



The Voice of Oregon Banking • Since 1905

August 5, 2020

The Honorable Kate Brown
Governor
State of Oregon
900 Court Street NE, Suite 254
Salem, OR 97301-4047

Delivered via Email

Dear Governor Brown,

Thank you for your leadership during this pandemic. We respect that you are dealing with many critical and fluid issues and appreciate the opportunities we've had to engage with you and your team. In general, the Oregon banking community has been effective – I would even say heroic – in serving its communities throughout the pandemic. From making approximately 62,000 Paycheck Protection Program loans to providing payment deferrals to most individuals and businesses that have requested one, Oregon's banks have committed to seeing their customers through this challenging time. Banks only thrive when their customers do the same.

That said, during the June special session, the Oregon legislature passed House Bill 4204, which you then signed into law. The legislation implemented temporary commercial and residential foreclosure moratoriums and prescribed other actions to be taken by "lenders." The bill provides that the foreclosure moratoriums expire on September 30, 2020 unless, not later than 30 days before September 30, the Governor extends them. For the reasons set forth below, ***we urge you not to risk further economic damage by extending House Bill 4204. We also ask that you discourage legislative leadership from such further action, which would be detrimental to Oregon's economic recovery.***

As we have stressed to both your team and the legislature, foreclosure moratoriums have long term consequences that will impact the flow of credit and, in turn, economic recovery in Oregon. As noted, banks have been very active throughout the pandemic in providing customized assistance to help their individual borrowers weather economic challenges. Not only does House Bill 4204 upset the balance of the credit ecosystem and threaten the extension of credit in the future; it is poorly constructed and creates substantial confusion for both borrowers and lenders. In the end, while intended to help families and businesses impacted by the pandemic, House Bill 4204 creates more challenges that it aims to solve. This is especially true given there has been no increase in foreclosure activity during the pandemic due to various tools lenders are deploying to assist struggling borrowers. Please know that foreclosures are almost always the last resort for a lender, and we are committed to avoiding them when possible.

Following is a non-exhaustive list of problems we have identified with House Bill 4204:

- **Hinders Commercial Real Estate Lending:** In addition to covering residential real estate loans, the bill encompasses commercial real estate loans. These loans are unique, customized and take months – if not years – to proceed to foreclosure. At the same time, rendering these loans unsecured only serves to deter lenders from making commercial real estate loans in Oregon. Regulated banks generally don't make unsecured real estate loans, and if they opted to make them, it would be limited to those borrowers that have other substantial sources of repayment. We are not in a credit crisis, but this could create one.
- **Limits Options to Assist Borrowers in Oregon:** Thanks to the federal CARES Act, swift and helpful regulatory guidance and the general spirit of leaning in to assist impacted customers and communities during the pandemic, banks have been able to provide substantial customized support and forbearance to their borrowers. From payment deferrals to loan modifications to emergency loan funds, banks have been able to structure workable solutions for their borrowers. This bill actually limits the options available to borrowers by prescribing a blanket process.
- **Disadvantages Oregon-Based Banks Due to Federal Preemption:** There are strong arguments that the foreclosure moratoriums, or at least the elements of the bill that go beyond actual moratoriums, are preempted by federal law. These include the payment deferral mandate and customer notice provisions. There are very strong arguments that preemption would apply to nationally chartered banks and state-chartered bank headquartered in other states, which means that Oregon's own state-chartered banks are disadvantaged over other members of the banking community. Surely this isn't the intent albeit the reality.
- **Contains Confusing and Likely Unlawful Retroactivity:** Although the language in House Bill 4204 is confusing and subject to various interpretations, it seems to apply retroactively and prohibit certain actions, including those that took place between March 8, 2020 and June 30, 2020, the day the bill was signed into law. How can lenders and servicers be found to violate this law when they fully complied with existing state and federal regulations in commencing a foreclosure as authorized by contract and under Oregon law prior to the special session? Furthermore, the private right of action provisions in the bill likely allow a borrower to file suit for damages and recover attorney's fees and costs based on collection and foreclosure activity by a lender when such action was legal, reasonable, and prudent at the time it occurred.

We are seeing confusion about retroactivity playing out in different arenas. For example, certain Oregon counties are starting to dismiss foreclosure cases filed between March 8 and June 30 that involve defaults that arose well before COVID-19. This is causing delays that are unnecessary yet costly to lenders and erode any equity that may exist.

