

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SJC-11490

APPEALS COURT DOCKET NO. 2012-P-0990
WORCESTER HOUSING COURT DOCKET NO. 10H85SP001207

U.S. BANK NATIONAL ASSOCIATION

PLAINTIFF-APPELLEE

v.

EDNA SCHUMACHER & JOHN SCHUMACHER

DEFENDANT-APPELLANT/APPLICANT

SUA SPONTE TRANSFER FROM APPEALS COURT

ON APPEAL FROM
THE WORCESTER HOUSING COURT

AMICUS BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S
APPLICATION FOR FURTHER APPELLATE REVIEW

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REPORT OF THE MORTGAGE SUMMIT WORKING GROUPS,
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Rules

Mass. R. App. P. 171

This Brief is submitted in support of the Appellant John Schumacher¹ pursuant to Mass. R. App. P. 17 and the Supreme Judicial Court's August 2, 2013 Announcement soliciting amicus briefs in this appeal. Community Legal Aid, Inc. submits this Brief on behalf of its clients facing foreclosure and eviction.

IDENTITY OF AMICUS CURIAE

Community Legal Aid, Inc. (CLA) is the state-funded civil legal aid program serving the low-income and elderly residents of Worcester, Hampden, Hampshire, Franklin, and Berkshire Counties. Its lawyers and paralegals currently provide critically-needed assistance to families and individuals facing eviction, domestic violence, homelessness, and barriers to employment, healthcare, and benefits programs. CLA's mission is to protect and advance the legal rights of low-income, elderly, and other disenfranchised people in order to secure access to basic needs and to challenge institutional barriers to social and economic justice.

¹ One of the parties, Edna Schumacher, is deceased. CLA will refer to the Appellant in a singular form.

Several of CLA's staff attorneys² specialize in representing homeowners, former homeowners, and tenants in pre- and post-foreclosure crisis. These attorneys have assisted hundreds of such clients in the past few years, challenging foreclosures and defending against evictions. With its extensive experience in representing individuals facing foreclosure, eviction, and homelessness, CLA is uniquely suited to analyze the impact of the foreclosure laws and mortgage laws of Massachusetts.

STATEMENT OF INTEREST

This case addresses the interpretation of foreclosure laws that impact tens of thousands of homeowners, former homeowners, and the public at large. CLA's service area includes two counties in the Commonwealth (Worcester and Hampden) that were among the most severely affected by the foreclosure crisis. Because CLA very frequently represents

² Prior to starting work as an attorney at CLA, Uri Strauss worked as an attorney at the Alliance for Affordable Housing and represented the Defendant John Schumacher in Worcester Housing Court and in Land Court. In addition, CLA Attorney Emily Jones represented the Defendant John Schumacher in a Limited Assistance Representation capacity in Worcester Housing Court.

homeowners, former homeowners, and tenants impacted by the foreclosure crisis, this organization and its clients have a strong interest in the sound and just development of Massachusetts foreclosure laws.

This Court's decision in the case at bar will have a far-reaching impact not only on John Schumacher but also on homeowners, former homeowners, and tenants who CLA represents as well as the communities CLA serves.

STATEMENT OF FACTS

The amicus curiæ adopts the Statement of Facts set forth in the Appellant's Brief.

ISSUES PRESENTED BY AMICUS CURIÆ

The amicus curiæ submits this brief solely to address the issue of whether a failure to strictly comply with the notice provisions of G. L. c. 244, § 35A, renders an extrajudicial foreclosure sale void or voidable, or otherwise affects its validity.

INTRODUCTION

It is the position of the amicus curiæ that a failure to strictly comply with the provisions of G. L. c. 244, § 35A renders an extra-judicial foreclosure sale void. The legislative history of the statute, the inconsistencies that have resulted in foreclosure practice as a result of non-compliant § 35A notices, and the plain meaning of the statute support a finding by this Court that strict compliance with § 35A is both required and preferred. Any other standard produces unnecessary uncertainty and unpredictable results. In this brief the amicus curiæ will demonstrate that the drafters' intent was to incorporate more protections for the struggling homeowner (pp. 5 - 11); that the various violations found in § 35A letters sent to homeowners undermine the Division of Bank's monitoring and enforcement efforts (pp. 11 - 19); and that any standard other than strict compliance renders the statute meaningless (pp. 19 - 22).

ARGUMENT

I. LEGISLATIVE HISTORY DEMONSTRATES THAT § 35A WAS INTENDED TO MAKE SWEEPING CHANGES IN MASSACHUSETTS FORECLOSURE LAW TO PROTECT HOMEOWNERS.

The Right to Cure Notice required by the original version of G.L. c. 244, § 35A ("§ 35A") was enacted by the Commonwealth pursuant to Chapter 206 of the Acts of 2007 entitled "An Act Protecting and Preserving Home Ownership." ADD 000004.

The history of this legislation, which made sweeping changes to the Commonwealth's foreclosure process, began with a Mortgage Summit convened by the Commissioner of Banks in November of 2006. The purpose of this summit was to address the rising incidence of foreclosure and to develop a foreclosure prevention strategy. Participants were drawn from government, non-profits, and the mortgage lending industry.

After this summit two Working Groups were formed, one looking at rules and enforcement and the second focusing on consumer education. The purpose of the Working Groups was to develop concrete recommendations both to help consumers confronted with the loss of their homes and to address longer-term issues

affecting communities across the Commonwealth. The Working Groups issued a report entitled, REPORT OF THE MORTGAGE SUMMIT WORKING GROUPS, RECOMMENDED SOLUTIONS TO PREVENT FORECLOSURES AND TO ENSURE MASSACHUSETTS CONSUMERS MAINTAIN THE DREAM OF HOMEOWNERSHIP, AT 2 (Apr. 11, 2007); ADD 000024.

In its introduction to its recommendations regarding the "Foreclosure Process," the Rules and Enforcement Working Group stated: "Most other states have incorporated some form of homeowner protection in their foreclosure laws." However, Massachusetts foreclosure laws have changed little since their enactment in 1857. Id. at 16; ADD 000038. Most prominently, the Working Groups' Report noted that "a lender can foreclose on a home where the mortgage is in default even if the borrower is able to catch up on late payments," and "homeowners get inadequate notice of a foreclosure sale before the sale occurs." Id.; ADD 000038.

To remedy these harsh foreclosure practices, the Working Groups' Report concluded, "Massachusetts foreclosure laws and procedures need to be updated to incorporate more protections for struggling homeowners." Id.; ADD 000038. The Working Groups' Report specifically recommended:

1. that a notice of intention to foreclose be provided 90 days before the residential mortgage is accelerated;
2. that the notice contain information about the 90-day right to cure default;
3. that mortgagees be prohibited from charging attorneys fees or other costs during the 90-day cure period; and
4. that the notice provide critical information about resources that "consumers could contact for information on how to address their problems." Id. at 17; ADD 000039.

The Working Groups' Report identified a serious concern. "With growing instances of fraud, there is currently an inadequate mechanism to track mortgage originators." Id. At 12; ADD 000034. According to the report most mortgages were not held by the original lender, but were sold in the secondary mortgage market. As a result, "nearly all the loan servicers or note holders are not the lender of record." Id. at 14; ADD 000036. For this reason, the Working Groups' Report noted, there was a lack of reliable information necessary to track "which lenders

or brokers originate mortgages that are most likely to end in foreclosure." Id. at 14; ADD 000036. To address this concern, the Working Groups' Report recommended that the right to cure notices must contain specific information "including the name of the borrower, the property address, the mortgage holder, the mortgage servicer, if applicable, the original lender, and if applicable, the licensed originator," and must be filed with the Division of Banks. Id. at 14; ADD 000036. The Working Groups' Report further recommended that the Division of Banks use the information contained in each pre-foreclosure notice to develop a database to "red flag" any peak foreclosure activity by a particular lender, broker, or servicer at any given time and to look at trends across industries.

Following the release of the Working Groups' Report, Governor Deval L. Patrick submitted a legislative proposal embodying the recommendations made by the Working Groups' Report - House Bill No. 4085 entitled "An Act Implementing the Division of Banks Mortgage Summit Recommendations" on June 11, 2007.³ This bill served as the basis for an "Act Protecting and

³ See Addendum at ADD 000061, ADD 000065.

Preserving Homeownership" that was enacted by the Legislature and signed by Governor Patrick on November 29, 2007. Consistent with the recommendations of the Working Groups' Report, the 2007 version of § 35A prohibited acceleration of maturity of the unpaid balance until the expiration of a ninety-day right to cure period, which began with service of a notice. §35A(b); see also REPORT OF THE MORTGAGE SUMMIT WORKING GROUPS, at 17; ADD 000039. The statute also prohibited the assessment of fees or other costs during the right to cure period. See § 35A(d). Additionally, the statute mandated that notices include a list of specific resources to help homeowners facing foreclosure. See § 35A(c) (6). Finally, the statute included the requirement that notices identify the mortgagee, the loan originator and the mortgage broker and that copies of each right to cure notice be filed with the Division of Banks. See § 35A(c) (6); see also REPORT OF THE MORTGAGE SUMMIT WORKING GROUPS, at 17; ADD 000039.

In determining whether § 35A is a statute relating to the power of sale, this Court should be guided by the "general and familiar rule...that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed

by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, **the mischief or imperfection to be remedied and the main object to be accomplished**, to the end that the purpose of the framers may be effectuated." Hanlon v. Hanlon, 286 Mass. 444, 447 (1932) (emphasis added). Application of these general principles to § 35A shows that the legislature intended to address the specific problems identified by the Mortgage Summit Working Groups' Report and to make sweeping changes to Massachusetts foreclosure law, particularly the power of sale, to remedy these problems.

The Working Groups' Report spells out the policies served by each requirement in § 35A. See Rosse v. Commissioner of Revenue, 430 Mass. 431, 439 n.6 (1999) (court may examine unofficial sources of legislative history in order to gain a "contemporary understanding of the underlying purposes" of the legislation). In considering whether mortgagees must strictly comply with each requirement in § 35A, this Court should adopt a statutory construction of § 35A that encourages the specific action the legislature sought to foster and promulgate, rather than a construction that will undermine the public policies the

legislature intended to be served. 2B SUTHERLAND
STATUTORY CONSTRUCTION § 56:1 (7th ed.); Libertarian Ass'n
of Massachusetts v. Sec'y of Commonwealth, 462 Mass.
538, 550 (2012) (recognizing that the court's primary
duty in interpreting a statute is to "to effectuate
the intent of the Legislature in enacting it"). The
interpretation of § 35A that best effectuates the
above-mentioned legislative purposes is one that
recognizes that § 35A regulates the exercise of the
power of sale and permits a mortgagee to lawfully
exercise the power of sale only if it has complied
strictly with each requirement in § 35A.

**II. WIDE-SPREAD VIOLATIONS OF § 35A HAVE UNDERMINED
THE DIVISION OF BANK'S MONITORING AND
ENFORCEMENT EFFORTS.**

When mortgagees fail to comply with § 35A by
mailing non-compliant right to cure notices, they harm
individual homeowners and the public at large. In the
course of representing dozens of homeowners in post-
foreclosure eviction cases since September 2012, CLA
has not encountered more than a handful of fully
compliant § 35A notices. As a result of widespread
and diverse violations of the statute, homeowners are
left misinformed or confused about their rights and
obligations, the foreclosure procedure, the identities

of the parties pressing claims against them, and the resources available to help cure the default or otherwise avoid, or mitigate the impacts of, foreclosure.

The following case examples, from CLA's files, are representative of the range of violations encountered by CLA's clients. Each violation is followed by a tally of violations of that type found by a review of selected CLA files and also court decisions rendered in § 35A cases. These numbers represent a small percentage of the violations that have occurred since 2008. Very few homeowners who have received right to cure notices have had them reviewed by an attorney.

1. **Violation: Incorrect Telephone Number for Borrowers' Hotline.**

Bank sent borrower a § 35A notice. The notice misstated the phone number for the Hotline. The borrower called the number provided and was not able to get through. Based on the borrower's income, it is very likely that had she received assistance, she could have received a modified loan and averted foreclosure. The borrower struggled for a prolonged period to get a loan modification on her own, but was

denied because the lender did not get the necessary documents.

Impact of Violation: Borrower was unable to get assistance in obtaining a loan modification and her home was foreclosed.

Number of violations of this type: 14

2. **Violation: Failure to Send § 35A Notice/Failure to Send Notice to All Mortgagors/Notice Sent to Address of Non-Mortgagor.**

Mortgagee sent the § 35A notice to the home of the co-mortgagor (a former spouse), but failed to send the notice to the co-mortgagor who resided at the mortgaged property. As a result, the borrower residing at the mortgaged property never received notice of the right to cure and was not aware of her legal right to avoid foreclosure by paying the arrearage during the cure period, which she could have afforded.

Impact of Violation: Borrower's home was auctioned.

Number of violations of this type: 6

3. **Violation: Amount Owed Includes Unlawful Fees.**

The mortgagee's § 35A notice included late fees well in excess of 3% of overdue principal and

interest, in violation of § 35A and of G.L. c. 183 § 59.

Impact of Violations: Borrower was not informed of the correct cure amount.

Number of violations of this type: 5

4. **Violation: Wrong Mortgagee Identified.**

The § 35A notice named "FNMA T Deal" as the current mortgagee, even though FNMA T Deal was not the original mortgagee, nor did it hold an assignment of mortgage at any point following the origination of the mortgage loan through the foreclosure sale.

Impact of Violations: Borrower and the Division of Banks were misinformed about the identity of the mortgagee. This impeded the Division's efforts to monitor foreclosure activities.

Number of violations of this type: 33

5. **Violation: Failure to Provide the Name and Address of the Mortgagee.**

Bank's § 35A notice said, "Please be advised that the name and address of the Mortgagee who holds your mortgage is: PRIVATE PRIVATE PRIVATE."

Impact of Violations: Borrower and the Division of Banks were not informed of the identity of the

mortgagee. This impeded the Division's efforts to monitor foreclosure activities.

Number of violations of this type: 17

6. Violation: Failure to name the Mortgage Broker.

Bank sent § 35A notice which did not identify the loan broker.

Impact of Violation: Borrower and the Division's were not informed of the identity of the mortgage broker. This impeded the Division of Banks efforts to monitor foreclosure activities.

Number of violations of this type: 26

7. Violation: Failure to Name the Mortgage Originator.

Bank sent § 35A notice which did not identify the loan originator.

Impact of Violations: Borrower and the Division of Banks were not informed of the identity of the mortgage originator. This impeded the Division's efforts to monitor foreclosure activities.

Number of violations of this type: 28

8. Violation: Cure Period Shorter than 90 Days.

§ 35A notice did not allow for a full 90 day right to cure period. The right to cure deadline stated in the letter fell a few days short.

Impact of Violations: Borrower did not receive the benefit of the full right to cure period.

Number of violations of this type: 4

9. **Violation: Overstatement of the Amount Owed.**

After the borrower fell slightly behind on the mortgage following a temporary income reduction, he received a § 35A notice which overstated the amount due by over \$2,000. Borrower was unable to cure the default because the amount due exceeded his resources. If he had been given notice with the correct amount due, he may have been able to cure the loan.

Impact of Violation: Foreclosure, where a cure was possibly within reach.

Number of violations of this type: 1

10. **Violation: Total Amount Due is Greater than the Sum of the charges.**

Mortgage company sent a § 35A notice which itemized the amount required to cure in several categories. The notice then gave a "Total Amount Due Calculation" which exceeded the sum of the itemized charges by several hundred dollars.

Impact of Violations: Mortgagors were not given a clear statement of amount owed.

Number of violations of this type: 2

11. **Violation: Wrong Originator Identified.**

\$ 35A notice identified the wrong party as the mortgage loan originator.

Impact of Violation: Mortgagor and the Division of Banks were misled about the identity of the mortgage originator. This impeded the Division's efforts to monitor foreclosure activities.

Number of violations of this type: 4

12. **Violation: Amount Owed Includes Unspecified and/or Potentially Unlawful Fees.**

The mortgagee's \$ 35A notice included a charge itemized as "Other."

Impact of Violation: Borrower was improperly charged for unspecified and/or unlawful fees.

Number of violations of this type: 4⁴

Based upon the above tallies, the most common \$35A violations have involved the failure to include basic information about the identity of the mortgagee,

⁴ This tally understates the number of \$ 35A notices with unlawful charges. CLA's clients do not always have the \$ 35A notices by the time they seek our help, and the copies of the notices received from the Land Court always redact any amounts owed.

the loan originator and the broker. These are serious violations, which result in a distortion of the Commonwealth's record keeping and analysis of foreclosure patterns and practices among different lenders. In response to the Working Groups' Report, the Legislature enacted G.L. c. 244 § 14A, which requires the Division of Banks to use information received from mortgagees to maintain a database including "foreclosure activity by mortgage lenders, mortgage holders and mortgage servicers, as well as the mortgage brokers and loan originators who placed these mortgage loans in the Commonwealth." ADD 000001.

The same statute requires the Division of Banks to produce an annual report analyzing the data contained in the database and reporting trends and developments. Missing or incorrect information in notices, particularly information concerning brokering and origination of defaulted loans, and the identity of the mortgagee, undermines the accuracy of the data and hinders the development of accurate analysis. To the extent that such analysis is used by the Division of Banks in its role as licenser and regulator of mortgage lenders, originators and brokers, incorrect

information in § 35A notices compromises these important government functions.

III. MASSACHUSETTS LAW AND PUBLIC POLICY STRONGLY FAVOR A STATUTORY INTERPRETATION OF § 35A THAT REQUIRES STRICT COMPLIANCE WITH ITS PROVISIONS.

This Court has acknowledged that non-judicial foreclosure by power of sale "evolved in order to meet the increase of business transactions requiring loans and the desire to have a more speedy process of foreclosing than was furnished by suit or entry." Eaton v. Fed. Nat. Mortgage Ass'n, 462 Mass. 569, 581 (2012). In return for such haste, Massachusetts has "always required that [foreclosure] proceed strictly in accord with the statutes that govern it." U.S. Bank Nat. Ass'n v. Ibanez, 458 Mass. 637, 655 (2011) (Cordy, J.) (concurring); Eaton at 581 (power of sale will be "will be jealously watched and declared void for the slightest unfairness or excess ...").

