



New York Bankers Association

STATEMENT OF

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REGARDING INT. NO. 494, 500 and 501

**SUBMITTED TO THE NEW YORK CITY COUNCIL
COMMITTEE ON HOUSING AND BUILDINGS**

Thank you for giving the New York Bankers Association (NYBA) the opportunity to comment on Int. Nos. 494, 500 and 501, all of which proposals seek to add new responsibilities to financial institutions and other entities who are commencing foreclosure actions in the City of New York. NYBA is comprised of the commercial banks and thrift institutions that do business in New York State. Our members employ more than 200,000 New Yorkers and have assets in excess of \$9 trillion.

We understand that the goals of these proposals are to ensure that properties are maintained during the foreclosure process (in the case of Ints. 494 and 500) and to ensure that the Housing Preservation and Development Department (the "Department") is aware of whether a property is in foreclosure (in the case of Intro. 501). We believe, however, that the duties and rights of mortgagors, mortgagees, homeowners and tenants, are already clearly and appropriately addressed in existing – and potentially conflicting - State law.

We further believe that – particularly during these very difficult economic times - any changes to foreclosure-related procedures, if warranted, should be consistent across the State and nation. Such action will avoid a patchwork of differing local rules and standards throughout the State and beyond, which can confuse consumers and make compliance unduly and unnecessarily burdensome for lenders and servicers. Therefore, we are concerned that each of these proposals could ultimately result in fewer mortgages being made by reputable financial institutions in New York City and further aggravate the recovery.

At the outset, I would like to commend the Council, as well as our State and federal leaders for their strong commitment to protect homeowners while maintaining access to appropriate credit through a vibrant banking system. Coupled with the long- standing commitment of our members to eradicate predatory lending practices, New Yorkers have fared better during the current economic and mortgage storm than citizens of many other states. In fact, while New York is the fourth most populous state in the nation, in the last quarter, (inclusive of New York City) we were ranked 43rd among all states in the rate of foreclosure filings and our statistics continue to compare extremely favorably to the rest of the nation. Indeed, recent statistics from RealtyTrac indicate that New York's foreclosure filings in the last quarter were more than 21% lower than a year ago.

Importantly, too, approximately 82% of the foreclosure filings in New York State in February 2011 were lis pendens, which is only the first filing in a foreclosure process that is the longest in the country, taking at least two years in many parts of New York City, and a minimum of three years in some areas of Brooklyn – providing ample time for borrowers and lenders to effect a meaningful work-out when possible. And, in fact, only one household out of every 75 that receives a

foreclosure filing results in a foreclosure (national statistic¹). This means that in the vast majority of cases homeowners keep their homes – the result most desired by homeowners and banks alike.

Since the issue of predatory lending first came into public view almost nine years ago, NYBA has played a leading role in developing solutions to the problem, even though most of our member banks do not make subprime loans. In this regard, our members have consistently supported strong legislation which would establish meaningful and workable uniform national standards in the subprime market designed to eradicate predatory practices, while not creating unnecessary impediments to the dream of home-ownership, particularly for moderate- and low-income Americans. We have also worked tirelessly with State legislators to craft high cost home loan, subprime lending and mortgage foreclosure laws which are among the most protective of homeowners and tenants in the nation.

Throughout the economic downturn of the last two years, NYBA has continued to work with State legislators on this important issue and New York homeowners and tenants now are afforded even further protections in the foreclosure process. For example, Chapter 507 of the Laws of 2009 (Chapter 507) requires that all defaulting homeowners receive a 90 day pre-foreclosure notice and participate in a mandatory settlement conference 60 days after proof of service has been filed with the County Clerk. The already existing right of mortgagors of owner-occupied one-to-four family dwellings to receive notice regarding the availability of help for homeowners in foreclosure, has also been extended to any tenant in a dwelling unit. Importantly, too, foreclosure proceeding plaintiffs are now subject to an array of maintenance obligations, once they have obtained a judgment of foreclosure and sale on property which is vacant, becomes vacant after the issuance of the judgment, or is abandoned by the mortgagor but is occupied by a tenant. Thus, New York State and City homeowners and tenants alike are afforded a comprehensive array of protections in excess of those in almost any other state in the union.

