

Date of Hearing: August 12, 2020

ASSEMBLY COMMITTEE ON JUDICIARY  
Mark Stone, Chair  
SB 1410 (Caballero) – As Amended August 5, 2020

**SENATE VOTE:** 28-9

**SUBJECT:** COVID-19 EMERGENCY: TENANCIES

**KEY ISSUE:** SHOULD THE STATE OFFER TAX CREDITS TO LANDLORDS WHO AGREE NOT TO EVICT THEIR TENANTS IN ORDER TO COMPENSATE THESE LANDLORDS FOR RENT THAT THEIR TENANTS HAVE NOT PAID DURING THE COVID-19 EMERGENCY, WHILE REQUIRING THE TENANTS TO MAKE DEFERRED PAYMENTS TO THE STATE IN ORDER TO PARTIALLY COMPENSATE THE STATE FOR THE COST OF THESE CREDITS?

**SYNOPSIS**

*This important author-sponsored bill proposes a two-step solution to address the risk of mass evictions stemming from tenants' COVID-19-related inability to make their rent payments. First, property owners would, by default, be barred from evicting a tenant during the COVID-19 state of emergency and for an unspecified period thereafter, unless the tenant posed a risk to the property or public health and safety. Second, property owners could offer their tenants COVID-19 eviction relief agreements, which would (i) grant owners sellable tax credits, which could be claimed for a ten-year period starting in 2024 in order to compensate them for unpaid rent, and (ii) require tenants to repay any unpaid rent deferred under these agreements to the state over the same ten-year period. Tenants who refused to enter into these agreements could be evicted for nonpayment of rent.*

*The main strength of the bill is that it would protect against widespread evictions during a pandemic, while providing future compensation to landlords for their present losses. Nevertheless, the bill in its present form leaves many unanswered questions, primarily in its provisions amending the Revenue and Tax Code. The analysis sets forth these open issues, which include uncertain protections for tenants who lack social security numbers or individual taxpayer identification numbers, prevention of fraud, and ambiguities and uncertainties in the administration of the bill's tax credit and repayment provisions.*

*This bill has both extensive support and opposition from nonprofits, rental housing associations, tenant groups, and local governments.*

**SUMMARY:** Provides tax credits to property owners as compensation for not evicting tenants who do not pay their full rent during the COVID-19 state of emergency. Requires these tenants to repay the state for this deferred unpaid rent, unless they qualify for income-based exemptions at the time of repayment. Specifically, **this bill:**

- 1) Prohibits the eviction of any tenant during a state of emergency declared by the Governor of California related to the COVID-19 pandemic and for an undefined number of days thereafter (covered period) unless the conditions specified in the bill are met.

- 2) Defines “real property” as residential real property, a residential rental unit, a mobilehome park, or a mobilehome park space or lot.
- 3) Defines “state of emergency” as an emergency related to the COVID-19 pandemic declared by the Governor pursuant to the California Emergency Services Act.
- 4) Permits an owner of real property and a tenant to enter into one or more COVID-19 eviction relief agreements (CERAs), the terms of which are specified by this bill, during the covered period.
- 5) Establishes the terms required to be provided for in a CERA, including:
  - a) An agreement by the owner to allow the tenant to defer any unpaid rent accrued during the covered period;
  - b) A specification of the amount of unpaid rent to be so deferred;
  - c) An agreement by the owner not to (i) serve a notice terminating the tenancy, (ii) file a complaint for unlawful detainer, (iii) take action to proceed with a pending unlawful detainer suit, (iv) commence or prosecute any other action to recover possession of the real property, or (v) request that a sheriff execute a writ of possession, based on the unpaid rent that will be deferred, during the covered period. Despite this agreement, the owner may take these actions if the notice alleges that the tenant has destroyed property or engaged in behavior that creates a substantial threat to public health or safety.
  - d) An agreement by the tenant to repay to the state any deferred unpaid rent accrued by the tenant during the covered period.
- 6) Sets forth a form of CERA in English, and mandates that owners exclusively use either this form of CERA or a form created by the Franchise Tax Board (FTB).
- 7) Tasks the FTB with creating a form of CERA in Spanish, Chinese, Tagalog, Vietnamese, and Korean.
- 8) Mandates that if the owner of real property wishes to enter into a CERA with a tenant and customarily communicates with that tenant in Spanish, Chinese, Tagalog, Vietnamese, or Korean, then the owner must provide the tenant a copy of a CERA in that language.
- 9) Requires that, if there are multiple owners of the real property, each owner must sign a CERA.
- 10) Requires that, if multiple tenants are signatories to a single lease agreement, or if multiple tenants each have a separate lease agreement, that each such tenant must sign a separate CERA.
- 11) Clarifies that so long as one tenant signs a CERA, that is sufficient to create a binding agreement between that tenant and owner, even if other tenants required to sign separate CERAs under 10) above refuse to do so.

