

**FINAL REPORT OF THE
MORTGAGE FORECLOSURE TASK FORCE
TO THE LEGISLATURE FOR
THE REGULAR SESSION OF 2012**

**In Accordance with Act 162,
Session Laws of Hawaii 2010**

**Prepared by the
LEGISLATIVE REFERENCE BUREAU**

**On Behalf of the
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS**

STATE OF HAWAII

December 2011

FOREWORD

Act 162, Session Laws of Hawaii 2010, created the Mortgage Foreclosure Task Force (the “Task Force”) for the purpose of conducting an extensive analysis of all factors affecting mortgage foreclosures in the state and to recommend appropriate legislation.

In its first year, the Task Force took on the herculean task of comprehensively reviewing most all aspects of judicial and nonjudicial foreclosures in the State. The Task Force divided itself into working groups consisting of representatives of the financial industry on the one hand and representatives of consumers and borrowers on the other hand, with a third group made up of representatives from both other groups, to research, discuss and propose changes to the existing foreclosure laws. This effort resulted in various recommendations to the Legislature prior to the 2011 Regular Session and many of these were included in Act 48, Session Laws of Hawaii 2011, which made sweeping changes to Hawaii's foreclosure laws. One major change that was not part of the recommendations was the creation of a mandatory dispute resolution program to be used prior to commencing nonjudicial foreclosures.

In its second year, the Task Force focused on refining the requirements and procedures specified in Act 48 in an effort to make them practical and fair to various groups and stakeholders involved in the foreclosure process. In addition, particular attention was devoted to addressing the statutes and procedures relating to enforcement and foreclosure by condominium and homeowner associations as part of their internal governance.

To accomplish these purposes, the Task Force once again divided itself into working groups, this time along the lines of three distinctly identified issues: substantive and technical revisions to Act 48; issues relating to condominium and homeowner associations; and issues relating to the dispute resolution process, including borrower counseling and loan modification evaluation and processing.

This report and the proposed legislation it contains is the result of the Task Force's second year of deliberations. Many issues which at the start were thought to be difficult to agree upon have been successfully “hammered out” and are in the proposed bill. This includes an attempt to reach a compromise on the contentious issue involving the applicability of the unfair and deceptive acts and practices laws with respect to the various nonjudicial foreclosure statutes and procedures. As is the case with all compromises, certain members of the Task Force disagreed with the proposed provisions

and their positions and concerns are set forth in the comments attached to this report as Appendix C.

In conclusion I want to thank the members of the Task Force, all of whom spent countless hours working to craft a measure that would be, in large part, useable by all. In doing so, it is clear that each member remained true to their represented group or constituency but never allowed this to detract from their sincere effort to come up with a possible solution. I would also like to thank the staff of the Department of Commerce and Consumer Affairs for their many hours of providing administrative support for the Task Force. And finally, I would like to thank Charlotte Carter-Yamauchi and Terrence Lee of the Legislative Reference Bureau for their extraordinary efforts to take the expressions of the Task Force and turn them into this report and the proposed bill.

Everett S. Kaneshige
Chairperson

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FINAL REPORT OF THE MORTGAGE FORECLOSURE TASK FORCE TO THE LEGISLATURE FOR THE REGULAR SESSION OF 2012

Executive Summary

Act 162, Session Laws of Hawaii 2010 (see Appendix A), established a mortgage foreclosure task force within the Department of Commerce and Consumer Affairs to undertake a study to develop both general and specific policies and procedures necessary to improve the manner in which mortgage foreclosures are conducted in the State.

The Act directed the task force to submit reports of its findings and recommendations, including any proposed legislation, to the Legislature for the regular sessions of 2011 and 2012.

Pursuant to the Act, the task force was formed in 2010, consisting of seventeen members representing public and private interests. Stephen H. Levins, representing the Office of Consumer Protection of the Department of Commerce and Consumer Affairs, served as Chair of the task force. Marvin S.C. Dang, representing the Hawaii Financial Services Association, served as Vice-Chair.

The task force held several public meetings over the legislative interim of 2010 to discuss the various items raised for review under the Act. The task force also created investigative groups that met apart from the task force but reported their recommendations to the task force at the public meetings.

Based upon its discussions and actions taken, the task force adopted several recommendations, including proposed legislation, in its report to the Legislature for the Regular Session of 2011. The proposed legislation primarily involved the nonjudicial foreclosure process authorized under part I of chapter 667, Hawaii Revised Statutes. Specifically, the proposed legislation dealt with the issues of service of notice, conversion to foreclosure by action, deficiency judgments, notice of pendency of action, and extinguishment of the mortgagor's interest. The task force also adopted a recommendation that did not involve proposed legislation, which was related to the issue of statutory bidding thresholds.

Some of the task force's recommendations submitted to the 2011 Legislature were included in Act 48, Session Laws of Hawaii 2011, a far-reaching mortgage foreclosure reform measure that, among other things:

- (1) Temporarily authorized mortgagors who are occupying, as a primary residence, real property that is subject to nonjudicial foreclosure to either:
 - (A) Participate in the mortgage foreclosure dispute resolution program established under Act 48; or

- (B) Convert the nonjudicial foreclosure to a judicial foreclosure;
- (2) Imposed a temporary moratorium on all new nonjudicial foreclosures conducted under part I of chapter 667, Hawaii Revised Statutes; and
- (3) Specified prohibited conduct and consequences of violations for foreclosing mortgagees, including making any violation of the mortgage foreclosure law under chapter 667, Hawaii Revised Statutes, an unfair or deceptive act or practice subject to enhanced penalties under chapter 480, Hawaii Revised Statutes.

The task force met again over several public meetings during the legislative interim of 2011 to continue its work under Act 162. Everett S. Kaneshige, representing the Department of Commerce and Consumer Affairs, served as Chair of the task force during this period. Marvin S.C. Dang, representing the Hawaii Financial Services Association, continued to serve as Vice-Chair. The focus of the meetings in 2011 was divided among these major issues:

- (1) The new mortgage foreclosure provisions of Act 48, Session Laws of Hawaii 2011;
- (2) Matters involving condominium and other homeowner associations, including association liens and the collection of unpaid assessments; and
- (3) Mortgage foreclosure counseling and dispute resolution issues.

Based upon its deliberations on these issues, the task force adopted further recommendations as set forth in this report to the Legislature for the Regular Session of 2012.

FINAL REPORT OF THE MORTGAGE FORECLOSURE TASK FORCE TO THE LEGISLATURE FOR THE REGULAR SESSION OF 2012

Act 162, Session Laws of Hawaii 2010

Act 162, Session Laws of Hawaii 2010, established a mortgage foreclosure task force to undertake a study to develop both general and specific policies and procedures necessary to improve the manner in which mortgage foreclosures are conducted in the State. The Act listed a number of issues for the task force to study.

As the rationale for the Act, the Legislature found that the number of mortgage foreclosures of residential property in the State had reached an alarming level, prompting numerous legislative proposals during the Regular Session of 2010. The Legislature, however, concluded that a comprehensive evaluation of Hawaii's mortgage foreclosure laws would be necessary before meaningful legislation could be enacted that, on balance, addressed the concerns of both borrowers and lenders, without further overburdening the courts.

The Act placed the mortgage foreclosure task force within the Department of Commerce and Consumer Affairs for administrative purposes. The Act also required the task force, with the assistance of the Legislative Reference Bureau, to submit its findings and recommendations, including any proposed legislation, to the Legislature in a preliminary report for 2011 and a final report for 2012.

The task force's preliminary report was submitted to the Legislature prior to the Regular Session of 2011. Some of the recommendations from the preliminary report were included in Act 48, Session Laws of Hawaii 2011, which instituted sweeping changes to Hawaii's mortgage foreclosure law.

This report constitutes the task force's final report for 2012.¹

The Task Force

Pursuant to Act 162, Session Laws of Hawaii 2010, the task force was formed in 2010, consisting of seventeen members. Eleven of the members were from organizations that were specifically invited to participate on the task force pursuant to the Act. The remaining six members were administratively added to the task force to maintain a balanced representation of interests, as authorized under the Act.² At its initial public meeting held on July 27, 2010, the

¹ At its final public meeting of 2011, held on December 14, 2011, the task force approved this report for submission to the Legislature.

² Section 2(a) of the Act provides that "[t]he chairperson of the task force shall seek to maintain a balanced representation of interests and may select additional task force members at the chairperson's discretion."

task force elected Stephen H. Levins as its chairperson and Marvin S.C. Dang as its vice-chairperson.

Following the Regular Session of 2011, the task force reconvened in a series of public meetings between August and December of 2011, specifically on August 2, September 14, October 5, October 26, November 16, November 30, December 5,³ and December 14. All public meetings were held in downtown Honolulu. A quorum of the members was present at each meeting.⁴ During these meetings, the task force narrowed the scope of the items to be studied, established a methodology to study those items, and developed recommendations for those items.

The 2011 membership of the task force differed from that of the prior year, reflecting changes in the representatives for member entities, the loss of one member as a result of the elimination of the entity represented,⁵ and the addition of new members to maintain a balanced representation of interests. At its initial public meeting for 2011 held on August 2, the task force elected Everett S. Kaneshige as its new chairperson.

The eighteen task force members for 2011 are listed below, generally in the order in which member organizations were listed under Act 162, followed by the additional members that were administratively added:

- (1) Everett S. Kaneshige, task force chairperson, deputy director of the Department of Commerce and Consumer Affairs;⁶
- (2) Marvin S.C. Dang, task force vice-chairperson, Hawaii Financial Services Association;
- (3) Bruce B. Kim, Department of Commerce and Consumer Affairs, Office of Consumer Protection;⁷
- (4) Jeff Gilbreath, Hawaiian Community Assets (i.e., the mortgage counseling organization approved by the United States Department of Housing and Urban Development);⁸
- (5) Ryker J. Wada, Legal Aid Society of Hawaii;

³ The task force on December 5 reconvened its meeting that was recessed on November 30.

⁴ The quorum for this eighteen-member task force appears to be ten members. Since Act 162 itself does not specify a number for the quorum, the Sunshine Law, specifically, section 92-15, Hawaii Revised Statutes, is invoked, and section 92-15 provides that:

...a majority of all the members to which the board or commission is entitled shall constitute a quorum to do business, and the concurrence of a majority of all the members to which the board of commission is entitled shall be necessary to make any action of the board of commission valid...

⁵ At the public meeting of December 7, 2010, Chair Stephen H. Levins informed the task force that a vacancy currently existed on the task force because the Hawaii State Bar Association ceased to have a bankruptcy law section.

⁶ At the public meeting of August 2, 2011, Vice Chair and Acting Chair Marvin S.C. Dang reported to the task force that he had informed the Legislature at an informational briefing on June 29, 2011, that he had appointed Everett S. Kaneshige and John Morris as additional members of the task force to maintain a balanced representation of interests, as authorized under section 2(a) of Act 162, Session Laws of Hawaii 2010.

⁷ Stephen H. Levins, the task force's chairperson in 2010, was replaced by Bruce B. Kim as the executive director of the Office of Consumer Protection within the Department of Commerce and Consumer Affairs.

⁸ Replaced Michelle Kauhane as the representative from Hawaiian Community Assets.

- (6) Kevin Oda, Hawaii Bankers Association;⁹
- (7) Gary Y. Kawamoto, Mortgage Bankers Association of Hawaii;¹⁰
- (8) Francis P. Hogan, Hawaii Credit Union League;
- (9) Jane Sugimura, Hawaii Council of Associations of Apartment Owners;
- (10) Steven Guttman, Hawaii State Bar Association Collection Law Section;
- (11) Julia H. Verbrugge, State of Hawaii Judiciary;
- (12) Iris K.I. Catalani, Department of Commerce and Consumer Affairs, Division of Financial Institutions;¹¹
- (13) Lorrin Hirano, Title Guaranty of Hawaii, Inc.;
- (14) John Morris, an attorney representing condominium associations;¹²
- (15) Joan Takano, Hawaii Government Employees Association;
- (16) Steven Tam, AARP Hawaii;
- (17) Colin A. Yost, an attorney representing borrower mortgagors in the foreclosure process; and
- (18) George J. Zweibel, an attorney representing borrower mortgagors in the foreclosure process.

While a number of the task force members represented statewide entities, it should be noted that only a single member was from any of the neighbor islands, due in large part to the lack of travel reimbursement for task force members.¹³ Accordingly, the task force expressed concerns that the Legislature should give due consideration to ensuring adequate representation from the neighbor islands on all future task forces and working groups and providing for their travel expenses.

Scope of Study

The task force in 2010 implicitly narrowed the scope of their study of mortgage foreclosure by focusing upon the items that section 2 of Act 162, Session Laws of Hawaii 2010, requires, or mandates, them to study.¹⁴

The mandatory items are set forth in sections 2(b), (d)(4) to (6), and (e) of the Act. These subsections and subparagraphs of section 2 require the task force to perform certain specified tasks. The following is the relevant text of section 2 of the Act that forms the focus of the task force's review:

⁹ Replaced Neal Okabayashi as the representative from Hawaii Bankers Association.

¹⁰ Replaced Linda Nakamura as the representative from Mortgage Bankers Association of Hawaii.

¹¹ Replaced D.B. Griffin as the Commissioner of Financial Institutions within the Department of Commerce and Consumer Affairs.

¹² See Footnote 6.

¹³ Section 2(f) of Act 162, Session Laws of Hawaii 2010, in creating the task force, specifically provided that task force members serve without compensation or reimbursement for expenses.

¹⁴ In the text of the Act, these mandatory items are signaled by the phrases "shall consider," "shall analyze," "shall comment on," "shall seek," and "shall propose." In contrast to the mandatory items are the discretionary items, or items that the task force may study. The discretionary items are signaled by the phrases "may take into account," "may consider and recommend," and "may propose."

[(2)] (b) The mortgage foreclosure task force shall undertake a study to develop both general and specific policies and procedures necessary to improve the manner in which mortgage foreclosures are conducted in the state. In particular, the task force shall consider the following areas for possible improvements:

- (1) The adequacy of notice given to mortgagors of available mortgage counseling programs and the optimal timing for such notification and counseling;*
- (2) The availability of loan documentation to mortgagors from mortgagees prior to and during the foreclosure process;*
- (3) The establishment of statutory bidding thresholds for properties sold via foreclosure;*
- (4) The statutory timeline for power-of-sale foreclosures;*
- (5) Further regulation of distressed property consultants; and*
- (6) Revisions to part II of chapter 667, Hawaii Revised Statutes, to make it a viable vehicle for power-of-sale foreclosures.*

...

(d) The mortgage foreclosure task force shall analyze the effectiveness and any defects of the foreclosure procedures currently set in statute for both judicial and power-of-sale foreclosures. In this analysis, the task force:

...

- (4) Shall comment on the extent to which the existing law does or does not comply with state and federal constitutional due process guarantees;*
- (5) Shall comment on any effect proposed legislative changes will have on borrowers who are current on their mortgage loans; and*
- (6) Shall seek to maintain and not erode existing consumer protections.*

(e) The mortgage foreclosure task force shall comment on the feasibility of establishing a state entity or administrator to focus on addressing the concerns of mortgagors, disseminating information, and otherwise engaging in consumer education. The task force shall propose funding mechanisms to enable the operation of this entity.

Based upon the agenda for the September 22, 2010, public meeting, the task force appeared to have interpreted section 2 of Act 162 to require them to consider possible changes to Hawaii law concerning eight items. These eight items, cross-referenced to the relevant subsections and subparagraphs of section 2 of the Act, are listed below as follows:

- (1) The adequacy of notice to mortgagors, section 2(b)(1);
- (2) The availability of loan documentation, section 2(b)(2);
- (3) The establishment of statutory bidding thresholds, section 2(b)(3);
- (4) The statutory timeline for power-of-sale foreclosures, section 2(b)(4);
- (5) Further regulation of distressed property consultants, section 2(b)(5);
- (6) Possible revisions to part II of chapter 667 of the Hawaii Revised Statutes, section 2(b)(6);

- (7) The effectiveness and any defects of the foreclosure procedures currently set in statute for both judicial and power of sale foreclosures, section 2(d) first sentence; and
- (8) The feasibility of establishing a state entity or administrator to focus on addressing the concerns of mortgagors, disseminating information, and otherwise engaging in consumer education, and proposing a funding mechanism to enable the operation of this entity, section 2(e).

Apparently, a ninth item was added later at the October 18, 2010, public meeting through a draft of a set of motions prepared and distributed by the lender investigative group (to be discussed later). This ninth item is the first sentence of section 2(b):

- (9) Developing both general and specific policies and procedures necessary to improve the manner in which mortgage foreclosures are conducted in the State, section 2(b) first sentence.

The mandatory items relate primarily to parts I and II of chapter 667, Hawaii Revised Statutes, on mortgage foreclosures. Part I of chapter 667 authorizes both foreclosure by action (or, the judicial foreclosure process), which has been in the statutes since at least 1859, and foreclosure by power of sale (or, the "old" nonjudicial foreclosure process), which has been in statutes since at least 1874. Specifically, foreclosure by action comprises sections 667-1 through 667-4, while foreclosure by power of sale comprises sections 667-5 through 667-10. Part II of chapter 667, on the other hand, authorizes the alternate power of sale foreclosure process (or, the "new" nonjudicial foreclosure process), which has been in the statutes since 1998 and comprises sections 667-21 through 667-42.

Act 48, Session Laws of Hawaii 2011

As mentioned previously, some of the task force recommendations submitted to the 2011 Legislature were included in Act 48, Session Laws of Hawaii 2011. Act 48 was a far-reaching mortgage foreclosure reform measure that, among other things:

- (1) Temporarily authorized mortgagors who are occupying, as a primary residence, real property that is subject to nonjudicial foreclosure to either:
 - (A) Participate in the mortgage foreclosure dispute resolution program established under Act 48; or
 - (B) Convert the nonjudicial foreclosure to a judicial foreclosure;
- (2) Imposed a temporary moratorium on all new nonjudicial foreclosures conducted under part I of chapter 667, Hawaii Revised Statutes; and
- (3) Specified prohibited conduct and consequences of violations for foreclosing mortgagees, including making any violation of the mortgage foreclosure law under chapter 667, Hawaii Revised Statutes, an unfair or deceptive act or practice subject to enhanced penalties under chapter 480, Hawaii Revised Statutes.

During the legislative interim of 2011, the task force shifted its focus towards addressing issues raised by Act 48, as described in the Methodology section below. These issues notably included section 667-60, Hawaii Revised Statutes, which deems any foreclosing mortgagee who violates the mortgage foreclosure law under chapter 667 to have committed an unfair or deceptive act or practice under section 480-2, Hawaii Revised Statutes. This provision has generated much discussion. For borrowers, section 667-60 is viewed as one of the most important provisions of Act 48, providing a strong deterrent to violations of Hawaii's mortgage foreclosure law and a meaningful remedy if violations do occur. On the other hand, there has been considerable concern expressed that the risk of incurring significant penalties¹⁵ for even "minor" violations of chapter 667 would prompt lenders to conduct foreclosures judicially rather than non-judicially. In turn, this raised questions about the potential impact of Act 48 on the courts, should a majority of all foreclosures be instituted judicially.

Along these lines, the task force at its public meetings in 2011 received regular updates from the Judiciary on the number of judicial foreclosure complaints filed statewide since the passage of Act 48 on May 5, 2011, in comparison with the number of filings for the same months in the previous year.

Number of judicial foreclosure complaints filed in all Hawaii circuit courts

	2010	2011
May	120	141
June	110	209
July	133	205
August	114	321
September	107	336
October	108	363
November	112	390

*Based on the Judiciary's reported data as of December 12, 2011

In addition, there have been eight petitions filed statewide to convert nonjudicial foreclosures to judicial foreclosures since Act 48 was signed into law in May 2011,¹⁶ based on the Judiciary's reported data as of December 12, 2011.

There were also concerns raised about the potential effect of Act 48 on the ability of title insurers and buyers of foreclosure properties to rely on public records to evaluate the title to property purchased from a foreclosure. Title searchers review the documents recorded in the Bureau of Conveyances and in the Office of the Assistant Registrar of the Land Court and the exhibits attached to the affidavits of nonjudicial foreclosure provided by the foreclosing mortgagee. Prior to Act 48, nearly all the steps required by chapter 667 could be verified by reviewing these records.

¹⁵ The imposition of fines for every day that a violation is found under section 480-3.1; voiding of the contract or agreement pursuant to section 480-12; and treble damages and reasonable attorneys' fees and costs for the claimant in a civil suit brought under section 480-13.

¹⁶ See sections 667-53, 667-54, and 667-55, Hawaii Revised Statutes.

However, by making any violation of chapter 667 an unfair or deceptive act or practice under section 480-2, Act 48 substantially increased the situations under which a foreclosure sale could be voidable under section 480-12. These situations include matters that cannot be independently verified by a review of the public record or by a statement given by the foreclosing mortgagee. Hence, some stakeholders have cautioned that title insurers could encounter difficulties in verifying the compliance of foreclosures with the requirements of Act 48 and, consequently, would need to issue title insurance policies that exclude coverage for the risk of a legal challenge to the foreclosure sale property for unverifiable violations.

Methodology

In 2010, the task force created three investigative groups to study the items presented in Act 162, Session Laws of Hawaii 2010. At the public meetings, the task force defined the investigative groups' scopes of investigation and limited their memberships to constitute less than a quorum. Specifically:

- (1) The borrower investigative group was created to discuss borrower concerns;
- (2) The lender investigative group was created to discuss lender concerns; and
- (3) Investigative group #3 was created to explore possible points of consensus between the borrower investigative group and the lender investigative group and was comprised primarily of members who were representatives from the other two groups.

The investigative groups met apart from the task force and from each other, but subsequently reported their recommendations to the task force as a whole at the public meetings.¹⁷

In 2011, the task force again created three investigative groups each with memberships constituting less than a quorum, albeit with new scopes of investigation largely geared toward addressing the mortgage foreclosure provisions established by Act 48, Session Laws of Hawaii 2011. Specifically,

¹⁷ Under the Sunshine Law, boards are authorized to create investigative groups that meet "outside the realm of a public meeting," section 1, Act 267, Session Laws of Hawaii 1996, which established section 92-2.5, Hawaii Revised Statutes, on permitted interactions of board members. In particular, section 92-2.5(b)(1) provides that:

(b) Two or more members of a board, but less than the number of members which would constitute a quorum for the board, may be assigned to:

- (1) Investigate a matter relating to the official business of their board; provided that:*
 - (A) The scope of the investigation and the scope of each member's authority are defined at a meeting of the board;*
 - (B) All resulting findings and recommendations are presented to the board at a meeting of the board; and*
 - (C) Deliberation and decisionmaking on the matter investigated, if any, occurs only at a duly noticed meeting of the board held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board; or*

....

- (1) Group #1 was created to make recommendations to clarify and improve Act 48, excluding mortgage foreclosure counseling and dispute resolution issues, and consisted of the following members:

(A) Iris K.I. Catalani;
(B) Marvin S.C. Dang;
(C) Steven Guttman;
(D) Lorrin Hirano;
(E) Francis P. Hogan;
(F) Bruce B. Kim;
(G) Kevin Oda;
(H) Colin A. Yost; and
(I) George J. Zweibel

;

- (2) Group #2 was created to discuss mortgage foreclosure issues relating to condominiums and other homeowner associations, including association liens and the collection of unpaid assessments, and consisted of the following members:

(A) Francis P. Hogan;
(B) Everett S. Kaneshige;
(C) Bruce B. Kim;
(D) John Morris; and
(E) Jane Sugimura

- (3) Group #3 was created to deal with mortgage foreclosure counseling and dispute resolution matters and consisted of the following members:

(A) Jeff Gilbreath;
(B) Everett S. Kaneshige;
(C) Gary Y. Kawamoto;
(D) Bruce B. Kim;
(E) John Morris;
(F) Joan Takano;
(G) Steven Tam;
(H) Julia H. Verbrugge; and
(I) Ryker J. Wada

As in 2010, these investigative groups met separately but subsequently reported their recommendations to the task force as a whole at the public meetings.

Developing Recommendations to the Legislature

As stated previously, Act 162, Session Laws of Hawaii 2010, directed the task force to submit findings and recommendations, including any proposed legislation, to the Legislature.

Pursuant to this mandate, the task force in 2011 focused upon developing recommendations to the Legislature with a particular focus on issues raised under Act 48, Session Laws of Hawaii 2011.

At the September 14, 2011, public meeting, the task force agreed to develop its recommendations to the Legislature in two general stages. At the first stage, the task force would receive preliminary recommendations from the three investigative groups and vote on whether to send the recommendations to the Legislative Reference Bureau for initial drafting and further consideration by the task force. Votes during this stage did not indicate any decision of the task force other than to send preliminary recommendations to the Legislative Reference Bureau. The intent of this approach was to allow the preliminary recommendations of the investigative groups to be prepared and drafted without waiting for the task force to give final approval of the recommendations.

At the second stage of developing recommendations to the Legislature, the task force conducted final votes on the preliminary recommendations, as presented in proposed legislation prepared by the Legislative Reference Bureau. The first bill draft prepared by the Bureau was distributed at the November 16, 2011, public meeting and included all of the recommendations from each investigative group that had been forwarded to the Bureau for drafting as of that date. Further recommendations from Group #3 were presented at the November 16 meeting and forwarded to the Bureau for drafting; these recommendations were included in a subsequent bill draft prepared by the Bureau and distributed at the November 30, 2011, public meeting. This later draft was used by the task force to vote on final recommendations at the November 30 and December 5 public meetings.

Hence, the *preliminary* substantive recommendations compiled from the three investigative groups, as presented in the bill draft prepared by the Legislative Reference Bureau and distributed at the November 30, 2011, public meeting for final voting by the task force, were as follows (all citations refer to the Hawaii Revised Statutes unless otherwise indicated):

Group #1 Recommendations

- (1) Amend chapter 667, the mortgage foreclosure law, to:
 - a. Consolidate all definitions within the chapter into a single statutory section;
 - b. Amend the definitions for:
 - i. "Approved budget and credit counselor," to refer to "Hawaii-based" counselors;
 - ii. "Approved housing counselor," to refer to "Hawaii-based" counselors listed on the website of the United States Department of Housing and Urban Development; and
 - iii. "Served," to exclude any return or affidavit of service requirements of the service of process or service of summons procedures cited in that definition; and
 - c. Repeal the definition of "foreclosing mortgagee."
- (2) Amend section 454M-10, on penalties for violations of the mortgage servicers law under chapter 454M, to:

- a. Repeal the minimum administrative fine amount of \$1,000 established by Act 48, Session Laws of Hawaii 2011, for violations of the mortgage servicers law; and
 - b. Clarify that the fine amounts to be deposited into the Mortgage Foreclosure Dispute Resolution Special Fund shall be \$1,000 of the aggregate amount of fines arising from a single violation;
- (3) Amend section 607-5, on the schedule of circuit court costs and fees, to reference the fee for petitions to convert nonjudicial foreclosures of residential property into judicial proceedings under section 667-53 and the deposit of these fees into the Mortgage Foreclosure Dispute Resolution Special Fund;
- (4) Amend the foreclosure by action and foreclosure by power of sale processes under part I of chapter 667 as follows:
 - a. Amend section 667-5 to:
 - i. Amend the geographical publication requirements for the notice of intent to foreclose by requiring publication in a daily newspaper of general circulation in the division of the district court in which the mortgaged property lies; and
 - ii. Provide that the mortgagee's filing of a copy of the notice of sale and the mortgagee's affidavit with the Bureau of Conveyances shall occur no earlier than ten days after the public sale of the mortgaged property;
 - b. Amend section 667-10 to specify that the distribution of surplus proceeds to the owner of the mortgaged property shall be made after the proceeds have been distributed pursuant to section 667-3;
- (5) Amend the alternate power of sale foreclosure process under part II of chapter 667 as follows:
 - a. Amend section 667-27, on public notice of public sale, to:
 - i. Eliminate the opening bid estimate as a required item in the public notice; and
 - ii. Amend the geographical publication requirements for public notices by requiring publication in a daily newspaper of general circulation in the division of the district court in which the mortgaged property lies;
 - b. Amend section 667-28 to require notice of the postponement or cancellation of a public sale to be provided to any person entitled to receive the notice of default under section 667-22;
 - c. Amend section 667-33 to require the foreclosing mortgagee's filing of the affidavit after public sale under section 667-32 and the conveyance document to be recorded at least ten days after the public sale;
 - d. Amend section 667-37 to:
 - i. Remove "borrowers" from the list of parties that can institute a judicial foreclosure of mortgaged property;
 - ii. Require judicial foreclosure actions to be filed before the public sale of the property; and
 - iii. Require the power of sale foreclosure process to be stayed during the pendency of a circuit court foreclosure action;
- (6) Amend section 667-53(a)(6), to change the fee for filing a petition to convert a nonjudicial foreclosure of residential property into a judicial foreclosure, to a firm

- \$250, all of which shall be deposited into the mortgage foreclosure dispute resolution special fund;
- (7) Amend section 667-57(a) to include nonjudicial foreclosures under part II of chapter 667 among the types of junior lienholder nonjudicial foreclosures that may not be initiated or continued until the conclusion of a foreclosure initiated by a foreclosing mortgagee;
 - (8) Amend section 667-58, on notices made pursuant to chapter 667, to provide that:
 - a. Attorneys for a mortgage servicer, foreclosing mortgagee, or lender shall not be required to be included in any affiliate statement of a foreclosing mortgagee or lender;
 - b. Any notice or other correspondence made by the attorney for the foreclosing mortgagee or lender shall not be required to reference any affiliate statement made by the foreclosing mortgagee or lender; and
 - c. Any notice or other correspondence made by the attorney for a mortgage servicer shall reference the appropriate affiliate statement of the foreclosing mortgagee or lender authorizing the mortgage servicer to act;
 - (9) Amend the mortgage foreclosure dispute resolution provisions under part V of chapter 667 as follows:
 - a. Amend section 667-82(a) to clarify that failure by the mortgagee and the owner-occupant to reach an agreement shall not constitute failure to comply with the requirements of the mortgage foreclosure dispute resolution program;
 - b. Amend section 667-85 to repeal the provision that provides immunity to a neutral who facilitates a dispute resolution from being: a necessary party to; called as a witness in; or compelled to produce documents in any proceeding that arises from or relates to the mortgage foreclosure dispute resolution program.

Group #2 Recommendations

- (1) Amend chapter 667 by adding a new part to establish an alternate power of sale process specifically for condominium and other homeowner associations and modeled after the process set forth in part II of chapter 667, as amended by the recommendations of the task force;
- (2) Amend chapter 421J, on planned community associations, to provide these associations with the same options as condominium associations with regard to association liens for assessments and the collection of unpaid assessments from tenants or rental agents;
- (3) Amend section 514B-146,¹⁸ on condominium association liens for assessments, to:
 - a. Place time limits on these liens;
 - b. Specify that in foreclosures of these liens, the obligation of the unit owner to pay a reasonable rental for the unit may arise as provided by law, and that the rent owed may be collected from the unit owner or any tenant of the unit; and
 - c. Authorize the association, if foreclosing on the lien, to request that its managing agent be appointed as receiver to collect rent from the tenant;

¹⁸ Corresponding amendments were also made to parallel provisions in section 514A-90 in later bill drafts.

- (4) Amend sections 667-5.5, 667-21.5, 667-78(a), and 667-79(a) to provide condominium and other homeowner associations with notice of an owner-occupant's decision to participate in the mortgage foreclosure dispute resolution program. Conforming amendments are proposed for section 667-83(a) to provide that for a stay of association foreclosure proceedings following a dispute resolution case opening to be valid, the aforementioned notifications must have been made;
- (5) Amend section 667-57(b) to allow condominium and other homeowner associations to proceed with a nonjudicial foreclosure notwithstanding a stay of foreclosure proceedings arising from a dispute resolution case opening, if the association has not been notified of the foreclosure action by the foreclosing mortgagee or of the dispute resolution case opening;
- (6) Amend section 667-53(b) to exempt planned community associations organized under chapter 421J from the process allowing owner-occupants to convert nonjudicial foreclosures of residential property into judicial foreclosures; and
- (7) Amend section 667-71(b) to exempt planned community associations organized under chapter 421J from the requirements of the mortgage foreclosure dispute resolution program in part V of chapter 667.

Group #3 Recommendations

- (1) Amend section 667-73(c) to authorize the Department of Commerce and Consumer Affairs to contract with approved housing counselors and approved budget and credit counselors for purposes of the mortgage foreclosure dispute resolution program under part V of chapter 667;
- (2) Amend section 667-78(a) to provide owner-occupants with the option of completing the mortgage foreclosure dispute resolution program election form on a website maintained by the Department of Commerce and Consumer Affairs;
- (3) Amend section 667-79(a) to provide more time for scheduling dispute resolution sessions;
- (4) Amend section 667-80(e) to require the consideration of various workout options and the owner-occupant's circumstances during the dispute resolution process; and
- (5) Amend section 667-81 to eliminate the role of the neutral foreclosure dispute resolution specialist in the handling of settlement documents memorializing an agreement resulting from the mortgage foreclosure dispute resolution process.

Subsequent to the distribution of the bill draft at the November 30 public meeting, numerous revisions and additions were proposed by the investigative groups and individual task force members at the public meetings held on November 30, December 5,¹⁹ and December 14. These additional *preliminary* recommendations were as follows (all citations refer to the Hawaii Revised Statutes unless otherwise indicated):

- (1) Amend section 45(4) of Act 48, Session Laws of Hawaii 2011, to make permanent the process under sections 667-53, 667-54, and 667-55 for converting nonjudicial foreclosures of residential property into judicial foreclosures;

¹⁹ See Footnote 3.

- (2) Amend the mortgage foreclosure dispute resolution program under part V of chapter 667 as follows:
 - a. Amend section 45(2) of Act 48, Session Laws of Hawaii 2011, to make the dispute resolution program permanent;
 - b. Amend section 667-80(c)(1) to require mortgagees to provide the mortgagor and the Department of Commerce and Consumer Affairs copies of pooling and servicing agreements prior to the first day of a dispute resolution session conducted under part V of chapter 667; and
 - c. Amend section 667-87(c) to: repeal the requirement that the actual settlement document memorializing an agreement resulting from the dispute resolution process be filed or recorded with the land court or the bureau of conveyances; and provide instead that the closing report of the neutral dispute resolution specialist be filed or recorded, with regard to the release of a stay of nonjudicial foreclosure proceedings pending dispute resolution pursuant to section 667-83;
- (3) Amend section 667-60, concerning foreclosing mortgagees who violate chapter 667 being deemed to have committed an unfair or deceptive act or practice under section 480-2, to alternatively:
 - a. Repeal the section outright;
 - b. Amend the section to specify the types of violations under chapter 667 for which contracts or agreements would be void pursuant to section 480-12; or
 - c. Amend the section to specify the types of violations under chapter 667 that constitute unfair or deceptive acts or practices; specify violations for which a foreclosure sale may be voided under section 480-12; and allow actions to void a foreclosure sale to be filed up to six months after an affidavit of the sale is recorded;
- (4) Amend section 667-56, on prohibited practices for mortgagees, as follows:
 - a. Amend paragraph (4) to provide that the bar against delaying the delivery of the recorded, conformed copy of the conveyance document to a bona fide purchaser who purchases in good faith in a public sale applies to delays of more than sixty days, rather than more than forty-five days, after the completion of the public sale; and
 - b. Amend paragraph (5) to provide that the bar against completing nonjudicial foreclosure proceedings during certain short sale escrows with a bona fide purchaser applies when the short sale offer is at least ten percent, rather than five percent, greater than the public sale price;
- (5) Amend section 667-59 to provide that a foreclosing mortgagee shall only be bound by agreements, obligations, representations, or inducements made in writing to a mortgagor on its behalf by its agents;
- (6) Support allowing mortgagees to continue to have the option to initiate nonjudicial foreclosure actions under section 667-5 of part I of chapter 667 when the moratorium on nonjudicial foreclosures under that part expires on July 1, 2012, pursuant to section 40 of Act 48, Session Laws of Hawaii 2011;
- (7) Amend sections 514A-90(a) and 514B-146(a), on condominium liens for assessments, and the corresponding new section added to chapter 421J for planned

- community associations in the bill draft, to prohibit association liens for assessments arising solely from fines, penalties, or late fees;
- (8) Create a new statutory section specifying prohibited conduct for condominium and other homeowner associations exercising the alternate power of sale foreclosure process established in the bill draft for these associations;
 - (9) Amend section 667-41, on public information requirements for persons intending to use the power of sale foreclosure process under part II of chapter 667, to provide specific language for a public information notice explaining the foreclosure process;
 - (10) Amend section 667-55(a), to clarify a portion of the required statement in foreclosure notices (which statement relates to conversions to judicial foreclosures) regarding the ability of a foreclosing lender to pursue a deficiency judgment against the mortgagor;
 - (11) Amend section 667-15(2) and (3), and section 667-25(b)(2) and (3), on the location of public sales of mortgaged property under part I and part II of chapter 667, respectively, to replace references to the eastern and western portions of Hawaii County with references to the districts of that county;
 - (12) Amend the geographical publication requirements in sections 667-5(a)(1)(B) (foreclosure notices under part I of chapter 667) and 667-27(d) (public notice of public sale under the nonjudicial foreclosure process in part II of chapter 667) by requiring publication within the real property tax zone in which the property is located, as shown on the applicable county real property tax maps kept by each respective county's real property tax assessment division, except for the county of Kalawao;
 - (13) Amend sections 667-24, 667-57(a), and 667-81(c) to replace references to "settlement document" with generic references to an "agreement to resolve the nonjudicial foreclosure" or "agreement;"
 - (14) Make further amendments to the definition of "serve" in chapter 667 to limit its application to foreclosure notices;
 - (15) Amend sections 667-6(a); 667-14; 667-63(a)(1); 667-79(c); 667-81(b), (c), and (d); and 667-83(a) to eliminate superfluous references to filings and recordings of documents with the assistant registrar of the land court or the bureau of conveyances, as they are already referenced in the definition of "record" in chapter 667;
 - (16) Amend sections 667-22(a)(3) (foreclosure notices under part II of chapter 667), 667-54 (required contents of petitions to convert to judicial foreclosure), and 667-75(b)(2) (notice of availability of dispute resolution in foreclosure notices) to make uniform references to a property's "certificate of title or transfer certificate of title number if registered in the land court;" and
 - (17) Amend section 667-32(b)(3), to amend the suggested language for an affidavit signed by the foreclosing mortgagee after a public sale is held under part II of chapter 667, to include the property's certificate of title, or transfer certificate of title number if registered with the land court, as part of the legal description of the property attached to the affidavit.

Recommendations to the Legislature

As noted previously, over the course of several public meetings, the task force took a final vote on all of the foregoing preliminary recommendations. The specific votes of task force members on proposals are detailed in the meeting minutes.²⁰

Not all of the preliminary recommendations were approved. Rather, the final recommendations adopted by the task force are the proposals that a majority of the task force could agree upon. Because the recommendations do not completely reflect the full range of views and opinions of the task force members on each proposal considered, readers are urged to review the individual comments of the task force members attached to this report as Appendix C.

It should also be noted that in formulating recommendations, the task force considered every item it was required to review under Act 162, Session Laws of Hawaii 2010. In particular, the task force notes that it defers to the prior recommendation of another state task force with regard to commenting "on the feasibility of establishing a state entity or administrator to focus on addressing the concerns of mortgagors, disseminating information, and otherwise engaging in consumer education," including funding proposals for this entity.²¹ The final report of the Hawaii state asset building and financial education task force²² recommends the creation of "a position or office at the State level that would act as a 'clearinghouse' of financial education programs and services across the state of Hawaii."²³ The mortgage foreclosure task force believes that this recommendation, together with the other proposals of the asset building and financial education task force to improve financial literacy in Hawaii, provides a roadmap for achieving the related goal of promoting consumer education and support in relation to mortgage foreclosures.

The final recommendations adopted by the task force, as presented in this report to the Legislature for the Regular Session of 2012, are set forth below in the form of proposed legislation with annotations. A version of the recommendations in standard legislative bill format is attached to this report as Appendix B. Highlights of these recommendations include amending section 667-60, Hawaii Revised Statutes, which makes any violation of the mortgage foreclosure law under chapter 667 an unfair or deceptive act or practice subject to enhanced penalties under chapter 480, Hawaii Revised Statutes. After extensive discussion, the task force adopted an amendment to specify the types of violations under chapter 667 that constitute unfair or deceptive acts or practices; specify violations for which a foreclosure sale may be voided under section 480-12; and allow actions to void a foreclosure sale to be filed up to six months after an affidavit of the sale is recorded. In addition, the task force adopted a range of other recommendations to improve the way mortgage foreclosures are conducted in Hawaii, including proposals to:

²⁰ The minutes for the meetings of the task force are available online at: <http://hawaii.gov/dcca/mftf>.

²¹ As required by section 2(e) of Act 162, Session Laws of Hawaii 2010.

²² Established by Senate Concurrent Resolution 92 and Senate Resolution 52, 2008.

²³ Page 14 of the January 2010 final report of the Hawaii State Asset Building and Financial Education Task Force.

- (1) Make permanent the process under Act 48 for converting nonjudicial foreclosures of residential property into judicial foreclosures;
- (2) Address practical challenges in the operation of the mortgage foreclosure dispute resolution program;
- (3) Establish an alternate power of sale foreclosure process specifically for condominium and other homeowner associations;
- (4) Provide planned community associations organized under chapter 421J, Hawaii Revised Statutes, with the same options as condominium associations with regard to association liens for assessments and the collection of unpaid assessments from tenants or rental agents;
- (5) Place time limits on condominium and other homeowner association liens for assessments, and prohibit such liens arising solely from fines, penalties, or late fees;
- (6) Provide specific language explaining the foreclosure process for the public information notice that must be distributed by persons intending to use the power of sale foreclosure process under part II of chapter 667, Hawaii Revised Statutes; and
- (7) Clarify, improve, and correct errors in the provisions of Act 48, Session Laws of Hawaii 2011.

Finally, additional conforming changes are recommended for consistency and clarity.

Final Recommendations

COMMENT 1

The following is a suggested preamble for proposed legislation setting forth the final recommendations of the task force.

PART I

SECTION 1. The legislature finds that Act 162, Session Laws of Hawaii 2010, established a mortgage foreclosure task force to develop policies and procedures to improve the way mortgage foreclosures are conducted in the State. Act 162 required the task force to submit its findings and

recommendations, including any proposed legislation, to the legislature for the regular sessions of 2011 and 2012.

The task force held several public meetings over the legislative interim of 2010 to discuss the various items for review raised under Act 162. Based upon these discussions, the task force adopted recommendations, including proposed legislation, in its report to the legislature for the regular session of 2011. Some of the task force's recommendations were included in Act 48, Session Laws of Hawaii 2011, a far-reaching mortgage foreclosure reform measure that, among other things:

- (1) Temporarily authorized mortgagors who are occupying, as a primary residence, real property that is subject to nonjudicial foreclosure to either:
 - (A) Participate in the mortgage foreclosure dispute resolution program established under Act 48; or
 - (B) Convert the nonjudicial foreclosure to a judicial foreclosure;
- (2) Imposed a temporary moratorium on all new nonjudicial foreclosures conducted under part I of chapter 667, Hawaii Revised Statutes; and
- (3) Specified prohibited conduct and consequences of violations for foreclosing mortgagees, including making any violation of the mortgage foreclosure law under chapter 667, Hawaii Revised Statutes, an unfair or deceptive act or practice subject to the enhanced penalties under chapter 480, Hawaii Revised Statutes.

The task force met again over several public meetings during the legislative interim of 2011 to continue its work under Act 162. The focus of these meetings was divided among these major issues:

- (1) The new mortgage foreclosure provisions of Act 48, Session Laws of Hawaii 2011;

- (2) Matters involving condominium and other homeowner associations, including association liens and the collection of unpaid assessments; and
- (3) Mortgage foreclosure counseling and dispute resolution issues.

