



# Ohio Legislative Service Commission

## Bill Analysis

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### **Am. Sub. H.B. 3**

128th General Assembly  
(As Passed by the House)

**Reps.** Foley and Driehaus, Heard, Skindell, Stewart, Yuko, Hagan, Harris, B. Williams, S. Williams, Yates, Luckie, Patten, Slesnick, Ujvagi, Letson, Harwood, Boyd, Weddington, Winburn, Pryor, Murray, Mallory, Domenick, DeBose, Brown, Chandler, DeGeeter, Dyer, Gerberry, Koziura, Lundy, Pillich

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## **BILL SUMMARY**

- Declares a six-month moratorium on residential mortgage foreclosure judgments and sales of occupied properties, establishes that mortgage and related payments must be made during the moratorium, and provides for discontinuance of the moratorium with respect to particular properties.
- Modifies court procedures and requirements with respect to residential mortgage foreclosures with additional duties given to the clerk of courts regarding complaints filed to initiate residential mortgage foreclosure actions.
- Requires a county auditor to use the sale price from a short sale as the true value of a property for taxation purposes.
- Establishes the Residential Mortgage Servicers Registration Act to be administered by the Superintendent of Financial Institutions of the Department of Commerce.
- Requires mortgage servicers to obtain a certificate of registration and sets forth business standards, responsibilities to borrowers, the requirement of civil and criminal background checks, civil and criminal penalties for violations, and a \$1,000 annual fee.
- Requires mortgage servicers to provide notice and information to property owners regarding resources and rights before a mortgage foreclosure action may be filed.
- Requires mortgage servicers to include with the filing of a complaint for a residential mortgage foreclosure, information regarding the holder of the note and the right to file for a foreclosure action.

- Requires that a filing fee of \$750 and a current appraisal accompany the filing for a residential mortgage foreclosure action.
- Requires the Director of Commerce to establish the State Foreclosure Prevention Project and to annually report to the General Assembly findings on foreclosures and mitigation results of that project.
- Requires the Director of Commerce to establish, and the Administrative Director of the Ohio Supreme Court to implement, the state foreclosure database for the purpose of tracking residential mortgage foreclosure information.
- Requires mortgage servicers to provide information regarding filings, adherence to notice requirements, and modification agreements with a borrower to the Administrative Director of the Supreme Court for inclusion in the state foreclosure database.
- Establishes the Foreclosure Prevention Revolving Trust Fund in the state treasury and requires that money in the fund be distributed to counties, the Ohio Housing Trust Fund, and the Department of Commerce to provide grants for preventing and mitigating problems related to foreclosure.
- Requires the Director of Commerce to adopt rules to implement comprehensive minimum loan modification standards for purposes of advising mortgage servicers of modification alternatives and for evaluating the loan modification efforts of mortgage servicers.

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## CONTENT AND OPERATION

### Overview of the bill

The bill modifies court procedures and requirements with respect to residential mortgage foreclosure actions, declares a six-month moratorium on residential mortgage foreclosure judgments and sales, enacts the Special Program to Reduce Foreclosures Act which, among other provisions, requires mortgage servicers to provide notice and information to property owners, and enacts the Residential Mortgage Servicers Registration Act which requires servicers to register with the Superintendent of Financial Institutions of the Department of Commerce, undergo civil and criminal background checks, and maintain standards of operation that comply with the bill's requirements. The "**COMMENT**" section at the end of this analysis contains a brief discussion of current mortgage servicers and the mortgage foreclosure process in Ohio.

The bill applies to every "**residential mortgage**," which is defined as an obligation to pay a sum of money evidenced by a note and secured by a lien upon real property located within this state containing four or fewer residential units, and includes such an obligation on a residential condominium or cooperative unit. (R.C. 1323.01(A)(3).)

### I. Moratorium

The bill declares a six-month moratorium on mortgage foreclosure actions on residential properties occupied by the owner of the property or the tenant of that owner, to commence on the effective date of the bill. (R.C. 2308.03(A).) The bill repeals the moratorium six months after the bill's effective date. (Section 3.)

The moratorium does not apply to any of the following:

- Unoccupied properties;
- Foreclosed properties that have been sold at auction and are awaiting a court's confirmation of the sale;
- A foreclosure action that a depository institution files if that depository institution is headquartered in Ohio, has \$2.5 billion or less in total assets, and originated and services the mortgage loan being foreclosed;
- A foreclosure action that a credit union files. (R.C. 2308.03(A)(2).)

Upon the filing of a residential mortgage foreclosure action, the clerk of courts must send with the summons to the borrower a notice that a moratorium is in effect and that proceedings have been stayed to give the borrower an opportunity to negotiate a

workout or modification of the mortgage loan with the mortgage servicer. The same notice must be sent to all qualified defendants in foreclosure actions currently pending as of the bill's effective date. (R.C. 2308.03(B).) The moratorium does not prohibit the filing of new foreclosure actions, and at any time during the moratorium, a borrower may petition the court to request that the foreclosure action on the borrower's property proceed as if there were no moratorium (R.C. 2308.03(A)(3) and (E)). Also during the moratorium, nothing prevents the clerk of courts or the plaintiff from taking any action to perfect service of the summons (R.C. 2308.03(F)).

### **Payments required during moratorium**

During the moratorium, a foreclosed borrower must make payments each month in an amount equal to one-half of the monthly payment that was in effect at the time the foreclosure action was filed, or other amount that the judge determines is just and equitable. The payments will be allocated first for taxes and insurance, if the borrower's mortgage loan required such payments into escrow, then to interest and any remaining amounts to principal. The borrower must make the payments to the mortgage servicer to whom the borrower made payments at the time the foreclosure action was filed. A mortgage servicer cannot refuse to accept these payments from the borrower. (R.C. 2308.03(C).)

If a borrower fails to make the required payments, 30 days after a missed payment, the party who filed the action may petition the court for the foreclosure action to resume and that action must resume as if there were no moratorium. During the time of the moratorium, the borrower must make a good faith effort to maintain the property and, upon a 24-hour written notice from the servicer, must grant entry to the servicer or other representative to inspect the property. (R.C. 2308.03(D) and (G).)

### **Extraordinary measure**

The bill sets forth the General Assembly's enactment of the moratorium (R.C. 2308.03) as an extraordinary measure necessary to respond to an emergency situation created by the mortgage foreclosure crisis in the state. The bill states that the high rate of residential foreclosures is proving harmful to families, lenders, and communities alike. The stated purpose of enacting the moratorium is to mitigate the very negative impact of the current situation and to preserve property values by providing time for solutions to begin to have an impact. These solutions that need time to be effective include implementing federal and state initiatives that provide assistance and guidance to homeowners, lenders, and communities. (Section 5.)

## II. The foreclosure process

### Clerk of courts duties

The bill prohibits a clerk of courts from accepting a complaint to initiate foreclosure on a residential mortgage loan unless the filing contains a copy of the notices and information the bill requires servicers to provide to borrowers (under R.C. 1323.02). The copies of these notices and information are to be filed under seal in connection with the foreclosure, along with a certification by the filer that all required notices and information have been provided and that the requisite periods of time have elapsed. The clerk also must provide the owner of the property a notice of the six-month moratorium established by this bill, so long as the moratorium remains in effect. (R.C. 2303.33(A) and (C).)

The bill gives a court or judicial officer access to the state foreclosure database (see "**State foreclosure database**," below) that the bill establishes to confirm information provided by the person filing the complaint. A materially inaccurate statement in the filer's certification is cause for dismissal of the action without prejudice and for payment by the filing party of costs incurred by the borrower in defending the foreclosure proceeding. (R.C. 2303.33(B).)

Within three business days of issuing a writ of execution in a residential mortgage foreclosure action, the clerk of court entering that writ must file information of that action with the Administrative Director of the Ohio Supreme Court for inclusion in the state foreclosure database. The filing must contain the name and address of the borrower, the date of the writ, and the name of the mortgage servicer or mortgage holder that filed the complaint to initiate the foreclosure action. (R.C. 2303.33(D).)