- 12) Mandates, if there are multiple CERAs between an owner and one or more tenants in the real property, that the sum of the rent deferred under these CERAs not exceed the total unpaid rent for the real property during the period of time governed by these CERAs.
- 13) Provides that an owner's offer to enter into a CERA is deemed rejected if one of three things occurs:
  - a) If the tenant rejects the offer. If this happens, the owner must obtain a signed acknowledgment of receipt from the tenant.
  - b) If the tenant does not respond to the offer within 30 days of the owner hand-delivering the offer to the tenant.
  - c) If the tenant does not respond to the offer within 40 days of the owner mailing the offer to the tenant.
- 14) Prohibits an owner from (i) serving a notice terminating the tenancy, (ii) filing a complaint for unlawful detainer, (iii) taking action to proceed with a pending unlawful detainer suit, (iv) commencing or prosecuting any other action to recover possession of the real property, or (v) requesting that a sheriff execute a writ of possession during the covered period, unless the tenant rejected an offer of a CERA, or the notice and the complaint based on that notice alleges that the tenant has destroyed property or engaged in behavior that creates a substantial threat to the public health and safety.
- 15) Safeguards against an owner falsely claiming to have offered a CERA to a tenant and then initiating an unlawful detainer action against the tenant by requiring the owner to sign a CERA and file it with the court together with the complaint. Requires the court to then mail this CERA to the tenant. If the tenant signs the CERA and returns it to the court, the unlawful detainer action will be stayed.
- 16) Permits a tenant to assert the existence of a fully-executed CERA as an affirmative defense to an unlawful detainer action.
- 17) Prohibits any collection action for unpaid rent deferred under a CERA and deems any claim for such rent extinguished.
- 18) Provides that any deferral or repayment of rent authorized by this bill is not counted in the calculation of rent for which rate increases are capped under current state law.
- 19) Permits an owner and a tenant to enter into a non-CERA agreement regarding unpaid rent, but prohibits them from, first, also entering into a CERA that covers any rent repaid pursuant to a non-CERA agreement, and second, from superseding the protections against evictions enacted by this bill.
- 20) States that the prohibition against eviction for unpaid rent during the covered period shall apply retroactively, but that evictions for unpaid rent pursuant to a rejected CERA will be allowed prospectively.
- 21) Provides, for taxable years beginning on January 1, 2024 and before January 1, 2034, a tax credit under the Personal Income Tax Law and Corporation Tax Law (tax credit) to owners

who enter into CERAs with their tenants in an amount equal to the amount of unpaid rent deferred under these CERAs.

- 22) Requires the FTB, on or before January 1, 2021, to create a registration program for owners who will be claiming tax credits. The information required to be collected for each tenant with whom the owner has entered into a CERA includes, but is not limited to:
  - a) The tenant's name, address, and social security number or tax identification number;
  - b) The amount of rent deferred by that tenant;
  - c) A copy of the fully-executed CERA with that tenant; and
  - d) A copy of the existing lease agreement with that tenant.
- 23) Requires an owner to provide the FTB with a copy of each fully-executed CERA by January 1, 2021 (if the agreement was executed before that date) or within 60 days of execution (if the agreement was executed after that date).
- 24) Makes an owner eligible for tax credits once that owner enters into at least one CERA with a tenant and has registered with the FTB. Requires the FTB to notify owners, upon registration, of the amount of tax credit they are eligible for.
- 25) Provides that owners who qualify as "small business owners," as defined, are entitled to an inflation adjustment for the tax credit of not less than 2 percent on deferred unpaid rent.
- 26) Permits owners whose tax credits exceed their tax liability for a given year to either:
  - a) Be paid the excess amount, if the Legislature makes an appropriation to allow the tax credits under this bill to be refundable; or
  - b) Carry over the excess amount to reduce their tax liability in succeeding years, until the credit is exhausted.
- 27) Provides that any other credit or deduction that an owner might claim in connection with deferred unpaid rent must be reduced by the amount of any tax credit provided to that owner under this bill.
- 28) Permits an owner to sell any tax credit that the owner has not claimed on its tax return to one unrelated party. Prohibits that unrelated party from making any further sale of that tax credit. Requires the owner to report specified information to the FTB prior to such a sale.
- 29) Requires an owner who violates a CERA to immediately repay the FTB for any tax credits received, plus interest (in an amount determined by FTB) from the date the credit was first claimed on the tax return.
- 30) Grants the FTB emergency regulatory authority to prescribe any regulations necessary or appropriate to administer the tax credits, including regulations to prevent a) improper claims from being filed and b) improper payments from being made with respect to net earnings from self-employment.