Based upon its deliberations on these issues, the task force adopted further recommendations in its report to the legislature for the regular session of 2012.

The purpose of this Act is to implement the recommendations of the mortgage foreclosure task force submitted to the legislature for the regular session of 2012.

COMMENT 2

The task force recommends adding two new sections to chapter 421J, on planned community associations, to provide these associations with the same options as condominium associations with regard to association liens for assessments (modeled after sections 514A-90 and 514B-146) and the collection of unpaid assessments from tenants or rental agents (modeled after sections 514A-90.5 and 514B-145).

PART II

SECTION 2. Chapter 421J, Hawaii Revised Statutes, is amended by adding two new sections to be appropriately designated and to read as follows:

"§421J-A Association fiscal matters; lien for assessments.

(a) All sums assessed by the association but unpaid for the share of the assessments chargeable to any unit shall constitute a lien on the unit with priority over all other liens, except:

- (1) Liens for taxes and assessments lawfully imposed by governmental authority against the unit;
- (2) All sums unpaid on any mortgage of record that was recorded prior to the recordation of a notice of a lien by the association and any costs and expenses, including attorneys' fees, provided in such mortgages; and

(3) Liens of a condominium association that are secured by the unit;

provided that a lien recorded by the association shall expire two years from the date of recordation; and provided further that no lien may be imposed by the association against any unit for any assessments arising solely from fines, penalties, or late fees.

The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board, acting on behalf of the association. In any such foreclosure, the unit owner shall be required to pay a reasonable rental for the unit, if so provided in the association documents or the law, and the plaintiff in the foreclosure shall be entitled to the appointment of a receiver to collect the rental owed by the unit owner or any tenant of the unit. If the association is the plaintiff, it may request that its managing agent be appointed as receiver to collect the rent from the tenant. The managing agent or board, acting on behalf of the association, unless prohibited by the declaration, may bid on the unit at foreclosure sale and acquire and hold, lease, mortgage, and convey the unit. Action to recover a money judgment for unpaid assessments shall be maintainable without foreclosing or waiving the lien securing the unpaid assessments owed.

(b) Except as provided in subsection (e), when the mortgagee of a mortgage of record or other purchaser of a unit obtains title to the unit as a result of foreclosure of the mortgage, the acquirer of title and the acquirer's successors and assigns shall not be liable for the share of the assessments by the association chargeable to the unit that became due prior to the acquisition of title to the unit by the acquirer. The unpaid share of assessments shall be deemed to be assessments

collectible from all of the unit owners, including the acquirer and the acquirer's successors and assigns. The mortgagee of record or other purchaser of the unit shall be deemed to acquire title and shall be required to pay the unit's share of assessments beginning:

- (1) Thirty-six days after the order confirming the sale to the purchaser has been filed with the court;
- (2) Sixty days after the hearing at which the court grants the motion to confirm the sale to the purchaser;
- (3) Thirty days after the public sale in a nonjudicial power of sale foreclosure conducted pursuant to chapter 667; or
- (4) Upon the recording of the instrument of conveyance;

whichever occurs first; provided that the mortgagee of record or other purchaser of the unit shall not be deemed to acquire title under paragraph (1), (2), or (3), if transfer of title is delayed past the thirty-six days specified in paragraph (1), the sixty days specified in paragraph (2), or the thirty days specified in paragraph (3), when a person who appears at the hearing on the motion or a party to the foreclosure action requests reconsideration of the motion or order to confirm sale, objects to the form of the proposed order to confirm sale, appeals the decision of the court to grant the motion to confirm sale, or the debtor or mortgagor declares bankruptcy or is involuntarily placed into bankruptcy. In any such case, the mortgagee of record or other purchaser of the unit shall be deemed to acquire title upon recordation of the instrument of conveyance.

(c) Except as provided in section 667-B(c), no unit owner shall withhold any assessment claimed by the association. A unit owner who disputes the amount of an assessment may request a written statement clearly indicating:

- (1) The amount of regular and special assessments included in the assessment, including the due date of each amount claimed;
- (2) The amount of any penalty, late fee, lien filing fee, and any other charge included in the assessment;
- (3) The amount of attorneys' fees and costs, if any, included in the assessment;
- (4) That under Hawaii law, a unit owner has no right to withhold assessments for any reason;
- (5) That a unit owner has a right to demand mediation or arbitration to resolve disputes about the amount or validity of an association's assessment; provided that the unit owner immediately pays the assessment in full and keeps assessments current; and
- (6) That payment in full of the assessment does not prevent the unit owner from contesting the assessment or receiving a refund of amounts not owed.

Nothing in this section shall limit the rights of a unit owner to the protection of all fair debt collection procedures mandated under federal and state law.

(d) A unit owner who pays an association the full amount claimed by the association may file in small claims court or require the association to mediate to resolve any disputes concerning the amount or validity of the association's claim. If the unit owner and the association are unable to resolve the dispute through mediation, either party may file for arbitration under chapter 658A; provided that a unit owner may only file for arbitration if all amounts claimed by the association are paid in full on or before the date of filing. If the unit owner fails to keep all association assessments current during the arbitration, the association may ask the arbitrator to temporarily suspend the arbitration proceedings. If the unit

owner pays all association assessments within thirty days of the date of suspension, the unit owner may ask the arbitrator to recommence the arbitration proceedings. If the unit owner fails to pay all association assessments by the end of the thirty-day period, the association may ask the arbitrator to dismiss the arbitration proceedings. The unit owner shall be entitled to a refund of any amounts paid to the association that are not owed.

(e) In conjunction with or as an alternative to foreclosure proceedings under subsection (a), where a unit is owner-occupied, the association may authorize its managing agent or board, after sixty days written notice to the unit owner and to the unit's first mortgagee of the nonpayment of the unit's share of the assessments, to terminate the delinquent unit's access to the common elements and cease supplying a delinquent unit with any and all services normally supplied or paid for by the association. Any terminated services and privileges shall be restored upon payment of all delinquent assessments, but need not be restored until payment in full is received.

(f) Before the board or managing agent may take the actions permitted under subsection (e), the board shall adopt a written policy providing for such actions and have the policy approved by a majority vote of the unit owners at an annual or special meeting of the association or by the written consent of a majority of the unit owners unless the association documents already permit the process.

(g) Subject to this subsection and subsections (h) and (i), the board may specially assess the amount of the unpaid regular monthly common assessments for assessments against a person who, in a judicial or nonjudicial power of sale foreclosure, purchases a delinquent unit; provided that:

- (1) A purchaser who holds a mortgage on a delinquent unit that was recorded prior to the filing of a notice of

lien by the association and who acquires the delinquent unit through a judicial or nonjudicial foreclosure proceeding, including purchasing the delinquent unit at a foreclosure auction, shall not be obligated to make, nor be liable for, payment of the special assessment as provided for under this subsection; and

- (2) A person who subsequently purchases the delinquent unit from the mortgagee referred to in paragraph (1) shall be obligated to make, and shall be liable for, payment of the special assessment provided for under this subsection; and provided further that the mortgagee or subsequent purchaser may require the association to provide, at no charge, a notice of the association's intent to claim a lien against the delinquent unit for the amount of the special assessment, prior to the subsequent purchaser's acquisition of title to the delinquent unit. The notice shall state the amount of the special assessment, how that amount was calculated, and the legal description of the unit.

(h) The amount of the special assessment assessed under subsection (g) shall not exceed the total amount of unpaid regular monthly common assessments that were assessed during the twelve months immediately preceding the completion of the judicial or nonjudicial power of sale foreclosure. In no event shall the amount of the special assessment exceed the sum of \$7,200.

(i) For purposes of subsections (g) and (h), the following definitions shall apply, unless the context requires otherwise:

"Completion" means:

- (1) In a nonjudicial power of sale foreclosure, when the affidavit required under section 667-33 is recorded; and
- (2) In a judicial foreclosure, when a purchaser is deemed to acquire title pursuant to subsection (b).

"Regular monthly common assessments" does not include:

- (1) Any other special assessment, except for a special assessment imposed on all units as part of a budget adopted pursuant to the association documents;
- (2) Late charges, fines, or penalties;
- (3) Interest assessed by the association;
- (4) Any lien arising out of the assessment; or
- (5) Any fees or costs related to the collection or enforcement of the assessment, including attorneys' fees and court costs.

(j) The cost of a release of any lien filed pursuant to this section shall be paid by the party requesting the release.

§421J-B Association fiscal matters; collection of unpaid assessments from tenants or rental agents. (a) If a unit owner rents or leases the unit and is in default for thirty days or more in the payment of the unit's share of the regular assessments, the board, for as long as the default continues, may demand in writing and receive each month from any tenant occupying the unit or rental agent renting the unit, an amount sufficient to pay all sums due from the unit owner to the association, including interest, if any, but the amount shall not exceed the tenant's rent due each month. The tenant's payment under this section shall discharge that amount of payment from the tenant's rent obligation, and any contractual provision to the contrary shall be void as a matter of law.

(b) Before taking any action under this section, the board shall give to the delinquent unit owner written notice of its intent to collect the rent owed. The notice shall:

- (1) Be sent both by first-class and certified mail;
- (2) Set forth the exact amount the association claims is due and owing by the unit owner; and
- (3) Indicate the intent of the board to collect such amount from the rent, along with any other amounts that become due and remain unpaid.

(c) The unit owner shall not take any retaliatory action against the tenant for payments made under this section.

(d) The payment of any portion of the unit's share of regular assessments by the tenant pursuant to a written demand by the board is a complete defense, to the extent of the amount demanded and paid by the tenant, in an action for nonpayment of rent brought by the unit owner against a tenant.

(e) The board may not demand payment from the tenant pursuant to this section if:

- (1) A commissioner or receiver has been appointed to take charge of the premises pending a mortgage foreclosure;
- (2) A mortgagee is in possession pending a mortgage foreclosure; or
- (3) The tenant is served with a court order directing payment to a third party.

(f) In the event of any conflict between this section and any provision of chapter 521, the conflict shall be resolved in favor of this section; provided that if the tenant is entitled to an offset of rent under chapter 521, the tenant may deduct the offset from the amount due to the association, up to the limits stated in chapter 521. Nothing herein precludes the unit owner or tenant from seeking equitable relief from a court of

competent jurisdiction or seeking a judicial determination of the amount owed.

(g) Before the board may take the actions permitted under subsection (a), the board shall adopt a written policy providing for the actions and have the policy approved by a majority vote of the unit owners at an annual or special meeting of the association or by the written consent of a quorum of the unit owners."

COMMENT 3

To clarify and streamline the use of terms within chapter 667, the task force recommends consolidating all definitions within the chapter into a new section 667-1 placed in a new part I to chapter 667.

The task force also recommends amending the current definitions within chapter 667 for:

- (1) "Approved budget and credit counselor," to refer to "Hawaii-based" rather than "local" counselors. A Hawaii-based counselor would provide more meaningful counseling and seems more appropriate and less ambiguous than "local;"**
- (2) "Approved housing counselor," to refer to "Hawaii-based" counselors listed on the website of the United States Department of Housing and Urban Development. A foreclosure notice must include contact information for approved housing counselors pursuant to sections 667-22(d) and 667-75(b)(5). The amendments here are intended to provide a common list of such counselors for lenders to refer to; and**
- (3) "Served," to limit its application to foreclosure notices and to exclude any return or affidavit of service requirements of the service of process or service of summons procedures cited in that definition.**

Finally, the current definition of "foreclosing mortgagee," as found in section 667-21, should be repealed in favor of the broader definition of "mortgagee" in the same section. The task force believes that all mortgagees should be equally subject to the requirements of chapter 667 and that the list of specified entities included in the definition of "foreclosing mortgagee" created more confusion.

SECTION 3. Chapter 667, Hawaii Revised Statutes, is amended as follows:

1. By adding a new part I to read:

"PART I. GENERAL PROVISIONS

§667-1 Definitions. As used in this chapter:

"Approved budget and credit counselor" means a Hawaii-based budget and credit counseling agency that has received approval from a United States trustee or bankruptcy administrator to provide instructional courses concerning personal financial management pursuant to title 11 United States Code section 111.

"Approved housing counselor" means a Hawaii-based housing counseling agency that has received approval from the United States Department of Housing and Urban Development to provide housing counseling services pursuant to section 106(a)(2) of the Housing and Urban Development Act of 1968, title 12 United States Code section 1701x, as the agency appears on the United States Department of Housing and Urban Development website.

"Assessment" has the same meaning as "assessment" in chapter 421J and "common expense" in chapter 514B.

"Association" has the same meaning as defined in sections 421J-2 and 514B-3.

"Association documents" has the same meaning as defined in section 421J-2 and includes the "declaration" defined in section 514B-3 and the "bylaws" described in section 514B-108, respectively.

"Association lien" has the same meaning as the lien established under section 421J-A or 514B-146.

"Borrower" means the borrower, maker, cosigner, or guarantor under a mortgage agreement.

"Department" means the department of commerce and consumer affairs.

"Director" means the director of commerce and consumer affairs.

"Dispute resolution" means a facilitated negotiation under part V between a mortgagor and mortgagee for the purpose of reaching an agreement for mortgage loan modification or other agreement in an attempt to avoid foreclosure or to mitigate damages if foreclosure is unavoidable.

"Foreclosure notice" means notice of intention to foreclose given pursuant to section 667-5 or notice of default and intention to foreclose prepared pursuant to section 667-22.

"Mailed" means to be sent by first class mail, postage prepaid, unless otherwise expressly directed in this chapter.

"Mortgage" means a mortgage, security agreement, or other document under which property is mortgaged, encumbered, pledged, or otherwise rendered subject to a lien for the purpose of securing the payment of money or the performance of an obligation.

"Mortgage agreement" includes the mortgage, the note or debt document, or any document amending any of the foregoing.

"Mortgaged property" means the property that is subject to the lien of the mortgage.

"Mortgagee" means the current holder of record of the mortgagee's or the lender's interest under the mortgage or the current mortgagee's or lender's duly authorized agent.

"Mortgagor" means the mortgagor or borrower named in the mortgage and, unless the context otherwise indicates, includes the current owner of record of the mortgaged property whose interest is subject to the mortgage.

"Neutral" means a person who is a dispute resolution specialist assigned to facilitate the dispute resolution process required by part V.

"Nonjudicial foreclosure" means foreclosure under power of sale.

"Open house" means a public showing of the mortgaged property during a scheduled time period.

"Owner-occupant" means a person, at the time that a notice of default and intention to foreclose is served on the mortgagor under the power of sale:

- (1) Who owns an interest in the residential property, and the interest is encumbered by the mortgage being foreclosed; and
- (2) For whom the residential property is and has been the person's primary residence for a continuous period of not less than two hundred days immediately preceding the date on which the notice is served.

"Power of sale" or "power of sale foreclosure" means a nonjudicial foreclosure when the mortgage contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure.

"Property" means property (real, personal, or mixed), an interest in property (including fee simple, leasehold, life estate, reversionary interest, and any other estate under applicable law), or other interests that can be subject to the lien of a mortgage.

"Record" means a document is recorded or filed in the office of the assistant registrar of the land court under chapter 501 or recorded in the bureau of conveyances under chapter 502, or both, as applicable.

"Residential property" means real property that is improved and used for residential purposes.

"Serve", when referring to providing notice of intention to foreclose or notice of default and intention to foreclose pursuant to a nonjudicial foreclosure, means to have service of the notice of default and intention to foreclose made in

accordance with the service of process or the service of summons under the Hawaii rules of civil procedure and under sections 634-35 and 634-36, excluding however, any return or affidavit of service obligations required therein.

"Time share interest" has the same meaning as in section 514E-1.

"Unit" has the same meaning as in sections 421J-2 and 514B-3.

"Unit owner" has the same meaning as "member" in section 421J-2 and "unit owner" in section 514B-3."

COMMENT 4

The task force recommends adding a new part to chapter 667 to establish an alternate power of sale process specifically for condominium and other homeowner associations and modeled after the process set forth in part II of chapter 667, as amended by the task force's recommendations. The new part includes a section (667-O) specifying prohibited conduct for condominium and other homeowner associations exercising the alternate power of sale foreclosure process under the new part.

2. By adding a new part to be appropriately designated and to read:

**"PART . ASSOCIATION ALTERNATE POWER OF SALE
FORECLOSURE PROCESS**

§667-A Alternate power of sale process. The process in this part is an alternative power of sale process for associations to the foreclosure by action and the foreclosure by power of sale in part IA.

§667-B Notice of default and intention to foreclose; contents; distribution. (a) When a unit owner has failed to pay an assessment, and when the association intends to conduct a power of sale foreclosure under this part, the association shall prepare a written notice of default and intention to foreclose addressed to the unit owner. The notice of default and intention to foreclose shall state:

- (1) The name and address of the association;
- (2) The name and last known address of the unit owners;
- (3) With respect to the unit, the address or a description of its location, tax map key number, and certificate of title or transfer certificate of title number if registered in the land court;
- (4) The description of the default or, if the default is a monetary default, an itemization of the delinquent amount;
- (5) The action required to cure the default, including the delinquent amount and the estimated amount of the association's attorney's fees and costs, and all other fees and costs related to the default estimated to be incurred by the association by the deadline date;
- (6) The date by which the default must be cured, which shall be within sixty days after service of the notice of default and intention to foreclose;
- (7) A statement that if the default is not cured by the deadline date stated in the notice of default and intention to foreclose, the entire unpaid balance of the moneys owed to the association will become due, that the association intends to conduct a power of sale foreclosure to sell the unit at a public sale without any court action and without going to court, and that the mortgagee or any other person may acquire the unit at the public sale;
- (8) The name, address, electronic address, and telephone number of the attorney who is representing the association; provided that the attorney shall be licensed to practice law in the State and physically located in the State; and

(9) Notice of the right of the unit owner to submit a payment plan within thirty days pursuant to subsection (c).

(b) The notice of default and intention to foreclose shall also contain wording substantially similar to the following in all capital letters and printed in not less than fourteen-point font:

"IF THE DEFAULT ON THE PAYMENT OF ASSESSMENTS CONTINUES AFTER THE DEADLINE DATE IN THIS NOTICE, THE UNIT MAY BE FORECLOSED AND SOLD WITHOUT ANY COURT ACTION AND WITHOUT GOING TO COURT.

YOU MAY HAVE CERTAIN LEGAL RIGHTS OR DEFENSES. FOR ADVICE, YOU SHOULD CONSULT WITH AN ATTORNEY LICENSED IN THIS STATE.

AFTER THE DEADLINE DATE IN THIS NOTICE, TWO PUBLIC SHOWINGS (OPEN HOUSES) OF THE UNIT BY THE ASSOCIATION WILL BE HELD, BUT ONLY IF ALL OWNERS OF THE PROPERTY WHO ALSO CURRENTLY RESIDE AT THE UNIT SO AGREE. TO SHOW THAT ALL OWNERS RESIDING AT THE UNIT AGREE TO ALLOW TWO OPEN HOUSES BY THE ASSOCIATION, THEY MUST SIGN A LETTER SHOWING THEY AGREE. THE SIGNED LETTER MUST BE SENT TO THIS OFFICE AT THE ADDRESS GIVEN IN THIS NOTICE.

THIS OFFICE MUST ACTUALLY RECEIVE THE SIGNED LETTER BY THE DEADLINE DATE IN THIS NOTICE. THE SIGNED LETTER MUST BE SENT TO THIS OFFICE BY CERTIFIED MAIL, REGISTERED MAIL, OR EXPRESS MAIL, POSTAGE PREPAID AND RETURN RECEIPT REQUESTED.

IF THE SIGNED LETTER IS NOT RECEIVED BY THIS OFFICE BY THE DEADLINE DATE, THE UNIT WILL THEN BE SOLD WITHOUT ANY OPEN HOUSES BEING HELD.

EVEN IF THIS OFFICE RECEIVES THE SIGNED LETTER TO

ALLOW THE ASSOCIATION TO HOLD TWO OPEN HOUSES OF THE UNIT, IF ALL OWNERS LATER DO NOT COOPERATE TO ALLOW THE OPEN HOUSES, THE UNIT WILL BE SOLD WITHOUT ANY OPEN HOUSES BEING HELD.

ALL FUTURE NOTICES AND CORRESPONDENCE WILL BE MAILED TO YOU AT THE ADDRESS AT WHICH YOU RECEIVED THIS NOTICE UNLESS YOU SEND WRITTEN INSTRUCTIONS TO THIS OFFICE INFORMING THIS OFFICE OF A DIFFERENT ADDRESS. THE WRITTEN INSTRUCTIONS MUST BE SENT TO THIS OFFICE BY CERTIFIED MAIL, REGISTERED MAIL, OR EXPRESS MAIL, POSTAGE PREPAID AND RETURN RECEIPT REQUESTED."

(c) A unit owner may submit a payment plan within thirty days after service of a notice of default and intention to foreclose on the unit owner. The unit owner shall submit the payment plan to the association or its attorney by certified mail return receipt requested or by hand delivery. A unit owner may also cure the default within sixty days after service of a notice of default and intention to foreclose on the unit owner by paying the association the full amount of the default, including the foreclosing association's attorneys' fees and costs, and all other fees and costs related to the default that are incurred or estimated to be incurred by the foreclosing association. The association shall not reject a reasonable payment plan; provided that a reasonable payment plan shall require the unit owner to pay, at a minimum, the current maintenance fee and some amount owed on the past due balance. From and after the date that the unit owner gives written notice to the association of its intent to cure the default or timely submits a payment plan, any nonjudicial foreclosure of the lien shall be stayed during the sixty-day period to cure the default or during the term of the payment plan or a longer period that

is agreed upon by the parties. A unit owner's failure to strictly perform any agreed-upon payment plan shall entitle the association to pursue its remedies without further delay.

For purposes of this section, a reasonable payment plan shall be a plan that provides for:

- (1) Timely payment of all assessments that become due after the date that the payment plan is proposed; and
- (2) Additional monthly payments of an amount sufficient to cure the default, within a reasonable period under the circumstances as determined by the board of directors in its discretion; provided that a period of up to twelve months shall be deemed reasonable; and provided further that the board of directors shall have the discretion to agree to a payment plan in excess of twelve months.

(d) The notice of default and intention to foreclose shall also include contact information for approved housing counselors and approved budget and credit counselors.

(e) The association shall have the notice of default and intention to foreclose served on:

- (1) The unit owner;
- (2) Any prior or junior creditors who have a recorded lien on the unit before the recordation of the notice of default and intention to foreclose under section 667-C;
- (3) The state director of taxation;
- (4) The director of finance of the county where the unit is located; and
- (5) Any other person entitled to receive notice under section 667-5.5.

§667-C Recordation of notice of default and intention to foreclose. Before the deadline date in the notice of default

and intention to foreclose, the notice shall be recorded in a recordable form in a manner similar to recordation of notices of pendency of action under section 501-151 or section 634-51, or both, as applicable. The recorded notice of default and intention to foreclose shall have the same effect as a notice of pendency of action. From and after the recordation of the notice of default and intention to foreclose, any person who becomes a purchaser or encumbrancer of the unit shall be deemed to have constructive notice of the power of sale foreclosure and shall be bound by the foreclosure.

§667-D Cure of default. (a) If the default is cured as required by the notice of default and intention to foreclose, or if the parties have agreed on a payment plan, the association shall rescind the notice of default and intention to foreclose. Within fourteen days of the date of the cure or an agreement on a payment plan, the association shall so notify any person who was served with the notice of default and intention to foreclose. If the notice of default and intention to foreclose was recorded, a release of the notice of default and intention to foreclose shall be recorded.

(b) If the default is not cured as required by the notice of default and intention to foreclose, or the parties have not agreed on a payment plan, the association, without filing a court action and without going to court, may foreclose the association's lien under power of sale to sell the unit at a public sale.

§667-E Date, place of public sale of unit. (a) The public sale of the unit shall take place on the later of the following:

- (1) At least sixty days after the public notice of the public sale is distributed under section 667-G; or

- (2) At least fourteen days after the date of the publication of the third public notice advertisement under section 667-G(d).

(b) The public sale of the unit shall be held only in the county where the unit is located; provided that the public sale shall be held only on grounds or at facilities under the administration of the State, as follows:

- (1) At the state capitol, for a public sale of a unit located in the city and county of Honolulu;
- (2) At a state facility in Hilo, for a public sale of a unit located in the districts of Hamakua, North Hilo, South Hilo, or Puna;
- (3) At a state facility in Kailua-Kona, for a public sale of a unit located in the districts of North Kohala, South Kohala, North Kona, South Kona, or Kau;
- (4) At a state facility in the county seat of Maui, for a public sale of a unit located in the county of Maui; and

(5) At a state facility in the county seat of Kauai, for a public sale of a unit located in the county of Kauai; as designated by the department of accounting and general services; provided further that no public sale shall be held on grounds or at facilities under the administration of the judiciary. The public sale shall be held during business hours on a business day.

(c) The public sale of the unit shall be conducted by the association on the date, at the time, and at the place described in the public notice of the public sale.

§667-F Public showing of unit. (a) If the default is not cured as stated in the notice of default and intention to foreclose, the association shall conduct two open houses of the unit before the public sale; provided that the association

timely received the signed letter of agreement from the unit owner as required by the notice of default and intention to foreclose. Only two open houses shall be required even if the date of the public sale is postponed.

(b) Even if the signed letter of agreement is timely received, if there is no subsequent cooperation by the unit owner to allow two open houses, the public sale may be held without any open houses of the unit. If the public notice of the public sale advertised the dates and times of the open houses, but there were no open houses because of the lack of cooperation by the unit owner, the public sale may still be held as advertised, and the public notice of the public sale may not need to be republished.

§667-G Public notice of public sale; contents; distribution; publication. (a) The association shall prepare the public notice of the public sale. The public notice shall state:

- (1) The date, time, and place of the public sale;
- (2) The dates and times of the two open houses of the unit, or if there will not be any open houses, the public notice shall so state;
- (3) The unpaid balance of the moneys owed to the association;
- (4) A description of the unit, including the address and the tax map key number of the unit;
- (5) The name of the unit owner;
- (6) The name of the association;
- (7) The name of any prior or junior creditors having a recorded lien on the unit before the recordation of the notice of default and intention to foreclose under section 667-C;

- (8) The name, the address in the State, and the telephone number in the State of the person in the State conducting the public sale; and
- (9) The terms and conditions of the public sale.
- (b) The public notice shall also contain wording substantially similar to the following in all capital letters:

"THE DEFAULT UNDER THE ASSOCIATION DOCUMENTS MAY BE CURED NO LATER THAN THREE BUSINESS DAYS BEFORE THE DATE OF THE PUBLIC SALE OF THE UNIT BY PAYING THE ENTIRE AMOUNT THAT WOULD BE OWED TO THE ASSOCIATION PLUS THE ASSOCIATION'S ATTORNEY'S FEES AND COSTS, AND ALL OTHER FEES AND COSTS INCURRED BY THE FORECLOSING ASSOCIATION RELATED TO THE DEFAULT, UNLESS OTHERWISE AGREED TO BETWEEN THE ASSOCIATION AND THE UNIT OWNER. THERE IS NO RIGHT TO CURE THE DEFAULT OR ANY RIGHT OF REDEMPTION AFTER THAT TIME. IF THE DEFAULT IS SO CURED, THE PUBLIC SALE SHALL BE CANCELED."
- (c) If the default is not cured as required by the notice of default and intention to foreclose, the association shall have a copy of the public notice of the public sale of the unit:
 - (1) Mailed or delivered to the unit owners at their respective last known addresses;
 - (2) Mailed or delivered to any prior or junior creditors having a recorded lien on the unit before the recordation of the notice of default and intention to foreclose under section 667-C;
 - (3) Mailed or delivered to the state director of taxation;
 - (4) Mailed or delivered to the director of finance of the county where the unit is located;
 - (5) Posted on the unit or on such other real property of which the unit is a part; and
 - (6) Mailed or delivered to any other person entitled to receive notice under section 667-5.5 or 667-21.5.

(d) The association shall have the public notice of the public sale printed in not less than seven-point font and published in the classified section of a daily newspaper of general circulation in the real property tax zone in which the unit is located, as shown on the applicable county real property tax maps kept by each respective county's real property tax assessment division, except for the county of Kalawao which shall be considered its own geographic area for the purposes of this subsection. The public notice shall be published once each week for three consecutive weeks, constituting three publications. The public sale shall take place no sooner than fourteen days after the date of the publication of the third public notice advertisement.

§667-H Postponement, cancellation of sale. (a) The public sale may be either postponed or canceled by the association. Notice of the postponement or the cancellation of the public sale shall be:

- (1) Announced by the association at the date, time, and place of the last scheduled public sale; and
- (2) Provided to any other person who is entitled to receive the notice of default under section 667-B.

(b) If there is a postponement of the public sale of the unit, a new public notice of the public sale shall be published once in the format described in section 667-G. The new public notice shall state that it is a notice of a postponed sale. The public sale shall take place no sooner than fourteen days after the date of the publication of the new public notice. Not less than fourteen days before the date of the public sale, a copy of the new public notice shall be posted on the unit or on another real property of which the unit is a part, and it shall be mailed or delivered to the unit owner, and to any other person entitled to receive notice under section 667-B(e).

(c) Upon the fourth postponement of every series of four consecutive postponements, the association shall follow all of the public notice of public sale requirements of section 667-G, including the requirements of mailing and posting under section 667-G(c) and of publication under section 667-G(d).

(d) The default under the association documents may be cured no later than three business days before the date of the public sale of the unit by paying the entire amount that would be owed to the association if the payments under the association documents had not been accelerated, plus the association's attorney's fees and costs, and all other fees and costs incurred by the association related to the default, unless otherwise agreed to between the association and the unit owner. There is no right to cure the default or any right of redemption after that time. If the default is so cured, the public sale shall be canceled.

§667-I Authorized bidder; successful bidder. Any person, including the association, shall be authorized to bid for the unit at the public sale and to purchase the unit. The highest bidder who meets the requirements of the terms and conditions of the public sale shall be the successful bidder. The public sale shall be considered as being held when the unit is declared by the association as being sold to the successful bidder. When the public sale is held, the successful bidder at the public sale, as the purchaser, shall make a nonrefundable downpayment to the association of not less than ten per cent of the highest successful bid price. If the successful bidder is the association or any other person having a recorded lien on the unit before the recordation of the notice of default and intention to foreclose under section 667-C, the downpayment requirement may be satisfied by offset and a credit bid up to the amount of the lien debt.

§667-J Successful bidder's failure to comply; forfeiture of downpayment. If the successful bidder later fails to comply with the terms and conditions of the public sale or fails to complete the purchase within forty-five days after the public sale is held, the downpayment shall be forfeited by that bidder. The forfeited downpayment shall be credited by the association first towards the association's attorney's fees and costs, then towards the fees and costs of the power of sale foreclosure, and any balance towards the moneys owed to the association. The association, in its discretion, may then accept the bid of the next highest bidder who meets the requirements of the terms and conditions of the public sale or may begin the public sale process again.

§667-K Conveyance of property on payment of purchase price; distribution of sale proceeds. (a) After the purchaser completes the purchase by paying the full purchase price and the costs for the purchase, the unit shall be conveyed to the purchaser by a conveyance document. The conveyance document shall be in a recordable form and shall be signed by the association in the foreclosing mortgagee's name. The unit owner shall not be required to sign the conveyance document.

(b) From the sale proceeds, after paying:

- (1) All liens and encumbrances in the order of priority as a matter of law;
- (2) The association's attorney's fees and costs;
- (3) The fees and costs; of the power of sale foreclosure; and
- (4) The moneys owed to the association, the balance of the sale proceeds shall be distributed by the association to junior creditors having valid liens on the unit in the order of their priority and not pro rata. Any

remaining surplus after payment in full of all valid lien creditors shall be distributed to the unit owner.

(c) Lien creditors prior to the association shall not be forced to their right of recovery. However, the association and any prior lien creditor may agree in writing that the proceeds from the sale will be distributed by the association to the prior lien creditor towards the payment of moneys owed to the prior lien creditor before any moneys are paid to the association.

§667-L Affidavit after public sale; contents. (a) After the public sale is held, the association shall sign an affidavit under penalty of perjury:

- (1) Stating that the power of sale foreclosure was made pursuant to the power of sale provision in the law or association documents;
- (2) Stating that the power of sale foreclosure was conducted as required by this part;
- (3) Summarizing what was done by the association;
- (4) Attaching a copy of the recorded notice of default and intention to foreclose; and
- (5) Attaching a copy of the last public notice of the public sale.

(b) The recitals in the affidavit required under subsection (a) may, but need not, be substantially in the following form:

- (1) I am duly authorized to represent or act on behalf of _____ (name of association) ("association") regarding the following power of sale foreclosure. I am signing this affidavit in accordance with the alternate power of sale foreclosure law (Chapter 667, Part _____, Hawaii Revised Statutes);

- (2) The association is a "association" as defined in the power of sale foreclosure law;
- (3) The power of sale foreclosure is of an association lien. If the lien was recorded, the lien was dated _____, and recorded in the _____ (bureau of conveyances or office of the assistant registrar of the land court) as _____ (recordation information). The unit is located at: _____ (address or description of location) and is identified by tax map key number: _____. The legal description of the property, which shall include the certificate of title or transfer certificate of title number if registered with the land court, is attached as Exhibit "A";
- (4) Pursuant to the power of sale provision of law or association documents, the power of sale foreclosure was conducted as required by the power of sale foreclosure law. The following is a summary of what was done:
- (A) A notice of default and intention to foreclose was served on the mortgagor, the borrower, and the following person: _____. The notice of default and intention to foreclose was served on the following date and in the following manner: _____;
- (B) The date of the notice of default and intention to foreclose was _____ (date). The deadline in the notice for curing the default was _____ (date), which deadline date was at least sixty days after the date of the notice;

- (C) The notice of default and intention to foreclose was recorded before the deadline date in the _____ (bureau of conveyances or office of the assistant registrar of the land court). The notice was recorded on _____ (date) as document no. _____. A copy of the recorded notice is attached as Exhibit "1";
- (D) The default was not cured by the deadline date in the notice of default and intention to foreclose;
- (E) A public notice of the public sale was initially published in the classified section of the _____, in accordance with section 667-G(d), Hawaii Revised Statutes, once each week for three consecutive weeks on the following dates: _____. A copy of the affidavit of publication for the last public notice of the public sale is attached as Exhibit "2". The date of the public sale was _____ (date). The last publication was not less than fourteen days before the date of the public sale;
- (F) The public notice of the public sale was sent to the unit owner, to the state director of taxation, to the director of finance of the county where the unit is located, and to the following: _____. The public notice was sent on the following dates and in the following manner: _____. Those dates were after the deadline date in the notice of default and intention to foreclose, and those dates were at least sixty days before the date of

the public sale;

- (G) The public notice of the public sale was posted on the unit or on such other real property of which the unit is a part on _____ (date). That date was at least sixty days before the date of the public sale;
- (H) Two public showings (open houses) of the unit were held (or were not held because the unit owner did not cooperate);
- (I) A public sale of the unit was held on a business day during business hours on: _____ (date), at _____ (time), at the following location: _____. The highest successful bidder was _____ (name) with the highest successful bid price of \$ _____; and
- (J) At the time the public sale was held, the default was not cured; and

(5) This affidavit is signed under penalty of perjury."

§667-M Recordation of affidavit, conveyance document; effect. (a) The affidavit required under section 667-L and the conveyance document shall be recorded no earlier than ten days after the public sale is held but not later than forty-five days after the public sale is held. The affidavit and the conveyance document may be recorded separately and on different days. After the recordation, the association shall mail or deliver a recorded copy to those persons entitled to receive the public notice of the public sale under section 667-G(c).

(b) When both the affidavit and the conveyance document are recorded:

- (1) The sale of the unit is considered completed;

- (2) All persons claiming by, through, or under the mortgagor and all other persons having liens on the unit junior to the lien of the association shall be forever barred of and from any and all right, title, interest, and claims at law or in equity in and to the unit and every part of the unit, except as otherwise provided by law;
- (3) The lien of the association and all liens junior in priority to the lien of a association shall be automatically extinguished from the unit; and
- (4) The purchaser shall be entitled to immediate and exclusive possession of the unit.

(c) The mortgagor and any person claiming by, through, or under the mortgagor and who is remaining in possession of the unit after the recordation of the affidavit and the conveyance document shall be considered a tenant at sufferance subject to eviction or ejectment. The purchaser may bring an action in the nature of summary possession under chapter 666, ejectment, or trespass or may bring any other appropriate action in a court where the unit is located to obtain a writ of possession, a writ of assistance, or any other relief. In any such action, the court shall award the prevailing party its reasonable attorney's fees and costs and all other reasonable fees and costs, all of which are to be paid for by the non-prevailing party.

§667-N Recordation; full satisfaction of debt by borrower.

The recordation of both the conveyance document and the affidavit shall not operate as full satisfaction of the debt owed by the unit owner to the association unless the sale proceeds from the unit or the amounts paid by a purchaser under the special assessment permitted by section 421J-A or 514B-146 are sufficient to satisfy the unit owner's debt to the association, including the association's legal fees and costs.

The debts of other lien creditors are unaffected except as provided in this part.

§667-O Prohibited conduct. It shall be a prohibited practice for any association to engage in any of the following practices:

- (1) Holding a public sale on a date, at a time, or at a place other than that described in the public notice of the public sale or a properly noticed postponement;
- (2) Specifying a fictitious place in the public notice of the public sale;
- (3) Conducting a postponed public sale on a date other than the date described in the new public notice of the public sale; or
- (4) Completing or attempting to complete nonjudicial foreclosure proceedings against a unit owner in violation of section 667-B(c)."

COMMENT 5

The task force recommends amending section 454M-10, on penalties for violations of the mortgage servicers law under chapter 454M, to:

- (1) **Repeal the minimum administrative fine amount of \$1,000 established by Act 48, Session Laws of Hawaii 2011, for violations of the mortgage servicers law; and**
- (2) **Clarify that the fine amounts to be deposited into the Mortgage Foreclosure Dispute Resolution Special Fund shall be \$1,000 of the aggregate amount of fines arising from a single violation.**

(See also Comment 50.)

PART III

SECTION 4. Section 454M-10, Hawaii Revised Statutes, is amended to read as follows:

"§454M-10 Penalty. Any person who violates any provision of this chapter may be subject to an administrative fine of [~~at least \$1,000 and~~] not more than \$7,000 for each violation; provided that \$1,000 of the aggregate fine amount shall be deposited into the mortgage foreclosure dispute resolution special fund established pursuant to section 667-86."

COMMENT 6

The task force recommends amending 514A-90, on condominium association liens for assessments, to:

- (1) Place time limits on these liens;**
- (2) Prohibit association liens for assessments arising solely from fines, penalties, or late fees;**
- (3) Specify that in foreclosures of these liens, the obligation of the unit owner to pay a reasonable rental for the unit may arise as provided by law, and that the rent owed may be collected from the unit owner or any tenant of the unit; and**
- (4) Authorize the association, if foreclosing on the lien, to request that its managing agent be appointed as receiver to collect rent from the tenant.**

Similar provisions are included in the new section 421J-A relating to planned community associations in Comment 2.

SECTION 5. Section 514A-90, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

"(a) All sums assessed by the association of apartment owners but unpaid for the share of the common expenses chargeable to any apartment constitute a lien on the apartment prior to all other liens, except:

- (1) Liens for taxes and assessments lawfully imposed by governmental authority against the apartment; and
- (2) All sums unpaid on any mortgage of record that was recorded prior to the recordation of notice of a lien by the association of apartment owners, and costs and

expenses including attorneys' fees provided in such mortgages~~[7]~~;
provided that a lien recorded by the association of apartment owners shall expire two years from the date of recordation; and provided further that no lien may be imposed by the association against any apartment for any assessments arising solely from fines, penalties, or late fees.

The lien of the association of apartment owners may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board of directors, acting on behalf of the association of apartment owners~~[7 in like manner as a mortgage of real property]~~. In any such foreclosure, the apartment owner shall be required to pay a reasonable rental for the apartment, if so provided in the bylaws~~[7]~~ or the law, and the plaintiff in the foreclosure shall be entitled to the appointment of a receiver to collect the rental owed~~[7]~~ by the apartment owner or any tenant of the apartment. If the association of apartment owners is the plaintiff, it may request that its managing agent be appointed as receiver to collect the rent from the tenant. The managing agent or board of directors, acting on behalf of the association of apartment owners, unless prohibited by the declaration, may bid on the apartment at foreclosure sale, and acquire and hold, lease, mortgage, and convey the apartment. Action to recover a money judgment for unpaid common expenses shall be maintainable without foreclosing or waiving the lien securing the unpaid common expenses owed.

(b) Except as provided in subsection (g), when the mortgagee of a mortgage of record or other purchaser of an apartment obtains title to the apartment as a result of foreclosure of the mortgage, the acquirer of title and the acquirer's successors and assigns shall not be liable for the share of the common expenses or

assessments by the association of apartment owners chargeable to the apartment [~~which~~] that became due prior to the acquisition of title to the apartment by the acquirer. The unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the apartment owners, including the acquirer and the acquirer's successors and assigns. The mortgagee of record or other purchaser of the apartment shall be deemed to acquire title and shall be required to pay the apartment's share of common expenses and assessments beginning:

- (1) Thirty-six days after the order confirming the sale to the purchaser has been filed with the court;
- (2) Sixty days after the hearing at which the court grants the motion to confirm the sale to the purchaser;
- (3) Thirty days after the public sale in a nonjudicial power of sale foreclosure conducted pursuant to [~~section 667-5,~~] chapter 667; or

(4) Upon the recording of the instrument of conveyance, whichever occurs first; provided that the mortgagee of record or other purchaser of the apartment shall not be deemed to acquire title under paragraph (1), (2), or (3), if transfer of title is delayed past the thirty-six days specified in paragraph (1), the sixty days specified in paragraph (2), or the thirty days specified in paragraph (3), when a person who appears at the hearing on the motion or a party to the foreclosure action requests reconsideration of the motion or order to confirm sale, objects to the form of the proposed order to confirm sale, appeals the decision of the court to grant the motion to confirm sale, or the debtor or mortgagor declares bankruptcy or is involuntarily placed into bankruptcy. In any such case, the mortgagee of record or other purchaser of the apartment shall be deemed to acquire title upon recordation of the instrument of conveyance."

COMMENT 7

The following amendments to section 514B-146 are identical to the foregoing amendments in Comment 6 to parallel the provisions in section 514A-90.

SECTION 6. Section 514B-146, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

"(a) All sums assessed by the association but unpaid for the share of the common expenses chargeable to any unit shall constitute a lien on the unit with priority over all other liens, except:

- (1) Liens for taxes and assessments lawfully imposed by governmental authority against the unit; and
- (2) All sums unpaid on any mortgage of record that was recorded prior to the recordation of a notice of a lien by the association, and costs and expenses including attorneys' fees provided in such mortgages~~[-]~~;

provided that a lien recorded by the association shall expire two years from the date of recordation; and provided further that no lien may be imposed by the association against any unit for any assessments arising solely from fines, penalties, or late fees.

The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board, acting on behalf of the association~~[, in like manner as a mortgage of real property]~~. In any such foreclosure, the unit owner shall be required to pay a reasonable rental for the unit, if so provided in the bylaws~~[,]~~ or the law, and the plaintiff in the foreclosure shall be entitled to the appointment of a receiver to collect the rental owed~~[-]~~ by the unit owner or any tenant of the unit. If the association is the plaintiff, it may request

that its managing agent be appointed as receiver to collect the rent from the tenant. The managing agent or board, acting on behalf of the association, unless prohibited by the declaration, may bid on the unit at foreclosure sale, and acquire and hold, lease, mortgage, and convey the unit. Action to recover a money judgment for unpaid common expenses shall be maintainable without foreclosing or waiving the lien securing the unpaid common expenses owed.