### Requirements for filing complaint

The bill requires that, when filing a complaint to initiate a residential mortgage foreclosure action, the person accompany that complaint with (1) a writing (see "**Provision of mortgage information**," below), (2) an appraisal of the property, (3) a certification that all notice requirements have been met, and (4) a payment of a filing fee of \$750. The bill states that, by filing a foreclosure action, the attorney avers that the attorney has a direct line of communication with, and can negotiate on behalf of, the plaintiff and the plaintiff's loan servicer (R.C. 2308.02(B)).

### Provision of mortgage information

A writing providing mortgage information must accompany the foreclosure complaint that is filed. That writing must contain all of the following:

- A statement setting forth the name of the holder of the note and asserting that the named holder is the true party in interest with a right to file the action;
- A statement as to whether the mortgage note has been securitized and if so, the identity of any mortgage-backed security that holds the loan and the name of the trustee of that mortgage-backed security;
- A statement as to whether the residential property is occupied and the date that its occupancy status last was assessed;
- Evidence that a check for \$750 has been transmitted to the Department of Commerce or evidence that the person is exempt from the filing fee (for exemptions, see "**Filing fee**," below). (R.C. 2308.02(A).)

### **Appraisal**

The complaint must be accompanied by a copy of an appraisal of the property, conducted within the prior three months by an appraiser who is certified or licensed pursuant to the Ohio Appraisers Law (R.C. Chapter 4763.) to perform residential appraisals. (R.C. 2308.02(C).)

### **Certification that notice requirements have been met**

In any foreclosure on a residential mortgage loan, the filing must contain a certification by the filing party that the notice and information the servicer is required to provide to the borrower prior to the filing were provided and that the required periods of time have elapsed (R.C. 2303.33(A)).

### **Filing fee**

The bill requires that a filing fee be charged any mortgage servicer that files a complaint to initiate a foreclosure action that involves a residential mortgage loan. The fee is to be paid simultaneously with filing a complaint in a court by transmission (presumably directly to the Department of Commerce) of a check in the amount of \$750 payable to the Department of Commerce for deposit into the trust fund the bill establishes. The bill prohibits the servicer from adding the amount of the fee to the amount the borrower owes the creditor or seek recovery of this cost from the borrower. The bill prohibits a court from granting a judgment of foreclosure to any servicer of a residential loan unless that servicer provides evidence to the court that the servicer has paid the fee as the bill requires.

The Director of Commerce must establish an accounting system to track the county that corresponds to each \$750 filing fee that is paid. The accounting system

must be used to determine the share of the funds distributed to each county. The filing fee may not be charged with respect to a filing for a foreclosure action that meets any of the following criteria:

- A filing on an unoccupied property;
- A filing on a property for which a filing fee was paid during the past 24 months with respect to the same mortgage loan;
- A filing by a credit union;
- A filing by a depository institution if that depository institution is headquartered in Ohio, has \$2.5 billion or less in total assets, and originated and services the mortgage loan being foreclosed. (R.C. 1323.11.)

### **Inspection of vacant properties in foreclosure**

If a plaintiff in a foreclosure suit has a reasonable suspicion that the property that is the subject of the foreclosure has been vacated, the plaintiff may request that a law enforcement officer having jurisdiction over the subject property inspect the property and take any other reasonable action to ascertain if the property has been vacated, in addition to any other rights or remedies a party to a foreclosure suit may have. A village, city, township, or county may set a fee for the property inspection.

The law enforcement officer conducting the inspection must issue a written report to the plaintiff stating an opinion as to whether or not the property has been vacated. An officer acting in good faith is immune from suit for any actions undertaken during such inspection. After the property is inspected, the plaintiff may request an *ex parte* order or other order from the court granting the plaintiff sole possession of the property. If the inspection report indicates that the property has been vacated, the plaintiff may take immediate possession of the property, but must request an order of possession from the court within five business days after taking possession. (R.C. 2308.021.)

### **Tax auditor valuation of short sale properties**

Existing law requires each county auditor, from the best sources of information available, to determine, as nearly as practicable, the true value of each separate tract, lot, or parcel of real property and of buildings, structures, and improvements located thereon within the county. In determining the true value of any tract, lot, or parcel of real estate, if such tract, lot, or parcel has been the subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time, either

before or after the tax lien date, the auditor must consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes.

Under the bill, the auditor must treat a short sale as an arm's length sale for taxation purposes, and thus the sale price from the short sale becomes the true value of the property for taxation purposes (R.C. 5713.03). The bill defines a "short sale" as a transaction in which the property that is the subject of a mortgage transaction is sold for an amount that is less than the amount of the debtor's outstanding obligation under the mortgage transaction (R.C. 1323.01(A)(9)).

### **III. The Special Program to Reduce Foreclosures Act**

The Special Program to Reduce Foreclosures Act establishes requirements of mortgage servicers with respect to information provided to borrowers, including (1) notifying borrowers prior to a foreclosure action of resources available to avoid foreclosure, and (2) the borrower's right to stay in the property during the foreclosure action and possibly after.

The bill establishes the State Foreclosure Prevention Project (see "**State Foreclosure Prevention Project**," below), under the Director of Commerce, and requires the development of a database system to be implemented and maintained by the Administrative Director of the Ohio Supreme Court to track residential mortgage foreclosure information and to promote the efforts of the Foreclosure Prevention Project. The bill requires the Director of Commerce annually to report to the General Assembly on foreclosures in Ohio and the actions and efforts of the Foreclosure Prevention Project. (R.C. 1323.01 to 1323.11.)

#### **Servicer duty to inform borrower**

The bill requires a mortgage servicer, at least 60 days prior to filing a complaint to initiate a residential mortgage foreclosure action on a property occupied by an owner or a tenant of that owner, to provide the borrower with a notice to inform the borrower of the amount due to the lender and the availability of resources to avoid foreclosure. The mortgage servicer must mail the notice to the last known address of the borrower and must evidence the mailing by a certificate of mailing from the United States postal service.

The notice must be on a form prescribed by the Director of Commerce and must include all of the following:

- An itemization of all past due amounts causing the loan to be in default;
- An itemization of any other charges that the borrower must pay in order to be current on loan payments;

- A statement that the borrower may have options available other than foreclosure, and that the borrower may discuss available options with the mortgage lender, the mortgage servicer, or a counselor approved by the United States Department of Housing and Urban Development;
- The address, telephone number, and other contact information for the mortgage lender, the mortgage servicer, or an agent for either of them who is authorized to work with the borrower to avoid foreclosure;
- The address, telephone number, and other contact information for the Department of Job and Family Services, including the following web site address: [www.OhioMeansJobs.com](http://www.OhioMeansJobs.com);
- The name, address, telephone number, and other contact information for one or more United States Department of Housing and Urban Development-approved counseling agencies operating to assist borrowers in Ohio to avoid foreclosure;
- The address, telephone number, and other contact information for the consumer complaint sections of the Division of Financial Institutions in the Ohio Department of Commerce and the Ohio Attorney General;
- The following information prominently displayed:  
  
"YOU HAVE THE RIGHT TO REMAIN IN THIS PROPERTY DURING THE FORECLOSURE PROCEEDINGS AND AFTER THE SHERIFF'S SALE UNTIL A COURT CONFIRMS THE SALE.  
  
ADDRESS OF PROPERTY: .....";
- Other information the Director considers necessary and includes on the form. (R.C. 1323.02.)

### **Servicer duty to file information for database**

Under the bill, within three business days after mailing the required notices, a mortgage servicer is required to file certain information with the Administrative Director of the Ohio Supreme Court, who is required to keep the information in the database the bill establishes. The information includes the date the notice was mailed to the borrower and, unless prohibited by a state or federal law, any additional information the Administrative Director requests for review as part of the State Foreclosure Prevention Project (see "**State Foreclosure Prevention Project**," below). (R.C. 1323.04(A).)