The recommendations of the Working Groups' Report and the legislative history makes clear that § 35A was enacted as a remedial statute to revamp the foreclosure process so as to provide badly needed protections for struggling homeowners and decrease the devastating effects of foreclosure on the neighborhoods across the Commonwealth. To

contend that § 35A does not regulate the power of sale belies the purposes underlying the statute's enactment and the express prohibitions in the statute.

It is important to remember that G.L. c. 244, § 35A prohibits a mortgagee from accelerating the mortgage debt or from enforcing the mortgage by any method authorized by G.L., c. 244 or any other law **until** the mortgagee has complied with the provisions of § 35A. Further, the variety and high volume of non-compliant notices, and the potential harms caused by those notices to homeowners and the Division's efforts to closely monitor foreclosures, further support a policy of requiring strict compliance with the statute.

As a matter of policy, "[t]he only protections that exist for consumer homeowners and the public-at-large are those self-effectuating statutory procedures established by the Legislature.

Importantly, it is in the context of non-judicial foreclosure that the Legislature has enacted, and refined over time, the statutory power of sale.

Requiring strict compliance with the statutory power of sale is therefore sound public policy, as it

assures the necessary measure of confidence that foreclosures are legally justified, and that the transfer which result from foreclosure sales are sound and not subject to collateral challenge."

Federal Nat'l Mortgage Ass'n. v. Lamoureux, No. 11-SP-3713 (Western Hous. Ct., Aug. 27, 2013); ADD 000074 (emphasis added). An interpretation requiring strict compliance with § 35A will ensure that Massachusetts' homeowners uniformly benefit from the protections enacted by their elected representatives. It will also preserve the public's confidence in the non-judicial foreclosure system.

CONCLUSION

The Commonwealth has clearly set out the requirements for a notice of right to cure that will inform borrowers of their default and provide them with the information the Legislature has deemed necessary to protect the borrower's interest in his home and prevent unnecessary foreclosures. The requirements are not burdensome, nor are they difficult to attain. The Legislature determined that these requirements must be met prior to a mortgagee

proceeding to a foreclosure by any means, including through the statutory power of sale.

For the foregoing reasons, the Court should uphold the requirements of the statute and find that a foreclosure is void where the mortgagee has failed to strictly comply with the statute.

Respectfully Submitted,



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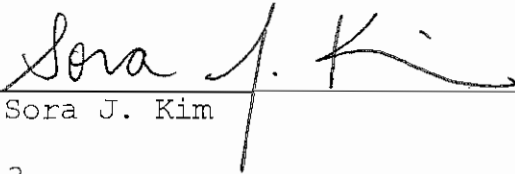
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RULE 16(k) CERTIFICATION

I, Sora J. Kim, hereby certify that this brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure.


Sora J. Kim

Dated: October 21, 2013

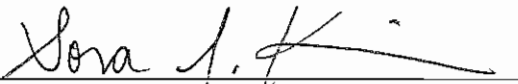
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Massachusetts General Laws Annotated
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Title III. Remedies Relating to Real Property (Ch. 237-245)
Chapter 244. Foreclosure and Redemption of Mortgages (Refs & Annos)

M.G.L.A. 244 § 14A

§ 14A. Foreclosure database; annual report on developments and trends in residential property foreclosures

Effective: November 29, 2007

Currentness

The commissioner of the division of banks, hereinafter referred to as the commissioner, shall maintain a foreclosure database that shall include, but not be limited to, foreclosure activity by mortgage lenders, mortgage holders and mortgage servicers, as well as the mortgage brokers and loan originators who placed these mortgage loans in the commonwealth, including information relative to the original mortgagee and any subsequent assignee. Based on the information received, the commissioner shall produce a report, at least annually, to track developments and trends of mortgage foreclosures on residential property in the commonwealth including, but not limited to, an analysis of the pre-foreclosure notices submitted to the commissioner compared to the final foreclosure notices, and any trends or patterns relative to the geographic location of the residential properties and interest rates. The report shall be available to the public upon request, and the commissioner shall make it available in any other manner that he may choose.

Credits

Added by St.2007, c. 206, § 10, eff. Nov. 29, 2007.

M.G.L.A. 244 § 14A, MA ST 244 § 14A
Current through Chapter 101 of the 2013 1st Annual Session

End of Document

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Massachusetts General Laws Annotated

Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)

Title III. Remedies Relating to Real Property (Ch. 237-245)

Chapter 244. Foreclosure and Redemption of Mortgages (Refs & Annos)

This section has been updated. [Click here for the updated version.](#)

M.G.L.A. 244 § 35A

§ 35A. Right of residential real property mortgagor to cure a default; acceleration of maturity date; notice; fees and penalties associated with default; filing of notice

Effective: May 1, 2008 to August 6, 2010

<[Text of section applicable as provided by 2007, 206, Sec. 21 as amended by 2007, 224, Sec. 2.]>

(a) Any mortgagor of residential real property located in the commonwealth consisting of a dwelling house with accommodations for 4 or less separate households and occupied in whole or in part by the mortgagor, shall have a 90 day right to cure a default of a required payment as provided in such residential mortgage or note secured by such residential real property by full payment of all amounts that are due without acceleration of the maturity of the unpaid balance of such mortgage. The right to cure a default of a required payment shall be granted once during any 5 year period, regardless of the mortgage holder.

(b) The mortgagee, or anyone holding thereunder, shall not accelerate maturity of the unpaid balance of such mortgage obligation or otherwise enforce the mortgage because of a default consisting of the mortgagor's failure to make any such payment in subsection (a) by any method authorized by this chapter or any other law until at least 90 days after the date a written notice is given by the mortgagee to the mortgagor.

Said notice shall be deemed to be delivered to the mortgagor when delivered to the mortgagor or when mailed to the mortgagor at the mortgagor's address last known to the mortgagee or anyone holding thereunder.

(c) The notice required in subsection (b) shall inform the mortgagor of the following:--

(1) the nature of the default claimed on such mortgage of residential real property and of the mortgagor's right to cure the default by paying the sum of money required to cure the default;

(2) the date by which the mortgagor shall cure the default to avoid acceleration, a foreclosure or other action to seize the home, which date shall not be less than 90 days after service of the notice and the name, address and local or toll free telephone number of a person to whom the payment or tender shall be made;

(3) that, if the mortgagor does not cure the default by the date specified, the mortgagee, or anyone holding thereunder, may take steps to terminate the mortgagor's ownership in the property by a foreclosure proceeding or other action to seize the home;

§ 35A. Right of residential real property mortgagor to cure a., MA ST 244 § 35A

(4) the name and address of the mortgagee, or anyone holding thereunder, and the telephone number of a representative of the mortgagee whom the mortgagor may contact if the mortgagor disagrees with the mortgagee's assertion that a default has occurred or the correctness of the mortgagee's calculation of the amount required to cure the default;

(5) the name of any current and former mortgage broker or mortgage loan originator for such mortgage or note securing the residential property; and

(6) that the mortgagor may be eligible for assistance from the Massachusetts Housing Finance Agency and the division of banks and the local or toll free telephone numbers the mortgagor may call to request this assistance.

(d) To cure a default prior to acceleration under this section, a mortgagor shall not be required to pay any charge, fee, or penalty attributable to the exercise of the right to cure a default. The mortgagor shall pay late fees as allowed pursuant to section 59 of chapter 183 and per-diem interest to cure such default. The mortgagor shall not be liable for any attorneys' fees relating to the mortgagor's default that are incurred by the mortgagee or anyone holding thereunder prior to or during the period set forth in the notice required by this section. The mortgagee, or anyone holding thereunder, may also provide for reinstatement of the note after the 90 day notice to cure has ended.

(e) A copy of the notice required by this section and an affidavit demonstrating compliance with this section shall be filed by the mortgagee, or anyone holding thereunder, in any action or proceeding to foreclose on such residential real property.

(f) A copy of the notice required by this section shall also be filed by the mortgagee, or anyone holding thereunder, with the commissioner of the division of banks. Additionally, if the residential property securing the mortgage loan is sold at a foreclosure sale, the mortgagee, or anyone holding thereunder, shall notify the commissioner of the division of banks, in writing, of the date of the foreclosure sale and the purchase price obtained at the sale.

Credits

Added by St.2007, c. 206, § 11, eff. May 1, 2008.

M.G.L.A. 244 § 35A, MA ST 244 § 35A

Current through the 2012 2nd Annual Session

End of Document

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CORRECTED REPRINT

HOUSE No. 4306

House bill No 4306, as reported by the committee on Financial Services, as amended by the House, as changed by the committee on Bills in the Third Reading and as passed to be engrossed by the House. October 18, 2007.

The Commonwealth of Massachusetts

In the Year Two Thousand and Seven.

AN ACT PROTECTING AND PRESERVING HOME OWNERSHIP

1 *Whereas*, The deferred operation of this act would tend to
2 defeat its purpose, which is to provide forthwith mortgage
3 protection for existing and new home owners, therefore it is
4 hereby declared to be an emergency law, necessary for the
5 immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1 To provide for certain unanticipated obligations
2 of the commonwealth, to provide for an alteration of purpose for
3 current appropriations and to meet certain requirements of law,
4 the sums set forth in this section are hereby appropriated from the
5 General Fund unless specifically designated otherwise in this
6 section for the several purposes and subject to the conditions
7 specified in this section, and subject to the laws regulating the dis-
8 bursement of public funds for the fiscal year ending June 30,
9 2008. These sums shall be in addition to any amounts previously
10 appropriated and made available for the purposes of said items

7006-0011 For the costs incurred by the division of banks associated with licensure of loan originators pursuant to said chapter 255F; provided that the division may expend revenues in an amount not to exceed \$5,000,000 from the revenue received from administrative fees associated with said licensure fees and from civil administrative penalties pursuant to the provisions of chapter 255F of the General Laws; provided that, \$2,000,000 shall be expended from such revenue as grants for the operation of a pilot program

for best lending practices, first-time homeowner counseling for non-traditional loans and 10 or more foreclosure education centers pursuant to section 13 of this act and that the grants shall be awarded through a competitive application process under criteria created by the division and that no funds shall be expended from this item in the AA object class for the compensation of state employees for such program; and provided further, that notwithstanding any general or special law to the contrary, for the purpose of accommodating timing discrepancies between the receipt of revenues and related expenditures, the commissioner may incur expenses and the comptroller may certify for payment the amount not to exceed the lower of this authorization or the most recent revenue estimate, as reported in the state accounting system

5,000,000

1 SECTION 2. Chapter 183 of the General Laws is hereby
2 amended by inserting after section 6C the following section:—
3 Section 6D. Every mortgage and assignment of mortgage
4 secured by residential property, as defined in section 1 of
5 chapter 255E, presented for record, in which a mortgage broker,
6 as defined in said section 1 of said chapter 255E, is involved shall
7 contain or have endorsed upon it the name, post office address and
8 license number of the mortgage broker and, if applicable, the
9 mortgage loan originator, as defined in section 1 of chapter 255F,
10 responsible for placing the mortgage loan with the mortgagee.
11 This endorsement, or notation that no mortgage broker or mort-
12 gage loan originator was involved in the mortgage, if known, shall
13 be recorded as part of the mortgage or assignment of mortgage.
14 Failure to comply with this section shall not affect the validity of
15 any mortgage or the recording of any mortgage or assignment of
16 mortgage.

1 SECTION 3. Section 63A of said chapter 183, as so appearing,
2 is hereby amended by inserting after the word "interest", in line 2,
3 the following words:—, change an adjustable or variable rate to a
4 fixed rate.

1 SECTION 4. Said section 63A of said chapter 183, as so
2 appearing, is hereby further amended by striking out, in line 44,
3 the words "one-half of"

1 SECTION 5. Chapter 184 of the General Laws is hereby
2 amended by inserting after section 17B the following section:—

3 Section 17B½ No mortgagee who makes a loan to a first-time
4 home loan borrower, to be secured by a mortgage on owner-
5 occupied, 1 to 4 family real estate in the commonwealth, shall
6 make a subprime loan at a variable or adjustable rate of interest
7 unless the mortgagor affirmatively opts in writing for the variable
8 or adjustable rate subprime loan and receives certification from a
9 counselor with a third-party nonprofit organization that the mort-
10 gator has received counseling in person on the advisability of the
11 loan transaction; provided further that said third party nonprofit
12 organization shall have been approved by: (1) the United States
13 Department of Housing and Urban Development; (2) a housing
14 financing agency of the commonwealth; (3) the Massachusetts
15 Homeownership Collaborative; (4) or the regulatory agency which
16 has jurisdiction over the creditor. The commissioner shall main-
17 tain a list of approved counseling programs. At or before closing
18 such a loan, the mortgagee shall obtain evidence that the mort-
19 gator has completed an approved counseling program. If such
20 subprime mortgage loan is made by a mortgagee in violation of
21 this section, the variable or adjustable rate terms of the loan shall
22 not be enforceable and the mortgagee shall only be entitled to col-
23 lect an interest rate equal to the lesser of the original interest rate,
24 including any discounted rate, or the current adjusted interest rate
25 throughout the remaining term of the loan. The commissioner of
26 banks shall issue directives or guidelines or adopt regulations to
27 administer and carry out this section and to further define the
28 terms used in this section.

1 SECTION 6 Section 13 of chapter 186 of the General Laws,
2 as appearing in the 2006 Official Edition, is hereby amended by
3 inserting after the word "transfer", in line 17, the following
4 word:—, foreclosure.

1 SECTION 7 Said chapter 186, is hereby further amended by
2 inserting after section 13 the following section:—
3 Section 13A. Upon a foreclosure of residential real property
4 pursuant to chapter 244, a tenant, occupying a dwelling unit under
5 an unexpired term for years or a lease for a definite term in effect
6 at the time of the foreclosure by sale, shall be deemed a tenant at
7 will. Foreclosure shall not affect the tenancy agreement of a

8 tenant whose rental payment is subsidized under state or federal
9 law

1 SECTION 8. Chapter 244 of the General Laws is hereby
2 amended by inserting after section 35 the following section:—

3 Section 35A. (a) Any mortgagor of residential real property
4 located in the commonwealth consisting of a dwelling house with
5 accommodations for 4 or less separate households and occupied in
6 whole or in part by the mortgagor, shall have a 90 day right to
7 cure a default of a required payment as provided in such residen-
8 tial mortgage or note secured by such residential real property by
9 full payment of all amounts that are due without acceleration of
10 the maturity of the unpaid balance of such mortgage. The right to
11 cure a default of a required payment shall be granted no more than
12 10 times during the term of such mortgage note.

13 (b) The mortgagee, or anyone holding thereunder, shall not
14 accelerate maturity of the unpaid balance of such mortgage oblig-
15 ation or otherwise enforce the mortgage because of a default con-
16 sisting of the mortgagor's failure to make any such payment in
17 subsection (a) by any method authorized by this chapter or any
18 other law until at least 90 days after the date a written notice is
19 given by the mortgagee to the mortgagor.

20 Said notice shall be deemed to be delivered to the mortgagor
21 when delivered to the mortgagor or when mailed to the mortgagor
22 at the mortgagor's address last known to the mortgagee or anyone
23 holding thereunder.

24 (c) The notice required in subsection (b) shall inform the mort-
25 gator of the following:—

26 (1) the nature of the default claimed on such mortgage of resi-
27 dential real property and of the mortgagor's right to cure the
28 default by paying the sum of money required to cure the default;

29 (2) the date by which the mortgagor shall cure the default to
30 avoid acceleration, a foreclosure or other action to seize the home,
31 which date shall not be less than 90 days after service of the
32 notice and the name, address and local or toll free telephone
33 number of a person to whom the payment or tender shall be made;

34 (3) that, if the mortgagor does not cure the default by the date
35 specified, the mortgagee, or anyone holding thereunder, may take

36 steps to terminate the mortgagor's ownership in the property by a
37 foreclosure proceeding or other action to seize the home;

38 (4) the name and address of the mortgagee, or anyone holding
39 thereunder, and the telephone number of a representative of the
40 mortgagee whom the mortgagor may contact if the mortgagor
41 disagrees with the mortgagee's assertion that a default has
42 occurred or the correctness of the mortgagee's calculation of the
43 amount required to cure the default;

44 (5) the name of any current and former mortgage broker or
45 mortgage loan originator for such mortgage note securing the
46 residential property; and

47 (6) that the mortgagor may be eligible for assistance from the
48 Massachusetts Housing Finance Agency and the division of banks
49 and the local or toll free telephone numbers the mortgagor may
50 call to request this assistance.

51 (d) To cure a default prior to acceleration under this section, a
52 mortgagor shall not be required to pay any charge, fee, or penalty
53 attributable to the exercise of the right to cure a default. The
54 mortgagor shall pay late fees as allowed pursuant to section 59 of
55 chapter 183 and per-diem interest to cure such default. The mort-
56 gagor shall not be liable for any attorneys' fees relating to the
57 mortgagor's default that are incurred by the mortgagee or anyone
58 holding thereunder prior to or during the period set forth in the
59 notice required by this section. The mortgagee, or anyone holding
60 thereunder, may also provide for reinstatement of the note after
61 the 90 day notice to cure has ended.

62 (e) A copy of the notice required by this section and an affi-
63 davit demonstrating compliance with this section shall be filed by
64 the mortgagee, or anyone holding thereunder, in any action or pro-
65 ceeding to foreclose on such residential real property.

66 (f) A copy of the notice required by this section shall also be
67 filed by the mortgagee, or anyone holding thereunder, with the
68 commissioner of banks. Additionally, if the residential property
69 securing the mortgage loan is sold at a foreclosure sale, the mort-
70 gagee, or anyone holding thereunder, shall notify the commis-
71 sioner of banks, in writing, of the date of the foreclosure sale and
72 the purchase price obtained at the sale.

1 SECTION 9. Section 2 of chapter 255E of the General Laws,
2 as appearing in the 2006 Official Edition, is hereby amended by
3 striking out, in lines 34 to 39, inclusive, the words “, or to any
4 nonprofit agency or corporation incorporated under the laws of
5 the commonwealth for the purpose of assisting low to moderate
6 income households in the purchase or rehabilitation of family resi-
7 dences of four units or less and which holds tax-exempt status
8 granted under the provisions of Section 501(e)(3) or 501(c)4 of
9 the Internal Revenue Code”.

