May 15, 2020

Chairman Kenyan McDuffie
1350 Pennsylvania Avenue NW, Suite 506
Washington, DC 20004

Dear Chairman McDuffie,

On behalf of the undersigned organizations representing an important segment of the District of Columbia's real estate finance industry, we are writing to offer support for your leadership in fighting the ongoing novel coronavirus COVID-19 pandemic. We understand how you and your staff are working around the clock to address the impacts of the virus, and we are ready to assist to best serve our community and fellow citizens.

In that spirit of partnership, we are following up on our conference call earlier this week with staff from your office about recently enacted emergency legislation which has created an urgent concern for our member companies.

The COVID-19 Response Supplemental Emergency Amendment Act of 2020[1] (B23-073) introduced by the City Council on April 6th, then passed on April 7th and signed by the Mayor on April 10th requires the creation of a D.C. Residential Mortgage and Commercial Mortgage Deferment Program for borrowers who can demonstrate evidence of a financial hardship resulting from the public health emergency. The purpose of these programs is to allow borrowers and renters to defer their payments for 90 days. As emergency legislation, the Act remains in effect no longer than 90 days.

The program was quickly amended by the Council by legislation (B23-075) which was introduced on April 20th, passed the next day, and signed by the Mayor on May 4th.[2] The Council did not hold a public hearing. Also, the Department of Insurance, Securities and Banking (DISB) DSIB offered no formal opportunity for public comment before issuing written FAQs and Guidance[3] on implementing the new law's provisions two days after the Mayor's enactment and two days before the first reporting requirements. Under these circumstances, please understand that the real estate finance industry is justifiably concerned.

These issues are magnified in light of sweeping previous federal action which already addresses the Council's concerns and which the industry can demonstrate impressive results[4] On March 27th, the President signed the *CARES Act*, the stimulus package that includes a host of provisions, including direct payments to American households and businesses that may experience financial hardship connected to the global spread of the virus, and single-family and multifamily/commercial forbearance, foreclosure, and eviction provisions. Additionally, in support of these consumer and small business needs, the Federal Housing Administration as well as the Government Sponsored Enterprises – Fannie Mae and Freddie Mac– have provided detailed policies and guidance to implement their programs.

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[1] Available at: https://code.dccouncil.us/dc/council/acts/23-286.html
[2] Available at: https://code.dccouncil.us/dc/council/acts/23-299.html
[3] Available at: https://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/DISB-FAQs-ResidentialCommercialMortgDefermentProg-dmoi-edits.pdf
[4] Nearly 4 million consumers have been placed in forbearance in the first weeks of the pandemic. See *Mortgage Bankers Association weekly report, Forbearance and Call Volume Survey*. https://www.mba.org/2020-press-releases/may/share-of-mortgage-loans-in-forbearance-increases-to-791

Our organizations and our member companies fully support these CARES Act borrower and renter relief efforts and are working vigorously to implement them amidst their own challenges as businesses during this pandemic. However, the D.C. law is unfortunately duplicative and divergent from these new federal requirements our members are already implementing. In addition to creating legal uncertainty as to which set of requirements servicers are to follow, many D.C. residents and businesses will be confused as to who may be eligible for forbearance under the law. In addition, the new law raises important questions about the scope of DISB over banks and other mortgage lenders. Lastly, the law did not provide the programmatic specificity needed to operationalize the forbearance program, which will likely lead to unnecessary complaints, a slower reaction to acute borrower need and ultimately enforcement by the Attorney General when a robust federal program is already available. We highlight these and other key issues below, along with recommended suggested legislative changes to address them.

PROPOSED LEGISLATIVE ACTION

1. Address conflicts between section 202 deferrals and forbearance under the CARES Act

Both section 202 and sections 4022 and 4023 of the CARES Act provide mechanisms under which borrowers can request and receive temporary relief from the contractual obligation to make timely mortgage payments. Those mechanisms and the relief they offer are similar but not identical, and a lender cannot simultaneously comply with both. For example, section 202 requires a borrower applying for a deferral under section 202 to demonstrate to the mortgage servicer evidence of a financial hardship resulting directly or indirectly from the public health emergency. In contrast, section 4022 of the CARES Act prohibits a servicer from requiring evidence of hardship.