The bill also requires that, within seven days after entering into a modification agreement, the servicer notify the Administrative Director of the nature and terms of any agreement with a borrower to do any of the following (R.C. 1323.04(B)):

- Reduce or forego any fees or arrearages, including acceptance of a deed in lieu of foreclosure;
- Alter the terms of the residential mortgage loan agreement by a reduction in the interest rate, a lessening of the monthly payment, an increase in the term for repayment, a deferment of interest or other payment, or an alteration of a variable rate adjustment date;
- Refinance the loan under new terms.

These filings and notices must be made in an electronic format prescribed by the Administrative Director and must contain the name and address of the borrower, the name and address of the mortgage servicer, and the name and address of the holder of the mortgage. The Administrative Director must include all of the information received in the state foreclosure database (see "**State foreclosure database**," below), and must make the information available for review by the State Foreclosure Prevention Project (see "**State Foreclosure Prevention Project**," below). (R.C. 1323.04(C) and (D).)

### **State Foreclosure Prevention Project**

The bill requires the Director of Commerce to establish the State Foreclosure Prevention Project pursuant to certain specifications. The purpose of the project is to collect residential mortgage foreclosure information, track loss mitigation efforts, encourage viable loan modifications, and seek solutions to avoid foreclosures for residential mortgage loans. In developing the project, the Director may include input from the United States Department of Housing and Urban Development-approved housing counselors, community organizations, state agencies including the Ohio Attorney General, mortgage lenders, mortgage servicers, and any other appropriate persons. (R.C. 1323.06.)

### **State foreclosure database**

The bill also establishes the state foreclosure database to track residential mortgage foreclosure information. The bill requires the Director of Commerce to design and develop the database, in consultation with the Administrative Director of the Ohio Supreme Court, in a manner that promotes the efforts of the State Foreclosure Prevention Project. The Administrative Director of the Ohio Supreme Court is required to implement the database not later than October 1, 2009. (R.C. 1323.07(A).)

Access to the information in the database is limited to the Administrative Director of the Ohio Supreme Court, the Director of Commerce, the Superintendent of Financial Institutions, the Ohio Attorney General, and, for the purposes the bill sets forth, the clerk of a court of common pleas. Each listed individual also may designate a representative to have access to the state foreclosure database. (R.C. 1323.07(B).)

Any information provided for inclusion in the state foreclosure database is exclusively for the use and purposes of the State Foreclosure Prevention Project. The database is not a public record subject to R.C. 149.43 and the information provided for and included in the database may not be disclosed except as the bill provides. However, a mortgage servicer is to have access to the information submitted with respect to its own loans. (R.C. 1323.07(C).)

The bill stipulates that providing information for the database does not violate any state law pertaining to financial privacy and that a mortgage servicer is held harmless for any alleged breach of privacy rights of a borrower with respect to information the mortgage servicer provides in accordance with the bill's requirements. (R.C. 1323.07(D).)

### **Report to the General Assembly**

The bill requires the Director of Commerce annually to submit a report to the General Assembly describing the operation of the State Foreclosure Prevention Project. The Director must present information in the report in aggregate form, and may include the number of borrowers helped, the effectiveness of the funds in preventing foreclosure, recommendations for further efforts needed to reduce foreclosures, and any other aggregated information the Director determines is pertinent or that the General Assembly requests. (R.C. 1323.08(A).)

In preparing the report, the Director is to review information in the state foreclosure database to determine all of the following (R.C. 1323.08(B)):

- Whether the loss mitigation programs and efforts effectively address loan default issues;
- The most effective means for establishing successful foreclosure alternatives including loan modification programs;
- Which procedures best comport with the servicer's obligation to investors to lessen losses resulting from borrower defaults.

## Evaluation of mortgage servicers

Using the information in the state foreclosure database, the Superintendent of Financial Institutions in the Department of Commerce is to determine whether any mortgage servicer has failed to provide required disclosures or information or is not acting in good faith to provide borrowers with an effective method to discuss payment options for past due amounts and alternatives to foreclosure. If the Superintendent determines that a mortgage servicer has violated any of these requirements, that conduct or failure may be considered when determining the character and general fitness of the mortgage servicer for its licensure or certificate of registration as a mortgage servicer under the bill or under R.C. Chapter 1321. (R.C. 1323.09.)

## Foreclosure prevention revolving trust fund

The bill establishes in the state treasury the Foreclosure Prevention Revolving Trust Fund, comprised of moneys collected or accruing to the trust fund. Each fiscal quarter the Director of Commerce is to distribute the amounts in the trust fund as follows:

- 10% to the Administrative Director of the Supreme Court, to establish, operate, and maintain the state foreclosure database and to fund foreclosure mediation programs in the state;
- 10% to the Department of Commerce, which amount may be used for (1) grants to counseling foreclosure prevention entities for the purpose of maintaining or expanding foreclosure prevention counseling and related services and activities to assist homeowners to prevent foreclosure, (2) grants to individuals or counseling entities for the purpose of providing emergency foreclosure prevention assistance loans, (3) loans and grants to nonprofit or local government entities to provide relocation assistance or acquire mortgage loans or properties from creditors in order to restructure the mortgage loans or restore the properties to productive use, (4) funding to establish, operate, and maintain the state foreclosure database, (5) funding for the expenses of the State Foreclosure Prevention Project, as well as the associated costs the Superintendent of Financial Institutions and the Director of Commerce incur related to outreach and education and to support investigation of mortgage fraud and fraudulent foreclosure prevention schemes in the state of Ohio.
- 37.5% to the Department of Development for deposit into the Ohio Housing Trust Fund, and 37.5% to the boards of county commissioners, to be distributed on a pro rata basis of the funds submitted with respect to foreclosure filings in each county. The money must be used to provide

- (1) grants to counseling foreclosure prevention entities for the purpose of maintaining or expanding foreclosure prevention counseling and related services and activities to assist homeowners to prevent foreclosure,
  - (2) grants to individuals or counseling entities for the purpose of providing emergency foreclosure prevention assistance loans,
  - (3) loans and grants to nonprofit or local government entities to provide relocation assistance or acquire mortgage loans or properties from creditors in order to restructure the mortgage loans or restore the properties to productive use,
  - (4) foreclosure prevention services,
  - (5) amelioration of dilapidated and vacant properties,
  - (6) assistance with the development of county land banks,
  - (7) other activities as they relate to foreclosure.
- 5% to the Attorney General for investigation of illegal activities associated with mortgage fraud and foreclosure prevention fraud, which funds the Attorney General may use to contract with local public prosecutors engaged in the investigation of foreclosure prevention fraud.

The Director of Development and boards of county commissioners are required to establish rules governing the procedures to qualify counseling and foreclosure prevention entities, nonprofit entities, and individuals for loan assistance to receive moneys from the trust fund to carry out the fund's purposes. Any moneys distributed to the Supreme Court but not used for the stated purposes must be reallocated to the Department of Commerce for deposit into the trust fund. Any amount deposited in the fund but not allocated by the end of the fiscal year is available for allocation in the subsequent fiscal year. (R.C. 1323.10.)

### **Director of Commerce's rule-making and other authority**

The bill permits the Director of Commerce to act through staff and those under the Director's control, including the Deputy Superintendent for Consumer Finance. The Director may adopt rules, in accordance with the Administrative Procedure Act (R.C. Chapter 119.), for the administration and enforcement of the provisions of the Special Program to Reduce Foreclosures Act. (R.C. 1323.01(C).)

## **IV. The Residential Mortgage Servicers Registration Act**

### **Overview**

The proposed "Residential Mortgage Servicers Registration Act" is comprised of R.C. 1323.20 to 1323.37 plus a criminal penalty section, R.C. 1323.99. The act requires mortgage servicers to be registered and generally establishes standards for, and regulates the behavior of, mortgage servicers. It provides civil and criminal penalties for violations.

