

COMMONWEALTH OF VIRGINIA

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VIRGINIA HOUSING COMMISSION

Meeting Summary

Mortgage Sub-Work Group 6th Floor Speaker's Conference Room, General Assembly Building July 19, 2011, 1:00 P.M.

Members present: Delegate Daniel Marshall, Senator John Watkins, Delegate Glenn Oder, Judson McKellar, Joe Face, Jay Spear, Pia Trigiani, Nick Kyrus, Susan Hancock, Bill Ernst, Mel Tull, Steven Deluca, Lindsay Lankford, Eddie Desch, Matt Bruning, Edward Miller, Duke De Haas, Steve Baugher, Alexander Macaulay, and Connie Chamberlin

Staff present: Elizabeth Palen and Beth Jamerson

I. Welcome and Call to Order

- **Delegate Daniel Marshall, Chair**
 - The meeting was called to order at 1:04 p.m.
 - Delegate Marshall asked for an update on the Secure and Fair Enforcement for Mortgage Licensing (SAFE) Act.
- **Joe Face; Commissioner of Financial Institutions, Virginia State Corporation Commission (SCC)**
 - In the licensing and registration of mortgage loan originators, as of July 18, the SCC has received 9,247 mortgage lender applications. The SCC had been expecting a maximum of 7,000 applications. Of the applications received, the SCC has approved 6,339, denied 57, and 2,389 applications have been withdrawn or abandoned. There are still 462 applications pending; approximately half of those applicants have provisional licenses. Since July 1, the SCC has no longer been able to issue provisional licenses. As of July 18, the SCC has licensed and registered 5,989 mortgage loan originators in Virginia.
 - The Department of Housing and Urban Development (HUD) recently issued a ruling on the SAFE Act. The SCC was about to issue a proposed regulation to modify existing regulations and update the new law when HUD issued its ruling. As a result, the SCC decided to postpone issuing its proposed regulation until it has had an opportunity to thoroughly analyze the HUD ruling to ensure the proposed regulation will complement the HUD ruling.

DELEGATE DAVID L. BULOVA
DELEGATE JOHN A. COSGROVE
DELEGATE ROSALYN R. DANCE
DELEGATE DANIEL W. MARSHALL, III
DELEGATE G. GLENN ODER

SENATOR MAMIE E. LOCKE
SENATOR JOHN C. WATKINS
SENATOR MARY MARGARET WHIPPLE

MARK K. FLYNN
T.K. SOMONATH
MELANIE S. THOMPSON

- On July 21, the Department of Treasury will jettison the new Consumer Financial Protection Bureau (CFPB), and it will become its own entity. This will occur one year after the passage of the Dodd-Frank Act. CFPB will oversee the SAFE Act and will become the de facto regulator of the Nationwide Mortgage Licensing System & Registry (NMLS). CFPB presently has approximately 200–300 employees, and it is estimated the bureau will eventually have as many as 1,000 employees. The bureau's initial focus will be on non-depository institutions. The bureau has intimated that it would like to partner with state regulators. The state regulators have identified over 200 rulings that CFPB will be required to issue as a result of the Dodd-Frank Act which will affect institutions that the SCC would normally regulate. It is anticipated that CFPB will become quite a large agency, and its impact is yet to be determined. The agency will report directly to the president, and the head of CFPB will be nominated by the president and confirmed by the Senate. Although the president has nominated Richard Cordray as director of CFPB, several senators have vowed to block any nomination unless the bureau's powers are limited.
- **Chip Dicks**, with Virginia Association of Realtors (VAR), asked Mr. Face if there was any change in the federal regulations that would make private lenders subject to the SAFE Act or whether they were still exempt from the legislation.
 - **Joe Face** answered that he did not recall any change and believed private lenders are still exempt from the legislation, but the key will be in the future rulings from CFPB.
- **Connie Chamberlin**, with Housing Opportunities Made Equal (HOME), pointed out that although HUD just issued a ruling regarding the SAFE Act, it will no longer enforce the SAFE Act as that responsibility is being shifted to CFPB. She asked Mr. Face who is going to be in charge of SAFE once it is overseen by CFPB.
 - **Joe Face** responded that he is unaware whether anyone within CFPB has been appointed to oversee SAFE Act issues.
- **Connie Chamberlin** asked whether HUD will be out of the picture entirely with regard to the SAFE Act.
 - **Joe Face** replied that as of July 21, CFPB will take over full responsibility of administering and enforcing the SAFE Act.
- **Senator Watkins** asked Mr. Face what that will mean for him and the SCC. He pointed out that there could be conflicts between the SCC and CFPB with regard to regulating non-depository institutions. He asked Mr. Face if he planned to bifurcate his organization.
 - **Joe Face** answered that he is unsure at this point how the changes will affect him. There are great uncertainties facing state regulators nationwide, and they are unsure what their role will become. He assured Senator Watkins that they are doing what they can to ensure they still have input with regard to the regulation of all financial institutions.
- **Delegate Marshall** pointed out that one of the reasons for passing mortgage loan originator legislation in Virginia was to regulate financial institutions within the state rather than through the federal government.