- 31) Requires a tenant who enters into a CERA to repay the unpaid rent deferred thereunder to the state in equal installments over a period of ten years in each taxable year beginning on January 1, 2024 and ending on January 1, 2034. Specifies that no interest shall be due on the deferred unpaid rent, unless and until the unpaid amount is sent to collections.
- 32) Permits a tenant to prepay any deferred unpaid rent that would otherwise be owed to the state under 31) above.
- 33) Permits a tenant to apply to the FTB to reduce or eliminate the amount of the installment payment that the tenant owes in a given year, according to the following formula:
  - a) If the tenant's taxable income for that year is less than 75 percent of the median state income, 100 percent of the installment payment for that year shall be eliminated.
  - b) If the tenant's taxable income for that year is between 75 and 99 percent of the median state income, 50 percent of the installment payment for that year shall be eliminated.
  - c) If the tenant's taxable income for that year is between 100 and 149 percent of the median state income, 25 percent of the installment payment for that year shall be eliminated.
- 34) Precludes the FTB or any other person from collecting any portion of an installment payment allowed to be reduced or forgiven under 33) above.
- 35) Specifies that, despite reduction or forgiveness of an installment payment, subsequent annual installments would remain due unless themselves separately reduced or forgiven by the FTB.
- 36) Excludes any reduced or forgiven installment payment from gross income.
- 37) Authorizes the FTB to require any person already legally-required to withhold taxes on behalf of the FTB, to also withhold installment payments owed by a tenant under this bill.
- 38) Requires a tenant to include in their annual tax return the remaining amount of any installment payment due for that year.
- 39) Authorizes the FTB to collect installment payments in any manner authorized for the collection of delinquent income tax liabilities, including, but not limited to liens, levies, and wage garnishments.
- 40) Charges the Department of Finance with ensuring that this bill does not affect funding required to be provided under the California Constitution for school districts and community college districts.
- 41) Requires the provisions of the bill relating to CERAs and eviction to remain in effect for two years after the state of emergency terminates, and as of that date to be repealed. Requires the provisions governing tax credits and repayment of deferred rent to remain in effect until December 31, 2034, and as of that date to be repealed.

**EXISTING LAW:**

- 1) Proclaims, as of March 4, 2020, a state of emergency to exist in California due to the COVID-19 pandemic. (Governor's Proclamation (Mar. 4, 2020).)

- 2) Provides that a tenant has committed unlawful detainer when the tenant continues in possession of the property without the owner's permission after the tenant's nonpayment of rent and service of a three-day notice to pay or quit, stating the amount that is due. (Code of Civil Procedure Section 1161 (2).)
- 3) Provides that a tenant has committed unlawful detainer when the tenant continues in possession of the property without the owner's permission after the tenant has breached a covenant of the lease or failed to perform other conditions under the lease and after service of a three-day notice requiring performance of such covenants or conditions. (Code of Civil Procedure Section 1161 (3).)
- 4) Provides that a tenant has committed unlawful detainer when the tenant continues in possession of the property without the owner's permission after the tenant has breached a covenant of the lease prohibiting subletting, assignment, or waste; has committed or permitted a nuisance on the premises; or used the premises for an unlawful purpose. (Code of Civil Procedure Section 1161 (4).)
- 5) Requires, until January 1, 2030, just cause to terminate a tenancy that meets specified conditions. (Civil Code Section 1946.2.)
- 6) Caps, until January 1, 2030, residential rental rate increases at no more than five percent plus the applicable change in the cost of living, or ten percent, whichever is less. (Civil Code Section 1947.12.)
- 7) Establishes the conditions, including but not limited to nonpayment of rent, under which the management of a mobilehome park may terminate the tenancy of a homeowner or resident and commence an unlawful detainer action. (Civil Code Section 798.56.)
- 8) Establishes the Personal Income Tax Law. (Revenue and Taxation Code Sections 17001 – 18181.)
- 9) Establishes the Corporation Tax Law. (Revenue and Taxation Code Sections 23001-25141.)
- 10) Provides several tax credits designed to encourage specific behavior, including the Low-Income Housing Tax Credit. (Revenue and Taxation Code Sections 23604-23698.)