The bill does not apply to any of the following (R.C. 1323.20(B)):

- Any entity that is chartered and lawfully doing business as a bank, savings bank, trust company, savings and loan association, or credit union under the authority of any law of this state, another state, or the United States;
- Life, property, or casualty insurance companies licensed to do business in this state;
- Any attorney or law firm acting on behalf of any mortgage note holder or mortgage servicer when acting in connection with the practice of law in this state, with certain exceptions (see "**Exemptions from mortgage servicer registration**," below);
- Any political subdivision, or any governmental or other public agency, corporation, or instrumentality in or of the United States or any state;
- An institution of higher education;
- A debt collector acting under the name of, and as agent for, a mortgage servicer registrant to collect a debt in default.

### **Exemptions from mortgage servicer registration**

Mortgage lenders registered under R.C. 1321.52 and mortgage brokers registered under R.C. 1322.02 are exempt from the registration requirements of the Residential Mortgage Servicers Registration Act, but must comply with the following in connection with the servicing of residential mortgage loans (R.C. 1323.20(C)):

- R.C. 1323.33(C) (prohibition on false or misleading statements of a material fact, omissions of statements required by state or federal law, or false promises regarding a material fact, through advertising or other means, or engaging in a continued course of misrepresentations);
- R.C. 1323.33(D) (prohibition on engaging in conduct that constitutes improper, fraudulent, or dishonest dealings);
- R.C. 1323.33(F) (prohibition on knowingly making, proposing, or soliciting fraudulent, false, or misleading statements on any mortgage servicing document or on any document related to an accounting of payments remitted or disbursed);

- R.C. 1323.33(G) (prohibition on knowingly instructing, soliciting, proposing, or otherwise causing a borrower to sign in blank a document);
- R.C. 1323.34 (servicer duties of good faith and fair dealing);
- R.C. 1323.35 (general prohibitions with respect to servicing a loan);
- R.C. 1323.36 (standards for collection of money).

Any violation of these sections is deemed an unfair or deceptive act or practice under the Consumer Sales Practices Act and may result in administrative action and penalties imposed by the Superintendent of Financial Institutions.

Any attorney or law firm primarily engaged in debt collection must comply with the following when acting as a mortgage servicer, notwithstanding the general exemption from the Residential Mortgage Servicers Registration Act (R.C. 1323.20(D)):

- R.C. 1323.33(D) (prohibition on engaging in conduct that constitutes improper, fraudulent, or dishonest dealings);
- R.C. 1323.36 (standards for collection of money).

Any violation by an attorney of these sections, in connection with any debt collection activity that is not considered the practice of law, is also deemed to be an unfair or deceptive act or practice.

## Registration requirements

Under the bill, "**mortgage servicer**" or "**servicer**" means a person who engages directly or indirectly, whether for compensation, gain for another, or on the person's own behalf, in the business of receiving scheduled periodic payments from a borrower pursuant to the terms of a residential mortgage loan, including amounts received for deposit in an escrow account, and applying those payments received toward principal, interest, and other obligations of the borrower including amounts to be paid from an escrow account (R.C. 1323.01(A)).

"Mortgage servicer" includes a person who makes or holds a loan if that person also services the loan. "Mortgage servicer" does not include any of the following:

(1) The Federal Deposit Insurance Corporation or the Resolution Trust Corporation, in connection with assets acquired, assigned, sold, or transferred pursuant to the "Federal Deposit Insurance Corporation Act," or as receiver or conservator of an insured depository institution.

(2) The Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Resolution Trust Corporation, or the Federal Deposit Insurance Corporation, in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by:

(a) Termination of the contract for servicing the loan for cause;

(b) Commencement of proceedings for bankruptcy of the servicer;

(c) Commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer or an entity by which the servicer is owned or controlled.

(3) The National Credit Union Administration, in connection with assets acquired, assigned, sold, or transferred pursuant to federal law, or as a receiver or conservator of an insured credit union.

(4) Any political subdivision or any public agency of the United States or any state. (R.C. 1323.01(A)(1).)

Under current law, a person must be registered as a mortgage lender under R.C. 1321.52 if the person "engages in the business of lending or collecting the person's own or another person's money, credit, or choses in action for such loans." The bill removes the registration requirement under the Mortgage Loan Law and includes those persons under the definition of "mortgage servicers" to whom the bill applies. (R.C. 1321.52<sup>1</sup> and 1323.01.)

The bill requires a person who performs mortgage servicing to be registered as a mortgage servicer and have a certificate of registration from the Superintendent of Financial Institutions, if the person does either of the following (R.C. 1323.21(A)):

- Engages in the business of collecting money, credit, or choses in action for residential mortgage loans or otherwise acts as a mortgage servicer;
- Collects accelerated mortgage payments from a biweekly or other accelerated payment plan that the person operates, arranges, or offers to arrange for compensation or gain in connection with a residential mortgage loan.

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<sup>1</sup> The bill proposes other changes to this section that were already enacted by Am. Sub. H.B. 1 of the 128th General Assembly.

The bill includes persons required to be licensed or registered under the Mortgage Servicers Registration Act under the definition of a "consumer finance company" (see **COMMENT 3**) (R.C. 1181.05 and 1181.21).

### **Servicing without registration**

Under the bill, any person who services a residential mortgage loan in willful violation of the bill's registration requirement, after receiving written notice of the violation from the Superintendent or a court, may not collect any amounts as interest or charges on that loan. Any amounts that are collected must be credited as a principal reduction to the loan. (R.C. 1323.21(B).)

### **Servicing with expired registration**

When a registration expires for any reason and the former registrant continues to service residential mortgage loans in violation of the bill's prohibition, the Superintendent may take administrative action, including action on any subsequent application for a certificate of registration. A servicer with an expired registration may not collect, charge, or retain any late fee, bad check charge except as incurred, charge related to default, cost to realize on its security interest, or prepayment penalty on any residential mortgage loan unless that servicer applies to the Superintendent for a registration renewal and a certificate of registration prior to the first day of August of the year the registration expires and the Superintendent approves that application. (R.C. 1323.21(C).)

### **Servicing in association with an exempt business**

The bill prohibits any person from conducting the business of a mortgage servicer in association with any exempt business if the Superintendent has ordered that exempt business, in writing, to desist from conduct that the Superintendent found to be a mere conduit for the mortgage servicer and that the association of the servicer and the exempt business is intended to conceal an evasion of the Residential Mortgage Servicers Registration Act. (R.C. 1323.21(D).)

### **Registration application procedures**

An application for registration as a mortgage servicer must be in writing, under oath, and in the form the Superintendent prescribes. It must contain an undertaking by the applicant to abide by the Residential Mortgage Servicers Registration Act, in addition to any other information that the Superintendent requires. Applicants that are foreign corporations must obtain and maintain a license pursuant to the Ohio Foreign Corporation Law (R.C. Chapter 1703.) before seeking registration or registration renewal as a mortgage servicer. (R.C. 1323.22(A).)

On the application, the applicant must designate an employee or owner as the applicant's operations manager, to be responsible for the everyday operations, compliance requirements, and management of the applicant. An operations manager may not be employed by any other mortgage servicer while acting as operations manager. The operations manager an applicant designates must be acceptable to the Superintendent and must have at least three years' experience in the mortgage, collections, servicing, or lending field. (R.C. 1323.01(A)(5) and 1323.22(C).)

### **Registration fees**

An applicant for registration must pay a nonrefundable \$200 investigation fee, a nonrefundable \$1,000 annual registration fee, and any additional fee required by law. If the application involves an investigation outside this state, the applicant may be required to advance sufficient funds to pay any of the actual expenses, when it appears that these expenses will exceed \$200. The Superintendent must furnish an itemized statement of any expenses that the applicant is required to pay and may not issue a certificate of registration unless all the required fees have been submitted. (R.C. 1323.22(B).)

The Superintendent may consider an application for registration as a mortgage servicer withdrawn if that application does not contain all of the required information and the applicant does not submit that information within 90 days after the Superintendent requests the information in writing. (R.C. 1323.22(D).)

