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S.B. No. 767

A BILL TO BE ENTITLED

AN ACT

relating to the regulation of certain residential mortgage  
foreclosure consulting services; providing a criminal penalty.

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

SECTION 1. Title 2, Business & Commerce Code, is amended by  
adding Chapter 21 to read as follows:

CHAPTER 21. REGULATION OF CERTAIN RESIDENTIAL FORECLOSURE

CONSULTING SERVICES

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 21.001. DEFINITIONS. (a) In this chapter:

(1) "Foreclosure consultant" means a person who makes  
a solicitation, representation, or offer to a homeowner to perform  
for compensation, or who for compensation performs, a service that  
the person represents will do any of the following:

(A) prevent or postpone a foreclosure sale;

(B) obtain a forbearance from:

(i) a mortgagee;

(ii) a beneficiary of a deed of trust; or

(iii) another person who holds a lien  
secured by the residence in foreclosure;

(C) assist the homeowner:

(i) to cure the default giving rise to the  
foreclosure action; or

(ii) to exercise the right of reinstatement

1 of the homeowner's obligation secured by the residence in  
2 foreclosure;

3 (D) obtain an extension of the period within  
4 which the homeowner may reinstate the homeowner's obligation  
5 secured by the residence in foreclosure;

6 (E) obtain a waiver of an acceleration clause  
7 contained in a promissory note or contract secured by a deed of  
8 trust or mortgage on a residence in foreclosure or contained in the  
9 deed of trust or mortgage;

10 (F) assist the homeowner to obtain a loan or  
11 advance of funds to prevent foreclosure;

12 (G) avoid or ameliorate the impairment of the  
13 homeowner's credit resulting from the recording of a notice of  
14 default or the conduct of a foreclosure sale;

15 (H) save the homeowner's residence from  
16 foreclosure; or

17 (I) assist the homeowner in obtaining excess  
18 proceeds from a foreclosure sale of the homeowner's residence.

19 (2) "Homeowner" means a person that holds record title  
20 to a residence in foreclosure at the time the foreclosure action has  
21 been commenced.

22 (3) "Mortgage servicer" has the meaning assigned by  
23 Section 51.0001, Property Code.

24 (4) "Residence in foreclosure" means residential real  
25 property consisting of not more than four single-family dwelling  
26 units, at least one of which is occupied as the property owner's  
27 principal place of residence, and against which a foreclosure

1 action has been commenced.

2 (b) For purposes of Subsections (a)(2) and (4), a  
3 foreclosure action has been commenced if:

4 (1) notice of sale has been filed under Section  
5 51.002(b), Property Code; or

6 (2) a judicial foreclosure action has been commenced.  
7 Sec. 21.002. EXCEPTION FROM APPLICABILITY OF CHAPTER.

8 (a) Except as provided by Subsection (b), this chapter does not  
9 apply to the following persons that perform foreclosure consulting  
10 services:

11 (1) an attorney admitted to practice in this state who  
12 performs those services in relation to the attorney's  
13 attorney-client relationship with a homeowner or the beneficiary of  
14 the lien being foreclosed;

15 (2) a person that holds or is owed an obligation  
16 secured by a lien on a residence in foreclosure if the person  
17 performs those services in connection with the obligation or lien;

18 (3) a mortgage servicer of an obligation secured by a  
19 lien on a residence in foreclosure if the servicer performs those  
20 services in connection with the obligation or lien;

21 (4) a person that regulates banks, trust companies,  
22 savings and loan associations, credit unions, or insurance  
23 companies under the laws of this state or the United States if the  
24 person performs those services as part of the person's normal  
25 business activities;

26 (5) an affiliate of a person described by Subdivision  
27 (4) if the affiliate performs those services as part of the

1 affiliate's normal business activities;

2 (6) a judgment creditor of the homeowner of the  
3 residence in foreclosure, if:

4 (A) the legal action giving rise to the judgment  
5 was commenced before the notice of default required under Section  
6 5.064, 5.066, or 51.002(d), Property Code; and

7 (B) the judgment is recorded in the real property  
8 records of the clerk of the county where the residence in  
9 foreclosure is located;

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

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

17 (9) a person licensed or registered under Chapter 156,  
18 Finance Code, if the person is engaging in an activity for which the  
19 person is licensed or registered under that chapter;

20 (10) a person licensed or registered under Chapter  
21 157, Finance Code, if the person is engaging in an activity for  
22 which the person is licensed or registered under that chapter;

23 (11) a nonprofit organization that provides solely  
24 counseling or advice to homeowners who have a residence in  
25 foreclosure or have defaulted on their home loans, unless the  
26 organization is an associate of the foreclosure consultant;

27 (12) a depository institution, as defined by Section

1 31.002, Finance Code, subject to regulation or supervision by a  
2 state or federal regulatory agency; or

3 (13) an affiliate or subsidiary of a depository  
4 institution described by Subdivision (12).

