

CORONAVIRUS INFORMATION & UPDATES

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Summarizing Certain Real Estate-Related Provisions of the CARES Act

Part I: Forbearance of Residential Mortgage Loan Payments for Multifamily Properties with Federally Backed Loans; Application to Senior Housing

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Part II: Implications of Relaxed Affiliation Provisions for Small Business Loans

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), commonly referred to as Phase 3 of the federal government's response to the coronavirus outbreak, provided specific aid to the owners and tenants of multifamily properties which are subject to Federally-backed mortgage loans (excluding construction loans). We have examined one provision of the CARES Act which provides owners of multifamily properties containing 5 or more units with up to 90 days of forbearance from loan payments in exchange for such owners agreeing to halt any existing eviction proceedings and not initiate new proceedings during the forbearance period. Our examination also includes an analysis as to whether seniors housing is included within the scope of "multifamily properties" and eligible for the protections set forth in the CARES Act. Finally, we have included a short summary describing the relaxation of the affiliation requirements by the Small Business Administration for restaurant and hotel businesses in order to provide stimulus to such businesses in the form of small business loans.

Part I

Forbearance of Residential Mortgage Loan Payments for Multifamily Properties with Federally Backed Loans

Section 4023 of the CARES Act provides multifamily borrowers with certain protections and rights for forbearance of loan payments under federally backed residential mortgages (e.g., purchased or securitized by Fannie Mae or Freddie Mac) for residential multifamily properties principally designed for the occupancy of five or more families. For the purposes of §4023, loans for temporary financing such as a construction loan are not eligible for forbearance.

Such forbearance is subject to such multifamily borrower's compliance with the conditions set forth in the CARES Act, most notably, its agreement to halt any existing, and not pursue any new, eviction proceedings during the forbearance period.

We have produced the text of §4023 of the CARES Act on Exhibit A attached hereto.

Section 4023(f) of the CARES Act contains all definitions related thereto, but for ease of reference:

"multifamily borrower" is a borrower of a residential mortgage loan that is secured by a lien against a property comprising of **five or more dwelling units.**" (§4023(f)(3))

CORONAVIRUS INFORMATION & UPDATES

“covered period” means the period beginning on the date of enactment of this Act and ending on the **sooner of** (A) the termination date of the national emergency concerning the novel coronavirus disease (COVID-19) outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.); or (B) December 31, 2020. (§4023(f)(5))

Requests for Forbearance by Multifamily Borrower: (§4023(b)):

The requirements for a multifamily borrower to request forbearance are fairly straight-forward:

1. Such multifamily borrower was current on its payments on **February 1, 2020**; and
2. Such multifamily borrower submits an oral or written affirmation to the servicer that it is experiencing a financial hardship during the COVID-19 emergency.

Requirements for Servicer upon Receipt of Request (§4023(c)):

Upon such request from the multifamily borrower, the servicer shall (A) document the financial hardship, (B) provide forbearance for **up to 30 days** and (C) extend the forbearance for up to **two additional 30 day periods upon request of the borrower** provided that, the multifamily borrower’s request for an extension is made during the covered period, and, at least 15 days prior to the end of the then current forbearance period. The multifamily borrower is entitled to terminate the forbearance at any time.

No Specific Requirements to Demonstrate Financial Hardship:

Section 4023 of the CARES Act does not define “financial hardship” for the purposes of requesting forbearance, nor does it delineate whether any documentation (including income verification) is required to be provided by the multifamily borrower, **so it is unclear whether the servicer is able to exercise any discretion on whether to grant the forbearance.**

Compare to §4022(c)(1) of the CARES Act (Foreclosure Moratorium and Consumer Right to Request Forbearance) which expressly states that “upon receiving a request for forbearance from a borrower under subsection (b) [of §4022 of the CARES Act], the servicer shall, with no other attestation to a financial hardship caused by the COVID-19 emergency.....provide forbearance.....” (§4022(c)(1)) Section 4022 is distinguishable from §4023 in many ways as §4022 is designed to restrict foreclosure of residential real estate designed principally for the occupancy of one to four families.