**FISCAL EFFECT:** As currently in print the bill is keyed fiscal.

**COMMENTS:** This bill represents the state Senate's proposed response to the looming risk of mass evictions statewide. The COVID-19 pandemic has caused many tenants to lose income, whether due to unemployment, reduced working hours, or small business closures. The July 31 expiration of increased \$600/week unemployment benefits, authorized in March under the federal CARES Act, will only add to these tenants' financial burden. Tenants' loss of income, in turn, often means they are unable to pay their full rent. Rental property owners bear the brunt of this nonpayment, with small owners facing the highest risk of foreclosure and/or loss of rental income on which they depend. According to the author:

In every part of California, there are families struggling financially because of COVID-19. Many are renters who are at risk of losing their home when emergency tenant protections run

out. Many others are small landlords at risk of foreclosure because their tenants cannot afford to pay rent.

SB 1410 bridges the financial void after eviction moratoria end by allowing tenants to agree to repay their rent over time, subject to hardship exemptions, and thus remain housed. Tenants would begin repaying missed rent in the 2024 tax year, and in steady increments each subsequent tax year until 2033. SB 1410 also keeps landlords (particularly small landlords) from falling into foreclosure by providing them with refundable tax credits in exchange for missed rent. These tax credits can be redeemed in annual increments during the 2024-2033 tax years, or can be sold by the landlord at any given time.

SB 1410 creates a voluntary agreement structure. Tenants are free to decline to utilize the program it creates, but that rejection subjects them to eviction under governing law. Landlords may decline to utilize the program, but tenants will likewise be protected from eviction. As such, for tenants and landlords who cannot otherwise arrange a modification of their lease agreements, SB 1410 provides an essential way to resolve their financial difficulty.

The FTB has published an analysis of the bill, as amended on June 19, 2020. (Franchise Tax Board, Bill Analysis: SB 1410, *Tenant-Owner COVID-19 Eviction Relief Agreements and Related Tax Credit*, available at <https://www.ftb.ca.gov/tax-pros/law/legislation/2019-2020/SB1410-061620-and-061920.pdf>.) According to the FTB, its records show approximately 3.7 million tenants reside in California. Based on its estimate that approximately 600,000 of these tenants, residing in properties owned by approximately 350,000 landlords, would participate in the program established by this bill, FTB goes on to estimate the revenue foregone by the state between 2024-2033 as a result of this program to total \$12.3 billion. (*Id.* at 10.) This is in addition to an estimated \$1.32 billion the state would lose in revenue from taxes on unpaid rent during the 2020-2023 period. (*Ibid.*) (The FTB has informed Committee staff that the agency will be releasing an updated analysis of the bill to reflect recent amendments, and that the numbers cited here will change slightly in that analysis.)

Preventing evictions is of immediate, paramount importance for the Legislature. Despite the apparent flaws in the workability of the bill that are identified in this analysis, the one unquestionable strength of the bill is that, by default, it prohibits eviction of any tenant for nonpayment of rent during the pandemic state of emergency. Such a prohibition is necessary to safeguard the health of every person in California, because people who are not safely housed are more likely to contract and transmit COVID-19. That said, the remedy for owners proposed in this bill—tax credits—is challenging to administer and of little immediate use to cash-strapped small landlords; moreover, the protections provided for tenants in the bill are arguably insufficient. *It is hoped that the Legislature will use the time remaining in this session to craft a bill that unites the best parts of this bill with the best parts of AB 1436 (Chiu), the Assembly's proposed solution to preventing evictions during the pandemic.*

***Central argument for this bill: the urgent need to ensure housing stability during the COVID-19 state of emergency.*** As of August 7, the Los Angeles Times coronavirus tracker showed 543,657 confirmed cases and 10,083 deaths in California. Both numbers continue to increase daily. At the same time, U.S. Census Bureau Data from July 9-14 indicate that over 1.7 million of the state's renters reported that they were unable to pay rent on time last month. For those tenants who *were* able to pay the prior month's rent, over a quarter (25.9%) report relying on

unemployment insurance to cover their spending needs during the last week. With the extra \$600 in CARES Act unemployment benefits having expired at the end of July, many of those who have been able to stay current on rent up until now are likely to fall behind.

While some owners have renegotiated rental agreements and accepted partial payments from tenants facing financial hardship, others will inevitably respond by seeking to evict tenants who are behind on their rent. This could lead to a public health catastrophe, as thousands of Californians leave their homes to search for new housing, move into already-overcrowded conditions that promote the spread of the virus, or find themselves on the streets. If this happens, COVID-19 transmission might become entirely uncontrollable.

