

BILL ANALYSIS

Senate Research Center
81R7675 JE-D

S.B. 1868
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Business & Commerce
4/27/2009
As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Foreclosure consultants work with the debtor and the debtor's financial institutions to stop or postpone foreclosure proceedings on the debtor's residential property. In the wake of the foreclosure crisis, foreclosure consultant businesses have soared in popularity. With no formal training required, one can become a foreclosure consultant with limited knowledge, or no knowledge, of the real estate, mortgage or foreclosure business. While many foreclosure consultants are legitimate, many are not, with mortgage fraud raising 26 percent in the last year alone, and due to the relatively new nature of foreclosure consulting services, no industry-specific regulations or guidelines exist.

As proposed, S.B. 1868 amends current law relating to the regulation of certain residential mortgage foreclosure consulting services, and provides a criminal penalty.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Title 2, Business & Commerce Code, by adding Chapter 21, as follows:

CHAPTER 21. REGULATION OF CERTAIN RESIDENTIAL FORECLOSURE CONSULTING SERVICES

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 21.001. DEFINITIONS. Defines "foreclosure consultant" and "residence in foreclosure."

Sec. 21.002. EXCEPTION FROM APPLICABILITY OF CHAPTER. (a) Provides that, except as provided by Subsection (b), this chapter does not apply to the following persons who perform foreclosure consulting services:

- (1) an attorney admitted to practice in this state who performs those services in relation to the attorney's attorney-client relationship with a homeowner or the beneficiary of the lien being foreclosed;
- (2) a person who holds or is owed an obligation secured by a lien on a residence in foreclosure if the person performs those services in connection with the obligation or lien;
- (3) a person that regulates banks, trust companies, savings and loan associations, credit unions, or insurance companies under the laws of this state or the United States if the person performs those services as part of the person's normal business activities;
- (4) an affiliate of a person described by Subdivision (3) if the affiliate performs those services as part of the affiliate's normal business activities;

(5) a judgment creditor of the homeowner of the residence in foreclosure, if the legal action giving rise to the judgment was commenced before the notice of default required under Section 5.064 (Seller's Remedies on Default) or 51.002(d) (relating to requiring a mortgage servicer of the debt to serve a debtor in default under a deed of trust or other contract lien) Property Code, and the judgment is recorded in the real property records of the clerk of the county where the residence in foreclosure is located;

(6) a licensed title insurer, title insurance agent, or escrow officer authorized to transact business in this state if the person is performing those services in conjunction with title insurance or settlement services;

(7) a licensed real estate broker or real estate salesperson if the person is engaging in an activity for which the person is licensed;

(8) a mortgage broker or loan officer licensed under Chapter 156 (Mortgage Brokers), Finance Code, if the person is engaging in an activity for which the person is licensed; or

(9) a nonprofit organization that provides solely counseling or advice to homeowners who have a residence in foreclosure or have defaulted on their home loans, unless the organization is an associate of the foreclosure consultant.

(b) Provides that this chapter applies to a person described by Subsection (a) if the person is providing foreclosure consulting services designed or intended to transfer title, directly or indirectly, to a residence in foreclosure to that person or the person's associate.

[Reserves Sections 21.003-21.050 for expansion.]

SUBCHAPTER B. CONTRACT FOR SERVICES

Sec. 21.051. **FORM AND TERMS OF CONTRACT.** Requires that each contract for the purchase of the services of a foreclosure consultant by a homeowner of a residence in foreclosure be in writing, dated, and signed by each homeowner and the foreclosure consultant.

Sec. 21.052. **REQUIRED DISCLOSURE.** Requires the foreclosure consultant, before entering into a contract with a homeowner of a residence in foreclosure for the purchase of the services of a foreclosure consultant, to provide the homeowner written notice in at least 14-point boldfaced type. Sets forth the required language of the notice.

[Reserves Sections 21.053-21.100 for expansion.]

SUBCHAPTER C. PROHIBITIONS, LIMITATIONS, AND DUTIES REGARDING SERVICES

Sec. 21.101. **RESTRICTIONS ON CHARGE OR RECEIPT OF CONSIDERATION.** Prohibits a foreclosure consultant from charging, collecting, or receiving compensation until the foreclosure consultant has fully performed each service the foreclosure consultant has contracted to perform or has represented the foreclosure consultant can or will perform unless the foreclosure consultant has obtained a surety bond or established and maintained a surety account for each location at which the foreclosure consultant conducts business in the manner that Subchapter E (Surety Bond; Surety Account), Chapter 393 (Credit Services Organizations), Finance Code, provides for credit services organizations, or receiving any consideration from a third party in connection with foreclosure consulting services provided to the homeowner of a residence in foreclosure unless the consideration is fully disclosed in writing to the homeowner.

Sec. 21.102. PROHIBITED CONDUCT. Prohibits a foreclosure consultant from taking any power of attorney from a homeowner for any purpose other than to inspect documents; for purposes of securing payment of compensation, acquiring an interest, directly or indirectly, in the real or personal property of the homeowner of a residence in foreclosure with whom the foreclosure consultant has contracted to perform services; or taking an assignment of wages to secure payment of compensation.

Sec. 21.103. RETENTION OF RECORDS. (a) Requires a foreclosure consultant to keep each record and document, including the foreclosure consultant contract, related to foreclosure consulting services performed on behalf of homeowners.

(b) Requires a foreclosure consultant to retain the records described by Subsection (a) until at least the third anniversary of the day the foreclosure consultant contract entered into by the consultant and the homeowner was terminated or concluded.

[Reserves Sections 21.104-21.150 for expansion.]

SUBCHAPTER D. ENFORCEMENT

Sec. 21.151. CRIMINAL PENALTY. (a) Provides that a person commits an offense if the person violates this chapter.

(b) Provides that an offense under this chapter is a Class C misdemeanor.

Sec. 21.152. DECEPTIVE TRADE PRACTICE. Provides that a violation of this chapter is a false, misleading, or deceptive act or practice actionable under Subchapter E (Deceptive Trade Practices and Consumer Protection), Chapter 17 (Deceptive Trade Practices).

SECTION 2. Makes application of this Act prospective.

SECTION 3. Effective date: September 1, 2009.