

Department of Legislative Services  
Maryland General Assembly  
2012 Session

FISCAL AND POLICY NOTE  
Revised

Senate Bill 786

(Senators Muse and Ramirez)

Judicial Proceedings and Budget and Taxation

Environmental Matters

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Real Property - Foreclosures and Mediation

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This bill authorizes a secured party to offer to participate in prefile mediation with a mortgagor or grantor to whom the secured party has delivered a notice of intent to foreclose. If the mortgagor or grantor elects prefile mediation, an order to docket or complaint to foreclose may not be filed until the completion of the mediation. The bill requires a secured party that offers prefile mediation to include specified information and a prefile mediation application in the notice of intent to foreclose. The bill authorizes the Commissioner of Financial Regulation to adopt regulations to carry out the bill's provisions. The bill also exempts from the State income tax any payment to an individual made as a result of a foreclosure settlement negotiated by the Attorney General.

An order to docket or complaint to foreclose served on a mortgagor or grantor before the effective date of the regulations adopted by the commissioner is in compliance with Maryland law if the order or complaint complies with current law as it existed immediately prior to October 1, 2012. The bill applies to all taxable years beginning after December 31, 2011.

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Fiscal Summary

**State Effect:** General fund revenues may decrease significantly beginning in FY 2013 due to the exemption, for the purposes of computing "Maryland adjusted gross income," of any payments received as a result of a foreclosure settlement negotiated by the Attorney General. General fund expenditures increase by \$22,000 in FY 2013 only for one-time tax form changes and computer programming modifications at the Comptroller's Office. Special fund revenues increase to reflect the collection of additional mediation fees from borrowers participating in prefile mediations. Any such increase may be at least partially offset by a reduction in requests for postfile mediations. Special fund expenditures increase significantly to reflect additional personnel in the

Office of Administrative Hearings (OAH) for additional prefile mediations to the extent that secured parties begin to offer them.

(in dollars)	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
GF Revenue	(-)	(-)	(-)	(-)	(-)
SF Revenue	-	-	-	-	-
GF Expenditure	\$22,000	\$0	\$0	\$0	\$0
SF Expenditure	-	-	-	-	-
Net Effect	(\$22,000)	\$0	\$0	\$0	\$0

Note: (-) = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

**Local Effect:** Local expenditures may increase minimally for local governments that issue certificates of vacancy and certificates of property unfit for human habitation. Local revenues may also increase minimally for local governments that charge a fee for the issuance of those certificates. Local income tax revenues may decrease significantly beginning in FY 2013.

**Small Business Effect:** Minimal.

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## Analysis

### Bill Summary:

*Prefile Mediation:* The bill requires a mortgagor or grantor to participate in housing counseling services if the mortgagor or grantor elects to participate in an offered prefile mediation. The Department of Housing and Community Development (DHCD) must prescribe the timing and form of certification of participating in housing counseling services.

If a mortgagor or grantor elects to participate in prefile mediation, the mortgagor or grantor must notify the secured party by submitting an application within 25 days after the secured party mails the notice of intent to foreclose. Once the secured party receives the application, the secured party must notify OAH within five business days.

The bill requires OAH to (1) schedule a prefile mediation session within 60 days after the day on which it receives the notice from the secured party; (2) notify the parties and their attorneys, if any, of the date of the prefile mediation session; and (3) issue a report describing the result of the mediation upon its completion.

The bill requires the Commissioner of Financial Regulation to, by regulation (1) establish the fee for prefile mediation; and (2) prescribe the form and content of the notice about prefile mediation, the application to participate in prefile mediation, and instructions to

complete the application. The fee must be distributed to the Housing Counseling and Foreclosure Mediation Fund.

The bill also requires the commissioner to develop a mediation checklist, for both prefile and postfile mediation (which, under current law, is known as foreclosure mediation), that describes the matters that must be reviewed and considered. The bill requires each party to review the mediation checklist at the start of a session and sign the checklist at the end of the session. The mediator must mark each item on the checklist as it is addressed during the session. The bill also requires each party to execute a mediation agreement if the mediation results in an agreement.

