AFSA
Protecting Credit Since 1916
American Financial Services Association

April 21, 2020

Chairman James M. Murphy
Joint Committee on Financial Services
State House, Room 254
Boston, MA 02133

**Re: House Docket No. 5014 – Emergency financial protections during the COVID-19 pandemic**

Dear Chairman Murphy:

I write on behalf of the American Financial Services Association (AFSA)[1] to express our serious concerns with HD 5014, an act to enact emergency financial protections and forbearance for consumers and small business during the COVID-19 pandemic, which would create substantial new requirements for creditors working with consumers in Massachusetts. AFSA members share the legislature's goal of providing relief to borrowers facing financial hardship due to the spread of COVID-19 and continue to take steps to work with borrowers to help them stay current on their accounts and keep their vehicles and homes during this emergency. As drafted, HD 5014's proposed requirements will likely disrupt credit markets and would create significant compliance challenges for creditors at a time when resources should be most focused on providing direct consumer relief.

This legislation would enact an emergency law "necessary for the immediate preservation of the public peace, safety, health and convenience" because of the COVID-19 pandemic; however, many of the requirements apply broadly, without any limitations or relation to COVID-19's impact. For example, in the opening to Section 2, at part (a), the bill mandates that creditors take certain actions upon a "demonstrated financial hardship." However, the contours of what would constitute such a hardship are not provided, leaving AFSA members without the ability to determine whether a customer satisfies the bill's requirements. For example, would a customer's temporary or *de minimus* loss in income satisfy this requirement, even if that same customer has sufficient financial reserves to weather the income loss?

In order to allow financial institutions to focus their relief efforts on those Massachusetts consumers most in need, the entirety of the bill's requirements should cover only consumers

[1] Founded in 1916, the American Financial Services Association (AFSA), based in Washington, D.C., is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including direct and indirect vehicle financing, traditional installment loans, mortgages, payment cards, and retail sales finance. AFSA members do not provide payday or vehicle title loans.

facing demonstrated financial hardships directly attributable to COVID-19. Accordingly, to the extent that Massachusetts intends to compel creditors, on an emergency basis, we respectfully request a clear standard of what constitutes a financial hardship and that the hardship be linked to COVID-19.

**SECTION 1: Definitions**

Pursuant to our request that the bill focus on consumers in need of relief, we request that that the definition of consumer be amended to include only individuals facing a demonstrated financial hardship due to COVID-19. Although we understand your intent behind extending the bill's protections to certain small businesses, this extension would come with considerable additional risks for creditors. Given the additional risks, new protections are not warranted considering the protections and relief already available to small businesses under federal authority, including the Paycheck Protection Program (PPP) and other Small Business Administration grants and loans. If small businesses remain in the definition of consumer, we respectfully request that the protections exclude inventory-secured financing, which would include, for example, lines of credit used by businesses to purchase inventory that are repaid upon the sale of that inventory.

**SECTION 2: Prohibit Debt Collection, Repossession, and Garnishment of Wages During the Pandemic**

While many AFSA members have already voluntarily self-imposed several of this section's restrictions, we believe clarification on certain points and removal of others is necessary to ensure consumers don't face possible additional costs and to prevent severe market disruption.

Part (a) (2) would limit a creditor from issuing or employing any process to or against a debtor in order to collect a debt. This broad prohibition would, in many cases, prevent creditors from proactively reaching out to consumers to offer relief and provide information on programs available. Because such outreach is in the consumer's interest, we believe this section should make clear that it would not prevent creditors from engaging in inbound and outbound customer service and collections calls and correspondence with customers for the purposes of providing customer account support, providing monthly payment reminders, late payment reminders, make payment arrangements, and otherwise working with customers to resolve past due accounts, understand reasons for delinquency, the potential duration, and what assistance or remedies creditors/lessors may be able to offer to assist the customer. In addition, this should not prevent creditors from sending any consumer notices required under existing state or federal laws, which would include, for example, early intervention letters required under the federal Real Estate Settlement Procedures Act.

