



MORTGAGE BANKERS ASSOCIATION

May 20, 2021

Honorable Julia Gonzales
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Honorable Steven Woodrow
Representative
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Re: Multifamily Forbearance Provision in proposed new section 38-38-1002

Dear Senator Gonzales and Representative Woodrow:

Thank you for your leadership during the current national health crisis and the resulting economic hardship our nation is facing. The impacts on consumers across the country in general, and in Colorado in particular, have been punishing. As we are sure you will agree, it is encouraging to see that as the available vaccines are more widely administered and vital federal relief programs are rolled out, critical economic indicators such as the unemployment rate, portend of better days ahead.

However, the impacts of the coronavirus on consumers are far from over, and the Mortgage Bankers Association (MBA)¹ believes that those most effected by the pandemic must be the priority for public policy as the country emerges gradually from these challenges. For example, MBA has robustly supported each round of federal rental assistance for tenants in multifamily properties financed by MBA member companies. This funding includes two rounds of Congressional appropriations totally nearly \$45 billion, and we understand that Colorado has received more than \$385 million in Emergency Rental Assistance as a result.

We recognize the challenge you face as legislators, appropriately balancing the interests of tenants, property owners, and lenders in this late and rapidly evolving stage of the COVID-19 pandemic. It is in this spirit that MBA is taking this opportunity to write and provide suggested changes to the April 21, 2021, draft of the proposed bill, *The Emergency COVID Relief Real Property Act*.

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 330,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 1,700 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

MBA believes that your proposal would be improved with the following revisions to the proposed new section 38-38-1002. *Temporary restrictions on foreclosures during the COVID-19 disaster emergency - property owners - landlords - declarations of financial hardship - exemption - definition – repeal:*

- **Covered period.** Colorado has received more than \$385 billion in federal Emergency Rental Assistance (ERA) funding, and the Colorado Emergency Rental and Mortgage Assistance program is up and running.² We believe that this federally funded Colorado ERA program is a far better solution to the problem of unpaid rents than imposing a mandatory forbearance requirement on lenders.

Should you nevertheless determine to impose such a requirement on lenders, we would recommend shortening the period covered by the provision to end on or before September 30, 2021. That shorter period would enable property owners and tenants to apply for and receive ERA, and for property owners to determine whether they still are unable to make timely, full mortgage payments even after all available ERA.

- **Rental assistance and forbearance.** Colorado's more than \$385 million in ERA should be property owners' first line of relief for unpaid rent, before any forbearance obligations are thrust onto lenders, and property owners should not be able to double-dip by obtaining both forbearance and rental assistance for the same unpaid rents. To clarify that this is the case, any forbearance relief afforded a property owner under the proposed bill should be *net* of any ERA funds that benefit that property owners.³
- **Sworn declarations of property owner financial hardship.** Under the proposed bill, consumer tenants are required to support their statements of financial hardship with sworn declarations attesting to the accuracy of those statements. We recommend that property owners, which are commercial borrowers, similarly attest to the accuracy of all statements submitted to a lender under this provision.⁴
- **Best efforts to make close to full payments.** Consumer tenants submitting declarations of financial hardship under the proposed bill must swear that that they are making best efforts to make timely partial payments that are as close to full payment as their circumstances permit, taking into account their nondiscretionary expenses. We recommend that property owners similarly attest that they are making best efforts to make timely payments that are as close to

² See Colorado's Emergency Rental and Mortgage Assistance webpage: [Emergency Rental and Mortgage Assistance | Department of Local Affairs \(colorado.gov\)](https://www.colorado.gov/pacific/local-affairs/emergency-rental-and-mortgage-assistance)

³ We note that the declaration under the CDC nationwide eviction moratorium similarly requires tenants to attest, under penalty of perjury, that "I have used best efforts to obtain all available government assistance for rent or housing." See CDC Declaration Form; available at: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/declaration-form.pdf>.