NYBA has also been at the forefront of financial literacy, bank access and mortgage workout initiatives. We believe that these initiatives, coupled with the strong legislative and regulatory actions already taken in New York State and in Washington, D.C. will ultimately have a meaningful and positive impact on reviving the State's mortgage market. We caution, however, that unnecessarily burdensome and duplicative new local ordinances, if enacted, could undermine, or diminish the resurgence of this important part of our economy.

In this regard, I would like to comment first on Int. No. 501 which would essentially require any mortgagee commencing a foreclosure action with respect to residential real property located in

¹ Source: www.foreclosuredeals.com

the City of New York to register with the Department within ten days of service of the pleadings that commence the action. Included within the information required in this proposal is the name, not only of the mortgagee bringing the action, but also “when applicable, the name of a principal or corporate officer of such mortgagee”, along with his or her mailing address, telephone number and e-mail address. Also required is the name of the person or entity against whom the action is brought and the identification of the property in question by street address, block and lot number. The property list and contact information of the mortgagee would then be maintained by the Department on an official city website.

We have a number of concerns with this proposed ordinance, most notably the mandated violation of the privacy rights of affected homeowners, as well as the potential security risks this notification could impose on homeowners and lenders’ corporate officers. We also believe this proposal imposes an unnecessary additional burdensome and in some respects, duplicative requirement on financial institutions, the cost of which will ultimately be borne by New York City mortgage customers.

We believe that the requirement to supply the identification of defaulting borrowers to the Department is completely contrary to the expectations of bank customers for confidentiality of their financial information. In fact this requirement raises a number of legal concerns, most notably that it may require lenders to breach their privacy obligations to their customers, as set forth in the Gramm Leach Bliley Act and other privacy statutes. These provisions would also compel national banks and federal thrift institutions to provide a city regulatory agency with data, which we believe is completely contrary to the preemption principles recently clarified and re-affirmed by the United States Supreme Court in *Cuomo v. Clearing House LLC*.

We are concerned as well that the requirement to supply detailed contact information for lender employees/private citizens which will then apparently be posted on a public website could actually endanger those employees, particularly given the current anti-bank climate that is prevalent today in the aftermath of the economic downturn. In this regard, we have been informed in discussions with the Office of Court Administration, that the courts generally do not require or seek this information, as they deem it to be both unnecessary to the process and violative of individual privacy rights. We believe, therefore, that any possible benefit of maintaining and posting such private information would be far outweighed by the potential damage to employees of lending institutions.

It is important to note, as well, that much of the information that would be required from mortgagees if this proposal were to be enacted, is already available today at County Clerk offices or

can be obtained from lis pendens filings. Moreover, this filing requirement would be in addition to the filing with the Superintendent of the Department of Financial Services now required of lenders statewide who are foreclosing on home loans. Chapter 507 requires mortgagees to provide to the Superintendent all relevant information about the borrower in order to facilitate a review as to whether the borrower “might benefit from counseling or other foreclosure prevention services.” Requiring that City lenders re-create in yet a third format, information already available will just impose another costly and time consuming burden for banking institutions, which inevitably will lead to fewer mortgage loans being made in New York City and greater borrowing costs for those consumers who do get mortgages. We believe that a far more efficient and less intrusive way – both for lending institutions and borrowers - for the Department to get the information it is seeking, would be to get it directly from the Court system or the Superintendent of the Department of Financial Services both of which already collect this data as a matter of course. Finally, we would note that the timeframe in which the information would be required of mortgagees – within 10 days of service of the pleadings initiating such action on the owner of the property – is far too short, given that even the defendant might not have received notice of the foreclosure at that early date.