The prefile agreement must designate the person and address to whom the mortgagor or grantor may provide notice of a change of financial circumstances and state that the mortgagor or grantor is not entitled to postfile mediation unless agreed to by the parties. OAH must draft this agreement and provide a copy of the agreement and a report of the mediation results to the parties and their attorneys, if any.

If a mortgagor or grantor notifies the designated person of a change of financial circumstances, the designee has to determine whether the change must alter the mediation agreement or mediation outcome and notify the mortgagor or grantor of that determination by first-class mail before any additional foreclosure action is taken. The bill authorizes the parties to the prefile mediation agreement to execute an amended agreement based on a material change of financial circumstances of the mortgagor or grantor. The secured party must provide a copy of this agreement to the mortgagor or grantor.

The bill does not prohibit a secured party and mortgagor or grantor from engaging in loss mitigation by other means. To the extent that a notice of intent to foreclose complies with the bill's provisions and current law, a notice of intent to foreclose that has been subject to a prefile mediation is valid for one year after the date of execution of the initial prefile mediation agreement.

The bill requires that an order to docket or a complaint to foreclose a mortgage or deed of trust on residential property include either the OAH report on the prefile mediation or a statement that the parties did not elect to participate in the prefile mediation, depending on whether such mediation occurred. Service of the copy of the order or complaint must include, if prefile mediation has occurred, a statement that the mortgagor or grantor is not entitled to postfile mediation except as otherwise provided in the prefile mediation agreement.

The bill authorizes the order to docket or complaint to foreclose to exclude the request for a postfile mediation form if (1) the parties have participated in prefile mediation and the

prefile mediation agreement does not give the mortgagor or grantor the right to participate in postfile mediation; or (2) the property subject to the mortgage or deed of trust is not owner-occupied.

*Property Unfit for Human Habitation:* The bill defines “certificate of property unfit for human habitation” to mean (1) in Baltimore City, a certificate of substantial repair; or (2) a certificate for residential property issued by a unit of a county or municipal corporation indicating that the county or municipal corporation has determined that the residential property is unfit for human habitation.

“Certificate of vacancy” means a certificate for a residential property issued by a unit of a county or municipal corporation indicating that the residential property is vacant.

The bill’s requirements relating to those certificates only apply to a county or municipal corporation that issues the certificates.

Accordingly, if a mortgage or deed of trust on residential property is in default, the bill authorizes a person with a secured interest in the property to request that a county or municipal corporation issue a certificate of vacancy or a certificate of property unfit for human habitation. A county or municipal corporation must issue to a secured party a certificate of vacancy or a certificate of property unfit for human habitation if the county or municipal corporation determines that the property is vacant or, in accordance with local, county, or State housing codes, unfit for human habitation, respectively. A certificate is valid for 60 days after the date the certificate is issued. A county or municipal corporation may charge a fee of up to \$100 and establish procedures for the issuance of the aforementioned certificates.

The bill authorizes the record owner or occupant of a property to challenge a certificate of vacancy or a certificate of property unfit for human habitation by notifying the circuit court of the challenge. A secured party filing an order to docket or complaint to foreclose based on a certificate of vacancy or a certificate of property unfit for human habitation must serve the foreclosure documents in accordance with existing requirements for service in a foreclosure action on residential property along with a description of the procedure to challenge the certificate and the form needed to make the challenge.

If a certificate is valid at the time of filing an order to docket or complaint to foreclose, the bill authorizes a secured party to expedite the foreclosure process. However, if a challenge to the certificate is upheld, the process may not be expedited.

The bill requires the commissioner to develop the description of the procedure to challenge a certificate of vacancy or certificate of property unfit for human habitation and the form needed to make the challenge.

## **Current Law:**

*Filing:* “Residential property” is defined as real property improved by four or fewer single-family dwelling units designed principally and intended for human habitation. Except under specified circumstances, an action to foreclose a mortgage or deed of trust on residential property cannot be filed until the later of 90 days after a default in a condition on which the mortgage or deed of trust states that a sale may be made or 45 days after a notice of intent to foreclose and accompanying loss mitigation application are sent.