The Superintendent must deposit any licensing fee, charge, or fine received pursuant to the Residential Mortgage Servicers Registration Act into the Consumer Finance Fund in the state treasury, unless otherwise specified by law (R.C. 1323.22(E)).

### **Investigations**

Any investigation the Superintendent undertakes with respect to an application for registration as a mortgage servicer must include a civil records check of the applicant, including any individual whose identity is required to be disclosed in the application. The investigation also shall include a criminal records check by the Superintendent of the Bureau of Criminal Identification and Investigation at the time of the initial application and every five years thereafter, or upon a change of control of the registrant if the persons acquiring control have not had a criminal records check submitted to the Superintendent of Financial Institutions within the past five years. Where the applicant is a business entity, the Superintendent may require a civil and criminal background check of those persons that in the Superintendent's determination have the authority to direct and control the applicant's operations. (R.C. 1323.23(A).)

The Superintendent of the Bureau of Criminal Identification and Investigation, or a vendor that Superintendent approves, is to conduct the criminal background check based on the applicant's fingerprints or, if fingerprints are unreadable, based on the applicant's social security number in accordance with the usual procedure for such checks. The bill also requires the Superintendent of Financial Institutions to request that criminal record information from the Federal Bureau of Investigation be obtained as part of the criminal records check. The applicant must pay any fee necessary for the criminal background check. (R.C. 109.572 and 1323.23(B) and (C).)

### **Issuance or denial of certificate of registration**

The bill directs the Superintendent of Financial Institutions to issue a certificate of registration as a mortgage servicer to an applicant if the Superintendent finds that the applicant's financial responsibility, experience, character, and general fitness command the confidence of the public and warrant the belief that the business will be operated honestly and fairly in compliance with the purposes of the registration law and the rules promulgated under it, and that the applicant has the requisite bond or applicable net worth. (R.C. 1323.24(A).)

If the Superintendent finds an applicant does not meet those conditions, the bill requires the Superintendent to issue a notice of intent to deny an application for registration or renewal and to notify the applicant of that denial, the grounds for the denial, and the applicant's opportunity to be heard on the action in accordance with the Administrative Procedure Act. (R.C. 1323.24(B).)

### **Expiration of registration**

All certificates of registration issued pursuant to the bill expire on the first day of July next after a certificate's issue, and on the first day of July in each succeeding year unless renewed by filing a renewal application and payment of an annual fee and any additional fee required by law, on or before the last day of June of each year (R.C. 1323.24(C)).

### **Registration renewal**

To renew a registration as a mortgage servicer, a registrant must file a renewal application on a form the Superintendent prescribes, along with any additional information that the Superintendent requires, on or before the last day of June. As a condition of renewal, a registrant must provide proof that the designated operations manager meets the criteria for initial approval and that the mortgage servicer meets the minimum standards for issuance of a certificate of registration. The bill prohibits the Superintendent from granting any renewal if the applicant's certificate of registration is subject to an order of suspension, revocation, or an unpaid and past due fine the

Superintendent has imposed. If an application for renewal of a certificate of registration does not contain all of the required information, and if the registrant does not submit that information to the Superintendent within 90 days after the Superintendent requests the information in writing, the Superintendent may consider the application withdrawn. (R.C. 1323.25.)

### **Additional investigation authority**

The bill enables the Superintendent, at any time there is a change of 5% or more in the ownership of a registrant, to make any investigation necessary to determine whether any fact or condition presently exists that, if it had existed at the time of the original application for a certificate of registration, it would have warranted denying the registration. In such a case, the Superintendent, in accordance with the Administrative Procedure Act, may revoke the registrant's certificate of registration. (R.C. 1323.26.)

### **Conditions of certification**

Each place of business to which borrowers are regularly directed to remit payment must display its own certificate of registration. The Superintendent may issue additional certificates of registration to the same person for additional places of business upon compliance with the requirements governing the issuance of a single certificate. A registrant is required to keep each certificate of registration conspicuously posted in each place of business. A certificate of registration is not transferable or assignable.

Any change in the place of business to a location outside the original municipal corporation requires a new certificate of registration. A registrant who makes such a change of location must submit a new application, pay the registration fee and, if the Superintendent requires, pay an investigation fee of \$200. The registrant must have the new certificate before operating in the new location.

A registrant who wishes to change its place of business within the same municipal corporation must give written notice of the change in advance to the Superintendent, who must provide a certificate for the new address without cost.

A registrant that changes its name must give written notice of the change to the Superintendent prior to acting as a mortgage servicer under the new name. The bill directs the Superintendent to provide a certificate in the new name without cost. (R.C. 1323.27.)

## Asset and bonding requirements

The bill establishes bonding requirements for mortgage servicers and a separate set of requirements that applies only to mortgage servicers that arrange biweekly or other accelerated payment plans and collects payments under those plans.

General mortgage servicers are required to maintain at all times a net worth of at least \$250,000 and, for each additional certificate of registration beyond the first, assets of at least \$50,000 either in use or readily available for use in the conduct of the business. (R.C. 1323.28(A).)

A mortgage servicer who arranges biweekly or other accelerated payment plans and collects payments on those plans must maintain in effect at all times a corporate surety bond issued by a bonding company or insurance company authorized to do business in this state and file a copy of the bond with the Superintendent. The bill sets forth specific requirements of that bond. (R.C. 1323.28(B).)

The bill also makes changes to the Mortgage Loan Law regarding the bonding and net worth requirements of registrants under that law (R.C. 1322.05).<sup>2</sup>

Under the bill, a mortgage servicer must give the Superintendent notice by certified mail of any action a borrower brings against the servicer alleging injury by a violation of the Residential Mortgage Servicers Registration Act and of any judgment that is entered against the servicer by an injured borrower. The notice must provide details sufficient to identify the action or judgment, and be filed within ten days after the commencement of the action or notice to the servicer of entry of a judgment. (R.C. 1323.28(C)(1).)

The bill requires a corporate surety to give to the Superintendent notice of any payment by certified mail within ten days after it pays any claim or judgment, with details sufficient to identify the person and the claim or judgment paid. (R.C. 1323.28(C)(2).)

Whenever the penal sum of the corporate surety bond is reduced by one or more recoveries or payments, a servicer must furnish a new or additional bond so that the total or aggregate penal sum of the bond or bonds equals the sum required under the bill. Otherwise, the bill requires the surety to execute and furnish an endorsement reinstating the bond to the required penal sum. (R.C. 1323.28(D).)

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<sup>2</sup> Note that this section has subsequently been amended by Am. Sub. H.B. 1 of the 128th General Assembly.

The bill specifies that the liability of the corporate surety on the bond to the Superintendent and to any injured borrower is not affected in any way by any misrepresentation, breach of warranty, or failure to pay the premium, by any act or omission upon the part of the servicer, by the insolvency or bankruptcy of the servicer, or by the insolvency of the servicer's estate. The servicer must maintain in effect liability for any act or omission that occurs during the term of the corporate surety bond for at least two years after the date on which the corporate surety bond is terminated or canceled. (R.C. 1323.28(E).)

The bill prohibits the servicer and the corporate surety from cancelling the corporate surety bond except upon notice to the Superintendent by certified mail, return receipt requested. Any such cancellation is not effective prior to 30 days after the Superintendent receives the notice. (R.C. 1323.28(F).)

Any mortgage servicer that fails to comply with these asset and bonding requirements must cease acting as a servicer in this state until that servicer complies with the requirements (R.C. 1323.28(G)).

## **Superintendent's authority**

### **Adopt rules**

The bill authorizes the Superintendent of Financial Institutions, in accordance with the Administrative Procedure Act, to adopt rules to administer and enforce the Residential Mortgage Servicers Registration Act and to carry out the purposes of the Act (R.C. 1323.29(A)).

