STATEMENT OF THE MASSACHUSETTS MORTGAGE BANKERS ASSOCIATION IN OPPOSITION TO HD.5166 & SD.2992:AN ACT TO GUARANTEE HOUSING STABILITY DURING THE COVID-19 EMERGENCY AND RECOVERY TO HOUSE AND SENATE LEADERSHIP & JOINT COMMITTEE ON RULES

July 16, 2020

On behalf of the Massachusetts Mortgage Bankers Association (MMBA) and our members who provide mortgage financing to consumers, we are writing to express our strong opposition to HD.5166 -An Act to Guarantee Housing Stability During The COVID-19 Emergency and Recovery. This legislation extends current eviction and foreclosure moratoriums as well as mandatory forbearances for 12 months after the state of emergency which we strongly feel will have an adverse impact to lending and recovery in Massachusetts.

Background:

We would like to provide you with some concerns about HD.5166. As you are aware there have been numerous federal and state laws; regulations; guidance, and secondary market policies protecting consumers and providing financial protections for homeowners impacted by COVID-19. Here is a partial list of actions issued since the state of emergency declared by Governor Baker on March 10th:

- On March 9th a press release was issued by the Board of Governors of the Federal Reserve System, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, National Credit Union Administration, Office of the Comptroller of the Currency, and Conference of State Bank Supervisors Agencies encouraging all financial institutions to meet financial needs of customers affected by Coronavirus
- On March 18th FHFA Suspends Foreclosures and Evictions for Enterprise-Backed Fannie Mae and Freddie Mac) Mortgages
- On March 18th HUD provided immediate relief for homeowners and suspended all foreclosure and evictions for the next 60 days.
- On March 25th Governor Baker Issues new actions to protect homeowners and low-income tenants from eviction and foreclosure including suspending non-essential evictions
- On March 25th the Division of Banks (DOB) issued new guidance to Massachusetts financial institutions and lenders urging them to provide relief for borrowers and will advocate for a 60-day stay on behalf of all homeowners facing imminent foreclosure on their homes.
- On March 26th the Consumer Financial Protection Bureau (CFPB) issues Statement on Bureau Supervisory and Enforcement Response to COVID-19 Pandemic
- On March 26th the Massachusetts Attorney General issues emergency regulation to protect consumers from harmful debt collection practices during Covid-19 crisis
- On March 27th President Trump signed the CARES Act into law. Under the Cares Act, mortgages that were sold to Fannie Mae, Freddie Mac, Veteran Affairs and USDA must allow consumers facing financial distress due to COVID0-19 to have mortgage payments postponed (deferred) for 6-12 months.
- On April 1, HUD issues Mortgage Letter 2020-06 to inform mortgagees of special loss mitigation home retention options available to single family borrowers
- The Boston City Council passed a non-binding resolution calling for the city, state, and feds to place a moratorium on rent and mortgage collection, evictions, and foreclosures
- The CFPB has posted several articles for consumers on mortgage relief, student loan payment relief, how to avoid scams, and online and mobile banking tips for beginners.
- On April 20th Governor Baker signed ***An Act Providing for a Moratorium on Evictions and Foreclosures during the COVID-19 Emergency*** into law. This law established a moratorium on evictions and foreclosures during the governor's COVID-19 emergency declaration. The Division of Banks issued FAQ's providing guidance to consumers for the new law.

The MMBA strongly opposes this new legislative initiative as we feel this legislation will adversely impact housing stability, housing recovery, property safety and mortgage lending in Massachusetts.

Concerns with federal regulations, Fannie Mae, Freddie Mac and Ginnie/Mae:

On June 17th the Office of the Controller of the Currency (OCC) issued a strong statement of federal preemption of pandemic response mandates that have been proposed by state legislatures. In this bulleting the OCC stated:

> "While these state and local actions are well-intended, the OCC is concerned that the proliferation of a multitude of competing requirements will conflict with banks' ability to operate effectively and efficiently, potentially increasing the risk to banks' safety and soundness and ultimately harming consumers."

The bulletin then proceeded to remind stakeholders that banks are governed primarily by uniform federal standards and **generally are not subject to state law limitations**; federal preemption derives from the Supremacy Clause of the U.S. Constitution; and therefore federal law preempts state and local laws that impermissibly conflict with banks' exercise of federally authorized powers under the standard set forth in *Barnett Bank of Marion County, N.A. v. Nelson*.5 Consistent with this standard. These include state law limitations on terms of credit, such as the schedule for repayment and interest, amortization of loans, balance, payments due, minimum payments, and term to maturity; disbursements and repayments; and processing, origination, and servicing mortgages. OCC regulations also address interest and non-interest fees.