The secured party must send written notice of intent to foreclose to the mortgagor or grantor and the record owner at least 45 days before the filing of an action to foreclose a mortgage or deed of trust on residential property. This notice must be sent by certified mail, postage prepaid, return receipt requested, and by first-class mail. A copy of the notice must also be sent to the Commissioner of Financial Regulation in DLLR. The notice must be in the form that the commissioner prescribes by regulation and contain specified information, including the name and telephone number of the secured party and an agent of the secured party who is authorized to modify the terms of the mortgage loan. The notice must also be accompanied by a loss mitigation application, instructions for completing the application, a description of the applicable eligibility requirements for the loss mitigation programs offered by the secured party, and an envelope preprinted with the address of the person responsible for conducting loss mitigation analysis on behalf of the secured party.

An order to docket or a complaint to foreclose a mortgage or deed of trust on residential property must contain specified information and be accompanied by specified documents, including a final loss mitigation affidavit and a request for foreclosure mediation form if the loss mitigation analysis has been completed. If the loss mitigation analysis has not been completed, the secured party must include a preliminary loss mitigation affidavit and related information, file a final loss mitigation affidavit with the court at least 30 days before the foreclosure sale date and no earlier than 28 days after the order to docket or complaint to foreclose is served, and send the final loss mitigation affidavit and a request for foreclosure mediation form to the mortgagor or grantor by certified mail.

*Foreclosure Mediation:* A grantor or mortgagor may file with the court a completed request for foreclosure mediation not later than 15 days after the service or mailing of the final loss mitigation affidavit. A \$50 filing fee must accompany the request. A grantor or mortgagor must also mail a copy of the request to the secured party’s foreclosure attorney. The secured party may then file a motion to strike, accompanied by an affidavit setting forth the reasons why foreclosure mediation is not appropriate. If the secured party files a motion to strike, it must mail a copy of the motion and affidavit to the grantor or mortgagor. The grantor or mortgagor has 15 days to file a response.

The court must transmit the request to OAH within five days of receiving the mediation request. OAH must conduct the mediation hearing within 60 days of this transmittal, unless the time is extended for good cause. Upon scheduling the mediation hearing, OAH must send notice to the parties detailing the production of specified documents by a specified date.

Both the grantor or mortgagor and the secured party, or a representative, must be present at the foreclosure mediation. The parties and the mediator must address loss mitigation programs that may be applicable to the loan secured by the mortgage or deed of trust that is the subject of the foreclosure action. OAH must file a report with the court stating the mediation's outcome by a specified date. If no agreement is reached at the foreclosure mediation, the foreclosure attorney may schedule the foreclosure sale, and the grantor or mortgagor may file a motion to stay the sale if filed within a specified date.

