



## MEMORANDUM

**To: Executive Chamber Staff**  
**From:** Kristina Persaud, Director of Governmental Affairs  
**Date:** December 26, 2022  
**Re: Opposition to A.7737-B**

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The New York Credit Union Association, representing all New York credit unions providing financial services to over 6 million New Yorkers, calls on the Governor to **veto A.7737-B** to protect New York's real property financial ecosystem.

The "Foreclosure Abuse Prevention Act" (FAPA)<sup>1</sup> would ostensibly reverse the Court of Appeals decision in *Freedom Mortgage Corporation v. Engel*, with the purported aim of protecting homeowners while failing to demonstrate a lack of adequate borrower protection.<sup>2</sup> As drafted, the FAPA would dramatically and negatively impact homeowners, homebuyers, and lenders by making it more expensive to obtain mortgages in New York State which already has one of the longest foreclosure processes in the country belabored by a litany hyper technical rules and regulations.<sup>3,4,5</sup>

We request a veto for the following reasons:

### **Legal Ambiguity Surrounding Retroactivity**

This legislation applies to "actions commenced on an instrument described under subdivision four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and **sale has not been enforced.**" In addition, Section 8 of the bill would amend New York's Civil Practice Act to stipulate that any discontinuance of such instrument will not "waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute."

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<sup>1</sup> S.5473-D Sanders / A.7737-B Weinstein

<sup>2</sup> *Freedom Mortgage Corporation v Engel*, No. 1, 2, 3, 4, 146 N.Y.S.3d 542, 547, 2021 N.Y. Slip Op. 01090, 2021 WL 623869 (N.Y., Feb. 18, 2021)

<sup>3</sup> <https://singlefamily.fanniemae.com/media/6726/display>

<sup>4</sup> *Tuthill Finance v. Candlin*, 129 A.D.3d 1375 (2015) 13 N.Y.S.3d 599, 2015 N.Y. Slip Op. 05249

<sup>5</sup> § 1304. Required prior notices, NY RP ACT & PRO § 1304

As drafted, this legislation will calculate the statute of limitation for foreclosure actions based on the first action taken to accelerate a mortgage loan. Specifically, sections 8 and 10 of the bill, read as a whole, mean that a statute of limitations is calculated from the date of an original loan acceleration even if the original case is ultimately dismissed or voluntarily discontinued. Following implementation, credit unions and other lenders will have uncollectable loans even though they followed all laws in place at the time of the action. Exasperated by the pandemic, auctions have been delayed due to court traffic. Thousands of foreclosure judgments have not been able to finish the judicial sale process. Lenders can potentially face dismissals for aiding members with forbearances during the pandemic using practices that had well-established legal precedence. The retroactive nature of the legislation will unjustifiably harm lenders who have rightfully won cases and create additional litigation on adjudicated foreclosures.

### **Reduction and Elimination of Loss Mitigation Options**

In a good-faith effort as well in keeping with statutory and regulatory requirements, credit unions participate in loss-mitigation practices to keep delinquent borrowers in their homes. These practices often include forbearance, interest rate reduction, capitalizing arrears, and extending the term of the loan. This process calls for underwriting, a test period, settlement conferences, and more. The time-consuming process requires a mandatory conference which is often delayed by the borrower, loss mitigation efforts up to 45 days before scheduled foreclosure sales, government-sponsored entity (GSE) required modification trial period, and more.<sup>6,7,8</sup>

To encourage these discussions, New York General Obligations Law (GOL) specifies the conditions under which parties can agree to halt the statute of limitation from running on foreclosure actions. GOL enshrines negotiation into law giving flexibility to negotiate alternatives to foreclosures without fear of the statute of limitations expiring. Subdivision 1 of the GOL provides that as a waiver of the expiration of the time limited for commencement of an action:

**to make the time limited for commencement of the action run from the date of the waiver or promise.** If the waiver or promise specifies a shorter period of limitation than that otherwise applicable, the time limited shall be the period specified.<sup>9</sup>

Good-faith efforts should not come at a steep risk for lenders but should rather be encouraged and facilitated. A strict accrual period will have a deleterious effect on

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<sup>6</sup> Rule 3408. Mandatory settlement conference in residential foreclosure actions, NY CPLR Rule 3408.

<sup>7</sup> § 33:8.50. Mandatory settlement conference in actions brought upon home loans, 2 Mortgages and Mortgage Foreclosure in N.Y. § 33:8.50

<sup>8</sup> GSE trial modifications: see [E-3.4-01: Suspending Foreclosure Proceedings for Workout Negotiations \(07/14/2021\) \(fanniemae.com\)](#)

<sup>9</sup> <https://codes.findlaw.com/ny/general-obligations-law/gob-sect-17-105.html> last seen 12/21/2022

delinquent homeowners compelling lenders to initiate foreclosure filings immediately rather than giving homeowners additional time to potentially reinstate the mortgage.

### **Damage to Home Lending Ecosystem**

As a corollary to the increased risk for lenders, credit qualifications and requirements for lending will necessarily be significantly more stringent and unforgiving. There will be limited borrowing opportunities for marginally qualified or lower income households and for more fortunate borrowers, costlier mortgages.

Moreover, increases in risks stemming from concerns regarding hyper-technical violations have historically negatively correlated with the Mortgage Credit Availability Index. Fannie Mae and Freddie Mac ceased purchases of some mortgage products in the state of New York in response to state-level “protection” laws narrowing access to the vital government-sponsored secondary market.<sup>10</sup> These laws were also correlated with a sharp increase in the number of loans lenders were required to repurchase further restricting lender access to secondary markets.<sup>11</sup> Put simply, increasing foreclosure risk will drive affordable homeownership further out of reach for New Yorkers creating a ripple effect across the housing market.

### **Other Suggestions**

Short of a veto, we ask for amendments to make the legislation apply solely prospectively, correct drafting errors, and clarify ambiguities regarding bilateral tolling agreements and redefaults. Amendments should ensure that the statute would not be interpreted retroactively to the date of cases that were voluntarily dismissed. This will at least protect those credit unions that reached good faith amendments with their member before this law was enacted. Suggested amendments to sections three, four, seven, and ten are included in a supplemental document.

### **Conclusion**

Credit unions should and will continue to work with struggling homeowners as foreclosures are the last resort, never the first. That being said, protections afforded to a few delinquent borrowers, especially repeatedly delinquent borrowers, should not come at a cost to the majority of homeowners who work diligently to pay their mortgage in a timely, responsible manner. Delinquent borrowers and bunk litigators should not be rewarded with clear titles to properties for which they never paid. Protect home lending practices to ensure all New Yorkers, especially those of modest means, can still afford the American dream of homeownership.

If you have any questions or concerns, please feel free to contact Kristina Persaud at (518) 437-8207 or [Kristina.persaud@nycua.org](mailto:Kristina.persaud@nycua.org).

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<sup>10</sup> <https://www.housingwire.com/articles/freddie-wont-buy-new-york-subprime-mortgages/>

<sup>11</sup> [U.S. mortgage bankers lament loan repurchase woes | Reuters](#)