5 (b) This chapter applies to a person described by Subsection  
6 (a) if the person is providing foreclosure consulting services to a  
7 homeowner designed or intended to transfer title, directly or  
8 indirectly, to a residence in foreclosure to that person or the  
9 person's associate, unless the person is a mortgagee or mortgage  
10 servicer that negotiates with or accepts from the mortgagor a deed  
11 in lieu of foreclosure for the benefit of the mortgagee.

12 Sec. 21.003. CONFLICT WITH OTHER LAW. To the extent of a  
13 conflict between this chapter and Chapter 393, Finance Code, this  
14 chapter controls.

15 [Sections 21.004-21.050 reserved for expansion]

16 SUBCHAPTER B. CONTRACT FOR SERVICES

17 Sec. 21.051. FORM AND TERMS OF CONTRACT. Each contract for  
18 the purchase of the services of a foreclosure consultant by a  
19 homeowner of a residence in foreclosure must be in writing, dated,  
20 and signed by each homeowner and the foreclosure consultant.

21 Sec. 21.052. REQUIRED DISCLOSURE. Before entering into a  
22 contract with a homeowner of a residence in foreclosure for the  
23 purchase of the services of a foreclosure consultant, the  
24 foreclosure consultant shall provide the homeowner written notice  
25 stating the following, in at least 14-point boldfaced type:

26 NOTICE REQUIRED BY TEXAS LAW

27 \_\_\_\_\_ (Name) or an associate of \_\_\_\_\_ (Name) cannot ask you to

sign or have you sign any document that transfers any interest in your home or property to \_\_\_\_\_ (Name) or \_\_\_\_\_ (Name's) associate.

\_\_\_\_\_ (Name) or \_\_\_\_\_ (Name's) associate cannot guarantee you that they will be able to refinance your home or arrange for you to keep your home.

You may, at any time, cancel or rescind this contract, without penalty of any kind.

If you want to cancel this contract, mail or deliver a signed and dated copy of this notice of cancellation or rescission, or any other written notice, indicating your intent to cancel or rescind to \_\_\_\_\_ (Name and address of foreclosure consultant) at \_\_\_\_\_ (Address of foreclosure consultant, including facsimile and electronic mail address).

As part of any cancellation or rescission, you (the homeowner) must repay any money spent on your behalf by \_\_\_\_\_ (Name of foreclosure consultant) prior to receipt of this notice and as a result of this agreement, within 60 days, along with interest calculated at the rate of eight percent per year.

[Sections 21.053-21.100 reserved for expansion]

SUBCHAPTER C. LIMITATIONS, PROHIBITIONS, AND DUTIES REGARDING SERVICES

Sec. 21.101. RESTRICTIONS ON CHARGE OR RECEIPT OF CONSIDERATION. A foreclosure consultant may not:

(1) charge or receive compensation until the foreclosure consultant has fully performed each service the foreclosure consultant has contracted to perform or has represented

1 the foreclosure consultant can or will perform unless the  
2 foreclosure consultant has obtained a surety bond or established  
3 and maintained a surety account for each location at which the  
4 foreclosure consultant conducts business in the manner that  
5 Subchapter E, Chapter 393, Finance Code, provides for credit  
6 services organizations; or

7 (2) receive any consideration from a third party in  
8 connection with foreclosure consulting services provided to the  
9 homeowner of a residence in foreclosure unless the consideration is  
10 fully disclosed in writing to the homeowner.

11 Sec. 21.102. PROHIBITED CONDUCT. A foreclosure consultant  
12 may not:

13 (1) take any power of attorney from a homeowner for any  
14 purpose other than to inspect documents;

15 (2) for purposes of securing payment of compensation,  
16 acquire an interest, directly or indirectly, in the real or  
17 personal property of the homeowner of a residence in foreclosure  
18 with whom the foreclosure consultant has contracted to perform  
19 services; or

20 (3) take an assignment of wages to secure payment of  
21 compensation.

22 Sec. 21.103. RETENTION OF RECORDS. (a) A foreclosure  
23 consultant shall keep each record and document, including the  
24 foreclosure consultant contract, related to foreclosure consulting  
25 services performed on behalf of a homeowner.

26 (b) A foreclosure consultant shall retain the records  
27 described by Subsection (a) until at least the third anniversary of

1 the day the foreclosure consultant contract entered into by the  
2 consultant and the homeowner was terminated or concluded.

3 [Sections 21.104-21.150 reserved for expansion]

4 SUBCHAPTER D. ENFORCEMENT

5 Sec. 21.151. CRIMINAL PENALTY. (a) A person commits an  
6 offense if the person violates this chapter.

7 (b) An offense under this chapter is a Class C misdemeanor.

8 Sec. 21.152. DECEPTIVE TRADE PRACTICE. A violation of this  
9 chapter is a false, misleading, or deceptive act or practice  
10 actionable under Subchapter E, Chapter 17.

11 SECTION 2. The changes in law made by this Act apply only to  
12 a contract entered into on or after the effective date of this Act.  
13 A contract entered into before the effective date of this Act is  
14 governed by the law in effect on the date the contract was entered  
15 into, and the former law is continued in effect for that purpose.

16 SECTION 3. This Act takes effect September 1, 2011.