May 14, 2020

The Honorable Monique Limón
Member, California State Assembly
State Capitol, Room 6031
Sacramento, CA 95814

RE: **<u>Opposition to AB 2501 (Limón): COVID-19 Homeowner, Tenant, and Consumer Relief Law of 2020</u>**

Dear Assembly Member Limón:

The organizations identified above regret to inform you of our opposition to your <u>Assembly Bill 2501</u>, a measure that, among other provisions, establishes a moratorium on foreclosure actions, mandates specific financial outcomes for mortgage borrower relief, and imposes significant new legal liability.

Given the recentness of this proposal, our members will undoubtedly continue to share feedback as they think through the implications of this measure. Accordingly, the content of this letter should not be considered exhaustive as it does not reflect the totality of our concerns and observations. We remain committed to being collaborative, constructive and solutions-oriented with the goal of minimizing unintended consequences that adversely impact distressed borrowers and undermine economic recovery.

Generally, this measure: 1) struggles from a broad scope and a lack of definitions 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 that are unevenly applied throughout the measure; and, 6) upends a national approach deployed through the CARES Act and federal agencies.

Unlike other efforts to provide much needed financial assistance, some of the mortgage-related relief granted in AB 2501 does not appear connected to a financial hardship due, directly or indirectly, to COVID-19 and the duration for some of the relief provided is unknown as it is tied to the end of the state of emergency. The latter is concerning because the state of emergency may linger for an extended period of time despite the lifting or amending of stay-at-home orders.

We are also concerned with inflexible relief proposed to be codified in statute that fails to keep pace with the evolving nature of the pandemic and assistance that is being provided and periodically updated by federal agencies and through additional acts of Congress. Actions are forthcoming as Congress negotiates additional relief through a CARES Act 2.0 and we are unclear how to reconcile such inconsistencies that may arise should AB 2501 be enacted.

Early Financial Relief Efforts Underscore Awareness and Attention to the Issue

California mortgage servicers are in the business of serving their customers, especially when hardship strikes. Our members succeed when our communities succeed, and we suffer when our communities suffer. It is widely recognized that it is in the interests of both lenders and borrowers to work constructively together to successfully navigate this unprecedented crisis.

Servicers have been motivated to work with borrowers and have, in fact, 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 efforts have been undertaken in an effort to be responsive.

Since the beginning of this national pandemic, California's mortgage servicers have been outreaching and working proactively with borrowers to minimize the adverse financial effects of this crisis, and they have done so with the encouragement of federal and state prudential supervisory agencies that worked together with the Financial Accounting Standards Board to issue an Interagency Statement to remove accounting and capital barriers to modifying loans for borrowers affected by the pandemic.

As a complement to the proactive outreach by mortgage servicers to their borrowers, given the unique nature of everyone's personal financial situation, our members immediately began to encourage borrowers experiencing hardships to reach out to their mortgage servicer to discuss their specific circumstances.

Individual institutions were also pleased to work collaboratively on a voluntary basis with the governor to announce important residential mortgage relief, including the offering of 90-day forbearance.

At the federal level, action has been taken on federally-backed mortgage loans to provide payment forbearance and to halt potential foreclosure actions. Recently enacted legislation, known as the Coronavirus Aid, Relief & Economic Security (CARES) Act, provides $2 trillion in economic stimulus. Among other provisions, the relief measure builds upon previous relief for residential mortgage loan borrowers as follows:

- **Single Family Forbearance** – For loans backed by federal government agencies or government sponsored entities (Fannie Mae and Freddie Mac):
    - Mortgage servicers are required to grant up to 180 days of forbearance to borrowers who request and make an affirmation of financial hardship due to COVID-19. That initial period must be extended up to another 180 days at the borrower's request.
    - Mortgage servicers are restricted from assessing penalties, fees or extra interest during the forbearance period.
    - Since the CARES Act passed in late March, according to a Mortgage Bankers Association press statement, mortgage servicers have provided forbearance to approximately 3.5 million borrowers nationwide in just seven weeks.

- **Multi-Family (5+ units) Forbearance** – For multifamily loans backed by federal government agencies or government sponsored entities (Fannie Mae and Freddie Mac), borrowers may request forbearance for a 30-day period, with up to two 30-day extensions:
    - Mortgage servicers are required to document the borrower's hardship.
    - Borrowers must provide tenant protections, including prohibitions on evictions for nonpayment or late payment fees.