Several other states such as California (AB 2501 the COVID-19 Homeowner, Tenant and Consumer Relief Law of 2020) have proposed similar efforts which exceed the CARES Act. In terms of secondary market disruption, Fannie Mae and Freddie Mac have specific directives that must be followed in order to provide a uniform functional marketplace for investors in mortgage loans. Government insurers and guarantors (FHA, VA, and USDA) backed by Ginnie Mae have done the same. Adding additional regulations puts at risk the ability to access the secondary market and could cause irreparable harm to Massachusetts home buyers.

As an example, for loans in Ginnie Mae pools, the deferment in this legislation will not adhere to Ginnie Mae guidelines. If a Massachusetts Veteran with a VA loan in a Ginnie Mae pool goes into a deferment under the bill, a lender/servicer would have to purchase the loan out of the Ginnie Mae pool for delinquency.

The MMBA would strongly recommend that there be an exemption for loans that are already covered under the CARES Act. As stated above, there are already federal and state guidance for forbearances and having an exemption would ensure there are no conflicts between procedures for those loans under the CARES Act and secondary market guidelines:

Section 5 (addition)

> The provisions of Sections 5 -10 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 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.

Additional Concerns with HD.5166

Documentation and capacity: Many consumers were not adversely impacted from COVID-19 yet this legislation allows anyone to qualify for the moratoriums without proof of financial hardship. In fact, this legislation goes beyond income loss to "any change in economic circumstances" caused in "any way", "directly or indirectly". Exactly what does that mean? Technically, any consumer who has had the slightest change in income, even if they still have the financial means to pay rent or mortgage payments, could qualify under this bill. A consumer doesn't have to document anything to qualify.

Legislation should require individuals financially impacted by COVID-19 provide documentation demonstrating their circumstances to their mortgage holder or landlord in order to receive relief.

Length of Moratoriums: The timing on this bill extends evictions, moratoriums and forbearances until 12 months after the state of emergency ends. As you know, many predict that we will only return to "normal" once a vaccine has been developed and available to the population which could be at least another year. In the meantime, many businesses have re-opened with employees returning back to work who were not able to work remotely. While the employee's – consumer's – circumstances have improved landlords are expected to go without receiving any rent and mortgage servicers must continue making mortgage payments to investors as well as paying taxes and insurance indefinitely? **Who will be willing to provide mortgage financing in Massachusetts when a borrower doesn't have to make any payments for an unspecified amount of time -regardless of their capacity to make payments?**

Again, the MMBA strongly feels that this legislation will adversely impact housing stability, housing recovery, property safety and mortgage lending in Massachusetts.

SECTION 2:
Although this section deals with rent payments, we would like to respectfully remind legislators that many property owners depend upon rental payments as their sole source of income which may be used to pay for essentials such as housing, food, and prescriptions. Landlords also depend upon rent payments to make needed repairs to properties. Without rent being received how will landlords be able to pay utilities, taxes, and insurance?

This legislation does not require a renter to provide evidence that they have actually experienced a financial hardship due to COVID-19. Instead the bill uses the following wording:

> "failure to pay such rent or use and occupancy resulted from a loss of income or other change in economic circumstances caused in any way, directly or indirectly, by the conditions and/or events described in the Emergency Declaration."

> "it shall be a rebuttable presumption that the tenant or occupant was unable to pay such rent or use and occupancy payments because of such lost income or other change in economic circumstances, and such presumption shall be rebutted only by clear and convincing evidence that the failure to pay rent was not based in whole or in part upon such lost income or other change in economic circumstances."

Legislation should be crafted that only those financially impacted and unable to make rent payments can qualify; consumers need to provide some type of documentation to their landlord; and there needs to be an acceptable time limit to this legislation.

Section 3:

> "(b) A city or town may provide that the just cause eviction protections of this chapter be extended beyond the expiration of Section 3(a), and for any duration, by legislative enactment in the manner provided in section 4 of chapter 4 of the General Laws, and may, in like manner, terminate such extension."

Legislation should not allow any additional extensions and there needs to be an acceptable time limit to this legislation.