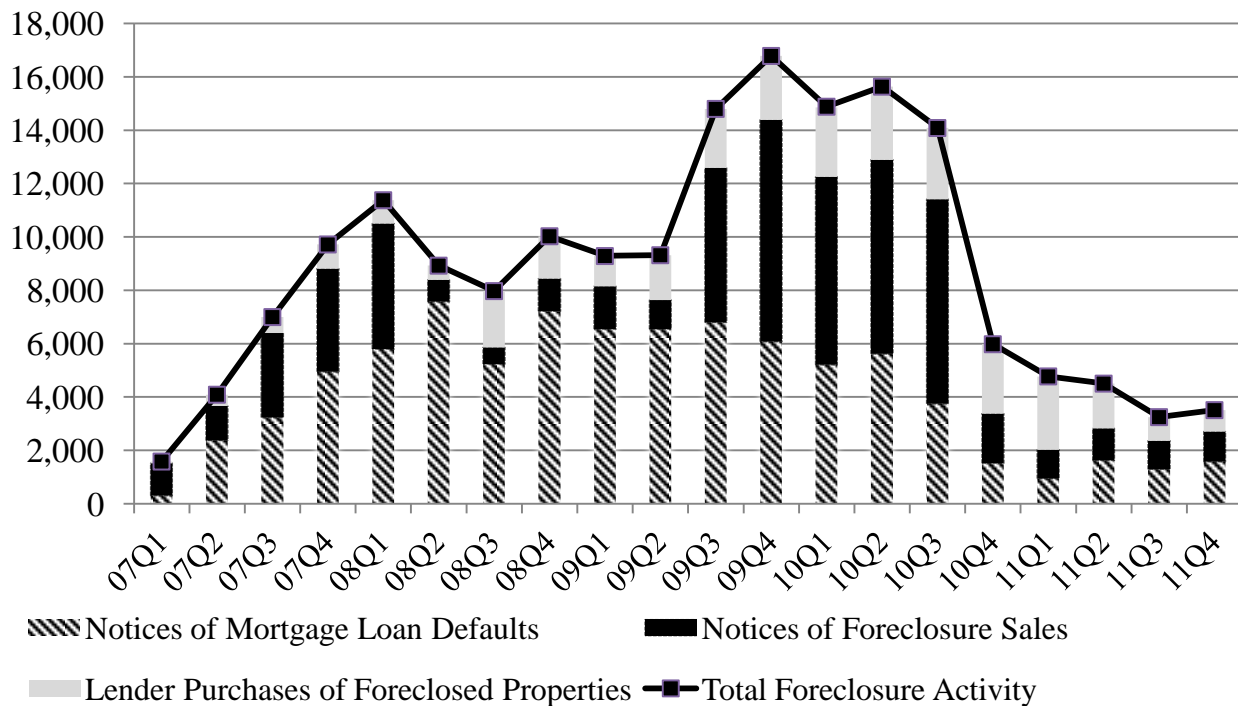
**Background:** The State's multifaceted approach to the foreclosure crisis has involved legislative reforms of mortgage lending laws, extensive consumer outreach efforts, and enhanced mortgage industry regulation and enforcement. Legislation passed during the 2008, 2009, 2010, and 2011 sessions (1) created the Mortgage Fraud Protection Act, Maryland's first comprehensive mortgage fraud statute; (2) tightened mortgage lending standards and required a lender to give due regard to a borrower's ability to repay a loan; (3) prohibited foreclosure rescue transactions and granted the Commissioner of Financial Regulation additional enforcement powers; (4) reformed the foreclosure process to provide homeowners with greater time and additional notices before their properties are sold; (5) required additional notices to be given to residential tenants renting properties pending foreclosure; (6) required a lender, under specified circumstances, to provide to a borrower a specified written notice regarding homebuyer education or housing counseling in connection with specified mortgage loans; (7) required the secured party to file a specified final loss mitigation affidavit and send to the mortgagor or grantor a copy of the affidavit and a request for foreclosure mediation form; and (8) lengthened the time period within which a homeowner may elect to participate in foreclosure mediation. Consumer outreach efforts include statewide public workshops to assist distressed homeowners, in coordination with the Maryland Foreclosure Prevention Pro Bono Project.

Due to a multitude of factors, including the State's new foreclosure mediation process, consumer outreach efforts, and legal issues surrounding many banks and mortgage companies' foreclosure practices, the number of foreclosure events decreased significantly from 50,563 in 2010 to 16,049 in 2011, as shown by **Exhibit 1**. Foreclosure events encompass real estate-owned (REO) purchases, notice of foreclosure sales, and notices of mortgage loan default. REO property is property acquired by a financial institution as a result of an unsuccessful foreclosure sale on the property. This type of acquisition often occurs when the amount of the outstanding loan owed to the financial

institution is greater than the value of the property. The low level of foreclosure events seems to be holding, though the fourth quarter of 2011 was the first increase in the number of foreclosure events from the previous quarter since the second quarter of 2010.

The Governor convened the Maryland Foreclosure Task Force in fall 2011. The task force included DLLR, DHCD, members of the General Assembly, the Judiciary, and representatives from private industry. In January 2012, the task force issued its report, including 12 recommendations aimed at addressing the foreclosure crisis in Maryland. As shown by **Exhibit 2**, borrowers have requested mediations on only 22.7% of eligible orders to docket or complaints to foreclose a mortgage or deed of trust on residential property. According to the task force, many borrowers are so far in default and have accumulated such a large amount of arrears that postfile mediation is unable to produce an acceptable retention option. One of the task force’s recommendations was the introduction of prefile mediation triggered by the delivery of the notice of intent to foreclose. A similar program in Florida is offered by the Federal National Mortgage Association (Fannie Mae).