- **Joe Face** responded that he does anticipate working with the federal government to some extent on the matter. CFPB has been reaching out to state regulators for help since it does not have its entire staff in place at this point. There are provisions in the Dodd-Frank Act that allow states to enforce the federal provisions from the Act. Between now and next session the SCC will be determining whether or not they will need to ask for state legislation to be amended to allow the state to directly enforce other provisions contained in the Dodd-Frank Act.
- **Delegate Marshall** pointed out that the Housing Commission will meet again in September, November, and December, and it may be difficult to fit that into the narrow time frame before session begins.
 - **Joe Face** clarified that determining whether or not he will recommend amending state legislation is something the SCC will be working on over the next few months. CFPB has indicated to the SCC that it would like the NMLS to be adapted to include the registration and licensing of payday and vehicle title lenders as well as other non-depository lenders.
- **Senator Watkins** asked Mr. Face if all states have passed mortgage loan originator (MLO) legislation?
 - **Joe Face** responded that all states have passed MLO legislation, and all are also now involved in the NMLS.
- **Senator Watkins** asked whether all states follow the model that Virginia used, in terms of criteria and guidelines for registering and licensing MLOs.
 - **Joe Face** answered that for the most part, most states followed the same model, although some states have unique aspects as in Virginia. Virginia has not yet received the official blessing from HUD that it is in compliance with the SAFE Act, and some states have but those are states that more closely mirrored the Act exactly with little to no difference from the model. Now, CFPB will be the agency to determine whether Virginia and the remaining states are in compliance.
- **Senator Watkins** asked whether Virginia has a registry for other non-depository institutions.
 - **Joe Face** answered that it does not have a registry for other non-depository institutions aside from internal processes where these institutions are accounted for. He asked Senator Watkins if he was referring to the national database.
- **Senator Watkins** said that he was referring to a database in Virginia that accounts for payday and title lenders and other non-depository institutions.
 - **Joe Face** asked if he meant a database for the purpose of licensing.
- **Senator Watkins** responded that although not initially, at some point those two will need to be incorporated.
 - **Joe Face** answered that the only databases in place are the NMLS and the payday loan database. Those are the only two databases that Virginia is associated with.
- **Senator Watkins** asked if one of the databases included title loans as well.

- **Joe Face** responded that title loans are not included at this point. All indications are that the NMLS could be the full repository for all non-depository institutions nationwide, in terms of licensing and registry.
- **Senator Watkins** expects that by the full Commission meeting in September there will be more concise information about CFPB and its potential impacts on the state level. He asked Mr. Face to put together a short report for the Commission meeting in September outlining CFPB's developments.
 - **Joe Face** told Senator Watkins he would put together a report on the matter ahead of the September meeting.

II. SB 795; Foreclosure Procedures (McEachin, 2011)

- **Senator McEachin** requested that SB 795 be moved to the Governor's Foreclosure Task Force.
- **Delegate Marshall** inquired whether the sub-work group would be amenable to accommodating Senator McEachin's request.
- The sub-work group agreed.

