



MORTGAGE BANKERS ASSOCIATION

July 17, 2020

Honorable Kate Brown
Office of the Governor
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Salem, OR 97301-4047

Honorable Peter Courtney
Senate President
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Salem, Oregon 97301
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Honorable Fred Girod
Senate Minority Leader
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Honorable Tina Kotek
House Speaker
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Honorable Christine Drazan
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Dear Governor Brown and Legislative Leaders,

We want to thank you and your staff for your hard work to address the vexing issues that our families, communities and businesses face because of the health emergency created by COVID-19. However, the Mortgage Bankers Association (MBA)¹ and its members serving consumers and businesses needing pandemic-related assistance in the state have grave concerns regarding Oregon's recently enacted residential, multifamily, and commercial mortgage law.

The passage and enactment of House Bills 4204 and 4213 in just a matter of days did not provide adequate and appropriate opportunity for stakeholder input from consumers, regulators, and industry to ensure that they did not contain state-wide protections unrelated to COVID-19 impacts, disruptive retroactive provisions and other impairments to obligations under private contracts, and conflicts with existing federal law, including conflicts the federal CARES Act and the multiple consumer-focused directives issued to implement this vast new federal program of forbearance and rent relief.

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, DC, 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 2,100 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, credit unions, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field.

Consequently, this public policy creates operational issues and creates regulatory and legal risk for the real estate finance industry in the state. In addition, it has the unintended effect of reducing opportunities for credit-worthy Oregon families looking to purchase or refinance a home with current historically low interest rates and for Oregon businesses seeking commercial mortgage financing. Most importantly, the law ignores the progress made by implementing the CARES Act and by mortgage lenders offering functionally equivalent opportunities to American families, and it potentially opens the state up to litigation risk because of conflicts with the U.S. Constitution's Contract Clause.

MBA urges you to amend this new law in the upcoming Special Legislative Session to address these concerns, including deeming mortgage lenders subject to, and in compliance with, the CARES Act as well as to those offering functionally equivalent consumer assistance to be in compliance with state law.

The Federal CARES Act is Working and Provides Oregon Families with more Options

The federal CARES Act offers consumers with federally backed loans sweeping new protections from economic harm resulting from pandemic-related job loss and/or income interruption. The new law offers rent relief, mortgage and rent forbearance for up to a year, protection from penalties and late fees, foreclosure protection and multiple opportunities to exist forbearance as personal circumstances change. Congress also insisted that homeowners and renters be able to access these opportunities with a simple phone call in which they only must assert their need.

The CARES Act supplemented these provisions by providing relief from Troubled Debt Restructured (TDR) accounting treatment for lenders that provide forbearance or other relief to help borrowers affected by the pandemic. State and federal prudential regulators issued an Interagency Statement embracing the CARES Act TDR relief and communicating their support for working prudently with borrowers to address COVID-19 impacts, and state insurance commissioners have provided similar accounting and capital relief to enable lenders to offer forbearance and other relief to borrowers.

At a time when middle class families needed this help the most, the real estate finance industry delivered. For example, in just a few short months since implementation of these provisions at the start of the pandemic, mortgage lenders provided 4.3 million American families with forbearance by implementing this federal mandates for government backed loans, which constitute nearly 80 percent of the residential mortgage market nationally. Additionally, investors of loans not backed by the federal government are also offering consumers with the same critically needed relief. MBA's latest Forbearance and Call Volume Survey revealed that the total proportion of loans portfolios now in forbearance stands at 8.18%, while the proportion of loan portfolios in forbearance for private-label securities (PLS) stands at a higher 10.93%.²

Rather than celebrate this success, Oregon has ignored these results and instead diverged from and conflicted with the federal law and the difficult work done to operationalize similar opportunities outside these requirements. The new law also fails to consider the exhausting

² <https://www.mba.org/2020-press-releases/july/share-of-mortgage-loans-in-forbearance-decreases-for-fourth-straight-week-to-818>

work of the affordable housing programs and their detailed written requirements for lenders to expand consumer opportunities. For example, the week the Legislature was passing these bills, the Federal Housing Finance Agency (FHFA) announced that Fannie Mae and Freddie Mac (the government sponsored enterprises, or GSEs) will extend their forbearance agreements for multifamily property owners with enterprise-backed mortgages for up to three months, for a total forbearance of up to six months. While properties are in forbearance, landlords must suspend all evictions for tenants unable to pay rent. The Federal Housing Administration, in just the last two weeks, has made a pair of announcements to: expand home retention measures to help homeowners with FHA-insured single family mortgages who are financially impacted by the COVID-19 pandemic to bring their mortgage current at the end of their COVID-19 forbearance;³ and, revise its mortgage servicing policies to remove unnecessary barriers for homeowners seeking mortgage payment relief, achieve operational consistency with industry standard best practices, and reduce burdens incurred by the industry when servicing an FHA-insured mortgage portfolio.