Renter Protections During Forbearance (§4023(d); 4023(e))

In exchange for a multifamily borrower receiving the benefit of forbearance on its loan payments, such multifamily borrower may not:

- (d) (1) evict or initiate the eviction of a tenant from a dwelling unit **solely** for nonpayment of rent or other fees or charges or (2) charge any late fees, penalties or other charges to a tenant described in clause (1) for late payment of rent;

CORONAVIRUS INFORMATION & UPDATES

and

(e) (1) require a tenant to vacate a dwelling unit before the date which is 30 days after the multifamily borrower provides the tenant with notice to vacate and (2) issue a notice to vacate under (1) until the expiration of the forbearance.

While §4023 expressly provides that the multifamily borrower may not evict **solely** for nonpayment of rent, it follows that a tenant may be evicted for other defaults under such lease, subject to the application of any state or local eviction moratoria that may be in effect.

Application to Senior Housing

Given the regulatory and licensing requirements associated with seniors housing facilities, and the amenities and other services provided to residents, it is not entirely clear that seniors housing fit within the definition of “multifamily” properties under §4023 of the CARES Act. While there is no statutory guidance expressly including or excluding senior housing facilities as multifamily properties, it is likely the intent of the CARES Act that owners of senior housing facilities and residents of such facilities would be afforded with the same protections as owners of multifamily apartment buildings and tenants of such buildings and we are aware of three Freddie-backed loans where the loan servicer has indicated that it considers Seniors Housing as multifamily and is processing the forbearance.

Notably, the Fannie Mae Multifamily Selling and Servicing Guide (effective as of February 4, 2019) (the “Guide”) defines “Asset Class” as “the specific type of Multifamily Property securing a Mortgage Loan (e.g., conventional multifamily, **Seniors Housing Property**, Manufactured Housing Community, Cooperative Property, etc.).” Further, Section 501.01 of the Guide provides that mortgage loans secured by a senior housing property must meet “multifamily underwriting standards.”

Since the Guide classifies Senior Housing Properties as a type of Multifamily Property securing a Mortgage Loan and loans made to such properties must meet the multifamily underwriting standards, it seems reasonable to expect that senior housing facilities should be afforded the benefits of the CARES Act.

However, given the lack of specificity in the definition of multi-family in §4023 of the CARES Act, borrowers should consult with their FNMA /Freddie representative to request direct guidance.

Part II: Implications of Relaxed Affiliation Provisions for Small Business Loans¹

Keeping American Workers Paid and Employed Act (Title I)

Under the CARES Act, businesses with less than 500 employees that have suffered disruption as a result of COVID-19 will be eligible to receive no-fee small business interruption loans from lenders enrolled in the SBA’s 7(a) loan program (the “7(a) Loan Program”) and other lenders approved by the SBA. Qualifying small businesses will be permitted to

¹ Note that this excerpt was posted by R&G in an alert issued on March 26, 2020 entitled “Bipartisan Proposal for Coronavirus Aid, Relief, and Economic Security Act (CARES Act) – Summary of Key Provisions.

CORONAVIRUS INFORMATION & UPDATES

borrow up to 2.5 times the borrower's average monthly payroll cost for the trailing twelve months, subject to a \$10 million borrowing cap.

Loan proceeds may be used only to pay payroll, rent, mortgages, utilities and debt obligations where the underlying agreement giving rise to such obligation was in effect prior to February 15, 2020. Loans made under the 7(a) Loan Program will be unsecured and will be effectively junior to existing secured debt instruments. The SBA will not require personal guarantees by owners or other affiliates of borrowers. Borrowers will be eligible for loan forgiveness equal to the amount spent by the borrower on payroll costs, mortgages, rent and utilities during the eight-week period following loan origination. The amount forgiven will be reduced proportionally by any reduction in employees retained compared to the prior year and reduced by the reduction in pay of any employee beyond 25 percent of their prior year compensation.