SECTION 5 (mortgage foreclosures):

"**shall not**, for the purposes of foreclosure of a residential property as defined in section 35B of said chapter 244 that is not vacant or abandoned: (i) **cause notice of a foreclosure sale to be published** pursuant to said section 14 of said chapter 244; (ii) **exercise a power of sale**; (iii) **exercise a right of entry**; (iv) **initiate a judicial or non-judicial foreclosure process;** or (v) **file a complaint to determine the military status of a mortgagor** under the federal Servicemembers Civil Relief Act, 50 USC sections 3901 to 4043, inclusive, on the basis of mortgage payments due and payable from the Emergency Declaration until **12 months after the Emergency Declaration is rescinded,** or the end of any forbearance period granted pursuant to Section 5(b) of Chapter 65 of the Acts of 2020. Any foreclosure actions taken in violation of this statute shall be against public policy and void. "

Recommended addition to Section 5:

The provisions of Sections 5 -10 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 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.

Mortgage lenders and servicers are diligently working with consumers who are facing a financial impact from COVID-19. This bill would prohibit lenders from enforcing their liens through the foreclosure process for an unspecified and unacceptable time frame. This prohibition includes loans that were significantly delinquent prior to the COVID-19 pandemic. Mandating banks, credit unions, lenders, and servicers to provide additional, unreasonable, assistance to consumers will create a hardship for all lenders who will have no option but to decrease lending in Massachusetts or increase the cost and interest rates to consumers in Massachusetts.

Section 6 (forbearances):

(a) ……the mortgagor submits a request to the mortgagor's servicer affirming that the mortgagor has experienced a financial impact from COVID-19. **The request may be made in any form**, written or oral, and the **forbearance shall be granted regardless of the mortgagor's delinquency status**. The forbearance shall last 180 days, although at the mortgagor's request, the period of forbearance may begin in an increment shorter than 180 days and then extended at the mortgagor's request. The forbearance shall be extended for an additional 180 days at the mortgagor's request. Fees, penalties or interest beyond the amounts scheduled and calculated as if the mortgagor made all contractual payments on time and in full under the terms of the mortgage contract shall not accrue during the period of forbearance granted under this subsection. A payment subject to the forbearance**, including any escrow payments required to be paid in the mortgage contract,** shall be added to the end of the term of the loan unless otherwise agreed to by the mortgagor and mortgagee. Nothing in this subsection shall prohibit a mortgagor and mortgagee from entering into an alternative payment agreement for the payments subject to the forbearance. **The mortgagee shall not furnish information to a consumer reporting agency related to mortgage payments subject to forbearance under this act.** "

According to the Mortgage Bankers Association's latest Forbearance and Call Volume Survey reported loans now in forbearance decreased by 8 basis points to 8.39% of servicers' portfolio volume as of June 28, compared to 8.47% the prior week. MBA estimates nearly 4.2 million homeowners are in forbearance plans. Mortgage lenders and servicers are advancing payments to secondary market investors and deferring mortgage payments at unprecedented levels. Requiring lenders to also advance taxes and insurance payments to the end of the mortgage term is creating an

unnecessary burden on mortgage lenders, especially without the requirement of documentation establishing the financial need.

> (c) A mortgagor who has requested and received mortgage forbearance under this section or under Section 5(b) of Chapter 65 of the Acts of 2020, as amended by this statute, must, for each month of the mortgage forbearance period, waive and forever hold tenants harmless from the obligation to pay that month's rent for each rental unit located on the property that is secured by the mortgage and which is occupied by a household who resided lawfully in the unit as of March 10, 2020, except where the **mortgagor demonstrates by clear and convincing evidence that the tenant's failure to pay rent did not result from a loss of income or other change in economic circumstances caused directly or indirectly by the conditions and/or events described in the Emergency Declaration.**

This legislation does not require a renter to provide evidence that they have actually experienced a financial hardship due to COVID-19. Therefore, how can a mortgagor provide evidence that the tenant's failure to pay did not result from a loss of income due to COVID-19?

SECTION 9 (Housing Court jurisdiction):

> "Notwithstanding any general or special law to the contrary, the Housing Court shall have sole and exclusive jurisdiction over all civil claims for rent or mortgage payments due and payable during the period running from March 10, 2020 until 12 months after the date the Emergency Declaration is rescinded. "

A mortgage is a legal contract between a lender and consumer for repayment of the mortgage. The housing court has no jurisdiction to change the terms of mortgage payments. This should only occur between the lender and borrower(s) in conjunction with secondary market guidelines and federal and state regulations.