Introduction Nos. 494 and 500 raise even more serious concerns, as they seek - each in a different way - to re-assign the obligations of property ownership from home and building owners to lenders, even though the lenders neither own nor have possession of the properties. Financial institution mortgagees are, like the Council, concerned about the state of neglect of many properties in the foreclosure process, and we are very aware and troubled by the negative implications these deteriorating properties may have on the neighborhoods in which they exist. However, as I mentioned earlier, we believe that the maintenance obligations set forth in Chapter Law 507 are not only comprehensive, but take to the outer limits the legal authority and obligation of mortgagee lenders to maintain property which they do not own. The burden should fall on the owners.

Pursuant to Chapter Law 507, New York imposes substantial maintenance obligations on mortgage foreclosure plaintiffs who have obtained a judgment of foreclosure and sale on property which is vacant, becomes vacant after the issuance of the judgment, or is abandoned by the mortgagor but is occupied by a tenant. In these circumstances, the lender has the duty to maintain that property until ownership has been officially transferred and the deed has been duly recorded. The maintenance obligations, quite appropriately, do not apply when a receiver is serving, or during the pendency of a bankruptcy proceeding commenced by the mortgagor.

The burden being placed on mortgagees by Int. 500 goes well beyond these legal parameters, however, imposing maintenance burdens on lenders, *apparently from the moment the*

foreclosure proceeding is filed until the conclusion of the proceeding (which as noted before, currently can be as much as three years in New York City), despite the fact that the mortgagee has no legal ownership to the property at that juncture in the proceeding and even where the property remains occupied by tenants. Needless to say, lenders who seek to enter occupied homes they do not own, to make repairs unauthorized by the owners themselves, are not only trespassers under the law but also place themselves at potential peril if challenged by fearful or irate homeowners or tenants. Moreover, they expose themselves to possibly huge financial liability.

Second, the extent of the maintenance requirements are arguably without end - ostensibly requiring mortgagees to maintain and perhaps even repair damages caused by irresponsible property owners, as if the lending institution was the actual homeowner or landlord. There appears to be no limit on the costs the mortgagee would be expected to incur; nor are there limits of any kind as to the mortgagee's maintenance duties. In essence, then, these proposals impose on the lender all the obligations of a full owner, at a time when the lender, at best, has limited rights of access and is not recognized as a lawful owner. Although we understand the desire of the City Council to see New York City properties maintained, this unfair and onerous proposal cannot achieve this goal without creating a conflict with the fundamental tenets of law. Surely, too, if enacted, this ordinance will discourage regulated financial institutions from extending mortgages in the City, as they will then face monetary obligations that have become completely unpredictable, and often, wildly disproportionate to their mortgage investment.

Int. 494 similarly seeks to impose inappropriate maintenance obligations on foreclosing mortgagees of any real property located within New York City, but does so by requiring them to procure and maintain compliance bonds which will be used to reimburse the Department "with respect to repairs made" in accordance with the administrative code and any fines or civil penalties imposed as a result of violations issued by the Department or other city agency during the pendency of the foreclosure. The bonds will be for amounts yet to be determined but which will be assessed using a formula based on a percentage of the assessed valuation of the property. In no event will the bond required be for less than \$10,000. Once again, the financial burden of maintaining properties not owned by the lenders will therefore, inappropriately and without legal authority, be shifted from the property owner to the lender, at unknown but potentially significant cost and administrative burden to the mortgagee. Clearly, these punitive measures will reduce the ability of New York City consumers to attain mortgages from credible financial institutions and will simply pile on costs for those who do receive such mortgages.

As I stated earlier, we oppose these proposals, not only for their content, but also because we do not believe that new foreclosure laws and regulations should be mandated at the local level.

We note, as well, that a significant amount of the mortgagees in New York City are national banks or thrift institutions, who quite possibly at least arguably, would not be covered by many, if not all, of the mandates in these proposals. Thus, it is possible that different New York City properties would have different maintenance obligations, causing confusion, and perhaps false expectations, for tenants, homeowners and government while potentially placing more stress on the State banking charter. Such an outcome would appear to be in direct conflict with Governor Cuomo's stated goal of enhancing the New York charter and revitalizing the financial services industry.