Recognizing that improvements can always be made, as the crisis has evolved, so has the response to it. We appreciate that a major policy objective of AB 2501 is to improve communication between a borrower and a mortgage servicer regarding what assistance may be offered post forbearance. To that objective, understanding that borrowers had questions regarding forbearance and needed clarity on what happens at the end of a forbearance period, a series of informational documents have been developed to provide greater specificity. For example, the Consumer Financial Protection Bureau prepared an informational guide along with an educational video in an effort to provide consumers with additional details on mortgage relief options and forbearance.

Since the vast amount of outstanding mortgages are federally-backed, either owned or insured by the federal government, a frequently asked questions document focused on forbearance was prepared by the Federal Housing Finance Agency (FHFA) that oversees Fannie Mae and Freddie Mac. Among other matters included in the document, is a question about what happens at the end of the forbearance period, which we know has been a common question (we've provided the question and answer from the document below – emphasis added).

> **What happens at the end of the forbearance?**
>
> At the end of the forbearance period, homeowners are still required to eventually fully repay the forbearance, **but they will not have to repay it all at once unless they are able to do so**. Servicers will reach out to homeowners in forbearance about 30 days before the scheduled end of forbearance to determine which assistance program works best for the homeowner at that point – a repayment plan, loan modification, or an extension of the forbearance period if needed.

Scripts have also been prepared by Fannie Mae and Freddie Mac for use by mortgage servicers when talking with borrowers about forbearance and what that means. The scripts align with the frequently asked question document referenced above.

A similar frequently asked questions document has also been prepared by the Federal Housing Administration (FHA) relative to FHA loans. For simplicity, we are including the relevant portion of the document relating to what happens at the conclusion of the forbearance period below.

> **Q. (Added 4.17.20) Will I be required to make a "lump sum" payment to my loan servicer for the total missed payments at the end of the COVID-19 Forbearance period?**
>
> A. (Added 4.17.20) No. A "lump sum" repayment for the total missed payments is not required immediately at the end of the COVID-19 forbearance period. However, your lender will then evaluate you to see what loss mitigation options may be available. If you are an owner-occupant borrower who indicates they have the ability to resume making on-time mortgage payments and were current or less than 30 days past due as of March 1, 2020, you may be eligible for a COVID-19 Standalone Partial Claim. A partial claim is a no interest, junior loan secured by your property. No payments are due on the COVID-19 Standalone Partial Claim until the payoff, maturity or acceleration of your insured mortgage, including for the sale of your Property or a refinancing, or the termination of FHA insurance on your mortgage. If you are not eligible for the COVID-19 Standalone Partial Claim, your servicer will evaluate you with FHA's other loss mitigation tools to help you repay the balance owed over time.

Further to this point, and discussed more below, on May 13, FHFA published a deferment policy for Fannie Mae and Freddie Mac loans whereby borrowers would be able to defer payment of forborne amounts until the loan matures or the property is sold, through the creation of a non-interest bearing balance. In other words – borrowers, if they were able to resume payments, would be brought current, resume their regular payments, and repay forborne amounts at the time the loan is paid off. Importantly, this repayment plan is not considered by FHFA to be a loan modification. This proposed legislation would appear to preclude this option which we believe is an important tool for borrowers and servicers to assist in recovery.

Existing Law Establishes Statutory Systems Designed to Assist Distressed Borrowers

In addition to the relief provided by the CARES Act, it's worth underscoring important state and federal consumer protections in place since the last economic recession designed to help distressed residential mortgage loan borrowers, specifically in California, where state law requires mortgage servicers to outreach and have conversations with borrowers to explore possible solutions and foreclosure prevention alternatives before beginning the foreclosure process.

More specifically, California's Homeowner Bill of Rights provides basic fairness and transparency for homeowners in the foreclosure process. 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.

AB 2501 Suffers from Fundamental Flaws

Relative to AB 2501, we have concerns with the measure that must be addressed. While we can appreciate the intent of the bill, we believe that it would actually undermine the positive impacts of existing efforts and protections and may ultimately frustrate and delay the speed in extending important relief to impacted borrowers.

Foreclosure Moratorium – Section 3273.10

Measure AB 2501 mandates a foreclosure moratorium during the COVID-19 state of emergency and for a 180-day period after the state of emergency is lifted with no specific end point.