In determining whether a business has 500 or less employees and is eligible to borrow under the 7(a) Loan Program, SBA rules require businesses to include the employee headcount of entities affiliated with the borrower. For example, in general, the number of employees in any private equity fund's portfolio company would be calculated by including employees in all other portfolio companies controlled by such private equity fund. The CARES Act waives the aggregation requirement for businesses in the food service and hospitality industries, SBA-approved franchises, and businesses that receive financial assistance from SBIC funds. While such waivers may allow businesses controlled by private equity funds to access the 7(a) Loan Program in those targeted sectors, the aggregation requirement would preclude most businesses controlled by private equity funds from participating in the 7(a) Loan Program.

EXHIBIT A

Section 4023 of the CARES Act

SEC. 4023. FORBEARANCE OF RESIDENTIAL MORTGAGE LOAN PAYMENTS FOR MULTIFAMILY PROPERTIES WITH FEDERALLY BACKED LOANS.

- a. **IN GENERAL.**—During the covered period, a multifamily borrower with a Federally backed multifamily mortgage loan experiencing a financial hardship due, directly or indirectly, to the COVID–19 emergency may request a forbearance under the terms set forth in this section.
- b. **REQUEST FOR RELIEF.**—A multifamily borrower with a Federally backed multifamily mortgage loan that was current on its payments as of February 1, 2020, may submit an oral or written request for forbearance under subsection (a) to the borrower's servicer affirming that the multifamily borrower is experiencing a financial hardship during the COVID–19 emergency.
- c. **FORBEARANCE PERIOD.**—
 1. **IN GENERAL.**—Upon receipt of an oral or written request for forbearance from a multifamily borrower, a servicer shall—
 - A. document the financial hardship;
 - B. provide the forbearance for up to 30 days; and

CORONAVIRUS INFORMATION & UPDATES

- C. extend the forbearance for up to 2 additional 30 day periods upon the request of the borrower provided that, the borrower’s request for an extension is made during the covered period, and, at least 15 days prior to the end of the forbearance period described under subparagraph (B).
 - 2. RIGHT TO DISCONTINUE.—A multifamily borrower shall have the option to discontinue the forbearance at any time.
- d. RENTER PROTECTIONS DURING FORBEARANCE PERIOD.—A multifamily borrower that receives a forbearance under this section may not, for the duration of the forbearance—
 - 1. evict or initiate the eviction of a tenant from a dwelling unit located in or on the applicable property solely for nonpayment of rent or other fees or charges; or
 - 2. charge any late fees, penalties, or other charges to a tenant described in paragraph (1) for late payment of rent.
- e. NOTICE.—A multifamily borrower that receives a forbearance under this section—
 - 1. may not require a tenant to vacate a dwelling unit located in or on the applicable property before the date that is 30 days after the date on which the borrower provides the tenant with a notice to vacate; and
 - 2. may not issue a notice to vacate under paragraph (1) until after the expiration of the forbearance.
- f. DEFINITIONS.—In this section:
 - 1. APPLICABLE PROPERTY.—The term “applicable property”, with respect to a Federally backed multifamily mortgage loan, means the residential multifamily property against which the mortgage loan is secured by a lien.
 - 2. FEDERALLY BACKED MULTIFAMILY MORTGAGE LOAN.—The term “Federally backed multifamily mortgage loan” includes any loan (other than temporary financing such as a construction loan) that—
 - A. is secured by a first or subordinate lien on residential multifamily real property designed principally for the occupancy of 5 or more families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and
 - B. is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary of Housing and Urban Development or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal Mortgage Association.
 - 3. MULTIFAMILY BORROWER.—the term “multifamily borrower” means a borrower of a residential mortgage loan that is secured by a lien against a property comprising 5 or more dwelling units.

CORONAVIRUS INFORMATION & UPDATES

4. COVID-19 EMERGENCY.—The term “COVID-19 emergency” means the national emergency concerning the novel coronavirus disease (COVID-19) outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.).
5. COVERED PERIOD.—The term “covered period” means the period beginning on the date of enactment of this Act and ending on the sooner of—
 - A. the termination date of the national emergency concerning the novel coronavirus disease (COVID-19) outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.); or
 - B. December 31, 2020.