1 SECTION 10. Section 8 of said chapter 255E, as so appearing,
2 is hereby amended by striking out the third paragraph and
3 inserting in place thereof the following 7 paragraphs:—

4 The commissioner shall inspect a licensee’s relevant records
5 and evidence of compliance with the provisions of this chapter or
6 any rule or regulation issued hereunder and with any other law,
7 rule or regulation applicable to the conduct of the business for
8 which it is licensed under this chapter. For the purposes of such
9 inspection, said commissioner or a representative of the commis-
10 sioner shall have access to the offices and place of business,
11 books, accounts, papers, records and files of all such licensees.
12 Said commissioner, and any person designated by him, may
13 require the attendance and testimony of any person whom the
14 commissioner deems necessary relative to the conduct and opera-
15 tion of such business. The total cost for any such inspection,
16 which shall be paid by the licensee within 30 days after the receipt
17 of an invoice therefore, shall be in accordance with fees deter-
18 mined annually by the commissioner of administration pursuant to
19 section 3B of chapter 7, including expenses for necessary travel
20 outside the commonwealth for the purposes of conducting such
21 inspections.

22 During the course of such inspection a mortgage lender that has
23 made 50 or more home mortgage loans in the last calendar year
24 shall be examined for its compliance with fair lending laws
25 including but not limited to the requirements of the federal Equal
26 Credit Opportunity Act, Home Mortgage Disclosure Act, and the
27 Predatory Home Loan Practices Act. Such examination shall also
28 include an evaluation of such mortgage lender’s: (a) origination of
29 loans and other efforts to assist low and moderate income resi-

30 dents, without distinction, to be able to acquire or to remain in
31 affordable housing at rates and terms that are reasonable consid-
32 ering the lender's history with similarly situated borrowers, the
33 availability of mortgage loan products suitable for such bor-
34 rowers, and consistency with safe and sound business practices
35 (b) origination of loans and other efforts to assist low and mod-
36 erate income residents' ability to acquire or to remain in afford-
37 able housing; (c) origination of loans that show an undue
38 concentration and a systematic pattern of lending resulting in the
39 loss of affordable housing units; (d) efforts working with delin-
40 quent residential mortgage customers to facilitate a resolution of
41 the delinquency; and (e) other efforts, including public notice of
42 the scheduling of examinations and the right of interested parties
43 to submit written comments relative to any such examination to
44 the commissioner, as, in the judgment of the commissioner, rea-
45 sonably bear upon the extent to which a mortgage lender is com-
46 plying with the requirements of fair lending laws and helping to
47 meet the mortgage loan credit needs of communities in the com-
48 monwealth.

49 Upon the completion of such examination, the commissioner
50 shall prepare a written evaluation of such lender's record of per-
51 formance, which shall be open to public inspection upon request
52 and said written evaluation shall include: (a) the assessment fac-
53 tors utilized to determine the mortgage lender's descriptive rating;
54 (b) the commissioner's conclusions with respect to each such
55 assessment factor; (c) a discussion of the facts supporting such
56 conclusions; and (d) the mortgage lender's descriptive rating and
57 the basis therefor.

58 Based upon such examination, the mortgage lender shall be
59 assigned one of the following descriptive ratings: (a) outstanding
60 record of performance in meeting the mortgage loan credit needs
61 of communities in the commonwealth; (b) high satisfactory record
62 of performance in meeting the mortgage loan credit needs of com-
63 munities in the commonwealth; (c) satisfactory record of perfor-
64 mance in meeting the mortgage loan credit needs of communities
65 in the commonwealth; (d) needs to improve record of performance
66 in meeting the mortgage loan credit needs of communities in the
67 commonwealth; or (e) substantial noncompliance in meeting the
68 mortgage loan credit needs of communities in the commonwealth.

69 Notwithstanding the foregoing, the commissioner may establish
70 an alternative examination procedure for any mortgage lender,
71 which, as of the most recent examination, has been assigned a
72 rating of outstanding or high satisfactory for its record of perfor-
73 mance in meeting its community mortgage loan credit needs.

74 In considering an application from a licensed mortgage lender
75 for a renewal of a license under this chapter, the commissioner
76 shall consider, but shall not be limited to, the record of perfor-
77 mance of any such lender in accordance with this section. Said
78 record of performance may be the basis for the denial of any such
79 renewal application.

80 For the purposes of this section, no mortgage lender may
81 include a loan origination or loan purchase for consideration as
82 part of its examination under this section if another mortgage
83 lender claims the same loan origination or purchase for its review
84 under this section or under section 14 of chapter 167.

85 The commissioner shall adopt regulations implementing the
86 requirements of this section

1 SECTION 11. Section 10 of said chapter 255E, as so
2 appearing, is hereby amended by striking out the first sentence
3 and inserting in place thereof the following sentence:— Whoever
4 violates any provision of section 2 or any rule or regulation made
5 thereunder by the commissioner shall be punished by a fine of not
6 more than \$2,000 or by imprisonment for not more than 2 and
7 one-half years in a house of correction or by imprisonment for not
8 more than 5 years in the state prison, or by both such fine and
9 imprisonment.

1 SECTION 12. The General Laws are hereby amended by
2 inserting after chapter 255E the following chapter:—

3 CHAPTER 255F.
4 LICENSING OF MORTGAGE LOAN ORIGINATORS.

5 Section 1 As used in this chapter, the following words shall,
6 unless the context otherwise requires, have the following mean-
7 ings:—

8 "Commissioner", the commissioner of banks.

9 "Division", the division of banks.

10 "Entity", a person or entity that is a licensee under
11 chapter 255E, as regulated by the division.

12 "Mortgage loan originator", a natural person who:— (a) is
13 employed by or associated with 1 and not more than 1 entity; and
14 (b) negotiates, solicits, arranges, provides or accepts residential
15 mortgage loan applications, or assists consumers in completing
16 such applications, except that employees whose responsibilities
17 are limited to clerical and administrative tasks and who do not
18 solicit borrowers, accept applications, or negotiate the terms of
19 residential mortgage loans on behalf of the employer shall not be
20 considered mortgage loan originators and do not require licenses.

21 "Mortgage loan", a loan or an extension of credit, including,
22 but not limited to, an extension of credit pursuant to a contract or
23 an assigned contract for the sale of goods or services, made to a
24 natural person, the proceeds of which are to be used primarily for
25 personal, family or household purposes, and which is secured
26 wholly or partially by a mortgage on residential property.

27 "Residential property", real property located in the common-
28 wealth having thereon a dwelling house with accommodations for
29 4 or less separate households and occupied, or to be occupied, in
30 whole or in part by the obligor on the mortgage debt.

31 Section 2. No natural person shall act as a mortgage loan origi-
32 nator unless such person has first obtained a mortgage loan origi-
33 nator license from the commissioner. A natural person who meets
34 the definition of a mortgage loan originator prior to enactment of
35 this chapter shall file an application, comply with all the require-
36 ments of this chapter and obtain a license from the commissioner
37 within 180 days of the enactment of this chapter without being
38 required to comply with subsection (b) of section 3. An entity
39 shall not knowingly employ or retain a mortgage loan originator
40 unless the mortgage loan originator is licensed under this chapter.

41 Section 3. (a) The application for a mortgage loan originator
42 license shall be in the form prescribed by the commissioner and
43 shall contain the name, address and license number of the entity
44 with whom a mortgage loan originator is or will be employed or
45 associated with and other information as the commissioner may
46 require, including evidence of compliance with subsection (b).
47 The application shall also include a description of the activities of

48 the applicant, in such detail and for such periods as the commis-
49 sioner may require, and such further information as the commis-
50 sioner may require. The commissioner may require a background
51 investigation of each applicant for a mortgage loan originator
52 license by means of fingerprint checks by the criminal history
53 systems board pursuant to section 172 of chapter 6, and the
54 Federal Bureau of Investigation for state and national criminal
55 history records checks. The information obtained thereby may be
56 used by the commissioner to determine the applicant's eligibility
57 for licensing under this chapter. Receipt of criminal history
58 record information by a private entity is prohibited. Each applica-
59 tion for a license shall be accomplished by an investigation fee.
60 Investigation and license fees shall be determined annually by the
61 secretary of administration under the provisions of section 3B of
62 chapter 7, provided, that such total annual fees shall be no less
63 than \$500.

64 (b) An applicant shall have completed a residential mortgage
65 lending course, approved by the division, not later than the 2 year
66 period immediately preceding the date of the application.

67 Section 4. If the commissioner finds that the financial respon-
68 sibility, character, reputation, integrity and general fitness of the
69 applicant is such as to warrant belief that the applicant will act
70 honestly, fairly, soundly and efficiently in the public interest,
71 consistent with the purposes of this chapter, the commissioner
72 shall issue the applicant a license to engage in the business of a
73 mortgage loan originator upon payment of the required fees. If
74 the commissioner shall not so find, or if the applicant's criminal
75 history demonstrates any felony criminal convictions or other con-
76 victions or admissions to sufficient facts involving fraud or if the
77 applicant has had any adverse civil judgments involving fraudu-
78 lent dealings, the commissioner shall not issue a license and shall
79 notify the applicant of the denial. Within 20 days thereafter, the
80 commissioner shall enter upon the division's records a written
81 decision and findings containing the reasons supporting the denial
82 and shall forthwith give written notice thereof by registered mail
83 to the applicant. Within 30 days after receipt of such notice, the
84 applicant may seek judicial review of the denial in accordance
85 with section 14 of chapter 30A.

86 Section 5. A mortgage loan originator may transact business
87 only for an employing entity. Each original license issued to a

88 mortgage loan originator must be provided to and maintained by
89 the employing entity at the entity's main office. If the employ-
90 ment of a mortgage loan originator is terminated, the entity shall
91 return the mortgage loan originator's license to the division within
92 5 business days after termination. The reason for termination
93 shall be given in a format determined in rules and regulations of
94 the commissioner. For a period of 1 year after the termination of
95 employment, the mortgage loan originator may request the
96 re-assignment of the license to another entity by submitting an
97 application to the division, along with a fee established by the
98 division by rule. The return of the license of any mortgage loan
99 originator to the division that is not re-assigned to another entity
100 terminates the right of the mortgage loan originator to engage in
101 any residential mortgage loan origination activity until division
102 procedures have been followed to reactivate such license. The
103 license of any mortgage loan originator that has been returned to
104 the division and not re-assigned to another entity within 1 year of
105 termination of employment shall be cancelled.

106 Each license shall state the name of the mortgage loan origi-
107 nator licensee and the name and main office address of the entity
108 employing such mortgage loan originator.

109 The commissioner may establish an expedited re-assignment
110 process of a mortgage loan originator's license to another entity if
111 the reason for such re-assignment is directly related to increased
112 responsibilities or compensation.

113 The commissioner may adopt, amend or repeal rules and regu-
114 lations to aid in the administration and enforcement of this
115 chapter.

116 Section 6. Each application for a license shall be accompanied
117 by an investigation fee. Investigation and license fees shall be
118 determined annually by the secretary of administration under
119 section 3B of chapter 7 provided that such total annual fees shall
120 be no less than \$500. The license of a mortgage loan originator
121 shall expire annually. Each licensee, shall annually, on or before a
122 date to be determined by the commissioner, submit a license
123 renewal application. Said license renewal application shall be on
124 a form prescribed by the commissioner, signed under the pains
125 and penalties of perjury, containing such information as the com-
126 missioner may require, including evidence satisfactory to the

127 commissioner that the licensee has completed at least 8 hours of
128 residential mortgage lending continuing education courses
129 approved by the division during the 12 months immediately pre-
130 ceding license renewal. Failure of the licensee to satisfy the con-
131 tinuing education requirement shall render the mortgage loan
132 originator ineligible for renewal and such license shall be deemed
133 to be inactive. A mortgage loan originator neglecting to file such
134 application or failing to amend the same within 15 days of notice
135 from the commissioner directing the same shall be deemed inac-
136 tive. Inactive mortgage loan originators are prohibited from
137 engaging in business as a mortgage loan originator.

138 Section 7 The commissioner may suspend, revoke or refuse to
139 renew any license issued pursuant to this chapter if the commis-
140 sioner finds that:— (1) the licensee has violated this chapter or
141 any rule or regulation adopted hereunder, or any other law applic-
142 able to the conduct of its business; (2) any fact or condition exists
143 which, if it had existed at the time of the original application for
144 such license, would have warranted the commissioner in refusing
145 to issue such license; or (3) the licensee has committed any fraud,
146 misappropriated funds or misrepresented any of the material par-
147 ticulars of a mortgage loan transaction.

148 Except as provided in section 8, no license shall be revoked or
149 suspended except after notice and a hearing thereon pursuant to
150 chapter 30A. Any order issued pursuant to this section shall be
151 subject to judicial review in accordance with section 14 of said
152 chapter 30A.

153 A licensee may surrender a license by delivering to the com-
154 missioner written notice that it hereby surrenders such license, but
155 such surrender shall not affect the civil or criminal liability of the
156 licensee for acts committed before such surrender.

157 Section 8 (a) If the commissioner determines, after giving
158 notice of and opportunity for a hearing, that a licensee has
159 engaged in an act or practice constituting a violation of a provi-
160 sion of this chapter or a rule, regulation or order hereunder, the
161 commissioner may order such licensee to cease and desist from
162 such unlawful act or practice and take such affirmative action as
163 in the commissioner's judgment will affect the purposes of this
164 chapter.

165 (b) If the commissioner makes written findings of fact that the
166 public interest will be irreparably harmed by delay in issuing an

167 order under subsection (a) the commissioner may issue a tempo-
168 rary cease and desist order. Upon the entry of a temporary cease
169 and desist order, the commissioner shall promptly notify, in
170 writing, the licensee and the employing entity affected thereby
171 that such order has been so entered, the reasons therefore, and that
172 within 20 days after the receipt of a written request from such
173 licensee, the matter will be scheduled for hearing to determine
174 whether such temporary order shall become permanent and final.
175 If no such hearing is requested and none is ordered by the com-
176 missioner, the order shall remain in effect until it is modified or
177 vacated by the commissioner. If a hearing is requested or ordered,
178 the commissioner, after giving notice of and opportunity for a
179 hearing to the licensee and the employing entity subject to said
180 order shall, by written findings of fact and conclusions of law,
181 vacate, modify or make permanent the order.

182 (c) No order under this section, except an order issued pursuant
183 to subsection (b), may be entered without prior notice of and
184 opportunity for a hearing. The commissioner may vacate or
185 modify an order under this section upon finding that the condi-
186 tions which required such an order have changed and that it is in
187 the public interest to so vacate or modify.

188 Any order issued pursuant to this section shall be subject to
189 judicial review in accordance with section 14 of chapter 30A.

190 Section 9. The commissioner may enforce the provisions of
191 this chapter, or restrain any violations thereof, by filing a civil
192 action in any court of competent jurisdiction.

193 Section 10. Whoever violates any provision of section 2 or
194 any rule or regulation thereunder by the commissioner shall be
195 punished by a fine of not more than \$2,000 or by imprisonment
196 for not more than 2 and one-half years in a house of correction or
197 by imprisonment for not more than 5 years in the state prison or
198 by both such fine and imprisonment. Each day such violation
199 occurs or continues shall be deemed a separate offense. The
200 penalty provision of this section shall be in addition to any other
201 law applicable to a licensee or other person for violating section 2
202 or any rule or regulation made thereunder.

203 Section 11. (a) Whenever the commissioner finds that any
204 licensee or exempt person under section 2 has violated this
205 chapter or any rule or regulation adopted thereunder, or any other

206 law of the commonwealth applicable to the conduct of a mortgage
207 loan originator on residential property in the commonwealth, the
208 commissioner may, by order, in addition to any other action autho-
209 rized under this chapter or any rule or regulation made thereunder,
210 impose a penalty upon the person which shall not exceed \$5,000
211 for each violation up to a maximum of \$100,000 for such viola-
212 tion plus the costs of investigation. The commissioner may
213 impose a penalty which shall not exceed \$5,000 for each violation
214 of this chapter, or any rule or regulation adopted thereunder, by a
215 person other than a licensee, plus the costs of investigation.

216 (b) Nothing in this section shall limit the right of any individual
217 or entity who has been injured as a result of any violation of this
218 chapter by a licensee, or any person other than a licensee, to bring
219 an action to recover damages or restitution in a court of competent
220 jurisdiction.

221 (c) Any findings or order issued by the commissioner pursuant
222 to this section shall be subject to review as provided in
223 chapter 30A.

224 Section 12. (a) Whenever the commissioner determines that
225 any person has, directly or indirectly, violated any section of this
226 chapter or any rule or regulation adopted thereunder, applicable to
227 the conduct of a mortgage loan originator on residential property
228 in the commonwealth, or any order issued by the commissioner
229 under this chapter or any written agreement entered between the
230 licensee and the commissioner, the commissioner may serve upon
231 that person a written notice of intention:—

232 (1) to prohibit the person from performing in the capacity of a
233 principal employee on behalf of any licensee for a period of time
234 that the commissioner considers necessary;

235 (2) to prohibit the person from applying for or obtaining a
236 license from the commissioner for a period up to 36 months
237 following the effective date of an order issued under
238 subsection (b) or (c); or

239 (3) to prohibit the person from any further participation, in any
240 manner, as a mortgage loan originator in the commonwealth or to
241 prohibit the person from being employed by, an agent of, or oper-
242 ating on behalf of a licensee under this chapter or any other busi-
243 ness which requires a license from the commissioner.

244 (b) A written notice issued under subsection (a) shall contain a
245 written statement of the facts that support the prohibition and shall
246 give notice of an opportunity for a hearing to be held thereon. The
247 hearing shall be fixed for a date not more than 30 days after the
248 date of service upon the commissioner of the request for a
249 hearing. If the person fails to submit a request for a hearing
250 within 20 days of service of notice under subsection (a), or other-
251 wise fails to appear in person or by a duly authorized representa-
252 tive, the party shall be considered to have consented to the
253 issuance of an order of prohibition in accordance with the notice.

254 (c) In the event of the consent under subsection (b), or if after a
255 hearing the commissioner finds that any of the grounds specified
256 in the notice have been established, the commissioner may issue
257 an order of prohibition in accordance with subsection (a) as the
258 commissioner finds appropriate.

259 (d) An order issued under subsection (b) or (c) shall be effec-
260 tive upon service upon the person. The commissioner shall also
261 serve a copy of the order upon the licensee of which the person is
262 an employee or on whose behalf the person is performing. The
263 order shall remain in effect and enforceable until it is modified,
264 terminated, suspended, or set aside by the commissioner or a court
265 of competent jurisdiction.