III. HB 2530; Foreclosure on Lien for Unpaid Assessments (Scott, J.M., 2011)

- **Delegate Scott** explained that this bill was before the Subcommittee on General Laws in the House during the most recent General Assembly session. A constituent, Clark Tyler, brought the problem and the impetus for the bill to Delegate Scott's attention. Delegate Scott introduced Clark Tyler to the sub-work group to give his presentation.
- **Clark Tyler**, the president of the Hallcrest Heights HOA in McLean, Virginia, began the presentation by explaining a problem the HOA experienced with unpaid assessments.
 - In 2008, one of the homeowners in Hallcrest Heights owed \$520,000 on a mortgage from subprime lender Countrywide Financial, who was taken over by Bank of America that same year. The homeowner stopped paying HOA dues and disappeared in 2008, and the HOA put a lien on the property in the amount of the unpaid assessments.
 - In 2010, the HOA received a notice from Bank of America stating that a foreclosure on the property was being initiated. The notice explained that at the foreclosure sale in January 2011, the HOA lien would be wiped out. When the foreclosure sale actually occurred in May 2011, the homeowner owed the HOA approximately \$4,000 in unpaid assessments.
 - Under Virginia law, Bank of America is only responsible for the HOA fees once it takes ownership of the property at the foreclosure sale. The total assessments from that point amounted to \$571.00, which Bank of America paid as full payment of the outstanding dues.
 - The property was eventually put on the market for \$580,000–\$600,000, and Mr. Tyler expressed his outrage that the bank would be profiting from the sale while refusing to pay all the assessments the HOA was owed. He also expressed his indignation at being unable to collect all the fees from Bank of America when it received \$97 billion in bailout money from the federal government.

- Mr. Tyler expressed his concern that there is a gap in the foreclosure process that results in detriment to the HOA. He suggested this practice could become an incentive to avoid paying HOA assessments if the problem is not corrected. HOAs provide important maintenance services to its homeowners and should be included as a more important component of the foreclosure process. He believes the bank “gamed the system,” and as a result, the county taxes and the mortgage were both paid, but not the HOA fees.
- **Delegate Marshall** asked Delegate Scott to describe the bill and what it was intended to accomplish.
 - **Delegate Scott** explained that the bill was intended to address the problems HOAs face during the foreclosure process with regard to recovering overdue assessments. He acknowledged that although the bill may not completely solve the issue, it is the first step toward fixing the problem.
- **Senator Watkins** asked Delegate Scott if the bill would give HOAs the first position with regard to lien priority.
 - **Delegate Scott** answered that yes, that is what the bill proposes.
- **Senator Watkins**—asked whether there are any covenants or restrictions within the deed that address provisions for liens.
 - **Clark Tyler** responded that there are provisions that address liens, and that the HOA had put a second lien on the property because the realtors intended to sell the property “as is.” The liens are in place until the foreclosure sale, at which point the liens are wiped out.
- **Senator Watkins** asked Mr. Tyler whether the deed that the homeowners sign when they purchase the property contains a provision for liens against the property for nonpayment of assessments.
 - **Clark Tyler** answered that the agreement does include a provision addressing liens on the property. In this case, the homeowner just vanished, and the HOA was unable to contact him.
- **Senator Watkins** asked Mr. Tyler to remind him whether Countrywide held the first deed of trust on the homeowner’s mortgage.
 - **Clark Tyler** responded that yes, Countrywide held the first deed of trust.
- **Alexander Macaulay**, with Citigroup, interjected that as a representative of the banking industry, he objected to the way in which Bank of America was being characterized by Mr. Tyler. References to the bailout are irrelevant, and the bank follows the laws as they exist today.
- **Delegate Marshall** invited anyone in favor of HB 2530 to address the work group.
- **Pia Trigiani**, of MercerTrigiani, introduced herself and explained that her firm represents the Community Associations Institute (CAI), which is a national organization of 30,000 members, approximately 4,000 of which make up three chapters in Virginia. Mercer Trigiani represents condominium and homeowner associations. The Virginia Legislative Action Committee (VLAC) is comprised of representative from the three Virginia Chapters of CAI, and represents the interests of community associations before the Virginia General Assembly.

