August 5, 2020

TO: All Members, Senate Committee on Judiciary

FROM: California Bankers Association
Affordable Housing Management Association-Pacific Southwest
American Bankers Association
American Financial Services Association
California Association of Collectors
California Community Banking Network
California Credit Union League
California Escrow Association
California Land Title Association
California Manufactured Housing Institute
California Mortgage Association
California Mortgage Bankers Association
Escrow Institute of California
Mortgage Bankers Association
Securities Industry and Financial Markets Association
Silicon Valley Leadership Group
United Trustees Association
Western Manufactured Housing Communities Association

RE: **<u>Opposition to AB 1436 (Chiu): COVID-19 Tenant and Homeowner Relief Act of 2020</u>**

The organizations identified above oppose <u>Assembly Bill 1436</u>, as substantially amended on July 28, 2020. **This measure contains nearly identical mortgage provisions from AB 2501 (Limon) that failed passage on the Assembly Floor in June.** Among other provisions, this measure mandates specific financial outcomes for mortgage forbearance relief, contains overly prescriptive post-forbearance repayment requirements and imposes significant legal liability.

Generally, this measure: 1) struggles from a broad scope that may distract from efforts to focus on those truly in need of financial assistance; 2) fails to acknowledge that mortgage servicers are intermediaries that must adhere to contractual obligations and investor guidelines; 3) raises legal and constitutional issues, such as takings and impairment of contracts; 4) introduces the potential for preemption for federally chartered institutions; 5) imposes punitive penalties; and, 6) upends a national approach deployed through the CARES Act and federal agencies.

<u>Early Financial Relief Efforts Underscore Awareness and Attention to the Issue</u>

California mortgage servicers are in the business of serving their customers, especially when hardship strikes. Servicers have been motivated to work with borrowers and have been doing so since the beginning of the pandemic. The awareness that borrowers might struggle to make their mortgage payments has been readily apparent and proactive efforts have been undertaken in an effort to be responsive.

<u>AB 1436 Suffers from Fundamental Flaws</u>

While we appreciate the intent of the bill, we believe that it undermines the positive impacts of existing efforts and protections and may ultimately delay the speed in extending important relief to impacted borrowers. While our organizations wish to be collaborative, constructive and solutions-oriented, the measure that was recently amended a few weeks prior to the Legislature's adjournment includes provisions that are highly problematic.

<u>General Observations</u>

As amended, whether in the single-family or multi-family provisions, this measure fails to provide credit for forbearance relief previously granted. As such, the measure permits the stacking of relief already provided in addition to the forbearance relief mandated by the measure. **Mortgage servicers and investors should be given credit for relief provided elsewhere against the relief in the measure.** At a minimum, failure to apply previously provided relief will impose significant losses on mortgage servicers that may result in distressed institutions because of impacts to capital and increased regulatory scrutiny and criticism. This is very concerning for lenders that portfolio their loans and maintain assets on their balance sheet. Moreover, layering additional mandates and delays may interfere with national forbearance programs in a way that negatively impacts affected borrowers.

Given the evolving nature of the pandemic, relief efforts have been dynamic. Measure AB 1436 should take into consideration the changing economic environment since the Legislature's ability to amend California law will lag and may become inconsistent or in conflict with changes at the federal level or efforts by federal agencies.

<u>Definitions – "Covered period" – Section 3273.1</u>

Subdivision (d) of this section defines "covered period" as "the time period between the operational date of this title and the earlier of either of the following: (1) Ninety days after the termination of the COVID-19 state of emergency. (2) April 1, 2021."

We request that the "covered period" align with the CARES Act forbearance provisions outlined in Section 4023 of the CARES Act.

<u>Mortgage Forbearance – Section 3273.10</u>

Subdivision (f) of this section requires a mortgage servicer to provide "a description of the types of loss mitigation options that may be available to the borrower at the end of the forbearance period based on the borrower's specific loan."

This requirement is impossible to comply with as all loss mitigation options will be unknowable when the borrower enters forbearance. A mortgage servicer will be unable to predict the borrower's financial condition at the end of the forbearance period and relief offered at the end of the forbearance period must be predicated on the borrower's financial condition at that time.

The requirement to describe loss mitigation options becomes more concerning when combined with the measure's significant new legal liability exposure. The measure provides two different ways where a mortgage servicer can be sued. First, Section 3273.14 establishes cause for a private right of action for misrepresentations to a borrower about "options for forbearance provided by state or federal law or otherwise provided or available through the servicer…and options for repayment after a forbearance period ends provided by state or federal law or otherwise provided or available through the servicer." Second, Section 3273.16 <u>mandates</u> that a court award a prevailing borrower attorney's fees and court costs when a preliminary injunction is obtained.

Subdivision (f) establishes the worst-case scenario where a duty has been imposed on a mortgage servicer that they cannot comply with while subjecting them to significant legal liability for their failure to comply.