(b) Except as provided in subsection (g), when the mortgagee of a mortgage of record or other purchaser of a unit obtains title to the unit as a result of foreclosure of the mortgage, the acquirer of title and the acquirer's successors and assigns shall not be liable for the share of the common expenses or assessments by the association chargeable to the unit ~~[which]~~ that became due prior to the acquisition of title to the unit by the acquirer. The unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the unit owners, including the acquirer and the acquirer's successors and assigns. The mortgagee of record or other purchaser of the unit shall be deemed to acquire title and shall be required to pay the unit's share of common expenses and assessments beginning:

- (1) Thirty-six days after the order confirming the sale to the purchaser has been filed with the court;
- (2) Sixty days after the hearing at which the court grants the motion to confirm the sale to the purchaser;
- (3) Thirty days after the public sale in a nonjudicial power of sale foreclosure conducted pursuant to ~~[section 667-5;]~~ chapter 667; or

(4) Upon the recording of the instrument of conveyance; whichever occurs first; provided that the mortgagee of record or other purchaser of the unit shall not be deemed to acquire title

under paragraph (1), (2), or (3), if transfer of title is delayed past the thirty-six days specified in paragraph (1), the sixty days specified in paragraph (2), or the thirty days specified in paragraph (3), when a person who appears at the hearing on the motion or a party to the foreclosure action requests reconsideration of the motion or order to confirm sale, objects to the form of the proposed order to confirm sale, appeals the decision of the court to grant the motion to confirm sale, or the debtor or mortgagor declares bankruptcy or is involuntarily placed into bankruptcy. In any such case, the mortgagee of record or other purchaser of the unit shall be deemed to acquire title upon recordation of the instrument of conveyance."

COMMENT 8

The task force recommends amending section 607-5, on the schedule of circuit court costs and fees, to reference the fee for petitions to convert nonjudicial foreclosures of residential property into judicial proceedings under section 667-53 and provide for the deposit of these fees into the Mortgage Foreclosure Dispute Resolution Special Fund. Corresponding amendments are made to section 667-53(a)(6) under Comment 27, and all of these amendments take effect on August 15, 2012, to provide the Judiciary time to administer the changes.

SECTION 7. Section 607-5, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

"(a) The fees prescribed by the schedule in this section shall be paid to the clerk of the circuit court as costs of court by the person instituting the action or proceeding, or offering the paper for filing, or causing the document to be issued or the services to be performed in the circuit court; provided that nothing in the schedule shall apply to cases of adults charged with commission of a crime, or to proceedings under section 571-11(1), (2), or (9), to proceedings under chapter 333F or 334, to small estates including decedents'

estates and protection of property of minors and persons under disability when the amount payable is fixed by another statute, ~~[or to nonjudicial foreclosures converted to judicial proceedings pursuant to section 667-53; and]~~; provided further that the fees prescribed by subsection (c)(32) shall be deposited by the clerk of the circuit court into the judiciary computer system special fund pursuant to section 601-3.7~~[-]~~; and provided further that the fees prescribed by subsection (b)(1a) shall be deposited by the clerk of the circuit court as provided in section 667-53(a)(6).

For the purpose of this section, "judgment" includes a decree and any order from which an appeal lies.

SCHEDULE

In the application of this schedule, each case assigned a new number or filed under the number previously assigned to a probate, trust, guardianship, or conservatorship, shall carry a fee for the institution or transfer of the action or proceeding as prescribed by part I, and in addition the fees prescribed by part II unless otherwise provided.

(b) **PART I**

Action or proceeding, general:

- (1) Civil action or special proceeding, unless another item in part I applies.....\$200
- (1a) Petition for conversion of nonjudicial foreclosure to judicial foreclosure.....\$250
- (2) Appeal to a circuit court.....\$100
- (3) Transfer of action to circuit court from district court, in addition to district court fees.....\$125

Trusts:

- (4) Proceeding for (A) appointment of trustee; (B) appointment of successor; (C) resignation of trustee; (D) instructions; (E) approval of

- investment; (F) approval of sale, mortgage, lease, or other disposition of property; (G) approval of compromise of claim, for each such matter.....\$100
- (5) Proceeding for (A) removal of trustee; (B) order requiring accounting; (C) invalidation of action taken by trustee; (D) termination of trust, for each such matter.....\$100
- (6) Accounting, this fee to be paid for each account filed and to include the settlement of the account.....\$10
- (7) Vesting order.....no charge under part I
- (8) Allowance of fees of trustees, attorneys, or other fees for services incurred in a proceeding for which a fee has been paid under this section.....no charge under part I
- (8a) Registration of a trust, or release of registration, under chapter 560.....\$3
- (9) Any other proceeding relating to a trust.....\$15
- Conservatorship:
- (10) Proceeding for (A) appointment; (B) appointment of successor; (C) resignation; (D) instructions, unless included in one of the foregoing proceedings; (E), (F), (G) approval of any matter listed in (E), (F), or (G) of item (4) in relation to a trust, for each such matter.....\$100
- (11) Proceeding of the nature listed in (A), (B), (C), or (D) of item (5) in relation to a trust, for each such matter.....\$15
- (12) Accounting, same as provided by item (6) in relation to a trust.....\$10
- (13) Any other proceeding relating to a

conservatorship.....no charge under part I
Guardianship:

(13a) Guardianship, including all matters of the nature
listed in items (4) to (9), whether in family or
circuit court\$100
Probate (decedents' estates). These fees include all matters of
the nature listed in items (4) to (9), without additional
charge:

(14) Probate, administration, domiciliary foreign
personal representative, or ancillary
administration, this fee to be paid once only for
each decedent's estate.....\$100

Family court cases:

- (15) Matrimonial action (annulment, divorce,
separation, or separate maintenance).....\$100
- (16) Adoption.....\$100
- (17) Guardianship, including all matters of the nature
listed in items (4) to (9)....As provided in item 13(a)
- (18) Termination of parental rights...no charge under part I
- (19) Any other family court proceeding, except motions or
other pleadings in matrimonial, adoption, and
guardianship actions, but including without limitation
custody proceedings even if in the form of an habeas
corpus proceeding.....\$15"

COMMENT 9

The following amendments are necessitated by the consolidation of statutory definitions into a single section within chapter 667, as described in Comment 3. The new definitions section is designated as section 667-1 under part I of chapter 667; consequently, the existing section 667-1 should re-designated as section 667-1.5, and the existing part I should be re-designated as part IA.

SECTION 8. Chapter 667, Hawaii Revised Statutes, is amended by designating:

1. Part I as part IA; and
2. Section 667-1 as section 667-1.5.

COMMENT 10

The task force recommends amending section 667-5 (under the judicial and nonjudicial foreclosure processes under part I of chapter 667) to:

- (1) Delete references to requirements for serving foreclosure notices that are already included in the definition of "serve" as proposed by the task force (see Comment 3);**
- (2) Amend the geographical publication requirements for foreclosure notices by requiring publication in a daily newspaper of general circulation in the real property tax zone in which the property is located, as shown on the applicable county real property tax maps kept by each respective county's real property tax assessment division, except for the county of Kalawao. The existing provision requires publication in the daily newspaper with the largest circulation, which eliminates any alternative and raises issues as to how the largest circulation is determined. In addition, the existing provision refers to publication in the "western" and "eastern" half of the county, which are not specifically defined. As an alternative, the task force recommends referring to county real property tax zones (see related amendment in Comment 21); and**
- (3) Provide that the mortgagee's filing of a copy of the notice of sale and the mortgagee's affidavit with the Bureau of Conveyances shall occur no earlier than ten days after the public sale of the mortgaged property. This amendment is necessary because section 667-56(5) allows a short sale escrow to be opened within ten days of the public sale; accordingly, the mortgagee may not file the affidavit of sale earlier than ten days after the sale. (See similar provision in Comment 24.)**

SECTION 9. Section 667-5, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (a) to read:

"(a) When a power of sale is contained in a mortgage, and where the mortgagee, the mortgagee's successor in interest, or any person authorized by the power to act in the premises[7]

desires to foreclose under power of sale upon breach of a condition of the mortgage, the mortgagee, successor, or person shall be represented by an attorney who is licensed to practice law in the State and is physically located in the State. The attorney shall:

- (1) Give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property as follows:
 - (A) By serving, not less than twenty-one days before the date of sale, written notice of intent to foreclose on all persons entitled to notice under this part ~~[in the same manner as service of a civil complaint under chapter 634 and the Hawaii rules of civil procedure]~~; provided that in the case of nonjudicial foreclosure of a lien by an association against a mortgagor who is not an owner-occupant, the association shall mail the notice by certified or registered mail, not less than twenty-one days before the date of sale, to:
 - (i) The unit owner at the address shown in the records of the association and, if different, at the address of the unit being foreclosed; and
 - (ii) All mortgage creditors whose names are known or can be discovered by the association; and
 - (B) By publication of the notice once in each of three successive weeks, constituting three publications with the last publication to be not less than fourteen days before the day of sale, in a daily newspaper ~~[having the largest]~~ of general circulation in the ~~[specific county in which the mortgaged property lies; provided that~~

~~for property located in a county with a population of more than one hundred thousand but less than three hundred thousand, the public notice shall be published in the newspaper having the largest circulation expressly in the eastern or western half of the county, corresponding to the location of the subject property;~~] real property tax zone in which the mortgaged property is located, as shown on the applicable county real property tax maps kept by each respective county's real property tax assessment division, except for the county of Kalawao which shall be considered its own geographic area for the purposes of this subparagraph;

- (2) Give notice of the mortgagor's right to elect to participate in the mortgage foreclosure dispute resolution program pursuant to section 667-75 or to convert the nonjudicial power of sale foreclosure to a judicial foreclosure pursuant to section 667-53; and
- (3) Give any notices and do all acts as authorized or required by the power contained in the mortgage."

2. By amending subsection (d) to read:

"(d) Any sale, of which notice has been given pursuant to subsections (a) and (b),] may be postponed from time to time by public announcement made by the mortgagee or by a person acting on the mortgagee's behalf. Upon request made by any person who is entitled to notice pursuant to section 667-5.5 or 667-6~~[7]~~ or this section, the mortgagee or person acting on the mortgagee's behalf shall provide the date and time of a postponed auction~~[7]~~ or,] if the auction is canceled, information that the auction was canceled. The mortgagee, not earlier than ten days after the public sale but within thirty days after selling the property in

pursuance of the power, shall file a copy of the notice of sale and the mortgagee's affidavit, setting forth the mortgagee's acts in the premises fully and particularly, in the bureau of conveyances."

COMMENT 11

The task force recommends amending section 667-5.5 to provide condominium and other homeowner associations with notice of an owner-occupant's decision to participate in the mortgage foreclosure dispute resolution program. (See related provisions in Comments 17, 42, and 46.)

SECTION 10. Section 667-5.5, Hawaii Revised Statutes, is amended to read as follows:

"[~~f~~]~~\$~~667-5.5[~~f~~] Foreclosure notice; planned communities; condominiums; cooperative housing projects. Notwithstanding any law or agreement to the contrary, any person who forecloses on a property under this part within a planned community, a condominium apartment or unit, or an apartment in a cooperative housing project shall notify, by registered or certified mail, the board of directors of the planned community association, the association of owners of the condominium project, or the cooperative housing project in which the property to be foreclosed is located, of the following:

- (1) The foreclosure at the time foreclosure proceedings are begun[~~-~~]; and
- (2) Any election by an owner-occupant of the property that is the subject of the foreclosure to participate in the mortgage foreclosure dispute resolution program under part V.

The notice, at a minimum, shall identify the property, condominium apartment or unit, or cooperative apartment that is the subject of the foreclosure and identify the name or names of the person or persons bringing foreclosure proceedings. [~~This~~

~~section]~~ Paragraph (1) shall not apply if the planned community association, condominium association of owners, or cooperative housing corporation is a party in a foreclosure action. This section shall not affect civil proceedings against parties other than the planned community association, association of owners, or cooperative housing corporation."

COMMENT 12

The task force recommends eliminating superfluous references to filings and recordations of documents with the assistant registrar of the land court or the bureau of conveyances, as redundant with the definition of "record" in the new section 667-1. (See discussion in Comment 3.)

Similar amendments are made in Comments 14, 35, 42, 44, and 46.

SECTION 11. Section 667-6, Hawaii Revised Statutes, is amended to read as follows:

"§667-6 Notice to mortgage creditors. (a) Whenever a mortgage creditor ~~[having]~~ who has a mortgage lien on certain premises desires notice that another mortgage creditor having a mortgage lien on the same premises intends to foreclose the mortgage and sell the mortgaged property pursuant to a power of sale under section 667-5, the mortgage creditor may submit a written request to the mortgagee who is foreclosing or who may foreclose the mortgage by power of sale, asking to receive notice of the mortgagee's intention to foreclose the mortgage under power of sale. This request for notice may be submitted any time after the recordation ~~[or filing]~~ of the subject mortgage ~~[at the bureau of conveyances or the land court, but must be]~~; provided that the request is submitted prior to the completion of the publication of the mortgagee's notice of intention to foreclose the mortgage and of the sale of the mortgaged property. This request shall be signed by the mortgage creditor, or its authorized representative, desiring to

receive notice, specifying the name and address of the person to whom the notice is to be mailed.

(b) The mortgagee receiving the request shall thereafter give notice to all mortgage creditors who have timely submitted their request. The notice shall be sent by mail or otherwise communicated to the mortgage creditors, not less than seven calendar days prior to the date of sale.

(c) No request for copy of any notice pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property or be deemed notice to any person that any party requesting copy of the notice has or claims any right, title, or interest in, or lien or charge upon the property described in the mortgage referred to therein."

COMMENT 13

The task force recommends amending section 667-10 (under the judicial and nonjudicial foreclosure processes under part I of chapter 667) to specify that the distribution of surplus proceeds from a public sale to the owner of the mortgaged property shall be made after the proceeds have been distributed pursuant to section 667-3. This is a clarifying amendment to ensure consistency with the related provisions of section 667-3.

SECTION 12. Section 667-10, Hawaii Revised Statutes, is amended to read as follows:

"§667-10 Power unaffected by transfer; surplus after sale.

No sale or transfer by the mortgagor shall impair or annul any right or power of attorney given in the mortgage to the mortgagee to sell or transfer the mortgaged property, as attorney or agent of the mortgagor, except as otherwise provided by chapters 501 and 502. When public sale is made of the mortgaged property under this part, distribution of the proceeds of the sale shall be as specified in section 667-3, and the remainder of the proceeds, if any, shall be paid over to the

owner of the mortgaged property, after deducting the amount of ~~[claim]~~ all claims and all expenses attending the same."

COMMENT 14

The task force recommends eliminating superfluous references to filings and recordations of documents with the assistant registrar of the land court or the bureau of conveyances, as redundant with the definition of "record" in the new section 667-1. (See discussion in Comment 3.)

Similar amendments are made in Comments 12, 35, 42, 44, and 46.

SECTION 13. Section 667-14, Hawaii Revised Statutes, is amended to read as follows:

"~~[f]~~**\$667-14**~~[f]~~ **Recordation of foreclosure notice.** The foreclosing mortgagee may record a copy of the foreclosure notice ~~[with the assistant registrar of the land court or the bureau of conveyances, as appropriate,]~~ in a manner similar to recordation of notices of pendency of action under section 501-151 or section 634-51, as applicable. The recorded notice shall have the same effect as a notice of pendency of action. ~~[From and after]~~ Upon the recordation of the notice, any person who thereafter becomes a purchaser or encumbrancer of the mortgaged property shall be deemed to have constructive notice of the power of sale foreclosure and shall be bound by the foreclosure."

COMMENT 15

The task force recommends amending section 667-15(2) and (3), on the location of public sales of mortgaged property under part I of chapter 667, to replace references to the eastern and western portions of Hawaii County with references to the districts of that county. (See related amendment in Comment 20.)

SECTION 14. Section 667-15, Hawaii Revised Statutes, is amended to read as follows:

"~~[f]~~**\$667-15**~~[f]~~ **Location of public sale following power of**

sale foreclosure. The public sale of the mortgaged property shall be held only on grounds or at facilities under the administration of the State, as follows:

- (1) At the state capitol, for a public sale of mortgaged property located in the city and county of Honolulu;
- (2) At a state facility in Hilo, for a public sale of mortgaged property located in the ~~[eastern portion of the county of Hawaii;]~~ districts of Hamakua, North Hilo, South Hilo, or Puna;
- (3) At a state facility in Kailua-Kona, for a public sale of mortgaged property located in the ~~[western portion of the county of Hawaii;]~~ districts of North Kohala, South Kohala, North Kona, South Kona, or Kau;
- (4) At a state facility in the county seat of Maui, for a public sale of mortgaged property located in the county of Maui; and
- (5) At a state facility in the county seat of Kauai, for a public sale of mortgaged property located in the county of Kauai;

as designated by the department of accounting and general services; provided that no public sale shall be held on grounds or at facilities under the administration of the judiciary. The public sale shall be held during business hours on a business day."

COMMENT 16

The following are technical amendments to reflect the re-designation of part I as part IA in chapter 667, and to repeal definitions that were transferred to the new consolidated section on definitions (section 667-1). Both amendments are described in Comment 3.

SECTION 15. Section 667-21, Hawaii Revised Statutes, is amended to read as follows:

"~~[f]~~ §667-21~~[f]~~ **Alternate power of sale process**~~[f]~~ **definitions**]. ~~[(a)]~~ The process in this part is an alternative power of sale process to the foreclosure by action and the foreclosure by power of sale in part ~~[I.]~~ IA.

~~[(b)] As used in this part:~~

~~"Approved budget and credit counselor" means a budget and credit counseling agency that has received approval from a United States trustee or bankruptcy administrator to provide instructional courses concerning personal financial management pursuant to Title 11 United States Code, section 111.~~

~~"Approved housing counselor" means a housing counseling agency that has received approval from the United States Department of Housing and Urban Development to provide housing counseling services pursuant to section 106(a)(2) of the Housing and Urban Development Act of 1968, Title 12 United States Code, section 1701x.~~

~~"Association" has the same meaning as the term is defined in section 514B-3.~~

~~"Borrower" means the borrower, maker, cosigner, or guarantor under a mortgage agreement.~~

~~"Foreclosing mortgagee" means the mortgagee that intends to conduct a power of sale foreclosure; provided that the mortgagee is a federally insured bank, a federally insured savings and loan association, a federally insured savings bank, a depository financial services loan company, a nondepository financial services loan company, a credit union insured by the National Credit Union Administration, a bank holding company, a foreign lender as defined in section 207-11, or an institutional investor as defined in section 454-1.~~

~~Unless the context clearly indicates otherwise, as used in this part, a "foreclosing mortgagee" shall encompass all of the following entities:~~

- ~~(1) The foreclosing mortgagee;~~
- ~~(2) Any person that has an ownership interest in the promissory note on the mortgage agreement or a security interest represented by the mortgage for the subject property;~~
- ~~(3) Any mortgage servicer, who services the mortgage loan of the mortgagor; and~~
- ~~(4) The agents, employees, trustees, and representatives of a lender, the foreclosing mortgagee, a mortgagee, and a mortgage servicer.~~

~~"Mailed" means to be sent by regular mail, postage prepaid, and by certified, registered, or express mail, postage prepaid and return receipt requested.~~

~~"Mortgage" means a mortgage, security agreement, or other document under which property is mortgaged, encumbered, pledged, or otherwise rendered subject to a lien for the purpose of securing the payment of money or the performance of an obligation.~~

~~"Mortgage agreement" includes the mortgage, the note or debt document, or any document amending any of the foregoing.~~

~~"Mortgaged property" means the property that is subject to the lien of the mortgage.~~

~~"Mortgagee" means the current holder of record of the mortgagee's or the lender's interest under the mortgage, or the current mortgagee's or lender's duly authorized agent.~~

~~"Mortgagor" means the mortgagor or borrower named in the mortgage and, unless the context otherwise indicates, includes the current owner of record of the mortgaged property whose interest is subject to the mortgage.~~

~~"Nonjudicial foreclosure" means foreclosure under power of sale.~~

~~"Open house" means a public showing of the mortgaged property during a scheduled time period.~~

~~"Owner-occupant" means a person, at the time that a notice of default and intention to foreclose is served on the mortgagor under the power of sale:~~

~~(1) Who owns an interest in the residential property, and the interest is encumbered by the mortgage being foreclosed; and~~

~~(2) For whom the residential property is and has been the person's primary residence for a continuous period of not less than two hundred days immediately preceding the date on which the notice is served.~~

~~"Power of sale" or "power of sale foreclosure" means a nonjudicial foreclosure under this part when the mortgage contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure.~~

~~"Property" means property (real, personal, or mixed), an interest in property (including fee simple, leasehold, life estate, reversionary interest, and any other estate under applicable law), or other interests that can be subject to the lien of a mortgage.~~

~~"Record" or "recorded" means a document is recorded or filed with the office of the assistant registrar of the land court under chapter 501 or recorded with the registrar of conveyances under chapter 502, or both, as applicable.~~

~~"Residential property" means real property that is improved and used for residential purposes.~~

~~"Served" means to have service of the notice of default and intention to foreclose made in accordance with the service of process or the service of summons under the Hawaii rules of civil procedure, and under sections 634-35 and 634-36.] "~~

COMMENT 17

The task force recommends amending section 667-21.5 to provide condominium and other homeowner associations with notice of an owner-occupant's decision to participate in the mortgage foreclosure dispute resolution program. (See related provisions in Comments 11, 42, and 46.)

SECTION 16. Section 667-21.5, Hawaii Revised Statutes, is amended to read as follows:

"~~[§]~~**§667-21.5**~~[§]~~ **Foreclosure notice; planned communities; condominiums; cooperative housing projects.** Notwithstanding any law or agreement to the contrary, any person who forecloses on a property under this part within a planned community, a condominium apartment or unit, or an apartment in a cooperative housing project shall notify, by way of registered or certified mail, the board of directors of the planned community association, the association of owners of the condominium project, or the cooperative housing project in which the property to be foreclosed is located, of the following:

- (1) The foreclosure at the time foreclosure proceedings are begun~~[§]~~; and
- (2) Any election by an owner-occupant of the property that is the subject of the foreclosure to participate in the mortgage foreclosure dispute resolution program under part V.

The notice, at a minimum, shall identify the property, condominium apartment or unit, or cooperative apartment that is the subject of the foreclosure and identify the name or names of the person or persons bringing foreclosure proceedings. ~~[This section]~~ Paragraph (1) shall not apply when the planned community association, condominium association of owners, or cooperative housing corporation is a party in a foreclosure action. This section shall not affect civil proceedings against

parties other than the planned community association, association of owners, or cooperative housing corporation."

COMMENT 18

The following amendments delete unnecessary references covered by the new definitions of "approved housing counselors," "approved budget and credit counselors," and "serve," as described in Comment 3.

In addition, section 667-22(a)(3) should be amended to conform with the various property description provisions within chapter 667 referencing a property's certificate of title, or transfer certificate of title number if registered with the land court. Similar amendments are made to sections 667-32(b)(3) in Comment 23, 667-54(a)(3) in Comment 28, and 667-75(b)(2) in Comment 39.

SECTION 17. Section 667-22, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (a) to read:

"(a) When the mortgagor or the borrower has breached the mortgage agreement, and when the foreclosing mortgagee intends to conduct a power of sale foreclosure under this part, the foreclosing mortgagee shall prepare a written notice of default and intention to foreclose addressed to the mortgagor, the borrower, and any guarantor. The notice of default and intention to foreclose shall state:

- (1) The name and address of the current mortgagee;
- (2) The name and last known address of ~~[all]~~ the mortgagors, the borrowers, and any guarantors;
- (3) ~~[The]~~ With respect to the mortgaged property, the address or a description of ~~[the]~~ its location ~~[of the mortgaged property]~~, ~~[the]~~ tax map key number, and ~~[the]~~ certificate of title or transfer certificate of title number if ~~[within the jurisdiction of]~~ registered in the land court~~[, of the mortgaged property]~~;

- (4) The description of the default or, if the default is a monetary default, an itemization of the delinquent amount;
- (5) The action required to cure the default, including the delinquent amount and the estimated amount of the foreclosing mortgagee's attorney's fees and costs, and all other fees and costs related to the default estimated to be incurred by the foreclosing mortgagee by the deadline date;
- (6) The date by which the default must be cured, which shall be at least sixty days after the date of the notice of default and intention to foreclose;
- (7) A statement that if the default is not cured by the deadline date stated in the notice of default and intention to foreclose, the entire unpaid balance of the moneys owed to the mortgagee under the mortgage agreement will become due, that the mortgagee intends to conduct a power of sale foreclosure to sell the mortgaged property at a public sale without any court action and without going to court, and that the mortgagee or any other person may acquire the mortgaged property at the public sale;
- (8) The name, address, electronic address, and telephone number of the attorney who is representing the foreclosing mortgagee; provided that the attorney shall be licensed to practice law in the State and physically located in the State; and
- (9) Notice of the right of the owner-occupant to elect to participate in any other process as established by law."

2. By amending subsections (d) and (e) to read:

"(d) The notice of default and intention to foreclose

shall also include contact information for ~~[local]~~ approved housing counselors and approved budget and credit counselors.

(e) The foreclosing mortgagee shall have the notice of default and intention to foreclose served on:

- (1) The mortgagor and the borrower ~~[in the same manner as service of a civil complaint under chapter 634 or the Hawaii rules of civil procedure, as they may be amended from time to time];~~
- (2) Any prior or junior creditors who have a recorded lien on the mortgaged property before the recordation of the notice of default and intention to foreclose under section 667-23;
- (3) The state director of taxation;
- (4) The director of finance of the county where the mortgaged property is located;
- (5) The department of commerce and consumer affairs, by filing the notice with the department when required; and
- (6) Any other person entitled to receive notice under this part."

COMMENT 19

The task force recommends replacing references to the "settlement document," memorializing an agreement resulting from mortgage foreclosure dispute resolution under section 667-81(c), with generic references to an "agreement to resolve the nonjudicial foreclosure" or "agreement." Similar amendments are made in Comments 31 and 44.

SECTION 18. Section 667-24, Hawaii Revised Statutes, is amended to read as follows:

"§667-24 Cure of default. (a) If the default is cured as required by the notice of default and intention to foreclose, or if the parties have reached ~~[a settlement document,]~~ an agreement to resolve the nonjudicial foreclosure, the

foreclosing mortgagee shall rescind the notice of default and intention to foreclose. Within fourteen days of the date of the cure or ~~[a settlement document reached by the parties,~~] an agreement to resolve the nonjudicial foreclosure, the foreclosing mortgagee shall so notify any person who was served with the notice of default and intention to foreclose. If the notice of default and intention to foreclose was recorded, a release of the notice of default and intention to foreclose shall be recorded.

(b) If the default is not cured as required by the notice of default and intention to foreclose, the parties have not reached ~~[a settlement document pursuant to part V]~~ an agreement to resolve the nonjudicial foreclosure and no report of noncompliance has been issued against the mortgagee under section 667-82, and the mortgagor has not elected to convert the foreclosure to a judicial action, the foreclosing mortgagee, without filing a court action and without going to court, may foreclose the mortgage under power of sale to sell the mortgaged property at a public sale."

COMMENT 20

The task force recommends amending section 667-25(b)(2) and (3), on the location of public sales of mortgaged property under part II of chapter 667, to replace references to the eastern and western portions of Hawaii County with references to the districts of that county. (See related amendments in Comment 15.)

SECTION 19. Section 667-25, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) The public sale of the mortgaged property shall be held only in the county where the mortgaged property is located; provided that the public sale shall be held only on grounds or at facilities under the administration of the State, as follows:

(1) At the state capitol, for a public sale of mortgaged

- property located in the city and county of Honolulu;
- (2) At a state facility in Hilo, for a public sale of mortgaged property located in the [~~eastern portion of the county of Hawaii;~~] districts of Hamakua, North Hilo, South Hilo, or Puna;
 - (3) At a state facility in Kailua-Kona, for a public sale of mortgaged property located in the [~~western portion of the county of Hawaii;~~] districts of North Kohala, South Kohala, North Kona, South Kona, or Kau;
 - (4) At a state facility in the county seat of Maui, for a public sale of mortgaged property located in the county of Maui; and
 - (5) At a state facility in the county seat of Kauai, for a public sale of mortgaged property located in the county of Kauai;

as designated by the department of accounting and general services; provided further that no public sale shall be held on grounds or at facilities under the administration of the judiciary. The public sale shall be held during business hours on a business day."

COMMENT 21

The task force recommends amending section 667-27, on public notice of public sale under the alternate power of sale foreclosure process in part II of chapter 667, as follows:

- (1) Eliminate the opening bid estimate as a required item in the public notice, because an estimate of the opening bid does not appear to further any purpose and is usually determined just prior to the public sale, not at the time of notice. Any estimate at the time of notice could be inaccurate by the time the public sale is conducted and may discourage potential bidders; and**
- (2) Amend the geographical publication requirements for public notices by requiring publication in a daily newspaper of general circulation in the real property tax zone in which the property is located, as shown on the applicable county real property tax maps kept by each respective county's**

real property tax assessment division, except for the county of Kalawao, for the same reasons mentioned in Comment 10.

SECTION 20. Section 667-27, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (a) to read:

"(a) The foreclosing mortgagee shall prepare the public notice of the public sale. The public notice shall state:

- (1) The date, time, and place of the public sale;
- (2) The dates and times of the two open houses of the mortgaged property, or if there will not be any open houses, the public notice shall so state;
- (3) The unpaid balance of the moneys owed to the mortgagee under the mortgage agreement;
- (4) A description of the mortgaged property, including the address and the tax map key number of the mortgaged property;
- (5) The name of the mortgagor and the borrower;
- (6) The name of the foreclosing mortgagee;
- (7) The name of any prior or junior creditors having a recorded lien on the mortgaged property before the recordation of the notice of default and intention to foreclose under section 667-23;
- (8) The name, the address in the State, and the telephone number in the State of the person in the State conducting the public sale; and
- (9) The terms and conditions of the public sale~~;~~ ~~and~~
- ~~(10) An estimate of the opening bid]."~~

2. By amending subsection (d) to read:

"(d) The foreclosing mortgagee shall have the public notice of the public sale printed in not less than seven-point font and published in the classified section of a daily newspaper ~~[having the largest]~~ of general circulation

~~[specifically] in the [county where the mortgaged property is located; provided that for property located in a county with a population of more than one hundred thousand but less than three hundred thousand, the public notice shall be published in the newspaper having the largest general circulation specifically in the western or eastern half of the county, as the case may be, in which the property is located.]~~ real property tax zone in which the mortgaged property is located, as shown on the applicable county real property tax maps kept by each respective county's real property tax assessment division, except for the county of Kalawao which shall be considered its own geographic area for the purposes of this subsection. The public notice shall be published once each week for three consecutive weeks, constituting three publications. The public sale shall take place no sooner than fourteen days after the date of the publication of the third public notice advertisement."

COMMENT 22

The task force recommends amending section 667-28 under the alternate power of sale foreclosure process in part II of chapter 667, to require notice of the postponement or cancellation of a public sale to be provided to any person entitled to receive the notice of default under section 667-22. This amendment restores provisions repealed by Act 48, Session Laws of Hawaii 2011, that the task force believes provide necessary and reasonable notice.

SECTION 21. Section 667-28, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) The public sale may be either postponed or canceled by the foreclosing mortgagee. Notice of the postponement or the cancellation of the public sale shall be ~~[announced]~~:

- (1) Announced by the foreclosing mortgagee at the date, time, and place of the last scheduled public sale~~[-]~~; and

- (2) Provided to any other person who is entitled to receive the notice of default under section 667-22."

COMMENT 23

To conform to the amendments made to the publication requirements for a public notice of public sale (under section 667-27(d) in Comment 21) the task force recommends amending the suggested language for affidavits required to be signed by the foreclosing mortgagee after the public sale of property in an alternate power of sale foreclosure under part II of chapter 667.

In addition, the suggested language for these affidavits should reference the inclusion of the property's certificate of title, or transfer certificate of title number if registered with the land court, as part of the legal description of the property attached to the affidavit, to conform to the various property description provisions within chapter 667. Similar amendments are made to sections 667-22(a)(3) in Comment 18, 667-54(a)(3) in Comment 28, and 667-75(b)(2) in Comment 39.

The amendments also remove a reference to the definition of "foreclosing mortgagee" because this definition is repealed in Comment 3.

SECTION 22. Section 667-32, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) The recitals in the affidavit required under subsection (a) may, but need not, be substantially in the following form:

- "(1) I am duly authorized to represent or act on behalf of _____ (name of mortgagee) ("foreclosing mortgagee") regarding the following power of sale foreclosure. I am signing this affidavit in accordance with the alternate power of sale foreclosure law (Chapter 667, Part II, Hawaii Revised Statutes);
- (2) The foreclosing mortgagee is a [~~"foreclosing mortgagee"~~] mortgagee as defined in [~~the power of sale foreclosure law;~~] section 667-1, Hawaii Revised Statutes, conducting a power of sale foreclosure;

- (3) The power of sale foreclosure is of a mortgage made by _____ (name of mortgagor) ("mortgagor"), dated _____, and recorded in the _____ (bureau of conveyances or office of the assistant registrar of the land court) as _____ (recordation information). The mortgaged property is located at: _____ (address or description of location) and is identified by tax map key number: _____. The legal description of the mortgaged property, which shall include the certificate of title or transfer certificate of title number if registered in the land court, is attached as Exhibit "A". The name of the borrower, if different from the mortgagor, is _____. ("borrower");
- (4) Pursuant to the power of sale provision of the mortgage, the power of sale foreclosure was conducted as required by the power of sale foreclosure law. The following is a summary of what was done:
- (A) A notice of default and intention to foreclose was served on the mortgagor, the borrower, and the following person: _____. The notice of default and intention to foreclose was served on the following date and in the following manner: _____;
- (B) The date of the notice of default and intention to foreclose was _____ (date). The deadline in the notice for curing the default was _____ (date), which deadline date was at least sixty days after the date of the notice;

- (C) The notice of default and intention to foreclose was recorded before the deadline date in the _____ (bureau of conveyances or office of the assistant registrar of the land court). The notice was recorded on _____ (date) as document no. _____. A copy of the recorded notice is attached as Exhibit "1";
- (D) The default was not cured by the deadline date in the notice of default and intention to foreclose;
- (E) A public notice of the public sale was initially published in the classified section of the _____, ~~[a daily newspaper of general circulation in the county where the mortgaged property is located,]~~ in accordance with section 667-27(d), Hawaii Revised Statutes, once each week for three consecutive weeks on the following dates: _____. A copy of the affidavit of publication for the last public notice of the public sale is attached as Exhibit "2". The date of the public sale was _____ (date). The last publication was not less than fourteen days before the date of the public sale;
- (F) The public notice of the public sale was sent to the mortgagor, to the borrower, to the state director of taxation, to the director of finance of the county where the mortgaged property is located, and to the following: _____. The public notice was sent on the following dates and in the following manner: _____. Those dates were

after the deadline date in the notice of default and intention to foreclose, and those dates were at least sixty days before the date of the public sale;

(G) The public notice of the public sale was posted on the mortgaged property or on such other real property of which the mortgaged property is a part on _____ (date). That date was at least sixty days before the date of the public sale;

(H) Two public showings (open houses) of the mortgaged property were held (or were not held because the mortgagor did not cooperate);

(I) A public sale of the mortgaged property was held on a business day during business hours on:

_____ (date), at
_____ (time), at the following
location: _____. The highest
successful bidder was _____ (name)
with the highest successful bid price of
\$ _____; and

(J) At the time the public sale was held, the default was not cured and there was no circuit court foreclosure action pending in the circuit where the mortgaged property is located; and

(5) This affidavit is signed under penalty of perjury."

COMMENT 24

The task force recommends amending section 667-33 under the alternate power of sale foreclosure process in part II of chapter 667 to require the foreclosing mortgagee's filing of the affidavit after public sale under section 667-32 and the conveyance document to be recorded at least ten days after the public sale. This amendment is necessary because section 667-56(5) allows a short sale escrow to be opened within ten days of the public sale;

accordingly, the mortgagee may not file the affidavit of sale and conveyance document earlier than ten days after the sale. (See similar provision in Comment 10.)

SECTION 23. Section 667-33, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) The affidavit required under section 667-32 and the conveyance document shall be recorded [~~at any time~~] no earlier than ten days after the public sale is held but not later than forty-five days after the public sale is held. The affidavit and the conveyance document may be recorded separately and on different days. After the recordation, the foreclosing mortgagee shall mail or deliver a recorded copy to those persons entitled to receive the public notice of the public sale under section 667-27(c)."

COMMENT 25

The task force recommends amending section 667-37 under the alternate power of sale foreclosure process in part II of chapter 667 as follows:

- (1) Remove "borrowers" from the list of parties that can institute a judicial foreclosure of mortgaged property. Borrowers should not be included in this list because the borrower's rights are to convert a nonjudicial foreclosure into a judicial foreclosure but not to institute a new foreclosure action.**
- (2) Require judicial foreclosure actions to be filed before the public sale of the property; and**
- (3) Require the power of sale foreclosure process to be stayed during the pendency of a circuit court foreclosure action. The task force believes that the restoration of this provision repealed by Act 48, Session Laws of Hawaii 2011, is necessary to accommodate judicial foreclosures.**

SECTION 24. Section 667-37, Hawaii Revised Statutes, is amended to read as follows:

"§667-37 Judicial action of foreclosure before public sale. This part shall not prohibit [~~the borrower,~~] the foreclosing mortgagee, or any other creditor having a recorded

lien on the mortgaged property before the recordation of the notice of default under section 667-23, from filing an action for the judicial foreclosure of the mortgaged property in the circuit court of the circuit where the mortgaged property is located[.]; provided that the action is filed before the public sale is held. The power of sale foreclosure process shall be stayed during the pendency of the circuit court foreclosure action."

COMMENT 26

The task force recommends amending section 667-41, on public information requirements for persons intending to use the power of sale foreclosure process under part II of chapter 667, to provide specific language for a uniform public information notice explaining the foreclosure process. This amendment takes effect on September 1, 2012.

SECTION 25. Section 667-41, Hawaii Revised Statutes, is amended to read as follows:

"§667-41 Public information notice requirement.

~~[Beginning on September 1, 2011, all] (a) All financial institutions, mortgagees, lenders, business entities and organizations without limitation, and persons, who intend to use the power of sale foreclosure under this part, under the conditions required by this part, shall [also develop informational materials to educate and inform borrowers and mortgagors. These materials shall be made available to the public and provided to the mortgagors of all mortgage agreements entered into, including the borrowers at the time of application for a mortgage or loan, or other contract containing a power of sale foreclosure provision. These materials, among other things, shall inform the borrower that the financial institution and other business entities and persons who are authorized under this part to exercise the power of sale foreclosure, in the event of the borrower's default, have the option of pursuing~~

~~either a judicial or nonjudicial foreclosure as provided by law. These informational materials shall fully and completely explain these remedies in simple and understandable terms.]~~ provide the public information notice described in subsection (b) to the public, upon request, and to any applicant submitting a loan application where residential property is required to be used to secure the loan. The notice shall be provided to all applicants and all owners of the residential property (if different from the applicants) within three business days after the submission of a written loan application, or within three business days after the time residential property is required to be used to secure a loan, whether or not there is a written loan application. The purpose of the public information notice is to inform the public, applicants, and others that the financial institutions, mortgagees, lenders, organizations, and other business entities and persons who are authorized under this part to enforce the foreclosure rights in a mortgage, in the event of the borrower's default, have the option of pursuing either a judicial or nonjudicial foreclosure in the manner provided by law.

(b) The public information notice requirement shall be satisfied by the delivery of a separate notice that contains the following wording and is printed in not less than fourteen-point font:

PUBLIC INFORMATION NOTICE PURSUANT TO
HAWAII REVISED STATUTES SECTION 667-41
WHAT IS FORECLOSURE?

This notice informs you regarding a lender's right to foreclose in the event of a default on the loan you have applied for or are considering if your home is used to secure its repayment.

The mortgage agreement or contract that you may enter into states that in the event the amounts due under the loan are not paid when they are due, or for other reasons you do not perform your promises in the note and mortgage, all of which are known as defaults, the lender shall have the option to foreclose the mortgage, which will result in a sale of your home.

The entity or person who holds your mortgage ("Mortgagee") may send you a notice informing you that the Mortgagee is starting foreclosure proceedings. You should not wait for that to happen; take steps to prevent a foreclosure as soon as you are having trouble paying your mortgage. You should contact your lender or your lender's loan servicer, or you may contact a budget and credit counselor or housing counselor, to discuss your situation.

STEP ONE: NOTICE OF DEFAULT. The first step in the foreclosure process is the Mortgagee usually sends you a written notice of default, which occurs after you are past due on your mortgage payment. The Mortgagee will tell you in the notice how much time you have to pay the required amount that is past due and, by paying, will return your loan to good standing.

STEP TWO: PROCEEDING TO FORECLOSURE. If you do not pay the required amount past due by the deadline in the notice of default, the Mortgagee may elect to proceed to collect the balance due on your loan through foreclosure. In Hawaii, there are two types of foreclosures: judicial and nonjudicial.

In a JUDICIAL FORECLOSURE, the Mortgagee files a lawsuit against you in order to obtain a court

judgment that you owe the balance due under your loan and to obtain an order to sell the property. The initial legal document you will receive in the lawsuit is called the complaint. You should consult an attorney of your choice who can advise you as to the steps needed to protect your rights. Judicial foreclosure involves the sale of the mortgaged property under the supervision of the court. You will receive notice of the foreclosure case hearings and the sale date and the judicial decision is announced after a hearing in court. The sale of the property must be approved by the court before it can be completed.

In a NONJUDICIAL FORECLOSURE, the process follows the procedures spelled out in Chapter 667 of the Hawaii Revised Statutes and in your mortgage. The nonjudicial procedures allow a Mortgagee to foreclose on and sell the property identified in the mortgage without filing a lawsuit or court supervision. This nonjudicial foreclosure is also called a power of sale foreclosure. The Mortgagee starts the process by giving you a written notice of default and of the Mortgagee's intent to sell the property.

After the required time has elapsed, you will be sent a notice of nonjudicial foreclosure sale, which will tell you the date and location of the sale.

In a NONJUDICIAL foreclosure, if you own an interest in the property you may have the right to participate in the Mortgage Foreclosure Dispute Resolution Program or to convert the nonjudicial foreclosure into a judicial foreclosure. The nonjudicial foreclosure may not proceed during the

dispute resolution process or after it has been converted to a judicial foreclosure.

PLEASE NOTE: Even if a judicial or nonjudicial foreclosure has commenced, you may be able to reinstate the loan and keep your home if you pay the delinquent amount then due and the foreclosure expenses that your Mortgagee has incurred. You must contact the Mortgagee as soon as possible to determine whether reinstatement is possible.

STEP THREE: PUBLIC SALE. The sale of a foreclosed home is usually made through a public auction, where the highest bidder who can make a cash deposit of up to 10% of the bid can buy the property. In a judicial foreclosure, the court appoints a third party commissioner to advertise and conduct the sale. In a nonjudicial foreclosure, the Mortgagee advertises and conducts the sale. In both types of sales, the Mortgagee has the right to buy the property by submitting a credit bid based upon the balance owed on the mortgage, so long as its bid is higher than any other bids. If the Mortgagee buys the property, the Mortgagee has the right to re-sell it in a private sale at a later date.

STEP FOUR: DISBURSEMENT OF PROCEEDS; POTENTIAL DEFICIENCY JUDGMENT. After the foreclosure sale is completed, the proceeds are paid out to lien holders, including the Mortgagee, in the order set by law and lastly to you if there are any proceeds left.

In a JUDICIAL FORECLOSURE, the court tells the commissioner whom to pay and how much. If the property did not sell for enough to pay off the balance due under your loan, the Mortgagee has the

right to ask the court for a deficiency judgment against you for the difference.