- **Delegate Marshall** asked Ms. Trigiani whether one member corresponds to one condominium or homeowner association.
 - **Pia Trigiani** answered that that is indeed the case.
- **Pia Trigiani**, in response to Senator Watkins' earlier question regarding provisions for liens, explained that liens on lots and condominium units for unpaid assessments are established in statute under the Condominium Act and the Virginia Property Owners' Association Act, and are reflected in the applicable recorded covenants and restrictions.
- **Pia Trigiani** explained issues facing condominium and homeowner associations with regard to lender foreclosures.
 - A VLAC survey has indicated that members across Virginia are dealing with situations similar to the scenario Mr. Tyler just described, although the range of issues is rather broad and not directly related to this legislation. In particular, there are problems involving lenders who delay foreclosures, and lenders who lock out owners and take possession of the property without following through with foreclosure in order to take legal title, leaving the owners unaware of their continuing obligation to pay assessments.
 - The Condominium Act was enacted in Virginia in 1974, and is the statutory basis for liens on condominium units in Virginia. When the statute was enacted, the lien priority was established, which gives first priority to real estate tax liens, followed by first deeds of trust, and then assessment liens. The Property Owners' Association Act, which is the law that governs Hallcrest Heights, was enacted in 1989 and created a different lien priority. The Property Owners' Association Act gave first priority to real estate tax liens, followed by the first deed of trust, and then the lien that was filed at the courthouse first, whether it be for a second deed of trust or unpaid assessments. Delegate Scott's legislation proposes a lien priority where an assessment lien would take precedence over a first deed of trust.
 - Across the country, Virginia's law is often looked to as a model for other states. Virginia's Condominium Act was the basis for the Uniform Condominium Act. There is a limited priority lien in the uniform statutes, and the Commission on Uniform State Laws recommends a limited priority lien, which is typically a six-month priority.
 - HOAs provide municipal services to communities through preservation of common areas, which can include snow removal and road maintenance, and removes these burdens from the locality. The challenge is that the only money HOAs typically receive is through assessments, and the assessments fund these important municipal services. When a homeowner does not pay his assessments, the other homeowners have to contribute more to continue funding these services.
 - At a minimum, the lien priority under the Property Owners' Association Act should mirror the lien priority under the Condominium Act, because HOAs carry significant burden. The scheme is in part driven by secondary mortgage market lending guidelines. The documents are

drafted to comply with those secondary mortgage market lending guidelines, and that is partly why the structure is set up that way. The six-month priority is fairly standard and secondary mortgage market lending agencies are comfortable with that lien priority. However, going beyond six-months would be troublesome and problematic.

