



MORTGAGE BANKERS ASSOCIATION

May 14, 2020

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
H-232, The Capitol
Washington, DC 20515

The Honorable Kevin McCarthy
Minority Leader
U.S. House of Representatives
H-204, The Capitol
Washington, DC 20515

The Honorable Mitch McConnell
Majority Leader
U.S. Senate
S-230, The Capitol
Washington, DC 20510

The Honorable Chuck Schumer
Democratic Leader
U.S. Senate
S-221, The Capitol
Washington, DC 20510

Dear Speaker Pelosi, Leader McCarthy, Leader McConnell, and Leader Schumer:

MBA is the national association representing the real estate finance industry, which employs more than 280,000 American workers throughout all parts of the country. The association works to ensure the continued strength of the nation's real estate markets and to extend access to affordable housing to all Americans. MBA's membership of over 2,300 companies represents all elements of real estate finance, including firms serving both the single-family and commercial/multifamily markets.¹

As Congress acknowledged earlier this year through its decisive actions, the COVID-19 pandemic has created an unprecedented health and financial crisis for all affected industries and their employees. As you work to fashion another potential COVID-19 relief proposal with the administration, we wish to outline key priorities to help homeowners and renters and the real estate finance market, arising from our members' growing experience with the ongoing implementation of the *Coronavirus Aid, Relief, and Economic Security (CARES) Act*. As Americans begin to emerge from quarantine and shift to a phased reopening of everyday life, these proposals will contribute to the country's economic recovery, sometimes without the need of additional taxpayer assistance.

Forbearance Requirements and the Potential Need for Adequate Liquidity

Congress and the administration have correctly decided that a nationwide, broad-scale forbearance program for federally-backed mortgages is appropriate, but policymakers must ensure this program is undertaken responsibly in order to avoid unintended consequences and market uncertainty. For example, some mortgage servicers, both single- and multifamily, will not be able to shoulder the entire onus of prescribed actions to protect American homeowners and renters absent the needed liquidity to execute those requirements – and advance required

¹ For more information, visit MBA's website at: <https://www.mba.org>.

payments of principal, interest, taxes, and insurance to investors, municipalities, and insurers when borrowers are unable to make those payments.

In April, Ginnie Mae implemented a revised version of its Pass-Through Assistance Program (“PTAP”) – a liquidity facility to provide Ginnie Mae mortgage servicers, known as “issuers,” assistance in advancing principal and interest payments to bondholders. Ginnie Mae’s leadership on this subject is laudable and welcome, but those actions are not a market-wide solution for servicer liquidity needs. In particular, the Ginnie Mae PTAP does not cover any advancing obligations associated with loans backing Fannie Mae or Freddie Mac (“the GSEs”) securities, nor does it cover advances of taxes and insurance on loans backing Ginnie Mae securities. MBA believes that the Federal Reserve and the Treasury Department should use a portion of the funding provided in the *CARES Act* to establish one or more liquidity facilities – for both the single-family and multifamily markets – to ensure that servicers can provide forbearance to distressed borrowers for the duration of this crisis.

Title IV of the *CARES Act* included a substantial funding backstop through which the Federal Reserve and Treasury can provide liquidity to heavily-impacted segments of the economy. There has been bipartisan and bicameral support for using those Emergency Stabilization Funds authorized in Section 4003 of the new law to establish a liquidity facility dedicated to mortgage servicing under the Federal Reserve’s 13(3) credit authorities. The creation of such a facility would provide welcome certainty and support to the mortgage markets – to the benefit of borrowers, lenders, servicers, investors, and other market participants. Providing the necessary facility to the marketplace will preserve access to credit and help borrowers take advantage of record low interest rates. The industry can be most helpful to many homeowners by more efficiently refinancing their mortgages, thereby reducing their monthly payments. This can be an important component of the economic stimulus, and establishing this liquidity facility will remove hurdles that could impede that. **In the absence of appropriate action by the Federal Reserve and Treasury, we believe Congress should direct the creation of such a facility for mortgage servicing, both single-family and multifamily, through legislation.**

In order to address liquidity issues completely, MBA further recommends that Congress amend the *National Housing Act* to permit Ginnie Mae issuers to access these liquidity facilities as a source of funds to pay for advances to securities holders, as well as to cover advances made to taxing authorities and insurers. **In order for such a system to work, Congress must adjust Ginnie Mae’s legal authority to approve pledges of an issuer’s future reimbursements on servicing advances.** The right to these future reimbursements would serve as collateral, enabling the issuer to access liquidity from the Federal Reserve. This technical fix could be made through minor amendments to the *National Housing Act* that would allow those portions of the Ginnie Mae advances not eligible for PTAP to be eligible for a Federal Reserve facility. Crafted properly, this provision could also facilitate private financing of Ginnie Mae advances.

