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States Focus on Commercial Mortgage Foreclosure Moratoriums

As COVID-19 related governmental orders continue to be implemented and extended across the U.S., some states are now focusing on providing relief to commercial real estate borrowers. Most states enacted measures at the start of the pandemic to protect individuals from foreclosures on residential properties and limit evictions of residential and, in some cases, commercial tenants as they struggled to continue to make rent payments. Some states are now turning their attention to commercial real estate borrowers and enacting orders or laws or considering legislation that would limit commercial lenders' ability to exercise foreclosure rights and other remedies. While not intended to be a 50-state survey, a few of these laws and bills are discussed below to provide a glimpse of how various states are approaching the COVID-19 pandemic and its effect on commercial real estate lending.

Oregon Prohibits Lenders from Taking Enforcement Action

Oregon recently passed the broadest emergency law related to COVID-19 impacting commercial real estate borrowers and lenders in [House Bill 4204](#). The law prohibits lenders from taking any enforcement action during the COVID-19 "emergency period," which is currently set to expire on September 30, 2020. A lender would be prohibited from taking any enforcement action if a property was performing pre-COVID-19 and the borrower notifies its mortgage lender that the borrower cannot make its payments. Mortgage lenders also have an obligation to provide notice to its borrowers of their rights under this statute. The September 30, 2020 date may be extended unilaterally by Oregon's governor on or prior to September 1, 2020. The statute does not limit how long the governor may extend the emergency period. The statute applies to any loan originated prior to September 30, 2020, as that date may be further extended.

There are some additional prohibited actions during this "emergency period," including implementing cash management and

imposing late fees, default interest or other penalties. Once a borrower sends a notice to its lender under the new law, during the emergency period a lender may not, among other things, collect payments under the loan or treat a failure to make a payment under the loan during the emergency period as a default. Any missed payments would be deferred until the maturity date. The statute is silent on many material questions, such as whether interest may be charged on the missed payments or how the law applies to portfolio loans secured only in part by property located in Oregon.

On August 13, the Oregon Bankers Association and three community state banks filed a lawsuit against the state. The lawsuit challenges the constitutionality of the portions of the bill that modify implementation of cash management, imposition of late fees, default interest and other penalties, the retroactive application of the law and notices required to be delivered to borrowers. The lawsuit does not challenge the constitutionality of the moratorium on foreclosures.

New York Proposes New Regulated Banking Rules

New York Governor Andrew Cuomo issued [Executive Order 202.28](#) on May 7, which expanded previous executive orders and placed a temporary moratorium on residential and commercial tenant evictions and foreclosures until August 19, 2020. A lender is prohibited from instituting foreclosure proceedings if the property is owned by a person facing financial hardship due to the COVID-19 pandemic or eligible for state or federal unemployment insurance or benefits. A landlord would also be prohibited from instituting eviction proceedings against any tenant that satisfies the same criteria.

If passed, [New York Senate Bill 8454](#) and [New York House Bill 10876](#) would require any New York regulated banking organization or mortgage servicer entity to grant a 120-day forbearance period to any qualified commercial mortgagor facing financial hardship during the New York state of emergency period. The forbearance period could be backdated to March 7. A lender would be required to defer any missed payments during the forbearance period, which would

be payable by the borrower as a balloon payment within 12 months after the end of the forbearance period. Late payments and interest would not be payable on any such missed payments. The deferred mortgage payments would also be apportioned to each tenant on a pro rata basis and such tenants would be entitled to a deferment of such amount from rent payments during the forbearance period. The tenants would also be entitled to repay the deferred rent within twelve months after the end of the forbearance period without payment of interest or late fees. Compliance with these restrictions would be a condition to a lender commencing foreclosure proceedings due to missed payments during the forbearance period. The bill would also prohibit evictions of any tenants during the forbearance period.

Ohio Considers Prohibiting Certain Foreclosure Filings

There are currently bills introduced in both the Ohio Senate ([Senate Bill 297](#)) and House of Representatives ([House Bill 562](#)) that would prohibit a residential or commercial lender from filing foreclosure proceedings so long as the state of emergency declared by Ohio's governor exists. The bills would also prohibit residential and commercial landlords from instituting eviction proceedings while the state of emergency continues. As of August 26, 2020, however, neither bill has moved out of its respective committee and neither chamber is in session.

Whether, and to what extent, this type of state legislation would apply to federally chartered banking institutions or would be pre-empted by applicable federal law will require a case-by-case, fact-dependent analysis that in some instances may ultimately be determined by the courts. The U.S. Department of the Treasury's Office of the Comptroller of the Currency (OCC) recently discussed the issue in [OCC Bulletin 2020-62](#). the (OCC) encourages states and localities to expressly exempt federally chartered banking institutions from such laws.

Lenders and borrowers should continue to monitor state legislation and executive orders and consult their legal counsel to determine the impact on their rights under any applicable loan documents. When determining loan closing dates, lenders and borrowers should

consider the state's re-opening progress and the likelihood that a state of emergency will be extended where governmental orders or legislation have been enacted or proposed.

Lenders should pay close attention to any notice requirements to ensure compliance with any legislation or executive orders for loans originated after the enactment of such laws and regulations.

Lenders should also consider whether any additional remedies or structure need to be included in their loan documents to adequately protect against a borrower availing themselves of state statutory and regulatory relief that negatively impacts the lender's remedies or collateral, whether in existence at closing or that may be implemented thereafter. Similarly, borrowers should be cognizant of loan document provisions related to any relief legislation or executive orders and ensure they understand the implications of such loan document provisions on their rights to seek relief.

Commercial real estate market advocates are closely monitoring whether this type of legislation will be a growing trend across the United States, especially in light of the Oregon statute which effectively prohibits commercial lenders from exercising any remedies under loan documents or implementing other provisions intended to protect the lender and collateral. If states continue to extend their statewide emergency periods, legislation like the Oregon statute and the bills proposed in New York and Ohio may continue to provide relief to commercial borrowers and tenants as the COVID-19 pandemic continues, but may also have a chilling effect on originations of new loans in such states as lenders assess their risks in light of such laws.

Additional legislation from across the U.S. can be found on the [CREFC State Legislation and Policy Tracker](#), published by the Commercial Real Estate Finance Council, or the MBA's Coronavirus State Resources webpage, published by the Mortgage Bankers Association.

For more information, please contact [Geoff White](#), [Chandler Hodge](#), [Devon Callaghan](#), [Doug Walter](#) or any attorney in Frost Brown Todd's [Financial Services Industry Team](#).

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