- **Elizabeth Palen** asked Ms. Trigiani how many states have the six-month priority lien.
 - **Pia Trigiani** responded that she was unsure of the exact number, but estimated that it was approximately slightly less than half of the states.
- **Delegate Oder** pointed out that it is nearly impossible to build a subdivision anymore without a HOA. There was a period of time when subdivisions were being developed where voluntary HOAs began forming to assist with small maintenance tasks, such as maintaining the entrance to the subdivision. However, recent requirements imposed on subdivisions necessitate the formation of HOAs. For instance, stormwater laws are such that a piece of property can no longer be developed without addressing the issue of stormwater runoff. Delegate Oder noted that he has seen subdivisions with as few as twelve houses require a HOA to fund a stormwater retention pond, its insurance costs, and its maintenance. The fact that other homeowners have to pay more in assessments to cover the non-paying resident is a problem that needs to be addressed.
- **Senator Watkins** pointed out that when dealing with foreclosures, the proceeds from the sale of the property are rarely enough to cover even half of the first deed of trust and the taxes, let alone six months of HOA assessments.
 - **Pia Trigiani** agreed that foreclosures are a problem in the current marketplace. Associations have statutory authority to enforce the lien for foreclosures, but they choose not to exercise this authority because they will be unable to pay off prior liens and still recover assessments. A Virginia Supreme Court case (available at <http://statecasefiles.justia.com/documents/virginia/-supremecourt/1021741.pdf?1306959574>) prescribes the way in which associations must pay off prior liens. In that instance, the lender takes the property, but associations lack the means to take the property because the associations' governing documents limit their authority to, for example, own property or expend the funds necessary to purchase the property. The problems are fairly significant; one community had 7,600 homes and averaged 30 foreclosures every month.
- **Delegate Marshall** invited anyone else in support of HB 2530 to address the work group. He then invited anyone in opposition to HB 2530 to address the work group.
- **Matt Bruning**, with the Virginia Bankers Association (VBA), expressed his sympathy for Mr. Tyler's situation, but explained that when assessment liens are moved up in lien preference, lenders assume additional risk when making the original loan. Just as homeowners assume the burden of additional fees when one homeowner does not pay his assessments, whenever a loan obligation goes unpaid, all the other borrowers assume the financial burden as well. He understands non-payment of assessments is a problem for associations, and offered to work with Ms. Trigiani and Delegate Scott to come to a solution. A six-month lien priority would

likely present similar issues for the banking industry, but he agreed to assess other states' positions on this issue.

- **Delegate Oder** expressed his appreciation that the VBA is willing to work on this issue, but stressed that a compromise must be reached. He has heard directly from homeowners who are members of associations how difficult it is for them to carry the weight of a non-paying resident, and he implored those present to work together to find a compromise on this issue.
- **Senator Watkins** asked if the bank is responsible for assessments once the property is transitioned into real estate owned (REO) property by the bank.
 - **Matt Bruning** replied that once the bank takes title of the property they are responsible for assessments from that point on.
 - **Pia Trigiani** explained that when a property is foreclosed on, the bank becomes the owner and is obligated to pay the assessments when the foreclosure sale concludes—even though a deed has not yet been recorded. The issue is that banks are delaying foreclosure, and in some cases even dispossess the owner of the property. One of her clients had a homeowner who was told to leave his property, and although he did so, the bank never foreclosed. The homeowner did not realize he still owned the home and was responsible for assessments until the sheriff came with a summons for him to appear in court for unpaid assessments. Another problematic situation occurred when the bank foreclosed on a property, and then rescinded the foreclosure, which left the owner responsible for the assessments again. She offered to work with the VBA on these issues. She mentioned that approximately fifteen years ago, they almost arrived at a compromise on this issue, but ultimately an agreement was never reached.
- **Connie Chamberlin** asked Ms. Trigiani if property taxes are paid during the period where banks are delaying foreclosure.
 - **Pia Trigiani** responded that the property taxes are typically paid, but the assessments are not. Another important point, particularly in condominium associations, is that the assessments go to pay insurance coverage, which covers fire and water damage, and that protects the lenders. This is particularly infuriating to associations, who are collecting assessments to protect someone else's property interest and are unable to recover those sums of money.
- **Delegate Oder** wondered if there is a way to deduct the dues from the property taxes since fewer services are required to maintain a vacant home.
- **Senator Watkins** agreed that when lending institutions take ownership of the property they must assume the responsibility of the assessments.
- **Delegate Marshall** invited anyone else in opposition to HB 2530 to address the work group.
- **Delegate Marshall** asked Delegate Scott whether he preferred the group act on HB 2530 as presented or if he would rather meet with those parties in support of and opposition to the bill to attempt to reach a compromise.

- **Delegate Scott** answered that he would like time to meet with Ms. Trigiani and Mr. Bruning to determine if the bill could be rewritten to suit everyone's needs.
- **Delegate Marshall** told Delegate Scott to decide whether he would like to present an update to the full Commission during the September meeting or the November meeting.

IV. Public Comment

- There was no public comment.

V. Adjourn

- The meeting was adjourned at 1:58 p.m.