February 21, 2025

Honorable William C. Smith, Jr., Chair
Judicial Proceedings Committee
Maryland Senate
2 East Miller Office Bldg.
Annapolis, MD, 21401

Re: SB 682 Real Property – Residential Foreclosures – Materially Delinquent Mortgages

TESTIMONY OF GEOFF WALSH, NATIONAL CONSUMER LAW CENTER

We present these comments on behalf of the National Consumer Law Center (NCLC). NCLC uses its expertise in consumer law to work for consumer justice and economic security for low-income and other disadvantaged people in the U.S. Thank you for the opportunity to offer testimony regarding SB 682, a bill that takes important steps toward reining in the growing threat that foreclosures of dormant second mortgages pose in Maryland and around the country. Often referred to as "zombie" second mortgages, these are old second mortgages that were inactive for many years. After investors buy them up, they suddenly come to life with threats to foreclose and demands for payment of exorbitant sums.

We support the concept of mandating a pause of foreclosures and compelling holders of zombie second mortgages to comply with consumer protection laws in the future. However, we have concerns about potential loopholes in the foreclosure pause that this bill defines. The bill also does not address the need for procedures and standards to adjust the massive accrued debt obligations that will burden homeowners when a foreclosure pause is no longer in place.

We would like to highlight these key points:

- Foreclosure of a second mortgage has devastating consequences for a homeowner – the loss of a home, and often a family's life savings.

- Foreclosures of long-dormant second (or "zombie") second mortgages have become a national scourge, with owners of these loans taking unfair advantages of homeowners who have been faithfully paying on their first mortgages for decades.

- Since the foreclosure crisis of 2008, many federal and state laws have been put in place that require owners and servicers of mortgage loans to communicate on a regular basis with borrowers about the status of their mortgage loans.

- For many years, and often for decades, the owners of zombie second mortgages consistently flouted the laws that obligated them to keep borrowers informed about the status of mortgage loans.

- After buying these loans for pennies on the dollar owed, buyers of zombie second mortgages take advantage of homeowners' lack of information about the status of the loans. They use the leverage of foreclosure to demand and collect sums that often exceed the amounts borrowed long ago.

- SB 682 has the potential to save families from foreclosure by creating a temporary delay of foreclosure where, for five years or longer, the owner of the loan flouted federal and state laws that required communications from the loan owner to the borrower about the status of the loan.

- SB 682 should allow holders of long-dormant second mortgages to enforce their property rights in the future only after they have established a pattern of communicating vital information to borrowers. All parties must be able to make informed decisions about their obligations going forward.

- We have concerns about definitions and other terms in the bill, and we address these specifically below. In particular, we are concerned that the bill does not address remedies needed to reduce the substantial debts for interest and fees that accrued while mortgage holders consistently ignored consumer protection laws.

1. The roots of the zombie mortgage foreclosure crisis

The zombie second mortgage crisis arose from a surge of second mortgages originated in the early 2000s, pushed by subprime mortgage brokers and lenders to borrowers who needed the extra financing to purchase or refinance a home. When housing prices were still on the rise, second mortgages, often in the form of "80/20" or "piggyback" loans, became common.

These 80/20 loan transactions financed the bulk of the sum advanced, around eighty percent of the principal balance owed, through a first mortgage and a smaller portion, around twenty percent of the principal balance, through a second mortgage from the same lender. Sometimes these second mortgage was considered the "down payment" for the first loan and eliminated the need for the borrower to put any money down on the loan.[1] The structure allowed

1 National Commission on the Causes of the Financial and Economic Crisis in the United States, The Financial Crisis Inquiry Report 109–111(2011), available at www.govinfo.gov. According to the report, "Piggyback loans—which often required nothing down—guaranteed that many borrowers would end up with negative equity if housing prices fell, especially if the appraisal had overstated the initial value." Id. at 110. The report noted that in a sample pool of first mortgage loans securitized by predatory lender New Century in 2006, thirty-three percent had a

the originator to charge fees for two distinct loans. Each loan often came loaded with its own array of abusive lending terms.