We believe this conflict should be resolved in favor of the more-generous relief provided by the CARES Act. For example, the forbearance periods under section 4022 and 4023 of the CARES Act are as generous or more generous than the deferral period specified under section 202. Moreover, the CARES Act provisions are already supported by an infrastructure of guidance and information for servicers and consumers.[5]

Recommendation. To prevent mortgage servicers from the impossible task of reconciling two similar but conflicting obligations to provide relief, we recommend that section 202 be amended to exempt mortgage loans that are subject to forbearance under sections 4022 or 4033 of the CARES Act. Specifically, we recommend adding a new subsection (m) to section 202(l)(3), as follows:

> **(m)** The provisions of this section do not apply to any residential or commercial loan that is a "Federally backed mortgage loan" under section 4022 of the CARES Act, codified at 15 USC 9056(a)(2), or a "Federally backed multifamily mortgage loan" under section 4023 of the CARES Act , codified at 15 US 9057(f)(2).

We note that this addition would effectively exempt the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, or the Government National Mortgage Corporation, without a waiver of the exemptions to the Mortgage Lender Act or not.

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[5] See, e.g., Federal Housing Finance Agency, COVID-19 Information and Resources; https://www.fhfa.gov/Homeownersbuyer/MortgageAssistance/Pages/Coronavirus-Assistance-Information.aspx; and Consumer Financial Protection Bureau, Guide to coronavirus mortgage relief options; https://www.consumerfinance.gov/about-us/blog/guide-coronavirus-mortgage-relief-options/

We also considered recommending an approach of deeming any lender that in compliance with the forbearance provisions of the CARES Act to be in compliance with section 202, but that would not address the conflicting application requirements or the borrower confusion about having to select from multiple statutory sources of relief.

2. Conform section 202 to the scope of DISB jurisdiction.

As specified in subsection (a), section 202 applies to:

> "a mortgage lender that makes a residential mortgage loan or commercial mortgage loan under the jurisdiction of the Commissioner of the Department of Insurance, Securities, and Banking."

It would be useful to explicitly recognize that the jurisdiction of DISB referred to in section 202 is limited.

a. Recognize limited DISB jurisdiction over non-DC-chartered banks

Ordinarily, banks are explicitly exempt from DSIB jurisdiction because they are explicitly exempted from the scope of the Mortgage Lending Act.[6] However, subsection (h) of section 202 waives those exemptions for purposes of section 202.

This would appear to bring banks within the jurisdiction of DISB. However, we note the ability of DISB to exert jurisdiction over mortgage lending by financial institutions may be limited by federal law, including the National Banking Act. For example, the Office of the Comptroller of the Currency (OCC) recognized exactly that on April 24, 2020 in OCC Bulletin 2020-43,[7] reminding national banks that *"*federal law vests the OCC with exclusive visitorial authority over banks*," and that*

> 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. The bank, however, should contact its examiner-in-charge as soon as possible.

The DISB website[8] reflects DISB's recognition of this limitation on its authority over banks are not chartered by the District of Columbia.

> There are currently 244 branch offices of national and other state banks doing business in the District of Columbia today. Only District-chartered banks are regulated by the Department of Insurance Securities and Banking (DISB). DISB does not regulate national banks or banks chartered by other states.

Recommendation. To reflect the limitations on DISB's jurisdiction over mortgage lending by depository institutions that are chartered by the OCC or by other states, we recommend that the Council remove subsection (h) of section 202 (and renumber subsequent subsections):

> ~~**(h)** To the extent necessary to conform with the provisions of this section, the exemptions in section 3 of the Mortgage Lender and Broker Act of 1996, effective~~

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[6] See D.C. Official Code § 26-1102(a).
[7] Available at: https://occ.gov/news-issuances/news-releases/2020/nr-occ-2020-43.html
[8] https://disb.dc.gov/node/329002 (viewed May 13, 2020).