Under the forbearance regime established in Section 4022 of the *CARES Act*, Congress did not include a defined “covered period” for the temporary mortgage relief provisions designed to help borrowers recover from the COVID-19 crisis. To address this inadvertent drafting error, Congress should clarify that Section 4022 applies over the same covered period as the related section 4023 of the *CARES Act*. **Specifically, we support technical correction language derived on a bipartisan basis (and as included in prior legislative drafts of the *CARES Act*) that defined**

the covered period as the period from enactment to the earlier of the termination of the COVID-19 national emergency or December 31, 2020. Absent an explicit legislative definition of a covered period within these forbearance requirements, courts may examine these relevant sections in the future and arrive at their own conclusions and definitions, thereby introducing an unnecessary element of market uncertainty.

Forbearance and Non-Government-Backed Mortgages

Forbearance under the *CARES Act* is appropriately focused on government-backed mortgages, consistent with the benefits lenders receive from the government backing of those loans. MBA appreciates that Section 4013 of the *CARES Act* facilitates forbearance and other accommodations on non-government-backed, private-sector mortgages by providing financial institutions with temporary relief from troubled debt restructuring (TDR) accounting treatment that might otherwise discourage lenders from working with borrowers to temporarily modify repayment terms. Federal and State banking regulatory agencies, the Financial Standards Accounting Board (FASB), and the National Association of Insurance Commissioners (NAIC) have similarly provided accounting and capital guidance and relief to encourage depository institutions, life insurers, and other lenders to work constructively with borrowers and to make prudent modifications to address the impacts of COVID-19, recognizing “such proactive measures to be in the best interest of institutions, their borrowers, and the economy.”² Section 4013 of the *CARES Act* and these additional regulatory, prudential, and supervisory efforts are proving effective in giving affected borrowers the relief they need to address the temporary impacts of the pandemic.

MBA and its members are working to extend relief to all those impacted by the pandemic. In just the past month, more than 3 million borrowers have been provided COVID-related loan forbearances. Any contemplated expansion of these requirements to private investors and owners could result in unintended consequences that warrant further consideration and public discussion. First, servicers do not control loss mitigation outcomes—investors and loan owners do—and a mandate that they provide forbearance or loan modifications would expose servicers to financial liability for breaching contractual obligations to private investors and insurers.³ Congress has dealt with similar concerns in the past by including a safe harbor for servicers that executed federally mandated loss mitigation options. For those that hold loans in portfolio, the unfunded imposition of these requirements could put a significant burden on small community lenders that rely on the income from loans they hold in their portfolios. These institutions and private sector investors have fewer resources available to support loss mitigation options than the GSEs and federal agencies responsible for federally-backed mortgage loans. Finally, any contemplated legislation in this area could implicate constitutional questions that deserve further

² See Interagency Statement on Loan Modifications and Reporting for Financial Institutions Working with Customers Affected by the Coronavirus (Revised), p. 2 (April 7, 2020).

³ It should be noted that the U.S. Congress also recognized that contractual requirements limit servicers’ authority to act when Congress enacted a safe harbor under the Truth in Lending Act to deem servicers that extended HAMP modifications to be acting in the best interest of the mortgage investors. 15 U.S.C. § 1639a.

analysis around takings of private property, which include contract rights,⁴ and the ability of the federal government to modify contracts between private parties.⁵

In addition to these concerns, MBA notes the following specific issues:

- The Consumer Financial Protection Bureau’s (CFPB’s) Servicing Rules already require notifications and an evaluation of borrower’s loss mitigation applications prior to proceeding with foreclosure.⁶ It will be important that any legislation contemplated provide significant borrower protections beyond what is already in place, without imposing burdensome new requirements for servicers to implement during this national emergency.
- Automatically giving forbearance to every delinquent borrower regardless of whether they are experiencing a COVID-related hardship may not be the best outcome for the borrower. For borrowers who have missed multiple payments, engaging with their mortgage servicer prior to obtaining a forbearance empowers borrowers to make a decision that fits their circumstances. A “one-size-fits-all” approach to forbearances would ignore the realities that different borrowers are in different situations, particularly when access to *CARES Act* forbearances is a streamlined process. Finally, at that point of delinquency, servicers would have already made multiple attempts to make contact with the borrower and provided a written notice to contact them regarding loss mitigation options, particularly for federally-backed loans.⁷

⁴*Lynch v. United States*, 292 U.S. 571, 579 (1934) (“valid contracts are property, and the rights of private individuals arising out of them are protected by the Fifth Amendment”); *Penn Central Transportation Company, et al. v. New York City, et al.*, 438 U.S. 104 (1978) (establishing a framework to evaluate federal legislation under the Takings Clause); *Cienega Gardens v. U.S.*, 503 F.3d 1266 (2007) (explaining that when legislation is aimed at contract rights themselves in order to nullify them, they are considered “taken” under the Constitution).