266 (e) Except as consented to in writing by the commissioner, any
267 person who, pursuant to an order issued under subsection (b) or
268 (c), has been prohibited from participating in whole or in part as a
269 mortgage loan originator may not, while the order is in effect,
270 continue or commence to perform in the capacity of a mortgage
271 loan originator, or otherwise participate in any manner, if so pro-
272 hibited by order of the commissioner, in the conduct of the affairs
273 of:—

274 (1) any licensee under this chapter;

275 (2) any other business which requires a license from the
276 commissioner; or

277 (3) any bank, as defined under section 1 of chapter 167 or any
278 subsidiary thereof

279 Section 13. The commissioner may suspend, revoke or refuse
280 to renew the license of the entity employing any licensed mort-
281 gage originator if said commissioner finds that: (a) the entity
282 knew or should have known that the mortgage loan originator has

283 violated this chapter or any rule or regulation adopted hereunder,
284 or any other law applicable to the conduct of its business; (b) the
285 entity knew of any fact or condition to exist which, if it had
286 existed at the time of the original application for such license,
287 would have warranted the commissioner in refusing to issue such
288 license; (c) the mortgage loan originator has committed any
289 fraud, misappropriated funds or misrepresented any of the mate-
290 rial particulars of a mortgage loan transaction approved by the
291 entity; or (d) has failed to comply with the reporting requirements
292 set forth in section 15.

293 Section 14. Each licensee shall, when directed by the commis-
294 sioner, permit the commissioner or a duly authorized representa-
295 tive to inspect its relevant records and evidence of compliance
296 with the provisions of this chapter or any rule or regulation issued
297 hereunder and with any other law, rule and regulation applicable
298 to the conduct of a mortgage loan originator licensed under this
299 chapter.

300 Section 15. An entity employing any licensed mortgage origi-
301 nator shall annually report the following to the commissioner of
302 banks:— (1) the total number of loans originated by all such
303 licensees; (2) the geographic distribution of such loans; (3) the
304 number of defaults of such loans; and (4) any such other informa-
305 tion the commissioner may require consistent with the provisions
306 of this chapter.

1 SECTION 13. The division of banks, in consultation with the
2 city of Boston, the department of housing and community devel-
3 opment, the Massachusetts Housing Finance Agency and the
4 Massachusetts Bankers Association, shall develop a pilot program
5 to identify best practices for financial institutions to provide first
6 time homebuyer loans, to provide for foreclosure prevention for
7 at-risk homeowners, and to assist approved counseling programs
8 with in-person counseling pursuant to section 17B½ of
9 chapter 184 of the General Laws, as provided for in item 7006-
10 0011 in section 1.

11 Such pilot program, shall also provide for best lending and bor-
12 rowing practices for consumers and mortgagees in cities or towns
13 with: (1) housing units within low or moderate income census
14 tracts as defined by the United States census bureau; or (2) high

15 foreclosure activity as measured by residential foreclosure peti-
16 tions filed over the total number of 1 to 4 family housing units
17 within such city or town. Such guidelines and counseling shall
18 provide for best practices that:— attain a minimal risk of high
19 cost lending; have a demonstrated ability to avoid foreclosures;
20 have a demonstrated record of pricing that ensures uniformity of
21 lending; avoid a disparity of pricing in low and moderate income
22 census tracts; and maintain foreclosure prevention practices that
23 meet or exceed standards met by government sponsored enter-
24 prises.

25 Such pilot program shall also provide for foreclosure training to
26 10 or more foreclosure education centers for counseling and assis-
27 tance to owner occupied 1 to 4 family dwellings in such geo-
28 graphic areas.

29 On or before December 31, 2008 the division of banks shall
30 report the results of such pilot program to the general court.

1 SECTION 14. The division of banks shall maintain a foreclo-
2 sure database that shall include, but not be limited to, foreclosure
3 activity by mortgage lenders, mortgage holders and mortgage
4 servicers, as well as the mortgage brokers and loan originators
5 who placed these mortgage loans in the commonwealth, including
6 information relative to the original mortgagee, and any subsequent
7 assignee. Based on the information received, the commissioner of
8 banks shall produce a report at least annually to track develop-
9 ments and trends of mortgage foreclosure on residential property
10 in the commonwealth, including but not limited to, an analysis of
11 the pre-foreclosure notices submitted to the commissioner com-
12 pared to the final foreclosure notices, and any trends or patterns
13 relative to the geographic location of the residential properties,
14 and interest rates. The report shall be available to the public upon
15 request, shall be filed with the joint committee on financial serv-
16 ices and the commissioner shall make it available in any other
17 manner that the commissioner may choose.

1 SECTION 15. Section 5 shall take effect on December 31,
2 2007.

1 SECTION 16. Section 8 shall apply to all mortgages of resi-
2 dential real property located in the commonwealth consisting of a
3 dwelling house with accommodations for 4 or less separate house-
4 holds and occupied in whole or in part by the mortgagor which
5 secures a loan before, on or after the effective date of said section;
6 provided, that said section 8 shall not apply to such mortgages
7 accelerated or whose statutory condition has been voided under
8 the terms of the mortgage to secure the note, prior to the effective
9 date of section 35A of chapter 244 of the General Laws

1 SECTION 17. Section 12 shall take effect on May 1, 2008.

**REPORT OF THE MORTGAGE SUMMIT
WORKING GROUPS**

*Recommended Solutions to Prevent Foreclosures and to Ensure
Massachusetts Consumers Maintain the Dream of
Homeownership*

April 11, 2007

ADD 000022

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Executive Summary

In response to rising foreclosures both locally and nationally, increasing evidence of mortgage fraud, and other developments in the mortgage market, the Commissioner of Banks convened a Mortgage Summit in November 2006 with participants from government, non-profit, and the mortgage lending industries to develop a foreclosure prevention strategy. From this Summit, two Working Groups were formed in December 2006 and began meeting in January 2007: one looking at rules and enforcement and the second focusing on consumer education and foreclosure assistance. The purpose of the Working Groups was to take the ideas of the Summit and develop concrete recommendations to both help consumers confronted with the loss of their homes as well as to address longer-term issues affecting communities across the Commonwealth of Massachusetts.

This report summarizes the recommendations of the Working Groups and is intended to be used by all stakeholders, including legislators, regulators, law enforcement, the mortgage lending industry, community and non-profit groups, and others to help address the rising number of subprime and nontraditional mortgage loans, growing evidence of mortgage fraud, and the subsequent rise in foreclosures in Massachusetts.

Below is a summary of some of the recommendations in this report:

- Criminalize the act of mortgage fraud.
- Support the multi-state licensing system for mortgage lenders and brokers being developed by the Conference of State Bank Supervisors.
- Raise the standards for applicants to become licensed as a mortgage lender or mortgage broker.
- Prohibit abusive foreclosure rescue schemes
- Increase enforcement resources at the Division of Banks to supervise existing mortgage lenders and brokers and, if applicable, mortgage loan originators.
- Implement changes to the foreclosure process to better protect consumers, including a required Notice of Intention to Foreclose, during which no additional fees could accrue, and a right to cure provision to provide a consumer the opportunity to pay all payments in default.
- Stop unfair and deceptive marketing and advertising practices.
- Recommend guidance to clarify that borrowers should be qualified based on their ability to repay a loan at a fully-indexed rate, particularly non-fully amortizing mortgages or so-called Hybrid adjustable rate mortgages.
- Increase funding for pre- and post-purchase homebuyer counseling.
- Create a dedicated website devoted to financial education resources in Massachusetts.
- Increase support and resources for foreclosure prevention counseling and intervention to help consumers facing the loss of their homes.
- Encourage lender forbearance as an alternative to foreclosure.

- Develop a foreclosure intervention mortgage program for those persons at risk of foreclosure who could still qualify for financing with flexible terms and credit enhancements.

Implementing the recommendations in this report may involve State or federal legislation or regulation. In addition, regulators, law enforcement officials, financial institutions, regulated entities, community and non-profit groups, as well as consumers themselves all have a role in preventing mortgage abuses. Some recommendations identify funding needs while others identify education programs.

Despite differences of opinion on some of the recommendations or the means to implement them, the participants of the Working Groups are all committed to do what they can to address the growing problems facing consumers and communities across Massachusetts.

I. Background and Format of Report

During 2006, the Commonwealth's real estate market started to cool and interest rates began to rise. These factors contributed significantly to the first substantial rise in foreclosure filings in many years in both Massachusetts and nationally. Factors such as slowing home sales, the upward re-pricing of adjustable rate mortgages, declining equity positions, and reduced opportunities to consolidate existing home mortgage and consumer credit debt into lower monthly payments have significantly challenged many homeowners. In addition, the seasoning of a growing number of subprime loans, nontraditional mortgage loans, and instances of mortgage fraud have also contributed to the increase in foreclosures.

In an effort to address the increasing number of mortgage foreclosures across Massachusetts, Commissioner of Banks Steven L. Antonakes called a Mortgage Summit in November 2006 with the stated purpose of bringing together a cross-section of stakeholders to develop a statewide foreclosure prevention strategy that would put into place lasting measures to help consumers confronted with the loss of their homes.

The full day long Mortgage Summit was attended by 49 individuals representing 29 divergent organizations and included representatives of the banking, credit union, mortgage lender, and mortgage broker industries; representatives from varied non-profit organizations, including numerous groups that focus primarily on matters related to housing, fair lending, and foreclosure prevention; and representatives of city, state, and federal governments.

Following the Mortgage Summit, the Division of Banks established two Working Groups and solicited the voluntary participation of summit participants and other interested parties. The first Working Group was charged with focusing on "Rules and Enforcement". The second Working Group was tasked with concentrating on "Consumer Education and Foreclosure Assistance".

Staffed with 25 to 30 participants each, the Working Groups began meeting in January 2007. Since that time, each Working Group met nearly every two weeks at the Division of Banks for generally two to three hours at a time. In addition, subcommittees were formed that met on their own to develop ideas and recommendations.

The pages that follow lay out specific recommendations for consideration by policy makers, regulators, legislators, industry, non-profit organizations, and other interested parties.

While the meetings of the Working Groups were facilitated by and this report was produced by personnel of the Division of Banks, the recommendations that follow represent those of the individuals assigned to the Working Groups. It should also be noted that not all of the participants agreed with each of the recommendations included here. The recommendations in this report, however, were either agreed to unanimously or by a significant majority of Working Group members.

The Division of Banks would like to express its appreciation to all of the individuals that gave substantially of their time. Their hard work and dedication is evidenced in the pages that follow.

II. Mortgage Summit Agenda

Mortgage Summit

November 14, 2006

Agenda

- 8:30 a.m. Coffee and Registration
- 9:00 a.m. Welcome and Introductions
- 9:15 a.m. Division of Banks and Office of the Attorney General:
Update and Overview of Recent Actions
- 9:45 a.m. Roundtable Discussion: Rules and Enforcement
*Potential Discussion Topics: Regulatory Oversight & Legislation
Guidelines / Best Practices
Suitability / Ability to Repay*
- 11:00 a.m. Break
- 11:15 a.m. Review of Foreclosure Trends
Julia Reade, Senior Research Associate, Federal Reserve Bank of Boston
- 11:45 a.m. Foreclosure Prevention & Intervention Strategies
LaRayne Hebert, District Director, NeighborWorks America
- 12:15 p.m. Lunch
- 1:00 p.m. Roundtable Discussion: Education and Outreach
*Potential Discussion Topics: Pre-Closing Education
Post-Closing Education
Outreach Initiatives*
- 2:00 p.m. Roundtable Discussion: Foreclosure Assistance
*Potential Discussion Topics: Foreclosure Counseling
Funding
Post Foreclosure / Reestablishing Credit*
- 3:00 p.m. Wrap Up and Next Steps
- 3:30 p.m. Adjourn

III. Mortgage Summit Attendees

Steven	Antonakes	Massachusetts Division of Banks
Cassie	Bardard	Freddie Mac
Steve	Bennett	Ecumenical Social Action Committee
James W.	Blake	HarborOne Credit Union
Helen	Blatz	Consumer Credit Counseling Services/MMI
Juan	Bonilla	Lawrence Community Works, Inc.
Tom	Callahan	Massachusetts Affordable Housing Alliance
Jim	Campen	The Fair Housing Center of Greater Boston
Jesse	Caplan	Office of the Attorney General
Helena	Chaikin	Homeowners Options for Massachusetts Elders
Prabai	Chakrabati	Federal Reserve Bank of Boston
Mary Ann	Clancy	Massachusetts Credit Union League
David	Cotney	Massachusetts Division of Banks
William F.	Cotter	Boston Department of Neighborhood Development
Kevin	Cuff	Massachusetts Mortgage Bankers Association
Tim	DeLessio	Federal Deposit Insurance Corporation
Carol	DeLorey	Brockton Interfaith Community/Nehemiah
James M.	Demers	New England Financial Services Association
Brenda	Doyle	Office of Consumer Affairs & Business Regulation
Rita	Farrrell	Massachusetts Housing Partnership Fund
Lisa	Fiandaca	Massachusetts Housing Finance Agency
Alicia	Flanagan	Massachusetts Division of Banks
Gina	Govoni	Massachusetts Housing Partnership Fund
Marty	Gruer	NeighborWorks America
Ginny	Hamilton	The Fair Housing Center of Greater Boston
Kristen	Harol	Lawrence Community Works, Inc.
LaRayne	Hebert	NeighborWorks America
Bonita	Irving	Massachusetts Division of Banks
Kevin F.	Kiley	Massachusetts Bankers Association
Pamela	Kogut	Office of the Attorney General
Denise	Leonard	Massachusetts Mortgage Association
Joseph A.	Leonard, Jr.	Massachusetts Division of Banks
Richard	Olson	Boston Community Capital
Robert	Padgett	Freddie Mac
John	Prendergast	Massachusetts Division of Banks
Robert	Pulster	Ecumenical Social Action Committee
Len	Raymond	Homeowners Options for Massachusetts Elders
Julia	Reade	Federal Reserve Bank of Boston
Kathleen	Schreck	Massachusetts Mortgage Bankers Association
Jon	Skarin	Massachusetts Bankers Association
Nicole	St. Peter	Office of Consumer Affairs & Business Regulation
Nancy	Sullivan	Homeowners Options for Massachusetts Elders
Janica S.	Tatarka	Office of Consumer Affairs & Business Regulation
Janna	Tetreault	Citizens' Housing and Planning Association
Kathleen	Tullberg	Massachusetts Community & Banking Council
Cortina	Vann	Massachusetts Affordable Housing Alliance
Richard	Walker	Federal Reserve Bank of Boston
Odette	Williamson	National Consumer Law Center
Kenneth A.	Willis	Federal Home Loan Bank of Boston

IV. Members of the Working Group on Rules and Enforcement

Rafael	Abislaiman	International Institute of Greater Lawrence
Jon	Auger	Middlesex Savings Bank
W. David	Brennan	Cape Cod Five Cents Savings Bank
Thomas	Callahan	Massachusetts Affordable Housing Alliance
Jim	Campen	Fair Housing Center of Greater Boston
Mary Ann	Clancy	Massachusetts Credit Union League
Bill	Cotter	Boston Department of Neighborhood Development
Kevin M.	Cuff	Massachusetts Mortgage Bankers Association
James M.	Demers	New England Financial Services Association
Chris	Dunn	South Shore Savings Bank
Mark L.	Fisher	Winchester Co-operative Bank
Ginny	Hamilton	Fair Housing Center of Greater Boston
Jack	Hamilton	Medway Co-operative Bank
Kevin F.	Kiley	Massachusetts Bankers Association
Denise M.	Leonard	Massachusetts Mortgage Association
Barry J.	McCarter	Hyde Park Savings Bank
James	McGaugh	Citigroup Inc.
Peter	Milewski	Massachusetts Housing Finance Agency
Richard	Olson	Boston Community Capital
Andrew	Olszowy	Federal Reserve Bank of Boston
Judith P.	Pfeffer	Westborough Bank
Robert	Pulster	Ecumenical Social Action Committee
Leonard F.	Raymond	Homeowner Options for Massachusetts Elders
Julia	Reade	Federal Reserve Bank of Boston
Kathleen C.	Schreck	Mortgage Network, Inc.
Odette	Williamson	National Consumer Law Center

Facilitated by: David J. Cotney, Division of Banks

Staff Assistance: Alicia Flanagan, Division of Banks

V. Members of the Working Group on Consumer Education and Foreclosure Assistance

LaTanya M.	Arnold	Massachusetts Affordable Housing Alliance
James W.	Blake	HarborOne Credit Union
Prabal	Chakrabarti	Federal Reserve Bank of Boston
Jacqueline	Cooper	Financial Education Associates, Inc.
Tim	Delessio	Federal Deposit Insurance Corporation
Lisa	Fiadaca	Massachusetts Housing Finance Agency
Aida	Franquiz	Boston Private Bank & Trust Company
Gina	Govoni	Massachusetts Housing Partnership
Marty	Gruer	NeighborWorks America
Donna	Haynes	Central Bank
LaRayne	Hebert	NeighborWorks America
Catherine	Jones	Spillane Consulting Associates
Ana	Luna	Arlington Community Trabajando
Mary Lees	Miller	Cape Cod Cooperative Bank
Mary	Moura	Wainwright Bank
Ronald	Pugliese	HSBC
Robert	Pulster	Ecumenical Social Action Committee
Steven	Quigley	Braintree Cooperative Bank
Leonard F.	Raymond	Homeowner Options for Massachusetts Elders
Julia	Reade	Federal Reserve Bank of Boston
Mayte	Rivera	Community & Enterprise Development Center, Northern Essex Community College
Jon	Skarin	Massachusetts Bankers Association
Nancy D.	Sullivan	Homeowner Options for Massachusetts Elders
Janna	Tetreault	Citizens' Housing and Planning Association
Kathleen	Tullberg	Massachusetts Community & Banking Council
Cortina	Vann	Massachusetts Affordable Housing Alliance
Kenneth A.	Willis	Federal Home Loan Bank of Boston
Juan P.	Bonilla	Lawrence CommunityWorks

Facilitated by: John M. Prendergast, Division of Banks

Staff Assistance: Alicia Flanagan, Division of Banks

VI. Recommendations of the Rules & Enforcement Working Group

The Rules & Enforcement Working Group was formed to examine more deeply structural issues concerning the regulation and supervision of the mortgage industry and the rules applicable to mortgage transactions, the foreclosure process in Massachusetts, as well as the enforcement tools available to regulatory and law enforcement agencies.

