or some other workout plan.

MEDIATION PROGRAM

- The new law requires mediation when a housing counselor or attorney refers a borrower to mediation. The new law only applies to property that was owner-occupied as of the date of the initial contact from beneficiary described above.

- The program does not apply to any federally insured depository institution that certifies to the department of commerce that it was not a beneficiary of trust deeds in more than 250 sales of owner-occupied residential real property that occurred in Washington in the preceding calendar year. This certification must occur annually. **The first certification must be made no later than August 22, 2011.**

- After the housing counselor or attorney refers the borrower to mediation by sending a notice to borrower and the Department, the Department selects a mediator and provides notice to the parties.

- Within 45 days of the referral (unless extended by the parties), the mediator convenes a mediation session in the county where the borrower resides, unless the parties agree on location. The beneficiary or authorized agent must meet in person with the borrower and beneficiary in the mediation session. The beneficiary must provide documents to the mediator and borrower at least 10 days before the mediation.

- The beneficiary cannot request that the borrower waive future claims he or she may have in connection with the trust.

- If the parties are unable to reach any agreement and the mediator certifies that the parties acted in good faith, the beneficiary may proceed with the foreclosure.

- The mediator's certification that the beneficiary failed to act in good faith is a defense to the non-judicial foreclosure, but not to a judicial foreclosure.

- The mediator may charge reasonable fees not to exceed $400 for a session lasing between 1-3 hours. The fee must be divided equally between the beneficiary and the borrower.

FORECLOSURE FAIRNESS ACCOUNT

- The new law creates the "foreclosure fairness account" to (i) provide housing counselors for borrowers, (ii) pay for enforcement of the new law, (iii) provide legal representation of homeowners, (iv) implement and operate the foreclosure fairness act, and (v) conduct homeowner prepurchase and postpurchase outreach and education programs.

- The account is funded by beneficiaries issuing notices of default on owner-occupied residential real property in Washington. Every quarter, for each owner-occupied residential real property for which a notice of default has been issued, the beneficiary has to remit $250 to the Department.

- Each beneficiary required to remit the funds has to report quarterly to the Department the number of owner-occupied real properties for which notices of default were issued during the previous quarter.

FORECLOSURE FAIRNESS ACT (CONT.)

- No beneficiary or loan servicer that is a federally insured depository institution that certifies that it has issued fewer than 250 notices of default in the preceding year has to pay into the account. **The first certification must be made no later than May 14, 2011**. Note that for purposes of these requirements, the "beneficiary" is the party that is the "holder" of the note secured by the trust deed. In other words, the servicer may not be the beneficiary. This means that if your institution is servicing loans for FNMA, FHLMC, or another third party, and also servicing loans for your own institution's portfolio, your institution may be eligible for the exemption with respect to portfolio loans even though FNMA and FHLMC would not be eligible for the exemption. In evaluating this issue, it is important to review your servicing agreements and procedures to determine who is the "holder" of the promissory notes for such loans. Call us if you'd like assistance in this process.

- Each beneficiary that is not eligible for the exemption must determine the number of owner-occupied residential real properties for which notices of default were issued between January 14, 2011 and April 14, 2011 and **by May 14, 2011**, must remit to the Department a one-time sum of $250 multiplied by the number of properties.

If you have questions regarding any part of the Washington Foreclosure Fairness Act, please do not hesitate to contact one of our foreclosure attorneys.

FARLEIGH WADA WITT

FORECLOSURE ATTORNEYS:

Valerie Tomasi .....*vtomasi@fwwlaw.com*

Michelle Bertolino .....*mbertolino@fwwlaw.com*

Kim McGair .....*kmcgair@fwwlaw.com*

Jason Ayres .....*jayres@fwwlaw.com*

Rick Baroway .....*rbaroway@fwwlaw.com*

Marisol McAllister ..... *mmcallister@fwwlaw.com*

Eleanor DuBay .....*edubay@fwwlaw.com*

Portland Office:

121 SW Morrison Street, Suite 600
Portland, OR 97204
Phone: 503.228.6044
Fax: 503.228.1741

Central Oregon Office:

750 Buckaroo Trail, Suite 203
Sisters, OR 97759
Phone: 541.549.4958
Fax: 541.549

www.fwwlaw.com

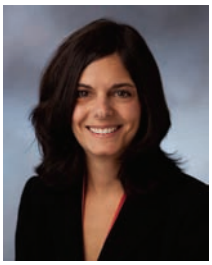
Valerie Tomasi
503.228.6044
vtomasi@fwwlaw.com

Michelle Bertolino
503.228.6044
mbertolino@fwwlaw.com

Kim McGair
503.228.6044
kmcgair@fwwlaw.com

Jason Ayres
503.228.6044
jayres@fwwlaw.com

Rick Baroway
503.228.6044
rbaroway@fwwlaw.com



Marisol McAllister
503.228.6044
mmcallister@fwwlaw.com

Eleanor DuBay
503.228.6044
edubay@fwwlaw.com