Keeping tenants housed may save many thousands of lives.

***How would this bill function to protect tenants from eviction while compensating property owners for lost rental income?*** As is likely evident, SB 1410 contains numerous provisions meant to address various contingencies. But in most cases, the bill is intended to work as follows:

1. By default, a tenant cannot be evicted for any conduct, including nonpayment of rent, that occurs during the COVID-19 state of emergency and an unspecified number of days thereafter (covered period), unless the eviction action is based on an allegation that the tenant has destroyed property or engaged in behavior which creates a substantial threat to the public health and safety.
2. An owner of rental property can offer a COVID-19 eviction relief agreement (CERA) to a tenant.
3. If the tenant rejects the CERA, the owner can then lawfully evict the tenant for failing to pay the full rent owed at any time during the covered period.
4. If the tenant accepts the CERA:
  - a. The owner is eligible for tax credits from the state of California in an amount equal to the rent that the tenant failed to pay during the period covered by the CERA. These tax credits may be claimed in any taxable year between 2024 and 2033. The owner can also sell the tax credits to a third party, which is then prohibited from re-selling them.
  - b. The tenant must repay the state any unpaid rent that is deferred under a CERA. Repayment is to occur in ten equal installments over a ten-year period between 2024 and 2033, though lower-income tenants can seek a reduction or forgiveness in the amount they owe the state based on their income in a given year.

***Landlord-tenant issues.*** This bill has been amended twice in the past two weeks to close loopholes in the provisions that deal with landlord-tenant law. These amendments include provisions to permit tenants to assert the existence of a fully-executed CERA as an affirmative defense to an unlawful detainer action, to prohibit tenants from being sued by owners for unpaid rent deferred under a CERA, to safeguard against owners fraudulently claiming to have offered CERAs to tenants, and to prevent owners from pursuing eviction actions using common-law alternatives to unlawful detainer, such as ejectment. Nevertheless, there are several remaining issues that ought to be addressed before this bill is voted on by the full Assembly.



1. *Does the bill protect tenants without SSNs and ITINs from eviction?*

The CERA requires that a tenant's social security number or individual taxpayer identification number be included. This makes sense given that the repayment mechanism is through the state tax system. However, if a tenant lacks either of these identifiers, it does not appear that they can enter into a CERA, and they might then be vulnerable to eviction. Undocumented Californians are the most likely to fall victim to this ambiguity. *The bill ought to be amended to provide either that such individuals cannot be evicted, or that they can enter into valid, binding CERAs.*

2. *Preventing a post-COVID eviction cliff.*

Under this bill, a property owner who did not offer a tenant a CERA could move to evict that tenant for nonpayment of rent as soon as the covered period ends. If many owners pursue this course of action (which they certainly may, given the practical difficulties, explained in more detail below, of obtaining immediate financial relief under the terms of the bill), it could lead to an "eviction cliff" in which many tenants are evicted simultaneously. While a post-COVID eviction cliff would not pose the same public health threats as an eviction cliff during the covered period, it would still exacerbate the state's ongoing homelessness crisis. *A wiser approach would be to permanently bar eviction for nonpayment of rent during the covered period, while preserving the owner's ability to sue the tenant for the unpaid rent once the covered period ends.* Tenants could still be evicted if they fail to pay rent once the covered period ends.

3. *Preventing evictions by other means.*

The bill does not currently forbid an owner from suing a tenant for rent that has gone unpaid during the COVID state of emergency. Accordingly, an unscrupulous owner could, rather than offer a tenant a CERA, threaten the tenant with a lawsuit for thousands of dollars. This may intimidate tenants into moving out of their homes, even though they have a legal right under this bill to continue their tenancy until the covered period ends. *In a similar vein, it would also be wise for the bill to explicitly forbid harassment, threats, and intimidation directed at tenants to coerce them into moving.*

Adding the following language to the bill would effect these changes:

No action to recover unpaid rent or other sums due under another monetary term of a tenancy may be pursued against a tenant during the state of emergency and \_\_\_ days thereafter.

A landlord shall not harass, threaten, or seek to intimidate a tenant in order to obtain a tenant's payment or agreement to pay any portion of unpaid rent or to obtain a tenant's vacation of the property because of a tenant's failure to pay rent.

Any stipulation, settlement agreement, or other agreement, including a lease agreement, that conflicts with or purports to waive the provisions of this section is prohibited and is void as contrary to public policy.