In a NONJUDICIAL FORECLOSURE, the Mortgagee distributes the proceeds from the sale. If the mortgaged property does not sell for enough to pay off the balance due under your loan, the Mortgagee may have the right to file a lawsuit against you to collect the deficiency. In many cases, after a nonjudicial foreclosure, a Mortgagee cannot or will not choose to file a lawsuit for a deficiency.

READ THE NOTE AND MORTGAGE CAREFULLY TO UNDERSTAND WHAT IS REQUIRED AND HOW TO AVOID FORECLOSURE, AND CONSULT WITH AN ATTORNEY REGARDING YOUR LEGAL RIGHTS.

(c) The requirements of this section shall apply only to written loan applications submitted, or to loans where residential property is required to be used as security, after August 31, 2012."

COMMENT 27

The task force recommends amending section 667-53(a)(6), to change the fee for filing a petition to convert a nonjudicial foreclosure of residential property into a judicial foreclosure, to a firm \$250, all of which shall be deposited into the mortgage foreclosure dispute resolution special fund. Corresponding amendments are made to section 667-53(a)(6) under Comment 9, and all of these amendments take effect on August 15, 2012, to provide the Judiciary time to administer the changes.

In addition, section 667-53(b) should be amended to exempt planned community associations organized under chapter 421J from the process allowing owner-occupants to convert nonjudicial foreclosures of residential property into judicial foreclosures, to parallel the existing exemption for condominium associations.

SECTION 26. Section 667-53, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

"(a) An owner-occupant of a residential property that is

subject to nonjudicial foreclosure under part [±] IA or II may convert the action to a judicial foreclosure provided that:

- (1) A petition conforming to section 667-54 shall be filed with the circuit court in the circuit where the residential property is located, stating that the owner-occupant of the property elects to convert the nonjudicial foreclosure to a judicial foreclosure proceeding no later than thirty days after the foreclosure notice is served on the owner-occupant as required by section 667-5 or 667-22;
- (2) Within forty-five days of the filing of the petition, all owner-occupants and mortgagors of an interest in the residential property whose interests are pledged or otherwise encumbered by the mortgage that is being foreclosed and all persons who have signed the promissory note or other instrument evidencing the debt secured by the mortgage that is being foreclosed, including without limitation co-obligors and guarantors, shall file a statement in the circuit court action that they agree to submit themselves to the judicial process and the jurisdiction of the circuit court; provided further that if this condition is not satisfied, the circuit court action may be dismissed with prejudice as to the right of any owner-occupant to convert the action to a judicial proceeding, and the mortgagee may proceed nonjudicially;
- (3) Filing a petition pursuant to paragraph (1) shall automatically stay the nonjudicial foreclosure action unless and until the judicial proceeding has been dismissed;
- (4) The person filing the petition pursuant to paragraph

- (1) shall have an affirmative duty to promptly notify the Hawaii attorney who is handling the nonjudicial foreclosure about the filing of the complaint for conversion;
- (5) All parties joined in the converted judicial proceeding may assert therein any claims and defenses that they could have asserted had the action originally been commenced as a judicial foreclosure action; and
- (6) ~~[Notwithstanding chapter 607, the]~~ The fee for filing the petition shall be ~~[not more than \$525, of which]~~ \$250, which shall be deposited into the mortgage foreclosure dispute resolution special fund established under section 667-86~~[-; provided that if the mortgage foreclosure dispute resolution program under part V has not yet been implemented, the filing fee shall be not more than \$300]~~.
- (b) This section shall not apply to foreclosures of association liens that arise under a declaration filed pursuant to chapter 421J, 514A, or 514B."

COMMENT 28

The task force recommends amending section 667-54(a)(3) to conform to the various property description provisions within chapter 667 referencing a property's certificate of title, or transfer certificate of title number if registered with the land court. Similar amendments are made to sections 667-22(a)(3) in Comment 18, 667-32(b)(3) in Comment 23, and 667-75(b)(2) in Comment 39.

SECTION 27. Section 667-54, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"[+](a)[+] A petition filed pursuant to section 667-53 shall contain at a minimum:

- (1) A caption setting forth the name of the court, the

title of the action, and the file number; provided that the title of the action shall include the names of the filing party as petitioner and the foreclosing party as the respondent;

- (2) The name, mailing address, and telephone number of the filing party;
- (3) The address or tax map key number, and the certificate of title or transfer certificate of title number if ~~[within the land court's jurisdiction,]~~ registered in the land court, of the property subject to the foreclosure action;
- (4) A statement identifying all other owner-occupants and mortgagors of the property whose interests are pledged or otherwise encumbered by the mortgage that is being foreclosed and all persons who have signed the promissory note or other instrument evidencing the debt secured by the mortgage that is being foreclosed, including without limitation co-obligors and guarantors;
- (5) A certification under penalty of perjury that the filing party is an owner-occupant of the subject property and seeks to convert the nonjudicial foreclosure to a judicial proceeding;
- (6) A statement certifying that the filing party served a copy of the petition on the attorney identified in the foreclosure notice under section 667-5 or 667-22 either by personal delivery at, or by postage prepaid United States mail to, the address of the attorney as set forth in the foreclosure notice under section 667-5 or 667-22; and
- (7) A copy of the foreclosure notice that was served on the filing party pursuant to section 667-5 or 667-22

and for which the filing party is seeking to convert to a judicial proceeding."

COMMENT 29

The task force recommends amending section 667-55(a), to clarify a portion of the required statement in foreclosure notices (which statement relates to conversions to judicial foreclosures) regarding the ability of a foreclosing lender to pursue a deficiency judgment against the mortgagor.

SECTION 28. Section 667-55, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) The foreclosure notice that is served as required under section 667-5 or 667-22 shall include, in addition to the contents required under section 667-5 or 667-22, a statement printed in not less than fourteen-point font as follows:

"IF THE PROPERTY BEING FORECLOSED IS IMPROVED AND USED FOR RESIDENTIAL PURPOSES, AN OWNER-OCCUPANT OF THE PROPERTY (DEFINED IN CHAPTER 667 OF THE HAWAII REVISED STATUTES AS A PERSON WHO, AT THE TIME THIS NOTICE IS SERVED, OWNS AN INTEREST IN THE RESIDENTIAL PROPERTY THAT IS SUBJECT TO THE MORTGAGE BEING FORECLOSED AND THE RESIDENTIAL PROPERTY HAS BEEN THE PRIMARY RESIDENCE CONTINUOUSLY FOR NOT LESS THAN TWO HUNDRED DAYS) HAS THE RIGHT TO CONVERT A NONJUDICIAL FORECLOSURE PROCEEDING TO A JUDICIAL FORECLOSURE WHERE CLAIMS AND DEFENSES MAY BE CONSIDERED BY A COURT OF LAW. TO EXERCISE THIS RIGHT, THE OWNER-OCCUPANT SHALL COMPLETE AND FILE THE ATTACHED FORM WITH THE CIRCUIT COURT IN THE CIRCUIT WHERE THE PROPERTY IS LOCATED WITHIN THIRTY DAYS AFTER SERVICE OF THIS NOTICE.

IN ADDITION, ALL OWNER-OCCUPANTS AND MORTGAGORS OF THE RESIDENTIAL PROPERTY WHOSE INTERESTS HAVE BEEN PLEDGED OR OTHERWISE ENCUMBERED BY THE MORTGAGE THAT

IS BEING FORECLOSED AND ALL PERSONS WHO HAVE SIGNED THE PROMISSORY NOTE OR OTHER INSTRUMENT EVIDENCING THE DEBT SECURED BY THE MORTGAGE THAT IS BEING FORECLOSED, INCLUDING, WITHOUT LIMITATION, CO-OBLIGORS AND GUARANTORS, SHALL FILE A STATEMENT IN THE CIRCUIT COURT ACTION THAT THEY AGREE TO SUBMIT TO THE JUDICIAL PROCESS AND THE JURISDICTION OF THE CIRCUIT COURT WITHIN FORTY-FIVE DAYS OF THE FILING OF THE ATTACHED FORM. FAILURE TO SATISFY THIS CONDITION MAY RESULT IN DISMISSAL OF THE CIRCUIT COURT ACTION WITH PREJUDICE.

AN OWNER-OCCUPANT SHALL PROMPTLY NOTIFY THE HAWAII ATTORNEY LISTED IN THIS NOTICE ABOUT THE FILING OF THE CONVERSION FORM.

MORTGAGE FORECLOSURE DISPUTE RESOLUTION MAY BE AVAILABLE IN NONJUDICIAL FORECLOSURE ACTIONS AS AN ALTERNATIVE FOR OWNER-OCCUPANTS ATTEMPTING TO AVOID FORECLOSURE OR TO MITIGATE THE EFFECTS OF FORECLOSURE ON AN OWNER-OCCUPANT. HOWEVER, IF AN OWNER-OCCUPANT FILES FOR CONVERSION, DISPUTE RESOLUTION MAY NOT BE AVAILABLE UNLESS ORDERED BY A JUDGE.

A FORECLOSING LENDER WHO COMPLETES A NONJUDICIAL FORECLOSURE OF RESIDENTIAL PROPERTY [~~SHALL~~] COULD BE PROHIBITED UNDER HAWAII LAW FROM PURSUING A DEFICIENCY JUDGMENT AGAINST A MORTGAGOR [~~UNLESS THE DEBT IS SECURED BY OTHER COLLATERAL, OR AS OTHERWISE PROVIDED BY LAW~~]. IF THIS ACTION IS CONVERTED TO A JUDICIAL PROCEEDING, HOWEVER, THEN ALL REMEDIES AVAILABLE TO A LENDER MAY BE ASSERTED, INCLUDING THE RIGHT TO SEEK A DEFICIENCY JUDGMENT."

COMMENT 30

The task force recommends amending section 667-56, on prohibited practices for mortgagees, as follows:

- (1) Amend paragraph (4) to provide that the bar against delaying the delivery of the recorded, conformed copy of the conveyance document to a bona fide purchaser who purchases in good faith in a public sale applies to delays of more than sixty days, rather than more than forty-five days, after the completion of the public sale; and
- (2) Amend paragraph (5) to provide that the bar against completing nonjudicial foreclosure proceedings during certain short sale escrows with a bona fide purchaser applies when the short sale offer is at least ten percent, rather than five percent, greater than the public sale price. This amendment addresses sales commissions of six percent on the short sale that would consume all or most of the percentage above the public sale price.

SECTION 29. Section 667-56, Hawaii Revised Statutes, is amended to read as follows:

"[+]§667-56[+] **Prohibited conduct.** It shall be a prohibited practice for any foreclosing mortgagee to engage in any of the following practices:

- (1) Holding a public sale on a date, at a time, or at a place other than that described in the public notice of the public sale or a properly noticed postponement;
- (2) Specifying a fictitious place in the public notice of the public sale;
- (3) Conducting a postponed public sale on a date other than the date described in the new public notice of the public sale;
- (4) Delaying the delivery of the recorded, conformed copy of the conveyance document to a bona fide purchaser who purchases in good faith for more than [~~forty-five~~] sixty days after the completion of the public sale;
- (5) Completing nonjudicial foreclosure proceedings during short sale escrows with a bona fide purchaser if the

short sale offer is at least [~~five~~] ten per cent greater than the public sale price; provided that escrow is opened within ten days and closed within forty-five days of the public sale; and provided further that a bona fide short sale purchaser shall have priority over any other purchaser;

- (6) Completing nonjudicial foreclosure proceedings during bona fide loan modification negotiations with the mortgagor; or
- (7) Completing nonjudicial foreclosure proceedings against a mortgagor who has been accepted or is being evaluated for consideration for entry into a federal loan modification program before obtaining a certificate or other documentation confirming that the mortgagor is no longer eligible for, or an active participant of, that federal program."

COMMENT 31

The task force recommends amending section 667-57(a) to specify that a junior lienholder may not initiate or continue nonjudicial foreclosures under part II of chapter 667 until the conclusion of a foreclosure initiated by a foreclosing mortgagee. The task force believes that the omission of part II nonjudicial foreclosures from this particular provision may have been an oversight.

Section 667-57(a) should also be amended to replace references to the "settlement document," memorializing an agreement resulting from mortgage foreclosure dispute resolution under section 667-81(c), with generic references to an "agreement to resolve the nonjudicial foreclosure" or "agreement." Similar amendments are made in Comments 19 and 44.

In addition, section 667-57(b) should be amended to allow condominium and other homeowner associations to proceed with a nonjudicial foreclosure notwithstanding a stay of foreclosure proceedings arising from a dispute resolution case opening, if the association has not been notified of the foreclosure action by the foreclosing mortgagee or of the dispute resolution case opening. (See related amendments regarding notice requirements in Comments 11 and 17.)

Finally, conforming amendments are made to delete references to the definition of "foreclosing mortgagee," consistent with the repeal of that definition. (See Comment 3.)

SECTION 30. Section 667-57, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

"(a) Upon initiation of a foreclosure action pursuant to part [±] IA or part II by a foreclosing mortgagee [~~as defined in section 667-21(b)~~], no junior lienholder shall be permitted to initiate or continue a nonjudicial foreclosure pursuant to part [±] IA or part II until the foreclosure initiated by the foreclosing mortgagee has been concluded by a judgment issued by a court pursuant to section [~~667-1,~~] 667-1.5, the recording of an affidavit after public sale pursuant to section 667-5 or 667-33, or the filing of [~~a settlement document~~] an agreement under the mortgage foreclosure dispute resolution provisions of section 667-81.

(b) Upon initiation of a foreclosure action pursuant to part [±] IA or part II by a foreclosing mortgagee [~~as defined in section 667-21(b)~~], no junior lienholder shall be permitted to initiate a nonjudicial foreclosure pursuant to part II during the pendency of a stay pursuant to section 667-83; provided that a junior lienholder may initiate or continue with a nonjudicial foreclosure pursuant to part II if [~~the~~]:

- (1) The junior lien foreclosure was initiated before the foreclosure action by the foreclosing mortgagee[±]; or
- (2) The junior lienholder is an association and has not been provided notice of the foreclosure action pursuant to sections 667-5.5 or 667-21.5, or has not received written notification of a case opening pursuant to section 667-79."

COMMENT 32

The task force recommends amending section 667-58, on notices made pursuant to chapter 667, to provide that:

- (1) Attorneys for a mortgage servicer, foreclosing mortgagee, or lender shall not be required to be included in any affiliate statement of a foreclosing mortgagee or lender;
- (2) Any notice or other correspondence made by the attorney for the foreclosing mortgagee or lender shall not be required to reference any affiliate statement made by the foreclosing mortgagee or lender; and
- (3) Any notice or other correspondence made by the attorney for a mortgage servicer shall reference the appropriate affiliate statement of the foreclosing mortgagee or lender authorizing the mortgage servicer to act.

Section 667-58 provides that any notices made pursuant to chapter 667 may be issued only by persons authorized by a foreclosing mortgagee or lender, as reflected in an affiliate statement specifying the authority granted. The task force believes that the foreclosing mortgagee, the lender, and the mortgage servicer should not have to identify its attorney in an affiliate statement. Furthermore, the attorney for a foreclosing mortgagee or lender should not be required to reference any affiliate statement of its client (the foreclosing mortgagee or lender) in notices or correspondence. However, because an affiliate statement is required when a mortgage servicer is authorized to act for a foreclosing mortgagee or lender, the attorney for a mortgage servicer needs to reference the affiliate statement in notices and correspondence.

SECTION 31. Section 667-58, Hawaii Revised Statutes, is amended to read as follows:

"[+]§667-58[+] **Valid notice[-]; affiliate statement.** (a)

Any notices made pursuant to this chapter may be issued only by persons authorized by a foreclosing mortgagee or lender pursuant to an affiliate statement signed by that foreclosing mortgagee or lender and recorded at the bureau of conveyances identifying the agency or affiliate relationship and the authority granted or conferred to that agent or representative.

(b) The bureau of conveyances document number for the affiliate statement required under subsection (a) shall be included in any notice required to be personally served upon the mortgagor or borrower under this chapter.

(c) Any notice provided by a mortgage servicer, including an agent, employee, or representative of that mortgage servicer, shall be issued only by a mortgage servicer that has been listed in the affiliate statement filed by the foreclosing mortgagee or lender under subsection (a); provided further that the mortgage servicer shall be licensed under or otherwise exempt from chapter 454M. The agency relationship or affiliation of the mortgage servicer and the foreclosing mortgagee or lender and any authority granted or conferred to that mortgage servicer shall be described in the affiliate statement filed under both subsection (a) and section 454M-5(a)(4)(F).

(d) No attorney of a mortgage servicer, foreclosing mortgagee, or lender shall be required to be included in any affiliate statement of a foreclosing mortgagee or lender. No notice or other correspondence made by any attorney for the foreclosing mortgagee or lender shall be required to reference any affiliate statement made by the foreclosing mortgagee or lender. Any notice or other correspondence made by any attorney for a mortgage servicer shall reference, in accordance with subsection (b), the appropriate affiliate statement of the foreclosing mortgagee or lender authorizing the mortgage servicer to act."

COMMENT 33

The following amendment deletes a reference to "foreclosing mortgagee," the definition for which is repealed under Comment 3.

SECTION 32. Section 667-59, Hawaii Revised Statutes, is amended to read as follows:

"[+]§667-59[+] Actions and communications with the mortgagor in connection with a foreclosure. A foreclosing mortgagee shall be bound by all agreements, obligations,

representations, or inducements made on its behalf by its agents, including but not limited to its employees, representatives, mortgage servicers, or persons authorized by a foreclosing mortgagee or lender pursuant to an affiliate statement recorded in the bureau of conveyances pursuant to section 667-58.

~~[For purposes of this section, "foreclosing mortgagee" has the same meaning as in section 667-21.] "~~

COMMENT 34

The task force recommends amending section 667-60, on foreclosing mortgagees who violate chapter 667 being deemed to have committed an unfair or deceptive act or practice under section 480-2, to:

- (1) Specify the types of violations under chapter 667 that constitute unfair or deceptive acts or practices;**
- (2) Specify violations for which a foreclosure sale may be voided under section 480-12; and**
- (3) Allow actions to void a foreclosure sale to be filed up to six months after an affidavit of the sale is recorded.**

This proposed amendment represents a compromise agreed to by thirteen of the eighteen members of the task force regarding the applicability of the unfair and deceptive acts and practices laws to the various nonjudicial foreclosure statutes and procedures. Certain members disagreed with the proposed revisions. Their positions and concerns are in the comments attached to this report as Appendix C.

SECTION 33. Section 667-60, Hawaii Revised Statutes, is amended to read as follows:

"~~[f]~~**§667-60**~~[f]~~ **Unfair or deceptive act or practice**~~[÷]~~**;**
transfer of title. (a) Any foreclosing mortgagee who ~~[violates]~~
engages in any of the following violations of this chapter shall
have committed an unfair or deceptive act or practice under
section 480-2~~[÷]~~**;**

- (1) Failing to provide a borrower or mortgagor with, or failing to serve as required, the information required by sections 667-5, 667-22, or 667-55;
- (2) Failing to publish, or to post, information on the mortgaged property, as required by sections 667-5, 667-27, or 667-28;
- (3) Failing to take any action required by section 667-24 if the default is cured or an agreement is reached;
- (4) Engaging in conduct prohibited under section 667-56;
- (5) Holding a public sale in violation of section 667-25 or section 667-26;
- (6) Failing to include in a public notice of public sale the information required by section 667-27 or section 667-28;
- (7) Failing to provide the information required by section 667-41;
- (8) With regard to mortgage foreclosure dispute resolution under part V:
 - (A) Failing to provide notice of the availability of dispute resolution as required by section 667-75;
 - (B) Participating in dispute resolution without authorization to negotiate a loan modification, or without access to a person so authorized, as required by section 667-80(a)(1);
 - (C) Failing to provide required information or documents as required by section 667-80(c); or
 - (D) Completing a nonjudicial foreclosure if a neutral's closing report under section 667-82 indicates that the foreclosing mortgagee failed to comply with requirements of the mortgage foreclosure dispute resolution program;

- (9) Completing a nonjudicial foreclosure while a stay is in effect under section 667-83;
- (10) Failing to distribute sale proceeds as required by section 667-31;
- (11) Making any false statement in the affidavit of public sale required by section 667-32; and
- (12) Attempting to collect a deficiency in violation of section 667-38.

(b) Notwithstanding subsection (a), the transfer of title to the purchaser of the property as a result of a foreclosure under this chapter shall only be subject to avoidance under section 480-12 for violations described in subsection (a)(1) to (9) if such violations are shown to be substantial and material; provided that a foreclosure sale shall not be subject to avoidance under section 480-12 for violation of section 667-56(5) .

(c) Any action to void the transfer of title to the purchaser of property under this chapter shall be filed in the circuit court of the circuit within which the foreclosed property is situated no later than one hundred eighty days following the recording of the affidavit required by section 667-5 or section 667-32, as applicable. If no such action is filed within the one hundred eighty-day period, then title to the property shall be deemed conclusively vested in the purchaser free and clear of any claim by the mortgagor or anyone claiming by, through, or under the mortgagor."

COMMENT 35

The task force recommends eliminating superfluous references to filings and recordings of documents with the assistant registrar of the land court or the bureau of conveyances, as redundant with the definition of "record" in the new section 667-1. (See discussion in Comment 3.)

Similar amendments are made in Comments 12, 14, 42, 44, and 46.

SECTION 34. Section 667-63, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) A mortgage creditor having a mortgage lien on a time share interest who desires notice that another mortgage creditor having a mortgage lien on the time share interest intends to foreclose and sell the mortgaged time share interest, pursuant to the power of sale under section 667-62, may submit a written request to the mortgagee who is foreclosing or who may foreclose the mortgage by power of sale, asking to receive notice of the mortgagee's intention to foreclose the mortgage under section 667-62. The request for notice:

- (1) May be submitted any time after the recordation [~~or filing~~] of the subject mortgage [~~at the bureau of conveyances or the land court but shall be~~]; provided that the request is submitted prior to completion of publication of notice of the intention to foreclose the mortgage and of the sale of the mortgaged time share interest;
- (2) Shall be signed by the mortgage creditor desiring to receive notice, or its authorized representative; and
- (3) Shall specify the name and address of the person to whom the notice is to be mailed."

COMMENT 36

The task force recommends amending section 667-71(b) to exempt planned community associations organized under chapter 421J from the requirements of the mortgage foreclosure dispute resolution program in part V of chapter 667, to parallel the existing exemption for condominium associations.

SECTION 35. Section 667-71, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) This part shall not apply to actions by an association to foreclose on a lien for amounts owed to the association that arise under a declaration filed pursuant to chapter 421J, 514A, or 514B, or to a mortgagor who has previously participated in dispute resolution under this part for the same property on the same mortgage loan."

COMMENT 37

The task force recommends amending section 667-73(c) to authorize the Department of Commerce and Consumer Affairs to contract with approved housing counselors and approved budget and credit counselors for purposes of the mortgage foreclosure dispute resolution program under part V of chapter 667.

In the course of providing counseling to an owner-occupant under the dispute resolution program, a housing counselor certified by the U.S. Department of Housing and Urban Development (HUD) will attempt to contact the mortgage lender or servicer to resolve the dispute. It is possible that an owner-occupant could elect to participate, go to required counseling, and have their dispute resolved by the housing counselor before the neutral becomes involved. The Department of Commerce and Consumer Affairs wanted to have clear statutory authority to contract with the HUD-certified housing counselors so that, in the event the situation just described occurs, the housing counselor can be compensated for services rendered, as resolving the dispute expeditiously is in the interest of both parties in the dispute resolution process.

SECTION 36. Section 667-73, Hawaii Revised Statutes, is amended as follows by amending subsection (c) to read as follows:

"(c) The department is authorized to contract with county, state, or federal agencies, and with private organizations or approved housing counselors or approved budget and credit counselors for the performance of any of the functions of this part. These contracts shall not be subject to chapter 103D or 103F."

COMMENT 38

This amendment eliminates a reference to "primary residence" that is already included in the definition of "owner-occupant" in Comment 3.

SECTION 37. Section 667-74, Hawaii Revised Statutes, is amended to read as follows:

"[+]§667-74[+] **Availability of dispute resolution required before foreclosure.** Before a public sale may be conducted pursuant to section 667-5 or 667-25 for a residential property that is occupied by an owner-occupant [~~as a primary residence~~], the foreclosing mortgagee [~~shall~~], at the election of the owner-occupant, shall participate in the mortgage foreclosure dispute resolution program under this part to attempt to negotiate an agreement that avoids foreclosure or mitigates damages in cases where foreclosure is unavoidable."

COMMENT 39

The following amendments eliminate references to "local" approved housing counselors and approved budget and credit counselors, to conform with amendments to the definitions of those terms in Comment 3.

In addition, amendments should be made to the description of the subject property in a foreclosure notice's disclosure of dispute resolution availability under section 667-75(b)(2), to conform with the various property description provisions within chapter 667 referencing a property's certificate of title, or transfer certificate of title number if registered with the land court. Similar amendments are made to sections 667-22(a)(3) in Comment 18, 667-32(b)(3) in Comment 23, and 667-54(a)(3) in Comment 28.

SECTION 38. Section 667-75, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) The notice required by subsection (a) shall be printed in not less than fourteen-point font and include:

- (1) The name and contact information of the mortgagor and the mortgagee;
- (2) The subject property address and legal description,

including tax map key number and the certificate of title or transfer certificate of title number if ~~[within the land court's jurisdiction,]~~ registered in the land court;

- (3) The name and contact information of a person or entity authorized to negotiate a loan modification on behalf of the mortgagee;
- (4) A statement that the mortgagor shall consult with an approved housing counselor or an approved budget and credit counselor at least thirty days prior to the first day of a scheduled dispute resolution session;
- (5) Contact information for all ~~[local]~~ approved housing counselors;
- (6) Contact information for all ~~[local]~~ approved budget and credit counselors;
- (7) A statement that the mortgagor electing to participate in the mortgage foreclosure dispute resolution program shall provide a certification under penalty of perjury to the department that the mortgagor is an owner-occupant of the subject property, including supporting documentation;
- (8) A general description of the information that an owner-occupant electing to participate in the mortgage foreclosure dispute resolution program is required to provide to participate in the program as described under section 667-80(c)(2);
- (9) A statement that the owner-occupant shall elect to participate in the mortgage foreclosure dispute resolution program pursuant to this part no later than thirty days after the department's mailing of the notice or the right shall be waived."

COMMENT 40

The following amendments eliminate references to "local" approved housing counselors and approved budget and credit counselors, to conform with amendments to the definitions of those terms in Comment 3.

SECTION 39. Section 667-77, Hawaii Revised Statutes, is amended to read as follows:

[f]§667-77[f] Notification to mortgagor by department.

Within ten days after the mortgagee's filing of a notice of default and intention to foreclose with the department, the department shall mail a written notification by registered or certified mail to the mortgagor that a notice of default and intention to foreclose has been filed with the department. The notification shall inform the mortgagor of an owner-occupant's right to elect to participate in the foreclosure dispute resolution program and shall include:

- (1) Information about the mortgage foreclosure dispute resolution program;
- (2) A form for an owner-occupant to elect or to waive participation in the mortgage foreclosure dispute resolution program pursuant to this part that shall contain instructions for the completion and return of the form to the department and the department's mailing address;
- (3) A statement that the mortgagor electing to participate in the mortgage foreclosure dispute resolution program shall provide a certification under penalty of perjury to the department that the mortgagor is an owner-occupant of the subject property, including a description of acceptable supporting documentation as required by section 667-78(a)(2);
- (4) A statement that the owner-occupant shall elect to participate in the mortgage foreclosure dispute

resolution program pursuant to this part no later than thirty days after the department's mailing of the notice or the owner-occupant shall be deemed to have waived the option to participate in the mortgage foreclosure dispute resolution program;

- (5) A description of the information required under section 667-80(c)(2) that the owner-occupant shall provide to the mortgagee and the neutral assigned to the dispute resolution;
- (6) A statement that the owner-occupant shall consult with an approved housing counselor or approved budget and credit counselor at least thirty days prior to the first day of a scheduled dispute resolution session;
- (7) Contact information for all [~~local~~] approved housing counselors;
- (8) Contact information for all [~~local~~] approved budget and credit counselors; and
- (9) Contact information for the department.

The notification shall be mailed to the subject property address and any other addresses for the mortgagor as provided in the mortgagee's notice of dispute resolution under 667-75 and the foreclosure notice under section 667-5 or 667-22(a)."

COMMENT 41

The task force recommends amending section 667-78(a) to provide owner-occupants with the option of completing the mortgage foreclosure dispute resolution program election form on a website maintained by the Department of Commerce and Consumer Affairs, to expand access to the program.

SECTION 40. Section 667-78, Hawaii Revised Statutes, is amended as follows:

- 1. By amending subsection (a) to read:

"(a) An owner-occupant elects to participate in the

mortgage foreclosure dispute resolution program by returning to the department:

- (1) The completed program election form provided
[pursuant]:
 - (A) Pursuant to section 667-77(2); or
 - (B) On a website maintained by the department;
- (2) Certification under penalty of perjury that the mortgagor is an owner-occupant, accompanied with any supporting documentation, including copies of recent utility billing statements, voter registration records, real estate property tax records, or state identification forms; and
- (3) A program fee of \$300.

The completed form and fees shall be received by the department no later than thirty days after mailing of the department's notification pursuant to section 667-77."

2. By amending subsection (c) to read:

"(c) If the owner-occupant does not elect to participate in dispute resolution pursuant to this part, the department shall notify the mortgagee within ten days of receiving an election form indicating nonelection or the termination of the thirty-day time period for election. After receiving the department's notification, the mortgagee may proceed with the nonjudicial foreclosure process according to the process provided in part [±] IA or part II of this chapter, as applicable."

COMMENT 42

The task force recommends amending section 667-79(a) to provide condominium and other homeowner associations with notice of an owner-occupant's decision to participate in the mortgage foreclosure dispute resolution program. (See related provisions in Comments 11, 17, and 46.)

In addition, section 667-79(a) should be amended to increase the amount of time to schedule a dispute resolution session under the mortgage foreclosure dispute resolution program. This would help ensure that owner-occupants participating in the program have sufficient time to meet other time-sensitive dispute resolution requirements, such as having to consult with an approved housing counselor or approved budget and credit counselor at least thirty days before the first day of a scheduled dispute resolution session pursuant to section 667-80(b).

The task force also recommends eliminating superfluous references to filings and recordations of documents with the assistant registrar of the land court or the bureau of conveyances, as redundant with the definition of "record" in the new section 667-1. (See discussion in Comment 3.) Similar amendments are made in Comments 12, 14, 35, 44, and 46.

SECTION 41. Section 667-79, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (a) to read:

"(a) If an owner-occupant elects to participate in the mortgage foreclosure dispute resolution program, the department shall open a dispute resolution case. Within twenty days of receipt of the owner-occupant's election form and fee in accordance with section 667-78, the department shall mail written notification of the case opening to the parties and, if applicable, the condominium or other homeowner association of the project where the owner-occupant's property is located, by registered mail, return receipt requested, which shall include:

- (1) Notification of the date, time, and location of the dispute resolution session;
- (2) An explanation of the dispute resolution process;
- (3) Information about the dispute resolution program requirements; and
- (4) Consequences and penalties for noncompliance.

The dispute resolution session shall be scheduled for a date no less than ~~[thirty]~~ forty and no more than ~~[sixty]~~ seventy days from the date of the notification of case opening, unless mutually agreed to by the parties and the neutral."

2. By amending subsection (c) to read:

"(c) The written notification of a case opening under this section shall operate as a stay of the foreclosure proceeding in accordance with section 667-83[7] and may be [~~filed or~~] recorded[~~, as appropriate, at the land court or bureau of conveyances~~]."

COMMENT 43

The following are technical amendments to replace a reference to "counsel" with "an attorney" in section 667-80(a), for consistency with the use of the latter term throughout chapter 667, and to reference "approved" housing counselors in 667-80(c) as defined in the new section 667-1 (see Comment 3).

SECTION 42. Section 667-80, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (a) to read:

"(a) The parties to a dispute resolution process conducted under this part shall consist of the owner-occupant or the owner-occupant's representative, and the mortgagee or the mortgagee's representative; provided that:

- (1) A representative of the mortgagee who participates in the dispute resolution shall be authorized to negotiate a loan modification on behalf of the mortgagee or shall have, at all stages of the dispute resolution process, direct access by telephone, videoconference, or other immediately available contemporaneous telecommunications medium to a person who is so authorized;
- (2) The mortgagee and owner-occupant may be represented by [~~counsel,~~] an attorney; and
- (3) The owner-occupant may be assisted by an approved housing counselor or approved budget and credit counselor."

2. By amending subsection (c) to read:

"(c) The parties shall comply with all information requests from the department or neutral. No less than fifteen days prior to the first day of the scheduled dispute resolution session:

(1) The mortgagee shall provide to the department and the mortgagor:

(A) A copy of the promissory note, signed by the mortgagor, including any endorsements, allonges, amendments, or riders to the note evidencing the mortgage debt;

(B) A copy of the mortgage document and any amendments, riders, or other documentation evidencing the mortgagee's right of nonjudicial foreclosure and interest in the property including any interest as a successor or assignee; and

(C) Financial records and correspondence that confirm the mortgage loan is in default.

(2) The owner-occupant shall provide to the department and the mortgagee:

(A) Documentation showing income qualification for a loan modification, including any copies of pay stubs, W-2 forms, social security or disability income, retirement income, child support income, or any other income that the owner-occupant deems relevant to the owner-occupant's financial ability to repay the mortgage;

(B) Any records or correspondence available which may dispute that the mortgage loan is in default;

(C) Any records or correspondence available evidencing a loan modification or amendment;

- (D) Any records or correspondence available that indicate the parties are currently engaged in bona fide negotiations to modify the loan or negotiate a settlement of the delinquency;
- (E) Names and contact information for approved housing counselors, approved budget and credit counselors, or representatives of the mortgagee, with whom the owner-occupant may have or is currently working with to address the delinquency; and
- (F) Verification of counseling by an approved housing counselor or approved budget and credit counselor."

COMMENT 44

The task force recommends amending section 667-81 to remove the neutral foreclosure dispute resolution specialist's participation in the documentation of agreements between parties to a mortgage foreclosure dispute resolution case. This is accomplished by eliminating the provisions requiring settlement documents to be signed in the presence of a neutral so as to avoid unnecessary second sessions, at a cost of both time and money to the neutrals. Furthermore, the attachment of the settlement document to the neutral's report would have created a data storage problem due to both its potential volume and its sensitive content. (Settlement agreements between lender and owner-occupant are likely to include personal financial information that would need to be protected for privacy.) The proposed amendment is intended to streamline the process and would avoid the Department of Commerce and Consumer Affairs having to retain large amounts of sensitive data.

For the same reasons, the task force recommends repealing the requirement that the settlement document memorializing an agreement resulting from the dispute resolution process be filed or recorded with the land court or the bureau of conveyances, and providing for the closing report of the neutral dispute resolution specialist to be filed or recorded instead, with regard to the release of a stay of nonjudicial foreclosure proceedings pending dispute resolution pursuant to section 667-83.

The task force also recommends eliminating superfluous references to filings and recordings of documents with the assistant registrar of the land court or the bureau of conveyances, as redundant with the definition of "record" in the new section 667-1. (See

discussion in Comment 3.) Similar amendments are made in Comments 12, 14, 35, 42, and 46.

In addition, section 667-81(c) should be amended to replace references to the "settlement document," memorializing an agreement resulting from mortgage foreclosure dispute resolution under section 667-81(c), with generic references to an "agreement to resolve the nonjudicial foreclosure" or "agreement." Similar amendments are made in Comments 19 and 31.

SECTION 43. Section 667-81, Hawaii Revised Statutes, is amended by amending subsections (b), (c), and (d) to read as follows:

"(b) If, despite the parties' participation in the dispute resolution process and compliance with the requirements of this part, the parties are not able to come to an agreement, the neutral shall file a closing report with the department that the parties met the program requirements. The mortgagee may ~~[file or]~~ record the report ~~[at the bureau of conveyances or the land court, as appropriate]~~. Upon recording of the report pursuant to this subsection, the foreclosure process shall resume along the timeline as it existed on the date before the mortgagor elected dispute resolution, and may proceed as otherwise provided by law. The mortgagee shall notify the mortgagor of the recording date and document number of this report and the deadline date to cure default in an amended foreclosure notice. Nothing in this subsection shall be construed to require the neutral to wait the full sixty days allotted for dispute resolution to determine that the parties were unable to reach an agreement and file a report.

(c) If the parties have complied with the requirements of this part and have reached an agreement, the agreement shall be memorialized in ~~[a settlement document]~~ writing and signed by the parties or their authorized representatives. ~~[If the parties or their authorized representatives participate in the dispute resolution session in person, the settlement document~~

~~shall be signed in the presence of the neutral. If any of the parties or their authorized representatives participate in the dispute resolution through telephone, videoconference, or other immediately available contemporaneous telecommunications medium, the settlement document shall be signed and returned to the neutral no later than ten days after the conclusion of the dispute resolution session.]~~ The parties shall be responsible for drafting any agreement reached~~[, and for filing or recording with the land court or the bureau of conveyances, as appropriate,]~~ and enforcing the ~~[settlement document.]~~ agreement. ~~[The neutral shall file the settlement document with the neutral's closing report.]~~ The ~~[settlement document]~~ agreement shall be a contract between the parties and shall be enforceable in a private contract action in a court of appropriate jurisdiction in the event of breach by either party. If the ~~[settlement document]~~ agreement allows for foreclosure or other transfer of the subject property, the stay of the foreclosure under section 667-83 shall be released upon ~~[filing or recording]~~ the ~~[settlement document]~~ recordation of the neutral's closing report ~~[with the land court or bureau of conveyances, as appropriate]~~. Thereafter, the office of the assistant registrar of the land court or bureau of conveyances may record a notice of sale or other conveyance document, as appropriate.

(d) If the parties to a dispute resolution process reach an agreement which resolves the matters at issue in the dispute resolution before the first day of the scheduled dispute resolution session scheduled pursuant to this section, the parties shall notify the neutral by that date. The neutral shall thereafter issue a closing report that the parties have reached an agreement prior to the commencement of a dispute resolution session. If the agreement provides for foreclosure,

the parties shall memorialize the agreement in a writing signed by both parties ~~[and provided to the neutral. Any agreement authorizing foreclosure shall be attached to the neutral's closing report]~~. The parties may ~~[file or]~~ record the report ~~[at the bureau of conveyances or the land court, as appropriate]~~. If the agreement authorizes foreclosure, the stay of the foreclosure under section 667-83 shall be released upon ~~[filing or recording with the land court or bureau of conveyances, as appropriate.]~~ the recordation of the report. Thereafter, the land court or bureau of conveyances may record a notice of sale or other conveyance document, as appropriate. No fees shall be refunded if the parties come to an agreement prior to a dispute resolution session conducted pursuant to this part."

COMMENT 45

The task force recommends amending section 667-82(a) to provide that failure by the mortgagee and the owner-occupant to reach an agreement in the dispute resolution process under part V of chapter 667 shall not constitute failure to comply with the requirements of the mortgage foreclosure dispute resolution program. The task force believes that a failure to agree, without more, should not be the basis for a neutral's determination that either party did not comply with the dispute resolution program.

SECTION 44. Section 667-82, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) The neutral's closing report shall indicate if the mortgagee or the owner-occupant failed to comply with requirements of the mortgage foreclosure dispute resolution program.

(1) In the case of the mortgagee, failure to comply with the requirements of the program may consist of:

(A) Participation in dispute resolution without the authority to negotiate a loan modification or without access at all stages of the dispute

- resolution process to a person who is so authorized;
- (B) Failure to provide the required information or documents;
 - (C) Refusal to cooperate or participate in dispute resolution; or
 - (D) Refusal or failure to pay program fees under section 667-79 in a timely manner.
- (2) In the case of the owner-occupant, failure to comply with the requirements of the program may consist of:
- (A) Failure to provide the required information or documents; or
 - (B) Refusal to cooperate or participate in dispute resolution[-];
- provided that failure by the mortgagee and the owner-occupant to reach an agreement to resolve the dispute shall not constitute failure by the mortgagee or the owner-occupant to comply with the requirements of the mortgage foreclosure dispute resolution program."

COMMENT 46

The task force recommends amending section 667-83(a) to provide that a stay of association foreclosure proceedings following a dispute resolution case opening is invalid unless notifications to condominium or other homeowner associations regarding the owner-occupant's decision to participate in dispute resolution program have been made. (See related provisions in Comments 11, 17, and 42.)

In addition, section 667-83(a) should be amended to eliminate superfluous references to filings and recordations of documents with the assistant registrar of the land court or the bureau of conveyances, as redundant with the definition of "record" in the new section 667-1. (See discussion in Comment 3.) Similar amendments are made in Comments 12, 14, 35, 42, and 44.

SECTION 45. Section 667-83, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) The written notification of a case opening under section 667-79 shall operate as a stay of the foreclosure proceeding[7] and may be [~~filed or~~] recorded[~~, as appropriate,~~ at the land court or bureau of conveyances.]; provided that the written notification shall not act as a stay on a foreclosure proceeding by an association unless the association has been provided notice pursuant to sections 667-5.5, 667-21.5, or 667-79."

COMMENT 47

The following amendment conforms the reference to "land court" to the specific reference to *the office of the assistant registrar* of the land court, as provided in the definition of "record."

SECTION 46. Section 667-86, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) All persons who record an affidavit in the office of the assistant registrar of the land court, pursuant to section 501-118, or who record a conveyance document in the bureau of conveyances for an owner-occupied property subject to a nonjudicial power of sale foreclosure shall pay a fee of \$100, which shall be deposited into the mortgage foreclosure dispute resolution special fund on a quarterly basis."

COMMENT 48

Comments 49 through 51 relate to statutory amendments that are grouped as "Part IV" in the task force's proposed legislation. All of these amendments affect statutes that are amended twice in the proposed legislation -- immediately when the proposed legislation takes effect and then again at a later date -- for various reasons that are explained below.

PART IV

COMMENT 49

The following amendment to the newly created section 421J-A in Comment 2 takes effect on September 30, 2014 (see section 57(3) in Comment 55), and lowers the cap on special assessments that planned community associations may impose for unpaid maintenance fees against a person who purchases a delinquent apartment in a power of sale foreclosure, consistent with the reversion of identical provisions for condominiums in sections 514A-90(h) and 514B-146(h), pursuant to section 45(2) of Act 48, Session Laws of Hawaii 2011.

SECTION 47. Section 421J-A, Hawaii Revised Statutes, is amended by amending subsection (h) to read as follows:

"(h) The amount of the special assessment assessed under subsection (g) shall not exceed the total amount of unpaid regular monthly common assessments that were assessed during the ~~[twelve]~~ six months immediately preceding the completion of the judicial or nonjudicial power of sale foreclosure. In no event shall the amount of the special assessment exceed the sum of ~~[\$7,200.]~~ \$3,600."

COMMENT 50

Comment 5 covers the initial amendments the task force proposes for section 454M-10, on penalties for violations of the mortgage servicers law under chapter 454M. This section directs that a portion of the administrative fines imposed are to be deposited into the Mortgage Foreclosure Dispute Resolution Special Fund established under section 667-86. However, the special fund will be repealed on September 30, 2014, pursuant to section 45(2) of Act 48, Session Laws of Hawaii 2011, and all funds remaining in the special fund are to be transferred to the compliance resolution fund pursuant to section 45(6) of Act 48.

Hence, section 454M-10 should be amended to repeal the reference to deposits of fines into the Mortgage Foreclosure Dispute Resolution Special Fund, effective September 30, 2014 (see section 57(3) in Comment 55).