### **Investigate violations**

The Superintendent may investigate alleged violations of the Act or complaints concerning any such violation. In conducting an investigation, the Superintendent, by subpoena, may compel witnesses to testify in relation to any matter over which the Superintendent has jurisdiction, and may require the production or photocopying of any book, record, or other document pertaining to such matter. If a person fails to comply with the subpoena, or permit photocopying of any document subpoenaed, a court of common pleas, upon the Superintendent's application, must compel obedience by attachment proceedings for contempt or a refusal to testify. (R.C. 1323.29(B).)

### **Revoke, suspend, or refuse to renew registrations**

The bill enables the Superintendent to revoke, suspend, or refuse to renew any certificate of registration if the Superintendent finds any of the following (R.C. 1323.29(C)(1)):

- A violation of or failure to comply with any provision of the Residential Mortgage Servicers Registration Act or the rules adopted under it, under the Consumer Sales Practices Act (R.C. Chapter 1345.), federal debt collection laws, or any other law applicable to the business conducted under the registrant's certificate of registration;
- The registrant has been convicted of or pleads guilty or *nolo contendere* (no contest) in a domestic, foreign, or military court to any felony or any criminal offense involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, breach of trust, dishonesty, or drug trafficking, or any criminal offense involving money or securities;
- The registrant's certificate of registration, license, or comparable authority as a mortgage servicer has been revoked in any other state.

The revocation, suspension, or refusal to renew a registration does not impair the obligation of any pre-existing lawful contract if a mortgage servicer makes a good faith effort to promptly transfer its collection rights to a registrant or person exempt from registration. If the servicer does not make the requisite good faith effort, it is subject to additional monetary fines and legal or administrative action by the Superintendent. (R.C. 1323.29(C)(3).)

### **Impose monetary fines**

In addition to, or in lieu of, any revocation, suspension, or denial, the Superintendent may impose a monetary fine after an administrative hearing or in settlement of matters subject to claims. A fine of not more than \$1,000 may be imposed for each day a violation of the Residential Mortgage Servicers Registration Act or a rule adopted thereunder is committed, repeated, or continued.

In determining the amount of a fine to impose, the Superintendent may consider all of the following: the seriousness of the violation; the servicer's good faith efforts to prevent the violation; the servicer's history regarding violations and compliance with the Superintendent's orders; the servicer's financial resources; and any other matters the Superintendent considers appropriate. Monetary fines do not preclude any criminal fine imposed for a violation. All fines are to be paid to the Treasurer of State to the credit of the existing Consumer Finance Fund. (R.C. 1323.29(C)(2), (F), and (G).)

The powers available to the Superintendent to revoke and suspend certificates of registration or to impose fines do not limit a court's ability to impose a cease and desist order preventing any further business or servicing activity (R.C. 1323.29(C)(4)).

## **Apply to the court of common pleas for order to enjoin violations**

The Superintendent may apply to the court of common pleas for an order enjoining any violation of the Act. Upon a showing that a person has committed or is about to commit a violation, the court must grant an injunction, restraining order, or other appropriate relief. If the application to a court is for an order enjoining a person from acting as a registrant or mortgage servicer, the Superintendent may request, and the court may impose, a civil penalty for that unregistered or unlicensed conduct in an amount not to exceed \$5,000 per violation. (R.C. 1323.29(D).)

## **Issue cease and desist orders**

If the Superintendent determines that a person is engaged in, or is believed to be engaged in, activities that may constitute a violation of the Act, after notice and a hearing conducted in accordance with the Administrative Procedure Act, the Superintendent may issue a cease and desist order (R.C. 1323.29(E)).

## **Mortgage servicer responsibilities to maintain records and file reports**

The bill requires mortgage servicers to keep separate records pertaining to each loan serviced, preserve those records for so long as the servicer has responsibility for the loan, and retain copies of those records for at least four years, even if the servicer transfers the original copies for any reason. At any time responsibility for the loan is transferred to another servicer, the servicer who is ceasing responsibility must transfer all original loan documents and records to the servicer who is assuming responsibility for the loan. Any system of electronic imaging of required records must be approved by the Superintendent of Financial Institutions prior to its use, but at no time will such a system be a substitute for maintaining original documents. (R.C. 1323.30(A)(1).)

As often as necessary, the Superintendent may make or cause to be made an examination of records pertaining to those loans serviced for the purpose of determining whether the servicer is complying with the bill's provisions and of verifying any registrant's annual report (R.C. 1323.30(A)(2)).

The Superintendent may require each servicer to file each year a report under oath or affirmation, on forms the Superintendent supplies, concerning the business and operations for the preceding calendar year. Whenever a servicer operates two or more registered offices or whenever two or more affiliated servicers operate registered offices, a composite report of the group of registered offices may be filed in lieu of individual reports. These reports are not public records and are not open to public inspection. (R.C. 1323.30(B).)

## **Confidential information; public records**

The bill specifies as confidential information: (1) examination information, and any information leading to or arising from an examination, and (2) investigation information, and any information arising from or leading to an investigation. This information is confidential for all purposes except when it is necessary for the Superintendent to take official action regarding the affairs of a servicer or in connection with criminal or civil proceedings to be initiated by a prosecuting attorney or the Attorney General. This otherwise confidential information also may be introduced into evidence or disclosed pursuant to existing law (R.C. 1181.25, not in the bill). (R.C. 1323.30(C).)

Public records under the bill include all application information except: social security numbers, employer identification numbers, financial account numbers, the identity of the institution where financial accounts are maintained, personal financial information, fingerprint cards and the information contained on such cards, and criminal background information. (R.C. 1323.31(D).)

Nothing in the bill related to confidential information and public records prevents the Superintendent from releasing information relating to servicers or exchanging that information with other financial institution regulatory authorities, which includes a regulator of a business activity in which a servicer is engaged, or has applied to engage in, to the extent that the regulator has jurisdiction over a servicer engaged in that business activity. A servicer is engaged in a business activity, and a regulator of that business activity has jurisdiction over the servicer, whether the servicer conducts the activity directly or a subsidiary or affiliate of the servicer conducts the activity. (R.C. 1323.30(E).)

Nothing in the bill related to confidential information and public records prevents the Superintendent from releasing information relating to mortgage servicers to the Attorney General, to the Superintendent of Real Estate and Professional Licensing of the Department of Commerce, the Superintendent of Insurance, or the Commissioner of Securities of the Department of Commerce for purposes of the laws they administer, or to local law enforcement agencies and local prosecutors. Confidential information the Superintendent releases to those persons remains confidential. The Superintendent of Financial Institutions, by rule, may designate additional state agencies and regulatory authorities as entities with which the Superintendent may share otherwise confidential information. (R.C. 1323.30(F).)

## **Standards of servicer conduct**

### **With respect to Superintendent of Financial Institutions**

The bill establishes requirements of cooperation and prohibits acts by servicers that hinder the responsibilities of the Superintendent. Under the bill, no person, in connection with any examination or investigation the Superintendent conducts pursuant to the Residential Mortgage Servicers Registration Act, may knowingly do any of the following (R.C. 1323.31):

- Circumvent, interfere with, obstruct, or fail to cooperate, including making a false or misleading statement, failing to produce records, or intimidating or suborning any witness;
- Withhold, abstract, remove, mutilate, destroy, or secrete any books, records, computer records, or other information;
- Tamper with, alter, or manufacture any evidence.

### **Duty to supervise; closure of office**

No mortgage servicer, through its operations manager or otherwise, may fail to reasonably supervise persons employed by or associated with the servicer or to establish reasonable procedures designed to avoid violations of the Act or violations of applicable state and federal consumer and lending laws or rules by persons employed by or associated with the servicer. The servicer also must keep the Superintendent informed of changes in personnel by notifying the Superintendent within ten business days of any change in a mortgage servicer's statutory agent designation or address and providing evidence that the servicer has filed those changes with the Secretary of State. (R.C. 1323.32(B).)

At least 30 days prior to the closure of a registered office location, the servicer must notify the Superintendent by filing a notice of closure. The notice must be on a form the Superintendent prescribes and indicate the custodian of the records and the location where the records will be maintained. Within five business days after the closure, the servicer must surrender the certificate of registration issued to that location by returning it to the Superintendent. The closure of an office and the surrender of a certificate does not affect a servicer's civil or criminal liability for acts committed before the surrender. (R.C. 1323.32(C).)