This provision applies without regard to whether or not the borrower is experiencing a financial hardship that is due, directly or indirectly, to COVID-19. Unlike the CARES Act, the moratorium is without a specific end point and is connected to the lifting of the state of emergency which may continue for an indefinite time despite the lifting or amending of stay-at-home orders.

Mortgage Forbearance – Section 3273.11

The measure requires the suspension of mortgage payments if the borrower is experiencing a financial hardship during the COVID-19 state of emergency or 180 days after the state of emergency has been lifted. The measure requires forbearance for 180 days and allows for an additional 180-day extension at request of borrower.

The financial hardship required to obtain a forbearance by the measure need not be due, directly or indirectly, to COVID-19; rather, forbearance would apply if the borrower experienced any financial hardship during the state of emergency or 180 days after the state of emergency has been lifted. This broad application may distract from efforts to focus on those truly experiencing financial hardship as a result of COVID-19. For example, our members have reported some borrowers using forbearance as a sort of cash management tool, where they request and obtain forbearance but continue to pay loans (using forbearance as an option to be able to not pay), or obtaining forbearance when they still have the means to pay their loans. This distracts servicers from their most important job, which is working with borrowers who cannot pay their loans and are in need of detailed attention. Forbearance efforts should be focused on borrowers who have hardship related to COVID-19.

Automatic Forbearance – Section 3273.12

This section requires a mortgage servicer to automatically grant a borrower who is or becomes 60 days or more delinquent on a mortgage obligation a 180-day forbearance. This provision ignores the common investor requirement that borrowers must reach out to mortgage servicers in order to request forbearance relief, and it conveys the false message that borrowers must become delinquent to obtain relief.

In addition, this section requires that a mortgage servicer provide "a complete and accurate description of the loss mitigation and reinstatement options that will be available to the borrower at the end of the forbearance period." This requirement is impossible to comply with as all loss mitigation and reinstatement options will be unknowable at the point in time the borrower enters forbearance as the mortgage servicer will be unable to predict the borrower's financial condition at the end of the forbearance period and relief offered at that time will be predicated on the borrower's financial condition.

In addition, this requirement becomes concerning when combined with the measure's significant new legal liability exposure provided for in Section 3273.18 which applies to a "false statement, misrepresentation, or concealment by a mortgage servicer related to the availability of post-forbearance payment options."

Accordingly, we request that this entire section be removed.

Post-Forbearance Recovery – Section 3273.14

Under this section, a mortgage servicer must evaluate the borrower's ability to return to making normal payments and must evaluate all loan modification options if the borrower cannot return to making regular normal payments. Ultimately, these provisions mandate particular outcomes with respect to post-forbearance options and is likely to be subject to legal challenges and federal preemption.

The California Homeowner Bill of Rights established a process wherein mortgage servicers must engage in outreach and the exploration of foreclosure prevention alternatives before commencing the non-judicial foreclosure process. However, the Homeowner Bill of Rights was clear that it was not dictating underwriting requirements and particular financial outcomes. Said more succinctly, the 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).

Measure AB 2501 takes this requirement one step further and crosses the threshold to dictate certain forms of relief following a forbearance period and requires that a mortgage servicer appeal to the Department of Business Oversight if investor guidelines prohibit the mortgage servicer from providing proscribed post-forbearance relief.

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."

We also note that this prescriptive limitation of the servicer's post-forbearance options conflicts with nationally-applicable standards recently promulgated by the FHFA that apply to Fannie Mae and Freddie Mac loans, and unlike language applicable to multifamily mortgage loans, AB 2501 lacks language with respect to residential mortgage loans that a servicer that complies with the CARES Act is in compliance with the measure. FHFA this week announced that borrowers will have a new post-forbearance repayment option – that being a deferral of delinquent amounts through the creation of a non-interest bearing balance that will be due when the mortgage is paid off, matures, or the property is sold. This option does not involve a modification of the loan, allows the borrower to maintain a payment they can afford and keeps them in their house, and would avoid the disruption to the national mortgage backed securities markets that fund approximately 75% of mortgage lending. However, it appears that servicers would not be able to offer borrowers this option, as the proposed legislation appears to require a modification.

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. Further, as noted above, the prescription of specific post-forbearance actions limits the options servicers have to assist borrowers.

