

lender on such a loan may be subject to specified civil remedies that are available to the consumer for willful violations of the law. Also, certain unlawful loan terms, such as balloon payments or prepayment penalties, may be rendered unenforceable. [California Financial Code Sections 4970 through 4979.8]

6. Loan servicing provisions, authority and compensation

In the case of “whole” promissory notes, lenders and note holders may decide whether to handle the loan servicing themselves or authorize by written agreement a servicing agent (i.e., a person licensed as a real estate broker or a person exempt from that license requirement). In contrast, a servicing agent must be retained/authorized for a transaction which falls under the multi-lender law. See Business and Professions Code Section 10238(k).

Loan servicing includes collecting payments from borrowers, disbursing payments to lenders or note holders, mailing appropriate notices, monitoring the status of senior liens and encumbrances, maintaining adequate insurance coverage(s), and coordinating foreclosure proceedings.

A servicing agreement must provide that payments received are to be immediately deposited into a client trust account and forwarded to the lender(s) or note holder(s) within 25 days after the agent receives them. The servicing agreement should identify the person who has the authority to instruct the trustee under the deed of trust to proceed with and record an NOD or an NOS and should further identify whether that authority vests in the servicing agent or is retained by the lenders or note holders. Also, provisions should be included requiring the servicing agent to: record requests for notices of delinquency (if applicable) and requests for

notices of default from senior lienors; notify you within 15 days of recording of any NOD and/or NOS; notify you within 15 days of receipt of any payment equal to or greater than five monthly payments; and notify you within 15 days of the day upon which any installment becomes delinquent for over 30 days. The servicing agent is also required to provide certain accountings to you detailing the principal balance at the end of each year and the collections and disbursements received and made during each year.

Many MLBs will request that the original promissory note and deed of trust be delivered to the servicing agent (who may be the MLB) to be held on behalf of the lenders or note holders during the term of the servicing agreement.

Note: It is important that the original promissory note and deed of trust together with any applicable assignments or endorsements be delivered first to you or to an independent custodian on your behalf (or on the behalf of all of the note holders) prior to the delivery of these documents to the servicing agent (who should provide you with a written receipt).

For multi-lender transactions, the servicing agreement must also require that the servicing agent's trust account(s) be inspected at three-month intervals by a CPA (with follow-up reports to the servicing agent and the Real Estate Commissioner) if:

- The total of payments due in any three consecutive months exceeds \$125,000.00; or
- The number of persons entitled to payments exceeds 120.

The servicing agreement should set forth the servicing agent's compensation. Many MLBs who service loans retain a portion of the interest rate being paid by the borrower on promissory notes being serviced. The servicing agreement may

also permit the MLB to retain the late charges and/or prepayment penalties as consideration for loan servicing activities.

Finally, the servicing agreement should describe how and under what circumstances you or the servicing agent may terminate the loan servicing agency. For example, the provision regarding termination should require written notification, a minimum notice period (e.g., 30 days), the signature of all or a majority of the lenders or note holders, and/or the payment of a cancellation fee (**liquidated damages**).

California law does not allow the advancing of funds by an MLB for payments that otherwise should have been paid or tendered by the borrower without a permit from the DOC as part of an issuer's plan. Accordingly, an MLB may not represent nor imply in any way that he or she will advance payments (funds) to you whether or not the borrower has performed, or that the MLB will advance payments to senior lienors to protect your **investment**.

MLBs do have limited authority to make advances to senior lienors to protect your trust deed **investment** provided that you receive written notice within 10 days of the date of the advance and the notice includes the following:

- 1) The date and the amount of payment;
- 2) The name of the person to whom the payment has been made;
- 3) The source of the funds used for the payment;
and
- 4) The reason for making the advance payment. Unless an MLB has received a special permit from the DBO (depending upon the activity being authorized), an MLB may not in any way guarantee your investment or imply that your investment is guaranteed. The risk of the investment is yours.