The Working Group met first in early January and reviewed the issues that arose during the Mortgage Summit. These included: regulatory oversight and licensing requirements, existing statutes and regulations and additional recommended requirements, industry guidelines and best practices, suitability and ability to repay standards, and the foreclosure process in Massachusetts.

Based on the issues before it, the Working Group divided itself into the following five committees:

- Barriers to Entry
- Data & Research
- Foreclosure Process
- Legislative Issues
- Products and Practices

Barriers to Entry

There was a strong consensus among both consumer and industry representatives that the barriers to entry for licensed mortgage lenders and mortgage brokers should be revisited. When the licensing of mortgage lenders and mortgage brokers was first implemented in 1992¹, the barriers to entry were set purposefully low to reflect existing businesses that had been in business years before licensing and to encourage competition and allow for the greatest consumer choice. However, recent enforcement actions by the Division of Banks and the Office of the Attorney General, an increase in foreclosure filings, and a dramatic increase in the number of licensees and a continued increase in applications to operate as a mortgage lender or a mortgage broker have raised the possibility that the barriers, which have changed little in the last 15 years, are now too low.

While there were only about 150 licensed mortgage lenders and mortgage brokers in 1992, today there are over 2,000. In addition, the Division of Banks receives 8 to 10 new applications each week, or nearly 500 per year. There has not been an accompanying increase in resources at the Division to supervise this growing trend. In addition, many of the new entrants over the last several years have minimal experience in the mortgage industry and, especially for mortgage brokers, very little net worth to absorb financial stress. This results in an increased risk for problems and violations after licensure.

To address these issues, the Working Group offers the following recommendations:

Increase the Net Worth/Bonding Requirements for Mortgage Lenders and Brokers

All applicants for a mortgage lender or mortgage broker license must demonstrate "financial responsibility". To ensure financial responsibility, the Division of Banks reviews personal and business financial statements, personal and corporate tax returns, as well as personal credit report information. In addition, for mortgage lenders, there is currently a \$100,000 minimum adjusted net worth requirement after excluding certain disallowed assets. However, a mortgage lender may substitute a surety bond for no greater than \$75,000 so long as the net worth and bond together are at least \$100,000. Consequently, a mortgage lender can be licensed in Massachusetts with an adjusted net worth as little as \$25,000. Similar to the fees for mortgage brokers and lenders, the net worth requirements have not changed since 1992.

For mortgage brokers, there is no minimum net worth requirement set in statute and an applicant for a license need only show that they have a minimum positive adjusted net worth.

The effect of these requirements is that a mortgage lender or broker can operate in Massachusetts on a thinly capitalized basis. In addition, with such little financial commitment required, an applicant has very little financial risk. While most companies operate with significantly more than the minimum required net worth, companies at the

¹ See G.L. c. 255E.

margin are unable to absorb losses or other market pressures. In addition, there could be very little capital or assets left for consumers who suffer harm.

The Working Group recommends setting net worth requirements for mortgage brokers and increasing net worth requirements for mortgage lenders. The Division should examine the requirements in other states to set a requirement at the upper end of the spectrum of what is currently required. In addition, the Division should establish a bonding or surety requirement so that there is some residual value for consumers that have been harmed to seek redress in the event that no other form of restitution exists.

Increase the License and Examination Fees for Mortgage Lenders and Brokers

Fees for mortgage lenders and brokers have not changed in the last 15 years. Currently, the annual license fee for mortgage brokers is \$500 while a mortgage lender is \$1,000 per year. A per branch fee of \$50 per location is also assessed to all licensees. In addition, the Division of Banks charges a per diem examination fee of \$220 per examiner for each examination. At the time these fees were first imposed, they were meant to pay for the costs of supervision for the Division. However, inflation has eroded the value of these fees.

At a minimum, these fees should be raised to account for the rise in inflation. Using the Consumer Price Index (CPI) the license fees set in 1992 in today's dollars would equal \$750 per year for a mortgage broker, \$1,500 per year for a mortgage lender, and \$75 per branch location per year. Increases above the rate of inflation could also be considered. *However, the Working Group's recommendation is contingent upon these increased fees being devoted to an increase in enforcement resources at the Division of Banks.* As noted above, staffing at the Division has not kept pace with the rapid growth in the number of licensees. Without additional resources, the Division will be unable to appropriately supervise the mortgage industry for the increasing instances of mortgage fraud and unfair and deceptive practices. Any increase in fees should be used for investigative, enforcement, and supervisory staffing purposes and to fund foreclosure prevention efforts.

Long-term, a risk-based assessment system should be developed. Similar to the risk-based assessment system that was implemented for banks and credit unions in 1997, such an assessment would be imposed on an annual basis to replace existing license and examination fees and should reflect the full costs of supervision for the Division.

Increase the Experience and Education Requirements for Mortgage Lenders and Brokers

The Division's licensing regulations for mortgage brokers and lenders require that "An Applicant shall demonstrate to the Commissioner's satisfaction that the Applicant, and its applicable officers and employees, possess the necessary educational and business experience to engage in the business of a mortgage lender" or "mortgage broker"². The Division's Regulatory Bulletin 5.1-102 requires that an applicant for a mortgage broker or lender license must possess a minimum of one year of experience working in the

² 209 CMR 42.03(2)(d) and 42.06(2)(d).

mortgage industry. However, applicants with less than one year may substitute up to six months experience with the completion of a formal course of training.

Given the highly complex nature of the mortgage industry in general, and Massachusetts laws and regulations in particular, it is unlikely that anyone can gain a sufficient understanding of all the requirements in one year. While most licensees have a clear understanding of the industry standards, many new entrants possess minimal experience and can obtain a license to work with consumers in what is likely the most significant financial transaction of their lives. A mortgage broker or lender should not be given a license to operate in Massachusetts until they have a demonstrated knowledge and understanding of all the complexities of mortgage lending.

The Working Group recommends that the experience requirements for mortgage lenders be raised to a minimum of five years and the requirements for mortgage brokers be raised to a minimum of three years.

Licensing of Mortgage Loan Originators

While a mortgage broker or mortgage lender must obtain a license at the company level, employees of the broker or lender are not required to be licensed in Massachusetts. Loan originator licensing is a growing phenomenon nationally, with over 20 states now requiring either the licensing or registration of mortgage originators in some form.

A major concern in the mortgage lending process is the relationship between the borrower and the mortgage originator. With growing instances of mortgage fraud, there is currently an inadequate mechanism to be able to track mortgage originators and to prevent rogue employees from moving from one company to another. In addition, there are no testing or education requirements for mortgage originators to work in Massachusetts. In states that require licensing of mortgage originators, there are usually some types of education and continuing education requirements to ensure that originators are fully informed on all of the obligations in Massachusetts.

Although not unanimous, and strongly opposed by the banking community, the majority of the Working Group supports the concept of licensing of mortgage loan originators. There are currently five bills pending that would require either licensing or registration of originators. The Working Group does not endorse any specific bill but does urge the Legislature to consider the following in its deliberations:

- The bill should ensure that the employing lender or broker remains fully accountable for the actions of its employees. A license given to a mortgage originator should not absolve the company from performing due diligence on prospective employees or from ensuring that its originators adhere to all policies and requirements.
- The bill must address issues of “portability”, meaning that an originator should not have the ability to take their license with them wherever they work. Rather, the employer should be required to report the reasons for leaving to the Division and an originator should be required to apply for reinstatement at a new employer.

- The bill should grant the Division of Banks full enforcement authority over originators with the same ability to suspend or ban individuals as it has for mortgage brokers and lenders.
- The bill should ensure that the mandate is fully funded. There will be start-up costs associated with licensing an estimated 30,000 to 40,000 mortgage originators in Massachusetts. In addition, additional resources will be required at the Division to supervise these entities. Licensing fees for mortgage originators should cover the costs of supervision and be devoted to increasing the Division's resources.

As noted above, the recommendation to support the licensing of mortgage loan originators was not unanimous. Most of the banking members felt strongly that originator licensing did not directly target the issue of foreclosures in the short-term and could be used as a marketing tool against exempt institutions.

Remove the Non-Profit Exemption

Shortly after the passage of Chapter 255E and the licensing of mortgage lenders and brokers in 1992, an exemption was added for non-profit entities assisting low- and moderate-income borrowers to purchase or refinance a home. Working Group participants, particularly consumer group representatives, believed that although there was a burden associated with obtaining a license, non-profit organizations should be held to the same experience and education requirements as for-profit companies. In addition, it was feared that the designation as a non-profit under Section 501(c)(3) or 501(c)(4) of the Internal Revenue Code could also be used as a loophole by some entities.

Other Issues Considered

In addition to the above recommendations, the Working Group also considered a suggestion by the banking community to impose a 180 day moratorium on issuing mortgage broker and mortgage lender licenses. The proponents of the moratorium stated that the establishment of a moratorium would give the Division, the Legislature, and the Patrick Administration time to evaluate current market practices, and to identify instances of consumer fraud or unfair and deceptive practices. The majority of the Working Group did not support the moratorium believing that it would not have any short-term or long-term impact on foreclosures since, presumably, no one applying for a license would bear responsibility for the current increase in foreclosures.

Data & Research

One of the difficulties in measuring the foreclosure problem is the lack of reliable data. While there are studies published and headlines announcing increasing foreclosures, most statistics cite foreclosure filings, not actual foreclosures. Many homeowners that receive notice of a foreclosure are able to avoid foreclosure, either through paying off the amount in default, restructuring the existing loan, or by selling their house prior to foreclosure. However, once a foreclosure occurs, the transfer of title is recorded at the Registry of Deeds. Because most mortgages are sold in the secondary market, nearly all the loan servicers or note holders are not the lender of record. In addition, there is no record on either the original mortgage or other filing of who the broker was in the transaction. Consequently, it is very difficult to quantify and track which lenders or brokers originate mortgages that are most likely to end in foreclosure.

The Working Group recommends the following initiatives to aid in tracking foreclosure data, analyze trends, and take appropriate action when warranted:

Create mandatory pre-foreclosure and foreclosure filing notices, with a copy to the Division of Banks.

In order to accurately measure and analyze foreclosure trends, basic information needs to be collected. In order to accomplish this, the Working Group recommends the following:

- A copy of the notice filed at the commencement of a foreclosure proceeding (pre-foreclosure notice) should be filed with the Division of Banks which includes basic information, including the name of the borrower, the property address, the mortgage holder, the mortgage servicer, if applicable, the original lender, and, if applicable, the licensed originator (see also the recommendation below under *Foreclosure Process* which would create a separate Notice of Intention to Foreclose).
- A copy of the final recorded foreclosure should be filed with the Division of Banks. This notice should include, in addition to the basic information above, the following: the name of the broker or mortgage originator, if applicable; whether it is a residential, one-to-four family or multi-family property; and whether the property is owner-occupied. Other information may also be included, including the type of mortgage, interest rate, etc.

In developing the notices above, various sources should be reviewed to determine what information is currently collected and available that could be easily incorporated.

The establishment of a foreclosure database

Using the data from the pre-foreclosure and foreclosure filings, an accurate and timely database of foreclosure information should be created. The data would be utilized to "red flag" any peak foreclosure activity by a particular lender, broker, or servicer, at any given time. In addition, there would more reliable data from which to look at trends across industries.

A filing fee for each pre-foreclosure and foreclosure filing

The holder or servicer of a mortgage should be required to pay a filing fee to cover the costs of administration of the notices and for the establishment of the foreclosure database. The fee should be sufficient to cover all start-up and ongoing operational costs of monitoring these trends.

Foreclosure Process

Each foreclosure of a residential mortgage is a personal, social and financial tragedy for the household facing foreclosure. The loss of a home represents the loss of a family's shelter and its most precious financial resource. Foreclosures also have a destabilizing effect on the neighborhood in which the homes are located due to homeowner turnover and because absentee speculators may replace the families who were forced from the homes.

Some believe that Massachusetts laws lack basic protections for homeowners facing foreclosure. Most other states have incorporated some form of homeowner protection in their foreclosure laws. However, Massachusetts foreclosure laws have changed little since their enactment in 1857.³

Four problems with existing Massachusetts law stand out:

- Massachusetts homeowners get inadequate notice of a foreclosure sale before the sale occurs. The only pre-foreclosure notice required by Massachusetts law may be sent as few as 14 days before the sale.
- Massachusetts law does not include a right to cure a default to prevent foreclosure. Unlike many states, Massachusetts does not allow a homeowner to avoid foreclosure by paying missed payments and allowable costs. This means that some Massachusetts homeowners lose their homes even though they can pay their lenders the entire amount they are in default.
- Massachusetts law allows foreclosure sales without a prior court proceeding. Many homeowners may have defenses to foreclosure including that no default has occurred or that the mortgage was obtained by fraud, unfair lending practices, or other scam. Unlike tenants facing eviction, Massachusetts homeowners have no court hearing in which to raise these defenses. Once a foreclosure sale is completed, the defenses are cut off by law.
- Massachusetts homeowners get no notice of what happens at the foreclosure sale of their home. There is no requirement that a lender inform a homeowner of the results of a foreclosure sale, including who buys their property, the amount paid, or whether the homeowner is entitled to any of the proceeds of the sale. Unscrupulous lenders use this to retain excess sale proceeds unlawfully or to inflate sale fees and costs.

Given the current foreclosure situation, Massachusetts foreclosure laws and procedures need to be updated to incorporate more protections for struggling homeowners. However, any changes to current statutes should also recognize that, in some cases, foreclosure is necessary so that a lender can preserve the asset (the home) it has in its portfolio.

Based on the above issues, the Working Group offers the following recommendations to improve the foreclosure process by granting consumers additional rights:

³ Stat. 1857 c. 33 § 1.

Notice of Intention to Foreclose

Many consumer advocates have noted that, along with the rise of foreclosure filings in Massachusetts, mortgage servicers and other mortgage holders have significantly decreased the time it takes to foreclose on a property. To address this issue, the Working Group recommends that a notice of intention to foreclose be given to a homeowner under the following terms:

- Notice must be provided 90 days before the residential mortgage is accelerated.
- The notice must contain information about the right to cure.
- No attorney fees or other costs may be charged during this period.

Ideally, such a notice would be accompanied by a listing of resources that consumers could contact for information on how to address their problems. A statewide network of certified or approved counselors could assist consumers facing foreclosure. In order to accomplish this, there would have to be some means of creating an approved list of counselors, either through the Department of Housing and Community Development or some other agency. In addition, there would have to be a funding mechanism to offset the costs of some of these services. There are bills that have been filed during the current legislative session that would create a fund to be administered by the Department of Housing and Community Development that would provide grants to non-profit agencies for the purposes of assisting consumers facing foreclosure. This could be a means to achieve this objective.

Right to Cure the Default

The Working Group felt that it was important to offer consumers facing foreclosure the right to cure the default. This is particularly true for consumers that first learn that they are in default and facing foreclosure who present a payment to the lender, only to learn that there are additional fees payable to bring the mortgage out of default. During the 90-day "notice of intention to foreclose" noted above, no additional fees could be charged. In addition, after the expiration of the 90-day period, only "reasonable" attorney fees should be imposed. Consumers should have the right to cure a default up to one hour prior to the scheduled beginning of a foreclosure sale.

Post Sale Procedure

As noted above, although a consumer may be entitled to any residual value from the sale of a property after foreclosure, there is no obligation to notify the consumer of their rights. Some servicers have sent notices of the disposition of the property to the consumer at their last known address, being the property which was foreclosed upon. The Working Group recommends that a lender should be required to give a consumer that has been foreclosed upon a notice of sale or disposition of the property. At a minimum, the notice should:

- Give the former homeowner notice of the foreclosure sale details.
- Notice of sale or disposition should list the amount of money received and how it was distributed, and if the former homeowner is entitled to any surplus.

- Give a full accounting of the costs and fees associated with the sale.

In addition, best efforts should be made to identify an accurate address to send the post-foreclosure notice.

Other Issues Considered

The Working Group was unable to come to a consensus around a suggestion that Massachusetts provide a judicial review of residential foreclosures. Mortgages or deeds of trust are foreclosed judicially by statute or custom in 23 states or territories.⁴ Under a judicial review system, a homeowner of a residential property (owner-occupied, 1 to 4 family dwelling) can raise all available defenses to the contract or the foreclosure. In effect, the holder of the mortgage would have to file an action and obtain a judgment to foreclose.

Although some believe judicial review would give consumers added protections, other members of the Working Group worried that the added time and cost of pursuing a foreclosure through a judicial review process could increase the risks and therefore the costs of mortgage credit for all Massachusetts consumers. Others dispute whether a judicial process would, in fact, significantly increase the cost of foreclosing on a mortgage. The impact of a judicial review process is also unclear, including the length of delay and the additional cost or administrative burden on the court system.

⁴ Delaware, Florida, Guam, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico, South Carolina, South Dakota, and Wisconsin. In addition, in Maryland, the process is supervised by the court; North Carolina requires a hearing before a clerk.

Legislative Issues

In addition to legislative issues specific to other committees, the Legislative Committee looked at several other legislative options. The Working Group recommends that the following issues be pursued through legislative changes:

Multi-State Licensing System for Mortgage Brokers and Lenders

The Working Group strongly supports the efforts by the Division of Banks working with the Conference of State Bank Supervisors (CSBS) to develop a national mortgage licensing system that will provide uniform licensing applications for residential mortgage lenders and mortgage brokers, as well as a central repository of information about licensing and public enforcement actions.

With mortgage fraud on the rise both nationally and locally, unfortunately, companies and individuals can perpetrate fraud in one state and, even after being caught, set up in another state with little chance of detection. The national licensing system will assist regulators to prevent fraud and to prevent problem entities and individuals from obtaining a license.

Legislation has been introduced in Massachusetts (H1028) by the House Chairman of the Joint Committee on Financial Services, Ronald Mariano to authorize the Division to participate in the multi-state licensing system and to conduct national criminal background checks on all license applicants and current licensees using fingerprint data through the Federal Bureau of Investigation. *The Working Group strongly supports this legislation and the multi-state licensing system.*

Although not opposed to the multi-state licensing system, one group stated that certain issues such as fees and privacy should be more thoroughly addressed prior to implementing the system. It should be noted that CSBS has announced the creation of an Industry Advisory Council to address industry concerns such as these.