~~September 9, 1996 (D.C. Law 11-155; D.C. Official Code § 26-1102), are waived for the duration of the public health emergency.~~

b. Recognize Limited DISB jurisdiction over Commercial and Multifamily Mortgage Lending.

Section 202 refers to mortgage lenders that make commercial mortgage loans and defines the term "commercial mortgage loan." However, the scope of section 202 is expressly limited to mortgage loans made "under the jurisdiction of DISB," which does not cover commercial or multifamily mortgage loans that are not made, held, or serviced by a banking organization chartered by DISB under title 1 of chapter 26 of the D.C. Code.

Apart from DISB jurisdiction over banks it charters, the jurisdiction of DISB over mortgage lending is established in the Mortgage Lender and Broker Act of 1996, effective September 9, 1996 (D.C. Law 11-155; D.C. Official Code § 26-1101 et seq.) ("Mortgage Lender Act").

The Mortgage Lender Act grants DISB jurisdiction to license and regulate persons doing business in the District of Columbia "as a mortgage loan originator, loan officer, mortgage lender, mortgage broker, or any permissible combination thereof,"[9] with respect to mortgage loans that (1) are primarily for personal, family, or household use and (2) are secured by mortgages on one to four family housing units, or individual units of condominiums or cooperatives.[10] As a result, DISB's jurisdiction under the Mortgage Lender Act does not extend to making and servicing mortgage loans that are for commercial purposes or that are secured by mortgages on commercial or multifamily properties.

Despite that clear limitation of the scope of DISB authority, DISB's FAQs and Guidance appears to bring services of commercial and multifamily mortgage loans within the scope of section 202, as follows:

> In short, any entity (save for the exceptions listed below) that services a residential or commercial mortgage loan for real property located in the District of Columbia must comply with the Act.
>
> Exceptions: A mortgage lender does not include the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, or the Government National Mortgage Corporation.

Recommendation. While we believe the scope of DISB jurisdiction, and therefore the scope of section 202, is readily apparent from the current statutory language, it could be clearer. To further clarify the scope of section 202, therefore, we recommend that subjections (a) and (l) be amended to read as follows:

> **(a)** In accordance with section 5(b)(15) of the District of Columbia Public Emergency Act of 1980, effective March 17, 2020 (D.C. Act 23-247; D.C. Official Code § 7-230~~1~~4(b)(15),[11] and ~~notwithstanding the any provision of~~ the jurisdiction conferred on the Commissioner of the Department of Insurance, Securities, and Banking by the Mortgage Lender and Broker Act of 1996, effective September 9, 1996 (D.C. Law 11-155; D.C. Official Code § 26-1101 et seq.) ("Mortgage Lender Act"), or by D.C. Law 11-155; D.C. Official Code, title 26, chapter 1, § 26-101 et seq. ~~any other provision of District law~~,

[9] See D.C. Official Code § 26-1103(a)(1).
[10] See D.C. Official Code § 26-1101(12) (definition of "mortgage loan").
[11] Footnote added: This is a recommended technical correction. The reference appears to be intended to refer to § 7-2304(15), as there is no § 7-2301(15).

during a period of time for which the Mayor has declared a public health emergency pursuant to section 5a of the District of Columbia Public Emergency Act of 1980, effective October 17, 2002 (D.C. Law 14- 194; D.C. Official Code § 7-2304.01), and for 60 days thereafter, a mortgage lender that makes a residential mortgage loan or commercial mortgage loan under the jurisdiction of the Commissioner of the Department of Insurance, Securities, and Banking, shall develop a deferment program for borrowers that at a minimum: …

* * *

(l) For the purposes of this section, the term:

(1) Commercial mortgage loan" means a loan for the acquisition, construction, or development of real property, or a loan secured by collateral in such real property, that is owned or used by a person, business, or entity for the purpose of generating profit, and shall include real property used for single-family housing, multifamily housing, retail, office space, and commercial space, that is made, owned, or serviced by a corporation organized under D.C. Law 11-155; D.C. Official Code, title 26, chapter 1, § 26-101 et seq.