⁴ Similarly, tenants making declarations under the CDC nationwide eviction moratorium must swear to the accuracy of their statements, under penalty of federal perjury statutes. See CDC Declaration Form.

full payment as their circumstances permit, taking into account rental assistance and their nondiscretionary expenses.⁵

- **Scope of foreclosure and late fees relief.** The proposed provision requires a lender to offer a forbearance agreement as to amounts of unpaid rent that the property owner reports to the lender. It is implicit that the associated provisions on foreclosure and late payment relief would apply only with respect to nonpayment of amounts deferred under a forbearance agreement. However, to avoid confusion as to the scope of relief, we recommend that the proposed provision explicitly link the relief as to nonpayment or late payments of amounts deferred under the required forbearance agreement.

We believe that these recommendations are consistent with the objective of balancing the interests of all the affected parties, including tenants, property owners, and lenders, and that they appropriately take into account how that balance of interests is affected by the federally funded ERA will have on tenants and property owners across Colorado.

To communicate each of these recommendations in more detail, we attach the text of new section 38-38-1002, marked up to reflect specific suggested language.

Thank you for reviewing our suggested changes and considering amending your draft legislation. Please do not hesitate to contact me if you or your staff have questions or would like additional information at (202) 557-2745 or mflood@mba.org.

Respectfully,



Mike Flood
Senior Vice President
Commercial/Multifamily Policy and Member Engagement

Attachment: Suggested Revisions to Proposed Multifamily Forbearance Provision

⁵ The CDC declaration form requires a similar statement, under penalty of perjury. See CDC Declaration Form.

Suggested Revisions to Proposed Multifamily Forbearance Provision⁶

38-38-1002. Temporary restrictions on foreclosures during the COVID-19 disaster emergency - property owners - landlords - declarations of financial hardship - exemption - definition - repeal.

Notes

(1) (a) NOTWITHSTANDING ANY PROVISION OF THIS ARTICLE 38 TO THE CONTRARY, ON AND AFTER THE EFFECTIVE DATE OF THIS SECTION, AND UNTIL ~~JANUARY 31~~ SEPTEMBER 30, 2021, A PROPERTY OWNER MAY PROVIDE TO THE PROPERTY OWNER'S MORTGAGE LENDER:

Shortening covered period to end September 30, 2021.

(I) A SWORN DECLARATION ATTESTING THAT ONE OR MORE OF THE PROPERTY OWNER'S TENANTS HAVE BEEN UNABLE TO PAY RENT AS A RESULT OF THE COVID-19 PANDEMIC;

(II) A COPY OF EACH SUCH TENANT'S SWORN DECLARATION OF FINANCIAL HARDSHIP, WHICH DECLARATION SATISFIES THE DESCRIPTION IN SECTION 13-40-128 (1)(b) AND WAS SUBMITTED TO THE PROPERTY OWNER;

(III) AN INDICATION OF THE TOTAL AMOUNT OF EACH TENANT'S UNPAID RENT AS OF THE DATE OF THE TENANT'S DECLARATION;

(IV) A SWORN DECLARATION ATTESTING ~~STATEMENT~~ THAT THE PROPERTY OWNER HAS WAIVED ALL LATE FEES, ADMINISTRATIVE FEES, AND EVICTION FILING FEES; ~~AND~~

Adding sworn declaration.

(V) A SWORN DECLARATION THAT THE PROPERTY OWNER HAS APPLIED FOR RENTAL ASSISTANCE WITH RESPECT TO EACH TENANT WHOSE SWORN DECLARATION IS PROVIDED, OR THAT THE TENANT HAS APPLIED FOR SUCH RENTAL ASSISTANCE, AND AN INDICATION OF THE TOTAL AMOUNT OF RENTAL ASSISTANCE RECEIVED OR EXPECTED TO BE RECEIVED IN RESPONSE TO SUCH APPLICATIONS;

Adding requirement to apply for and disclose rental assistance.