The structure of 80/20 mortgages confused many borrowers. Often, they did not realize that two distinct mortgages encumbered their homes. Further complicating the matter, many borrowers obtained modifications of the first mortgages, but not the seconds. If borrowers were aware of the second mortgages, the terms were often egregious, including steep interest rate adjustments. After a short time many could not afford the payments.

As the Great Recession's foreclosure crisis progressed and housing values plummeted, many borrowers came to owe more on the loans than the current value of heir properties. For this reason, holders of second mortgages often placed the accounts in charged-off status and ceased collection for a decade or more. However, when property values rose in certain areas, these dormant second mortgages became hot commodities. Debt buyers purchased them, reactivated the accounts, and threatened foreclosures. Invariably, the current loan holders sought to recover the full range of fees and interest that allegedly came due while the loan was charged-off.

2. **The consequences of foreclosure of a second mortgage are drastic.**

According to common law, upon foreclosure of a second mortgage (or any other junior mortgage), the borrower loses all rights in the property. The purchaser at the junior mortgage foreclosure sale can proceed to evict the borrower and take possession of the property. If there is substantial equity in the property, the purchaser is incentivized to pay off the first mortgage and acquire unencumbered title to a valuable asset. The business model of certain debt buyers is to seek out these "opportunities" to gain a windfall. This is a particularly harsh result when the borrower kept current on the first mortgage for many years while receiving no communications from the junior mortgage holder.

Even if the holder of the second mortgage does not foreclose on it, it can use the threat of foreclosure as powerful leverage to extract payments from the homeowner. The recent rise in housing values has increased equity in homes, making it an ideal time for second mortgage holders to threaten foreclosures. Despite surviving the last foreclosure crisis and then the financial challenges of the COVID-19 pandemic, borrowers are now at risk of losing their homes and the equity they have earned.

3. **Zombie foreclosures are a growing threat.**

A July 2024 CBS News piece reported that, during 2006 and 2007, 30% of second mortgages became delinquent and many lenders wrote off the debts or sold the debts for less than what was owed.[2] These mortgages are now coming to life and threatening foreclosure. An NPR

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piggyback second mortgage on the same property. Id. at 111. Keeping the first mortgages at an eighty percent loan-to-value ratio also kept them within the guidelines for securitization by the GSEs. Id. at 110.

[2] *Could a zombie mortgage put you at risk of foreclosure? Long-forgotten debt is coming back to haunt homeowners*, Ash-har Quraishi, Josh Peña, Ryan Beard, Taylor Johnston, Amy Corral, CBS News, July 24, 2024. Found at: https://www.cbsnews.com/news/zombie-mortgages-debt-haunt-homeowners/

piece in May 2024 reported that there is now foreclosure activity on at least 10,000 of these second mortgages.[3]

In a February 2024 survey, NCLC asked homeowner advocates how often their clients had been on the verge of losing their homes or lost their homes because of a zombie second mortgage when they came for help.[4] Ninety percent of the 116 respondents reported having seen clients with zombie second mortgages, and 56% of that total reported seeing clients with zombie second mortgages either always, usually, or sometimes. Seventy-five percent of survey respondents reported that their zombie second mortgage clients always, usually, or sometimes had not received monthly mortgage statements for two years or more. Eighty-five percent of survey respondents said that either always, usually, or sometimes their clients with zombie seconds had been charged interest on the loan during the time they were not receiving monthly statements. Seventy-four percent of respondents said that their zombie second mortgage clients were always, usually, or sometimes on the verge of losing their homes, or lost their homes, because of a zombie second mortgage. This was a nationwide survey, but we have no reason to believe that Maryland homeowners are less affected than those in other states.