SECTION 48. Section 454M-10, Hawaii Revised Statutes, is amended to read as follows:

"~~§454M-10~~ **Penalty.** Any person who violates any provision of this chapter may be subject to an administrative fine of not more than \$7,000 for each violation~~[-; provided that \$1,000 of the aggregate fine amount shall be deposited into the mortgage~~

~~foreclosure dispute resolution special fund established pursuant to section 667-86]."~~

COMMENT 51

Comment 27 covers the initial amendments proposed for section 667-53, on conditions for conversions of nonjudicial foreclosures to judicial foreclosures. Section 667-53(a)(6) requires the fee for filing the petition for these conversions to be deposited into the Mortgage Foreclosure Dispute Resolution Special Fund established under section 667-86. However, the special fund will be repealed on September 30, 2014, pursuant to section 45(2) of Act 48, Session Laws of Hawaii 2011, and all funds remaining in the special fund are to be transferred to the compliance resolution fund pursuant to section 45(6) of Act 48.

Assuming the task force's recommendation to make the conversion process permanent is implemented (see Comment 52), section 667-53(a)(6) should be amended to provide for the deposit of these fees after the repeal of the special fund, effective September 30, 2014 (see section 57(3) in Comment 55).

SECTION 49. Section 667-53, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) An owner-occupant of a residential property that is subject to nonjudicial foreclosure under part IA or II may convert the action to a judicial foreclosure provided that:

- (1) A petition conforming to section 667-54 shall be filed with the circuit court in the circuit where the residential property is located, stating that the owner-occupant of the property elects to convert the nonjudicial foreclosure to a judicial foreclosure proceeding no later than thirty days after the foreclosure notice is served on the owner-occupant as required by section 667-5 or 667-22;
- (2) Within forty-five days of the filing of the petition, all owner-occupants and mortgagors of an interest in the residential property whose interests are pledged or otherwise encumbered by the mortgage that is being foreclosed and all persons who have signed the

promissory note or other instrument evidencing the debt secured by the mortgage that is being foreclosed, including without limitation co-obligors and guarantors, shall file a statement in the circuit court action that they agree to submit themselves to the judicial process and the jurisdiction of the circuit court; provided further that if this condition is not satisfied, the circuit court action may be dismissed with prejudice as to the right of any owner-occupant to convert the action to a judicial proceeding, and the mortgagee may proceed nonjudicially;

- (3) Filing a petition pursuant to paragraph (1) shall automatically stay the nonjudicial foreclosure action unless and until the judicial proceeding has been dismissed;
- (4) The person filing the petition pursuant to paragraph (1) shall have an affirmative duty to promptly notify the Hawaii attorney who is handling the nonjudicial foreclosure about the filing of the complaint for conversion;
- (5) All parties joined in the converted judicial proceeding may assert therein any claims and defenses that they could have asserted had the action originally been commenced as a judicial foreclosure action; and
- (6) The fee for filing the petition shall be \$250, which shall be deposited into the [~~mortgage foreclosure dispute resolution special fund established under section 667-86.~~] compliance resolution fund."

COMMENT 52

The task force recommends amending section 45(4) of Act 48, Session Laws of Hawaii 2011, to make permanent the process for converting nonjudicial foreclosures of residential property into judicial foreclosures under sections 667-53, 667-54, and 667-55.

PART V

SECTION 50. Act 48, Session Laws of Hawaii 2011, is amended by amending section 45 to read as follows:

"SECTION 45. This Act shall take effect upon its approval; provided that:

- (1) The mortgage foreclosure dispute resolution program established by section 1 of this Act shall be operative no later than October 1, 2011;
- (2) Sections 1, 13, and 14 shall be repealed on September 30, 2014, and sections 514A-90(h) and 514B-146(h), Hawaii Revised Statutes, shall be reenacted in the form in which they read on the day before the effective date of this Act;
- (3) Section 10 shall take effect on July 1, 2012;
- ~~[(4) Section 5 shall be repealed on December 31, 2012;]~~
- ~~[(5)]~~ (4) Section 7 shall be repealed on September 30, 2014, and section 26-9(o), Hawaii Revised Statutes, shall be reenacted in the form in which it read on the day before the effective date of this Act; and
- ~~[(6)]~~ (5) Upon the repeal of section 1, all moneys remaining in the mortgage foreclosure dispute resolution special fund established under section 667-P, Hawaii Revised Statutes, shall be transferred to the compliance resolution fund established under section 26-9(o), Hawaii Revised Statutes."

PART VI

COMMENT 53

The task force recommends a conforming amendment to repeal section 667-21.6 in favor of similar provisions established in section 667-B under Comment 4.

SECTION 51. Section 667-21.6, Hawaii Revised Statutes, is repealed.

~~["**§667-21.6** **Foreclosure of association lien; cure of default.**— If a unit owner notifies the association or its attorney by certified mail return receipt requested or by hand-delivery within five business days following a response to the unit owner's request for the amount to cure a default, together with an estimated amount of the foreclosing association's attorneys' fees and costs, and all other fees and costs related to the default estimated to be incurred by the foreclosing association, that it intends to cure the default, the association shall allow sixty calendar days to the unit owner to cure the default. The association shall not reject a reasonable payment plan for cure of the default; provided that a reasonable plan shall require the owner to pay at a minimum the current maintenance fee and some amount owed on the past due balance. From and after the date that the unit owner gives written notice to the association of its intent to cure the delinquency, any nonjudicial foreclosure of the lien shall be stayed pending the sixty-day period or a longer period that is agreed upon by the parties."]~~

COMMENT 54

The task force recommends conforming amendments to repeal the definitions in sections 667-50, 667-61, and 667-72, in favor of the consolidated definitions under the new section 667-1 in Comment 3.

SECTION 52. Section 667-50, Hawaii Revised Statutes, is repealed.

~~["§667-50] Definitions. For purposes of this chapter, "foreclosure notice" shall mean notice of intention to foreclose given pursuant to section 667-5 or notice of default and intention to foreclose prepared pursuant to section 667-22."]~~

SECTION 53. Section 667-61, Hawaii Revised Statutes, is repealed.

~~["§667-61] Definitions. For the purposes of sections 667-62 to 667-65, "time share interest" shall have the same meaning as in section 514E-1."]~~

SECTION 54. Section 667-72, Hawaii Revised Statutes, is repealed.

~~["§667-72] Definitions. As used in this part:~~

~~"Approved budget and credit counselor" means a budget and credit counseling agency that has received approval from a United States trustee or bankruptcy administrator to provide instructional courses concerning personal financial management pursuant to Title 11 United States Code section 111.~~

~~"Approved housing counselor" means a housing counseling agency that has received approval from the United States Department of Housing and Urban Development to provide housing counseling services pursuant to section 106(a)(2) of the Housing and Urban Development Act of 1968, Title 12 United States Code section 1701x.~~

~~"Association" has the same meaning as in sections 514B-3 and 421J-2.~~

~~"Department" means the department of commerce and consumer affairs.~~

~~"Director" means the director of commerce and consumer affairs.~~

~~"Dispute resolution" means a facilitated negotiation between a mortgagor and mortgagee for the purpose of reaching an agreement for mortgage loan modification or other agreement in an attempt to avoid foreclosure or to mitigate damages if foreclosure is unavoidable.~~

~~"Mortgagee" has the same meaning as the term is defined in section 667-21.~~

~~"Mortgagor" has the same meaning as the term is defined in section 667-21.~~

~~"Neutral" means a person who is a dispute resolution specialist assigned to facilitate the dispute resolution process required by this part.~~

~~"Owner-occupant" means a person, at the time that a notice of default and intention to foreclose is served on the mortgagor under the power of sale:~~

- ~~(1) Who owns an interest in the residential property, and the interest is encumbered by the mortgage being foreclosed; and~~
- ~~(2) For whom the residential property is and has been the person's primary residence for a continuous period of not less than two hundred days immediately preceding the date on which the notice is served."]~~

COMMENT 55

The following are standard provisions in legislation, including the effective dates of the various recommendations of the task force.

SECTION 55. In codifying the new sections added by sections 2 and 3 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 56. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 57. This Act shall take effect upon its approval; provided that:

- (1) Section 7 of this Act, amending section 607-5(a) and (b), Hawaii Revised Statutes, and the amendments made to section 667-53(a)(6), Hawaii Revised Statutes, in section 26 of this Act, shall take effect on August 15, 2012;
- (2) Section 25 of this Act, amending section 667-41, Hawaii Revised Statutes, shall take effect on September 1, 2012; and
- (3) Sections 47, 48, and 49 in part IV of this Act, amending sections 421J-A(h), 454M-10, and 667-53(a)(6), Hawaii Revised Statutes, shall take effect on September 30, 2014.

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Appendix A

Approved by the Governor
on JUN 3 2010

THE SENATE
TWENTY-FIFTH LEGISLATURE, 2010
STATE OF HAWAII

ACT 162
S.B. NO. 2472
S.D. 2
H.D. 1
C.D. 1

A BILL FOR AN ACT

RELATING TO MORTGAGE FORECLOSURES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

- 1 SECTION 1. The legislature finds that the number of
2 mortgage foreclosures of residential property has reached an
3 alarming level. The legislature acknowledges that this
4 situation is not unique to Hawaii and is part of a nationwide
5 economic downturn and resulting upheaval throughout the home
6 lending industry. Because of these concerns, there have been
7 numerous measures proposed during the 2010 legislative session
8 to address foreclosure-related issues. However, it is unclear
9 whether any of these approaches will improve the conditions
10 relating to foreclosures or improve the current foreclosure
11 laws.
- 12 The legislature further finds that a comprehensive
13 evaluation of Hawaii's mortgage foreclosure laws is necessary
14 before the enactment of meaningful legislation that, on balance,
15 addresses the concerns of both borrowers and lenders involved in
16 mortgage foreclosures without further overburdening the courts.
- 17 The purpose of this Act is to create a mortgage foreclosure
18 task force to conduct an extensive analysis of all factors

2010-2025 SB2472 CD1 SMA.doc



1 affecting mortgage foreclosures in the state and to recommend
2 appropriate legislation.

3 SECTION 2. (a) There is established a mortgage
4 foreclosure task force within the department of commerce and
5 consumer affairs for administrative purposes. The director of
6 commerce and consumer affairs shall select the initial members
7 of the task force and shall invite at least one member from each
8 of the following:

- 9 (1) The department of commerce and consumer affairs'
10 office of consumer protection;
- 11 (2) A mortgage counseling organization approved by the
12 United States Department of Housing and Urban
13 Development, preferably with expertise in consumer
14 credit counseling;
- 15 (3) The Legal Aid Society of Hawaii;
- 16 (4) The Hawaii Financial Services Association;
- 17 (5) The Hawaii Bankers Association;
- 18 (6) The Mortgage Bankers Association of Hawaii;
- 19 (7) The Hawaii Credit Union League;
- 20 (8) The Hawaii Council of Associations of Apartment
21 Owners;

1 (9) The Hawaii State Bar Association Collection Law
2 Section;

3 (10) The Hawaii State Bar Association Bankruptcy Law
4 Section or the Bankruptcy Court of the United States
5 District of Hawaii; and

6 (11) The Hawaii state judiciary.

7 The members of the mortgage foreclosure task force shall elect a
8 chairperson from among its membership. The chairperson of the
9 task force shall seek to maintain a balanced representation of
10 interests and may select additional task force members at the
11 chairperson's discretion.

12 (b) The mortgage foreclosure task force shall undertake a
13 study to develop both general and specific policies and
14 procedures necessary to improve the manner in which mortgage
15 foreclosures are conducted in the state. In particular, the
16 task force shall consider the following areas for possible
17 improvements:

18 (1) The adequacy of notice given to mortgagors of
19 available mortgage counseling programs and the optimal
20 timing for such notification and counseling;



- 1 (2) The availability of loan documentation to mortgagors
- 2 from mortgagees prior to and during the foreclosure
- 3 process;
- 4 (3) The establishment of statutory bidding thresholds for
- 5 properties sold via foreclosure;
- 6 (4) The statutory timeline for power-of-sale foreclosures;
- 7 (5) Further regulation of distressed property consultants;
- 8 and
- 9 (6) Revisions to part II of chapter 667, Hawaii Revised
- 10 Statutes, to make it a viable vehicle for power-of-
- 11 sale foreclosures.
- 12 (c) In undertaking the study, the mortgage foreclosure
- 13 task force may take into account any of the following factors:
- 14 (1) Existing regulation, on both the state and federal
- 15 levels;
- 16 (2) The state of the national and local economy, mortgage
- 17 loan default rates, and unemployment rates;
- 18 (3) Local borrowing and lending practices vis-à-vis
- 19 mainland practices;
- 20 (4) Standard mortgage loan qualifications;
- 21 (5) Language barriers and other cultural factors unique to
- 22 this state;



- 1 (6) The extent to which predatory mortgage lending, abuse
2 of collection procedures, and otherwise unfair,
3 fraudulent, and deceptive practices have impacted
4 mortgagors;
- 5 (7) The effect of various mortgage loan terms, interest
6 rates, fees, risk-based pricing, single-premium credit
7 insurance, financing, and payment structures;
- 8 (8) The extent to which mortgage loan terms and conditions
9 are disclosed to and understood by borrowers;
- 10 (9) A borrower's ability to negotiate mortgage loan terms
11 and prices;
- 12 (10) The role of mortgage servicing agents and their
13 practices;
- 14 (11) The availability, consumer knowledge, and use of
15 mortgage counseling;
- 16 (12) The availability, consumer knowledge, and use of loan
17 modification processes;
- 18 (13) The length of time and expense associated with
19 completing the foreclosure process;
- 20 (14) The extent to which mortgagees provide mortgagors with
21 mortgage documents when requested;



- 1 (15) The impact on the state's judicial system and the
- 2 timely resolution of foreclosure disputes;
- 3 (16) The extent to which mortgage foreclosures go
- 4 uncontested;
- 5 (17) The proof required to establish standing for
- 6 foreclosing mortgagees;
- 7 (18) Association and maintenance fees and other costs borne
- 8 by neighbor unit holders in condominium or community
- 9 associations when mortgagors are in default;
- 10 (19) Abuses of the existing law by mortgagors and
- 11 mortgagees;
- 12 (20) The effect of certain inefficiencies and barriers
- 13 under the current law relating to foreclosures, such
- 14 as serving process upon absent or deceased mortgagors;
- 15 and
- 16 (21) The extent to which the above factors impact power-of-
- 17 sale vis-à-vis judicial foreclosures.
- 18 (d) The mortgage foreclosure task force shall analyze the
- 19 effectiveness and any defects of the foreclosure procedures
- 20 currently set in statute for both judicial and power-of-sale
- 21 foreclosures. In this analysis, the task force:



- 1 (1) May consider and recommend alternative procedures for
2 timeshare property;
- 3 (2) May consider and recommend alternative procedures for
4 foreclosures sought by junior lien holders such as
5 condominiums, co-op apartments, and community
6 associations collecting maintenance fees;
- 7 (3) May propose measures to clarify the application of
8 chapter 667, Hawaii Revised Statutes, to other
9 property statutes;
- 10 (4) Shall comment on the extent to which existing law does
11 or does not comply with state and federal
12 constitutional due process guarantees;
- 13 (5) Shall comment on any effect proposed legislative
14 changes will have on borrowers who are current on
15 their mortgage loans; and
- 16 (6) Shall seek to maintain and not erode existing consumer
17 protections.
- 18 (e) The mortgage foreclosure task force shall comment on
19 the feasibility of establishing a state entity or administrator
20 to focus on addressing the concerns of mortgagors, disseminating
21 information, and otherwise engaging in consumer education. The



1 task force shall propose funding mechanisms to enable the
2 operation of this entity.

3 (f) Members of the mortgage foreclosure task force shall
4 serve without compensation and shall not be reimbursed for
5 expenses.

6 (g) The mortgage foreclosure task force shall submit a
7 report of its findings and recommendations, including any
8 proposed legislation, to the legislature no later than twenty
9 days prior to the convening of the 2011 and 2012 regular
10 sessions, and shall participate in a joint informational session
11 upon request of the legislature.

12 (h) The legislative reference bureau shall assist the task
13 force in preparing its findings, recommendations, and proposed
14 legislation; provided that the chairperson of the task force
15 shall submit the task force's proposals to the legislative
16 reference bureau for drafting no later than November 1, 2010 for
17 the report to the 2011 regular session and no later than
18 November 1, 2011, for the report to the 2012 regular session.

19 (i) The mortgage foreclosure task force shall cease to
20 exist on June 30, 2012.

21



1 SECTION 3. This Act shall take effect upon its approval.

2

APPROVED this 3 day of JUN, 2010


GOVERNOR OF THE STATE OF HAWAII

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A BILL FOR AN ACT

RELATING TO REAL PROPERTY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

PART I

SECTION 1. The legislature finds that Act 162, Session Laws of Hawaii 2010, established a mortgage foreclosure task force to develop policies and procedures to improve the way mortgage foreclosures are conducted in the State. Act 162 required the task force to submit its findings and recommendations, including any proposed legislation, to the legislature for the regular sessions of 2011 and 2012.

The task force held several public meetings over the legislative interim of 2010 to discuss the various items for review raised under Act 162. Based upon these discussions, the task force adopted recommendations, including proposed legislation, in its report to the legislature for the regular session of 2011. Some of the task force's recommendations were included in Act 48, Session Laws of Hawaii 2011, a far-reaching mortgage foreclosure reform measure that, among other things:



.B. NO.

(1) Temporarily authorized mortgagors who are occupying, as a primary residence, real property that is subject to nonjudicial foreclosure to either:

(A) Participate in the mortgage foreclosure dispute resolution program established under Act 48; or

(B) Convert the nonjudicial foreclosure to a judicial foreclosure;

(2) Imposed a temporary moratorium on all new nonjudicial foreclosures conducted under part I of chapter 667, Hawaii Revised Statutes; and

(3) Specified prohibited conduct and consequences of violations for foreclosing mortgagees, including making any violation of the mortgage foreclosure law under chapter 667, Hawaii Revised Statutes, an unfair or deceptive act or practice subject to the enhanced penalties under chapter 480, Hawaii Revised Statutes.

The task force met again over several public meetings during the legislative interim of 2011 to continue its work under Act 162. The focus of these meetings was divided among these major issues:



.B. NO.

(1) The new mortgage foreclosure provisions of Act 48,
Session Laws of Hawaii 2011;

(2) Matters involving condominium and other homeowner
associations, including association liens and the
collection of unpaid assessments; and

(3) Mortgage foreclosure counseling and dispute resolution
issues.

Based upon its deliberations on these issues, the task force
adopted further recommendations in its report to the legislature
for the regular session of 2012.

The purpose of this Act is to implement the recommendations
of the mortgage foreclosure task force submitted to the
legislature for the regular session of 2012.

PART II

SECTION 2. Chapter 421J, Hawaii Revised Statutes, is
amended by adding two new sections to be appropriately
designated and to read as follows:

"§421J-A Association fiscal matters; lien for assessments.

(a) All sums assessed by the association but unpaid for the
share of the assessments chargeable to any unit shall constitute
a lien on the unit with priority over all other liens, except:



.B. NO.

1 (1) Liens for taxes and assessments lawfully imposed by
2 governmental authority against the unit;

3 (2) All sums unpaid on any mortgage of record that was
4 recorded prior to the recordation of a notice of a
5 lien by the association and any costs and expenses,
6 including attorneys' fees, provided in such mortgages;
7 and

8 (3) Liens of a condominium association that are secured by
9 the unit;

10 provided that a lien recorded by the association shall expire
11 two years from the date of recordation; and provided further
12 that no lien may be imposed by the association against any unit
13 for any assessments arising solely from fines, penalties, or
14 late fees.

15 The lien of the association may be foreclosed by action or
16 by nonjudicial or power of sale foreclosure procedures set forth
17 in chapter 667, by the managing agent or board, acting on behalf
18 of the association. In any such foreclosure, the unit owner
19 shall be required to pay a reasonable rental for the unit, if so
20 provided in the association documents or the law, and the
21 plaintiff in the foreclosure shall be entitled to the



.B. NO.

1 appointment of a receiver to collect the rental owed by the unit
2 owner or any tenant of the unit. If the association is the
3 plaintiff, it may request that its managing agent be appointed
4 as receiver to collect the rent from the tenant. The managing
5 agent or board, acting on behalf of the association, unless
6 prohibited by the declaration, may bid on the unit at
7 foreclosure sale and acquire and hold, lease, mortgage, and
8 convey the unit. Action to recover a money judgment for unpaid
9 assessments shall be maintainable without foreclosing or waiving
10 the lien securing the unpaid assessments owed.

11 (b) Except as provided in subsection (e), when the
12 mortgagee of a mortgage of record or other purchaser of a unit
13 obtains title to the unit as a result of foreclosure of the
14 mortgage, the acquirer of title and the acquirer's successors
15 and assigns shall not be liable for the share of the assessments
16 by the association chargeable to the unit that became due prior
17 to the acquisition of title to the unit by the acquirer. The
18 unpaid share of assessments shall be deemed to be assessments
19 collectible from all of the unit owners, including the acquirer
20 and the acquirer's successors and assigns. The mortgagee of
21 record or other purchaser of the unit shall be deemed to acquire



.B. NO.

1 title and shall be required to pay the unit's share of
2 assessments beginning:

3 (1) Thirty-six days after the order confirming the sale to
4 the purchaser has been filed with the court;

5 (2) Sixty days after the hearing at which the court grants
6 the motion to confirm the sale to the purchaser;

7 (3) Thirty days after the public sale in a nonjudicial
8 power of sale foreclosure conducted pursuant to
9 chapter 667; or

10 (4) Upon the recording of the instrument of conveyance;
11 whichever occurs first; provided that the mortgagee of record or
12 other purchaser of the unit shall not be deemed to acquire title
13 under paragraph (1), (2), or (3), if transfer of title is
14 delayed past the thirty-six days specified in paragraph (1), the
15 sixty days specified in paragraph (2), or the thirty days
16 specified in paragraph (3), when a person who appears at the
17 hearing on the motion or a party to the foreclosure action
18 requests reconsideration of the motion or order to confirm sale,
19 objects to the form of the proposed order to confirm sale,
20 appeals the decision of the court to grant the motion to confirm
21 sale, or the debtor or mortgagor declares bankruptcy or is



.B. NO.

1 involuntarily placed into bankruptcy. In any such case, the
2 mortgagee of record or other purchaser of the unit shall be
3 deemed to acquire title upon recordation of the instrument of
4 conveyance.

5 (c) Except as provided in section 667-B(c), no unit owner
6 shall withhold any assessment claimed by the association. A
7 unit owner who disputes the amount of an assessment may request
8 a written statement clearly indicating:

9 (1) The amount of regular and special assessments included
10 in the assessment, including the due date of each
11 amount claimed;

12 (2) The amount of any penalty, late fee, lien filing fee,
13 and any other charge included in the assessment;

14 (3) The amount of attorneys' fees and costs, if any,
15 included in the assessment;

16 (4) That under Hawaii law, a unit owner has no right to
17 withhold assessments for any reason;

18 (5) That a unit owner has a right to demand mediation or
19 arbitration to resolve disputes about the amount or
20 validity of an association's assessment; provided that



.B. NO.

1 the unit owner immediately pays the assessment in full
2 and keeps assessments current; and

3 (6) That payment in full of the assessment does not
4 prevent the unit owner from contesting the assessment
5 or receiving a refund of amounts not owed.

6 Nothing in this section shall limit the rights of a unit owner
7 to the protection of all fair debt collection procedures
8 mandated under federal and state law.

9 (d) A unit owner who pays an association the full amount
10 claimed by the association may file in small claims court or
11 require the association to mediate to resolve any disputes
12 concerning the amount or validity of the association's claim.

13 If the unit owner and the association are unable to resolve the
14 dispute through mediation, either party may file for arbitration
15 under chapter 658A; provided that a unit owner may only file for
16 arbitration if all amounts claimed by the association are paid
17 in full on or before the date of filing. If the unit owner
18 fails to keep all association assessments current during the
19 arbitration, the association may ask the arbitrator to
20 temporarily suspend the arbitration proceedings. If the unit
21 owner pays all association assessments within thirty days of the



.B. NO.

1 date of suspension, the unit owner may ask the arbitrator to
2 recommence the arbitration proceedings. If the unit owner fails
3 to pay all association assessments by the end of the thirty-day
4 period, the association may ask the arbitrator to dismiss the
5 arbitration proceedings. The unit owner shall be entitled to a
6 refund of any amounts paid to the association that are not owed.

7 (e) In conjunction with or as an alternative to
8 foreclosure proceedings under subsection (a), where a unit is
9 owner-occupied, the association may authorize its managing agent
10 or board, after sixty days written notice to the unit owner and
11 to the unit's first mortgagee of the nonpayment of the unit's
12 share of the assessments, to terminate the delinquent unit's
13 access to the common elements and cease supplying a delinquent
14 unit with any and all services normally supplied or paid for by
15 the association. Any terminated services and privileges shall
16 be restored upon payment of all delinquent assessments, but need
17 not be restored until payment in full is received.

18 (f) Before the board or managing agent may take the
19 actions permitted under subsection (e), the board shall adopt a
20 written policy providing for such actions and have the policy
21 approved by a majority vote of the unit owners at an annual or



.B. NO.

1 special meeting of the association or by the written consent of
2 a majority of the unit owners unless the association documents
3 already permit the process.

4 (g) Subject to this subsection and subsections (h) and
5 (i), the board may specially assess the amount of the unpaid
6 regular monthly common assessments for assessments against a
7 person who, in a judicial or nonjudicial power of sale
8 foreclosure, purchases a delinquent unit; provided that:

9 (1) A purchaser who holds a mortgage on a delinquent unit
10 that was recorded prior to the filing of a notice of
11 lien by the association and who acquires the
12 delinquent unit through a judicial or nonjudicial
13 foreclosure proceeding, including purchasing the
14 delinquent unit at a foreclosure auction, shall not be
15 obligated to make, nor be liable for, payment of the
16 special assessment as provided for under this
17 subsection; and

18 (2) A person who subsequently purchases the delinquent
19 unit from the mortgagee referred to in paragraph (1)
20 shall be obligated to make, and shall be liable for,
21 payment of the special assessment provided for under



.B. NO.

1 this subsection; and provided further that the
2 mortgagee or subsequent purchaser may require the
3 association to provide, at no charge, a notice of the
4 association's intent to claim a lien against the
5 delinquent unit for the amount of the special
6 assessment, prior to the subsequent purchaser's
7 acquisition of title to the delinquent unit. The
8 notice shall state the amount of the special
9 assessment, how that amount was calculated, and the
10 legal description of the unit.

11 (h) The amount of the special assessment assessed under
12 subsection (g) shall not exceed the total amount of unpaid
13 regular monthly common assessments that were assessed during the
14 twelve months immediately preceding the completion of the
15 judicial or nonjudicial power of sale foreclosure. In no event
16 shall the amount of the special assessment exceed the sum of
17 \$7,200.

18 (i) For purposes of subsections (g) and (h), the following
19 definitions shall apply, unless the context requires otherwise:

20 "Completion" means:



1 (1) In a nonjudicial power of sale foreclosure, when the
2 affidavit required under section 667-33 is recorded;
3 and

4 (2) In a judicial foreclosure, when a purchaser is deemed
5 to acquire title pursuant to subsection (b).

6 "Regular monthly common assessments" does not include:

7 (1) Any other special assessment, except for a special
8 assessment imposed on all units as part of a budget
9 adopted pursuant to the association documents;

10 (2) Late charges, fines, or penalties;

11 (3) Interest assessed by the association;

12 (4) Any lien arising out of the assessment; or

13 (5) Any fees or costs related to the collection or
14 enforcement of the assessment, including attorneys'
15 fees and court costs.

16 (j) The cost of a release of any lien filed pursuant to
17 this section shall be paid by the party requesting the release.

18 **\$421J-B Association fiscal matters; collection of unpaid**
19 **assessments from tenants or rental agents.** (a) If a unit owner
20 rents or leases the unit and is in default for thirty days or
21 more in the payment of the unit's share of the regular



1 assessments, the board, for as long as the default continues,
2 may demand in writing and receive each month from any tenant
3 occupying the unit or rental agent renting the unit, an amount
4 sufficient to pay all sums due from the unit owner to the
5 association, including interest, if any, but the amount shall
6 not exceed the tenant's rent due each month. The tenant's
7 payment under this section shall discharge that amount of
8 payment from the tenant's rent obligation, and any contractual
9 provision to the contrary shall be void as a matter of law.

10 (b) Before taking any action under this section, the board
11 shall give to the delinquent unit owner written notice of its
12 intent to collect the rent owed. The notice shall:

- 13 (1) Be sent both by first-class and certified mail;
14 (2) Set forth the exact amount the association claims is
15 due and owing by the unit owner; and
16 (3) Indicate the intent of the board to collect such
17 amount from the rent, along with any other amounts
18 that become due and remain unpaid.

19 (c) The unit owner shall not take any retaliatory action
20 against the tenant for payments made under this section.



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1 (d) The payment of any portion of the unit's share of
2 regular assessments by the tenant pursuant to a written demand
3 by the board is a complete defense, to the extent of the amount
4 demand and paid by the tenant, in an action for nonpayment of
5 rent brought by the unit owner against a tenant.

6 (e) The board may not demand payment from the tenant
7 pursuant to this section if:

8 (1) A commissioner or receiver has been appointed to take
9 charge of the premises pending a mortgage foreclosure;

10 (2) A mortgagee is in possession pending a mortgage
11 foreclosure; or

12 (3) The tenant is served with a court order directing
13 payment to a third party.

14 (f) In the event of any conflict between this section and
15 any provision of chapter 521, the conflict shall be resolved in
16 favor of this section; provided that if the tenant is entitled
17 to an offset of rent under chapter 521, the tenant may deduct
18 the offset from the amount due to the association, up to the
19 limits stated in chapter 521. Nothing herein precludes the unit
20 owner or tenant from seeking equitable relief from a court of



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1 competent jurisdiction or seeking a judicial determination of
2 the amount owed.

3 (g) Before the board may take the actions permitted under
4 subsection (a), the board shall adopt a written policy providing
5 for the actions and have the policy approved by a majority vote
6 of the unit owners at an annual or special meeting of the
7 association or by the written consent of a quorum of the unit
8 owners."

9 SECTION 3. Chapter 667, Hawaii Revised Statutes, is
10 amended as follows:

11 1. By adding a new part I to read:

12 **"PART I. GENERAL PROVISIONS**

13 **§667-1 Definitions.** As used in this chapter:

14 "Approved budget and credit counselor" means a Hawaii-based
15 budget and credit counseling agency that has received approval
16 from a United States trustee or bankruptcy administrator to
17 provide instructional courses concerning personal financial
18 management pursuant to title 11 United States Code section 111.

19 "Approved housing counselor" means a Hawaii-based housing
20 counseling agency that has received approval from the United
21 States Department of Housing and Urban Development to provide



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1 housing counseling services pursuant to section 106(a)(2) of the
2 Housing and Urban Development Act of 1968, title 12 United
3 States Code section 1701x, as the agency appears on the United
4 States Department of Housing and Urban Development website.

5 "Assessment" has the same meaning as "assessment" in
6 chapter 421J and "common expense" in chapter 514B.

7 "Association" has the same meaning as defined in sections
8 421J-2 and 514B-3.

9 "Association documents" has the same meaning as defined in
10 section 421J-2 and includes the "declaration" defined in section
11 514B-3 and the "bylaws" described in section 514B-108,
12 respectively.

13 "Association lien" has the same meaning as the lien
14 established under section 421J-A or 514B-146.

15 "Borrower" means the borrower, maker, cosigner, or
16 guarantor under a mortgage agreement.

17 "Department" means the department of commerce and consumer
18 affairs.

19 "Director" means the director of commerce and consumer
20 affairs.



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1 "Dispute resolution" means a facilitated negotiation under
2 part V between a mortgagor and mortgagee for the purpose of
3 reaching an agreement for mortgage loan modification or other
4 agreement in an attempt to avoid foreclosure or to mitigate
5 damages if foreclosure is unavoidable.

6 "Foreclosure notice" means notice of intention to foreclose
7 given pursuant to section 667-5 or notice of default and
8 intention to foreclose prepared pursuant to section 667-22.

9 "Mailed" means to be sent by first class mail, postage
10 prepaid, unless otherwise expressly directed in this chapter.

11 "Mortgage" means a mortgage, security agreement, or other
12 document under which property is mortgaged, encumbered, pledged,
13 or otherwise rendered subject to a lien for the purpose of
14 securing the payment of money or the performance of an
15 obligation.

16 "Mortgage agreement" includes the mortgage, the note or
17 debt document, or any document amending any of the foregoing.

18 "Mortgaged property" means the property that is subject to
19 the lien of the mortgage.



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1 "Mortgagee" means the current holder of record of the
2 mortgagee's or the lender's interest under the mortgage or the
3 current mortgagee's or lender's duly authorized agent.

4 "Mortgagor" means the mortgagor or borrower named in the
5 mortgage and, unless the context otherwise indicates, includes
6 the current owner of record of the mortgaged property whose
7 interest is subject to the mortgage.

8 "Neutral" means a person who is a dispute resolution
9 specialist assigned to facilitate the dispute resolution process
10 required by part V.

11 "Nonjudicial foreclosure" means foreclosure under power of
12 sale.

13 "Open house" means a public showing of the mortgaged
14 property during a scheduled time period.

15 "Owner-occupant" means a person, at the time that a notice
16 of default and intention to foreclose is served on the mortgagor
17 under the power of sale:

- 18 (1) Who owns an interest in the residential property, and
19 the interest is encumbered by the mortgage being
20 foreclosed; and



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(2) For whom the residential property is and has been the person's primary residence for a continuous period of not less than two hundred days immediately preceding the date on which the notice is served.

"Power of sale" or "power of sale foreclosure" means a nonjudicial foreclosure when the mortgage contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure.

"Property" means property (real, personal, or mixed), an interest in property (including fee simple, leasehold, life estate, reversionary interest, and any other estate under applicable law), or other interests that can be subject to the lien of a mortgage.

"Record" means a document is recorded or filed in the office of the assistant registrar of the land court under chapter 501 or recorded in the bureau of conveyances under chapter 502, or both, as applicable.

"Residential property" means real property that is improved and used for residential purposes.



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1 "Serve", when referring to providing notice of intention to
2 foreclose or notice of default and intention to foreclose
3 pursuant to a nonjudicial foreclosure, means to have service of
4 the notice of default and intention to foreclose made in
5 accordance with the service of process or the service of summons
6 under the Hawaii rules of civil procedure and under sections
7 634-35 and 634-36, excluding however, any return or affidavit of
8 service obligations required therein.

9 "Time share interest" has the same meaning as in section
10 514E-1.

11 "Unit" has the same meaning as in sections 421J-2 and 514B-
12 3.

13 "Unit owner" has the same meaning as "member" in section
14 421J-2 and "unit owner" in section 514B-3."

15 2. By adding a new part to be appropriately designated and
16 to read:

17 **"PART . ASSOCIATION ALTERNATE POWER OF SALE**
18 **FORECLOSURE PROCESS**

19 **§667-A Alternate power of sale process.** The process in
20 this part is an alternative power of sale process for



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1 associations to the foreclosure by action and the foreclosure by
2 power of sale in part IA.

3 **§667-B Notice of default and intention to foreclose;**
4 **contents; distribution.** (a) When a unit owner has failed to
5 pay an assessment, and when the association intends to conduct a
6 power of sale foreclosure under this part, the association shall
7 prepare a written notice of default and intention to foreclose
8 addressed to the unit owner. The notice of default and
9 intention to foreclose shall state:

- 10 (1) The name and address of the association;
- 11 (2) The name and last known address of the unit owners;
- 12 (3) With respect to the unit, the address or a description
13 of its location, tax map key number, and certificate
14 of title or transfer certificate of title number if
15 registered in the land court;
- 16 (4) The description of the default or, if the default is a
17 monetary default, an itemization of the delinquent
18 amount;
- 19 (5) The action required to cure the default, including the
20 delinquent amount and the estimated amount of the
21 association's attorney's fees and costs, and all other



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fees and costs related to the default estimated to be incurred by the association by the deadline date;

(6) The date by which the default must be cured, which shall be within sixty days after service of the notice of default and intention to foreclose;

(7) A statement that if the default is not cured by the deadline date stated in the notice of default and intention to foreclose, the entire unpaid balance of the moneys owed to the association will become due, that the association intends to conduct a power of sale foreclosure to sell the unit at a public sale without any court action and without going to court, and that the mortgagee or any other person may acquire the unit at the public sale;

(8) The name, address, electronic address, and telephone number of the attorney who is representing the association; provided that the attorney shall be licensed to practice law in the State and physically located in the State; and



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1 (9) Notice of the right of the unit owner to submit a
2 payment plan within thirty days pursuant to subsection
3 (c).

4 (b) The notice of default and intention to foreclose shall
5 also contain wording substantially similar to the following in
6 all capital letters and printed in not less than fourteen-point
7 font:

8 "IF THE DEFAULT ON THE PAYMENT OF ASSESSMENTS
9 CONTINUES AFTER THE DEADLINE DATE IN THIS NOTICE, THE
10 UNIT MAY BE FORECLOSED AND SOLD WITHOUT ANY COURT
11 ACTION AND WITHOUT GOING TO COURT.

12 YOU MAY HAVE CERTAIN LEGAL RIGHTS OR DEFENSES.
13 FOR ADVICE, YOU SHOULD CONSULT WITH AN ATTORNEY
14 LICENSED IN THIS STATE.

15 AFTER THE DEADLINE DATE IN THIS NOTICE, TWO
16 PUBLIC SHOWINGS (OPEN HOUSES) OF THE UNIT BY THE
17 ASSOCIATION WILL BE HELD, BUT ONLY IF ALL OWNERS OF
18 THE PROPERTY WHO ALSO CURRENTLY RESIDE AT THE UNIT SO
19 AGREE. TO SHOW THAT ALL OWNERS RESIDING AT THE UNIT
20 AGREE TO ALLOW TWO OPEN HOUSES BY THE ASSOCIATION,
21 THEY MUST SIGN A LETTER SHOWING THEY AGREE. THE



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1 SIGNED LETTER MUST BE SENT TO THIS OFFICE AT THE
2 ADDRESS GIVEN IN THIS NOTICE.

3 THIS OFFICE MUST ACTUALLY RECEIVE THE SIGNED
4 LETTER BY THE DEADLINE DATE IN THIS NOTICE. THE
5 SIGNED LETTER MUST BE SENT TO THIS OFFICE BY CERTIFIED
6 MAIL, REGISTERED MAIL, OR EXPRESS MAIL, POSTAGE
7 PREPAID AND RETURN RECEIPT REQUESTED.

8 IF THE SIGNED LETTER IS NOT RECEIVED BY THIS
9 OFFICE BY THE DEADLINE DATE, THE UNIT WILL THEN BE
10 SOLD WITHOUT ANY OPEN HOUSES BEING HELD.

11 EVEN IF THIS OFFICE RECEIVES THE SIGNED LETTER TO
12 ALLOW THE ASSOCIATION TO HOLD TWO OPEN HOUSES OF THE
13 UNIT, IF ALL OWNERS LATER DO NOT COOPERATE TO ALLOW
14 THE OPEN HOUSES, THE UNIT WILL BE SOLD WITHOUT ANY
15 OPEN HOUSES BEING HELD.

16 ALL FUTURE NOTICES AND CORRESPONDENCE WILL BE
17 MAILED TO YOU AT THE ADDRESS AT WHICH YOU RECEIVED
18 THIS NOTICE UNLESS YOU SEND WRITTEN INSTRUCTIONS TO
19 THIS OFFICE INFORMING THIS OFFICE OF A DIFFERENT
20 ADDRESS. THE WRITTEN INSTRUCTIONS MUST BE SENT TO
21 THIS OFFICE BY CERTIFIED MAIL, REGISTERED MAIL, OR



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1 EXPRESS MAIL, POSTAGE PREPAID AND RETURN RECEIPT
2 REQUESTED."

3 (c) A unit owner may submit a payment plan within thirty
4 days after service of a notice of default and intention to
5 foreclose on the unit owner. The unit owner shall submit the
6 payment plan to the association or its attorney by certified
7 mail return receipt requested or by hand delivery. A unit owner
8 may also cure the default within sixty days after service of a
9 notice of default and intention to foreclose on the unit owner
10 by paying the association the full amount of the default,
11 including the foreclosing association's attorneys' fees and
12 costs, and all other fees and costs related to the default that
13 are incurred or estimated to be incurred by the foreclosing
14 association. The association shall not reject a reasonable
15 payment plan; provided that a reasonable payment plan shall
16 require the unit owner to pay, at a minimum, the current
17 maintenance fee and some amount owed on the past due balance.
18 From and after the date that the unit owner gives written notice
19 to the association of its intent to cure the default or timely
20 submits a payment plan, any nonjudicial foreclosure of the lien
21 shall be stayed during the sixty-day period to cure the default



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1 or during the term of the payment plan or a longer period that
2 is agreed upon by the parties. A unit owner's failure to
3 strictly perform any agreed-upon payment plan shall entitle the
4 association to pursue its remedies without further delay.

5 For purposes of this section, a reasonable payment plan
6 shall be a plan that provides for:

- 7 (1) Timely payment of all assessments that become due
8 after the date that the payment plan is proposed; and
9 (2) Additional monthly payments of an amount sufficient to
10 cure the default, within a reasonable period under the
11 circumstances as determined by the board of directors
12 in its discretion; provided that a period of up to
13 twelve months shall be deemed reasonable; and provided
14 further that the board of directors shall have the
15 discretion to agree to a payment plan in excess of
16 twelve months.

17 (d) The notice of default and intention to foreclose shall
18 also include contact information for approved housing counselors
19 and approved budget and credit counselors.

20 (e) The association shall have the notice of default and
21 intention to foreclose served on:



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- 1 (1) The unit owner;
- 2 (2) Any prior or junior creditors who have a recorded lien
- 3 on the unit before the recordation of the notice of
- 4 default and intention to foreclose under section 667-
- 5 C;
- 6 (3) The state director of taxation;
- 7 (4) The director of finance of the county where the unit
- 8 is located; and
- 9 (5) Any other person entitled to receive notice under
- 10 section 667-5.5.

11 **§667-C Recordation of notice of default and intention to**
12 **foreclose.** Before the deadline date in the notice of default
13 and intention to foreclose, the notice shall be recorded in a
14 recordable form in a manner similar to recordation of notices of
15 pendency of action under section 501-151 or section 634-51, or
16 both, as applicable. The recorded notice of default and
17 intention to foreclose shall have the same effect as a notice of
18 pendency of action. From and after the recordation of the
19 notice of default and intention to foreclose, any person who
20 becomes a purchaser or encumbrancer of the unit shall be deemed



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1 to have constructive notice of the power of sale foreclosure and
2 shall be bound by the foreclosure.

3 **\$667-D Cure of default.** (a) If the default is cured as
4 required by the notice of default and intention to foreclose, or
5 if the parties have agreed on a payment plan, the association
6 shall rescind the notice of default and intention to foreclose.
7 Within fourteen days of the date of the cure or an agreement on
8 a payment plan, the association shall so notify any person who
9 was served with the notice of default and intention to
10 foreclose. If the notice of default and intention to foreclose
11 was recorded, a release of the notice of default and intention
12 to foreclose shall be recorded.

13 (b) If the default is not cured as required by the notice
14 of default and intention to foreclose, or the parties have not
15 agreed on a payment plan, the association, without filing a
16 court action and without going to court, may foreclose the
17 association's lien under power of sale to sell the unit at a
18 public sale.

19 **\$667-E Date, place of public sale of unit.** (a) The
20 public sale of the unit shall take place on the later of the
21 following:



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(1) At least sixty days after the public notice of the public sale is distributed under section 667-G; or

(2) At least fourteen days after the date of the publication of the third public notice advertisement under section 667-G(d).