(VI) A SWORN DECLARATION ATTESTING ~~STATEMENT~~ THAT THE NONPAYMENT OF RENT BY THE TENANTS WHOSE DECLARATIONS ARE PROVIDED, NET OF RENTAL ASSISTANCE RECEIVED OR EXPECTED TO BE RECEIVED, HAS RENDERED THE PROPERTY OWNER UNABLE TO PAY THE PROPERTY OWNER'S MORTGAGE PAYMENT IN FULL; AND

Adding sworn declaration and reflecting net unpaid rent after rental assistance.

⁶ Suggested revisions are based on the April 21, 2021, draft of the proposed bill.

(VII) A SWORN DECLARATION ATTESTING THAT THE PROPERTY OWNER IS MAKING THE PROPERTY OWNER'S BEST EFFORTS TO MAKE TIMELY PARTIAL MORTGAGE PAYMENTS THAT ARE AS CLOSE TO FULL PAYMENT AS THE PROPERTY OWNER'S CIRCUMSTANCES PERMIT, TAKING INTO ACCOUNT THE UNPAID RENT REPORTED UNDER SUBSECTION (1)(a)(III) AND THE PROPERTY OWNER'S OTHER NONDISCRETIONARY EXPENSES.

Incorporating "best efforts" statement required in tenant statements.

(b) IF A MORTGAGE LENDER RECEIVES FROM A PROPERTY OWNER THE INFORMATION DESCRIBED IN SUBSECTION (1)(a) OF THIS SECTION, THE MORTGAGE LENDER:

(I) SHALL OFFER THE PROPERTY OWNER A FORBEARANCE AGREEMENT CONCERNING THE AMOUNT OF RENT THAT REMAINS UNDER TENANT SWORN DECLARATIONS OF FINANCIAL HARDSHIP PROVIDED TO THE LENDER UNDER SUBSECTION (1)(a)(II), NET OF RENTAL ASSISTANCE RECEIVED OR EXPECTED;

Linking required forbearance agreement to reported unpaid rent, net of rental assistance.

(II) SHALL NOT INITIATE A NEW FORECLOSURE PROCEEDING OR SUBMIT A BID FOR FORECLOSURE ON THE PROPERTY FOR AT LEAST NINETY DAYS AFTER RECEIVING THE INFORMATION WHERE THE BASIS FOR THE PROCEEDING OR FORECLOSURE BID IS THE NONPAYMENT OF AMOUNTS DEFERRED UNDER A FORBEARANCE AGREEMENT OFFERED TO THE PROPERTY OWNERS UNDER SUBSECTION (1)(b)(I) AND ACCEPTED BY THE PROPERTY OWNER; AND

Linking foreclosure relief payments deferred under forbearance agreement.

(III) SHALL NOT CHARGE THE PROPERTY OWNER A LATE FEE, INCLUDING ANY INTEREST, PENALTY, ADMINISTRATIVE FEE, OR EVICTION FILING FEE, FOR THE PROPERTY OWNER'S LATE REMITTANCE OR NONREMITTANCE OF A MORTGAGE PAYMENT DEFERRED UNDER A FORBEARANCE AGREEMENT OFFERED UNDER SUBSECTION (1)(b)(I) AND ACCEPTED BY THE PROPERTY OWNER.

Linking late fee relief to payments deferred under forbearance agreement.

(2) NOTHING IN THIS SECTION RELIEVES A PROPERTY OWNER OF THE OBLIGATION TO PAY MORTGAGE PAYMENTS PURSUANT TO A MORTGAGE LOAN OR PROMISSORY NOTE.

(3) NOTWITHSTANDING ANY PROVISION OF THIS SECTION TO THE CONTRARY, THE RESTRICTIONS DESCRIBED IN THIS SECTION DO NOT APPLY TO A MORTGAGE LENDER WITH REGARD TO A PROPERTY OWNER IF THE MORTGAGE LENDER

POSSESSES EVIDENCE THAT THE PROPERTY OWNER'S SWORN DECLARATION OF FINANCIAL HARDSHIP DESCRIBED IN SUBSECTION (1)(a)(I) OF THIS SECTION INCLUDES ONE OR MORE FALSE CLAIMS OR STATEMENTS.