In the Appendix to NCLC's 2024 mortgage servicing report, we described borrowers affected by these unfair practices.[5] For example, a low-income Latina single mother mistakenly believed the second mortgage of an 80/20 loan was discharged when she received a HAMP modification in 2010 and she stopped receiving any correspondence on the second. More than a decade later, she started getting multiple harassing calls from a debt collector threatening to foreclose if she did not start making payments on the second mortgage. They claimed she owed the original principal balance plus over ten years of interest and fees. The stress of potentially losing her home along with other challenges exacerbated her underlying mental health issues, and she had to be hospitalized for several months. The debt collector offered her a loan modification, which she could not afford but, desperate to save her home, signed anyway. She then fell into default on that modification and was facing foreclosure. Our report references similar cases involving Maryland homeowners.[6]

4. **The holders of zombie second mortgages violate an array of consumer protection laws before and during foreclosures.**

Zombie second mortgage wreak havoc on homeowners because demands for payment appear suddenly following years of complete silence from anyone claiming to own the loan. In

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[3] Zombie 2nd mortgages are coming to life, threatening thousands of Americans' homes, Chris Arnold, Robert Smith, Jess Jiang, Sam Yellowhorse Kesler, Robert Benincasa, Nick McMillan, Planet Money, NPR May 18, 2024. Found at: https://www.npr.org/2024/05/10/1197959049/zombie-second-mortgages-homeowners-foreclosure
[4] National Consumer Law Center, Homeowners at Risk: Nationwide Survey Reveals Critical Gaps the CFPB Must Address to Prevent Foreclosures, February 21, 2024 Appendix A, Question 15, available at https://www.nclc.org/resources/homeowners-at-risk-nationwide-survey-reveals-critical-gaps-the-cfpb-must-address-to-prevent-foreclosures/
[5] National Consumer Law Center, Homeowners at Risk: Nationwide Survey Reveals Critical Gaps the CFPB Must Address to Prevent Foreclosures, February 21, 2024 Appendix B, pp. 1-4, available at https://www.nclc.org/resources/homeowners-at-risk-nationwide-survey-reveals-critical-gaps-the-cfpb-must-address-to-prevent-foreclosures/
[6] *Id.*, p. 4.

the wake of the 2008 foreclosure crisis, federal and state regulators implemented rules designed to prevent exactly this type of surprise attack from a predatory lender. Major mortgage servicers have adjusted their practices to comply with these rules, but holders and servicers of zombie second mortgages ignored these laws completely. If the holders of second mortgages had followed the laws, homeowners would not be in the position they find themselves today. In effect, holders of zombie seconds are now seeking to profit handsomely from their years of flaunting federal and state laws. Because the recent consumer protection laws at the federal level do not create defenses to foreclosures, mortgage holders can foreclose without facing accountability for repeated violations of these laws.

Several federal laws obligate mortgage servicers to send written communications to homeowners on a regular basis. They also require that holders and servicers of mortgages send communications to borrowers whenever important changes affecting loan servicing take place. The Truth in Lending Act ("TILA") requires that new holders or assignees of mortgages inform borrowers of any transfers of loan ownership within thirty days after the loan is sold.[7] A transfer of servicing rights for a second mortgage also triggers obligations under the federal Real Estate Settlement Procedures Act ("RESPA") for both the transferor servicer and the transferee servicer to provide timely notices of a servicing transfer to the borrower.[8] Although ownership and servicing rights of zombie second mortgages changed hands multiple times over the years, homeowners seldom, if ever, received notices about these transfers. Receipt of these transfer notices would have given homeowners a clear sign that someone still claimed a right to payment of the mortgage debt.

The Dodd-Frank Act created important obligations under TILA for mortgage servicers to provide periodic account statements to borrowers.[9] The CFPB issued rules under Regulation Z that implemented this TILA requirement.[10] The rules apply to a first and second mortgage loan secured by a dwelling. Limited exemptions from the periodic statement requirements apply to small servicers, servicers who provide detailed account information in coupon books, and in certain instances, to loans involved in bankruptcy.[11]

The TILA obligation to send periodic mortgage account statements applies to a "servicer," which includes the "creditor, assignee, or servicer, as applicable."[12] The requirement applies to all of these parties.