⁵ *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923); *Cienega Gardens v. U.S.*, 503 F.3d 1266 (2007); *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) (applying a Due Process analysis to federal legislation interfering with private contracts); *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (giving careful consideration to due process challenges with retroactive effects and explaining that if a legislation changes the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which were the very objects of property ownership).

⁶ See 12 CFR 1024.41.

⁷ See e.g., 12 C.F.R. § 1024.39 (early intervention requirements, including live contact and written notice); Fannie Mae, Single Family Servicing Guide, D2-2 (requirements for contacting borrower to assist borrower who is facing default or in default); Fannie Mae, Lender Letter 2020-02 (updated Apr. 29, 2020) (Quality Right Party Contact (“QRPC”) requirement and COVID-19 forbearances); Freddie Mac, Single-Family Seller/Servicer Guide, 9102.3 (establishing borrower contact during delinquency); Freddie Mac, Bulletin 2020-10 (Apr. 8, 2020) (QRPC requirement and COVID-19 forbearances); FHA, HUD Handbook 4000.1 III.A.2.h (early default intervention); FHA FAQ KA-05466 (“All Early Delinquency timeline and disclosure requirements remain applicable for borrowers impacted by the COVID-19 National Emergency. However, Mortgagee Letter 2020-06 provides mortgagees the added flexibility to utilize any available methods for communicating with

Accordingly, we urge Congress to carefully examine extending CARES Act forbearance provisions for government-backed mortgages to other mortgages that are not backed by the government.

Early Payment Forbearance

In late March, the GSEs updated their selling guidelines to make clear they would not accept delivery of loans that met all of their underwriting criteria but entered forbearance due to COVID-19 hardships shortly after closing. Subsequently, that guidance was changed to allow purchases of certain loans, but only at steep discounts that force lenders to incur significant losses. These policies effectively make already-closed loans, which were underwritten in accordance with all applicable GSE parameters, unsalable in the secondary market. Consequently, lenders dependent upon the sale of these loans have been left without feasible options. They must hold these loans in their portfolios or on their warehouse lines, limiting their capacity to originate new loans.

The problems caused by these policies extend beyond loans purchased directly by the GSEs. Many of the larger mortgage aggregators that purchase loans from other, often smaller lenders have adopted policies similar to those of the GSEs, as they too seek to avoid the risk of purchasing unsalable loans. On a parallel track, the Federal Housing Administration (FHA) will not insure loans in forbearance at all. Because lenders cannot model or predict which borrowers will request forbearance after the loan has closed, they have been forced to curtail their lending. Lenders of all sizes have been left with no choice but to restrict their offerings or significantly raise prices to mitigate risk.

As a result, access to credit has been significantly diminished, particularly for lower-income borrowers without ample reserves to cover mortgage payments in the event of job loss or increased medical expenses. These policies do not reflect the spirit of the *CARES Act*, as they penalize borrowers and harm the market simply due to borrower requests for forbearance. **Absent revisions to GSE or FHA guidelines, legislation is needed to prohibit the GSEs and FHA from denying the purchase or the insuring of recently-closed loans, of all loan types and purposes, simply because the borrower has requested (or entered into) forbearance. Similarly, legislation should prohibit the GSEs or FHA from applying any pricing, repurchase, or indemnification requirements that are more stringent than those that apply to similarly-situated loans that are not in forbearance.**

Emergency Rental Assistance and Broad Housing Assistance

The *CARES Act* took preliminary steps towards stabilizing the housing market and mitigating the threat of housing interruption by providing \$4 billion for Emergency Solutions Grants to states and localities and significant additional funding for Section 8 rental housing assistance to the Department of Housing & Urban Development (HUD). While we applaud these measures, they do not adequately address the need to provide housing relief to the millions of renters and homeowners (and their families), whose employment previously placed them above the traditional

a borrower regarding the COVID-19 Forbearance. Servicers should continue their normal servicing activities and we encourage you to maintain contact with the borrowers.”).

threshold for such housing assistance programs and are now faced with the sudden loss of their income.

MBA recommends Congress establish a comprehensive emergency rental assistance program sufficient to ensure that everyone who is impacted by COVID-19 does not lose their rental home after they have suffered a reduction in income or who subsequently fall so far behind on rent they will face an increased likelihood of being evicted. Such a program should be designed to provide assistance to renters in need as quickly as possible. Millions of renters are being hit hard by the impacts of the pandemic, and providing a way to help those renters maintain their homes through this tough period will be critical to their ability to participate in the future economic recovery.