3. Specify and clarify a reasonable repayment period.

Subsection (c)(2) of section 202 provides that, if the borrower and servicer cannot agree to a "reasonable time" to repay the deferred amounts, the repayment period will be 5 years from the end of the deferment period, or the end of the original term of the mortgage loan, whichever is earlier.

A 5-year repayment period is far longer than what would generally be viewed as a reasonable time for repayment of deferred amounts. As a result, establishing a 5-year repayment period as a default if the borrower does not agree to a shorter repayment period offered by the servicer creates a strong incentive for the borrower to refuse to accept objectively reasonable repayment periods. We believe that the 18-month repayment period established in section 202 for repayment of 90-days of reduced rent would be the outer limit for a reasonable repayment period for repayment of 90-days of deferred mortgage payments.

In addition, we are concerned that the provision could be misread to conclude that it would require a lender to consent to a repayment period that extended beyond the original term of the mortgage loan. While we do not believe that to be an accurate reading of the language of the provision, the consequences of confusion warrant clarification.

Recommendation. To remove the unreasonably long repayment period, and to clarify this provision, we recommend that the repayment period for repayment of deferred mortgage payments be conformed to the 18-month repayment period for deferred rental payments under section 202(g)(2) and otherwise clarified as follows:

(c) The mortgage lender shall approve each application in which a borrower:

(1) Demonstrates to the mortgage servicer evidence of a financial hardship resulting directly or indirectly from the public health emergency, including an existing delinquency or future ability to make payments; and

(2) Agrees in writing to pay the deferred payments within:

(A) A reasonable time agreed to in writing by the applicant and the mortgage servicer; or

(B) If no reasonable time can be agreed to pursuant to subparagraph (A) of this paragraph, ~~5 years~~ within 18 months from the end of the deferment period, or, if the remaining original term of the mortgage is less than 18 months, within the original term of the mortgage loan ~~whichever is earlier~~.

4. Harmonize requirements for a deferral program

Section 202 requires each mortgage servicers within its scope to develop a deferment program for borrowers that meets certain minimum requirements. Included in the requirement that the program

> **(1)** Grants at least a 90-day deferment of mortgage payments for borrowers;
>
> **(2)** Waives any late fee, processing fee, or any other fees accrued during the pendency of the public health emergency; and
>
> **(3)** Does not report to a credit bureau any delinquency or other derogatory information that occurs as a result of the deferral.

Requirements (1) and (3) relate to deferrals and to the period of the deferral and so could reasonably be characterized as elements of a deferral program, but requirement (2), as currently draft, has no link to deferrals and so is not reasonably related to a deferral program.

Recommendation. To harmonize requirement (2) with its context in section 202, establishing minimum requirements for a deferral program, we recommend that requirement (2) be modified to relate that requirement to such a program, e.g., by incorporating language from § 202(g)(1), as follows:

> **(2)** Waives any late fee, processing fee, or any other fees accrued during the period of time in which there is mortgage deferral in place ~~pendency of the public health emergency~~;

* * *

We hope you find these suggestions helpful to you as you continue to serve the residents of the District as we all navigate these unprecedented circumstances. We will separately submit a letter to DSIB identifying concerns with section 202 that may be addressed administratively, by interpretation of the current law or by way of guidance.

Thank you for your interest in working with the real estate finance industry on this issue to better serve D.C. consumers. Please reach out to Kobie Pruitt (kpruitt@mba.org) if you have any questions about these legislative suggestions or the concerns that underlie them.

Sincerely,

Mortgage Bankers Association of Metropolitan Washington
Maryland Mortgage Bankers and Brokers Association
Virginia Mortgage Bankers Association
Mortgage Bankers Association