Despite our concerns about these proposals, we applaud the Council for seeking solutions to the current foreclosure crisis and pledge to collaborate on workable solutions. NYBA and its members have been working on this issue for many years, developing in 2001, "Best Practices for High Cost Home Lending" - even before New York State's comprehensive anti-predatory lending legislation was enacted. NYBA was deeply involved in the development of the original high cost home lending law, which is one of the toughest such laws in the nation and was equally involved in the development of 2008's Chapter Law 472 and 2009's Chapter Law 507, which together added significant new protections for virtually all homeowners and tenants alike. We have worked closely with and supported the Court System to help integrate the conferencing procedures mandated by the new laws, and testified before New York State Chief Judge Lippman in support of legal aid services for low-income New Yorkers. NYBA also played an integral role in 2006, when the New York State Legislature passed the Home Equity Theft Prevention Act, and also supported another recent State law, which requires mortgage loan originators working for bankers and brokers to register and attain continuing education credits.

New York's banking industry and the non-profit groups it supports have also had in place, already for many years, a strong and wide-ranging support system to assist troubled borrowers. Programs such as Operation Hope, Neighborhood Housing Services, NeighborWorks, the Community Preservation Corporation and the New York Mortgage Coalition have long worked, in coordination with local financial institutions, to offer foreclosure prevention counseling. In 2007, NYBA joined forces with New York's multi-agency Halt Abusive Lending Transactions (HALT) Task Force. All of this is in addition to the assistance and education that banks themselves provide prior to a home purchase and when a borrower is having difficulty meeting his or her obligations. Additionally, in response to the recent increase in foreclosures in New York and nationwide, many banks have been aggressively reaching out to help. Several of our largest member banks have established refinancing and grant programs in the billions of dollars to help keep troubled borrowers in their homes.

As a result of a pilot program we developed with Senator Charles Schumer, bank mortgage

specialists and neighborhood churches, almost nine years ago, we learned much about the tactics that drive borrowers away from legitimate lenders and toward abusive lenders. In response to what we learned, the industry stepped up its activity in two areas: education and access. Financial education, or financial literacy, is not only the best defense against the predators, it is the best offense for consumers who want a financially secure future. A borrower must have basic knowledge about the mortgage process to navigate such a complex transaction. Financial education resources are plentiful in our communities. Not only do banks and thrifts hold home-buying seminars in their communities, they also provide significant funding for consumer groups and community advocates to help educate borrowers, and many even help borrowers in distress to stave off disaster through loans and grants. In fact, lenders are holding counseling fairs throughout New York City neighborhoods.

The New York Bankers Association supports a number of financial education programs for all age levels. Notably, our national partner, Operation Hope, is operating a thriving Hope Center in Harlem, providing a comprehensive range of advisory services for distressed borrowers and potential homebuyers and even potential small business owners. The mission of Operation Hope, and organizations like it, is financial empowerment through in-school curricula for children and young adults, as well as workshops, budget and credit counseling, and mortgage and small business lending counseling for adult consumers. Resources like this are making a difference and will help loosen the grip of the predators who remain very much alive in our neighborhoods. In this regard, I would note that on July 21, 2011, NYBA will be co-chairing Operation Hope's Financial Literacy Forum at the New York Stock Exchange. The event is a day-long forum with speakers and panel discussions focused on making "the business case for financial literacy."

Regarding access, traditional banks in New York are expanding into more and more neighborhoods every day. This has been good for competition and ultimately good for consumers because it means more choices and better alternatives to what the predators continue to offer. We support the State's Banking Development District program, which has been instrumental in encouraging banks to set up shop in underserved neighborhoods. In just the past few years, the number of new districts designated by the Banking Department has nearly doubled.

In summary, the New York Bankers Association welcomes this opportunity to comment on New York's mortgage and foreclosure situation and we pledge to continue to work with you, and other public policy makers on additional efforts to resolve quickly this situation, while not discouraging the reputable lenders from providing mortgages to credit worthy borrowers, because of new onerous and unnecessary requirements and obligations. Thank you for the opportunity to appear before you today.