### **Books and records open to inspection**

The bill requires a mortgage servicer to maintain books and records in compliance with the Act and make them accessible to the Superintendent. After any

closure, records remain subject to examination and or investigation. The servicer must send a written notice of any change in the location of the records or the custodian of those records. (R.C. 1323.32(D).)

### **Duty to inform borrower**

The bill requires a mortgage servicer to provide information regarding the amount required to pay in full a residential mortgage loan when requested by the borrower or by another person the borrower designates in writing. The servicer must provide the requested payoff statement without charge once during any 12-month period. If additional payoff statements are requested, the servicer may charge an amount not in excess of \$3 for each additional statement. The servicer must provide any payoff statement within five business days of the request. (R.C. 1323.33(A).)

### **Duty of honesty**

The bill establishes standards of servicer honesty with respect to registration and compliance with state and federal laws. It prohibits any mortgage servicer from obtaining a certificate of registration through any false or fraudulent representation of a material fact or any omission of a material fact required by state or federal law, or making any substantial misrepresentation in the registration application. Further, it prohibits a mortgage servicer from making false or misleading statements of a material fact, omissions of statements required by state or federal law, or false promises regarding a material fact, through advertising or other means, or engaging in a continued course of misrepresentations. Also, no mortgage servicer may engage in conduct that constitutes improper, fraudulent, or dishonest dealings. (R.C. 1323.33(B) to (D).)

The bill imposes upon a mortgage servicer or an applicant for registration a duty to notify the Superintendent within 30 days after the servicer or applicant has (1) been convicted of or pleads guilty or *nolo contendere* in a domestic, foreign, or military court to any felony, (2) been convicted of or pleads guilty or *nolo contendere* in a domestic, foreign, or military court to any criminal offense involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, breach of trust, dishonesty, or drug trafficking, or any criminal offense involving money or securities, or (3) had a mortgage servicer registration, license, or comparable authority revoked in any other state. (R.C. 1323.33(E).)

Under the bill, no mortgage servicer may knowingly make, propose, or solicit fraudulent, false, or misleading statements on any mortgage servicing document or on any document related to an accounting of payments remitted or disbursed. For these purposes, "fraudulent, false, or misleading statements" does not include mathematical

errors, inadvertent transposition of numbers, typographical errors, or any other bona fide error. (R.C. 1323.33(F).)

In addition, the bill prohibits a mortgage servicer from knowingly instructing, soliciting, proposing, or otherwise causing a borrower to sign a blank document (R.C. 1323.33(G)).

A violation of the bill's standards of conduct and other specified responsibilities with respect to a borrower is deemed an unfair or deceptive act or practice in violation of the Consumer Sales Practices Act (R.C. 1345.02). (R.C. 1323.33(H).)

### **Duties of good faith and fair dealing**

In addition to the duties imposed by common law or other provisions of state or federal law, the bill requires a mortgage servicer, in the course of servicing residential mortgage loans in Ohio, to do all of the following (R.C. 1323.34(A)):

- Act with good faith and fair dealing in any transaction, practice, or course of business associated with its servicing;
- Act with reasonable skill, care, and diligence;
- Act in good faith to provide the borrower with the facts relating to the nature and extent of any delinquency or default and the amounts owed or necessary to reinstate the loan or cure the default;
- Subject to the servicer's duties and obligations under its mortgage servicing contract, attempt a resolution, modification, or workout to the delinquency of a borrower who requests assistance;
- Make a good faith effort to correct any erroneous information it has provided to any credit reporting agency;
- Provide information regarding the amount required to pay in full a residential mortgage loan within five business days when requested by the borrower or by another person designated in writing by the borrower. The servicer must provide the requested payoff statement without charge once during any 12-month period. If additional payoff statements are requested, the servicer may charge an amount not in excess of \$3 for each additional statement.
- Make all payments from any escrow account in a timely manner, so as to avoid the assessment of late fees, penalties, or consequential damages,

notwithstanding any loan delinquency, unless there are insufficient funds in the escrow account to cover the payments;

- Accept and credit each residential mortgage loan payment received on the date received;
- Take all steps necessary to terminate a foreclosure action when the condition giving rise to the action has been fully cured; upon cure of default, reinstate the borrower to the same position as if the default had not occurred; and nullify, as of the date of the cure, any acceleration of any obligation under the residential mortgage loan or note arising from the default.

In addition, any mortgage servicer for a government-insured loan must comply with the loss mitigation standards and guidelines required by the insuring entity.

When establishing a loan modification solution for a borrower, a mortgage servicer must seek to achieve long-term sustainability for the borrower and adhere to the loan modification standards established by the Director of Commerce (see "**Comprehensive minimum loan modification standards**," below). (R.C. 1323.34(B).)

### **Prohibitions with respect to servicing a loan**

The bill prohibits any mortgage servicer from doing any of the following activities in connection with servicing a residential mortgage loan (R.C. 1323.35):

- Collect, charge, or retain any fee from the borrower unless the fee is reasonable, for a bona fide service rendered, and is specifically authorized by the residential mortgage loan and permitted by law;
- Initiate a foreclosure action without proof of ownership as evidenced by a declaration signed under penalty of perjury, stating that the party in interest has reviewed the original note and all subsequent assignments, and has concluded that the party in interest owns the note or mortgage;
- Fail to provide written notice to the borrower before acquiring and placing hazard, homeowner's, or flood insurance on a property or acquire and place such insurance if the mortgage servicer knows or has reason to know that a policy for such insurance is in effect;
- Acquire and place hazard, homeowner's, or flood insurance on a property for an amount that exceeds the greater of the insurable improvements to the property, the last known coverage amount of insurance sufficient to

meet the borrower's insurance obligations, or the unpaid balance owed by the borrower;

- Fail to refund unearned premiums for insurance placed by the mortgage servicer or its agents upon the borrower, providing there is reasonable evidence that the needed coverage had been obtained, the forced placement is no longer necessary, and the property is properly insured in accordance with the loan or note.

## **Standards for collection of money**

The bill prohibits a mortgage servicer from using unfair, deceptive, or unconscionable means to collect or attempt to collect any claim in connection with a residential mortgage loan. Without limiting the general application of the foregoing, the following conduct violates the bill's prohibition (R.C. 1323.36(A)):

- The collection of or the attempt to collect any interest or other charge, fee, or expense incidental to the principal obligation, unless expressly authorized by the agreement creating the obligation and by law;
- Any communication with a borrower, if the mortgage servicer knows that the borrower is represented by an attorney and the attorney's name and address are known or could be easily ascertained, unless the attorney fails to respond within 30 days to answer correspondence, return phone calls, or discuss the obligation in question or unless the attorney consents to the servicer having direct communication with the borrower;
- Placing a telephone call or otherwise communicating by telephone with a borrower or third party, at any place, including place of employment, falsely stating that the call is "urgent" or an "emergency";
- Using profane or obscene language or language that is intended to unreasonably abuse the listener or reader;
- Placing telephone calls without disclosure of the caller's identity and with the intent to annoy, harass, or threaten any person at the number called;
- Causing expense to any person in the form of long-distance telephone tolls, text messaging fees, or other charges the servicer causes by concealment of the true purpose of the communication;
- Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously, or at unusual times or at times

known to be inconvenient, with the intent to annoy, abuse, oppress, or threaten any person at the called number.

These requirements are in addition to any other requirements set forth in federal or state law regulating the conduct of collection activities, including the Federal Fair Debt Collection Practices Act (R.C. 1323.36(B)).

### **Servicer business standards**

Under the bill, no mortgage servicer, in conducting a mortgage servicer business, may engage in any unfair, deceptive, or unconscionable act in violation of the Consumer Sales Practices Act (R.C. 1345.02). The bill authorizes the Attorney General to take enforcement action and a borrower may seek recovery under that act for violations. However, a borrower may not recover damages, attorney's fees, and costs under the Consumer Sales Practices Act if the borrower already has recovered damages based on the same acts or circumstances in a cause of action initiated under the Residential Mortgage Servicers Registration Act. (R.C. 1323.361.)

