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Senate Committee on General Government, Consumer and Small Business Protection
Testimony of Kelly Harpster in Support of SB 558
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Chair Shields, Vice-Chair George, and members of the committee, thank you for the opportunity to testify. My name is Kelly Harpster, and I am an attorney in private practice representing homeowners with mortgage and foreclosure issues. I am currently a member of the Advisory Committee for the Foreclosure Avoidance Mediation Program. I served on the workgroup that helped develop the rules and forms for the FAMP program last spring, and I traveled across the state helping train our foreclosure mediators, housing counselors and attorneys. Today I testify in support of SB 558.

The Foreclosure Crisis Is Not Yet Over

Although we have entered the sixth year of the foreclosure crisis nationally, the first significant wave of foreclosures did not strike Oregon until 2010. Recently, the headlines have been filled with good news and early signs of recovery. But behind those headlines is a hard reality: Oregon has years of foreclosures still to go and 2013 will be a difficult year for struggling homeowners.

You may have heard that the national foreclosure rate has declined. But did you know that in 25 of our 50 states foreclosure rates are on the rise, in some states by more than 50%? You may have heard that Oregon's foreclosure rate plummeted last year by 40%, one of the largest declines in the nation. But we all know that the drop was the result of a significant legal decision that caused a temporary halt to foreclosures in Oregon and a period of decreased foreclosure activity while lenders adjusted. In every state where there has been a significant but temporary disruption to the foreclosure process, there has been a resulting surge in foreclosures, a phenomenon RealtyTrac has dubbed the "boomerang effect." Even without a surge, Oregon is on track this year for more than 16,000 new foreclosures.

The pattern is expected to continue. The Center for Responsible Lending concluded in a study published in late 2011 that we are not even halfway through the foreclosure crisis. In fact, for all of the good news lately, the Oregon foreclosure rate today remains more than double the national foreclosure rate at the height of the Great Depression, the greatest economic crisis in American history. The reality is thousands of Oregonians will face foreclosure this year alone, and the foreclosure avoidance program is their best hope.

Avoidable Foreclosures Are a Burden on Homeowners, Investors and Communities

Foreclosures take a heavy toll not only on homeowners, but also on the investors who own the loans and the communities where the properties are located. Investors stand to lose 30-60% of the outstanding loan balance in a foreclosure. Over 40% of the gross loss can be attributed to the costs of foreclosure. One Congressional committee found that the average default costs the lender \$77,935, while preventing a foreclosure costs only \$3,300. The cost of foreclosures, many of which could be avoided, will be passed through to future borrowers in the form of higher fees.

Foreclosures also hurt communities. For example, the Center for Responsible Lending recently found that simply being in close proximity to a foreclosed property costs the neighbor an average of more than \$27,000 in lost value. So far, simply living in close proximity to a foreclosure has caused more than \$1.95 trillion in losses to neighbors. Homeowners nationwide have altogether lost at least \$7 trillion in home equity since 2006. With more foreclosures flooding the Oregon market, recent home price gains could be wiped out upsetting an already fragile housing recovery. And in a state where property taxes fund essential services, we cannot afford further losses.

The foreclosure avoidance program helps borrowers and investors avoid the costs and burdens of foreclosure when there are mutually beneficial alternatives. Avoiding foreclosures when possible is good policy, protects our struggling communities, and it makes good economic sense. But the existing program cannot function until the judicial foreclosure loophole is closed.

SB 558 Closes a Gaping Loophole That Has Hobbled the Program

Despite a solid track record of success in other jurisdictions, foreclosure mediation in Oregon has been hobbled by a gaping loophole. Lenders can avoid the program by filing judicial foreclosures instead of foreclosing non-judicially. Since the program's launch in July 2012, and despite widespread interest from homeowners, only 8 mediations have taken place. Some lenders started making the switch to judicial foreclosures in 2011. After the *Niday* decision, nearly all lenders in Oregon have avoided mediation by foreclosing through the courts. Homeowners, investors, communities and even the courts have suffered as a result, while committed housing counselors and mediators sit idly by waiting for the opportunity to put their training and experience to use.

SB 558 closes the loophole and requires all non-exempt beneficiaries to participate in the foreclosure avoidance program prior to commencing either a judicial or a non-judicial foreclosure. SB 558 better aligns the structure of the program with the policy goals of foreclosure mediation: to avoid unnecessary and costly foreclosures when they can be avoided.

The Outcome of *Niday* is Irrelevant to the Future of the Program

The Legislature does not need to wait for a decision from the Oregon Supreme Court in *Niday*. Even if MERS prevails in the litigation, there is no guarantee that all lenders will return to non-judicial foreclosures. Lenders could choose to continue foreclosing judicially solely to avoid participating in the program, hobbling the program for another year while thousands of foreclosures flood the system.

Even if most lenders returned to non-judicial foreclosures, leaving the loophole in place would encourage gaming. A non-exempt lender could initiate the process, knowing that some homeowners will not respond and the lender will get a certificate of compliance without having to participate. When a homeowner does pay the fee, the lender can avoid participation by rescinding the notice of default and foreclosing judicially instead. At least one major servicer has engaged in a similar practice when homeowners challenge a facially unlawful non-judicial foreclosure, waiting until after litigation is filed to rescind the notice of default and requesting dismissal of the case so that the bank can proceed judicially instead. There is no reason to think the pattern will not continue.

Unless the Legislature closes the loophole, there is no guarantee that a year from now we will have more than another dozen mediations completed. Meanwhile, the costs and burdens associated with avoidable foreclosures will continue to mount while trained mediators and housing counselors continue to wait idly by. With another 16,000 or more foreclosures expected this year alone, Oregon cannot afford to wait any longer. It is time to close the loophole and let the program work the way it was intended.

I urge you to vote for passage of SB 558.