(b) The public sale of the unit shall be held only in the county where the unit is located; provided that the public sale shall be held only on grounds or at facilities under the administration of the State, as follows:

(1) At the state capitol, for a public sale of a unit located in the city and county of Honolulu;

(2) At a state facility in Hilo, for a public sale of a unit located in the districts of Hamakua, North Hilo, South Hilo, or Puna;

(3) At a state facility in Kailua-Kona, for a public sale of a unit located in the districts of North Kohala, South Kohala, North Kona, South Kona, or Kau;

(4) At a state facility in the county seat of Maui, for a public sale of a unit located in the county of Maui; and



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1 (5) At a state facility in the county seat of Kauai, for a
2 public sale of a unit located in the county of Kauai;
3 as designated by the department of accounting and general
4 services; provided further that no public sale shall be held on
5 grounds or at facilities under the administration of the
6 judiciary. The public sale shall be held during business hours
7 on a business day.

8 (c) The public sale of the unit shall be conducted by the
9 association on the date, at the time, and at the place described
10 in the public notice of the public sale.

11 **\$667-F Public showing of unit.** (a) If the default is not
12 cured as stated in the notice of default and intention to
13 foreclose, the association shall conduct two open houses of the
14 unit before the public sale; provided that the association
15 timely received the signed letter of agreement from the unit
16 owner as required by the notice of default and intention to
17 foreclose. Only two open houses shall be required even if the
18 date of the public sale is postponed.

19 (b) Even if the signed letter of agreement is timely
20 received, if there is no subsequent cooperation by the unit
21 owner to allow two open houses, the public sale may be held



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1 without any open houses of the unit. If the public notice of
2 the public sale advertised the dates and times of the open
3 houses, but there were no open houses because of the lack of
4 cooperation by the unit owner, the public sale may still be held
5 as advertised, and the public notice of the public sale may not
6 need to be republished.

7 **\$667-G Public notice of public sale; contents;**
8 **distribution; publication.** (a) The association shall prepare
9 the public notice of the public sale. The public notice shall
10 state:

11 (1) The date, time, and place of the public sale;

12 (2) The dates and times of the two open houses of the
13 unit, or if there will not be any open houses, the
14 public notice shall so state;

15 (3) The unpaid balance of the moneys owed to the
16 association;

17 (4) A description of the unit, including the address and
18 the tax map key number of the unit;

19 (5) The name of the unit owner;

20 (6) The name of the association;



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(7) The name of any prior or junior creditors having a recorded lien on the unit before the recordation of the notice of default and intention to foreclose under section 667-C;

(8) The name, the address in the State, and the telephone number in the State of the person in the State conducting the public sale; and

(9) The terms and conditions of the public sale.

(b) The public notice shall also contain wording substantially similar to the following in all capital letters:

"THE DEFAULT UNDER THE ASSOCIATION DOCUMENTS MAY BE CURED NO LATER THAN THREE BUSINESS DAYS BEFORE THE DATE OF THE PUBLIC SALE OF THE UNIT BY PAYING THE ENTIRE AMOUNT THAT WOULD BE OWED TO THE ASSOCIATION PLUS THE ASSOCIATION'S ATTORNEY'S FEES AND COSTS, AND ALL OTHER FEES AND COSTS INCURRED BY THE FORECLOSING ASSOCIATION RELATED TO THE DEFAULT, UNLESS OTHERWISE AGREED TO BETWEEN THE ASSOCIATION AND THE UNIT OWNER. THERE IS NO RIGHT TO CURE THE DEFAULT OR ANY RIGHT OF REDEMPTION AFTER THAT TIME. IF THE DEFAULT IS SO CURED, THE PUBLIC SALE SHALL BE CANCELED."



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1 (c) If the default is not cured as required by the notice
2 of default and intention to foreclose, the association shall
3 have a copy of the public notice of the public sale of the unit:

4 (1) Mailed or delivered to the unit owners at their
5 respective last known addresses;

6 (2) Mailed or delivered to any prior or junior creditors
7 having a recorded lien on the unit before the
8 recordation of the notice of default and intention to
9 foreclose under section 667-C;

10 (3) Mailed or delivered to the state director of taxation;

11 (4) Mailed or delivered to the director of finance of the
12 county where the unit is located;

13 (5) Posted on the unit or on such other real property of
14 which the unit is a part; and

15 (6) Mailed or delivered to any other person entitled to
16 receive notice under section 667-5.5 or 667-21.5.

17 (d) The association shall have the public notice of the
18 public sale printed in not less than seven-point font and
19 published in the classified section of a daily newspaper of
20 general circulation in the real property tax zone in which the
21 unit is located, as shown on the applicable county real property



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1 tax maps kept by each respective county's real property tax
2 assessment division, except for the county of Kalawao which
3 shall be considered its own geographic area for the purposes of
4 this subsection. The public notice shall be published once each
5 week for three consecutive weeks, constituting three
6 publications. The public sale shall take place no sooner than
7 fourteen days after the date of the publication of the third
8 public notice advertisement.

9 **§667-H Postponement, cancellation of sale.** (a) The
10 public sale may be either postponed or canceled by the
11 association. Notice of the postponement or the cancellation of
12 the public sale shall be:

13 (1) Announced by the association at the date, time, and
14 place of the last scheduled public sale; and

15 (2) Provided to any other person who is entitled to
16 receive the notice of default under section 667-B.

17 (b) If there is a postponement of the public sale of the
18 unit, a new public notice of the public sale shall be published
19 once in the format described in section 667-G. The new public
20 notice shall state that it is a notice of a postponed sale. The
21 public sale shall take place no sooner than fourteen days after



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1 the date of the publication of the new public notice. Not less
2 than fourteen days before the date of the public sale, a copy of
3 the new public notice shall be posted on the unit or on another
4 real property of which the unit is a part, and it shall be
5 mailed or delivered to the unit owner, and to any other person
6 entitled to receive notice under section 667-B(e).

7 (c) Upon the fourth postponement of every series of four
8 consecutive postponements, the association shall follow all of
9 the public notice of public sale requirements of section 667-G,
10 including the requirements of mailing and posting under section
11 667-G(c) and of publication under section 667-G(d).

12 (d) The default under the association documents may be
13 cured no later than three business days before the date of the
14 public sale of the unit by paying the entire amount that would
15 be owed to the association if the payments under the association
16 documents had not been accelerated, plus the association's
17 attorney's fees and costs, and all other fees and costs incurred
18 by the association related to the default, unless otherwise
19 agreed to between the association and the unit owner. There is
20 no right to cure the default or any right of redemption after



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1 that time. If the default is so cured, the public sale shall be
2 canceled.

3 **\$667-I Authorized bidder; successful bidder.** Any person,
4 including the association, shall be authorized to bid for the
5 unit at the public sale and to purchase the unit. The highest
6 bidder who meets the requirements of the terms and conditions of
7 the public sale shall be the successful bidder. The public sale
8 shall be considered as being held when the unit is declared by
9 the association as being sold to the successful bidder. When
10 the public sale is held, the successful bidder at the public
11 sale, as the purchaser, shall make a nonrefundable downpayment
12 to the association of not less than ten per cent of the highest
13 successful bid price. If the successful bidder is the
14 association or any other person having a recorded lien on the
15 unit before the recordation of the notice of default and
16 intention to foreclose under section 667-C, the downpayment
17 requirement may be satisfied by offset and a credit bid up to
18 the amount of the lien debt.

19 **\$667-J Successful bidder's failure to comply; forfeiture**
20 **of downpayment.** If the successful bidder later fails to comply
21 with the terms and conditions of the public sale or fails to



1 complete the purchase within forty-five days after the public
2 sale is held, the downpayment shall be forfeited by that bidder.
3 The forfeited downpayment shall be credited by the association
4 first towards the association's attorney's fees and costs, then
5 towards the fees and costs of the power of sale foreclosure, and
6 any balance towards the moneys owed to the association. The
7 association, in its discretion, may then accept the bid of the
8 next highest bidder who meets the requirements of the terms and
9 conditions of the public sale or may begin the public sale
10 process again.

11 **\$667-K Conveyance of property on payment of purchase**
12 **price; distribution of sale proceeds.** (a) After the purchaser
13 completes the purchase by paying the full purchase price and the
14 costs for the purchase, the unit shall be conveyed to the
15 purchaser by a conveyance document. The conveyance document
16 shall be in a recordable form and shall be signed by the
17 association in the foreclosing mortgagee's name. The unit owner
18 shall not be required to sign the conveyance document.

19 (b) From the sale proceeds, after paying:

20 (1) All liens and encumbrances in the order of priority as
21 a matter of law;



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(2) The association's attorney's fees and costs;

(3) The fees and costs; of the power of sale foreclosure;
and

(4) The moneys owed to the association, the balance of the
sale proceeds shall be distributed by the association
to junior creditors having valid liens on the unit in
the order of their priority and not pro rata. Any
remaining surplus after payment in full of all valid
lien creditors shall be distributed to the unit owner.

(c) Lien creditors prior to the association shall not be
forced to their right of recovery. However, the association and
any prior lien creditor may agree in writing that the proceeds
from the sale will be distributed by the association to the
prior lien creditor towards the payment of moneys owed to the
prior lien creditor before any moneys are paid to the
association.

§667-L Affidavit after public sale; contents. (a) After
the public sale is held, the association shall sign an affidavit
under penalty of perjury:



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- (1) Stating that the power of sale foreclosure was made pursuant to the power of sale provision in the law or association documents;
- (2) Stating that the power of sale foreclosure was conducted as required by this part;
- (3) Summarizing what was done by the association;
- (4) Attaching a copy of the recorded notice of default and intention to foreclose; and
- (5) Attaching a copy of the last public notice of the public sale.

(b) The recitals in the affidavit required under subsection (a) may, but need not, be substantially in the following form:

- (1) I am duly authorized to represent or act on behalf of _____ (name of association) ("association") regarding the following power of sale foreclosure. I am signing this affidavit in accordance with the alternate power of sale foreclosure law (Chapter 667, Part , Hawaii Revised Statutes);

- (2) The association is a "association" as defined in the



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1 power of sale foreclosure law;

2 (3) The power of sale foreclosure is of an association
3 lien. If the lien was recorded, the lien was dated
4 _____, and recorded in the
5 _____ (bureau of conveyances or office
6 of the assistant registrar of the land court) as
7 _____ (recordation information). The
8 unit is located at: _____ (address or
9 description of location) and is identified by tax map
10 key number: _____. The legal
11 description of the property, which shall include the
12 certificate of title or transfer certificate of title
13 number if registered with the land court, is attached
14 as Exhibit "A";

15 (4) Pursuant to the power of sale provision of law or
16 association documents, the power of sale foreclosure
17 was conducted as required by the power of sale
18 foreclosure law. The following is a summary of what
19 was done:

20 (A) A notice of default and intention to foreclose
21 was served on the mortgagor, the borrower, and



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1 the following person: _____. The
2 notice of default and intention to foreclose was
3 served on the following date and in the following
4 manner: _____;

5 (B) The date of the notice of default and intention
6 to foreclose was _____ (date).
7 The deadline in the notice for curing the default
8 was _____ (date), which deadline
9 date was at least sixty days after the date of
10 the notice;

11 (C) The notice of default and intention to foreclose
12 was recorded before the deadline date in the
13 _____ (bureau of conveyances or
14 office of the assistant registrar of the land
15 court). The notice was recorded on
16 _____ (date) as document no.
17 _____. A copy of the recorded
18 notice is attached as Exhibit "1";

19 (D) The default was not cured by the deadline date in
20 the notice of default and intention to foreclose;

21 (E) A public notice of the public sale was initially



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1 published in the classified section of the
2 _____, in accordance with section
3 667-G(d), Hawaii Revised Statutes, once each week
4 for three consecutive weeks on the following
5 dates: _____. A copy of the
6 affidavit of publication for the last public
7 notice of the public sale is attached as Exhibit
8 "2". The date of the public sale was
9 _____ (date). The last
10 publication was not less than fourteen days
11 before the date of the public sale;

12 (F) The public notice of the public sale was sent to
13 the unit owner, to the state director of
14 taxation, to the director of finance of the
15 county where the unit is located, and to the
16 following: _____. The public
17 notice was sent on the following dates and in the
18 following manner: _____. Those
19 dates were after the deadline date in the notice
20 of default and intention to foreclose, and those
21 dates were at least sixty days before the date of



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- 1 the public sale;
- 2 (G) The public notice of the public sale was posted
- 3 on the unit or on such other real property of
- 4 which the unit is a part on _____
- 5 (date). That date was at least sixty days before
- 6 the date of the public sale;
- 7 (H) Two public showings (open houses) of the unit
- 8 were held (or were not held because the unit
- 9 owner did not cooperate);
- 10 (I) A public sale of the unit was held on a business
- 11 day during business hours on: _____
- 12 (date), at _____ (time), at the
- 13 following location: _____. The
- 14 highest successful bidder was
- 15 _____ (name) with the highest
- 16 successful bid price of \$ _____;
- 17 and
- 18 (J) At the time the public sale was held, the default
- 19 was not cured; and
- 20 (5) This affidavit is signed under penalty of perjury."



1 §667-M Recordation of affidavit, conveyance document;

2 effect. (a) The affidavit required under section 667-L and the
3 conveyance document shall be recorded no earlier than ten days
4 after the public sale is held but not later than forty-five days
5 after the public sale is held. The affidavit and the conveyance
6 document may be recorded separately and on different days.

7 After the recordation, the association shall mail or deliver a
8 recorded copy to those persons entitled to receive the public
9 notice of the public sale under section 667-G(c).

10 (b) When both the affidavit and the conveyance document
11 are recorded:

12 (1) The sale of the unit is considered completed;

13 (2) All persons claiming by, through, or under the
14 mortgagor and all other persons having liens on the
15 unit junior to the lien of the association shall be
16 forever barred of and from any and all right, title,
17 interest, and claims at law or in equity in and to the
18 unit and every part of the unit, except as otherwise
19 provided by law;



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(3) The lien of the association and all liens junior in priority to the lien of a association shall be automatically extinguished from the unit; and

(4) The purchaser shall be entitled to immediate and exclusive possession of the unit.

(c) The mortgagor and any person claiming by, through, or under the mortgagor and who is remaining in possession of the unit after the recordation of the affidavit and the conveyance document shall be considered a tenant at sufferance subject to eviction or ejectment. The purchaser may bring an action in the nature of summary possession under chapter 666, ejectment, or trespass or may bring any other appropriate action in a court where the unit is located to obtain a writ of possession, a writ of assistance, or any other relief. In any such action, the court shall award the prevailing party its reasonable attorney's fees and costs and all other reasonable fees and costs, all of which are to be paid for by the non-prevailing party.

§667-N Recordation; full satisfaction of debt by borrower.

The recordation of both the conveyance document and the affidavit shall not operate as full satisfaction of the debt owed by the unit owner to the association unless the sale



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1 proceeds from the unit or the amounts paid by a purchaser under
2 the special assessment permitted by section 421J-A or 514B-146
3 are sufficient to satisfy the unit owner's debt to the
4 association, including the association's legal fees and costs.
5 The debts of other lien creditors are unaffected except as
6 provided in this part.

7 **\$667-0 Prohibited conduct.** It shall be a prohibited
8 practice for any association to engage in any of the following
9 practices:

- 10 (1) Holding a public sale on a date, at a time, or at a
11 place other than that described in the public notice
12 of the public sale or a properly noticed postponement;
- 13 (2) Specifying a fictitious place in the public notice of
14 the public sale;
- 15 (3) Conducting a postponed public sale on a date other
16 than the date described in the new public notice of
17 the public sale; or
- 18 (4) Completing or attempting to complete nonjudicial
19 foreclosure proceedings against a unit owner in
20 violation of section 667-B(c)."

PART III

.B. NO.

SECTION 4. Section 454M-10, Hawaii Revised Statutes, is amended to read as follows:

"§454M-10 **Penalty.** Any person who violates any provision of this chapter may be subject to an administrative fine of [at least ~~\$1,000~~ and] not more than \$7,000 for each violation; provided that \$1,000 of the aggregate fine amount shall be deposited into the mortgage foreclosure dispute resolution special fund established pursuant to section 667-86."

SECTION 5. Section 514A-90, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

"(a) All sums assessed by the association of apartment owners but unpaid for the share of the common expenses chargeable to any apartment constitute a lien on the apartment prior to all other liens, except:

(1) Liens for taxes and assessments lawfully imposed by governmental authority against the apartment; and

(2) All sums unpaid on any mortgage of record that was recorded prior to the recordation of notice of a lien by the association of apartment owners, and costs and expenses including attorneys' fees provided in such mortgages[-];



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1 provided that a lien recorded by the association of apartment
2 owners shall expire two years from the date of recordation; and
3 provided further that no lien may be imposed by the association
4 against any apartment for any assessments arising solely from
5 finances, penalties, or late fees.

6 The lien of the association of apartment owners may be
7 foreclosed by action or by nonjudicial or power of sale
8 foreclosure procedures set forth in chapter 667, by the managing
9 agent or board of directors, acting on behalf of the association
10 of apartment owners[~~, in like manner as a mortgage of real~~
11 ~~property~~]. In any such foreclosure, the apartment owner shall be
12 required to pay a reasonable rental for the apartment, if so
13 provided in the bylaws[~~7~~] or the law, and the plaintiff in the
14 foreclosure shall be entitled to the appointment of a receiver to
15 collect the rental owed[~~-~~] by the apartment owner or any tenant of
16 the apartment. If the association of apartment owners is the
17 plaintiff, it may request that its managing agent be appointed as
18 receiver to collect the rent from the tenant. The managing agent
19 or board of directors, acting on behalf of the association of
20 apartment owners, unless prohibited by the declaration, may bid on
21 the apartment at foreclosure sale, and acquire and hold, lease,



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1 mortgage, and convey the apartment. Action to recover a money
2 judgment for unpaid common expenses shall be maintainable without
3 foreclosing or waiving the lien securing the unpaid common
4 expenses owed.

5 (b) Except as provided in subsection (g), when the mortgagee
6 of a mortgage of record or other purchaser of an apartment obtains
7 title to the apartment as a result of foreclosure of the mortgage,
8 the acquirer of title and the acquirer's successors and assigns
9 shall not be liable for the share of the common expenses or
10 assessments by the association of apartment owners chargeable to
11 the apartment [~~which~~] that became due prior to the acquisition of
12 title to the apartment by the acquirer. The unpaid share of
13 common expenses or assessments shall be deemed to be common
14 expenses collectible from all of the apartment owners, including
15 the acquirer and the acquirer's successors and assigns. The
16 mortgagee of record or other purchaser of the apartment shall be
17 deemed to acquire title and shall be required to pay the
18 apartment's share of common expenses and assessments beginning:

- 19 (1) Thirty-six days after the order confirming the sale to
20 the purchaser has been filed with the court;



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(2) Sixty days after the hearing at which the court grants the motion to confirm the sale to the purchaser;

(3) Thirty days after the public sale in a nonjudicial power of sale foreclosure conducted pursuant to ~~[section 667-5;]~~ chapter 667; or

(4) Upon the recording of the instrument of conveyance, whichever occurs first; provided that the mortgagee of record or other purchaser of the apartment shall not be deemed to acquire title under paragraph (1), (2), or (3), if transfer of title is delayed past the thirty-six days specified in paragraph (1), the sixty days specified in paragraph (2), or the thirty days specified in paragraph (3), when a person who appears at the hearing on the motion or a party to the foreclosure action requests reconsideration of the motion or order to confirm sale, objects to the form of the proposed order to confirm sale, appeals the decision of the court to grant the motion to confirm sale, or the debtor or mortgagor declares bankruptcy or is involuntarily placed into bankruptcy. In any such case, the mortgagee of record or other purchaser of the apartment shall be deemed to acquire title upon recordation of the instrument of conveyance."



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SECTION 6. Section 514B-146, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

"(a) All sums assessed by the association but unpaid for the share of the common expenses chargeable to any unit shall constitute a lien on the unit with priority over all other liens, except:

(1) Liens for taxes and assessments lawfully imposed by governmental authority against the unit; and

(2) All sums unpaid on any mortgage of record that was recorded prior to the recordation of a notice of a lien by the association, and costs and expenses including attorneys' fees provided in such mortgages [-];

provided that a lien recorded by the association shall expire two years from the date of recordation; and provided further that no lien may be imposed by the association against any unit for any assessments arising solely from fines, penalties, or late fees.

The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board, acting on behalf



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1 of the association[, ~~in like manner as a mortgage of real~~
2 ~~property~~]. In any such foreclosure, the unit owner shall be
3 required to pay a reasonable rental for the unit, if so provided
4 in the bylaws[7] or the law, and the plaintiff in the
5 foreclosure shall be entitled to the appointment of a receiver
6 to collect the rental owed[-] by the unit owner or any tenant of
7 the unit. If the association is the plaintiff, it may request
8 that its managing agent be appointed as receiver to collect the
9 rent from the tenant. The managing agent or board, acting on
10 behalf of the association, unless prohibited by the declaration,
11 may bid on the unit at foreclosure sale, and acquire and hold,
12 lease, mortgage, and convey the unit. Action to recover a money
13 judgment for unpaid common expenses shall be maintainable
14 without foreclosing or waiving the lien securing the unpaid
15 common expenses owed.

16 (b) Except as provided in subsection (g), when the
17 mortgagee of a mortgage of record or other purchaser of a unit
18 obtains title to the unit as a result of foreclosure of the
19 mortgage, the acquirer of title and the acquirer's successors
20 and assigns shall not be liable for the share of the common
21 expenses or assessments by the association chargeable to the



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1 unit ~~[which]~~ that became due prior to the acquisition of title
2 to the unit by the acquirer. The unpaid share of common
3 expenses or assessments shall be deemed to be common expenses
4 collectible from all of the unit owners, including the acquirer
5 and the acquirer's successors and assigns. The mortgagee of
6 record or other purchaser of the unit shall be deemed to acquire
7 title and shall be required to pay the unit's share of common
8 expenses and assessments beginning:

- 9 (1) Thirty-six days after the order confirming the sale to
10 the purchaser has been filed with the court;
- 11 (2) Sixty days after the hearing at which the court grants
12 the motion to confirm the sale to the purchaser;
- 13 (3) Thirty days after the public sale in a nonjudicial
14 power of sale foreclosure conducted pursuant to
15 ~~[section 667-5,]~~ chapter 667; or
- 16 (4) Upon the recording of the instrument of conveyance;
17 whichever occurs first; provided that the mortgagee of record or
18 other purchaser of the unit shall not be deemed to acquire title
19 under paragraph (1), (2), or (3), if transfer of title is
20 delayed past the thirty-six days specified in paragraph (1), the
21 sixty days specified in paragraph (2), or the thirty days



1 specified in paragraph (3), when a person who appears at the
2 hearing on the motion or a party to the foreclosure action
3 requests reconsideration of the motion or order to confirm sale,
4 objects to the form of the proposed order to confirm sale,
5 appeals the decision of the court to grant the motion to confirm
6 sale, or the debtor or mortgagor declares bankruptcy or is
7 involuntarily placed into bankruptcy. In any such case, the
8 mortgagee of record or other purchaser of the unit shall be
9 deemed to acquire title upon recordation of the instrument of
10 conveyance."

11 SECTION 7. Section 607-5, Hawaii Revised Statutes, is
12 amended by amending subsections (a) and (b) to read as follows:

13 "(a) The fees prescribed by the schedule in this section
14 shall be paid to the clerk of the circuit court as costs of
15 court by the person instituting the action or proceeding, or
16 offering the paper for filing, or causing the document to be
17 issued or the services to be performed in the circuit court;
18 provided that nothing in the schedule shall apply to cases of
19 adults charged with commission of a crime, or to proceedings
20 under section 571-11(1), (2), or (9), to proceedings under
21 chapter 333F or 334, to small estates including decedents'



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1 estates and protection of property of minors and persons under
2 disability when the amount payable is fixed by another statute,
3 ~~[or to nonjudicial foreclosures converted to judicial~~
4 ~~proceedings pursuant to section 667-53; and]~~; provided further
5 that the fees prescribed by subsection (c) (32) shall be
6 deposited by the clerk of the circuit court into the judiciary
7 computer system special fund pursuant to section 601-3.7[+]; and
8 provided further that the fees prescribed by subsection (b) (1a)
9 shall be deposited by the clerk of the circuit court as provided
10 in section 667-53(a) (6).

11 For the purpose of this section, "judgment" includes a
12 decree and any order from which an appeal lies.

13 SCHEDULE

14 In the application of this schedule, each case assigned a
15 new number or filed under the number previously assigned to a
16 probate, trust, guardianship, or conservatorship, shall carry a
17 fee for the institution or transfer of the action or proceeding
18 as prescribed by part I, and in addition the fees prescribed by
19 part II unless otherwise provided.

20 (b)

PART I

21 Action or proceeding, general:



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- 1 (1) Civil action or special proceeding, unless
2 another item in part I applies \$200
- 3 (1a) Petition for conversion of nonjudicial
4 foreclosure to judicial foreclosure \$250
- 5 (2) Appeal to a circuit court \$100
- 6 (3) Transfer of action to circuit court from district
7 court, in addition to district court fees \$125
- 8 Trusts:
- 9 (4) Proceeding for (A) appointment of trustee; (B)
10 appointment of successor; (C) resignation of
11 trustee; (D) instructions; (E) approval of
12 investment; (F) approval of sale, mortgage,
13 lease, or other disposition of property; (G)
14 approval of compromise of claim, for each such
15 matter \$100
- 16 (5) Proceeding for (A) removal of trustee; (B) order
17 requiring accounting; (C) invalidation of action
18 taken by trustee; (D) termination of trust, for
19 each such matter \$100



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- 1 (6) Accounting, this fee to be paid for each account
2 filed and to include the settlement of the
3 account \$10
- 4 (7) Vesting order no charge under part I
- 5 (8) Allowance of fees of trustees, attorneys, or
6 other fees for services incurred in a
7 proceeding for which a fee has been paid
8 under this section no charge under part I
- 9 (8a) Registration of a trust, or release of
10 registration, under chapter 560 \$3
- 11 (9) Any other proceeding relating to a trust \$15
- 12 Conservatorship:
- 13 (10) Proceeding for (A) appointment; (B) appointment
14 of successor; (C) resignation; (D) instructions,
15 unless included in one of the foregoing
16 proceedings; (E), (F), (G) approval of any matter
17 listed in (E), (F), or (G) of item (4) in
18 relation to a trust, for each such matter \$100
- 19 (11) Proceeding of the nature listed in (A), (B), (C),
20 or (D) of item (5) in relation to a trust, for
21 each such matter \$15



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- 1 (12) Accounting, same as provided by item (6) in
2 relation to a trust \$10
- 3 (13) Any other proceeding relating to a
4 conservatorship no charge under part I
- 5 Guardianship:
- 6 (13a) Guardianship, including all matters of the nature
7 listed in items (4) to (9), whether in family or
8 circuit court \$100
- 9 Probate (decedents' estates). These fees include all matters of
10 the nature listed in items (4) to (9), without additional
11 charge:
- 12 (14) Probate, administration, domiciliary foreign
13 personal representative, or ancillary
14 administration, this fee to be paid once only for
15 each decedent's estate \$100
- 16 Family court cases:
- 17 (15) Matrimonial action (annulment, divorce,
18 separation, or separate maintenance) \$100
- 19 (16) Adoption \$100
- 20 (17) Guardianship, including all matters of the nature
21 listed in items (4) to (9) ... As provided in item 13(a)



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(18) Termination of parental rights .. no charge under part I

(19) Any other family court proceeding, except motions or

other pleadings in matrimonial, adoption, and

guardianship actions, but including without limitation

custody proceedings even if in the form of an habeas

corpus proceeding \$15"

SECTION 8. Chapter 667, Hawaii Revised Statutes, is

amended by designating:

1. Part I as part IA; and

2. Section 667-1 as section 667-1.5.

SECTION 9. Section 667-5, Hawaii Revised Statutes, is

amended as follows:

1. By amending subsection (a) to read:

"(a) When a power of sale is contained in a mortgage, and

where the mortgagee, the mortgagee's successor in interest, or

any person authorized by the power to act in the premises [7]

desires to foreclose under power of sale upon breach of a

condition of the mortgage, the mortgagee, successor, or person

shall be represented by an attorney who is licensed to practice

law in the State and is physically located in the State. The

attorney shall:

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1 (1) Give notice of the mortgagee's, successor's, or
2 person's intention to foreclose the mortgage and of
3 the sale of the mortgaged property as follows:

4 (A) By serving, not less than twenty-one days before
5 the date of sale, written notice of intent to
6 foreclose on all persons entitled to notice under
7 this part ~~[in the same manner as service of a~~
8 ~~civil complaint under chapter 634 and the Hawaii~~
9 ~~rules of civil procedure]~~; provided that in the
10 case of nonjudicial foreclosure of a lien by an
11 association against a mortgagor who is not an
12 owner-occupant, the association shall mail the
13 notice by certified or registered mail, not less
14 than twenty-one days before the date of sale, to:

15 (i) The unit owner at the address shown in the
16 records of the association and, if
17 different, at the address of the unit being
18 foreclosed; and

19 (ii) All mortgage creditors whose names are known
20 or can be discovered by the association; and

21 (B) By publication of the notice once in each of



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1 three successive weeks, constituting three
2 publications with the last publication to be not
3 less than fourteen days before the day of sale,
4 in a daily newspaper [~~having the largest~~] of
5 general circulation in the [~~specific county in~~
6 ~~which the mortgaged property lies, provided that~~
7 ~~for property located in a county with a~~
8 ~~population of more than one hundred thousand but~~
9 ~~less than three hundred thousand, the public~~
10 ~~notice shall be published in the newspaper having~~
11 ~~the largest circulation expressly in the eastern~~
12 ~~or western half of the county, corresponding to~~
13 ~~the location of the subject property,]~~ real
14 property tax zone in which the mortgaged property
15 is located, as shown on the applicable county
16 real property tax maps kept by each respective
17 county's real property tax assessment division,
18 except for the county of Kalawao which shall be
19 considered its own geographic area for the
20 purposes of this subparagraph;

21 (2) Give notice of the mortgagor's right to elect to



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1 participate in the mortgage foreclosure dispute
2 resolution program pursuant to section 667-75 or to
3 convert the nonjudicial power of sale foreclosure to a
4 judicial foreclosure pursuant to section 667-53; and

5 (3) Give any notices and do all acts as authorized or
6 required by the power contained in the mortgage."

7 2. By amending subsection (d) to read:

8 "(d) Any sale, of which notice has been given pursuant to
9 subsections (a)" and (b), may be postponed from time to time by
10 public announcement made by the mortgagee or by a person acting
11 on the mortgagee's behalf. Upon request made by any person who
12 is entitled to notice pursuant to section 667-5.5 or 667-6[7] or
13 this section, the mortgagee or person acting on the mortgagee's
14 behalf shall provide the date and time of a postponed auction[7]
15 or, if the auction is canceled, information that the auction was
16 canceled. The mortgagee, not earlier than ten days after the
17 public sale but within thirty days after selling the property in
18 pursuance of the power, shall file a copy of the notice of sale
19 and the mortgagee's affidavit, setting forth the mortgagee's
20 acts in the premises fully and particularly, in the bureau of
21 conveyances."



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SECTION 10. Section 667-5.5, Hawaii Revised Statutes, is amended to read as follows:

"[+]§667-5.5[+] Foreclosure notice; planned communities; condominiums; cooperative housing projects. Notwithstanding any law or agreement to the contrary, any person who forecloses on a property under this part within a planned community, a condominium apartment or unit, or an apartment in a cooperative housing project shall notify, by registered or certified mail, the board of directors of the planned community association, the association of owners of the condominium project, or the cooperative housing project in which the property to be foreclosed is located, of the following:

(1) The foreclosure at the time foreclosure proceedings are begun[-]; and

(2) Any election by an owner-occupant of the property that is the subject of the foreclosure to participate in the mortgage foreclosure dispute resolution program under part V.

The notice, at a minimum, shall identify the property, condominium apartment or unit, or cooperative apartment that is the subject of the foreclosure and identify the name or names of



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1 the person or persons bringing foreclosure proceedings. ~~[This~~
2 ~~section]~~ Paragraph (1) shall not apply if the planned community
3 association, condominium association of owners, or cooperative
4 housing corporation is a party in a foreclosure action. This
5 section shall not affect civil proceedings against parties other
6 than the planned community association, association of owners,
7 or cooperative housing corporation."

8 SECTION 11. Section 667-6, Hawaii Revised Statutes, is
9 amended to read as follows:

10 "**§667-6 Notice to mortgage creditors.** (a) Whenever a
11 mortgage creditor ~~[having]~~ who has a mortgage lien on certain
12 premises desires notice that another mortgage creditor having a
13 mortgage lien on the same premises intends to foreclose the
14 mortgage and sell the mortgaged property pursuant to a power of
15 sale under section 667-5, the mortgage creditor may submit a
16 written request to the mortgagee who is foreclosing or who may
17 foreclose the mortgage by power of sale, asking to receive
18 notice of the mortgagee's intention to foreclose the mortgage
19 under power of sale. This request for notice may be submitted
20 any time after the recordation ~~[or filing]~~ of the subject
21 mortgage ~~[at the bureau of conveyances or the land court, but~~



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1 ~~must be~~; provided that the request is submitted prior to the
2 completion of the publication of the mortgagee's notice of
3 intention to foreclose the mortgage and of the sale of the
4 mortgaged property. This request shall be signed by the
5 mortgage creditor, or its authorized representative, desiring to
6 receive notice, specifying the name and address of the person to
7 whom the notice is to be mailed.

8 **(b)** The mortgagee receiving the request shall thereafter
9 give notice to all mortgage creditors who have timely submitted
10 their request. The notice shall be sent by mail or otherwise
11 communicated to the mortgage creditors, not less than seven
12 calendar days prior to the date of sale.

13 **(c)** No request for copy of any notice pursuant to this
14 section nor any statement or allegation in any such request nor
15 any record thereof shall affect the title to real property or be
16 deemed notice to any person that any party requesting copy of
17 the notice has or claims any right, title, or interest in, or
18 lien or charge upon the property described in the mortgage
19 referred to therein."

20 SECTION 12. Section 667-10, Hawaii Revised Statutes, is
21 amended to read as follows:



.B. NO.**"§667-10 Power unaffected by transfer; surplus after sale.**

No sale or transfer by the mortgagor shall impair or annul any right or power of attorney given in the mortgage to the mortgagee to sell or transfer the mortgaged property, as attorney or agent of the mortgagor, except as otherwise provided by chapters 501 and 502. When public sale is made of the mortgaged property under this part, distribution of the proceeds of the sale shall be as specified in section 667-3, and the remainder of the proceeds, if any, shall be paid over to the owner of the mortgaged property, after deducting the amount of [claim] all claims and all expenses attending the same."

SECTION 13. Section 667-14, Hawaii Revised Statutes, is amended to read as follows:

"[+]§667-14[+] Recordation of foreclosure notice. The foreclosing mortgagee may record a copy of the foreclosure notice ~~[with the assistant registrar of the land court or the bureau of conveyances, as appropriate,]~~ in a manner similar to recordation of notices of pendency of action under section 501-151 or section 634-51, as applicable. The recorded notice shall have the same effect as a notice of pendency of action. ~~[From and after]~~ Upon the recordation of the notice, any person who



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1 thereafter becomes a purchaser or encumbrancer of the mortgaged
2 property shall be deemed to have constructive notice of the
3 power of sale foreclosure and shall be bound by the
4 foreclosure."

5 SECTION 14. Section 667-15, Hawaii Revised Statutes, is
6 amended to read as follows:

7 "[+]§667-15[+] Location of public sale following power of
8 sale foreclosure. The public sale of the mortgaged property
9 shall be held only on grounds or at facilities under the
10 administration of the State, as follows:

11 (1) At the state capitol, for a public sale of mortgaged
12 property located in the city and county of Honolulu;

13 (2) At a state facility in Hilo, for a public sale of
14 mortgaged property located in the ~~[eastern portion of~~
15 ~~the county of Hawaii,]~~ districts of Hamakua, North
16 Hilo, South Hilo, or Puna;

17 (3) At a state facility in Kailua-Kona, for a public sale
18 of mortgaged property located in the ~~[western portion~~
19 ~~of the county of Hawaii,]~~ districts of North Kohala,
20 South Kohala, North Kona, South Kona, or Kau;

21 (4) At a state facility in the county seat of Maui, for a



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1 public sale of mortgaged property located in the
2 county of Maui; and

3 (5) At a state facility in the county seat of Kauai, for a
4 public sale of mortgaged property located in the
5 county of Kauai;

6 as designated by the department of accounting and general
7 services; provided that no public sale shall be held on grounds
8 or at facilities under the administration of the judiciary. The
9 public sale shall be held during business hours on a business
10 day."

11 SECTION 15. Section 667-21, Hawaii Revised Statutes, is
12 amended to read as follows:

13 "[+]§667-21[+] Alternate power of sale process[+
14 definitions]. [(a)] The process in this part is an alternative
15 power of sale process to the foreclosure by action and the
16 foreclosure by power of sale in part [I.] IA.

17 ~~[(b) As used in this part:~~

18 ~~"Approved budget and credit counselor" means a budget and~~
19 ~~credit counseling agency that has received approval from a~~
20 ~~United States trustee or bankruptcy administrator to provide~~



~~instructional courses concerning personal financial management pursuant to Title 11 United States Code, section 111.~~

~~"Approved housing counselor" means a housing counseling agency that has received approval from the United States Department of Housing and Urban Development to provide housing counseling services pursuant to section 106(a)(2) of the Housing and Urban Development Act of 1968, Title 12 United States Code, section 1701x.~~

~~"Association" has the same meaning as the term is defined in section 514B-3.~~

~~"Borrower" means the borrower, maker, cosigner, or guarantor under a mortgage agreement.~~

~~"Foreclosing mortgagee" means the mortgagee that intends to conduct a power of sale foreclosure, provided that the mortgagee is a federally insured bank, a federally insured savings and loan association, a federally insured savings bank, a depository financial services loan company, a nondepository financial services loan company, a credit union insured by the National Credit Union Administration, a bank holding company, a foreign lender as defined in section 207-11, or an institutional investor as defined in section 454-1.~~



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1 ~~Unless the context clearly indicates otherwise, as used in~~
2 ~~this part, a "foreclosing mortgagee" shall encompass all of the~~
3 ~~following entities:~~

4 ~~(1) The foreclosing mortgagee;~~

5 ~~(2) Any person that has an ownership interest in the~~
6 ~~promissory note on the mortgage agreement or a security interest~~
7 ~~represented by the mortgage for the subject property;~~

8 ~~(3) Any mortgage servicer, who services the mortgage loan~~
9 ~~of the mortgager; and~~

10 ~~(4) The agents, employees, trustees, and representatives~~
11 ~~of a lender, the foreclosing mortgagee, a mortgagee, and a~~
12 ~~mortgage servicer.~~

13 ~~"Mailed" means to be sent by regular mail, postage prepaid,~~
14 ~~and by certified, registered, or express mail, postage prepaid~~
15 ~~and return receipt requested.~~

16 ~~"Mortgage" means a mortgage, security agreement, or other~~
17 ~~document under which property is mortgaged, encumbered, pledged,~~
18 ~~or otherwise rendered subject to a lien for the purpose of~~
19 ~~securing the payment of money or the performance of an~~
20 ~~obligation.~~



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1 ~~"Mortgage agreement" includes the mortgage, the note or~~
2 ~~debt document, or any document amending any of the foregoing.~~

3 ~~"Mortgaged property" means the property that is subject to~~
4 ~~the lien of the mortgage.~~

5 ~~"Mortgagee" means the current holder of record of the~~
6 ~~mortgagee's or the lender's interest under the mortgage, or the~~
7 ~~current mortgagee's or lender's duly authorized agent.~~

8 ~~"Mortgager" means the mortgagor or borrower named in the~~
9 ~~mortgage and, unless the context otherwise indicates, includes~~
10 ~~the current owner of record of the mortgaged property whose~~
11 ~~interest is subject to the mortgage.~~

12 ~~"Nonjudicial foreclosure" means foreclosure under power of~~
13 ~~sale.~~

14 ~~"Open house" means a public showing of the mortgaged~~
15 ~~property during a scheduled time period.~~

16 ~~"Owner-occupant" means a person, at the time that a notice~~
17 ~~of default and intention to foreclose is served on the mortgagor~~
18 ~~under the power of sale.~~

19 ~~(1) Who owns an interest in the residential property, and~~
20 ~~the interest is encumbered by the mortgage being foreclosed; and~~



1 ~~(2) For whom the residential property is and has been the~~
2 ~~person's primary residence for a continuous period of not less~~
3 ~~than two hundred days immediately preceding the date on which~~
4 ~~the notice is served.~~

5 ~~"Power of sale" or "power of sale foreclosure" means a~~
6 ~~nonjudicial foreclosure under this part when the mortgage~~
7 ~~contains, authorizes, permits, or provides for a power of sale,~~
8 ~~a power of sale foreclosure, a power of sale remedy, or a~~
9 ~~nonjudicial foreclosure.~~

10 ~~"Property" means property (real, personal, or mixed), an~~
11 ~~interest in property (including fee simple, leasehold, life~~
12 ~~estate, reversionary interest, and any other estate under~~
13 ~~applicable law), or other interests that can be subject to the~~
14 ~~lien of a mortgage.~~

15 ~~"Record" or "recorded" means a document is recorded or~~
16 ~~filed with the office of the assistant registrar of the land~~
17 ~~court under chapter 501 or recorded with the registrar of~~
18 ~~conveyances under chapter 502, or both, as applicable.~~

19 ~~"Residential property" means real property that is improved~~
20 ~~and used for residential purposes.~~



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~~"Served" means to have service of the notice of default and intention to foreclose made in accordance with the service of process or the service of summons under the Hawaii rules of civil procedure, and under sections 634-35 and 634-36.] "~~

SECTION 16. Section 667-21.5, Hawaii Revised Statutes, is amended to read as follows:

"[+]§667-21.5[+] **Foreclosure notice; planned communities; condominiums; cooperative housing projects.** Notwithstanding any law or agreement to the contrary, any person who forecloses on a property under this part within a planned community, a condominium apartment or unit, or an apartment in a cooperative housing project shall notify, by way of registered or certified mail, the board of directors of the planned community association, the association of owners of the condominium project, or the cooperative housing project in which the property to be foreclosed is located, of the following:

(1) The foreclosure at the time foreclosure proceedings are begun[-]; and

(2) Any election by an owner-occupant of the property that is the subject of the foreclosure to participate in



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1 the mortgage foreclosure dispute resolution program
2 under part V.

3 The notice, at a minimum, shall identify the property,
4 condominium apartment or unit, or cooperative apartment that is
5 the subject of the foreclosure and identify the name or names of
6 the person or persons bringing foreclosure proceedings. [This
7 ~~section~~] Paragraph (1) shall not apply when the planned
8 community association, condominium association of owners, or
9 cooperative housing corporation is a party in a foreclosure
10 action. This section shall not affect civil proceedings against
11 parties other than the planned community association,
12 association of owners, or cooperative housing corporation."