Moreover, parts (a) (3) and (4) would, in part, prohibit enforcement of any bank account or wage garnishment order. Compliance with these requirements would seem to require the suspension of existing garnishment orders already in place, which would be problematic for both consumers and creditors. Suspension or amendment of an existing garnishment order would require creditors make changes through a court of competent jurisdiction. With many courts closed or operating with limited schedules due to the pandemic, the feasibility of making such changes is not clear. More importantly, even if courts were available, there are typically additional court-imposed costs for the consumer to suspend and subsequently reinstate such garnishment orders. To prevent such costs from accruing for consumers, we request that the bill clarify it would suspend existing garnishment orders only upon direct request from the consumer, if feasible.

Separately, the prohibition in Part (a)(4) also includes repossession. We respectfully request that the bill be amended to clarify that it would not limit voluntary surrenders—which provide borrowers with the ability to voluntarily turn over a vehicle based on their own assessment of their financial situation and vehicle needs. Additionally, the bill should not prevent recovery by creditors of vehicles at risk due to mechanics liens, fraud, vehicles in impound lots in jeopardy of being sold, abandoned vehicles, seized vehicles, or in other cases where collateral may be in jeopardy.

Leaving creditors without the ability to recover their collateral in instances where it may be at risk could cause a significant disruption in the vehicle finance market, with implications for larger financial markets due to existing securitization and master credit agreements. We do not believe that the legislature intends to prohibit voluntary surrender or recovery of vehicles at risk but amending the bill on these important points would make the intent clear and prevent such a market disruption.

Further problematic, Part (a) (5) would prohibit a creditor from creating, perfecting, or enforcing any lien against property of a consumer. While we understand the intent is to provide relief, this wide-reaching prohibition would likely cut off access to credit for Massachusetts consumers. Lien creation and perfection are critical components of secured loan transactions, like home mortgages and vehicle sales financing. Such loans are conditioned on the ability to secure the loan with collateral—e.g. the house or vehicle being purchased—and preventing creditors from taking necessary steps to legally secure a loan would prevent these transactions from taking place at all, cutting off access to important sources of credit. This prohibition could even prevent a consumer from refinancing a mortgage or vehicle loan to lower future monthly payments and free up money that can be put toward savings or emergency expenses or from making certain post-forbearance loan modifications required under Section 3 of the bill.

In addition, part (a)(8) creates a conundrum for creditors, in mandating that creditors cannot "deny relief to any consumer who requests forbearance of payments." This language fails to

provide any guardrails with respect to what is reasonable under the circumstances in terms of forbearance activity. For example, how long would a forbearance need to last in order to satisfy the bill's requirements? Or what if a customer has previously received a forbearance due to COVID-19, would a creditor have to grant a second forbearance? While many AFSA members have already created forbearance programs that they feel fit consumers' needs, if this provision is enacted without additional detail, it would leave creditors unable to gauge the legal requirements being imposed upon them.

Finally, Part (d) requires the return of any property garnished or attached after March 10, 2020, within 15 days of enactment. Because this provision would apply the bill's requirements retroactively against creditors that were operating within compliance of existing laws at the time the property was garnished or attached, we respectfully request that you remove it from the bill. In addition to this provision's concerning retroactive enforcement, the 15-day deadline presents a significant compliance challenge. If this provision remains in the bill, the deadline should be extended to at least 60 days to allow creditors adequate time to take the necessary steps. This bill also ignores the possibility that some creditors garnishing consumer wages may indeed be a small business that is itself experiencing financial hardships. Forcing disgorgement of garnished funds legally obtained in the past may put the garnishing creditor in a financial bind.

**SECTION 3: Preventing default during the state of emergency**

While we appreciate that part (a) clarifies that the prohibition on demanding payment for a debt would not include regular monthly statements, we reiterate the concerns we addressed above regarding part (a)(2) of Section 2 and respectfully request that the restrictions clearly make allowance for certain communications in addition to monthly statements.

