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The Honorable Speaker Kotek, Honorable Chair Holvey, and Honorable Members of the House Committee on Business and Labor,

Thank you for the opportunity to provide written testimony related to regulation of commercial and residential foreclosures in Oregon, and pending 2021 House Bill 2009.

This law firm's core practice area includes representing national, regional, and small loan servicers, investors, and originators in all aspects of mortgage banking and consumer finance matters, including litigation, transactions, and regulatory compliance.

We are writing to express the significant, adverse impacts and unintended consequences that portions of HB 2009, as proposed, would have on both our clients and their customers in the state of Oregon, including:

- **Retroactive Effect**: By defining the “Emergency period” as beginning on December 31, 2020, the proposed bill would retroactively void valid notices of default and would compel courts to involuntarily dismiss pending judicial foreclosures filed after the expiration of the previous Oregon foreclosure moratorium, and prior to the effective date of the proposed bill. The retroactive effect would unfairly punish those lenders and servicers who fully complied with existing state and federal regulations in commencing a foreclosure as authorized by contract and under Oregon law after the legislature chose not to extend the prior moratorium during the Third Special Session of 2020. The private right of action section allows a borrower to file suit for damages and recover attorneys’ fees and costs based on collection and foreclosure activity by a lender or trustee that was not prohibited at the time the action occurred.
- **Constitutional Concerns**: Both the Oregon Constitution (Section 21) and the U.S. Constitution (Article I, section 10, clause 1) have absolute prohibitions on ex post facto laws and impairments of contract rights. HB 2009 would be subject to immediate constitutional challenge for impairing the contract rights of, and imposing retroactive obligations on, Oregon lenders.
- **Applicability to Pre-Existing Defaults and Defaults Unrelated to Financial Difficulty**: The proposal does not effectively distinguish between defaults that were caused by COVID-related loss of income, and defaults that predated or were incidental to the state of emergency. The proposed bill is overly-broad and is unduly burdensome on those lenders and servicers looking to enforce the contractual and statutory rights to recover on their collateral under defaults that have

nothing to do with the current pandemic or the related economic downturn, including in those situations where borrowers have not communicated any interest in a mortgage loan workout, which can include, for example, borrowers who have passed away, or those who are divorcing (or ending a partnership) and have no interest in retaining the property.

- **No Exemption for Abandoned/Vacant Properties:** The proposed bill would conflict with the goals of the “Good Neighbor Law” (ORS 18.995), passed by the Oregon legislature in 2013, which requires Oregon lenders take responsibility for blighted, abandoned properties in foreclosure through community registration programs and financial penalties for non-compliance. Unlike the federal CARES Act, HB 2009 has no exemptions for abandoned properties, and therefore would further extend the adverse impacts on neighbors and communities by preventing lenders from obtaining possession of blighted and vacant properties through foreclosure. There is no harm to Oregon borrowers in allowing the foreclosure of abandoned homes. In fact, many loans, particularly reverse mortgages, provide that the failure to occupy the premises is grounds for default, so providing an exception for foreclosure of abandoned properties would be consistent with both the loan terms and the Oregon policy to compel lenders to address vacant properties. Preventing lenders from foreclosing, and thereby preventing lenders from putting abandoned properties back to productive use, only exacerbates the housing shortages in our communities, and hinders rather than helps the goal of housing families during the ongoing COVID crisis.
- **Clouds on Title to Foreclosure Properties/Lack of Bona Fide Purchaser Defenses:** The proposed 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 would create clouds on titles by retroactively declaring such transactions void (and not merely voidable upon proof of some cognizable harm), and thus would impose substantial burdens on property investors, title companies, and other parties with no connection to the mortgage lending business. These downstream consequences would prevent foreclosed, abandoned, and blighted properties from being put back to productive use in housing Oregonians in need of shelter during the pandemic.
- **Oregon Foreclosure Avoidance Program and Federal Moratoria:** Because most Oregon mortgages are given by government-supported entities and serviced by loan servicers subject to state and federal oversight, there are already robust consumer protections in place to provide Oregon homeowners reasonable opportunities to save their homes even in the face of short-term financial disruptions. Indeed, no other western state has passed a legislative equivalent to HB 2009, due to the other protections already in place. Additional forbearance provisions (with funding from the federal government under the CARES Act) have provided an additional safety net for borrowers. And further, if all else fails, there is the Oregon Foreclosure Avoidance Program (“OFAP”), which compels most lenders to hold face-to-face meetings with their borrowers, with the goal of reaching a “foreclosure-avoidance measure,” before a foreclosure can commence. Imposing additional, unfunded obstacles on lenders seeking to recover their collateral when all else fails will only increase the cost of lending in Oregon and will delay the eventual economic recovery, without providing meaningful relief to borrowers who remain obligated to make up the missed payments.

We strongly encourage you to allow lenders and loan servicers to continue to work with their borrowers to find solutions to problems brought about by the COVID-19 pandemic. A new, retroactive foreclosure moratorium, imposed after a two month lapse after the prior moratorium ended, will not solve the problem, and will add a second wave add-on effect just when the economy begins to recover and the mandatory forbearance ends. The problems that are postponed, but not solved, under an additional

moratorium will not go away under the proposal, and will only be compounded when those bills eventually come due.

Thank you again for the opportunity to provide written testimony on the issue of commercial and residential foreclosure moratoria. If you have any question, please contact Tony Kullen at (503) 479-8871.

Very truly yours,

WRIGHT, FINLAY & ZAK, LLP

/s/ Tony Kullen, Esq.
Managing Attorney, Oregon