



May 11, 2020

Commissioner Mary Gallagher
1000 Washington Street
10th Floor, Boston, MA 02118-6400

Re: Additional Guidance on Chapter 65 of the Acts of 2020

We are writing to request further clarification of Chapter 65 of the Acts of 2020, An Act Providing for a Moratorium on Evictions and Foreclosures During the Covid-19 Emergency, as it pertains to mortgage forbearance. We appreciate the Division's previous Frequently Asked Questions (FAQs) but have concerns as to several issues regarding the forbearance process, which we believe would benefit from additional guidance and FAQs from the DOB. The main issues we are seeing, which we believe would benefit from guidance to servicers and consumers alike are:

1. Servicers Are Not Offering 180 Forbearance Periods

The experience of housing counselors, legal services attorneys, and homeowners has shown that the majority of servicers are not aware of the Massachusetts law and are not offering the required 180-day forbearance period. Instead, they are only offering much shorter forbearance programs, without discussing with consumers any option for the 180-day period Chapter 65 requires and which the CARES Act requires for government-backed loans.

For example, Wells Fargo and a local credit union recently only offered three months forbearance, and U.S. Bank and others are only offering six months forbearance if the loan is backed by Freddie Mac. Other servicers are only giving forbearance in one- month increments.

One particular problem we have heard about is that borrowers in bankruptcy are not being offered forbearance, even if they have asserted an inability to pay based on a COVID-19 hardship. For example, both PHH Mortgage and Home Point Financial Corp. told borrowers currently in Chapter 13 Bankruptcies that they were not eligible for any sort of forbearance.

Further, servicers are either not disclosing what will happen to payments in forbearance or giving homeowners options that do not include adding the payments to the end of the loan term. For example, Select Portfolio Servicing not only offered borrowers only a 90-day forbearance period but indicated that the deferred amount will be due as a lump sum at the end of the 90-day period.

In order to ensure that servicers are following Massachusetts law, it is necessary for the DOB to issue guidance directly to servicers and banks informing them of the new Massachusetts homeowner protections and requiring them to provide the statutorily required forbearance period of 180 days upfront and that there is no exception to such requirement for borrowers in bankruptcy. In addition, servicers should be directed to tell borrowers that the forbearance amounts will be added to the end of their loan (unless otherwise agreed) and they will not be required to pay back all the money in a lump sum at the end of the forbearance period.

2. **Forbearance of Escrow Payments**

We believe the intent of the law was to provide forbearance for a borrower's entire monthly payment, including the amounts attributed to escrow payments for taxes and insurance. This intent, we believe is evidenced by the language in Section 5(b) of the statute, which states that

[f]ees, 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 shall be added to the end of the term of the loan unless otherwise agreed to by the mortgagor and mortgagee.

(emphasis added). Most, if not all, borrowers pay one lump mortgage payment each month as required by the mortgage contract which usually includes principal, interest and escrow. There are no separate payments for escrow. Thus, because escrow is included in their monthly payment, the escrowed amounts must be added to the end of the term of the loan just like the principal and interest portion of the payment.

There is nothing in Chapter 65 that exempts escrow payments from forbearance. Moreover, The DOB's FAQ No. 13 is likely to confuse borrowers and servicers about the servicer's duties under federal servicing laws. For example, when the mortgage contract requires that the mortgagor pay escrow for taxes and insurance, RESPA requires that servicers continue to advance timely payments for these items as long as the mortgagor's payment is not more than thirty days overdue. 12 C.F.R. §1024.17(k)(1),(2). Section 5(b) of the state Act provides that during forbearance the borrower's account must be treated "as if the mortgagor made all contractual payments on time and in full under the terms of the mortgage contract." Under RESPA, servicers who agreed to allow a forbearance of scheduled payments in accordance with the state law must continue to advance funds for taxes and insurance in a timely manner.