**Tax issues.** Due to the changes in the legislative calendar resulting from the COVID-19 pandemic, Senate policy bills are being referred to only a single Assembly Committee for hearing at this time. In an attempt to compensate for this single referral, Judiciary Committee

staff reached out to the Revenue and Taxation Committee, to which the bill would ordinarily have also been referred, to ensure that the latter's expertise was also brought to bear on this measure. Judiciary Committee staff have also discussed the bill at length with the FTB and with various stakeholders. Participants in these discussions have identified the following issues with the portions of the bill that address tax credits for property owners and repayment of deferred unpaid rent by tenants. *It is hoped that the authors will address as many of these issues as possible before the bill is voted on by the full Assembly.*

1. *The bill may do little for small and undercapitalized landlords.*

The fact that landlords can sell their tax credits to third parties is meant to provide relief to landlords who, due to financial difficulties stemming from unpaid rent, need short-term financial assistance and cannot wait until 2024 for tax relief under the bill. However, unlike the state's low-income housing tax credit (LIHTC) program, a market for selling and buying these credits does not yet exist. When a market does emerge, it will likely take time for efficiencies to produce a reliable and consistent price for each credit that is transparent for both the landlord and the state. It is unclear whether a market for the credits will develop quickly enough, and whether the price for them will be high enough, to ameliorate the financial distress of small and undercapitalized landlords.

Revenue and Tax Committee staff note that, absent changes to federal tax law, it is unlikely that the maximum resale price of tax credits will exceed 79 cents on the dollar for certain taxpayers, and may be much lower. This is because decreasing state income taxes will, in some cases, correspondingly increase federal income tax liability, depending on the taxpayer's circumstances. As an example, if a corporation reduced its state income tax by one dollar, that corporate taxpayer would lose that one dollar in deduction for federal tax purposes, which means that the taxpayer's federal tax liability would increase by an amount equal to the federal tax rate. At a 21% marginal tax rate, this would mean a 21 cent federal tax increase for every dollar in state tax credit claimed. (Note that individual taxpayers' situations may vary.) If the consequence of claiming these credits is that federal tax liability increases, taxpayers purchasing the tax credits from landlords will include the cost of those taxes in the initial price. In other words, the corporation will not pay more than 79 cents for every dollar of tax credit. By comparison, the LIHTC usually sells for around 70 cents for every dollar of tax credit—and this is in a stable, well-developed market in which buyers (typically financial institutions) gain additional benefits from purchasing the credits, such as helping to satisfy their obligations under the federal Community Reinvestment Act. The price of the tax credit envisioned by this bill would further be discounted by a normal rate of inflation as well as an expected return on investment. The return on investment expected by investors may also consider the potential of default by the landlord if the CERA is violated, which may further drive down the price.

Finally, a landlord representative who spoke to Judiciary Committee staff noted that, because tax credits under the bill can only be sold once to a third party, and the third party buyer then would be prohibited from making any further transfers, brokers would be unable to purchase individual tax credits and bundle them for sale to large buyers. Landlords' view is that this prohibition will impair efficient functioning of the market for tax credits and reduce their overall value. On the other hand, allowing further resale of tax credits would greatly increase the administrative costs for FTB and might allow for increased fraud.

2. *Tax credits may offer significant avenues for fraud and identity theft.*

As noted by the Senate Governance and Finance Committee in its analysis of the bill:

SB 1410's credit would be the first that could be refunded upon appropriation of the [L]egislature, sold, or carried over. According to FTB and a report by the Legislative Analyst's Office, "Options for a State Earned Income Tax Credit," refundable credits increase refund fraud and identity theft. Historically, both the IRS and the FTB have experienced fraud and improper claims with refundable credits. More importantly, if a refund is determined to be fraudulent, it is usually difficult for FTB to recover its value. The Committee may wish to consider whether the circumstances that give rise to SB 1410 merit more flexibility than is allowed any other tax credit, and whether the potential risks of a refundable credit are acceptable in this case.

*To reduce the potential of fraud, the author may wish to make the credit refundable only to the property owner that originally received the credit.*

3. *Repayment mechanism is unclear and may impose significant hardship on tenants*

In its current form, the bill appears to contemplate that most tenants will reconcile their annual repayment obligation when they file their tax returns. That is, they will specify on their tax returns the amount of deferred unpaid rent they owe for the year, and apply for a reduction or elimination of that amount based on their annual income. However, if tenants fail to make the appropriate payments throughout the year, it may lead to many tenants owing significant amounts of unpaid rent at a single point in the year, a financial hardship that many will be ill-equipped to bear. Moreover, under the terms of the bill, unpaid installments can be sent to collections, which will add interest and penalties to the amount a tenant owes.

