

September 1, 2020 Update: On August 31, 2020, Governor Brown signed Executive Order 20-37, utilizing her authority to extend the "Emergency Period" (as defined in Oregon House Bill 4204). Thus, effective August 31, 2020, the Emergency Period is March 8, 2020 to December 31, 2020. All other provisions of the law remain unchanged.

OREGON'S NEW FORECLOSURE MORATORIUM LAW AND NOTICE REQUIREMENTS SUMMARY FOR LENDERS

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On Tuesday, June 30, 2020, the Governor of Oregon signed Oregon House Bill 4204, referred to in this summary as the "Foreclosure Moratorium Law." The Foreclosure Moratorium Law prevents any foreclosures of residential or commercial real property¹ in Oregon through at least December 31, 2020, and imposes a lender notice requirement.

The Foreclosure Moratorium Law also provides certain borrower protections for failure to make payments if the borrower first notifies the lender of COVID-19 pandemic impacts.

This summary does not include all details of the new law and should not be used as the basis for any legal action or business decisions as there are nuances and other applicable clauses which are not addressed below. Our attorneys are well versed in this law and would be happy to evaluate any specific questions raised by our clients.

Foreclosure Moratorium

From March 8, 2020 through December 31, 2020 (the "Emergency Period"), lenders² are not allowed to start or complete any judicial or non-judicial foreclosure, or to enforce any forfeiture remedy. Foreclosures started before June 30, 2020, are tolled (that is, stalled) and may continue after the Emergency Period expires. This new law is sweeping and there are only limited exceptions for tax foreclosure proceedings and abandonment of real property as further detailed in the new law.

Notice and Forbearance Provisions

Required Lender Notice to Borrowers. By August 29, 2020, each lender authorized to do business in Oregon, who has real property collateral located in Oregon, must provide written notice by mail to all of its borrowers³ of the borrower's rights for accommodation under the Foreclosure Moratorium Law. There is no prescribed form of notice, though our firm is available to prepare such notices for our lender clients.

Borrower COVID-19 Notice to Lender. A lender who receives the COVID-19 notice described below is prohibited from declaring a payment default or exercising certain rights and remedies during the Emergency Period.⁴

- **Borrower COVID-19 Notice.** To trigger default protections, a borrower must first notify the lender that the borrower will not be able to make periodic installment payment(s). A borrower does not need to provide a notification more than once during the Emergency Period. For loans secured by residential properties with four or fewer units, the borrower's notice must attest that the failure to pay is a result of a loss of income related to the COVID-19 pandemic. For all other borrowers, the notice must

¹ All references to "real property" also include personal property used as a residence in Oregon.

² There is a broad definition of "lender" under the Foreclosure Moratorium Law, including trustees of trust deeds.

³ As used herein, "borrower" means a grantor or mortgagor in connection with real property subject to the Foreclosure Moratorium Law, a purchaser in a land sale contract, a person that enters into a retail installment contract with, or gives a security interest to, a lender for the subject property, and certain successors in interest.

⁴ Note we question the constitutionality of this retroactive measure and its applicability to loans secured by Oregon real property governed by another state's laws.

include financial statements or other evidence demonstrating a loss of income related to the COVID-19 pandemic and must disclose any Paycheck Protection Program (or other state or federal relief program) funds that the borrower has received.

- Lender Restrictions After Receipt of COVID-19 Notice. After receiving a COVID-19 notice, a lender may not:
 - Treat any nonpayment during the Emergency Period as a default;⁵
 - Impose any default interest, charge, fee, penalty, attorney's fees, or other amounts relating to the deferred payments (see below);
 - Require or charge for an inspection, appraisal, or broker opinion of value not otherwise permitted in the absence of a default;
 - Initiate any cash management, lockbox procedures, or other control of the operating revenue⁶ not already in place prior to June 30, 2020;
 - Declare a default for failure to meet financial covenants due to inadequate operating revenue resulting from the COVID-19 pandemic; or
 - For certain residential loans, treat the unpaid amounts as impediments to the "foreclosure avoidance measures" in ORS 86.707 et seq.

Additionally, unless the lender and borrower otherwise agree to modify, defer, or otherwise mitigate the loan, a lender is required to:

- Defer from collecting the unpaid periodic installment payment(s) during the Emergency Period; and
- Permit the borrower to pay such deferred amount at the loan maturity date.

A lender may adjust escrow impound payments to account for unpaid amounts. There may be other actions a lender may take as a result of nonpayment following its receipt of a COVID-19 notice. For example, withholding holdback disbursements if the loan documents prescribe a minimum debt service coverage ratio as a condition to disbursement. Lenders should review their loan documents closely in connection with the Foreclosure Moratorium Law to see what provisions remain operative. **Generally speaking, loan document provisions that relate strictly to nonmonetary defaults may be unaffected; provided, however, that the remedy of foreclosure is not available during the Emergency Period. Above all else, we recommend evaluating each loan on a case-by-case basis.**

In addition to sending the required notice and reviewing loan documents, lenders should also update their forms, processes, and loan calculations to comply with this new law. A failure to follow the Foreclosure Moratorium Law exposes a lender to liability for the borrower's actual damages, court costs and attorney's fees.

Remote Notary Law. Lenders may also be interested in Oregon House Bill 4212. This law temporarily allows notaries to perform notarial acts using technological means for remote individuals, subject to compliance with certain safeguards set forth in the law.

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This is not legal advice and does not create any attorney-client relationship and does not constitute any attorney-client communication.

⁵ This applies to nonpayment of periodic installment payment(s) as well as any other amount due to the lender in connection with the loan during the Emergency Period.

⁶ It is unclear at this point whether this provision applies to receiverships and revocation of license to collect rent, to extent permitted without declaration of a payment default.