Finally, national forbearance programs now in operation, and federal laws, already mandate a full swath of consumer disclosures aimed at properly informing affected borrowers of their forbearance options. For example, the CFPB's servicing rule (Regulation X) has robust requirements for establishing live contact by servicers with delinquent borrowers; FHA program requirements mandate twice-daily outbound calls beginning as early as day 10 of delinquency; and, Fannie Mae and Freddie Mac servicers must send early payment reminder notices to borrowers and must begin outbound contact attempts no later than the 36th day of delinquency. Additional layers of disclosures will only confuse the consumer.

We ask that the notice provision in subdivision (f) be removed and we propose an alternative where a mortgage servicer would be required to provide a notice to the borrower following the offering of a forbearance plan confirming the borrower has entered forbearance indicating that the mortgage servicer will work with the borrower to explore options prior to the end of the forbearance period including examples of options that would be discussed contingent on the borrower's own financial condition at the end of the forbearance period.

Subdivision (g) provides that a mortgage servicer who, with respect to federally backed mortgages, complies with the CARES Act regarding forbearance is deemed in compliance with this section. **We request that a mortgage servicer who, with respect to non-federally backed mortgages, complies with the CARES Act regarding forbearance should similarly be deemed in compliance with this section.**

<u>Post-Forbearance Recovery – Section 3273.11</u>

This section duplicates provisions in subdivision (f) of Section 3273.10 by requiring a mortgage servicer to provide another notice of options a borrower may have to modify their loan or reinstate their mortgage.

This section fails to acknowledge the underlying provisions of the California Homeowner Bill of Rights, which establishes a process wherein mortgage servicers must engage in outreach and the exploration of foreclosure prevention alternatives before commencing the non-judicial foreclosure process. More specifically, California's Homeowner Bill of Rights key provisions include:

- Borrower outreach and exploration of options to avoid foreclosure: Before a notice of default may be filed, mortgage servicers must contact borrowers to assess their financial situation and explore options for the borrower to avoid foreclosure.

Mortgage servicers must also provide the toll-free telephone number made available by the U.S. Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency.

- Restriction on dual track foreclosure: Mortgage servicers are restricted from advancing the foreclosure process if the homeowner is working on securing a loan modification. When a homeowner completes an application for a loan modification, the foreclosure process is essentially paused until the complete application has been fully reviewed.
- Provisions of a single point of contact: Homeowners are provided a single point of contact as they navigate the system and try to keep their homes – a person or team with the mortgage servicer who knows the facts of their case, has their paperwork and can get them a decision about their application for a loan modification.
- Verification of documents: Mortgage servicers that record and file multiple unverified documents will be subject to a civil penalty of up to $7,500 per loan in an action brought by a civil prosecutor. Mortgage servicers who are in violation are also subject to enforcement by licensing agencies, including the Department of Business Oversight and the Department of Real Estate.
- Enforceability: Borrowers have authority to seek redress of material violations of these foreclosure process protections. Injunctive relief is available prior to a foreclosure sale and recovery of damages is available following a sale.

Provisions in this section also mandate particular outcomes with respect to post-forbearance options and is likely to be subject to legal challenges and federal preemption. Even the Homeowner Bill of Rights was clear that it was not dictating underwriting requirements and particular financial outcomes. Said more succinctly, that law established a framework to compel a conversation.

Existing law Civil Code Section 2923.4 from the Homeowner Bill of Rights makes this clear:

> "The purpose of the act that added this section is to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure. **Nothing in the act that added this section, however, shall be interpreted to require a particular result of that process.**" (emphasis added).

This measure takes this requirement one step further and crosses the threshold to dictate (or prohibit) certain forms of relief or repayment following a forbearance period.

It's important to note the Office of Comptroller of the Currency (OCC) recently issued a bulletin wherein the OCC reiterated "that federal law vests the OCC with exclusive visitorial authority over banks. Unless otherwise authorized by federal law, this authority generally precludes state and local officials from conducting examinations, requiring the production of banks' books or records, or exercising other visitorial authority with respect to banks. If a bank receives a request from a state or local official seeking information that constitutes an attempt to exercise visitation over the bank, the bank is not required to provide this information."

A subsequent bulletin issued by the OCC on June 17, 2020, expands upon their previous statement. Among other provisions, the bulletin indicates that:

> "Federal law preempts state and local laws that impermissibly conflict with banks' exercise of federally authorized powers under the standard set forth in *Barnett Bank of Marion County, N.A. v. Nelson*. Consistent with this standard, OCC regulations provide examples of the types of state laws that do not apply to banks' lending and deposit-taking activities. These include state law limitations on: terms of credit, such as the schedule for repayment and interest, amortization of loans, balance, payments due, minimum payments, and term to maturity; disbursements and repayments; and processing, origination, and servicing mortgages. OCC regulations also address interest and non-interest fees.
>
> OCC regulations preempt state laws that conflict with the real estate lending powers of banks and specifically preempt state laws that interfere with banks' ability to make mortgage loans secured by real estate. State action that limits banks' ability to foreclose on a defaulted loan and take possession of collateral, beyond what is provided for in the CARES Act, would interfere with banks' powers to make secured mortgage loans."