Criminalization of Mortgage Fraud

Mortgage fraud is among the fastest growing white collar crimes of this decade. It is a trend quickly sweeping through the country that can impact the financial health of families, property values and industry reputations. Mortgage fraud reports nearly doubled between 2003 and 2004 according to a U.S. Treasury Department study last November of suspicious activity reports filed by financial institutions. More than \$1 billion in suspected fraudulent mortgages were reported to the Federal Bureau of Investigation in 2005⁵. This amount represents a \$429 million increase. A concern exists relative to fraud which has slipped through the real estate boom and that is surfacing now.

Mortgage fraud generally relates to a mortgage transaction involving a purposeful misrepresentation of various factors in the process for the benefit of one or more parties. Most often, such transactions involve the misrepresentation of property appraisals, home

⁵ SAR Activity Review -- By the Numbers (Issue 6, May 2006).

values and the credit worthiness of buyers. In essence, someone lies or misrepresents a fact on a statement that a lender uses to make a loan.

Mortgage fraud manifests itself primarily in two ways: fraud for housing and fraud for profit. Fraud for housing represents the bulk of the number of instances of fraud and is perpetrated by the borrower in order to obtain a mortgage. Because there is an intention to repay the loan, there are few losses associated with this type of mortgage fraud. On the other hand, fraud for profit is perpetrated by one or more individuals for the purpose of extracting some type of value out of the transaction. This could involve property flipping, money laundering, or other crimes. In addition, a faulty or fake appraisal is at the basis of many fraudulent transactions. Valuations may be subjective but fraud is not. Many appraisers feel pressured to overstate their valuations to continue to receive assignments by brokers, lenders and real estate agents. Finally, some mortgage lenders and brokers have purposely steered customers, often those with low-incomes or with limited English speaking abilities, into loans they cannot afford, by using misleading tactics.

Misrepresentations of any size not only hurt the borrowers, but also the industry, the economy, the real estate market and specific neighborhoods. Passing laws that punish the crime of mortgage fraud and aggressively prosecuting those individuals may help to slow or stop its growth.

Georgia was the first State in the nation to enact a law specifically criminalizing mortgage fraud and allowing scam artists to be charged with racketeering. Arizona, Colorado, Mississippi, New Jersey, Oklahoma, Texas and Utah are considering laws that would make mortgage fraud a specific crime. Only four states, Utah, Michigan, North Carolina and Arkansas, make it illegal to force appraisers into making false valuations.

Massachusetts currently does not have a mortgage fraud statute. In addition, current fraud statutes are inadequate to completely address the magnitude of this issue.

Summary of Recommendations

The thrust of this recommendation is to make it a crime to commit mortgage fraud. Those who commit fraud in the mortgage process need more than a slap on the wrist and should be vigorously prosecuted. The issue centers around accountability, deterrence and punishment. The proposed provisions seek to:

- Clarify what constitutes fraud in the mortgage industry, including patterns of such fraud, and the making of fraud a felony;
- Clarify specific actions that constitute fraud within the appraisal process and eliminate the manipulation of appraisals;
- Provide prosecutors with the flexibility necessary to try cases more efficiently because mortgage fraud can overlap many jurisdictions;
- Grant authority to the District Attorneys and to the Attorney General to conduct investigations and to prosecute mortgage fraud cases;
- Hold homebuyers at the same level of punishment and culpability as other players involved in fraudulent transactions;

- Permit forfeiture of all real and personal property involved in a fraudulent mortgage transaction;
- Result in a penalty of up to 10 years imprisonment and/or a \$50,000.00 fine for violations; and
- Result in a penalty of up to 20 years imprisonment and/or a \$500,000.00 fine for multiple cases of mortgage fraud.

Foreclosure Rescue Schemes

The dramatic rise in foreclosures in Massachusetts and across the nation has also resulted in the growth of so-called mortgage or foreclosure rescue schemes. Foreclosure rescue fraud is simply another type of real estate-related fraud. The Office of the Attorney General has taken a keen interest in protecting consumers from these schemes. The Attorney General filed two civil enforcement actions in the fall of 2006 to stop foreclosure rescue schemes, one against a Brockton attorney and another against a North Shore mortgage broker, and another civil action in the spring of 2007 against nineteen defendants, including mortgage brokers, a real estate company and closing attorneys.

There are two common types of foreclosure rescue schemes: distressed property consultants and distress property purchasers. Distressed property consultants offer phantom help to homeowners in distress, typically promising to “buy them time” or “save the home” by negotiating with the homeowners’ creditors. In exchange for a fee that ranges from \$1,000 to \$2,500, the distressed property consultant does little or nothing and essentially abandons the homeowner to a fate that might have been prevented with professional intervention.

Distressed property purchasers lead homeowners to sign over the deed to their property by telling them they can stay in their home and pay rent until they get back on their feet financially, often promising that the home will be held in trust for their benefit. Many homeowners do not realize they are selling their home to the “rescuer,” and most receive no financial benefit from the transaction, even when their equity in the property is greater than what they owe. Commonly, the homeowners’ rental payments are much higher than their mortgage payments. Using a variety of devices, the “rescuer” ultimately strips the home of its equity, often by selling it to a third party and the homeowner ends up facing eviction.

Summary of Proposed Legislation

The Working Group recommends proposed legislation to protect homeowners when dealing with distressed property consultants and property purchasers. With corrective legislation, bail out consultants would be required to detail all of their services in a clearly written contract and permit homeowners to cancel anytime before all services have been performed. The provisions seek to:

- Require distressed property consultants to provide homeowners with a written contract listing all services;
- Require the consultant contract to contain a right to cancel at any time;

- Prohibit the consultant from receiving any compensation until all services have been performed;
- Require purchasers to provide homeowners with a written contract that lists the terms of the sale and makes it clear that the home is actually being sold;
- Permit the homeowner to cancel the sales contract for five business days after it is signed;
- Require the purchaser to make a determination that the homeowner has the ability to make rental payments and to buy the home back prior to the sale;
- Require the purchaser to pay the homeowner at least 82% of the fair market value of the home at the time title is transferred;
- Permit the homeowner who remains in the home under a rental agreement to cancel the rental agreement at any time;
- Require the purchaser to record the purchase contract with the county recorder of deeds so that any subsequent purchaser is put on notice; and
- Mandate that a violation of these provisions is a violation of the consumer protection laws.

Products & Practices

During the past several years the evolution of risk-based pricing and subprime lending has presented consumers with tremendous choices and opportunities. However, the improved access to credit that has resulted from innovative nontraditional and subprime mortgage products has not come without both cost and consequences.

Risk-based pricing provides an intended fair cost of borrowing to higher-risk consumers who would not otherwise qualify for conventional mortgage financing. The dramatic increase in delinquencies and foreclosures that has resulted from increased subprime lending activity demonstrates the severe consequences for many borrowers that have taken out these loans. There is also fear of the potential effects of high foreclosure rates on certain communities, especially low- and moderate-income neighborhoods with high concentrations of immigrant or minority borrowers, where foreclosure rates are the highest.

In reviewing existing product choices and industry practices, the variety of opinions emerged at both the committee and Working Group levels. Lenders feel that existing requirements are sufficient and that additional limitations could hurt borrowers by restricting or limiting product choices. Restrictive guidelines could result in the unintended consequences of needy and deserving borrowers being denied access to credit. There is also a belief that existing guidelines and requirements should be enforced by fully staffed and funded regulators and law enforcement before any new statutory or regulatory requirements are imposed.

Housing agencies, credit counseling organizations, and consumer advocacy organizations argue that uniform, standard loan underwriting criteria or "suitability" standards would result in equitable and fair access to credit, fair pricing and an appropriateness of product for all borrowers and support sustainable homeownership. There is also the belief that proper regulation of loan products and processes will level the playing field for quality lenders who already follow the rules and engage in ethical and fair lending practices.

As an overarching theme of the Working Group, it was agreed that *it should be a fundamental goal of all parties in a mortgage transaction that borrowers only obtain loans they can reasonably be expected to repay based on all information available at the time the loan is made and that all borrowers understand the terms of the loan.*

The following are recommendations by the Working Group to guide industry practices and the development or adaptation of mortgage products:

Subprime, Nontraditional Mortgage, and Hybrid ARM Product Lending Guidance Should Be Applicable to All Types of Lenders

It was agreed that there is a specific subset of mortgage products that appear to be at the center of the mortgage lending and foreclosure crisis, including: subprime loans, nontraditional loans (including interest-only loans and payment option ARMs) and short-term teaser rate Hybrid ARMs (including 2/28 & 3/27).

On October 4, 2006, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the National Credit Union Administration (the Agencies) issued an interagency guidance relative to nontraditional mortgage product risks. (Nontraditional mortgage products include interest-only mortgages and payment option ARMs, or other mortgage products that do not fully amortize.) This interagency guidance applies to all banks and their subsidiaries, bank holding companies and their nonbank subsidiaries, savings associations and their subsidiaries, savings and loan holding companies and their subsidiaries, and credit unions. The guidance addresses many of the concerns noted above with regard to nontraditional mortgages, including documentation of income, ability to repay, and “payment shock”.

Payments on nontraditional loans can increase significantly when the loans begin to amortize. Commonly referred to as “payment shock,” this is of particular concern for payment option ARMs where the borrower makes minimum payments that may result in negative amortization. Under the guidance, lenders should analyze a borrower’s ability to repay the debt by final maturity at the fully-indexed rate. This analysis should not be based on an over-reliance of credit scores as a substitute for income verification in the underwriting process.

The Guidance also states that lenders should clearly disclose the risks that borrowers may assume in a nontraditional mortgage product. In addition to apprising consumers of the benefits of nontraditional mortgage products, providers should take appropriate steps to alert consumers to the risks of these products, including the likelihood of increased future payment obligations.

Recognizing that the federal interagency guidance does not cover a majority of non-bank entities originating loans in the Commonwealth, the Division of Banks, in cooperation with the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR), developed parallel guidance for licensed mortgage brokers and mortgage lenders in Massachusetts. The Guidance was issued in proposed format for comments on November 14, 2006, and became final in the form of a Regulatory Bulletin on January 2, 2007⁶. The guidance adopted by the Agencies and the Division helps to promote the uniform application of consumer protections for all borrowers.

While the nontraditional mortgage guidance goes a long way in addressing abusive practices associated with these products, the guidance does not address so called Hybrid ARM products, including 2/28 and 2/27 loans. Under these fully-amortizing products, a very low initial fixed rate for 2 or 3 years is followed by an adjustable rate period of 27 or 28 years. Similar to nontraditional mortgage products, there is a significant payment shock associated with these products. In addition, a prepayment penalty that extends beyond the teaser rate fixed period prevents many consumers from refinancing into a more conventional fixed rate or adjustable rate product.

To address these concerns, the Agencies released a proposed Statement on Subprime Mortgage Lending (Statement) on March 2, 2007. Similar to the nontraditional

⁶ See Regulatory Bulletin 5.1-103, “Guidance on Nontraditional Mortgage Product Risks”.

mortgage guidance, the Statement would apply to all state and federally chartered banks and credit unions and their nonbank subsidiaries. The proposed Statement addresses the issues raised above relative to the risks of these Hybrid ARM products. *Once finalized, the Working Group strongly encourages the Division to issue a parallel Statement or guidance to licensed mortgage brokers and lenders to ensure a level playing field and that consumers receive the full protections of the Statement.*

Steering borrowers to higher cost loans when they may qualify for lower costs loans is inappropriate.

One potential way to address this would be for all loan applications originated with the intent to be sold in the secondary market be first submitted to automated underwriting systems, (for example, Freddie Mac or Fannie Mae) prior to recommending a nontraditional or subprime mortgage product. If a borrower is eligible for traditional conventional financing using automated underwriting, such a product with applicable terms and conditions should be presented along with other financing options. This would allow the borrower to make an informed choice between various mortgage financing options.

Stop Unfair and Deceptive Marketing Practices

The Division of Banks, the Office of Consumer Affairs, and the Office of the Attorney General should increase their current efforts to collaborate and identify false, deceptive, or misleading advertising practices, including offers for “easy credit” or “low-cost credit”. These agencies should work with lending groups, trade associations, and consumer groups to develop a code of conduct for advertising. In addition, these agencies should consider convening a meeting of the editorial boards of the major media outlets, including print, broadcast, and electronic, to draw attention to the advertisements placed with their organizations and to remind them of their obligation to police the content of advertisements. Finally, the agencies should use their enforcement authority to go after anyone using unfair or deceptive marketing practices.

It should be noted that Representative Kevin G. Honan has filed a bill (H1237) on behalf of Boston Mayor Thomas Menino that would define certain unfair and deceptive advertising practices.

Require Anti-tying Disclosure by Real Estate Brokers

The Division of Banks, the Office of Consumer Affairs, and the Board of Registration of Real Estate Brokers & Salespersons should work together to review the practices of real estate brokers and salespersons that refer clients to mortgage lenders and brokers. Some of those real estate brokers are part of a “captive” organization, meaning an affiliated mortgage company or mortgage brokerage firm offers mortgage financing to clients of real estate brokers. Even with independent real estate brokers, there may be incentives to refer clients to a particular lender or broker. Notice or disclosure should be given to home buying consumers that the purchase of a home is not contingent on arranging financing through any specific lender or broker referred by the Realtor.

Additional Recommendations

In addition to the above recommendations, the Working Group also offers the following suggestions:

- Pre-payment penalties should not be charged after the initial reset period of an ARM product.
- Full, simple, and clear disclosure of all the features of the loan that might affect the monthly payment and borrower equity, should be provided.
- Full, simple, and clear disclosure of the incremental cost of each of the risk layering features of the approved loan should be provided.
- Changes in loan terms at or just prior to closing that adversely affect the borrower by increasing costs, fees, or rates or changing other terms are inappropriate and should be considered predatory.
- Require that the name and license number of the mortgage broker be added to the mortgage so that it becomes a public record.
- Require all licensed mortgage lenders and mortgage brokers to report through the annual report to the Division of Banks the number of loans that they originated that went into foreclosure.
- Require all licensed mortgage lenders and mortgage brokers to report through the annual report to the Division of Banks the number of loans originated in Massachusetts that meet the definition of a high APR loan (HAL) under the Home Mortgage Disclosure Act (HMDA)⁷ and the percentage of all loans originated in Massachusetts that are HALs.
- Based on the HAL data reported by mortgage lenders and mortgage brokers, consideration should be given to the following:
 1. If the majority of a lender's or broker's business are HALs, the lender or broker must disclose this to the customer in writing, along with information that better pricing and terms may be available from another lender.
 2. If the majority of a mortgage lender's or broker's closed loan business is defined as HALs, a separate license designation could identify them as a High APR lender or broker. This High APR identification would also have to appear in all advertising.

Other Issues Considered

The Working Group discussed the concepts of "suitability" and "fiduciary duty". This standard is a familiar practice in the securities industry, where brokers have a fiduciary duty to their client. Basically, a suitability standard would require a lender to

⁷ Under HMDA, lenders are required to report the spread between the APR on the loan and the comparable Treasury rate if the spread exceeds three percentage points on a first lien and five percentage points on a second lien mortgage. These loans are sometimes referred to as "High APR" loans or "Higher-Priced" loans. This is not to be confused with a "high cost home mortgage loan" as defined under G.L. c. 183C.

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only make a loan to a borrower so long as the product was suitable based on an evaluation of the borrower's individual circumstances and needs. Consumer advocates argue that a suitability standard would not be overly burdensome and is appropriate to ensure that a consumer is not steered to a product that is clearly unsuitable for him or her. Many lenders contend that a suitability standard is far too subjective and could in fact restrict credit to many borrowers, particularly members of protected classes who are some of the very borrowers a suitability standard is meant to protect. There was a lack of consensus, therefore on what to recommend regarding the concept of suitability.

VII. Recommendations of the Consumer Education & Foreclosure Assistance Working Group

After the Mortgage Summit, the Consumer Education & Foreclosure Assistance Working Group was tasked with taking the comments from the Summit to draft more specific recommendations. Specifically, the Working Group was responsible for issues such as: homebuyer and homeowner education and counseling, effective means for outreach to communities most affected by increasing foreclosures, assistance and resources for consumers faced with foreclosure, foreclosure intervention and rescue programs, and ways to fund these programs.

The Working Group divided into two committees to develop more concrete recommendations concerning these issues:

- Education and Counseling
- Foreclosure Intervention Products and Services

Education & Counseling

Objective: To recommend ways to inform the general public about available resources for pre-purchase education, post-purchase support and financial education.

In achieving this objective, the Working Group stresses three points that should be emphasized to all consumers:

- Consumers need to get informed and educated early in the process, whether that is early in the homebuying process or early in the credit problem stage, before the foreclosure process begins.
- Prevention is key: A homebuyer that avoids the loan they can't afford or plans for unforeseen problems down the road is less likely to face foreclosure.
- Buyers have to take responsibility to educate themselves. Relying on others to act in your interest will only open yourself up to trouble.

The Working Group recommends distributing information by two main approaches:

Statewide Campaigns

The Working Group recommends developing several different statewide campaigns to provide broad education to a wide variety of Massachusetts residents.

Grassroots Approach

A grassroots approach is essential to reaching people across Massachusetts that may not be aware of the existing resources available to assist them in making important financial decisions because they are not tapped into homebuyer education groups, community development corporations, or other local entities.

As an example of a grassroots approach, the Working Group recommends that the Greater Boston Civic Engagement Initiative (CEI) be used as a model. CEI was established in 2002 as a three-year \$1 million effort to increase nonpartisan voter registration and mobilization in low-income communities and communities of color with low rates of voter participation. CEI invests in community-based organizations, such as community development corporations, health centers, service providers and ethnic alliances that include voter registration activities as one component of their work. The theory is that since they are embedded in their communities, they are trusted and have credibility to encourage voter participation as part of engagement in the local community. In the first year, 19 organizations in Boston, Chelsea, Salem, and Lynn received one-year grants in the range of \$15,000-\$30,000 and registered nearly 7,000 new voters, among other accomplishments.