A periodic account statement takes on a particularly important function in the context of a second mortgage. As in the case of a first mortgage, the servicer of a second mortgage must provide the borrower with an account statement each billing cycle. These are typically monthly statements. Each statement must include, *inter alia*: the amount due as of a specific due date; an explanation of the amount due with a breakdown; a description of the most recent transaction

7 12 C.F.R. § 1026.39(b), implementing 15 U.S.C. § 1641(g).
8 12 U.S.C. § 2605(b); Reg. X 12 C.F.R. § 1024.33(b).
9 15 U.S.C. § 1638(f).
10 12 C.F.R. § 1026.41 (initial version effective February 14, 2014).
11 However, they do not cover a reverse mortgage, HELOC, or other type of open-end consumer credit. 12 C.F.R. § 1026.41(a)(1).
12 Reg. Z 12 C.F.R. § 1026.41(a)(2).

and payment application; contact information for further explanations about the account; and information about the availability of housing counseling.[13]

If the borrower is more than forty-five days delinquent, the periodic statement must provide detailed information about the long-term arrearage owed and warn the borrower about risks of foreclosure.[14] Given that the rule has a specific provision applicable to loans in default, a creditor, assignee, or servicer cannot argue that loans in default are exempt from the periodic statement requirement.

The TILA periodic statement rule obligates servicers to keep borrowers informed about the status of a second mortgage, including whether it has been charged-off or re-activated for collection, as well as who currently owns the loan and how to contact appropriate parties for up-to-date information. Compliance with the periodic statement rule would prevent the surprise appearance of a long-dormant second mortgage along with unexpected claims for years of accrued interest and fees.

In addition to the federal laws that mandate written communications from a mortgage holder to a borrower, a number of federal and state laws prohibit debt collection practices that are unfair, deceptive, or abusive. These laws generally apply to mortgage servicing and foreclosures. The Fair Debt Collection Practices Act ("FDCPA") prohibits a wide range of unfair and deceptive practices by debt collectors.[15] The Consumer Financial Protection Bureau has issued guidance specifically finding that the FDCPA applies to practices of servicers of zombie second mortgages.[16] According to the CFPB, the FDCPA's remedies for unfair and deceptive debt collection through foreclosure apply in non-judicial as well as judicial foreclosures. They also apply beyond foreclosures to demands for payment related to zombie second mortgages.[17] Maryland has its own statute that regulates debt collection and that embodies many of the same prohibitions as the federal FDCPA.[18]

Common practices of zombie second mortgage holders fall within the prohibition of Maryland's statute barring unfair and deceptive commercial practices.[19] The practices are unfair because loan holders systematically violated consumer protection laws to place themselves in a position of overwhelming power. They then use that position to coerce payment of substantial debts that they acquired for a fraction of the amounts they later demand. The practices are deceptive because the long-term chronic failure to provide essential information about the debts

13 12 C.F.R. § 1026.41(d).
14 12 C.F.R. § 1026.41(d). See Kumi v. United Asset Mgmt., L.L.C., 574 F. Supp. 3d 1253, 1259 (N.D. Ga. 2021) (granting injunction against foreclosure sale of second mortgage, noting harm to borrower from not receiving periodic statements that would have informed borrower about the ongoing status of the debt).
15 15 U.S.C. §§ 1692, 1693.
16 Consumer Financial Protection Bureau, Fair Debt Collection Practices Act (Regulation F); Time-Barred Debt (Apr. 26, 2023) at 5, available at www.consumerfinance.gov.

17 *Id.* at 6.
18 Md. Code Ann., Com. Law §§ 14-201 to 14-204 (West) (Debt Collection). *See also* Md. Code Ann., Com. Law §§ 13-301(14)(iii) (applicability of UDAP statute to debt collection).

19 Md. Code Ann, Com Law § 13-301, *et seq.*

deprives consumers of the ability to make informed decisions about how to best protect their rights under the mortgage.