Foreign Language Translation – Section 3273.15

This section requires that any notice or agreement be provided in the languages described in Civil Code Section 1632 but ignores the important triggering event contained in Section 1632 wherein the entity negotiates primarily with the customer in one of the specified languages. In addition, the measure fails to adhere to the common practice where the state has prepared the translated forms as a means to avoid unnecessary litigation over the translation of boilerplate documents. Accordingly, we request that this section be removed or that it conform with the historical treatment of translation requirements.

Remedies and Penalties – Sections 3273.18 and 3273.19

We object to draconian, uneven, and lopsided remedies and penalties provided for in AB 2501. Not only are mortgage servicers subject to legal liability under this proposal through Business and Professions Code Section 17200, a section of law that has long been a concern for the business community, 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 allow in a lopsided fashion a "prevailing borrower" (as opposed to a prevailing party) to 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.

Finally, we are particularly concerned with provisions in Section 3273.18 that would cause mortgage investors to forfeit their right to initiate foreclosure for any violation of the residential mortgage provisions of the bill (Chapter 2, Article 1) for the duration of the emergency plus 180 days. Under this section, even minor compliance errors could put at risk a mortgage investor's security interest in the underlying collateral. The bill's ability to cure violations of ambiguous requirements with difficult-to-determine monetary remedies offers little comfort or certainty.

Multi-Family Mortgages – Sections 3273.21-3273.24

Under the multi-family provisions of the measure, mortgage servicers must "automatically" grant multifamily borrowers a minimum of 180-day forbearance with an automatic right for the borrower to extend the forbearance another 180 days. The borrower has 12 months to bring the loan current following the end of the forbearance period. The automatic forbearance and automatic extension under the measure is without regard to the loan status and without regard to the borrower being current on the loan as of a specific date, so long as the borrower affirms hardship during the COVID-19 emergency. While the servicer has the right to request documentation to evidence hardship, approval is automatic even in cases where the borrower was delinquent on the loan well before COVID-19.

We believe that the measure should align with the CARES Act by requiring that multi-family borrowers request forbearance in writing pursuant to mortgage servicer relief programs. Furthermore, the forbearance and extension right under the measure should not be automatic. As an unintended consequence, the measure may create disparate treatment among multi-family borrowers, entirely predicated on whether their loan is held by the government sponsored entities.

Given the length of forbearance allowed for under the measure, the ability for the borrowers to repay the deferred amounts over 12 months as allowed for may result in a greater number of delinquencies and foreclosures as borrowers may find themselves in greater financial distress resulting from a protracted forbearance period.

In addition, the extended periods of forbearance periods for multi-family loans established under the measure could impose substantial and adverse accounting and capital requirements for lenders due to an increase of trouble debt restructures (TDR), despite the TDR relief afforded by the CARES Act and state and federal prudential regulators' Interagency Statement on Troubled Debt Restructurings. Applicable standards may impose on lenders adverse TDR accounting and capital treatment for loan modifications and forbearances greater than six months or more for loan were already past due as of a proscribed date.

Under the measure, forbearances greater than six months and loans past due as of a certain proscribed date could result in an increase in TDRs and create a major hardship on lenders by imposing increased capital requirements. The measure should align with the CARES Act and the Interagency Statement by shortening the forbearance period to six months and providing that loans that were already past due prior to the start of the health emergency as not eligible.

Finally, AB 2501 includes a federal CARES Act exemption for multi-family mortgage loans but not residential 1-4 mortgage loans. We propose providing single family mortgage loans with the same treatment, especially given the fact that the vast majority of California mortgages are federally-backed loans.

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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 2501 ignores existing protections.

We appreciate the ability to express our opposition to AB 2501 and the opportunity to underscore the important work already underway by mortgage servicers who have been proactively working with their customers. If you have any questions, please do not hesitate to contact us.

Sincerely,

California Bankers Association
American Financial Services Association
California Association of Realtors
California Chamber of Commerce
California Community Banking Network
California Credit Union League
California Land Title Association
California Mortgage Association
California Mortgage Bankers Association
Mortgage Bankers Association
Securities Industry and Financial Markets Association
United Trustees Association

cc: All Members, Assembly Committee on Banking and Finance
Michael Burdick, Consultant, Assembly Committee on Banking and Finance
Elizabeth Enea, Consultant, Assembly Republican Caucus