Both methods will include messages targeted to different groups:

- First-Time Homebuyers

- Current Homeowners Interested in Learning More Information
- Current Homeowners at Risk of Losing Their Homes

The messages should further be provided in multiple languages and to people of various ages (young families versus elders).

The Working Group recommends that a partnership of government, non-profit, and industry groups be formed to identify specific entities to carry out the following actions and to oversee the initiative as a whole.

Short-Term Actions:

1. Statewide Campaign: State Agencies Should Support Homebuyer Education

It should be Massachusetts public policy to support the importance of homebuyer education. State agencies and state legislators should be equipped with the tools to refer consumers to available resources. A directory of housing counseling and other resources should be developed by the Department of Housing and Community Development and distributed to all state agencies and all state legislators to better serve clients and constituents.

2. Grassroots Approach: Initiative to Inform Local Communities

A. Regional Meetings

Convene regional meetings or forums to bring together “change agents”: local officials, chambers of commerce, local non-profit organizations, members of the Massachusetts Municipal Association, local real estate agents, community development corporations, housing partnerships, other community-based organizations and community leaders. The “change agents” will all use the same unified, simple message and have resources to back up the message. The method used to educate and encourage “change agents” could be modeled after traditional voter turnout techniques. The regional meetings would provide education on the issue of predatory lending and foreclosures.

Create a packet of information to distribute that will include:

- Data by community (collect data on which communities have high rates of subprime lending; which communities are experiencing high rates of foreclosure).
- What the issues are (how do foreclosures affect local communities and neighborhoods; what is the fiscal impact for a municipality?).
- What can communities do? (ask local lenders to convene financial education seminars; send “Don’t Borrow Trouble” brochures to all town residents; start their own initiative to combat foreclosures).
- Copies of the “Don’t Borrow Trouble” brochures which include the 1-800 number for the Division of Banks hotline should be given to homebuyer counseling agencies, other community-based organizations and municipalities to distribute.

- Standardized form for change agents to use when providing information to consumers. The form could capture financial information and could be used to refer the consumer on for additional support or to determine if the consumer is at risk for foreclosure.
- Local officials should also be provided with information on the steps taken by other communities, e.g. Boston, Brockton and Lawrence.

B. Utilize Local Media Outlets

- Contact local newspapers and encourage the editors to run stories about subprime and predatory lending; consider obtaining “guest” columns to distribute to various newspapers.
- Educate local media about subprime and predatory lending and the negative impact it has had on their community.
- Contact local radio stations.
- Utilize local cable television. Community members can ask their local cable stations to run previously taped segments, including one segment that could be run statewide in multiple languages.
- Contact television stations to determine if they could donate air time to run previously recorded videos.

3. Grassroots Approach: Workshops to Inform Consumers

Encourage community-based non-profit organizations to hold workshops on post-purchase issues. Some non-profit organizations offer post-purchase classes. The Working Group recommends that these organizations increase their focus on predatory lending, refinancing and financial planning for the future. This will provide information to both homeowners before they experience financial problems and may capture homeowners that are already at risk for losing their homes and get them connected with services faster.

Long-Term Actions

1. Statewide Campaign: New Marketing Strategy

Massachusetts needs to develop a new way to reach people with the resources and information already available. A new statewide marketing strategy should be developed and a public spokesperson(s) should be identified. The Working Group recommends developing a competition and pair college students with local advertising and marketing firms to develop new messages about the importance of financial education and understanding mortgage products.

This competition could be modeled after the CHAPA and Federal Home Loan Bank of Boston’s successful Affordable Housing Development Competition. That competition matches graduate students with professionals in the development community and provides the opportunity to combine classroom experience with real-world practice in affordable-housing development.

A similar approach could be used for a marketing competition to match college students with marketing professionals to develop new ways to reach out to the broader community about the importance of financial education. This can also present an opportunity for partnerships with organizations such as the American Marketing Association (AMA) – Boston Chapter. Associations such as these can introduce this initiative to their collegiate members or affiliates, where they can apply their marketing skills in a real-world situation. This also provides an opportunity for awareness and visibility among college students themselves who may soon be entering the home buying market.

2. Statewide Campaign: Website on Financial Education

The State should develop a website dedicated to financial education and existing resources in Massachusetts. The website should be developed and maintained by the Office of Consumer Affairs and Business Regulation and should model other successful websites like the State of Pennsylvania's Office of Financial Education website (www.moneysbestfriend.com).

The Working Group also recommends tapping into existing websites that may offer some of this information such as The Beehive (www.beehive.org), the state's Virtual Gateway, and other state-initiative websites.

3. Statewide Campaign: Legislation Filed to Create a Home Preservation Fund

At least three legislative petitions were filed for the 2007-2008 session regarding foreclosure and include the creation of funds to be used to preserve homeownership. One of the bills filed (S747/H1290) calls for the creation of a \$10 million fund to be used for grants and loans to homeowners who are victims of predatory lending and are facing foreclosure and for grants and loans to non-profits to conduct education campaigns, counseling, legal services, and refinance assistance. At a hearing on that bill, it was suggested that if law enforcement officials recover judgments in cases alleging unfair or deceptive conduct by predatory mortgage lenders or brokers, they be authorized to contribute some portion of those recoveries to the Fund.

Under the bill, the Department of Housing and Community Development would be tasked with determining eligibility criteria to gain access to the funds. The Working Group recommends that, if implemented, high priority should be given to expanding the capacity of community-based organizations to assist local residents on credit and foreclosure issues in areas of the state with the highest levels of high-cost loans and foreclosures.

In addition to a state funding mechanism, those who are responsible for causing the current foreclosure crisis should help to solve the problem. If a foreclosure fund is established to help consumers facing foreclosure, a significant portion of those funds should be devoted to helping consumers stay in their homes as well as to counseling consumers to help repair their credit and to avoid getting into trouble again (see recommendations below under *Foreclosure Intervention Products and Services*).

Foreclosure Intervention Products and Services

The purpose of the Foreclosure Intervention Products and Services Committee was to try to find ways to reduce the number of foreclosures in the future, while at the same time trying to help those individuals who are in the process of foreclosure through products or services.

Widely published statistics show a growing foreclosure problem in Massachusetts. The current housing market slowdown, the upward re-pricing of adjustable rate mortgages have made it difficult for many consumers facing foreclosure to refinance into a more affordable loan. In addition, The Working Group believes that the additional reasons for the increase in foreclosure include the following:

- Fraud
- Exotic mortgages to unsophisticated borrowers
- Speculators
- Stated-income loans
- Loans with low initial interest rates which qualify a borrower and then adjust to interest rates that exceed the borrower's capability to pay

As a result of these issues, the Working Group recommends a number of options to mitigate the ongoing problems occurring in the Massachusetts marketplace:

Enhance the Mortgage Hotline

The Division of Banks offers a "1-800" number or mortgage hotline for consumers to call seeking help. In the past, the Division of Banks has partnered with the National Consumer Law Center to create resources for Division staff to use when consumers call who have been victimized by predatory lending practices. The Division should establish a similar model for consumers facing foreclosure. Division staff should have lists of resources to refer consumers to that need counseling or help in refinancing to avoid foreclosure. In addition, trained bilingual staff should be available to assist consumers who do not speak English.

Also, NeighborWorks America currently operates a hotline: 888-995-HOPE (www.995hope.org). The Working Group recommends that the Division of Banks consider the NeighborWorks model as a best practice to learn more what their process has been like.

Develop a list of foreclosure counselors

A statewide directory of counselors should be developed and made available to staff at the Division for the Mortgage Hotline for consumers facing foreclosure. There are currently bills pending before the Legislature that would create a fund to be administered by the Department of Housing and Community Development that would provide grants to non-profit agencies for the purposes of assisting consumers facing foreclosure. Callers to the Mortgage Hotline could be referred to such organizations approved by the Department of Housing and Community Development.

Develop a listing of lenders willing to assist consumers out of foreclosure

The Division should seek financial institutions and lenders throughout the state to register as willing to help individual borrowers in local communities who are at risk of foreclosure. Individual financial institutions would sign up and when someone called the "800" number they would be referred to a financial institution for counseling and assistance based on the location of the property. Participating institutions would offer an "intervention" product similar to the recommendation below (see "Foreclosure Intervention Mortgage" below).

Establish a fund or grants for organizations providing counseling or legal services to consumers facing foreclosure

Throughout discussions with various counseling agencies on the Working Group, it is apparent that funding sources for their organizations has been dwindling and in this kind of environment it is deemed inadequate. As a result, the Working Group recommends that the Commonwealth increase the funding to the agencies involved in assisting homeowners who face foreclosure. In addition, a disproportionately large segment of the foreclosure market represent minorities and individuals where English is a second language. Because of language and cultural barriers, there is a tendency for assistance to occur at the last possible moment and therefore any hope of reducing the list of foreclosure becomes problematic. Through appropriate funding levels, early intervention through various outreach efforts will provide a more meaningful solution. Additionally with an appropriate level of funding, homeowner education can take place for first time homebuyers. It is highly recommended that all first time homebuyers receive pre-purchase and post-purchase counseling or education, although the Working Group does not recommend making this a requirement. This will necessitate financial support for many local grassroots organizations, serving immigrant and minority communities throughout the state. In addition, if the counseling agency is not an independent third-party provider, they should disclose to the consumer any financial interest that the counselor or agency may have in the loan.

As mentioned above, there are bills pending before the Legislature to create a funding mechanism for counseling and other organizations. This would be accomplished either through appropriation or through fees from foreclosure filings or licensing. *The Working Group recommends that some funding mechanism be established to ensure adequate services for Massachusetts homeowners at risk of losing their homes.*

Lender Forbearance

The social and human costs of foreclosure are well known. However, foreclosure is costly for lenders or the servicers of mortgages as well, both in terms of the monetary costs as well as the reputational risks. As an alternative to foreclosure, lenders, servicers, and note holders should consider forbearance in the form of temporary rate reduction, waiver of pre-payment penalties, waiving or capitalizing late fees, or restructuring the terms of the note. Failure to exercise prudent forbearance could result in a spiral of increased foreclosures, causing depressed community housing values, causing even more foreclosures. On an individual basis, there are few economic incentives to offer reduced

rates or altered terms to a borrower in trouble. However, the industry as a whole benefits by bringing down foreclosure rates. *The Working Group recommends that the Division of Banks, the Office of Consumer Affairs, other Administration officials, the Attorney General, and other officials convene a meeting of those lenders, servicers, and investment firms with the largest portfolios of at risk loans to urge them to exercise forbearance as a first alternative to foreclosure.*

Develop a foreclosure intervention mortgage program

The Working Group recommends the development of a new product be called, "The Community Relief Mortgage" (the Program). The Program would be designed to help those mortgage borrowers who are in the process of foreclosure or at risk for foreclosure but can still qualify for refinancing with flexible underwriting and credit enhancements.

The Working Group has created the framework for a creative but sound Product. In general, the Product would be a 10/30 mortgage or, in essence, a 40-year term. The initial rate on the mortgage would be discounted from current market to approximately 5% and fixed for a period of 10 years. At the time of re-pricing, the rate will not exceed the original 40-year market rate plus a cap of 1%. For example, if at the time of the initial application, the fixed-rate on a 40-year mortgage was 6%, then at the time of re-pricing after 10 years, the maximum the rate could advance would be 7%. The borrower would not be subject to PMI. On a \$250,000 loan the "lost" interest will be recovered after re-pricing in year 26 of the 30-year portion of the loan.

Program Highlights

- Expanded qualifying ratios
- Closing costs included in the mortgage
- Maximum mortgage amounts would equal FannieMac/FreddieMac limits
- The homeowner must maintain occupancy for a minimum of five years or pay back the discounted rate out of any appreciation.
- Impaired credit caused by the high cost of an initial mortgage would not discount eligibility for the program

Eligibility Requirements

- Owner occupied, one-to-four family property and condominium and co-operative dwellings
- Principal Residence
- No income limitations
- Prior participation in a foreclosure counseling by a third party without a financial interest in the loan

Create a market for the Foreclosure Intervention Mortgage Program

Credit Enhancement

This mortgage Product is clearly not a conventional program. Some form of credit enhancement may be necessary. The Working Group discussed the role that the Government Sponsored Enterprises (GSEs), including FannieMae, FreddieMac, and the Federal Home Loan Banks, could play in assisting the credit enhancement of this Product. Helping to preserve affordable housing is at the core of the mission of the GSEs and each has developed affordable housing programs. *The Working Group recommends that the GSEs should play a role in helping consumers repair their credit and remain in their homes.* This can be a shared risk approach with lenders where the present value between the market rate and the discounted rate could be amortized over the life of the Product.

Incentives to offer or invest in the Intervention Program

It is also anticipated that a marketing effort on the part of the Administration would be necessary to encourage various lenders to support this product. In addition, a secondary market of investors would be necessary to ensure the sustainability of the Product. Given this set of circumstances, it may be necessary to convince various foundations, the State Retirement Board under the State Treasurer's Office, various pension funds and others to invest in this effort as an alternative to the detrimental impact that would otherwise occur.

Given the current housing slowdown and backlog of homes available in the market, there continues to be downward pressure on pricing. When you add to that pressure the volume of foreclosures that are expected, it can only be detrimental to the housing pricing environment. This in turn could cause values statewide to decline, thereby reducing the tax-base upon which cities and towns rely to pay for critical services. This potential tax shortfall could be substantial given the potential impact by having this many families being moved out of their homes through foreclosure. When you consider that the majority of the foreclosures are occurring in the older industrialized cities, the social pressures that will be experienced in those cities will be significant.

Those who have contributed to the crisis should help solve it

The Working Group strongly believes that lenders who have originated a substantial number of loans in foreclosure and the holders of a substantial number of loans in foreclosure should bear the primary responsibility to help alleviate the current foreclosure crisis by investing in such a Product. Foreclosing on a property, taking possession, and attempting to sell a property in a declining housing market is a very costly proposition. Investing in the Community Relief Mortgage program would be less costly than the costs of a spiraling foreclosure crisis or the reputational damage, including litigation risk, by large scale foreclosures.

In addition to the above recommendation to convene a meeting of industry and government officials to encourage lenders to exercise forbearance, *the Working Group*

also recommends that these same lenders and investors be urged to invest in the Community Relief Program as another means to alleviate the foreclosure problem.

While there is no question that a product of this nature will require strong public support and potential use of public funds, the alternative spiral of foreclosures is potentially more disruptive, uncontrolled and debilitating to municipal and the state's economy and to the mortgage market itself.

For those with no alternatives to foreclosure, assistance will be required

Despite anyone's best efforts or intentions, many people will not qualify for any forbearance or discounted product. For those individuals who will have to suffer the loss of their homes, they will have many needs. First among these is the need for shelter. If any foreclosure assistance funding is available, one of the key resources that will be required is ensuring that families that have lost their home find safe housing, either with relatives or through rental housing. This may require emergency funds and help from groups such as the Housing Consumer Education Centers. An increase in foreclosures will also increase the numbers of families on waiting lists for rental subsidies and vouchers. Second, these families will need counseling services to be able to rebuild their credit and ensure that they do not fall into similar circumstances again.

Additional Recommendations

In addition to the above recommendations, the Working Group also offers the following suggestions:

- The Federal Reserve should consider amending Regulation C pursuant to the Home Mortgage Disclosure Act (HMDA) to require the lender that closed the loan to file under HMDA. Currently, only the institution that made the credit decision is required to report the transaction under HMDA. However, many lenders "table fund" a transaction by underwriting the loan using another lender's guidelines, closing the mortgage in their name, but then immediately sell the loan to the lender that approved the loan pursuant to contracted underwriting guidelines. Under these circumstances, the "originating" lender never reports the transaction under HMDA even though they are the only face that the consumer ever knew.
- Government at both the federal and State levels should be wary of banning products outright. Rather, regulators should target practices, including steering borrowers into products that are inappropriate. Although subprime loans are often blamed for being part of the foreclosure problem, when underwritten appropriately, subprime loans can be a bridge for consumers to improve their credit to qualify for a prime loan. In addition, for many homeowners facing foreclosure, refinancing into a subprime loan may be their only alternative. Restricting borrower access to these products may only compound the problem.

VIII. Conclusion

The attendees at the Mortgage Summit and participants in the Working Groups represent the broad spectrum of those involved in one way or another in the mortgage industry. Government agencies, regulated entities, trade groups, community organizations, as well as advocacy groups all had a seat at the table. Each in their own right are also consumers.

Since all involved have roles within the mortgage process, all acknowledge that foreclosures will occur. History reflects that fact. However, all agree that a confluence of recent and ongoing events have resulted in the flood of foreclosure activity today. The recommendations in this report do two things. They recognize that current events evidence various new reasons for foreclosures, and two, that there are new areas to consider for resolution of today's mortgage problems.

Those resolutions may lie in State or federal legislation or regulation as well as with regulators, law enforcement officials, financial institutions, regulated entities, community and non-profit groups, as well as consumers themselves. Some recommendations identify funding needs while others identify education programs.

Despite our differences, the participants of the Working Groups also agree that we are committed to do what we can to address this growing problem.

House 4085
An Act Implementing the Division of Banks Mortgage Summit Recommendations

Summary

House 4085 is a message filed by Governor Deval Patrick to provide assistance to homeowners facing foreclosure, criminalize mortgage fraud, prohibit abusive mortgage foreclosure rescue schemes, and other measures as part of a comprehensive plan to prevent predatory lending and protect families facing foreclosures.

SECTION 1 of this legislation seeks to add a new section, section 35DD, to Massachusetts General Laws chapter 10 to establish a Division of Banks Trust Fund which would be used solely in connection with the establishment, administration, operation and updating of a mortgage foreclosure database which would be established under SECTION 5 of this legislation. The Division of Banks Trust Fund would consist of 100% of the fee revenue collected from the filing fee in connection with filing a Notice of Intent To Foreclose and Right To Cure with the Division as required by SECTION 5 of the legislation. The filing fee for the Notice of Intent To Foreclose and Right To Cure shall be established by the Secretary of Administration and Finance.

SECTION 2 of this legislation seeks to add a new section, section 6D, to chapter 183 of the Massachusetts General Laws in order to require every mortgage and assignment of a mortgage secured by one-to-four family, owner-occupied real estate in the Commonwealth to have endorsed on it the name, post office address and license number of the mortgage broker and, if applicable, the mortgage loan originator responsible for placing such mortgage loan with a mortgage lender. This endorsement, or a notation that no mortgage broker or mortgage loan originator was involved in the transaction, shall be recorded as part of the mortgage. Failure to include this information shall not affect the validity of the mortgage. No register of deeds shall accept a mortgage or assignment of mortgage for recording unless it is in compliance with this section.