Finally, investors who purchase zombie second mortgages often buy a bare bones electronic record of a transaction that took place fifteen, twenty, or more years ago. They seldom have access to an accurate servicing history file. This means they cannot vouch for a payment history or past communications to the borrower. They often cannot document that they have authority to enforce the relevant promissory note, a requirement to foreclose under Maryland law.[20]

5. Existing federal and state laws do not provide effective remedies to homeowners facing foreclosure of a zombie second mortgage.

Although federal and state laws obligate holders of second mortgages to provide important and accurate information to borrowers on a regular basis, the failure to comply with these laws often does not provide an effective defense to a foreclosure under current Maryland law. Violations of the TILA and RESPA communication requirements can subject an offending servicer to a lawsuit for monetary damages, including modest penalties. However, even for these monetary claims consumers face short statutes of limitations, ranging from one to three years from when the violation occurred. The same is true for violations of the FDCPA and state debt collection law.

In addition, obstacles to defense against a foreclosure arise when the party foreclosing is a downstream assignee of the loan. Consumers have faced difficulties bringing certain legal claims under Maryland laws against the current assignee of a mortgage when prior holders were responsible for major misconduct. The consumer's claims involving a zombie second mortgage foreclosure can involve conduct by multiple loan holders and multiple loan servicers who handled the loan for over a decade or longer in the past.[21] All of these actors contributed to the current unfair foreclosure, but each entity will attempt to shift liability to someone else. Many entities active in the years leading up to the 2008 foreclosure crisis have gone out of business.

Finally, consumers need access to an attorney to effectively contest a non-judicial foreclosure in Maryland. A borrower needs to file a lawsuit in court in order enforce rights under a consumer protection law. Once hauled into court, holders of zombie second mortgages resist requests for documents and other discovery. Litigation can be costly and well beyond the reach of most consumers.

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[20] Deutsche Bank Nat'l Tr. Co. v. Brock, 63 A.3d 40, 51 (Md. 2013) (applying U.C.C. § 3-301); Anderson v. Burson, 35 A.3d 452, 461–463 (Md. 2011).

[21] *See e.g.* Nationstar Mtge. LLC v. Kemp, 476 Md. 149, 258 A.3d 296 (2021) (statutory prohibition on a lender's inspection fee for real property applies to a mortgagee's assignee and a mortgage loan servicer); Thompkins v. Mountaineer Investments, LLC, 439 Md. 118, 94 A.3d 61 (2014) (no recourse against current owner of mortgage for claims arising from loan originator's actions); Sharma v. Rushmore Loan Mgt. Services, LLC, 611 F. Supp. 3d 63 (D. Md. 2020) (trustees and trustees were not mortgage lenders within meaning of Maryland mortgage lender licensing statute); Robinson v. Fay Servicing, LLC, 2019 WL 4735431 (D. Md. Sept. 27, 2019) (assignees of mortgage lenders are not "Mortgage Lenders" under the Maryland Mortgage Lender Law).

6. **Senate Bill 682 has the potential to provide much-needed protections for consumers facing foreclosure of a zombie second mortgage**

SB 682 defines a "materially delinquent mortgage" as one on which the borrower made no payments during the preceding five years. § 7-105.19(A)(4).[22] The Bill has a proposed effective date of January 1, 2026. With that date in mind, the Bill provides that until October 1, 2027 the holder of a materially delinquent mortgage cannot commence a foreclosure or judicial sale unless "at least one piece of loan-related correspondence" was sent to the borrower during each billing cycle for the immediately preceding 24 months.§ 7-105.19(B)(3)(I). An exception to this requirement applies if a "law, regulation, or executive order "prohibited" the loan holder from sending the referenced communications to the borrower. *Id.* In the alternative, the Bill would allow the loan holder to foreclose before October 1, 2027 if it served the borrower with "a form provided by the Commissioner of Financial Regulation" at least 90 days before commencing foreclosure. § 7-105.19(B)(3)(II). The Bill text does not describe this form's purpose or suggest what it would say.