13 SECTION 17. Section 667-22, Hawaii Revised Statutes, is
14 amended as follows:

15 1. By amending subsection (a) to read:

16 "(a) When the mortgagor or the borrower has breached the
17 mortgage agreement, and when the foreclosing mortgagee intends
18 to conduct a power of sale foreclosure under this part, the
19 foreclosing mortgagee shall prepare a written notice of default
20 and intention to foreclose addressed to the mortgagor, the
21 borrower, and any guarantor. The notice of default and



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1 intention to foreclose shall state:

2 (1) The name and address of the current mortgagee;

3 (2) The name and last known address of ~~[all]~~ the
4 mortgagors, the borrowers, and any guarantors;

5 (3) ~~[The]~~ With respect to the mortgaged property, the
6 address or a description of ~~[the]~~ its location ~~[of the~~
7 ~~mortgaged property]~~, ~~[the]~~ tax map key number, and
8 ~~[the]~~ certificate of title or transfer certificate of
9 title number if ~~[within the jurisdiction of]~~
10 registered in the land court ~~[, of the mortgaged~~
11 ~~property]~~;

12 (4) The description of the default or, if the default is a
13 monetary default, an itemization of the delinquent
14 amount;

15 (5) The action required to cure the default, including the
16 delinquent amount and the estimated amount of the
17 foreclosing mortgagee's attorney's fees and costs, and
18 all other fees and costs related to the default
19 estimated to be incurred by the foreclosing mortgagee
20 by the deadline date;

21 (6) The date by which the default must be cured, which



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1 shall be at least sixty days after the date of the
2 notice of default and intention to foreclose;

3 (7) A statement that if the default is not cured by the
4 deadline date stated in the notice of default and
5 intention to foreclose, the entire unpaid balance of
6 the moneys owed to the mortgagee under the mortgage
7 agreement will become due, that the mortgagee intends
8 to conduct a power of sale foreclosure to sell the
9 mortgaged property at a public sale without any court
10 action and without going to court, and that the
11 mortgagee or any other person may acquire the
12 mortgaged property at the public sale;

13 (8) The name, address, electronic address, and telephone
14 number of the attorney who is representing the
15 foreclosing mortgagee; provided that the attorney
16 shall be licensed to practice law in the State and
17 physically located in the State; and

18 (9) Notice of the right of the owner-occupant to elect to
19 participate in any other process as established by
20 law."

21 2. By amending subsections (d) and (e) to read:



1 "(d) The notice of default and intention to foreclose
2 shall also include contact information for [local] approved
3 housing counselors and approved budget and credit counselors.

4 (e) The foreclosing mortgagee shall have the notice of
5 default and intention to foreclose served on:

6 (1) The mortgagor and the borrower [~~in the same manner as~~
7 ~~service of a civil complaint under chapter 634 or the~~
8 ~~Hawaii rules of civil procedure, as they may be~~
9 ~~amended from time to time~~];

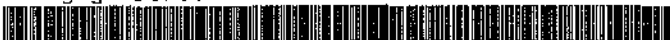
10 (2) Any prior or junior creditors who have a recorded lien
11 on the mortgaged property before the recordation of
12 the notice of default and intention to foreclose under
13 section 667-23;

14 (3) The state director of taxation;

15 (4) The director of finance of the county where the
16 mortgaged property is located;

17 (5) The department of commerce and consumer affairs, by
18 filing the notice with the department when required;
19 and

20 (6) Any other person entitled to receive notice under this
21 part."



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1 SECTION 18. Section 667-24, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "**§667-24 Cure of default.** (a) If the default is cured as
4 required by the notice of default and intention to foreclose, or
5 if the parties have reached ~~[a settlement document,~~ an
6 agreement to resolve the nonjudicial foreclosure, the
7 foreclosing mortgagee shall rescind the notice of default and
8 intention to foreclose. Within fourteen days of the date of the
9 cure or ~~[a settlement document reached by the parties,~~ an
10 agreement to resolve the nonjudicial foreclosure, the
11 foreclosing mortgagee shall so notify any person who was served
12 with the notice of default and intention to foreclose. If the
13 notice of default and intention to foreclose was recorded, a
14 release of the notice of default and intention to foreclose
15 shall be recorded.

16 (b) If the default is not cured as required by the notice
17 of default and intention to foreclose, the parties have not
18 reached ~~[a settlement document pursuant to part V]~~ an agreement
19 to resolve the nonjudicial foreclosure and no report of
20 noncompliance has been issued against the mortgagee under
21 section 667-82, and the mortgagor has not elected to convert the



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1 foreclosure to a judicial action, the foreclosing mortgagee,
2 without filing a court action and without going to court, may
3 foreclose the mortgage under power of sale to sell the mortgaged
4 property at a public sale."

5 SECTION 19. Section 667-25, Hawaii Revised Statutes, is
6 amended by amending subsection (b) to read as follows:

7 "(b) The public sale of the mortgaged property shall be
8 held only in the county where the mortgaged property is located;
9 provided that the public sale shall be held only on grounds or
10 at facilities under the administration of the State, as follows:

11 (1) At the state capitol, for a public sale of mortgaged
12 property located in the city and county of Honolulu;

13 (2) At a state facility in Hilo, for a public sale of
14 mortgaged property located in the ~~[eastern portion of~~
15 ~~the county of Hawaii,]~~ districts of Hamakua, North
16 Hilo, South Hilo, or Puna;

17 (3) At a state facility in Kailua-Kona, for a public sale
18 of mortgaged property located in the ~~[western portion~~
19 ~~of the county of Hawaii,]~~ districts of North Kohala,
20 South Kohala, North Kona, South Kona, or Kau;

21 (4) At a state facility in the county seat of Maui, for a



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1 public sale of mortgaged property located in the
2 county of Maui; and

3 (5) At a state facility in the county seat of Kauai, for a
4 public sale of mortgaged property located in the
5 county of Kauai;

6 as designated by the department of accounting and general
7 services; provided further that no public sale shall be held on
8 grounds or at facilities under the administration of the
9 judiciary. The public sale shall be held during business hours
10 on a business day."

11 SECTION 20. Section 667-27, Hawaii Revised Statutes, is
12 amended as follows:

13 1. By amending subsection (a) to read:

14 "(a) The foreclosing mortgagee shall prepare the public
15 notice of the public sale. The public notice shall state:

16 (1) The date, time, and place of the public sale;

17 (2) The dates and times of the two open houses of the
18 mortgaged property, or if there will not be any open
19 houses, the public notice shall so state;

20 (3) The unpaid balance of the moneys owed to the mortgagee
21 under the mortgage agreement;



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(4) A description of the mortgaged property, including the address and the tax map key number of the mortgaged property;

(5) The name of the mortgagor and the borrower;

(6) The name of the foreclosing mortgagee;

(7) The name of any prior or junior creditors having a recorded lien on the mortgaged property before the recordation of the notice of default and intention to foreclose under section 667-23;

(8) The name, the address in the State, and the telephone number in the State of the person in the State conducting the public sale; and

(9) The terms and conditions of the public sale[~~;~~ and

~~(10) An estimate of the opening bid]. "~~

2. By amending subsection (d) to read:

"(d) The foreclosing mortgagee shall have the public notice of the public sale printed in not less than seven-point font and published in the classified section of a daily newspaper [~~having the largest~~] of general circulation [~~specifically~~] in the [~~county where the mortgaged property is located;~~ provided that for property located in a county with a



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1 ~~population of more than one hundred thousand but less than three~~
2 ~~hundred thousand, the public notice shall be published in the~~
3 ~~newspaper having the largest general circulation specifically in~~
4 ~~the western or eastern half of the county, as the case may be,~~
5 ~~in which the property is located.]~~ real property tax zone in
6 which the mortgaged property is located, as shown on the
7 applicable county real property tax maps kept by each respective
8 county's real property tax assessment division, except for the
9 county of Kalawao which shall be considered its own geographic
10 area for the purposes of this subsection. The public notice
11 shall be published once each week for three consecutive weeks,
12 constituting three publications. The public sale shall take
13 place no sooner than fourteen days after the date of the
14 publication of the third public notice advertisement."

15 SECTION 21. Section 667-28, Hawaii Revised Statutes, is
16 amended by amending subsection (a) to read as follows:

17 "(a) The public sale may be either postponed or canceled
18 by the foreclosing mortgagee. Notice of the postponement or the
19 cancellation of the public sale shall be [announced];



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1 (1) Announced by the foreclosing mortgagee at the date,
2 time, and place of the last scheduled public sale[-];
3 and

4 (2) Provided to any other person who is entitled to
5 receive the notice of default under section 667-22."

6 SECTION 22. Section 667-32, Hawaii Revised Statutes, is
7 amended by amending subsection (b) to read as follows:

8 "(b) The recitals in the affidavit required under
9 subsection (a) may, but need not, be substantially in the
10 following form:

11 "(1) I am duly authorized to represent or act on behalf of
12 _____ (name of mortgagee) ("foreclosing
13 mortgagee") regarding the following power of sale
14 foreclosure. I am signing this affidavit in
15 accordance with the alternate power of sale
16 foreclosure law (Chapter 667, Part II, Hawaii Revised
17 Statutes);

18 (2) The foreclosing mortgagee is a [~~"foreclosing~~
19 ~~mortgagee"~~] mortgagee as defined in [~~the power of sale~~
20 ~~foreclosure law;~~] section 667-1, Hawaii Revised
21 Statutes, conducting a power of sale foreclosure;



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1 (3) The power of sale foreclosure is of a mortgage made by
2 _____ (name of mortgagor)
3 ("mortgagor"), dated _____, and
4 recorded in the _____ (bureau of
5 conveyances or office of the assistant registrar of
6 the land court) as _____ (recordation
7 information). The mortgaged property is located at:
8 _____ (address or description of
9 location) and is identified by tax map key number:
10 _____. The legal description of the
11 mortgaged property, which shall include the
12 certificate of title or transfer certificate of title
13 number if registered in the land court, is attached as
14 Exhibit "A". The name of the borrower, if different
15 from the mortgagor, is _____
16 ("borrower");

17 (4) Pursuant to the power of sale provision of the
18 mortgage, the power of sale foreclosure was conducted
19 as required by the power of sale foreclosure law. The
20 following is a summary of what was done:

21 (A) A notice of default and intention to foreclose



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1 was served on the mortgagor, the borrower, and
2 the following person: _____. The
3 notice of default and intention to foreclose was
4 served on the following date and in the following
5 manner: _____;

6 (B) The date of the notice of default and intention
7 to foreclose was _____ (date).
8 The deadline in the notice for curing the default
9 was _____ (date), which deadline
10 date was at least sixty days after the date of
11 the notice;

12 (C) The notice of default and intention to foreclose
13 was recorded before the deadline date in the
14 _____ (bureau of conveyances or
15 office of the assistant registrar of the land
16 court). The notice was recorded on
17 _____ (date) as document no.
18 _____. A copy of the recorded
19 notice is attached as Exhibit "1";

20 (D) The default was not cured by the deadline date in
21 the notice of default and intention to foreclose;



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1 (E) A public notice of the public sale was initially
2 published in the classified section of the
3 _____, [~~a daily newspaper of~~
4 ~~general circulation in the county where the~~
5 ~~mortgaged property is located,~~] in accordance
6 with section 667-27(d), Hawaii Revised Statutes,
7 once each week for three consecutive weeks on the
8 following dates: _____. A copy
9 of the affidavit of publication for the last
10 public notice of the public sale is attached as
11 Exhibit "2". The date of the public sale was
12 _____ (date). The last
13 publication was not less than fourteen days
14 before the date of the public sale;

15 (F) The public notice of the public sale was sent to
16 the mortgagor, to the borrower, to the state
17 director of taxation, to the director of finance
18 of the county where the mortgaged property is
19 located, and to the following:
20 _____. The public notice was sent
21 on the following dates and in the following



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1 manner: _____. Those dates were
2 after the deadline date in the notice of default
3 and intention to foreclose, and those dates were
4 at least sixty days before the date of the public
5 sale;

6 (G) The public notice of the public sale was posted
7 on the mortgaged property or on such other real
8 property of which the mortgaged property is a
9 part on _____ (date). That date
10 was at least sixty days before the date of the
11 public sale;

12 (H) Two public showings (open houses) of the
13 mortgaged property were held (or were not held
14 because the mortgagor did not cooperate);

15 (I) A public sale of the mortgaged property was held
16 on a business day during business hours on:

17 _____ (date), at

18 _____ (time), at the following

19 location: _____. The highest

20 successful bidder was _____ (name)

21 with the highest successful bid price of



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1 \$ _____; and

2 (J) At the time the public sale was held, the default
3 was not cured and there was no circuit court
4 foreclosure action pending in the circuit where
5 the mortgaged property is located; and

6 (5) This affidavit is signed under penalty of perjury."

7 SECTION 23. Section 667-33, Hawaii Revised Statutes, is
8 amended by amending subsection (a) to read as follows:

9 "(a) The affidavit required under section 667-32 and the
10 conveyance document shall be recorded [~~at any time~~] no earlier
11 than ten days after the public sale is held but not later than
12 forty-five days after the public sale is held. The affidavit
13 and the conveyance document may be recorded separately and on
14 different days. After the recordation, the foreclosing
15 mortgagee shall mail or deliver a recorded copy to those persons
16 entitled to receive the public notice of the public sale under
17 section 667-27(c)."

18 SECTION 24. Section 667-37, Hawaii Revised Statutes, is
19 amended to read as follows:

20 "\$667-37 Judicial action of foreclosure before public
21 sale. This part shall not prohibit [~~the borrower,~~] the



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1 foreclosing mortgagee, or any other creditor having a recorded
2 lien on the mortgaged property before the recordation of the
3 notice of default under section 667-23, from filing an action
4 for the judicial foreclosure of the mortgaged property in the
5 circuit court of the circuit where the mortgaged property is
6 located[-]; provided that the action is filed before the public
7 sale is held. The power of sale foreclosure process shall be
8 stayed during the pendency of the circuit court foreclosure
9 action."

10 SECTION 25. Section 667-41, Hawaii Revised Statutes, is
11 amended to read as follows:

12 "**\$667-41 Public information notice requirement.**

13 ~~[Beginning on September 1, 2011, all]~~ (a) All financial
14 institutions, mortgagees, lenders, business entities and
15 organizations without limitation, and persons, who intend to use
16 the power of sale foreclosure under this part, under the
17 conditions required by this part, shall ~~[also develop~~
18 ~~informational materials to educate and inform borrowers and~~
19 ~~mortgagors. These materials shall be made available to the~~
20 ~~public and provided to the mortgagors of all mortgage agreements~~
21 ~~entered into, including the borrowers at the time of application~~



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1 ~~for a mortgage or loan, or other contract containing a power of~~
2 ~~sale foreclosure provision. These materials, among other~~
3 ~~things, shall inform the borrower that the financial institution~~
4 ~~and other business entities and persons who are authorized under~~
5 ~~this part to exercise the power of sale foreclosure, in the~~
6 ~~event of the borrower's default, have the option of pursuing~~
7 ~~either a judicial or nonjudicial foreclosure as provided by law.~~
8 ~~These informational materials shall fully and completely explain~~
9 ~~these remedies in simple and understandable terms.] provide the~~
10 public information notice described in subsection (b) to the
11 public, upon request, and to any applicant submitting a loan
12 application where residential property is required to be used to
13 secure the loan. The notice shall be provided to all applicants
14 and all owners of the residential property (if different from
15 the applicants) within three business days after the submission
16 of a written loan application, or within three business days
17 after the time residential property is required to be used to
18 secure a loan, whether or not there is a written loan
19 application. The purpose of the public information notice is to
20 inform the public, applicants, and others that the financial
21 institutions, mortgagees, lenders, organizations, and other



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1 business entities and persons who are authorized under this part
2 to enforce the foreclosure rights in a mortgage, in the event of
3 the borrower's default, have the option of pursuing either a
4 judicial or nonjudicial foreclosure in the manner provided by
5 law.

6 (b) The public information notice requirement shall be
7 satisfied by the delivery of a separate notice that contains the
8 following wording and is printed in not less than fourteen-point
9 font:

10 PUBLIC INFORMATION NOTICE PURSUANT TO

11 HAWAII REVISED STATUTES SECTION 667-41

12 WHAT IS FORECLOSURE?

13 This notice informs you regarding a lender's
14 right to foreclose in the event of a default on the
15 loan you have applied for or are considering if your
16 home is used to secure its repayment.

17 The mortgage agreement or contract that you may
18 enter into states that in the event the amounts due
19 under the loan are not paid when they are due, or for
20 other reasons you do not perform your promises in the
21 note and mortgage, all of which are known as defaults,



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1 the lender shall have the option to foreclose the
2 mortgage, which will result in a sale of your home.

3 The entity or person who holds your mortgage
4 ("Mortgagee") may send you a notice informing you that
5 the Mortgagee is starting foreclosure proceedings.
6 You should not wait for that to happen; take steps to
7 prevent a foreclosure as soon as you are having
8 trouble paying your mortgage. You should contact your
9 lender or your lender's loan servicer, or you may
10 contact a budget and credit counselor or housing
11 counselor, to discuss your situation.

12 STEP ONE: NOTICE OF DEFAULT. The first step in
13 the foreclosure process is the Mortgagee usually sends
14 you a written notice of default, which occurs after
15 you are past due on your mortgage payment. The
16 Mortgagee will tell you in the notice how much time
17 you have to pay the required amount that is past due
18 and, by paying, will return your loan to good
19 standing.

20 STEP TWO: PROCEEDING TO FORECLOSURE. If you do
21 not pay the required amount past due by the deadline



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1 in the notice of default, the Mortgagee may elect to
2 proceed to collect the balance due on your loan
3 through foreclosure. In Hawaii, there are two types
4 of foreclosures: judicial and nonjudicial.

5 In a JUDICIAL FORECLOSURE, the Mortgagee files a
6 lawsuit against you in order to obtain a court
7 judgment that you owe the balance due under your loan
8 and to obtain an order to sell the property. The
9 initial legal document you will receive in the lawsuit
10 is called the complaint. You should consult an
11 attorney of your choice who can advise you as to the
12 steps needed to protect your rights. Judicial
13 foreclosure involves the sale of the mortgaged
14 property under the supervision of the court. You will
15 receive notice of the foreclosure case hearings and
16 the sale date and the judicial decision is announced
17 after a hearing in court. The sale of the property
18 must be approved by the court before it can be
19 completed.

20 In a NONJUDICIAL FORECLOSURE, the process follows
21 the procedures spelled out in Chapter 667 of the



1 Hawaii Revised Statutes and in your mortgage. The
2 nonjudicial procedures allow a Mortgagee to foreclose
3 on and sell the property identified in the mortgage
4 without filing a lawsuit or court supervision. This
5 nonjudicial foreclosure is also called a power of sale
6 foreclosure. The Mortgagee starts the process by
7 giving you a written notice of default and of the
8 Mortgagee's intent to sell the property.

9 After the required time has elapsed, you will be
10 sent a notice of nonjudicial foreclosure sale, which
11 will tell you the date and location of the sale.

12 In a NONJUDICIAL foreclosure, if you own an
13 interest in the property you may have the right to
14 participate in the Mortgage Foreclosure Dispute
15 Resolution Program or to convert the nonjudicial
16 foreclosure into a judicial foreclosure. The
17 nonjudicial foreclosure may not proceed during the
18 dispute resolution process or after it has been
19 converted to a judicial foreclosure.

20 PLEASE NOTE: Even if a judicial or nonjudicial
21 foreclosure has commenced, you may be able to



1 reinstate the loan and keep your home if you pay the
2 delinquent amount then due and the foreclosure
3 expenses that your Mortgagee has incurred. You must
4 contact the Mortgagee as soon as possible to determine
5 whether reinstatement is possible.

6 STEP THREE: PUBLIC SALE. The sale of a
7 foreclosed home is usually made through a public
8 auction, where the highest bidder who can make a cash
9 deposit of up to 10% of the bid can buy the property.
10 In a judicial foreclosure, the court appoints a third
11 party commissioner to advertise and conduct the sale.
12 In a nonjudicial foreclosure, the Mortgagee advertises
13 and conducts the sale. In both types of sales, the
14 Mortgagee has the right to buy the property by
15 submitting a credit bid based upon the balance owed on
16 the mortgage, so long as its bid is higher than any
17 other bids. If the Mortgagee buys the property, the
18 Mortgagee has the right to re-sell it in a private
19 sale at a later date.

20 STEP FOUR: DISBURSEMENT OF PROCEEDS; POTENTIAL
21 DEFICIENCY JUDGMENT. After the foreclosure sale is



1 completed, the proceeds are paid out to lien holders,
2 including the Mortgagee, in the order set by law and
3 lastly to you if there are any proceeds left.

4 In a JUDICIAL FORECLOSURE, the court tells the
5 commissioner whom to pay and how much. If the
6 property did not sell for enough to pay off the
7 balance due under your loan, the Mortgagee has the
8 right to ask the court for a deficiency judgment
9 against you for the difference.

10 In a NONJUDICIAL FORECLOSURE, the Mortgagee
11 distributes the proceeds from the sale. If the
12 mortgaged property does not sell for enough to pay off
13 the balance due under your loan, the Mortgagee may
14 have the right to file a lawsuit against you to
15 collect the deficiency. In many cases, after a
16 nonjudicial foreclosure, a Mortgagee cannot or will
17 not choose to file a lawsuit for a deficiency.

18 READ THE NOTE AND MORTGAGE CAREFULLY TO
19 UNDERSTAND WHAT IS REQUIRED AND HOW TO AVOID
20 FORECLOSURE, AND CONSULT WITH AN ATTORNEY REGARDING
21 YOUR LEGAL RIGHTS.



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1 (c) The requirements of this section shall apply only to
2 written loan applications submitted, or to loans where
3 residential property is required to be used as security, after
4 August 31, 2012."

5 SECTION 26. Section 667-53, Hawaii Revised Statutes, is
6 amended by amending subsections (a) and (b) to read as follows:

7 "(a) An owner-occupant of a residential property that is
8 subject to nonjudicial foreclosure under part [F] IA or II may
9 convert the action to a judicial foreclosure provided that:

10 (1) A petition conforming to section 667-54 shall be filed
11 with the circuit court in the circuit where the
12 residential property is located, stating that the
13 owner-occupant of the property elects to convert the
14 nonjudicial foreclosure to a judicial foreclosure
15 proceeding no later than thirty days after the
16 foreclosure notice is served on the owner-occupant as
17 required by section 667-5 or 667-22;

18 (2) Within forty-five days of the filing of the petition,
19 all owner-occupants and mortgagors of an interest in
20 the residential property whose interests are pledged
21 or otherwise encumbered by the mortgage that is being



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1 foreclosed and all persons who have signed the
2 promissory note or other instrument evidencing the
3 debt secured by the mortgage that is being foreclosed,
4 including without limitation co-obligors and
5 guarantors, shall file a statement in the circuit
6 court action that they agree to submit themselves to
7 the judicial process and the jurisdiction of the
8 circuit court; provided further that if this condition
9 is not satisfied, the circuit court action may be
10 dismissed with prejudice as to the right of any owner-
11 occupant to convert the action to a judicial
12 proceeding, and the mortgagee may proceed
13 nonjudicially;

14 (3) Filing a petition pursuant to paragraph (1) shall
15 automatically stay the nonjudicial foreclosure action
16 unless and until the judicial proceeding has been
17 dismissed;

18 (4) The person filing the petition pursuant to paragraph
19 (1) shall have an affirmative duty to promptly notify
20 the Hawaii attorney who is handling the nonjudicial
21 foreclosure about the filing of the complaint for



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conversion;

(5) All parties joined in the converted judicial proceeding may assert therein any claims and defenses that they could have asserted had the action originally been commenced as a judicial foreclosure action; and

(6) ~~[Notwithstanding chapter 607, the]~~ The fee for filing the petition shall be ~~[not more than \$525, of which]~~ \$250, which shall be deposited into the mortgage foreclosure dispute resolution special fund established under section 667-86~~[, provided that if the mortgage foreclosure dispute resolution program under part V has not yet been implemented, the filing fee shall be not more than \$300].~~

(b) This section shall not apply to foreclosures of association liens that arise under a declaration filed pursuant to chapter 421J, 514A, or 514B."

SECTION 27. Section 667-54, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"~~[+]~~ (a) ~~[+]~~ A petition filed pursuant to section 667-53 shall contain at a minimum:



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- 1 (1) A caption setting forth the name of the court, the
2 title of the action, and the file number; provided
3 that the title of the action shall include the names
4 of the filing party as petitioner and the foreclosing
5 party as the respondent;
- 6 (2) The name, mailing address, and telephone number of the
7 filing party;
- 8 (3) The address or tax map key number, and the certificate
9 of title or transfer certificate of title number if
10 ~~[within the land court's jurisdiction,]~~ registered in
11 the land court, of the property subject to the
12 foreclosure action;
- 13 (4) A statement identifying all other owner-occupants and
14 mortgagors of the property whose interests are pledged
15 or otherwise encumbered by the mortgage that is being
16 foreclosed and all persons who have signed the
17 promissory note or other instrument evidencing the
18 debt secured by the mortgage that is being foreclosed,
19 including without limitation co-obligors and
20 guarantors;
- 21 (5) A certification under penalty of perjury that the



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filing party is an owner-occupant of the subject property and seeks to convert the nonjudicial foreclosure to a judicial proceeding;

(6) A statement certifying that the filing party served a copy of the petition on the attorney identified in the foreclosure notice under section 667-5 or 667-22 either by personal delivery at, or by postage prepaid United States mail to, the address of the attorney as set forth in the foreclosure notice under section 667-5 or 667-22; and

(7) A copy of the foreclosure notice that was served on the filing party pursuant to section 667-5 or 667-22 and for which the filing party is seeking to convert to a judicial proceeding."

SECTION 28. Section 667-55, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) The foreclosure notice that is served as required under section 667-5 or 667-22 shall include, in addition to the contents required under section 667-5 or 667-22, a statement printed in not less than fourteen-point font as follows:

"IF THE PROPERTY BEING FORECLOSED IS



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1 IMPROVED AND USED FOR RESIDENTIAL PURPOSES, AN
2 OWNER-OCCUPANT OF THE PROPERTY (DEFINED IN
3 CHAPTER 667 OF THE HAWAII REVISED STATUTES AS A
4 PERSON WHO, AT THE TIME THIS NOTICE IS SERVED,
5 OWNS AN INTEREST IN THE RESIDENTIAL PROPERTY THAT
6 IS SUBJECT TO THE MORTGAGE BEING FORECLOSED AND
7 THE RESIDENTIAL PROPERTY HAS BEEN THE PRIMARY
8 RESIDENCE CONTINUOUSLY FOR NOT LESS THAN TWO
9 HUNDRED DAYS) HAS THE RIGHT TO CONVERT A
10 NONJUDICIAL FORECLOSURE PROCEEDING TO A JUDICIAL
11 FORECLOSURE WHERE CLAIMS AND DEFENSES MAY BE
12 CONSIDERED BY A COURT OF LAW. TO EXERCISE THIS
13 RIGHT, THE OWNER-OCCUPANT SHALL COMPLETE AND FILE
14 THE ATTACHED FORM WITH THE CIRCUIT COURT IN THE
15 CIRCUIT WHERE THE PROPERTY IS LOCATED WITHIN
16 THIRTY DAYS AFTER SERVICE OF THIS NOTICE.

17 IN ADDITION, ALL OWNER-OCCUPANTS AND
18 MORTGAGORS OF THE RESIDENTIAL PROPERTY WHOSE
19 INTERESTS HAVE BEEN PLEDGED OR OTHERWISE
20 ENCUMBERED BY THE MORTGAGE THAT IS BEING
21 FORECLOSED AND ALL PERSONS WHO HAVE SIGNED THE



1 PROMISSORY NOTE OR OTHER INSTRUMENT EVIDENCING
2 THE DEBT SECURED BY THE MORTGAGE THAT IS BEING
3 FORECLOSED, INCLUDING, WITHOUT LIMITATION, CO-
4 OBLIGORS AND GUARANTORS, SHALL FILE A STATEMENT
5 IN THE CIRCUIT COURT ACTION THAT THEY AGREE TO
6 SUBMIT TO THE JUDICIAL PROCESS AND THE
7 JURISDICTION OF THE CIRCUIT COURT WITHIN FORTY-
8 FIVE DAYS OF THE FILING OF THE ATTACHED FORM.
9 FAILURE TO SATISFY THIS CONDITION MAY RESULT IN
10 DISMISSAL OF THE CIRCUIT COURT ACTION WITH
11 PREJUDICE.

12 AN OWNER-OCCUPANT SHALL PROMPTLY NOTIFY THE
13 HAWAII ATTORNEY LISTED IN THIS NOTICE ABOUT THE
14 FILING OF THE CONVERSION FORM.

15 MORTGAGE FORECLOSURE DISPUTE RESOLUTION MAY
16 BE AVAILABLE IN NONJUDICIAL FORECLOSURE ACTIONS
17 AS AN ALTERNATIVE FOR OWNER-OCCUPANTS ATTEMPTING
18 TO AVOID FORECLOSURE OR TO MITIGATE THE EFFECTS
19 OF FORECLOSURE ON AN OWNER-OCCUPANT. HOWEVER, IF
20 AN OWNER-OCCUPANT FILES FOR CONVERSION, DISPUTE
21 RESOLUTION MAY NOT BE AVAILABLE UNLESS ORDERED BY



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1 A JUDGE.

2 A FORECLOSING LENDER WHO COMPLETES A
3 NONJUDICIAL FORECLOSURE OF RESIDENTIAL PROPERTY
4 ~~[SHALL]~~ COULD BE PROHIBITED UNDER HAWAII LAW FROM
5 PURSUING A DEFICIENCY JUDGMENT AGAINST A
6 MORTGAGOR ~~[UNLESS THE DEBT IS SECURED BY OTHER~~
7 ~~COLLATERAL, OR AS OTHERWISE PROVIDED BY LAW]~~. IF
8 THIS ACTION IS CONVERTED TO A JUDICIAL
9 PROCEEDING, HOWEVER, THEN ALL REMEDIES AVAILABLE
10 TO A LENDER MAY BE ASSERTED, INCLUDING THE RIGHT
11 TO SEEK A DEFICIENCY JUDGMENT."

12 SECTION 29. Section 667-56, Hawaii Revised Statutes, is
13 amended to read as follows:

14 "[+]§667-56[+] **Prohibited conduct.** It shall be a
15 prohibited practice for any foreclosing mortgagee to engage in
16 any of the following practices:

- 17 (1) Holding a public sale on a date, at a time, or at a
18 place other than that described in the public notice
19 of the public sale or a properly noticed postponement;
- 20 (2) Specifying a fictitious place in the public notice of
21 the public sale;



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- 1 (3) Conducting a postponed public sale on a date other
2 than the date described in the new public notice of
3 the public sale;
- 4 (4) Delaying the delivery of the recorded, conformed copy
5 of the conveyance document to a bona fide purchaser
6 who purchases in good faith for more than [~~forty-five~~]
7 sixty days after the completion of the public sale;
- 8 (5) Completing nonjudicial foreclosure proceedings during
9 short sale escrows with a bona fide purchaser if the
10 short sale offer is at least [~~five~~] ten per cent
11 greater than the public sale price; provided that
12 escrow is opened within ten days and closed within
13 forty-five days of the public sale; and provided
14 further that a bona fide short sale purchaser shall
15 have priority over any other purchaser;
- 16 (6) Completing nonjudicial foreclosure proceedings during
17 bona fide loan modification negotiations with the
18 mortgagor; or
- 19 (7) Completing nonjudicial foreclosure proceedings against
20 a mortgagor who has been accepted or is being
21 evaluated for consideration for entry into a federal



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1 loan modification program before obtaining a
2 certificate or other documentation confirming that the
3 mortgagor is no longer eligible for, or an active
4 participant of, that federal program."

5 SECTION 30. Section 667-57, Hawaii Revised Statutes, is
6 amended by amending subsections (a) and (b) to read as follows:

7 "(a) Upon initiation of a foreclosure action pursuant to
8 part [H] IA or part II by a foreclosing mortgagee [~~as defined in~~
9 ~~section 667-21(b)~~], no junior lienholder shall be permitted to
10 initiate or continue a nonjudicial foreclosure pursuant to part
11 [H] IA or part II until the foreclosure initiated by the
12 foreclosing mortgagee has been concluded by a judgment issued by
13 a court pursuant to section [~~667-1,~~] 667-1.5, the recording of
14 an affidavit after public sale pursuant to section 667-5 or 667-
15 33, or the filing of [~~a settlement document~~] an agreement under
16 the mortgage foreclosure dispute resolution provisions of
17 section 667-81.

18 (b) Upon initiation of a foreclosure action pursuant to
19 part [H] IA or part II by a foreclosing mortgagee [~~as defined in~~
20 ~~section 667-21(b)~~], no junior lienholder shall be permitted to
21 initiate a nonjudicial foreclosure pursuant to part II during



1 the pendency of a stay pursuant to section 667-83; provided that
2 a junior lienholder may initiate or continue with a nonjudicial
3 foreclosure pursuant to part II if ~~[the]~~:

4 (1) The junior lien foreclosure was initiated before the
5 foreclosure action by the foreclosing mortgagee[-]; or

6 (2) The junior lienholder is an association and has not
7 been provided notice of the foreclosure action
8 pursuant to sections 667-5.5 or 667-21.5, or has not
9 received written notification of a case opening
10 pursuant to section 667-79."

11 SECTION 31. Section 667-58, Hawaii Revised Statutes, is
12 amended to read as follows:

13 "[+]§667-58[+] Valid notice[-]; affiliate statement. (a)

14 Any notices made pursuant to this chapter may be issued only by
15 persons authorized by a foreclosing mortgagee or lender pursuant
16 to an affiliate statement signed by that foreclosing mortgagee
17 or lender and recorded at the bureau of conveyances identifying
18 the agency or affiliate relationship and the authority granted
19 or conferred to that agent or representative.

20 (b) The bureau of conveyances document number for the
21 affiliate statement required under subsection (a) shall be



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1 included in any notice required to be personally served upon the
2 mortgagor or borrower under this chapter.

3 (c) Any notice provided by a mortgage servicer, including
4 an agent, employee, or representative of that mortgage servicer,
5 shall be issued only by a mortgage servicer that has been listed
6 in the affiliate statement filed by the foreclosing mortgagee or
7 lender under subsection (a); provided further that the mortgage
8 servicer shall be licensed under or otherwise exempt from
9 chapter 454M. The agency relationship or affiliation of the
10 mortgage servicer and the foreclosing mortgagee or lender and
11 any authority granted or conferred to that mortgage servicer
12 shall be described in the affiliate statement filed under both
13 subsection (a) and section 454M-5(a)(4)(F).

14 (d) No attorney of a mortgage servicer, foreclosing
15 mortgagee, or lender shall be required to be included in any
16 affiliate statement of a foreclosing mortgagee or lender. No
17 notice or other correspondence made by any attorney for the
18 foreclosing mortgagee or lender shall be required to reference
19 any affiliate statement made by the foreclosing mortgagee or
20 lender. Any notice or other correspondence made by any attorney
21 for a mortgage servicer shall reference, in accordance with



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1 subsection (b), the appropriate affiliate statement of the
2 foreclosing mortgagee or lender authorizing the mortgage
3 servicer to act."

4 SECTION 32. Section 667-59, Hawaii Revised Statutes, is
5 amended to read as follows:

6 "[+]§667-59[+] **Actions and communications with the**
7 **mortgagor in connection with a foreclosure.** A foreclosing
8 mortgagee shall be bound by all agreements, obligations,
9 representations, or inducements made on its behalf by its
10 agents, including but not limited to its employees,
11 representatives, mortgage servicers, or persons authorized by a
12 foreclosing mortgagee or lender pursuant to an affiliate
13 statement recorded in the bureau of conveyances pursuant to
14 section 667-58.

15 ~~[For purposes of this section, "foreclosing mortgagee" has~~
16 ~~the same meaning as in section 667-21.] "~~

17 SECTION 33. Section 667-60, Hawaii Revised Statutes, is
18 amended to read as follows:

19 "[+]§667-60[+] **Unfair or deceptive act or practice[-];**
20 **transfer of title.** (a) Any foreclosing mortgagee who [violates]
21 **engages in any of the following violations of this chapter shall**



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1 have committed an unfair or deceptive act or practice under
2 section 480-2[-]:

3 (1) Failing to provide a borrower or mortgagor with, or
4 failing to serve as required, the information required
5 by sections 667-5, 667-22, or 667-55;

6 (2) Failing to publish, or to post, information on the
7 mortgaged property, as required by sections 667-5,
8 667-27, or 667-28;

9 (3) Failing to take any action required by section 667-24
10 if the default is cured or an agreement is reached;

11 (4) Engaging in conduct prohibited under section 667-56;

12 (5) Holding a public sale in violation of section 667-25
13 or section 667-26;

14 (6) Failing to include in a public notice of public sale
15 the information required by section 667-27 or section
16 667-28;

17 (7) Failing to provide the information required by section
18 667-41;

19 (8) With regard to mortgage foreclosure dispute resolution
20 under part V:



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- 1 (A) Failing to provide notice of the availability of
2 dispute resolution as required by section 667-75;
- 3 (B) Participating in dispute resolution without
4 authorization to negotiate a loan modification,
5 or without access to a person so authorized, as
6 required by section 667-80(a)(1);
- 7 (C) Failing to provide required information or
8 documents as required by section 667-80(c); or
- 9 (D) Completing a nonjudicial foreclosure if a
10 neutral's closing report under section 667-82
11 indicates that the foreclosing mortgagee failed
12 to comply with requirements of the mortgage
13 foreclosure dispute resolution program;
- 14 (9) Completing a nonjudicial foreclosure while a stay is
15 in effect under section 667-83;
- 16 (10) Failing to distribute sale proceeds as required by
17 section 667-31;
- 18 (11) Making any false statement in the affidavit of public
19 sale required by section 667-32; and
- 20 (12) Attempting to collect a deficiency in violation of
21 section 667-38.



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1 (b) Notwithstanding subsection (a), the transfer of title
2 to the purchaser of the property as a result of a foreclosure
3 under this chapter shall only be subject to avoidance under
4 section 480-12 for violations described in subsection (a)(1) to
5 (9) if such violations are shown to be substantial and material;
6 provided that a foreclosure sale shall not be subject to
7 avoidance under section 480-12 for violation of section 667-
8 56(5).

9 (c) Any action to void the transfer of title to the
10 purchaser of property under this chapter shall be filed in the
11 circuit court of the circuit within which the foreclosed
12 property is situated no later than one hundred eighty days
13 following the recording of the affidavit required by section
14 667-5 or section 667-32, as applicable. If no such action is
15 filed within the one hundred eighty-day period, then title to
16 the property shall be deemed conclusively vested in the
17 purchaser free and clear of any claim by the mortgagor or anyone
18 claiming by, through, or under the mortgagor."

19 SECTION 34. Section 667-63, Hawaii Revised Statutes, is
20 amended by amending subsection (a) to read as follows:



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1 "(a) A mortgage creditor having a mortgage lien on a time
2 share interest who desires notice that another mortgage creditor
3 having a mortgage lien on the time share interest intends to
4 foreclose and sell the mortgaged time share interest, pursuant
5 to the power of sale under section 667-62, may submit a written
6 request to the mortgagee who is foreclosing or who may foreclose
7 the mortgage by power of sale, asking to receive notice of the
8 mortgagee's intention to foreclose the mortgage under section
9 667-62. The request for notice:

10 (1) May be submitted any time after the recordation [~~or~~
11 ~~filing~~] of the subject mortgage [~~at the bureau of~~
12 ~~conveyances or the land court but shall be~~]; provided
13 that the request is submitted prior to completion of
14 publication of notice of the intention to foreclose
15 the mortgage and of the sale of the mortgaged time
16 share interest;

17 (2) Shall be signed by the mortgage creditor desiring to
18 receive notice, or its authorized representative; and

19 (3) Shall specify the name and address of the person to
20 whom the notice is to be mailed."

21 SECTION 35. Section 667-71, Hawaii Revised Statutes, is



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1 amended by amending subsection (b) to read as follows:

2 "(b) This part shall not apply to actions by an
3 association to foreclose on a lien for amounts owed to the
4 association that arise under a declaration filed pursuant to
5 chapter 421J, 514A, or 514B, or to a mortgagor who has
6 previously participated in dispute resolution under this part
7 for the same property on the same mortgage loan."

8 SECTION 36. Section 667-73, Hawaii Revised Statutes, is
9 amended as follows by amending subsection (c) to read as
10 follows:

11 "(c) The department is authorized to contract with county,
12 state, or federal agencies, and with private organizations or
13 approved housing counselors or approved budget and credit
14 counselors for the performance of any of the functions of this
15 part. These contracts shall not be subject to chapter 103D or
16 103F."

17 SECTION 37. Section 667-74, Hawaii Revised Statutes, is
18 amended to read as follows:

19 "~~+~~\$667-74~~+~~ **Availability of dispute resolution required**
20 **before foreclosure.** Before a public sale may be conducted
21 pursuant to section 667-5 or 667-25 for a residential property



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1 that is occupied by an owner-occupant [~~as a primary residence~~],
2 the foreclosing mortgagee [~~shall~~], at the election of the owner-
3 occupant, shall participate in the mortgage foreclosure dispute
4 resolution program under this part to attempt to negotiate an
5 agreement that avoids foreclosure or mitigates damages in cases
6 where foreclosure is unavoidable."

7 SECTION 38. Section 667-75, Hawaii Revised Statutes, is
8 amended by amending subsection (b) to read as follows:

9 "(b) The notice required by subsection (a) shall be
10 printed in not less than fourteen-point font and include:

11 (1) The name and contact information of the mortgagor and
12 the mortgagee;

13 (2) The subject property address and legal description,
14 including tax map key number and the certificate of
15 title or transfer certificate of title number if
16 [~~within the land court's jurisdiction,~~] registered in
17 the land court;

18 (3) The name and contact information of a person or entity
19 authorized to negotiate a loan modification on behalf
20 of the mortgagee;

21 (4) A statement that the mortgagor shall consult with an



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approved housing counselor or an approved budget and credit counselor at least thirty days prior to the first day of a scheduled dispute resolution session;

(5) Contact information for all ~~local~~ approved housing counselors;

(6) Contact information for all ~~local~~ approved budget and credit counselors;

(7) A statement that the mortgagor electing to participate in the mortgage foreclosure dispute resolution program shall provide a certification under penalty of perjury to the department that the mortgagor is an owner-occupant of the subject property, including supporting documentation;

(8) A general description of the information that an owner-occupant electing to participate in the mortgage foreclosure dispute resolution program is required to provide to participate in the program as described under section 667-80(c)(2);

(9) A statement that the owner-occupant shall elect to participate in the mortgage foreclosure dispute resolution program pursuant to this part no later than



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thirty days after the department's mailing of the
notice or the right shall be waived."

SECTION 39. Section 667-77, Hawaii Revised Statutes, is
amended to read as follows:

[+]~~§~~667-77[+] Notification to mortgagor by department.

Within ten days after the mortgagee's filing of a notice of
default and intention to foreclose with the department, the
department shall mail a written notification by registered or
certified mail to the mortgagor that a notice of default and
intention to foreclose has been filed with the department. The
notification shall inform the mortgagor of an owner-occupant's
right to elect to participate in the foreclosure dispute
resolution program and shall include:

(1) Information about the mortgage foreclosure dispute
resolution program;

(2) A form for an owner-occupant to elect or to waive
participation in the mortgage foreclosure dispute
resolution program pursuant to this part that shall
contain instructions for the completion and return of
the form to the department and the department's
mailing address;



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1 (3) A statement that the mortgagor electing to participate
2 in the mortgage foreclosure dispute resolution program
3 shall provide a certification under penalty of perjury
4 to the department that the mortgagor is an owner-
5 occupant of the subject property, including a
6 description of acceptable supporting documentation as
7 required by section 667-78(a)(2);

8 (4) A statement that the owner-occupant shall elect to
9 participate in the mortgage foreclosure dispute
10 resolution program pursuant to this part no later than
11 thirty days after the department's mailing of the
12 notice or the owner-occupant shall be deemed to have
13 waived the option to participate in the mortgage
14 foreclosure dispute resolution program;

15 (5) A description of the information required under
16 section 667-80(c)(2) that the owner-occupant shall
17 provide to the mortgagee and the neutral assigned to
18 the dispute resolution;

19 (6) A statement that the owner-occupant shall consult with
20 an approved housing counselor or approved budget and
21 credit counselor at least thirty days prior to the



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1 first day of a scheduled dispute resolution session;

2 (7) Contact information for all ~~[local]~~ approved housing
3 counselors;

4 (8) Contact information for all ~~[local]~~ approved budget
5 and credit counselors; and

6 (9) Contact information for the department.