**Exhibit 1**  
**State Foreclosure Events**  
**2007-2011**



Source: Department of Housing and Community Development

**Exhibit 2**  
**Orders to Docket (OTDs) and Mediation Requests by County**  
**Fiscal 2011**

	<u>Owner-Occupied OTDs</u>	<u>OTDs Eligible for Mediation</u>	<u>% of OTDs Eligible for Mediation</u>	<u>Mediation Requests</u>	<u>Mediation Requests as % of Eligible OTDs</u>
Allegany	54	38	70.4%	5	13.2%
Anne Arundel	615	334	54.3%	91	27.2%
Baltimore City	1,386	784	56.6%	147	18.8%
Baltimore	1,040	566	54.4%	134	23.7%
Calvert	115	72	62.6%	15	20.8%
Caroline	69	36	52.2%	4	11.1%
Carroll	168	72	42.9%	30	41.7%
Cecil	161	104	64.6%	15	14.4%
Charles	305	191	62.6%	56	29.3%
Dorchester	85	50	58.8%	6	12.0%
Frederick	300	169	56.3%	34	20.1%
Garrett	35	26	74.3%	8	30.8%
Harford	304	166	54.6%	35	21.1%
Howard	231	125	54.1%	32	25.6%
Kent	32	23	71.9%	4	17.4%
Montgomery	775	460	59.4%	115	25.0%
Prince George's	1,917	1,121	58.5%	277	24.7%
Queen Anne's	85	54	63.5%	9	16.7%
St. Mary's	84	51	60.7%	13	25.5%
Somerset	45	29	64.4%	3	10.3%
Talbot	63	41	65.1%	12	29.3%
Washington	240	142	59.2%	21	14.8%
Wicomico	170	112	65.9%	16	14.3%
Worcester	138	71	51.4%	18	25.4%
<b>Total</b>	<b>8,417</b>	<b>4,837</b>	<b>57.5%</b>	<b>1,100</b>	<b>22.7%</b>

Source: Department of Labor, Licensing, and Regulation



On February 9, 2012, the U.S. Department of Justice, U.S. Department of Housing, and 49 state Attorneys General announced an agreement with five major banks providing for compensation for damages arising from improper foreclosure procedures and to provide relief to states and homeowners from underwater mortgages. The value of the settlement ranges from \$26.0 billion to \$39.0 billion, to be distributed based on a formula contained within the agreement. Maryland is expected to receive almost \$960.0 million in funding, which is about 7% of the total settlement. Due to the recent announcement and complexity of the agreement, many of the details of the settlement, including when the money will be received, are still unclear.

The settlement agreement has four primary components:

- *Principal Reduction:* (\$17 billion to \$32 billion) A minimum of \$17 billion will be allocated to mortgage debt forgiveness/loan modifications, forbearance, short sales, and other assistance to homeowners, primarily by reducing the principal on mortgages that have negative equity and are delinquent. It is estimated that the funding could benefit up to one million homeowners nationally. Maryland expects to receive \$808.5 million in funding under this program.
- *Refinancing:* Homeowners who have negative equity but are current on their mortgages will receive about \$3.0 billion in refinancing; up to 750,000 homeowners could be eligible for this refinancing. Maryland expects to receive \$64.0 million in refinancing funds.
- *Payments to Foreclosed Homeowners:* About \$1.5 billion is allocated to homeowners who had their homes foreclosed upon between January 1, 2009, and December 31, 2011, and who meet specified criteria. Maryland's share of payments is expected to total \$24.1 million.
- *Government Payments:* The federal government will receive \$750 million under the settlement. States will receive \$2.75 billion to help fund consumer protection and state foreclosure protection efforts. Maryland expects to receive \$62.5 million.