SECTION 10 (violations):

> "Violations of this chapter shall constitute unfair or deceptive acts or practices as that term is defined under G.L. c. 93A, § 2 and/or 940 C.M.R. 3.00 et seq., and shall be enforceable by the Attorney General as well as by aggrieved tenants, homeowners, or other occupants in the same manner and to the same extent as other violations of c. 93A. All the remedies of G.L. c. 93A shall be available for violations of all sections of this chapter."

Mortgage lenders and servicers have been working with their borrowers unable to make their mortgage payments well before the COVID-19 pandemic. The mortgage industry is already deferring an unprecedented amount of payments each month. A lender should not also need to worry if a mistake or a misunderstanding results in a 93A violation.

This legislation will harm more than it will help the recovery process in Massachusetts. We understand that many consumers have been significantly impacted by COVID-19. Our lenders and servicers are already working with borrowers on forbearances and loan modifications; they are already deferring mortgage payments and working with consumers. This bill goes beyond reasonableness by causing hardship to financial institutions.
This legislation requires:

- A lender must accept the word of any mortgage customer that he/she has experienced a change in their economic circumstances - either directly or indirectly.
- A lender has no right to ask for any documentation of what the change of circumstance is or what the financial impact is.
- A lender has no right to refuse a forbearance request, even if a consumer is still able to make payments.
- A lender must not charge any additional fees or interest for the deferment.
- A lender must defer mortgage and escrow payments until the end of the mortgage term – which could be as long as 30 years.
- A lender must, however, continue to pay real estate taxes and insurance payments.
- A lender must not indicate on a credit report that payments are in forbearance.

- A lender must defer these payments for an unknown length of time – depending upon the state of emergency it could be months or year(s).
- A lender must not start or resume the foreclosure procedures until after the state of emergency ends. If the average time for a foreclosure in Massachusetts is 24-36 months – a consumer may be able to remain in their home without making a single mortgage payment for 3-5 years.
- A lender who does not correctly comply with any portion of this bill could have the Attorney General, tenants, homeowners, or other occupants bring a claim in court for unfair and deceptive practices resulting in triple damages, attorney costs, damages including emotional distress and loss of license to do business in Massachusetts.

In return:

- A consumer doesn't need to provide **any** documentation that they have experienced a "change in economic circumstances" caused in any way, directly or indirectly by COVID-19.
- A consumer can obtain a forbearance even if they are still able to make mortgage payments.
- A consumer doesn't need to pay real estate taxes or insurance until 12 months after the end of the state of emergency.
- A consumer doesn't need to pay mortgage payments until 12 months after the end of the state of emergency.
- A consumer will not be charged any fees or additional interest.
- A consumer's credit report will not indicate he/she has not made mortgage payments and is in deferral.
- A consumer doesn't need to repay any deferred mortgage payments, real estate taxes or insurance until the end of the loan term.
- A consumer can file a claim in court against the lender for emotional distress, treble damages, and attorney fees if he/she feels the lender has not complied with this bill.

I would respectfully ask you to consider the following two questions:

- **Why would any Massachusetts consumer make a mortgage payment?**
- **Why would any lender want to lend in Massachusetts?**

The answers to these questions are extremely problematic for the future of lending in Massachusetts. Recovering from the pandemic will require sacrifices and cooperation from all of us -but it has to be shared. Consumers, lenders, and legislators all need to be part of the solution. Borrowers must document financial hardships and not be allowed to take advantage of the pandemic when they are financially able to make mortgage payments. Lenders must continue to work with borrowers that have been impacted by this terrible crisis and continue to do their part in deferments. Legislators must balance the needs of consumers without causing unrealistic financial burdens on lenders and servicers that will result in hurting the recovery process in Massachusetts.

As you consider the future of this legislation please keep in mind the numerous actions by the Federal Housing Finance Agency, Fannie Mae, Freddie Mac, the Consumer Finance Protection Bureau, The Massachusetts legislature, Governor Baker, the Massachusetts Attorney General, and the Massachusetts Division of Banks to protect consumers impacted by COVID-19 from additional financial hardships. Does legislation this unbalanced in favor of consumers truly enhance what is already in place or does it provide consumers with carte blanche to avoid obligations they could meet?

The MMBA is an association that advocates for the welfare of our members and consumers. Our members are working with consumers to offer payment accommodations for all impacted with COVID-19 during this pandemic. We strongly encourage that any legislation be specifically for consumers that have a documented financial impact due to the COVID - 19 pandemic and not for the general population. Please contact me for questions or additional information.

Sincerely,

Deborah J Sousa

Deborah J. Sousa, Executive Director