- **Abrides Contracts:** Both the Oregon Constitution (Article 1, section 21) and the U.S. Constitution (Article I, section 10, clause 1) have prohibitions on ex post facto laws and the impairment of contract rights. House Bill 4204 is subject to constitutional challenge for impairing the contract rights of, and imposing retroactive obligations on, Oregon lenders.
- **Raises Practical Issues with Payment Deferrals:** The payment deferral mandate is not only of questionable constitutional validity and likely subject to federal preemption (see above), but it

creates a variety of practical problems. These range from compliance with conflicting rules for government-guaranteed loan programs (USDA, VA, housing agencies, etc.) to managing interest rate risk for borrowers through the use of swaps. It also fails to consider the many moving parts involved in extending credit. For example, reference is continually made to periodic installment payments, and deferral of periodic payments to when full performance is due, but it is silent about a loan that matures or balloons and become due in full during the covered period. Must a bank extend the loan maturity?

- **Ties Up Abandoned/Blighted Properties:** House Bill 4204 has no exemptions for abandoned properties, and therefore would exacerbate adverse impacts on neighbors and communities when a property is abandoned. A lender cannot obtain possession of abandoned property until foreclosure. Moreover, there is no exception when a lender or servicer needs to take action because a borrower is causing damage to a property that is deteriorating its collateral value.
- **Imposes Clouds on Title to Foreclosure Properties/Lack of Bona Fide Purchaser Defenses:** The bill provides no exception for bona fide purchasers of foreclosure properties at trustee's sales or sheriff's execution sales, or for subsequent third-party purchasers. The bill creates clouds on titles by retroactively declaring such transactions void (and not merely voidable upon proof of some cognizable harm), and thus imposes substantial burdens on property investors, title companies and other parties with no connection to the mortgage lending business.
- **Creates Substantial Other Uncertainty:** In the haste of the special session, the final language that made it into House Bill 4204 was poorly vetted and created a variety of questions and uncertainties. Following is a non-exhaustive sampling of additional practical issues created by the bill that lenders are forced to work through with no guidance:
 - Subsection 3 discusses the notice given by a borrower to a financial institution. It is not clear from the Act how a borrower is to "notify" the lender that the borrower will not be able to make payments. Questions include: Does the notice need to be in writing? Can a notice be a casual remark made to a teller? Further questions exist with regard to borrowers that applied for loan modifications and forbearance prior to the effective date of the bill. In this case, is a request prior to the passage of House Bill 4204 considered notice such that the lender must retroactively credit any late charge or similar fee that may have been imposed prior to June 30, 2020? This is highly problematic, but these are the questions arising out of this confusing new law. In short, the ex post facto nature of Subsection 3 creates serious compliance and audit issues for any lender or servicer with an Oregon portfolio.
 - The notice requirement found in subsection 9 of the bill, arguably subject to federal preemption, is extremely vague. Among other concerns with the section is the lack of clarity about what is meant by "a borrower's rights for accommodation."
 - What constitutes personal property used as a residence for purposes of this law (cars, RVs, long haul trucks, etc.)?
 - If a borrower fails to make a payment on an obligation which is secured by both personal property and Oregon real property, is the lender barred from declaring a default for failure to make a periodic installment payment or to pay any other amount

that is due to the lender? The answer is yes, House Bill 4204 serves to encompass loans secured primarily by personal property but also by real property.

- What is the course of action when a loan is subject to a bankruptcy proceeding (voluntary or involuntary)? Does this law modify the bankruptcy plan?
- If extended, lenders will run into conflicts and pro-cyclical challenges with accounting rules, federal and state regulations and laws.

In addition to the aforementioned concerns, we are also hearing examples of loan deals falling apart because of House Bill 4204. For example, we have heard that some multi-family housing projects are being impacted due to lenders pulling out over concerns with Oregon's legislative environment. This will exacerbate Oregon's housing affordability crisis and could do real long-term damage to Oregon's reputation in the capital markets.

Please know that the Oregon banking community remains committed to helping our customers and communities weather pandemic-related challenges. Foreclosures are not presently on the rise, and we have a variety of tools that we can use – if allowed to – in helping customers struggling with loan payments. While well intentioned, House Bill 4204 not only provides no real-world assistance but actual adversely impacts local banks and the customers that depend on them for credit. We strongly urge you to let it sunset on September 30 without extension, allowing Oregon's financial services industry to continue to do what they do best: provide safe, accessible and reliable financial services to Oregon families and businesses.

Please feel free to contact me with any questions.

Very best regards,

A handwritten signature in black ink that reads "Linda Navarro". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Linda Navarro
President and CEO