Servicers cannot simply opt out of the obligations to comply with their escrow duties under the uniform mortgage contract and RESPA. If a servicer were to terminate an escrow account, RESPA would require a short-year accounting and potentially the return of any surplus in the account. 12 C.F.R. § 1024.17(f)(2)(1), 1024.17(i)(4). The servicer would also need to send the Escrow Cancellation Notice under TILA no later than 30 business

days before the account is closed. 12 CFR § 1026.20(e). In addition, a servicer could not proceed to impose force-placed insurance without complying with the RESPA requirements of 12 C.F.R. § 1024.17(k)(5)(i) and would have to pay the borrower's hazard insurance rather than force place even if the loan is delinquent.

Most mortgage loans are subject to published guidelines that govern servicing of federally-backed loans. These protocols do not permit servicers to bifurcate scheduled payments in the manner that FAQs Nos. 13 and 22 suggest. In suggesting that this is an acceptable practice in the servicing industry, the FAQs will deter many borrowers from asking for forbearance when they need the option and would greatly benefit from it. Finally, federally backed loans are requiring servicers to forbear principle, interest, and escrow payments. Fannie Mae and Freddie Mac's Extend Modification, for example, require escrow shortages to be spread over a 60-month period for borrowers who are unable to pay an escrow shortage as a lump sum. Massachusetts law should be consistent with the federal law.

Servicers are required under RESPA (12 CFR §1024.17) to continue to make timely disbursements for taxes and insurance for the account. As such, they must forbear the escrow payments in addition to payments of principal and interest and such payments, as Section 5(b) of the Act clearly specifies, "shall be added to the end of the term of the loan unless otherwise agreed to by the mortgagor and mortgagee." We request that DOB clarify this and correct the answer given in the prior FAQs, as well as directly communicate to servicers that all portions of mortgage payments, including escrow, are subject to forbearance of 180 days.

3. **Requests for Forbearance can be Oral and No Specific Form Should Be Required**

The statute only requires that borrowers submit a request to the servicer affirming that the borrower has experienced a financial impact from COVID-19. Once that is done the servicer is required to grant a forbearance of 180 days. There is no requirement that the request be in writing or use any specific form. In order to ensure that borrowers do not lose their housing during the COVID-19 emergency, the statute was intended to take effect immediately and put the least burden on struggling homeowners. Again, DOB should make this clear to servicers and borrowers.

4. **Mortgage Term Extended for Forbearance Period**

Section 5(b) of the Act states that "[a] payment subject to the forbearance shall be added to the end of the term of the loan unless otherwise agreed to by the mortgagor and mortgagee." We urge the DOB to issue guidance that the rule should be that unless a borrower prefers a lump sum balloon payment that the term of the loan be extended by the number of deferred payments *with no interest accruing on these payments*. Balloon payments are difficult, if not impossible, for many borrowers to make, even at the end of a loan.

5. **Require Disclosures from Servicers**

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The DOB should require servicers to provide clear and accurate disclosures to borrowers as to what they are entitled to under Chapter 65 and as to the terms of the forbearance they are granted.

6. **Clarify that the Act does not Diminish Borrower Rights under Federal Law**

The FAQs should clarify that nothing in the state law diminishes obligations of servicers under the CARES Act as applied to federally backed mortgage loans, including the borrower's right to an additional forbearance of up to 180 days.

In addition to issuing guidance to servicers on these issues, we request that DOB create a document in plain English for consumers, which gives an overview of their rights to forbearance under Chapter 65. Borrowers do not fully understand their rights under the law and are not being offered what they should be under the law. Therefore, it is critical that there is something in a digestible format that informs borrowers what the main terms of the law are and what rights they have under the law.

If you have any questions, feel free to contact Nadine Cohen, Alexa Rosenbloom, and Todd Kaplan of Greater Boston Legal Services at ncohen@gbls.org, arosenbloom@gbls.org, and tkaplan@gbls.org. Thank you for your prompt attention to these issues.

Sincerely,

Greater Boston Legal Services, on behalf of our low-income clients

National Consumer Law Center, on behalf of our low-income clients

Legal Services Center, on behalf of our low-income clients

Harvard Legal Aid Bureau

Massachusetts Law Reform Institute

Central West Justice Center

Northeast Justice Project