Parts (c) and (e) would each prohibit a creditor from assessing "any monetary charge or penalty of any kind—including but not limited to interest and late fees—on any debt." Many creditors have already voluntarily waived late fees and deferment fees and continue to work directly with borrowers to provide relief to keep accounts current and adjust payment schedules to meet each borrower's financial situation. Conversely, the proposed prohibition on interest would represent an extreme interference by effectively dissolving valid contractual obligations and could create far-reaching unintended consequences. The state has a vital interest in permitting the enforcement of reasonable, valid obligations to ensure the existence of a robust credit market. Waiving interest accrual for all consumer accounts for an indefinite period of time as this emergency continues would inject immense amounts of uncertainty and risk into broader financial markets. Further, implementation of any interest prohibition for existing accounts would be near impossible given the major changes to existing systems that would be required.

Additionally, an across-the-board freeze on all interest for the duration of the emergency, plus an additional 90 days, would likely result in the complete interruption of lending of any kind in Massachusetts, leaving the Commonwealth's consumers without access to any form of emergency credit, vehicle financing, or mortgage loan.

Moreover, Part (e) creates multiple unreasonable scenarios for creditors with its broad restrictions. First, this provision could be construed to limit creditors, in perpetuity, from working with borrowers to establish certain otherwise-legal repayment plans for any debt containing an amount that became due during the effective period of the Act, in contravention of creditors' lawful and contractual right after the Act's provisions have expired. Second, Part (e) compels creditors to work with borrowers on a permanent workout option, but without providing the limitations of this mandate, thus creating scenarios in which customers with short-term credit instruments could demand untenably long-term repayment options that creditors would be hard-pressed to reject, owing to the language of the bill. Consequently, we would request that this Part be amended to (1) allow for the availability of lawful and contractual repayment terms after the termination of the Act, and (2) that language be inserted that clarifies that creditors are not required to provide workout options which are unacceptable or unworkable within their own credit underwriting standards.

**SECTION 5: Suspension of All Negative Consumer Credit Reporting During the Pandemic**

The federal Fair Credit Reporting Act (FCRA) requires furnishers—those entities that report information to credit reporting agencies—to report only accurate information. This duty for accurate reporting does not distinguish between negative or positive consumer information, meaning all accurate information must be reported, whether positive or negative. Because of this duty, compliance with a wholesale prohibition on reporting negative consumer information would necessarily require the suspension of *all* credit reporting. The harm from such a suspension would be felt by those consumers across Massachusetts fortunate enough to be able to stay current on their accounts, but now unable to reap the benefits of favorable credit reporting.

This significant harm would come with little added consumer benefit, as the federal CARES Act provides protections and relief for consumers from adverse credit reporting due to the coronavirus outbreak, and creditors are already taking steps to implement these changes. Any Massachusetts-specific changes to the credit reporting systems and processes would require significant time to implement, test, and validate, and thus could not be implemented in the time period contemplated by the bill.

**Effective period**

While we have concerns about enforcement of the bill's retroactive provisions, we also believe extending its application 90 days beyond the end of the state of emergency would create problems for creditors and consumers and make Massachusetts an outlier relative to other states, which have imposed less stringent consumer relief regulations with effective periods limited to the length of the emergency declaration. For instance, generally accepted accounting principles (GAAP) require unpaid debt be charged off following 120 days of nonpayment, and any debt charge off has servicing implications for both creditors and consumers. The 90-day extension, combined with the fact that many companies began offering relief more than 30 days ago, would already leave accounts at 120 days without payment, not even taking into account the length of the emergency itself.

We believe the changes outlined above will allow AFSA's members to continue to focus on providing direct relief to those consumers facing hardship without significant disruption to credit markets. Thank you for your attention to this matter. If you have any questions or if AFSA can be of any further assistance to you as you move forward, please do not hesitate to contact me at 202-469-3181 or mkownacki@afsamail.org.

Sincerely,

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