



August 10, 2020

The Honorable Hannah-Beth Jackson, Chair
Senate Committee on Judiciary
State Capitol, Room 2032
Sacramento, CA 95814-4900

Re: Assembly Bill 1436 – The COVID-19 Tenant and Homeowner Relief Law of 2020

Dear Chairwoman Jackson:

We write on behalf of the American Financial Services Association (AFSA)¹ and California Financial Services Association (CFSA) to express our opposition to Assembly Bill 1436, the COVID-19 Tenant and Homeowner Relief Law of 2020, which would create substantial new requirements for mortgage lenders and servicers working with consumers in California. AFSA and CFSA members share the legislature's goal of providing relief to homeowners facing financial hardship due to COVID-19 and its consequences, and they continue to work with borrowers to help them stay current on their accounts, keep their homes during this emergency, and ultimately emerge from the crisis in the best financial condition possible. Our members in the mortgage industry have already been offering California consumers unprecedented relief since the emergency began.

As amended, AB 1436 raises significant concerns for mortgage servicers and lenders that provide credit to consumers on agreed upon contract terms and based on the fundamental assumptions that the obligation is secured by the home and the terms of the contract will be honored. Compromising the ability to enforce those transactions on their original terms may have longer term unintended consequences on mortgage markets, putting consumers, creditors, and their employees at risk far after the current crisis subsides. Because our members have been providing relief to borrowers since the emergency began, such sweeping requirements are unnecessary and would only serve to divert resources away from providing direct relief to consumers and toward modifying systems for compliance with the bill's requirements.

Constitutional Concerns

¹ Founded in 1916, the American Financial Services Association (AFSA), based in Washington, D.C., is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including direct and indirect vehicle financing, traditional installment loans, mortgages, payment cards, and retail sales finance. AFSA members do not provide payday or vehicle title loans.

The U.S. Constitution prohibits states from passing ex-post facto laws and laws impairing legally valid contracts.² Mortgage loans are based on the premise that they are secured by collateral and repaid on set terms. AB 1436's provisions would fundamentally compromise our members' mortgage contracts by effectively severing the contract from the secured collateral for an indefinite period of time. Leaving creditors without the ability to secure collateral as necessary would fundamentally impair their ability to stay in business and enter into future contracts.

Further, the disruption of existing contracts would be an unconstitutional taking in violation of the Fifth Amendment's Takings Clause³ and impermissible without just compensation to our members. Valid contracts are property within the meaning of the Takings Clause,⁴ and if the state removes our ability to secure collateral under our contracts for a public purpose, the U.S. Constitution and the California Constitution both require fair compensation, with the California Constitution's takings clause requiring such compensation before the taking occurs.⁵

California has a vital interest in permitting the enforcement of reasonable, valid obligations to ensure the existence of a robust credit market. This proposal will inject immense amounts of uncertainty and risk into financial markets and would substantially impair mortgage contracts in the state. While temporary relief for borrowers may be a legitimate public purpose, the proposed impairment would not meet established standards of what qualifies as a necessary or reasonable method of achieving that goal, due in part, to the bill's vague financial hardship applicability and the extreme forbearance measures proposed.

Financial Hardship

The bill's proposed protections are available to consumers experiencing a financial hardship that prevents the borrower from making timely payments on the mortgage obligation due, directly or indirectly, to the COVID-19 emergency. However, the parameters of what would constitute such a hardship are not provided, leaving mortgage lenders and servicers without the ability to determine whether a customer satisfies the bill's requirements. For example, could a customer's temporary or *de minimis* loss of income satisfy this requirement, even if that same customer has sufficient financial reserves to weather the income loss?

² "No State shall . . . pass any Bill of Attainder, ex post facto Law, or law impairing the Obligation of Contracts" U.S. Constitution, Article I, Section 10.

³ ". . . nor shall private property be taken for public use without just compensation." U.S. Constitution, Amendment V.

⁴ *Lynch v. United States*, 292 U. S. 571, 579 (1934) ("The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States.")

⁵ Private property may be taken . . . only when just compensation . . . has *first* been paid to, or into the court for, the owner." California Constitution, Article I, Section 19 (emphasis added).

Additionally, the bill would be open to abuse by bad actors, as there would be no means for lenders and servicers to determine whether the financial hardship is legitimate. To prevent such abuses, in addition to requiring a written attestation, lenders and servicers should be authorized to request an explanation of the basis of the hardship with verification, if necessary. Such an approach would ensure that relief is available to and directed toward those consumers most in need.

In order to allow financial institutions to focus their relief efforts on those California consumers most in need, we respectfully request a clear standard of what constitutes a financial hardship and that mortgage lenders and servicers be authorized to request a supported explanation of the hardship.

Mandatory Forbearance

One of the bill's requirements across is forbearance periods totaling up to 12 months, mandatory upon consumer request. Because the bill would be effective retroactive to the start of the declared emergency, this mandate creates much confusion regarding its applicability to consumers already receiving forbearance under existing relief programs. For instance, if a customer has previously received a forbearance due to COVID-19, would a creditor have to grant an additional forbearance for the length required by the bill, or would the length previous forbearance count toward the mandatory period? While many financial institutions have already created forbearance programs that they feel fit consumers' needs, if this provision is enacted without additional detail, it would leave creditors unable to gauge the legal requirements being imposed upon them.

The bill's blanket forbearance requirement would also make it difficult for creditors to work with borrowers through existing relief and loan modification programs that allow a consumer to make an adjusted or partial payment if they can. Such programs are based on assessments of individual borrower needs and may allow a creditor to avoid charge off of a delinquent debt until the consumer is able to bring the account current. Compliance with the bill would require significant adjustments to existing programs and systems, and the time required to make these changes may mean delays in the availability of relief to consumers.

Private Enforcement

The bill also empowers borrowers who are harmed by a violation of the requirements to "bring an action to obtain injunctive relief, damages, restitution, and any other remedy to redress the violation." The broad proposed remedies available to borrowers under this section will invite unnecessary and punitive private litigation with little additional protection for California residents beyond what would be available with a clear right to cure for the consumer. Navigating

this crisis is a new world for all of us, industry and consumer alike; financial institutions are trying their best to make accommodations for consumers, just as consumers are trying their best to stay current on their payments. A right to cure would allow lenders and servicers to correct good faith mistakes for borrowers, while the existing enforcement authority held by the attorney general's office and the Department of Business Oversight would allow for enforcement against abuses by bad actors.

Without significant changes, we believe the proposed legislation may prevent our members from continuing to focus on providing direct relief to those consumers facing hardship and could lead to significant disruption to credit markets. For these reasons, we oppose this bill and respectfully urge you not to move forward with it. Thank you for your attention to this matter. If you have any questions or if CFSA or AFSA can be of any further assistance to you, please do not hesitate to contact either of us at your convenience.

Sincerely,



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Senate Judiciary Committee Members