We also encourage the Congress to consider legislation that establishes a Housing Assistance Fund of sufficient scale to assist renters, support homeowners with mortgage payment assistance, and provide financial assistance to borrowers to reduce the amount owed following a period of forbearance.

This direct assistance is the most efficient mechanism to quickly ensure that Americans can keep a roof over their heads, that borrowers/owners can meet their financial obligations, and that lenders can work with their customers to keep their loans current. Rental assistance, the reserves built up by borrowers/owners over the long favorable economic cycle, and established emergency forbearance programs offered by the FHA and the GSEs will help the economy weather a short-term crisis and help individuals and families re-enter the workforce without relying solely on long-term unemployment insurance.

Section 232 Loan Forbearance

Section 4023 of the *CARES Act* does not provide forbearance relief for HUD Section 232 loans that help finance nursing homes, assisted living facilities, and board and care facilities, despite the prevalent use of these properties by vulnerable communities acutely impacted by COVID-19. **To provide comparable forbearance relief across similar HUD programs, Congress should amend the *CARES Act's* definition of a "multifamily borrower" to include a borrower of a HUD Section 232 loan secured by a nursing home, assisted living facility, or board and care facility.**

Tenant Eviction Moratorium

Furthermore, *CARES Act* Section 4024 establishes a 120-day moratorium on eviction filings for tenants in properties financed by federally-related loans. While renters may be protected from eviction proceedings temporarily, this provision does not treat nonpayment of rent during the crisis as forgiven, so some tenants could be surprised by the size of the accrued costs of unpaid rents. Leaders in both the Congress and the administration have publicly stated that those tenants that can still pay their rent should continue to meet their obligations. **In order to reduce the chance of any potential consumer harm, Congress should clarify in section 4024(b) of the *CARES Act* that its protections are limited to tenants experiencing COVID-19 related hardships.**

Term Asset-Backed Securities Loan Facility (TALF)

MBA was pleased by the Federal Reserve and the Treasury Department's timely decision to revive the TALF. Renewing this program sends a clear signal to markets that regulators understand the gravity of COVID-19's impact on the American economy. The exclusion, however, of newly issued AAA commercial mortgage-backed securities (CMBS) and single-asset single-borrower (SASB) transactions from "TALF 2.0" has caused significant harm to lending in secondary and tertiary markets. **MBA recommends that Congress direct the Federal Reserve to include newly issued AAA CMBS and SASB transactions as eligible collateral within the TALF 2.0 program, as they were included in the program during the Global Financial Crisis.**

Current Expected Credit Losses (CECL)

MBA believes that the CARES Act relief from implementation of the FASBCECL methodology provided under section 4014 should be extended to include non-depository institutions – including life insurers and independent mortgage bankers – as well as to depository institutions. These institutions are equally affected by the need to respond to the COVID-19 pandemic and are equally deserving of additional time to address the operational burden of implementing the CECL standard. **Accordingly, we recommend that Congress amend section 4014(b) of the CARES Act so that the temporary relief it affords applies to any "financial institution" rather than only to any "insured depository institution, bank holding company, or any affiliate thereof."**

Remote Online Notarization (RON)

Finally, as Congress looks to provide practical solutions that facilitate health and safety best practices (and consumer preferences) during this time of economic dislocation, **MBA recommends advancing bipartisan, bicameral legislation (S. 3533 and H.R. 6364) designed to allow notaries in states without enacted remote online notarization (RON) laws the ability to execute remote real estate closing transactions, provided they meet minimum standards, during this period of national crisis.** MBA – along with a broad array of industry partners including the National Association of REALTORS® and the American Land Title Association – would support including this bipartisan legislation within any evolving COVID-19 package in order to help apply a measure of transactional freedom to the flow of essential real estate closing activities during these difficult times of social distancing.

Conclusion

MBA hopes that you and your staff teams find the recommendations in this letter helpful as you determine the next actions Congress may take to build upon the foundation of the CARES Act and provide additional COVID-19 relief to workers, renters, homeowners, and our ailing economy. MBA stands ready to serve as a resource to you, your offices, and your colleagues throughout this crisis.

Thank you in advance for your consideration of the views expressed within this letter.

MBA Priorities for Next Potential COVID-19 Relief Package
May 14, 2020
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Sincerely,

A handwritten signature in black ink, appearing to read "Bill Killmer". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Bill Killmer
Senior Vice President
Legislative and Political Affairs

cc: The Honorable Maxine Waters, Chairwoman, House Committee on Financial Services
The Honorable Patrick McHenry, Ranking Member, House Committee on Financial Services
The Honorable Mike Crapo, Chairman, Senate Committee on Banking, Housing, and Urban Affairs
The Honorable Sherrod Brown, Ranking Member, Senate Committee on Banking, Housing and Urban Affairs