**State Fiscal Effect:** The bill exempts, for the purpose of computing Maryland adjusted gross income, any payment received by an individual as a result of a foreclosure settlement negotiated by the Attorney General. Accordingly, general fund revenues may decrease significantly beginning in fiscal 2013. However, the amount of the revenue loss cannot be reliably estimated and depends on the amount of eligible settlement payments received in each year and whether the payments are taxable under the federal income tax. Assuming that the bill solely applies to the \$24.1 million to be allocated to Maryland homeowners, as per the February 9, 2012 agreement, total general fund revenues decrease by \$1.1 million. Total revenues could decrease further if the bill applies to future settlements negotiated by the Attorney General. Additionally, the Comptroller's

Office reports that it will incur a one-time expenditure increase of \$22,000 in fiscal 2013 to add the subtraction modification to the personal income tax return. This includes data processing changes to the SMART income tax return processing and imaging systems and system testing.

Special fund expenditures also increase to hire additional personnel at OAH for additional mediations to the extent that the volume of total mediations increases under the bill. If, however, prefile mediations simply substitute, in a similar quantity, for postfile mediations, expenditures are not materially affected. Special fund revenues increase to reflect the collection of additional mediation fees from borrowers participating in prefile mediations. Any such increase in special fund revenues may be at least partially offset by a reduction in special fund revenues due to fewer requests for postfile mediations.

Any increased activity is not quantifiable due to the inability to accurately predict the number of borrowers who will participate in prefile mediation. A secured party must currently offer mediation when the order to docket is accompanied with a final loss mitigation affidavit. However, under the bill, a secured party *has the option* to offer mediation prior to filing the order to docket. The extent to which the number of mediations increases is dependent on the decision of the secured parties with the largest mortgage loan market shares. For example, according to DLLR, Bank of America has a 25% mortgage loan market share. It is uncertain whether the bank will offer prefile mediation.

Additionally, as noted above, the bill requires a secured party that offers prefile mediation to include a prefile mediation application in the notice of intent to foreclose. Secured parties filed 154,867 notices of intent to foreclose in fiscal 2011. However, the number of notices of intent to foreclose cannot be used to predict the number of borrowers who will choose to participate in prefile mediation. As shown in Exhibit 2, only 8,417 orders to docket resulted from the 154,867 notices of intent to foreclose in fiscal 2011. A borrower may receive multiple notices of intent to foreclose. A borrower who is consistently more than 60 days delinquent on a payment may receive a notice of intent to foreclose each month. Additionally, notices of intent to foreclose must be sent to commercial and investor-owned properties. Only owner-occupied residential properties are eligible for mediation.

Despite the inability to accurately estimate the number of additional borrowers who will choose to participate in mediation due to its being offered prior to the filing of the order of docket, any increase in the number of mediations may significantly increase special fund expenditures and revenues. OAH advises that, to the extent that the number of mediations increases dramatically, OAH may need to purchase additional forms, supplies, communication, and computer equipment and hire additional personnel. Further, any increase in the number of mediations will increase special fund revenues due

to the collection of the filing fee from borrowers wishing to participate in prefile mediation.

**Local Fiscal Effect:** Local expenditures may increase minimally for local governments that issue certificates of vacancy and certificates of property unfit for human habitation. Local revenues may also increase minimally for local governments that charge a fee for the issuance of those certificates.

Local income tax revenues also decrease by about 3% of the total net State subtraction modification claimed. Assuming that the bill solely applies to the \$24.1 million to be allocated to Maryland homeowners as per the February 9, 2012 agreement, total local revenues decrease by \$720,000. Total revenues could decrease further if the bill applies to future settlements negotiated by the Attorney General.

**Additional Comments:** Funding has been included in the supplemental budget for an appropriation pertaining to establishing prefile mediations before the commencement of foreclosure actions. However, the appropriation is contingent solely on HB 1374, which is identical to SB 786, as amended by the Senate.

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### Additional Information

**Prior Introductions:** None.

**Cross File:** Although designated as a cross file, HB 1288 (Delegate Carter – Environmental Matters) is no longer identical. However, although not designated as a cross file, HB 1374 (Chair, Environmental Matters Committee (By Request – Labor, Licensing, and Regulation) – Environmental Matters) is now identical.

**Information Source(s):** State Department of Assessments and Taxation; Office of the Attorney General (Consumer Protection Division); Department of Housing and Community Development; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Office of Administrative Hearings; Department of Legislative Services

**Fiscal Note History:** First Reader - March 13, 2012  
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