Given that mortgage servicers will be outreaching to borrowers near the end of the forbearance period to discuss options, and existing law which compels conversations between mortgage servicers and borrowers before the non-judicial foreclosure process commences, we believe adequate protections are in place and that this section should be removed from the bill.

At a minimum, subdivision (c) should be removed from the bill. This subdivision includes language requiring servicers who, because of contractual requirements on private label securities, will not be able to provide post forbearance options to borrowers in the manner prescribed by the bill, to disclose this at the time of the forbearance. Failing to disclose any limits on these post forbearance options would force the servicer to forfeit compliance with its contractual obligations to the investor. These provisions are unworkable as servicers will not know at the beginning of the forbearance what options the consumer will have to exit forbearance, nor would the disclosure of the covenants for such securities provide any useful consumer information.

Subdivision (e) should also be amended to provide that a mortgage servicer who, with respect to non-federally backed mortgages, complies with federal mortgage agency guidance regarding borrower options following forbearance should similarly be deemed in compliance with this section.

<u>Remedies and Penalties – Sections 3273.14, 3273.16 and 3273.23</u>

We object to draconian, uneven, and lopsided remedies and penalties provided for in AB 1436. While a specific cross reference to Business and Professions Code Section 17200 is not present, the measure continues to provide the same type of legal exposure. Liability imposed through Section 17200, has long been a concern for the business community.

In addition, the measure includes similar relief provided for in the Homeowner Bill of Rights. The circumstances surrounding the Homeowner Bill of Rights were different than the current crisis and the effort then was to compel behavior based on alleged deficiencies at that time by mortgage servicers.

At a minimum, we do not believe it is appropriate to <u>mandate</u>, in a lopsided fashion, that a "prevailing borrower" (as opposed to a prevailing party) recover attorney's fees and costs when the borrower obtains an injunction. At this early stage of the legal process, the borrower has not prevailed on the merits.

We believe that applying the same penalties during the Legislature's response to the Great Recession to the current circumstance is unwarranted and excessive and will lead to mischief by trial attorneys.

<u>Multi-Family Mortgages – Sections 3273.20-3273.23</u>

Under the multi-family provisions of the measure, upon an oral or written request for forbearance from a borrower, mortgage servicers must grant multi-family borrowers up to 180 days of forbearance in 30-day increments.

We believe that the measure should align with the CARES Act by requiring that multi-family borrowers request forbearance <u>in writing</u> pursuant to mortgage servicer relief programs. The granting of forbearance in subdivision (b) should be contingent upon: (i) real property taxes and insurance for the mortgage property being current and paid to date; (ii) that the property not be vacant or abandoned; and (iii) where the borrower executes documentation as reasonably requested by the mortgage servicer relating to the forbearance. In addition, subdivision (c) and the extension of forbearance should be contingent on the borrower fully performing its obligations under the prior forbearance.

Finally, similar to the safe harbor provided for in subdivision (g) of Section 3273.10, language should be included in the measure that provides that a mortgage servicer of a federally backed multi-family mortgage loan that complies with Section 4023 of the CARES Act is deemed to be in compliance with the article. Further, a mortgage servicer of any other multi-family loan that provides forbearance consistent with the requirements of Section 4023 of the CARES Act, should similarly be deemed to be in compliance with this article.

Tenant Provisions

While this bill requires lenders to work with multi-family borrowers, it also severely undermines the ability for those borrowers to receive enough income repay their multi-family loans. First, the unlawful detainer/civil action moratorium encourages renters to treat the moratorium as a rent holiday. Second, virtually every tenant can qualify for this relief because the bill requires only a statement that the ability to pay full rent has been affected, without even a minimum threshold of impact, supporting documentation, or any process for testing the validity of the statement. Third, the bill recognizes, but does not provide funding for, the financial burden it imposes on rental property owners. The bill provides that, "If a local initiative, ordinance, regulation, or other policy conflicts with this section, the provision that provides greater protection to covered tenants shall apply," which invites a patchwork of local requirements and creates unmanageable complexity and significant legal and regulatory risk.

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As the pandemic evolves, mortgage servicers and property owners will explore every option to assist borrowers with financial hardships during this challenging period. Our members realize that the economic challenge facing the country from this public health emergency is significant. The current economic slowdown will be painful for individuals and businesses alike, including some mortgage servicers and their staff. But we recognize that we all need to work together to meet, and get through, this challenge together, unfortunately the approach outlined in AB 1436 goes too far.

We appreciate the ability to express our opposition to AB 1436. If you have any questions, please do not hesitate to contact us.

cc: The Honorable David Chiu, Member, California State Assembly
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