7 The notification shall be mailed to the subject property address
8 and any other addresses for the mortgagor as provided in the
9 mortgagee's notice of dispute resolution under 667-75 and the
10 foreclosure notice under section 667-5 or 667-22(a)."

11 SECTION 40. Section 667-78, Hawaii Revised Statutes, is
12 amended as follows:

13 1. By amending subsection (a) to read:

14 "(a) An owner-occupant elects to participate in the
15 mortgage foreclosure dispute resolution program by returning to
16 the department:

17 (1) The completed program election form provided
18 [pursuant]:

19 (A) Pursuant to section 667-77(2); or

20 (B) On a website maintained by the department;

21 (2) Certification under penalty of perjury that the



1 mortgagor is an owner-occupant, accompanied with any
2 supporting documentation, including copies of recent
3 utility billing statements, voter registration
4 records, real estate property tax records, or state
5 identification forms; and

6 (3) A program fee of \$300.

7 The completed form and fees shall be received by the department
8 no later than thirty days after mailing of the department's
9 notification pursuant to section 667-77."

10 2. By amending subsection (c) to read:

11 "(c) If the owner-occupant does not elect to participate
12 in dispute resolution pursuant to this part, the department
13 shall notify the mortgagee within ten days of receiving an
14 election form indicating nonelection or the termination of the
15 thirty-day time period for election. After receiving the
16 department's notification, the mortgagee may proceed with the
17 nonjudicial foreclosure process according to the process
18 provided in part [I] IA or part II of this chapter, as
19 applicable."

20 SECTION 41. Section 667-79, Hawaii Revised Statutes, is
21 amended as follows:



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1 1. By amending subsection (a) to read:

2 "(a) If an owner-occupant elects to participate in the
3 mortgage foreclosure dispute resolution program, the department
4 shall open a dispute resolution case. Within twenty days of
5 receipt of the owner-occupant's election form and fee in
6 accordance with section 667-78, the department shall mail
7 written notification of the case opening to the parties and, if
8 applicable, the condominium or other homeowner association of
9 the project where the owner-occupant's property is located, by
10 registered mail, return receipt requested, which shall include:

11 (1) Notification of the date, time, and location of the
12 dispute resolution session;

13 (2) An explanation of the dispute resolution process;

14 (3) Information about the dispute resolution program
15 requirements; and

16 (4) Consequences and penalties for noncompliance.

17 The dispute resolution session shall be scheduled for a date no
18 less than [~~thirty~~] forty and no more than [~~sixty~~] seventy days
19 from the date of the notification of case opening, unless
20 mutually agreed to by the parties and the neutral."

21 2. By amending subsection (c) to read:



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1 "(c) The written notification of a case opening under this
2 section shall operate as a stay of the foreclosure proceeding in
3 accordance with section 667-83 [7] and may be [~~filed or~~
4 recorded[, ~~as appropriate, at the land court or bureau of~~
5 conveyances] ."

6 SECTION 42. Section 667-80, Hawaii Revised Statutes, is
7 amended as follows:

8 1. By amending subsection (a) to read:

9 "(a) The parties to a dispute resolution process conducted
10 under this part shall consist of the owner-occupant or the
11 owner-occupant's representative, and the mortgagee or the
12 mortgagee's representative; provided that:

13 (1) A representative of the mortgagee who participates in
14 the dispute resolution shall be authorized to
15 negotiate a loan modification on behalf of the
16 mortgagee or shall have, at all stages of the dispute
17 resolution process, direct access by telephone,
18 videoconference, or other immediately available
19 contemporaneous telecommunications medium to a person
20 who is so authorized;

21 (2) The mortgagee and owner-occupant may be represented by



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1 ~~[counsel,]~~ an attorney; and

2 (3) The owner-occupant may be assisted by an approved
3 housing counselor or approved budget and credit
4 counselor."

5 2. By amending subsection (c) to read:

6 "(c) The parties shall comply with all information
7 requests from the department or neutral. No less than fifteen
8 days prior to the first day of the scheduled dispute resolution
9 session:

10 (1) The mortgagee shall provide to the department and the
11 mortgagor:

12 (A) A copy of the promissory note, signed by the
13 mortgagor, including any endorsements, allonges,
14 amendments, or riders to the note evidencing the
15 mortgage debt;

16 (B) A copy of the mortgage document and any
17 amendments, riders, or other documentation
18 evidencing the mortgagee's right of nonjudicial
19 foreclosure and interest in the property
20 including any interest as a successor or
21 assignee; and



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(C) Financial records and correspondence that confirm the mortgage loan is in default.

(2) The owner-occupant shall provide to the department and the mortgagee:

(A) Documentation showing income qualification for a loan modification, including any copies of pay stubs, W-2 forms, social security or disability income, retirement income, child support income, or any other income that the owner-occupant deems relevant to the owner-occupant's financial ability to repay the mortgage;

(B) Any records or correspondence available which may dispute that the mortgage loan is in default;

(C) Any records or correspondence available evidencing a loan modification or amendment;

(D) Any records or correspondence available that indicate the parties are currently engaged in bona fide negotiations to modify the loan or negotiate a settlement of the delinquency;

(E) Names and contact information for approved housing counselors, approved budget and credit



.B. NO.

1 counselors, or representatives of the mortgagee,
2 with whom the owner-occupant may have or is
3 currently working with to address the
4 delinquency; and

5 (F) Verification of counseling by an approved housing
6 counselor or approved budget and credit
7 counselor."

8 SECTION 43. Section 667-81, Hawaii Revised Statutes, is
9 amended by amending subsections (b), (c), and (d) to read as
10 follows:

11 "(b) If, despite the parties' participation in the dispute
12 resolution process and compliance with the requirements of this
13 part, the parties are not able to come to an agreement, the
14 neutral shall file a closing report with the department that the
15 parties met the program requirements. The mortgagee may [file
16 or] record the report [~~at the bureau of conveyances or the land~~
17 ~~court, as appropriate~~]. Upon recording of the report pursuant
18 to this subsection, the foreclosure process shall resume along
19 the timeline as it existed on the date before the mortgagor
20 elected dispute resolution, and may proceed as otherwise
21 provided by law. The mortgagee shall notify the mortgagor of



.B. NO.

1 the recording date and document number of this report and the
2 deadline date to cure default in an amended foreclosure notice.
3 Nothing in this subsection shall be construed to require the
4 neutral to wait the full sixty days allotted for dispute
5 resolution to determine that the parties were unable to reach an
6 agreement and file a report.

7 (c) If the parties have complied with the requirements of
8 this part and have reached an agreement, the agreement shall be
9 memorialized in ~~[a settlement document]~~ writing and signed by
10 the parties or their authorized representatives. ~~[If the~~
11 ~~parties or their authorized representatives participate in the~~
12 ~~dispute resolution session in person, the settlement document~~
13 ~~shall be signed in the presence of the neutral. If any of the~~
14 ~~parties or their authorized representatives participate in the~~
15 ~~dispute resolution through telephone, videoconference, or other~~
16 ~~immediately available contemporaneous telecommunications medium,~~
17 ~~the settlement document shall be signed and returned to the~~
18 ~~neutral no later than ten days after the conclusion of the~~
19 ~~dispute resolution session.]~~ The parties shall be responsible
20 for drafting any agreement reached[, ~~and for filing or recording~~
21 ~~with the land court or the bureau of conveyances, as~~



.B. NO.

1 ~~appropriate,]~~ and enforcing the ~~[settlement document.]~~
2 agreement. ~~[The neutral shall file the settlement document with~~
3 ~~the neutral's closing report.]~~ The ~~[settlement document]~~
4 agreement shall be a contract between the parties and shall be
5 enforceable in a private contract action in a court of
6 appropriate jurisdiction in the event of breach by either party.
7 If the ~~[settlement document]~~ agreement allows for foreclosure or
8 other transfer of the subject property, the stay of the
9 foreclosure under section 667-83 shall be released upon ~~[filing~~
10 ~~or recording]~~ the ~~[settlement document]~~ recordation of the
11 neutral's closing report ~~[with the land court or bureau of~~
12 ~~conveyances, as appropriate].~~ Thereafter, the office of the
13 assistant registrar of the land court or bureau of conveyances
14 may record a notice of sale or other conveyance document, as
15 appropriate.

16 (d) If the parties to a dispute resolution process reach
17 an agreement which resolves the matters at issue in the dispute
18 resolution before the first day of the scheduled dispute
19 resolution session scheduled pursuant to this section, the
20 parties shall notify the neutral by that date. The neutral
21 shall thereafter issue a closing report that the parties have



.B. NO.

1 reached an agreement prior to the commencement of a dispute
2 resolution session. If the agreement provides for foreclosure,
3 the parties shall memorialize the agreement in a writing signed
4 by both parties ~~[and provided to the neutral. Any agreement~~
5 ~~authorizing foreclosure shall be attached to the neutral's~~
6 ~~closing report]~~. The parties may ~~[file or]~~ record the report
7 ~~[at the bureau of conveyances or the land court, as~~
8 ~~appropriate]~~. If the agreement authorizes foreclosure, the stay
9 of the foreclosure under section 667-83 shall be released upon
10 ~~[filing or recording with the land court or bureau of~~
11 ~~conveyances, as appropriate.]~~ the recordation of the report.
12 Thereafter, the land court or bureau of conveyances may record a
13 notice of sale or other conveyance document, as appropriate. No
14 fees shall be refunded if the parties come to an agreement prior
15 to a dispute resolution session conducted pursuant to this
16 part."

17 SECTION 44. Section 667-82, Hawaii Revised Statutes, is
18 amended by amending subsection (a) to read as follows:

19 "(a) The neutral's closing report shall indicate if the
20 mortgagee or the owner-occupant failed to comply with
21 requirements of the mortgage foreclosure dispute resolution



.B. NO.

1 program.

2 (1) In the case of the mortgagee, failure to comply with
3 the requirements of the program may consist of:

4 (A) Participation in dispute resolution without the
5 authority to negotiate a loan modification or
6 without access at all stages of the dispute
7 resolution process to a person who is so
8 authorized;

9 (B) Failure to provide the required information or
10 documents;

11 (C) Refusal to cooperate or participate in dispute
12 resolution; or

13 (D) Refusal or failure to pay program fees under
14 section 667-79 in a timely manner.

15 (2) In the case of the owner-occupant, failure to comply
16 with the requirements of the program may consist of:

17 (A) Failure to provide the required information or
18 documents; or

19 (B) Refusal to cooperate or participate in dispute
20 resolution[+];



.B. NO.

1 provided that failure by the mortgagee and the owner-
2 occupant to reach an agreement to resolve the dispute
3 shall not constitute failure by the mortgagee or the
4 owner-occupant to comply with the requirements of the
5 mortgage foreclosure dispute resolution program."

6 SECTION 45. Section 667-83, Hawaii Revised Statutes, is
7 amended by amending subsection (a) to read as follows:

8 "(a) The written notification of a case opening under
9 section 667-79 shall operate as a stay of the foreclosure
10 proceeding[~~7~~] and may be [~~filed or~~] recorded[~~7, as appropriate,~~
11 ~~at the land court or bureau of conveyances.~~]; provided that the
12 written notification shall not act as a stay on a foreclosure
13 proceeding by an association unless the association has been
14 provided notice pursuant to sections 667-5.5, 667-21.5, or 667-
15 79."

16 SECTION 46. Section 667-86, Hawaii Revised Statutes, is
17 amended by amending subsection (b) to read as follows:

18 "(b) All persons who record an affidavit in the office of
19 the assistant registrar of the land court, pursuant to section
20 501-118, or who record a conveyance document in the bureau of
21 conveyances for an owner-occupied property subject to a



.B. NO.

1 nonjudicial power of sale foreclosure shall pay a fee of \$100,
2 which shall be deposited into the mortgage foreclosure dispute
3 resolution special fund on a quarterly basis."

4 **PART IV**

5 SECTION 47. Section 421J-A, Hawaii Revised Statutes, is
6 amended by amending subsection (h) to read as follows:

7 "(h) The amount of the special assessment assessed under
8 subsection (g) shall not exceed the total amount of unpaid
9 regular monthly common assessments that were assessed during the
10 [twelve] six months immediately preceding the completion of the
11 judicial or nonjudicial power of sale foreclosure. In no event
12 shall the amount of the special assessment exceed the sum of
13 [~~\$7,200-~~] \$3,600."

14 SECTION 48. Section 454M-10, Hawaii Revised Statutes, is
15 amended to read as follows:

16 "**S454M-10 Penalty.** Any person who violates any provision
17 of this chapter may be subject to an administrative fine of not
18 more than \$7,000 for each violation[~~; provided that \$1,000 of~~
19 ~~the aggregate fine amount shall be deposited into the mortgage~~
20 ~~foreclosure dispute resolution special fund established pursuant~~
21 ~~to section 667-86]."~~



.B. NO.

1 SECTION 49. Section 667-53, Hawaii Revised Statutes, is
2 amended by amending subsection (a) to read as follows:

3 "(a) An owner-occupant of a residential property that is
4 subject to nonjudicial foreclosure under part IA or II may
5 convert the action to a judicial foreclosure provided that:

6 (1) A petition conforming to section 667-54 shall be filed
7 with the circuit court in the circuit where the
8 residential property is located, stating that the
9 owner-occupant of the property elects to convert the
10 nonjudicial foreclosure to a judicial foreclosure
11 proceeding no later than thirty days after the
12 foreclosure notice is served on the owner-occupant as
13 required by section 667-5 or 667-22;

14 (2) Within forty-five days of the filing of the petition,
15 all owner-occupants and mortgagors of an interest in
16 the residential property whose interests are pledged
17 or otherwise encumbered by the mortgage that is being
18 foreclosed and all persons who have signed the
19 promissory note or other instrument evidencing the
20 debt secured by the mortgage that is being foreclosed,
21 including without limitation co-obligors and



.B. NO.

1 guarantors, shall file a statement in the circuit
2 court action that they agree to submit themselves to
3 the judicial process and the jurisdiction of the
4 circuit court; provided further that if this condition
5 is not satisfied, the circuit court action may be
6 dismissed with prejudice as to the right of any owner-
7 occupant to convert the action to a judicial
8 proceeding, and the mortgagee may proceed
9 nonjudicially;

10 (3) Filing a petition pursuant to paragraph (1) shall
11 automatically stay the nonjudicial foreclosure action
12 unless and until the judicial proceeding has been
13 dismissed;

14 (4) The person filing the petition pursuant to paragraph
15 (1) shall have an affirmative duty to promptly notify
16 the Hawaii attorney who is handling the nonjudicial
17 foreclosure about the filing of the complaint for
18 conversion;

19 (5) All parties joined in the converted judicial
20 proceeding may assert therein any claims and defenses
21 that they could have asserted had the action



.B. NO.

originally been commenced as a judicial foreclosure
action; and

(6) The fee for filing the petition shall be \$250, which
shall be deposited into the [~~mortgage-foreclosure
dispute-resolution special fund established under
section 667-86.~~] compliance resolution fund."

PART V

SECTION 50. Act 48, Session Laws of Hawaii 2011, is
amended by amending section 45 to read as follows:

"SECTION 45. This Act shall take effect upon its approval;
provided that:

(1) The mortgage foreclosure dispute resolution program
established by section 1 of this Act shall be
operative no later than October 1, 2011;

(2) Sections 1, 13, and 14 shall be repealed on
September 30, 2014, and sections 514A-90(h) and
514B-146(h), Hawaii Revised Statutes, shall be
reenacted in the form in which they read on the day
before the effective date of this Act;

(3) Section 10 shall take effect on July 1, 2012;

~~[(4) Section 5 shall be repealed on December 31, 2012;]~~



.B. NO.

1 ~~[(+5)]~~ (4) Section 7 shall be repealed on September 30,
2 2014, and section 26-9(o), Hawaii Revised Statutes,
3 shall be reenacted in the form in which it read on the
4 day before the effective date of this Act; and
5 ~~[(+6)]~~ (5) Upon the repeal of section 1, all moneys
6 remaining in the mortgage foreclosure dispute
7 resolution special fund established under section 667-
8 P, Hawaii Revised Statutes, shall be transferred to
9 the compliance resolution fund established under
10 section 26-9(o), Hawaii Revised Statutes."

PART VI

12 SECTION 51. Section 667-21.6, Hawaii Revised Statutes, is
13 repealed.

14 ~~["§667-21.6] Foreclosure of association lien; cure of~~
15 ~~default. If a unit owner notifies the association or its~~
16 ~~attorney by certified mail return receipt requested or by hand~~
17 ~~delivery within five business days following a response to the~~
18 ~~unit owner's request for the amount to cure a default, together~~
19 ~~with an estimated amount of the foreclosing association's~~
20 ~~attorneys' fees and costs, and all other fees and costs related~~
21 ~~to the default estimated to be incurred by the foreclosing~~



1 ~~association, that it intends to cure the default, the~~
2 ~~association shall allow sixty calendar days to the unit owner to~~
3 ~~cure the default. The association shall not reject a reasonable~~
4 ~~payment plan for cure of the default, provided that a reasonable~~
5 ~~plan shall require the owner to pay at a minimum the current~~
6 ~~maintenance fee and some amount owed on the past due balance.~~
7 ~~From and after the date that the unit owner gives written notice~~
8 ~~to the association of its intent to cure the delinquency, any~~
9 ~~nonjudicial foreclosure of the lien shall be stayed pending the~~
10 ~~sixty day period or a longer period that is agreed upon by the~~
11 ~~parties-"]~~

12 SECTION 52. Section 667-50, Hawaii Revised Statutes, is
13 repealed.

14 ~~["§667-50] Definitions. For purposes of this chapter,~~
15 ~~"foreclosure notice" shall mean notice of intention to foreclose~~
16 ~~given pursuant to section 667-5 or notice of default and~~
17 ~~intention to foreclose prepared pursuant to section 667-22."]~~

18 SECTION 53. Section 667-61, Hawaii Revised Statutes, is
19 repealed.



.B. NO.

1 ~~["§667-61] Definitions. For the purposes of sections~~
2 ~~667-62 to 667-65, "time share interest" shall have the same~~
3 ~~meaning as in section 514E-1."]~~

4 SECTION 54. Section 667-72, Hawaii Revised Statutes, is
5 repealed.

6 ~~["§667-72] Definitions. As used in this part:~~
7 ~~"Approved budget and credit counselor" means a budget and~~
8 ~~credit counseling agency that has received approval from a~~
9 ~~United States trustee or bankruptcy administrator to provide~~
10 ~~instructional courses concerning personal financial management~~
11 ~~pursuant to Title 11 United States Code section 111.~~

12 ~~"Approved housing counselor" means a housing counseling~~
13 ~~agency that has received approval from the United States~~
14 ~~Department of Housing and Urban Development to provide housing~~
15 ~~counseling services pursuant to section 106(a)(2) of the Housing~~
16 ~~and Urban Development Act of 1968, Title 12 United States Code~~
17 ~~section 1701x.~~

18 ~~"Association" has the same meaning as in sections 514B-3~~
19 ~~and 421J-2.~~

20 ~~"Department" means the department of commerce and consumer~~
21 ~~affairs.~~



.B. NO.

1 ~~"Director" means the director of commerce and consumer~~
2 ~~affairs.~~

3 ~~"Dispute resolution" means a facilitated negotiation~~
4 ~~between a mortgagor and mortgagee for the purpose of reaching an~~
5 ~~agreement for mortgage loan modification or other agreement in~~
6 ~~an attempt to avoid foreclosure or to mitigate damages if~~
7 ~~foreclosure is unavoidable.~~

8 ~~"Mortgagee" has the same meaning as the term is defined in~~
9 ~~section 667-21.~~

10 ~~"Mortgagor" has the same meaning as the term is defined in~~
11 ~~section 667-21.~~

12 ~~"Neutral" means a person who is a dispute resolution~~
13 ~~specialist assigned to facilitate the dispute resolution process~~
14 ~~required by this part.~~

15 ~~"Owner-occupant" means a person, at the time that a notice~~
16 ~~of default and intention to foreclose is served on the mortgagor~~
17 ~~under the power of sale.~~

18 ~~(1) Who owns an interest in the residential property, and~~
19 ~~the interest is encumbered by the mortgage being foreclosed, and~~

20 ~~(2) For whom the residential property is and has been the~~
21 ~~person's primary residence for a continuous period of not less~~



1 ~~than two hundred days immediately preceding the date on which~~
2 ~~the notice is served."~~]

3 SECTION 55. In codifying the new sections added by
4 sections 2 and 3 of this Act, the revisor of statutes shall
5 substitute appropriate section numbers for the letters used in
6 designating the new sections in this Act.

7 SECTION 56. Statutory material to be repealed is bracketed
8 and stricken. New statutory material is underscored.

9 SECTION 57. This Act shall take effect upon its approval;
10 provided that:

11 (1) Section 7 of this Act, amending section 607-5(a) and
12 (b), Hawaii Revised Statutes, and the amendments made
13 to section 667-53(a)(6), Hawaii Revised Statutes, in
14 section 26 of this Act, shall take effect on August
15 15, 2012;

16 (2) Section 25 of this Act, amending section 667-41,
17 Hawaii Revised Statutes, shall take effect on
18 September 1, 2012; and

19 (3) Sections 47, 48, and 49 in part IV of this Act,
20 amending sections 421J-A(h), 454M-10, and



.B. NO.

1 667-53(a)(6), Hawaii Revised Statutes, shall take
2 effect on September 30, 2014.
3

INTRODUCED BY: _____



.B. NO.

Report Title:

Mortgage Foreclosures; Homeowner Association Liens and Assessments

Description:

Implements the 2011 recommendations of the Mortgage Foreclosure Task Force to address various issues relating to the mortgage foreclosures law and related issues affecting homeowner association liens and the collection of unpaid assessments.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



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Appendix C

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Honolulu, Hawaii 96814
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RE: Hawaii State Mortgage Foreclosure Task Force

Hawaiian Community Assets (HCA) participated on the task force as the only Hawaii-based HUD housing counseling agency providing free foreclosure prevention counseling to families statewide. As the HCA representative on the Task Force since August 2011, I am submitting comments regarding the actions taken and/or recommended during my time of service.

Section 667-60: This section was identified throughout our convening as a highly contentious issue; however, Members Hirono and Zweibel were able to draft a compromise that creates clear "rules of the road" for both lenders and borrowers that will allow for effective implementation of nonjudicial foreclosures in Hawaii through the dispute resolution program and, more broadly, improve the way mortgage foreclosures are conducted in the State. Furthermore, the compromise upholds common sense consumer protections by addressing some of the most egregious violations, such as "robo-signing", committed by large, Continental United States lenders, while ensuring that typographical and other non-substantial errors are not cause for finding mortgage servicers, title insurance companies, or other entities in violation of unfair or deceptive acts or practices. The compromise, which is included in our Task Force draft bill, was supported by 13 members with 4 against and 1 abstention.

Section 667-85: As head of the Housing Counseling and Dispute Resolution Program Work Group which consisted of both Hawaii-based lender and borrower representatives, I facilitated lengthy discussion about this section and established agreement among all members of the work group to maintain the section's following language: "A neutral shall not be a necessary party to, called as a witness in, or subject to any subpoena duces tecum for the production of documents in any arbitral, judicial, or administrative proceeding that arises from or relates to the mortgage foreclosure dispute resolution program". According to work group members, this language must be maintained in order to ensure highly-qualified neutrals participate in the dispute resolution program and provide the opportunity for the program to function in the utmost effective and efficient manner for all parties involved. Work group 3 feared that without this language a number of highly-qualified neutrals who have already begun training to serve in this capacity would withdraw, leaving a vacuum filled by less qualified individuals and therefore compromising the efficiency and effectiveness of the dispute resolution program sessions.

Section 667-80: As Director of a HUD approved housing counseling agency, I have seen the Federal programs established to address our foreclosure crisis fail miserably because of a lack of process, despite the fact that clear, concise process is widely accepted by lenders, realtors, housing counseling agencies, and other industry experts as a "best practice" in assisting families achieve and sustain homeownership. Without such process for addressing our families' mortgage situations when they are on the brink of foreclosure, we willfully ignore this industry standard. This was the reason behind the Federal Deposit Insurance Corporation's (FDIC) creation of the "Modification-in-a-Box" Program. The program was established as a "comprehensive package of information to give servicers and financial institutions all of the tools necessary to implement a systematic and streamlined approach to modifying loans." It goes without saying that prior to the foreclosure crisis, servicers and financial institutions were in the business of servicing mortgage loans, NOT modifying them. The FDIC program provides a time tested process for determining the best workout options available to homeowners and lenders for conventional 30-year, fixed rate mortgages as well as adjustable-rate and interest-only mortgage loans. This standard not only provides a clear set of calculations, assumptions, and forms that can be reviewed for accuracy by borrowers, lenders, and third-party neutrals, but also provides housing counseling agencies with a highly effective tool to establish an agreement between borrowers and lenders before entering the dispute resolution program. For these reasons, it is crucial for the future success of the dispute resolution program to maintain the language in this section as written: "A dispute resolution process conducted pursuant to this part shall use the calculations, assumptions, and forms established by the Federal Deposit Insurance Corporation Loan Modification Program Guide as set out on the Federal Deposit Insurance Corporation's publicly accessible website or a different program or process if agreed to by both parties and the neutral." Please note the language allows for the use of a different program or process should it be mutually agreeable among borrowers, lenders, and the neutral, thus allowing for flexibility to pursue workout options outside of the standardized process established by the FDIC program.

- Jeff Gilbreath, Executive Director

"Building Foundations for Future Generations"

HAWAII FINANCIAL SERVICES ASSOCIATION
c/o Marvin S.C. Dang, Attorney-at-Law
P.O. Box 4109
Honolulu, Hawaii 96812-4109
Telephone No.: (808) 521-8521
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December 14, 2011

COMMENTS OF THE HAWAII FINANCIAL SERVICES ASSOCIATION
ABOUT THE RECOMMENDATIONS OF THE MORTGAGE FORECLOSURE TASK FORCE

Act 162 (2010) designated the Hawaii Financial Services Association ("HSFA") as one of the organizations to be represented on the Hawaii Mortgage Foreclosure Task Force ("Task Force"). The HFSA is a trade association for Hawaii's consumer credit industry. Its members include financial services loan companies, financial institutions, and other mortgage lenders. As the HFSA's representative on the Task Force since July, 2010, I am submitting these comments about the recommendations in the Task Force's Report to the Legislature for the 2012 Session.

1. The Task Force members collectively devoted innumerable hours in investigative groups and at Task Force meetings to produce the recommendations in the Report. These recommendations, if adopted by the Legislature, could improve Hawaii's foreclosure process and will change various provisions in Act 48 (May 5, 2011) which is Hawaii's new mortgage foreclosure law. I agree conceptually with most of the Task Force's recommendations.

2. The Task Force attempted to correct one of the more problematic provisions in Act 48. Hawaii Revised Statutes ("HRS") Sec. 667-60 states: "Any foreclosing mortgagee who violates this chapter shall have committed an unfair or deceptive act or practice under section 480-2." It unnecessarily subjects lenders to the liabilities in HRS Sec. 480-2 for even immaterial and nonsubstantive violations of HRS Chapter 667 (Mortgage Foreclosures). HRS Sec. 667-60 has been cited as one of the reasons why lenders decided after May 5, 2011 to foreclose judicially rather than non-judicially. This section should be repealed. Instead, the Task Force is recommending that Sec. 667-60 be changed to: (a) create a "laundry list" of 21 violations which would be unfair or deceptive acts or practices (including 7 items in Sec. 667-56 and 4 items related to the Mortgage Foreclosure Dispute Resolution Program), (b) create 17 violations which could result in a non-judicial foreclosure sale being voided, and (c) allow actions to void the foreclosure sale to be filed up to 6 months after an affidavit of the sale is recorded. I disagree with the approach taken by this recommendation. This recommendation is arguably unwarranted and overly broad. It could effectively discourage lenders from foreclosing non-judicially.

3. Because of irreconcilable differences among the Task Force members, the Task Force was unable to make recommendations to correct some of the other problematic provisions in Act 48, including, but not limited to:

a. HRS Sec. 667-85, which reads in part: "A neutral shall not be a necessary party to, called as a witness in, or subject to any subpoena duces tecum for the production of documents in any arbitral, judicial, or administrative proceeding that arises from or relates to the mortgage foreclosure dispute resolution program." This sentence should be repealed. A neutral in the Mortgage Foreclosure Dispute Resolution Program should not be immune from testifying if the neutral makes findings or determinations which subject a lender or a borrower to sanctions.

b. HRS Sec. 667-59, which provides in part: "A foreclosing mortgagee shall be bound by all agreements, obligations, representations, or inducements made on its behalf by its agents including but not limited to its employees, representatives, mortgage servicers, or persons authorized by a foreclosing mortgagee or lender pursuant to an affiliate statement recorded in the bureau of conveyances pursuant to section 667-58." A foreclosing mortgagee should only be bound by "written" rather than alleged oral agreements, obligations, representations, or inducements.

4. The Task Force split evenly on (and accordingly did not adopt) my motion that the Task Force recommend to the Legislature that "*mortgagees [lenders] be allowed to continue to have the option to initiate non-judicial foreclosure actions under HRS §667-5 of Part I of HRS Chapter 667 when the moratorium in Act 48 (Section 40) ends on July 1, 2012.*" The Part I non-judicial foreclosure process should continue to exist as a viable alternative to the Part II non-judicial foreclosure process now that Act 48 strengthened consumer protections in Part I. In this regard, Act 48: (a) requires that Part I foreclosure notices be served at least 21 days before the auction date, (b) specifies that the service of the notice be in the same manner as serving civil complaints, (c) enables an owner-occupant to convert a Part I non-judicial foreclosure to a judicial foreclosure or to elect dispute resolution under certain circumstances, and (d) prohibits a lender in a Part I non-judicial foreclosure from pursuing a deficiency against certain owner-occupants.

5. Because of the increasing costs being charged by certain newspapers of daily circulation in Hawaii to publish notices of judicial and non-judicial foreclosure auctions, the Legislature should consider the statutory alternative of allowing these notices to be posted on a centralized internet website maintained by a state government agency.

MARVIN S.C. DANG for Hawaii Financial Services Association

HAWAII BANKERS ASSOCIATION

Statement Regarding Amendments to Act 48 Recommended by the Mortgage Foreclosure Task Force

December 14, 2011

The Hawaii Bankers Association (HBA) appreciates the opportunity to participate in the 2011 Mortgage Foreclosure Task Force. This year's meetings focused on making recommendations to improve Act 48 following its enactment earlier this year. HBA participated in the Act 48 Investigative Group and recommended revisions to address issues raised by both consumer and lender groups with the goal of making necessary revisions to Act 48 to remove obstacles, impediments and risks to participate in the non-judicial foreclosure process. Without achieving such goal, the government-sponsored enterprises (now effectively owned by the US Government), who own or guarantee the vast majority of Hawaii's residential mortgage loans, will not participate in the non-judicial foreclosure process.

Numerous revisions to Act 48 were recommended by HBA which were not included in the final recommended revisions approved by the Task Force. Nevertheless, HBA continues to believe such revisions are necessary to allow Act 48 to be implemented and used correctly and effectively. In order for the Legislature and any reviewer of the Task Force's recommended revisions to get a complete understanding of the divergent views expressed at the Task Force and Investigative Group meetings, HBA presents this Statement.

1. Unfair and Deceptive Act or Practice. Section 667-AC (new Section 667-60) makes any violation of Chapter 667 by a foreclosing mortgagee an unfair or deceptive act or practice (UDAP) under Section 480-2. With this statute, the proof requirement that a claimant must establish that an act was "unfair and deceptive" is removed. Any violation of Chapter 667, no matter how miniscule, becomes an unfair and deceptive act or practice entitling the claimant to certain remedies and damages, the worst of which, under Section 480-12, is the voiding of the offending contract or agreement. Additionally, treble damages and attorneys' fees and costs for the claimant under Section 480-13, and the imposition of a fine by the State for every day that a violation is found under Section 480-3.1, makes it extremely unlikely that any foreclosing lender will risk the penal damages imposed by Act 48. If the Legislature intended to end all non-judicial foreclosures, this has been accomplished. If the Legislature, however, recognizes that there is a place for non-judicial foreclosures in certain situations, Section 667-AC must be repealed. The Task Force, over lender groups' objection, did pass a proposed amendment to Section 667-AC that attempts to alleviate some lender concerns, however, many of the items still considered UDAP acts are vague, ambiguous and ultimately impossible to comply with unless clarity is given. Additionally, there is a 180-day period after the sale for the foreclosed borrower to bring any claims to overturn the sale. Such a long period, which essentially amounts to a "waiting" period, will chill potential bidding from the public at large, because, among other reasons, the waiting period will make it impossible to obtain financing, reducing the foreclosure price as only lenders or cash buyers will be able to bid. Other measures are available to ensure compliance with Chapter 667. If Section 667-AC is permitted to remain, in whatever form, the goals and remedial purposes of Act 48 will remain thwarted and unused.
2. Prohibited Conduct. Section 667-Y (new Section 667-56) prohibits a foreclosing mortgagee from engaging in certain enumerated practices. While items (1) - (4) of the section are clear, items (5) - (7) are vague, ambiguous and ripe for unknowing violation. Item (5) gives a potential short sale priority over the foreclosure so long as the sales price is at least 5% greater than the foreclosure sale price. Recognizing that a sales commission of 6% on the short sale would wipe out the entire 5% increased sales price, the Task Force agreed to increase this percentage to at least 10%. However, this does not address other conditions in the short sale that might have prevented the lender from approving the short sale, such as payment of other debts of the seller that effectively reduce the amount of the payoff to the lender. This effectively places unsecured creditors ahead of the foreclosing lender and other lien holders. This should not be acceptable and the foreclosing lender should not be forced to accept it. As for items (6) & (7), there is no definition to determine what are "bona fide loan modification negotiations" or "being evaluated for consideration for entry into a federal loan modification program." Moreover, in either instance, if a borrower proposes numerous loan modifications or applications for entry into a loan modification program just before closing of a foreclosure sale, must a foreclosing lender continue to postpone the closing of the sale to deal with each proposal or application? Section 667-Y must be amended to provide clarity to these items.
3. Oral Representations. Section 667-AB (new Section 667-59) binds a foreclosing mortgagee to all agreements, obligations, representation or inducements made by its agents, employees, servicers, etc. Besides the proof problems and violation of the parol evidence rule, this section is counter to the express provisions in virtually all notes and mortgages which require any revision to the existing terms to be in writing. Additionally, this section is potentially ripe for abuse by savvy borrowers who could elicit representations from unsuspecting employees of the lender, unbeknownst to the responsible employee of the lender handling the loan.
4. Authority. Section 667-J (new Section 667-80) must be amended to permit mainland lenders to attend during reasonable business hours where they are situated. Additionally, provision must be made to accommodate situations where approval of a third person is required. For example, (1) where mortgage insurance is in place, the insurer will be required to approve the modification in addition to the lender, or (2) a loan subject to HAMP.
5. Public Information Disclosure. Existing Section 667-41, while improved by the proposed amendment approved by the Task Force, still potentially applies to certain commercial loans. HBA doubts that the Legislature intended this informational notice to apply to commercial applicants and requests that the Legislature, in addition to adopting the proposed revisions made the Task Force, also enact a further amendment to specify that such notice requirement applies only to consumer, residential mortgage loans.

2011 Mortgage Foreclosure Task Force

Report on behalf of the Hawaii Credit Union League

The Hawaii Credit Union League represents 83 federal credit unions in the State of Hawaii. Our credit unions are not-for-profit, member-owned financial cooperatives. Sixty-one of our credit unions write mortgage loans and are concerned about some of the provisions in the recently amended Chapter 667. The League respectfully submits the following comments concerning the draft report of the 2011 Mortgage Foreclosure Task Force.

1. **§667-56: Prohibited practices:** The League seeks repeal of §§667-56(5), -56(6) and -56(7). In all three subsections, the phrase "completing nonjudicial foreclosure proceedings" is ambiguous. It is unclear whether that period ends with: recordation of an affidavit of sale; recordation of a conveyance document to the foreclosure sale purchaser; or recovery of possession from the foreclosed mortgagor of the foreclosed property by the purchaser.

(a) Section 667-56(5) also ignores that a lender or servicer may not have notice of a pending short sale escrow at the time of completion of a nonjudicial foreclosure sale.

(b) Section 667-56(6) also uses the vague phrase "bona fide loan modification negotiations." If a mortgagor has been denied a loan modification, can the mortgagor then reapply seriatim and maintain the mortgagor's status as pending bona fide loan modification negotiations? Does the time reset each time a mortgagor submits a loan modification request notwithstanding the requests are not materially different than one already denied?

(c) Section 667-56(7) also is too vague because it fails to define with clarity when a mortgagor is being evaluated and when a mortgagor is no longer being evaluated for a loan modification program. Section 667-56(7) presumes that there will be timely-issued documentation that a borrower is no longer being evaluated when that is not always the case.

2. **§667-58(a):** As worded, the subsection implies credit unions must file affiliate statements naming their own officers. The League suggests it be amended to begin as follows:

Any notices made pursuant to this chapter may be issued only by the foreclosing mortgagee or lender, or by a person identified by the foreclosing mortgagee or lender in an affiliate statement signed by that foreclosing mortgagee or lender and recorded

3. **§667-59:** This section, captioned, "Actions and Communications with the Mortgagor in Connection with a Foreclosure," should be amended to include the words "in writing," in the first sentence so that it will read as follows:

"A foreclosing mortgagee shall be bound by all agreements, obligations, representations, or inducements to the mortgagor, which are made in writing by its agents, including but not limited to its"

4. **§667-60:** This section should be repealed. Many Hawaii credit unions are too small to survive even one successful attack under this section. Lenders have always been subject to Chapter 480. Making virtually any technical mistake in the administration of a foreclosure an "unfair and deceptive act or practice" will defeat the intent of the drafters of Act 48, because no rational lender will initiate the complicated nonjudicial foreclosure process. As a result none of those lenders and their loans will go through the dispute resolution process.

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Although I am an employee of Title Guaranty of Hawaii, Inc. and President of the Hawaii Land Title Association, I submit this statement individually and not on behalf of these organizations or any title insurer. From my perspective, the biggest issue facing the Mortgage Foreclosure Task Force during this second year of its deliberations was new section 667-60, the so-called unfair and deceptive practices section of Chapter 667. As pointed out by the representatives of the lenders group, Act 48 increased both the length of the nonjudicial foreclosure process and also the potential liability, and on balance it made the judicial foreclosure remedy the more prudent choice. From a title insurance perspective, because buyers of foreclosure properties and title insurers primarily rely on a search of the public record to determine whether title to property purchased from a foreclosure is insurable, the introduction of many more factors on which an avoidance of a nonjudicial foreclosure sale could be based substantially increased the risk of a claim against the buyer and its title insurer. Even before Act 48 the risk of insuring a nonjudicial foreclosure sale was not small; title insurers paid hundreds of thousands of dollars on defense costs and losses. Under Act 48, some of the specified prohibited practices – for example, the prohibition against completing a nonjudicial foreclosure during bona fide loan modification negotiations – are virtually impossible to independently verify in a search of the public records.

A buyer of the foreclosed property might therefore be subject to losing his or her title long after they have moved in and invested money in improving it. While a title policy can be issued, the steps needed to verify compliance with Act 48 are prohibitive as a practical matter, and the risk of a challenge to the sale for unverifiable violations would likely be excepted from coverage and would fall on the buyer.

The recommendation to amend Section 667-60 as submitted by the Task Force has the goals of providing more specificity as to what violations of Chapter 667 constitute unfair and deceptive practices, and setting a time limitation within which challenges to the foreclosure sale must be brought. This proposal is a compromise between the competing public policies of consumer protection for the foreclosed borrower and stability of land titles for the purchaser of the property. Not all parts of the real estate industry including some in the field of title insurance will favor this proposal, but it was felt that this was a helpful movement toward encouraging the use of the nonjudicial foreclosure remedy. Still, unless further changes are made to section 667-60, it appears that judicial foreclosures will remain the preferred course of action.

COMMENTS OF GEORGE J. ZWEIBEL¹

1. Unfair or deceptive act or practice ("UDAP"). For borrowers, §667-60 is one of the most important provisions in Hawaii's foreclosure law. Wrongful foreclosure has devastating consequences for borrowers and their families. Declaring that a chapter 667 violation constitutes a UDAP under §480-2 deters violations and provides meaningful remedies if they occur, and helps ensure that important borrower rights – including dispute resolution and conversion of nonjudicial to judicial foreclosures – are honored. Lenders state that §667-60 may result in the imposition of severe penalties for "miniscule" violations of chapter 667. In response, the Task Force is recommending various "safe harbors," e.g., providing a public information notice for complying with §667-41 and clarifying where foreclosure notices must be published. The Task Force also recommends limiting the general applicability of §667-60 to chapter 667 violations most likely to result in wrongful foreclosure and/or financial harm, limiting the avoidance of a transfer of title under §480-12 to the most serious of these violations, and limiting to 180 days the time in which a borrower can file a court action challenging the transfer of title in a foreclosure. The recommended revision of §667-60 reflects substantial compromise and strikes a fair and reasonable balance between lenders' concerns and the need to protect borrowers from real harm caused by chapter 667 violations.

2. Use of FDIC loan modification guidelines in foreclosure dispute resolution. Section 667-80(e) mandates use of the calculations, assumptions and forms established by the Federal Deposit Insurance Corporation loan modification program (or a different program or process if the parties and neutral agree). The Task Force considered but rejected recommending removal of the specific reference to the FDIC guidelines, because that program is widely recognized as the most objective, transparent and verifiable loan modification program in widespread use. Retention of the FDIC language in §667-80(e) will help avoid mistakes and ensure that the "net present value" calculation accurately determines whether it is more beneficial for the loan holder to modify the loan or to foreclose. Conversely, its deletion would seriously undercut the dispute resolution program's ability to achieve its intended goal.

3. Sunset of dispute resolution program. Under Act 48, the dispute resolution program currently is scheduled to end on September 30, 2014. Although the program has been available since October 1, 2011, mortgagees have stopped doing nonjudicial foreclosures in Hawaii, claiming they face undue risk of liability under §667-60. (As noted above, several Task Force recommendations address this concern.) Consequently, mortgagees' decision to stop doing nonjudicial foreclosures will have reduced, probably to considerably less than the intended three years, the period during which dispute resolution will actually be available. On the other hand, by facilitating negotiations between owner-occupants and mortgagees to determine whether a loan modification or other agreement avoiding nonjudicial foreclosure is possible, the dispute resolution program will benefit homeowners and loan holders alike for as long as it continues to exist. For these reasons, the sunset provision in Act 48 should be repealed.

4. Oral misrepresentations. Lenders wish to amend §667-59 so that foreclosing mortgagees would be bound only by *written* agreements and representations made on their behalf. Government consumer protection law enforcement agencies and private consumer attorneys have long recognized that most misrepresentations are made *orally* and not put into writing, so they can later be denied. Contrary to general rules of evidence, proof of oral misrepresentations usually is permitted to establish UDAP or fraud claims. The change lenders propose would eliminate mortgagees' legal responsibility for all oral misrepresentations made by their representatives.

5. Completing foreclosure during consideration or after approval of loan modification. Some lenders wish to repeal §667-56(6) and (7), which prohibit completing a foreclosure during loan modification negotiations or after acceptance into a federal loan modification program. There have been many reports of instances in which large mainland servicers have completed foreclosures while loan modifications were being considered or while trial or permanent modifications were in effect. Retention of §667-56(6) and (7) is essential to protect Hawaii homeowners from such abuses and harm they cause.

¹ I am a Hawaii Island attorney and have represented borrowers throughout the state. Earlier, I was a regional director and staff attorney at the Federal Trade Commission and a legal aid consumer lawyer.