An alternative approach might be for the Employment Development Department, which already has processes in place to collect remittances from paychecks, to collect an appropriate fraction of the installment owed for the year from each tenant with a repayment obligation. However, this approach would impose an unnecessary financial burden on low-income taxpayers who would unnecessarily lose income throughout the year, and only have the withheld amounts refunded at tax time. The bill in its current version does not specify whether a tenant could request to have the year's payments forgiven or reduced, based on the tenant's projected reduced income, before the payments are due.

4. *Debt forgiveness may affect low-income tenants' eligibility for other state and federal programs.*

If a tenant's obligation to repay deferred unpaid rent is reduced or eliminated by the state, it is likely that the amount of this reduction or elimination will be treated as taxable income by the federal government. This treatment could, in turn, lead low and very low-income households to lose eligibility for federal or state benefits that require income to be below a specified amount, such as the Earned Income Tax Credit and Supplemental Security Income.

5. *How will FTB collect from tenants who move out of state?*

A tenant who moved out of state after entering into a CERA and thereafter would not earn income in California would not, under current law, be legally required to file a California state

tax return. It is unclear how the state would obtain repayment of deferred unpaid rent from such a tenant. This may become an issue of particular concern if tenants move out of state largely to avoid significant tax debts incurred under this bill.

6. *How will owner violations of CERAs be enforced?*

The bill provides for a property owner to repay any tax credits claimed if they violate a CERA, (e.g., by evicting their tenant). Many issues are left unaddressed by the bill, including how a “violation” is defined and who would adjudicate the issue; how the FTB would learn of an alleged violation; how landlord repayment would work if the offending landlord had sold the tax credit to a third party; whether a credit sold to a third party in such a scenario could be recaptured; and whether and how a tenant would be relieved of their repayment obligation in the event of a violation.

Finally, it goes without saying that an owner who sold their tax credit might then have little incentive to honor a CERA if they knew there were no penalty for subsequently evicting a tenant.

7. *Significant unknowns with how tax authorities should characterize and treat tax credits.*

The answers to the following questions are simply unclear from the text of the bill, yet they are critical to its administration:

- Should landlords be able to deduct expenses for the period of time that they forego rent under a CERA? Generally, a landlord is allowed a deduction for expenses to offset income. However, because the income from rent payments is being forgone in exchange for tax credits, it is not clear if deductions should be allowed.
- Should future tax credits taken by the landlord be considered income? Generally, tax credits are not considered income. Tax credits provide a taxpayer with a dollar for dollar reduction in state income tax liability. Treating tax credits as taxable income would be a departure from existing practice. However, tax credits under this program essentially work as a substitute for forgone income. Not treating tax credits as income would effectively provide landlords with tax free income, for both state and federal purposes.
- In a similar vein, should proceeds from the sale of a tax credit be considered taxable income? Proceeds from the sale of a tax credit are generally considered taxable income equal to the full amount of the price received for the credit. However, if the credit itself is not treated as income, there will likely be a disparity in treatment between those taxpayers that choose to keep and utilize the tax credit for themselves and those that sell the credit.
- What if an owner obtains a tax credit for a rental period and sells the property before the rental period expires? Does the previous owner forfeit the corresponding portion of the tax credit? Is the new owner bound by the existing CERA? Can the new owner claim a tax credit for any period in which the previous owner has claimed a CERA? More generally, can a CERA be renegotiated, and if so, how is the FTB to be notified of the new terms?
- Will a tenant who is a party to a CERA now be required to file a tax return even if they would not have done so otherwise (for example, because their income was below the income tax return filing threshold)? The bill also requires a tenant to include, within the

tax return, the remaining amount of any installment payment due for that year but it is unclear if FTB is required to verify the amount specified by the tenant.

- Will tenants be expected to make estimated payments of unpaid deferred rent that is owed to the state, and will there be penalties for underpayment?
- To what degree would tenants whose repayment obligation is reduced or eliminated in a given year be eligible for the state's renters tax credit in the same year?
- Would owners that do not have tax liability, such as nonprofit affordable housing providers, be unable to take advantage of this bill? If so, how are they to be compensated for agreeing not to evict their tenants?
- Will deferred unpaid rent be treated as an interest-free loan to the tenant, and if so, is there income in the amount of the interest not charged?
- Why does the bill only provide the FTB with emergency regulatory authority to administer the tax credit provisions of this bill, and not its taxpayer repayment provisions?

