

The HBOR applies to homeowners who occupy a one to four dwelling unit home or a landlord who owns no more than three residential real properties, or one or more landlords who together own no more than three residential real properties and their tenant is unable to pay rent due to a reduction in income resulting from the novel coronavirus. If the HBOR applies, the lender is required to exercise due diligence to contact the homeowner(s) before commencing foreclosure. The advance contact is to provide the homeowner with information regarding the alternatives or options that may be available to avoid foreclosure, including referring the homeowner to independent counseling services (who are often HUD approved).

### **Event 2: Notice of Default (NOD)**

If you and your lender or its servicing agent cannot agree on alternative mortgage loan terms to avoid foreclosure (a modification or restructuring), your lender or your servicing agent can direct the trustee to record a NOD against your home *provided you have been contacted a minimum of 30 days in advance of the recording in the manner referred to in Event 1*. If a complete loss mitigation application is submitted before the lender or its servicing agent has made the first filing to initiate foreclosure, the foreclosure process is automatically stayed unless: (1) the lender or its servicing agent informs the borrower that she is not eligible for any loss mitigation option; (2) appeals to the former have been exhausted; (3) the borrower has rejected every loss mitigation offer provided by the lender or its servicing agent; or (4) the borrower is unable to comply with the terms of the agreed-upon loss mitigation option (collectively, the “Loss Mitigation Stay Process”). The NOD may be recorded if you have not submitted a complete application for a first loan modification offered by or through the lender or its servicing agent, or if you have submitted a complete loan application and a final written decision denying your eligibility for a modification has been issued. The recording of the NOD officially begins the foreclosure procedure. You will receive a copy of the NOD by certified postage prepaid mail.

Whether a lender can issue a NOD is dependent upon a “power of sale” clause included within the terms of your mortgage loan. California mortgages and deeds of trust generally include power of sale clauses which contractually authorize lenders or their servicing agents to cause the foreclosure of defaulted loans and to sell the security properties to recover the balances owing on the mortgage loans and otherwise seek to limit their losses (if any).

“Power of sale” clauses granting authority to the named or substituted trustee to foreclose the security property upon the instruction of the lender are governed by California’s procedural law arising from the contract between lenders and homeowners (the mortgage or deed of trust). Lenders generally do not require court supervision and approval for non-judicial foreclosure sales and, therefore, are able to proceed quickly with state-mandated timelines (included within the procedural law) to complete the foreclosure process.

In the event a mortgage or a deed of trust does not include a “power of sale” clause, a lender will sue the defaulting homeowner to obtain a court-ordered judicial foreclosure. In the past, California lenders rarely pursued judicial foreclosures except in connection with non-purchase money loans funded by financial depository institutions or lenders licensed under a lending law (institutional lenders), or by private investors/lenders (whose loan documents typically are not as detailed and comprehensive as those prepared by institutional lenders).

The suit to judicially foreclose may include a claim for a “deficiency judgment” under which the homeowner may be subject to a claim for the shortage of money (if any) between the security property’s fair market value and the balance of the loan. Deficiency judgments are not permitted when the mortgage loan on your home meets the definition of a purchase money loan (e.g., a loan made by the lender at the time you purchased and agreed to occupy your home) and also are not permitted when a non-judicial foreclosure occurs of your mortgage loan.



Deficiency judgments are not permitted (except for the amount of new principal advanced) even when the loan was made for the purpose of refinancing the purchase money loan taken out at the time you acquired your home. Judicial foreclosures take longer and cost more money than non-judicial foreclosures. Since the availability of deficiency judgments have been restructured under current law, the decision by the lender or its servicing agent to pursue a non-judicial or judicial foreclosure will, in the future, be carefully considered.

California is a “one-action” rule state wherein the lender must carefully choose which single action it will take against the defaulting homeowner. Should the lender conclude a non-judicial foreclosure out of court under the authority of the “power of sale” clause, the lender has elected the non-judicial foreclosure procedure as its remedy to foreclose the homeowner’s interest in the security property.

Should the non-judicial foreclosure sale result in an amount to be paid to the lender less than the money owed on the loan, the lender is prohibited from suing the homeowner for a deficiency judgment on the mortgage, but may still be able to file an action in court for fraud or to make a claim against a guarantor. While the non-judicial foreclosure sale does not constitute a form of action limiting other available judicial remedies under the “one form of action” rule, bidding on the property at the time of the non-judicial foreclosure sale waives most claims against the homeowner (excepting fraud which may be subject to dollar limits or claims for waste), or claims against third parties.

To protect itself from such a shortfall, a lender will often credit bid the outstanding balance it is owed with the hope a third party will outbid the lender and, as a result, the lender can “walk away” with full payment in cash of the debt represented by the mortgage loan. When the lender is the successful bidder (in the absence of a third-party bidder), the security property becomes known as a lender-held REO (Real Estate Owned), which it then hopes to sell on the open real estate market.