The Bill would potentially prohibit foreclosure of a zombie second mortgage from January 1, 2026 to October 1, 2027 unless the loan holder could show that it gave the borrower "at least one piece of loan related correspondence" each month during the two years preceding foreclosure.

The Bill's concept of "loan-related correspondence" relies primarily on the periodic mortgage account statement that the TILA obligates services to give borrowers on a regular basis. § 7-105.19(A)(3)(I), referencing 12 C.F.R. § 1026.41. As discussed in Part 4, above, in a few limited circumstances the TILA periodic statement rule excepts servicers from the requirement to give the borrower monthly account statements. SB 682 conditions foreclosure of a materially delinquent mortgage during the 2026-2027 stay period upon creditors' compliance with the TILA periodic statement rule for the past two years. Unless circumstances existed that triggered one of the exceptions to the obligation to send periodic statements, statements must have been sent for each of the 24 months preceding commencement of foreclosure. Otherwise, the zombie mortgage holder must wait until after October 1, 2027 to commence foreclosure.

If a servicer of a materially delinquent mortgage was not required to send TILA periodic statements during any of the 24 months preceding commencement of a foreclosure, the foreclosure would be permitted during the 2026-2027 stay period if the servicer had provided an alternative statement for each month that a TILA statement was not sent. The alternative statement must have contained: (1) the name and contact information of the secured party; (2) the current amount of the outstanding principal balance; (3) the current interest rate in effect; (4)

[22] The definition excludes any period in which an executive order or similar official action restricted foreclosure. The intent behind this exclusion appears to be to subtract from the five years any time affected by orders such as those issued by the Maryland Governor in 2020 during the COVID-19 pandemic. As discussed later in these comments, this time exclusion does not appear to be based on a correct understanding of how executive orders and similar actions restricting foreclosures affect the borrower's obligation to make payments on a mortgage.

the amount currently due disaggregated by principal, interest, charges, and fees; and (5) the length of any payment delinquency, including the date of last payment.§ 7-105.19(A)(3)(II).[23]

After October 1, 2027, the holder of the materially delinquent mortgage can commence foreclosure if it sent the loan related correspondence (periodic statements) to the borrower for each of the preceding 24 consecutive months. § 7-105.19(B)(4).

7. Concerns and proposed amendments

a. The bill must be amended to ensure that a foreclosure pause is comprehensive.

The Bill seeks to create a breathing spell during which the mortgage holder can begin to bring itself into compliance with laws that require communications from the loan holder to the borrower. However, the Bill allows foreclosure at any time, even during this breathing spell, if the loan holder gives the borrower a "form provided by the Commissioner of Financial Regulation ninety days before commencing foreclosure." § 7-105.19(B)(3)(II). Without more information about this notice, it is difficult to assess the ultimate value of the Bill for consumers. If the intent is to provide a 22-month breathing spell for the borrower and loan holder to explore alternatives to foreclosure, it is unclear why § 7-105.19(B)(3)(II) was placed in the Bill. We urge the deletion of § 7-105.19(B)(3)(II).

b. The bill must address relief from the underlying debts.

The Bill does not address modification of the debt obligation and adjustment of repayment terms based on the mortgage holder's past unlawful conduct. The Bill's reference to the borrower's ability to assert a defense of laches in a judicial proceeding is helpful. § 7-105.19(C).[24] In particular, the language in this subsection clarifying the application of laches to actions of predecessors of the current mortgage holder and servicer is very helpful.

Maryland law recognizes the authority of courts to enforce equitable principles in the non-judicial and judicial foreclosure contexts.[25] Legislation should direct courts to apply these doctrines against holders of zombie second mortgages. For example, abatement of interest, fees, and charges accrued during periods of non-compliance with consumer protection laws is an

[23] The alternative statement language is also helpful because it addresses the need for communications in connections with second mortgages in the form of home equity lines of credit ("HELOC" loans). As a form of open-end credit, HELOCS are not covered by the TILA periodic statement requirements.