The new law undermines ongoing efforts to assist consumers, because it creates duplicative and sometimes contradictory requirements when viewed alongside these regulations and program requirements established by Congress, regulatory bodies, federal executive agencies, and the government sponsored enterprises. These conflicts have the potential to significantly limit access to credit for Oregon borrowers, by disrupting the securitization market that provides needed liquidity for the mortgage market. In addition, by not aligning the law to the federal CARES Act, it could potentially prevent Oregon families from taking advantage of ongoing improvements to the program specifically designed to help them.

Options to repay forborne payments are determined by the owner/investor or insurer of the loan and the borrower's unique financial situation. A one-size-fit all option will not be in the best interest of all borrowers. For example, deferring repayment of forborne amounts until the end of the loan would not provide meaningful assistance for borrowers who were already struggling to make their monthly payments before they entered forbearance.

Oregon Law Conflicts with the U.S. Constitution's Contracts Clause

Moreover, the Oregon law potentially conflicts with the Contracts Clause of the U.S. Constitution by requiring forbearance and other borrower relief options not consistent with existing contractual obligations or federal law. Loans are contractual agreements between parties, which necessitate terms for an offer, acceptance at an adequate price or consideration to make them valid. By requiring the forbearance for all mortgage loans and mandating a lender allow borrowers to add the balance to the end of the mortgage term, for example, Oregon is altering key financial terms of private mortgage contracts and is unlawfully impairing the obligation of contracts. Moreover, the law retroactively invalidates and voids lawful sales of real property that occurred prior to its enactment, which profoundly impairs obligations under contracts.

The law attempts to mitigate this conflict and impact by stating the provisions of the law "do not undermine a contractual bargain, interfere with a party's reasonable expectations or prevent a party from safeguarding or reinstating the party's rights." The new law even includes an

³ https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_102

alternative assertion which to implement the significant and legitimate public purpose of responding to the declaration of a state of emergency”

However, one cannot legislate the impact of law. Notwithstanding an legislative assertion to the contrary, the actual impact of the law will be to undermine contractual bargains, interfere with parties’ reasonable expectations and prevent parties from safeguarding or reinstating the parties’ rights, as well as to conflict with federal law. Moreover, many of the provisions in the law apply generally across all borrowers, lenders, and financing agreements, without regard to actual COVID-19 impact, which diminishes the “emergency” nature of those provisions. As a result, in its current form, the law opens the state up to legal challenges as to the law’s constitutionality.

Conclusion

We urge you to support amendments, in a special session of the legislature, that would address the concerns above, including deeming companies that are subject to, and in compliance with, the federal *CARES Act*, or providing forbearance that is functionally equivalent, to also be in compliance with state mandates as to forbearance. Notably, Oregon is out of step with other state legislatures (e.g., New York and Washington, D.C.) that have passed forbearance legislation that has included language that exempts loans made, insured, or held by federal agencies or the GSEs (i.e., loans subject to CARES Act forbearance provisions).

Therefore, we encourage you to adopt the following language:

The provisions of this (Title/Section/Chapter, etc.) do not apply to any residential or commercial loan that: (i) 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); or (ii) receives a forbearance that is consistent with a “forbearance” provided for under section 4022 or section 4023 of the CARES Act, including terms for (1) the duration of the forbearance and the extending or shortening of a forbearance, (2) the accrual of interest or fees in connection with the forbearance and any extensions, and (3) the requirements for the requesting of a forbearance, and an extension or shortening of a forbearance, by a borrower, and the provision of a forbearance, and any extension or shortening of a forbearance, by the servicer.

Even with such necessary amendments, the law could operate as intended to serve the interests of consumers and businesses in the state that have been affected by the COVID-19 pandemic.

We also encourage you to engage with federal policymakers to prevent future gaps in policy that could harm consumers and limit their options for assistance,

For these reasons and others, please make significant amendments to the law so that the real estate finance industry can continue to provide renters and homeowners the most effective

assistance possible. We would be pleased to provide you with any additional information that might be helpful as you consider this request.

Thank you for your consideration. If you or your staff have any questions or need more information, please feel to contact William Kooper at wkooper@mba.org.

Respectfully,

A handwritten signature in black ink, appearing to read "Pete Mills". The signature is written in a cursive style with a large initial "P" and a long, sweeping underline.

Pete Mills
Senior Vice President
Residential Policy and Member Engagement