### **Damages to borrower**

#### **Civil penalties**

A borrower injured by a violation of the Residential Mortgage Servicers Registration Act may recover damages in an amount not less than all improper charges or fees paid to the mortgage servicer, plus reasonable attorney's fees and court costs. The borrower also may be awarded punitive damages. The bill does not prevent recovery under other applicable sections of law but prevents double recovery based on the same acts or circumstances. (R.C. 1323.37.)

#### **Criminal penalties**

A violation of the prohibition of collecting money on a mortgage without registration or arranging for and collecting money on an accelerated mortgage payment without registration (R.C. 1323.21(A)(1) and (2)), the prohibition of making fraudulent statements in connection with a mortgage servicing document (R.C. 1323.33(F)), or the prohibition of causing a borrower to sign a blank document (R.C. 1323.33(G)), is made a felony of the fifth degree.

A violation of the prohibition of interfering with an examination or investigation by the Superintendent (R.C. 1323.31) is made a felony of the fourth degree. (R.C. 1323.99.)

## **Delayed effective date for registration of mortgage servicers**

The provisions of the bill concerning initial registration of mortgage servicers (R.C. 1323.21) take effect six months after the effective date of the bill. During that six-month period, the Superintendent of Financial Institutions may take applications for registration as a mortgage servicer, process the applications, and issue certificates of registration as the Superintendent is able. During that time, no mortgage servicer is required to have a certificate of registration and the Superintendent is not obligated to issue certificates until the Superintendent is able. (Section 6.)

## **V. Comprehensive minimum loan modification standards**

The bill instructs the Director of Commerce to adopt rules to implement comprehensive minimum loan modification standards for purposes of advising mortgage servicers of modification alternatives and for evaluating the loan modification efforts of mortgage servicers. The Director must design the standards to reflect modification alternatives that would keep a borrower in the borrower's home when the anticipated recovery under a loan modification or workout plan is greater than the anticipated recovery through foreclosure, on a net present value basis. (R.C. 1323.05(A).)

The loan modification standards must include some combination of the following features (R.C. 1323.05(B)):

- An interest rate reduction, as needed, for a fixed term of at least five years;
- An extension of the amortization period for the loan term, to not more than 40 years from the original date of the loan;
- Deferral of some portion of the principal amount of the unpaid principal balance until maturity of the loan;
- Reduction of principal;
- Compliance with a federally mandated loan modification program;
- Other factors the Director determines are appropriate, which factors may include efforts implemented in other states that have resulted in a reduction in foreclosures.

The bill requires that when a mortgage servicer establishes a loan modification solution for a borrower, the mortgage servicer is required to seek to achieve long-term sustainability for the borrower and adhere to the standards described above. (R.C. 1323.34(B).)

## VI. Definitions

The bill adopts the following additional definitions for its purposes:

**"Mortgage lender"** means a person engaged in the business of making residential mortgage loans for compensation or gain (R.C. 1323.01(A)(2)).

**"Employee"** means an individual for whom a person pays a wage or salary, pays social security and unemployment taxes, provides workers' compensation coverage, and withholds local, state, and federal income taxes. **"Employee"** includes any individual who acts as an operations manager of a registered mortgage servicer, but for whom the servicer is prevented by law from making income tax withholdings. (R.C. 1323.01(A)(4).)

**"Subprime loan"** or **"subprime mortgage"** means a residential mortgage loan originated between January 1, 2001, and January 1, 2009, in which the difference between the annual percentage rate for the loan and the Federal Home Loan Mortgage Corporation primary mortgage market survey rate for a comparable transaction, as of the date the interest rate is set, is greater than 1.5 percentage points if the loan is a first mortgage loan or 3.5 percentage points if the loan is a mortgage loan in a subordinate position (R.C. 1323.01(A)(6)).

**"Unoccupied property"** means a property intended for residential occupancy that is not occupied by the owner of the property or the owner's tenant (R.C. 1323.01(A)(7)).

**"Superintendent of Financial Institutions"** or **"Superintendent"** includes the Deputy Superintendent for Consumer Finance (R.C. 1323.01(A)(8)).

**"Depository institution"** means an entity chartered and lawfully doing business under the authority of any law of this state, another state, or the United States as a bank, savings bank, trust company, or savings and loan association. **"Depository institution"** does not mean the holding company of such an institution. (R.C. 1323.01(A)(10).)

**"Credit union"** means an entity chartered under Chapter 1733. of the Revised Code or under similar laws of another state or the United States. **"Credit union"** includes a credit union service organization consisting of multiple credit unions. (R.C. 1323.01(A)(11).)

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## **COMMENT**

### **1. Mortgage servicers**

A mortgage servicer is a person who is in the business of receiving scheduled mortgage payments from a borrower. Although it is possible that the original lender (the loan originator) will service a mortgage until it is paid off or the house is sold, in today's market, that loan may be sold multiple times and the rights to service that loan also may be sold or contracted out to a separate company. The servicer generally has a contract with the holder of the loan to collect payments for the loan as well as to collect amounts the borrower pays into an escrow account for taxes and insurance. The servicer pays the amounts due from the escrow account for taxes and insurance. It is also the servicer who notifies a borrower when payments are late, imposes late fees, and files a foreclosure action if the borrower does not become current in payments. All actions of the servicer are pursuant to the terms of the servicer's contract with the holder of the loan. It is possible that the servicer may be part of the same company (lender) who holds the loan.

### **2. Foreclosure**

Foreclosure procedures are governed by state law and therefore procedures among states differ. In Ohio, only judicial foreclosure is possible. Judicial foreclosure is overseen by courts at every step of the procedure. This means that when a borrower defaults, the lender must file a complaint with the court and go through a court process in order to recover what is owed the lender. With judicial foreclosure, the lender has no right to possess the house unless and until the lender becomes the successful bidder at the sheriff's auction and a court confirms that sale. In Ohio, the borrower, at any time during the foreclosure action, may pay the amount due and retain the house until a court confirms the sale at auction. This means even after a home has been sold at sheriff's sale the borrower may keep the home by paying the amount due. In Ohio, the borrower also has a right to live in the property until the court confirms the sheriff's sale.

### **3. Consumer finance companies**

The bill includes persons required to be registered under the Residential Mortgage Servicers Registration Act under the definition of a "consumer finance company." R.C. 1181.05(B) prohibits the Superintendent of Financial Institutions and all other employees of the Division of Financial Institutions from directly or indirectly borrowing money from any consumer finance company that is under the supervision of the Superintendent of Financial Institutions. According to an exception under R.C. 1181.05(C), the employee may retain any extension of credit that otherwise would be prohibited by this section if both of the following apply: (1) the employee obtained the

extension of credit prior to October 29, 1995, or the commencement of the employee's employment with the Division, or as a result of a change in the employee's marital status, the consummation of a merger, acquisition, transfer of assets, or other change in corporate ownership beyond the employee's control, or the sale of the extension of credit in the secondary market or other business transaction beyond the employee's control, and (2) the employee liquidates the extension of credit under its original terms and without renegotiation. If the employee chooses to retain the extension of credit, the employee immediately must provide written notice of the retention to the employee's supervisor. Thereafter, the employee is disqualified from participating in any decision, examination, audit, or other action that may affect that particular creditor.

The inclusion of persons required to be registered under the Residential Mortgage Servicers Registration Act under the definition of a "consumer finance company" may prohibit employees of the Division of Financial Institutions from holding mortgages obtained from many sources. It appears that this restriction would apply to all employees, and could prove problematic to many individuals who already hold mortgages from major servicers.

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## HISTORY

ACTION	DATE
Introduced	02-17-09
Reported, H. Housing & Urban Revitalization	05-13-09
Passed House (54-43)	05-20-09

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