[24] The laches defense applies when protracted inaction in enforcing the equitable remedy of foreclosure has worked to the disadvantage of the borrower who acted in reliance on that inaction. Laches focuses on the inequity of enforcement of the mortgage in view of the particular circumstances of the borrower and the property. Two elements must coalesce for laches to apply. First, there must have been an unreasonably long delay in the commencement of foreclosure. Second, this delay must cause some prejudice or harm to the borrower. Borrowers are harmed by the delays in foreclosure of a zombie second mortgage in two ways. First, they lost opportunities for modifications and other loss mitigation options when arrearages were manageable. Programs were in effect during the foreclosure crisis that could have wiped out many of these second mortgages had the borrowers been aware of them. Second, the passage of time results in lost documents, records, and other evidence that a borrower needs to defend against a foreclosure.

[25] Wells Fargo Home Mortg., Inc. v. Neal, 398 Md. 705, 922 A.2d 538 (2007).

appropriate remedy courts could impose. In the context of laches claims, the Bill should make clear that courts have the authority to direct that liens securing abandoned debts be voided.

Virginia recently enacted legislation addressing zombie second mortgage foreclosures.[26] The Virginia legislation specifically provides for the abatement of interest accrued during periods of non-compliance with the TILA periodic statement rule. Inclusion of such a provision in this Bill would better hold loan holders accountable for past misconduct and lead to fewer foreclosures. A bill recently filed in Massachusetts would similarly authorize courts to reduce accrued arrearages upon findings of inequitable conduct by the holders of a zombie mortgage.[27] Virginia and Massachusetts, like Maryland, are non-judicial foreclosure states.

If the courts cannot address the massive amounts of interest accrued during the dormancy period of a zombie mortgage, many homeowners will simply find themselves unable to address the mortgage debt, and the zombie mortgage holder will proceed to foreclose. For the same reasons, it is important that the legislation specifically state that it does not limit in any way the ability of borrowers to pursue claims and defenses arising under other laws and from the terms of their loan documents.

c. The definition of "materially delinquent mortgage" inappropriately excludes many zombie mortgages that should be covered.

The definition of "materially delinquent mortgage" should be amended. § 7-105.19(A)(4). Defining a materially delinquent mortgage as one for which the borrower made no payments in the preceding five years is clear. However, excluding from the five years any time during which "a secured party could not institute a foreclosure proceeding due to an executive order or other similar action restricting foreclosure actions" does not make sense. We are not aware of any executive orders or similar actions that directed borrowers not make payments on their mortgages. Certainly executive orders were in effect during the COVID-19 pandemic that limited foreclosure activity. However, these orders did not direct borrowers to cease payments.

Absent a formal forbearance agreement between the mortgage holder and the borrower, the borrower's obligation to make payments was not affected by an executive order staying foreclosures. The Bill language appears to confuse foreclosure stays ordered by a government authority and forbearance agreements, which were contractual agreements between mortgage holders and borrowers. Given the nature of zombie mortgages, it is highly unlikely that borrowers and holders of zombie mortgages entered into forbearance agreements during the COVID-19 pandemic. Similarly, the automatic stay in bankruptcy cases does not order the borrower to stop making mortgage payments. We suggest deleting references to exceptions to or tolling of the five-year period defining a "materially delinquent mortgage" in § 7-105.19(A)(4).

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[26] Va. H.B. 184, signed into law by the Governor of Virginia in April 2024, *An Act to amend and reenact § 55.1-321 of the Code of Virginia (relating to foreclosure procedures; subordinate mortgage; affidavit required).*

[27] Mass. Senate Bill No. 2437, as filed Jan. 17, 2025.

d. The bill's proposed effective date is unreasonably delayed.

Finally, there is an immediate need for protections against commencement of foreclosures that this Bill would stay. The proposed January 1, 2026 effective date should be modified to ninety days from final approval of the Bill.

Geoff Walsh
Andrea Bopp Stark
Senior Attorneys
National Consumer Law Center
7 Winthrop Square, 4th Floor
Boston, MA 02110
gwalsh@nclc.org
(617) 542-80910