**ARGUMENTS IN SUPPORT:** The Association of Regional Center Agencies believes this bill would help protect the state's most vulnerable residents:

The majority of people with developmental disabilities choose to live in their family home. Their families, by choosing to support them in this way, can and do face significant economic hardships as a result. Separately, the dedicated individuals who work as direct support professionals, forming the backbone of the system that makes community life possible, are chronically underpaid due to low rates limited by state law. For all, housing can be far too tenuous – at best. COVID-19 has created unique and exceptional economic challenges for Californians. But concerns about housing should not be among them. This bill will provide a measure of protection to our community, potentially removing at least one concern from the far too lengthy list of potential threats to their health, safety, and wellbeing.

The City of Santa Monica applauds the balanced nature of the bill:

To avoid the looming eviction crisis the state must ensure that tenants who are economically impacted by COVID-19 and who are unable to pay rent due to no-fault of their own are not evicted, while providing landlords, who themselves are at-risk of foreclosure if they are unable to pay the mortgage or bills related to the residential property, the ability to maintain costs in order to keep those tenants housed. SB 1410 provides eviction protection to tenants unable to make payments during the COVID-19 pandemic by providing residential landlords and mobile-home park owners financial tax incentives to keep tenants housed and provides tenants with a mechanism to pay their back-rent installments starting in 2024.

**ARGUMENTS IN OPPOSITION:** AIDS Healthcare Foundation contends that the state should pursue an alternate financing mechanism to backfill unpaid rent:

[T]he Legislature should consider a bond measure that would provide relief to tenants and landlords immediately, would perpetuate the housing uncertainty spawned by the pandemic beyond the end of the pandemic and would not depend on an unpredictable job market 4 years from now.

California Rental Housing Association asks for a narrowing of eviction protections and swifter financial assistance from the state:

[T]his bill should be amended to specify that the commitment to not evict a tenant under this agreement is limited to the nonpayment of rent. As currently written, this bill would require that under this agreement, property owners would agree to not terminate a tenancy for any causes other than cases where tenants have destroyed property or have created a threat to public safety. [...] [O]btain[ing] a tax credit years later...does not address the need of rental housing providers for financial assistance now. That is also why CalRHA, in early April 2020, proposed a statewide renter assistance program. We have also proposed other measures such as a uniform rent repayment plan for renters adversely affected from the COVID-19 pandemic and resulting state of emergency. Many of our members are small property owners who are unable to absorb such a massive financial hit and they cannot wait years for repayment. For this reason, we believe that this bill should be amended to protect small owners with an earlier redeemable tax credit.

**Other Related Legislation:** AB 1436 (Chiu, 2020) would prohibit a tenant from being evicted if they did not pay rent during the period between March 4, 2020 and the earlier of either the end of the State of Emergency or April 1, 2021, provided the tenant has experienced COVID-19 economic impacts. The bill also provides tenants an additional 12 months to become current on unpaid rent before a landlord can bring a collection action against them. The bill is currently scheduled to be heard in the Senate Judiciary Committee.

SB 915 (Leyva, 2020) would prohibit mobilehome parks from evicting residents who notify park management of COVID-19 economic impacts, and require parks to provide those residents with additional time to repay outstanding rent, utilities, or other charges, and to cure violations of park rules. The bill is currently awaiting a vote on the Assembly floor.

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

Abundant Housing LA  
Association of Regional Center Agencies  
Child Care Law Center  
City of Long Beach  
City of Santa Monica  
Greenlining Institute  
Haidar Awad, Councilmember, City of Hawthorne  
Housing California  
Jewish Center for Justice  
People for Housing – Orange County YIMBY  
YIMBY Action  
YIMBY Law

### **Support if Amended**

California Apartment Association  
California Housing Consortium  
Valley Industry & Commerce Association

**Oppose unless Amended**

ACLU of California  
Alliance of Californians for Community Empowerment (ACCE)  
Bend the Arc, Jewish Action: Southern California  
California Association of Realtors  
California Rental Housing Association  
Eviction Defense Network  
Housing How! CA  
Kennedy Commission  
Orange County Communities Organized for Responsible Development (OCCORD)  
Property Owners for Fair and Affordable Housing  
Rent Relief Coalition San Luis Obispo  
Working Partnerships USA

**Opposition**

Affordable Housing Management Association, Pacific Southwest  
Affordable Housing Management Association, Northern CA Hawaii Apartment Association,  
AIDS Healthcare Foundation  
Apartment Association, California Southern Cities  
Apartment Association of Orange County  
Asian Americans Advancing Justice–California  
East Bay Rental Housing Association  
San Francisco Tenants Union  
Southern California Rental Housing Association

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