SECTION 3 amends Massachusetts General Laws chapter 183, section 27 to mandate that a foreclosing mortgagee provide to the mortgagor a written, itemized accounting of the disposition of the proceeds of a foreclosure sale, including, but not limited to, the sale price, legal fees, auctioneer fees, publication costs, and other fees, and any surplus due to the mortgagor or the amount of any deficiency within 30 days of the date of the foreclosure sale.

SECTION 4 seeks to add a new section, section 69, to chapter 183 of the Massachusetts General Laws in order to prohibit a mortgage lender from making a variable or adjustable rate mortgage loan on one-to-four family, owner-occupied property in the Commonwealth unless (1) the loan meets all the standard underwriting criteria for a conventional mortgage loan as established by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation and is rated "A" paper under those criteria; or (2) the mortgagor affirmatively opts in writing for the variable or adjustable rate mortgage loan and receives certification from a counselor with a third-party nonprofit organization approved by the U.S. Department of Housing and Urban Development, a housing agency of the Commonwealth, or the regulatory agency which has jurisdiction over the creditor, that the mortgagor has received counseling on the advisability of the loan transaction. Counseling shall be allowed by telephone. If a mortgage loan is made in violation of this section, the variable or adjustable rate terms shall not be enforceable and the mortgagee shall only be entitled to collect interest at the lesser of the original interest rate,

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including any discounted rate, or the current adjusted rate. The Commissioner of Banks may issue directives or guidelines, or adopt regulations to administer this section.

SECTION 5 amends the Massachusetts foreclosure statute, Massachusetts General Laws chapter 244, by adding four new sections, section 14A, 14B, 14C and 14D.

Section 14A prohibits a mortgage holder from foreclosing on an owner-occupied, one-to-four family property unless the mortgagee has provided the borrower with a 90-day Notice of Intent To Foreclose and Right To Cure as set out in the legislation. A copy of this notice shall be filed with the Division and this filing shall include the rate of interest on such loan and whether the loan has a variable or fixed rate of interest. Section 14A also prohibits the lender from charging the borrower any attorneys' fees or other fees and charges other than per diem interest during the 90-day right to cure.

Section 14B states that the mortgagee may, without further action, proceed with the foreclosure sale if the borrower fails to cure the default during the 90-day right to cure. If the property is sold at a foreclosure sale, the mortgagee shall notify the Division, in writing, of the date of such foreclosure sale and the purchase price obtained at such sale and shall include a copy of the Notice of Intent To Foreclose and Right To Cure for said property. The information filed is relative to the foreclosure database established by Section 14D.

Section 14C prohibits foreclosure rescue schemes by making any reconveyance agreement between a homeowner who is in default or foreclosure and a purchaser illegal and unenforceable in the Commonwealth unless the purchaser is a spouse, parent, grandparent, child, grandchild, sibling, aunt or uncle of the homeowner.

Section 14D requires the Division of Banks to maintain a foreclosure database relative to foreclosure activity by mortgage lenders, mortgage holders and mortgage servicers as well as mortgage brokers and loan originators who placed such mortgage loans in the Commonwealth. Such data shall be public and include, among other things, analysis on foreclosure notices compared to foreclosure sales and any patterns on the geographic location on foreclosures. SECTION 1 of the legislation relates to the expenses required for the administration of the database.

SECTION 6 amends Massachusetts General Laws chapter 255E, section 2 in order to delete the mortgage lender or mortgage broker licensing exemption for any nonprofit agency or corporation incorporated under the laws of the Commonwealth for the purpose of assisting low to moderate income households in the purchase or rehabilitation of family residences of four or less units and which holds tax exempt status granted under the provisions of Section 501(c)(3) and 501(c)(4) of the Internal Revenue Code.

SECTION 7 establishes the crime of mortgage fraud in the Commonwealth by adding a new Section 35A to Massachusetts General Laws chapter 266. This amendment sets forth the various activities that trigger this statute, when, with the intent to defraud, a person knowingly:

(1) makes or causes to be made any deliberate material misstatement, material misrepresentation or material omission during or in connection with the mortgage lending process with the intention that it be relied on by a mortgage lender, mortgagee or any other party to the mortgage lending process;

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(2) uses or facilitates the use of any deliberate material misstatement, material misrepresentation or material omission during the mortgage lending process with the intention that it be relied on by a mortgage lender, mortgagor, or any other party to the mortgage lending process;

(3) receives any proceeds or other funds in connection with a residential mortgage closing that the person knew resulted from a violation of (1) or (2) of this subsection;

(4) coerces or induces a real estate appraiser to inflate the value of real property used as collateral for a residential mortgage loan;

(5) represents or implies that a real estate appraiser will not be selected to conduct an appraisal or selected for future appraisal work unless the appraiser agrees in advance to a value, range of values or a minimum value for the real property;

(6) represents or implies that a real estate appraiser will not be paid for an appraisal unless the appraiser agrees in advance to a value, range of values or a minimum value for the real property;

(7) conspires to violate any of the provisions of paragraphs (1) through (6) of this subsection; or

(8) files or causes to be filed with the register of deeds of any county of the Commonwealth any document that the person knows to contain a deliberate material misstatement, material misrepresentation or material omission.

There are provisions for venue for litigation, including the county in which the residential property is located; any county in which any act was performed in furtherance of the violation; any county in which any person alleged to have violated this section had control or possession of any proceeds of the violation; if a closing occurred, in any county in which the closing occurred; or any county in which a document containing a deliberate material misstatement, material misrepresentation, or material omission is filed with the register of deeds.

There is a provision authorizing District Attorneys and the Attorney General to conduct the criminal investigation and prosecution under this section. The penalty for a violation of this section is imprisonment in state prison for up to 5 years or in a house of correction for up to 2.5 years, by a fine not to exceed \$10,000 for a natural person or \$100,000 for any other person, or by both such fine and imprisonment. If a violation of this section involves engaging or participating in a pattern of residential mortgage fraud or a conspiracy or endeavor to engage or participate in a pattern of residential mortgage fraud, the penalty is imprisonment in state prison for up to 15 years and by a fine not to exceed \$50,000 for a natural person or \$500,000 for any other person, or by both such fine and imprisonment. Each instance of residential mortgage fraud under this section is a separate offense. All real and personal property subject to a violation of this section shall be subject to forfeiture to the Commonwealth.

SECTION 8 of the legislation authorizes the Division of Banks Trust Fund, established under SECTION 1 of this legislation, to retain all unexpended funds for fiscal years 2008, 2009 and 2010. Funds deposited in the Fund that remain unexpended at the end of the fiscal year and that exceed 20% of the Fund's expenditures for the previous fiscal year shall revert to the General Fund beginning in Fiscal Year 2011.

SECTION 9 makes the act effective upon passage.

Note: As the title indicates, this legislation is based on the recommendations of a Mortgage Summit convened by the Massachusetts Division of Banks. The Mortgage Summit resulted in the formation of two Working Groups. One was to focus on Education and Foreclosure Assistance and the other had jurisdiction for Rules and Enforcement. The Working Groups concluded their work and made their recommendations at the end of March. This full report, entitled *Report of the Mortgage Summit Working Groups*, is available at http://www.mass.gov/Eoca/docs/dob/Mortgage_Summit_Final_20070409.pdf.

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The Commonwealth of Massachusetts



EXECUTIVE DEPARTMENT
STATE HOUSE • BOSTON 02133
(617) 725-4000

DEVAL L. PATRICK
GOVERNOR
TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

June 11, 2007.

To the Honorable Senate and House of Representatives:

I am filing for your consideration the attached legislative proposal, entitled, "An Act Implementing the Division of Banks Mortgage Summit Recommendations."

Massachusetts, like other states across the country, faces an escalating and complex crisis of home foreclosure. This legislation draws upon the recommendations of the Mortgage Summit Group, a partnership of 50 participants with a wide range of expertise— from non-profit agencies, government agencies and the mortgage lending industry. An outgrowth of that broad partnership, this comprehensive legislation will fight the surge in home foreclosures and curb predatory lending. The bill criminalizes mortgage fraud in the Commonwealth; creates a centralized statewide foreclosure database of foreclosure activity to monitor and analyze foreclosures and foreclosure patterns at the Division of Banks; and mandates that mortgage holders file a 90-day notice of intent to foreclose with the homeowner and the Division of Banks. Finally, this bill requires mortgagees to receive consumer counseling prior to obtaining non-conforming variable rate mortgage loans.

These reform measures will go a long way toward empowering the people of the Massachusetts to meet their mortgage obligations. Accordingly, I urge your early and favorable consideration of this bill, which protects Massachusetts families from predatory lending and the increasing risk of losing their homes.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Deval Patrick".

DEVAL L. PATRICK,
Governor.

The Commonwealth of Massachusetts

In the Year Two Thousand and Seven.

AN ACT IMPLEMENTING THE DIVISION OF BANKS MORTGAGE SUMMIT
RECOMMENDATIONS.

*Be it enacted by the Senate and House of Representatives in General
Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. Chapter 10 of the General Laws is hereby amended
2 by inserting after section 35CC the following section:—

3 Section 35DD. (a) There shall be established on the books of the
4 commonwealth a separate fund to be known as the Division of
5 Banks Trust Fund, to be expended, without prior appropriation, by
6 the division of banks. The fund shall consist of 100 per cent of the
7 fee revenue collected under subsection (b). Funds from the account
8 shall be expended solely in connection with establishing, adminis-
9 tering, operating and updating a mortgage foreclosure database in
10 the commonwealth and providing reports from information in that
11 database. No expenditure shall be made from the fund which shall
12 cause the fund to be in deficit at the close of any fiscal year.
13 Moneys deposited in the fund that are unexpended at the end of the
14 fiscal year and that exceed 20 per cent of the fund's expenditures for
15 the previous fiscal year shall revert to the General Fund.

16 (b) Notwithstanding any general or special law to the contrary, the
17 secretary of administration and finance shall adopt regulations to
18 establish a fee for the filing of a Notice of Intent To Foreclose and
19 Right To Cure with the division under section 14A of chapter 244.

1 SECTION 2. Chapter 183 of the General Laws is hereby amended
2 by inserting after section 6C the following section:—

3 Section 6D. Every mortgage and assignment of mortgage secured
4 by residential property, as defined in section 1 of chapter 255E, pre-
5 sented for record, in which a mortgage broker, as defined in section
6 1 of chapter 255E, is involved shall contain or have endorsed upon it
7 the name, post office address and license number of the mortgage

8 broker and, if applicable, the mortgage loan originator responsible
9 for placing the mortgage loan with the mortgagee. This endorse-
10 ment (or notation that no mortgage broker or mortgage loan origi-
11 nator was involved in the mortgage) shall be recorded as part of the
12 mortgage or assignment of mortgage. Failure to comply with this
13 paragraph shall not affect the validity of any mortgage or assignment
14 of mortgage or the recording of any mortgage or assignment of
15 mortgage. No register of deeds shall accept a mortgage or assign-
16 ment of a mortgage for recording unless it is in compliance with the
17 requirements of this section.

18 For the purposes of this section, "mortgage loan originator" shall
19 mean a natural person: (a) who is employed by or associated with a
20 mortgage lender or mortgage broker and (b) who negotiates, solicits,
21 arranges, provides or accepts residential mortgage loan applications,
22 or assists consumers in completing those applications.

1 SECTION 3. Section 27 of chapter 183, as appearing in the 2004
2 Official Edition, is hereby amended by adding the following para-
3 graph:—

4 The holder of a mortgage of real estate, or the holder's representa-
5 tives, shall provide to the mortgagor or the mortgagor's heirs, suc-
6 cessors or assigns a written notice containing an itemized accounting
7 of the disposition of the proceeds arising from a sale under the
8 power of sale, including but not limited to the sale price, legal fees,
9 auctioneer fees, publication costs, and other fees, and any surplus
10 due to the mortgagor or the amount of any deficiency, within 30
11 days after the date of the sale.

1 SECTION 4. Chapter 183 is hereby further amended by adding
2 the following section:—

3 Section 69. No mortgagee who makes a loan to be secured by a
4 mortgage on owner-occupied, 1 to 4 family real estate in the com-
5 monwealth shall make the loan at a variable or adjustable rate of
6 interest unless: (i) the loan meets all of the standard underwriting
7 criteria for a conventional mortgage loan as established by the Fed-
8 eral National Mortgage Association or the Federal Home Loan
9 Mortgage Corporation and is rated "A" paper under those criteria;
10 or (ii) the mortgagor affirmatively opts in writing for the variable or
11 adjustable rate loan and receives certification from a counselor with

12 a third-party nonprofit organization approved by the United States
13 Department of Housing and Urban Development, a housing
14 financing agency of the commonwealth, or the regulatory agency
15 which has jurisdiction over the creditor, that the mortgagor has
16 received counseling on the advisability of the loan transaction.
17 Counseling shall be allowed in whole or in part by telephonic
18 means. The commissioner shall maintain a list of approved coun-
19 seling programs. At or before closing such a loan, the mortgagee
20 shall obtain evidence that the mortgagor has completed an approved
21 counseling program. If a mortgage loan is made by a mortgagee in
22 violation of this section, the variable or adjustable rate terms of the
23 loan shall not be enforceable and the mortgagee shall only be enti-
24 tled to collect an interest rate equal to the lesser of the original
25 interest rate, including any discounted rate, or the current adjusted
26 interest rate throughout the remaining term of the loan. The com-
27 missioner may issue directives or guidelines or adopt regulations in
28 order to administer and carry out this section and to further define
29 the terms used in this section.

1 SECTION 5, Chapter 244 of the General Laws is hereby amended
2 by inserting after section 14 the following 4 sections:—

3 Section 14A. (a) After a breach of condition of a mortgage loan
4 secured by residential property in the commonwealth, a mortgagee
5 or holder of the mortgage shall not proceed against the mortgaged
6 premises under a power of sale unless the mortgagee or holder of the
7 mortgage gives the mortgagor the notice described in this section.

8 (b) The notice shall be in writing and shall be mailed, postage
9 prepaid, by certified mail with return receipt requested, to the mort-
10 gator at his last address then known to the mortgagee, at least 90
11 days before exercising any rights under a power of sale.

12 (c) The notice shall conspicuously state the rights of the mort-
13 gator upon default in substantially the following form:

14 The heading shall read: "Notice of Intent To Foreclose and Right
15 To Cure." The body of the notice shall read: "You are now in default
16 on a mortgage loan transaction dated _____. This mortgage loan is
17 secured by property located at _____. This loan was originated by
18 (name of mortgagee), assigned to _____ (if applicable) and is being
19 serviced by _____ (if applicable). The mortgage broker/mortgage
20 originator for this mortgage loan transaction was _____. You may

21 cure your default by paying all sums due on the mortgage loan on or
22 before (a date which is at least 90 days after the notice has been
23 mailed). If you pay this amount within the time allowed, you are no
24 longer in default and may continue on with the transaction as though
25 the default had not occurred. You may contact the mortgagee or the
26 mortgagee's agent at (telephone number of mortgagee or mort-
27 gagee's agent) in order to obtain the amount due to cure the default
28 on your mortgage loan.

29 If you do not cure your default by the date stated above, (name of
30 mortgagee) may begin foreclosure proceedings against you, and you
31 could lose your home."

32 (d) A copy of the notice described in this section shall be filed
33 with the commissioner of banks and shall include the rate of interest
34 on the loan and whether it was a variable or fixed rate of interest.
35 The filing fee for the notice shall be determined annually by the Sec-
36 retary of administration under section 3B of chapter 7.

37 (e) No attorney's fees or other fees or charges other than per diem
38 interest may be charged to the mortgagor during the mortgagor's 90-
39 day right to cure.

40 Section 14B. If after receiving a Notice of Intent To Foreclose and
41 Right To Cure from the mortgagee under section 14A, the mortgagor
42 fails to cure a default on a mortgage loan secured by residential
43 property, as defined in section 1 of chapter 255E, within the time
44 permitted by the Notice (which shall be at least 90 days after the
45 Notice has been mailed), the mortgagee may do all acts authorized
46 or required under the power of sale. If the residential property
47 securing the mortgage loan is sold at a foreclosure sale, the mort-
48 gagee shall notify the commissioner of banks, in writing, of the date
49 of the foreclosure sale and the purchase price obtained at the sale,
50 and shall include a copy of the notice required under section 14A.

51 Section 14C. (a) For the purposes of this section, the following
52 terms shall have the following meanings:

53 "Default", a condition in which a homeowner is 1 or more months
54 in arrears on the mortgage payments.

55 "Foreclosure", a condition in which a homeowner has received a
56 notice issued by a court under chapter 57 of the acts of 1943 or has
57 received a notice under section 14A of this chapter.

58 "Purchaser", any person who acquires title to residential property.

59 "Transfer of title", the transfer of a mortgagor's interest to a pur-
60 chaser by purchase agreement, option to purchase, lease, or any
61 other means, or by the creation of a mortgage or other lien or encum-
62 brance that allows the purchaser to obtain legal or equitable title to
63 all or part of the property.

64 (b) The transfer of title to residential property, as defined in
65 section 1 of chapter 255E, by a mortgagor who is in default or fore-
66 closure during the time of default or foreclosure, made in contempla-
67 tion of a subsequent conveyance of an interest back to the mortgagor
68 by the purchaser, that allows the homeowner to regain possession of
69 the residential property is prohibited unless the purchaser is a
70 spouse, parent, grandparent, child, grandchild, sibling, aunt, or uncle
71 of the mortgagor.

72 Section 14D. The commissioner of banks shall maintain a foreclo-
73 sure database that shall include, but not be limited to, foreclosure
74 activity by mortgage lenders, mortgage holders and mortgage ser-
75 vicers, as well as the mortgage brokers and loan originators who
76 placed these mortgage loans in the commonwealth, including infor-
77 mation relative to the original mortgagee, and any subsequent
78 assignee. Based on the information received, the commissioner shall
79 produce a report at least annually to track developments and trends
80 of mortgage foreclosure on residential property in the common-
81 wealth, including but not limited to an analysis of the pre-foreclo-
82 sure notices submitted to the commissioner compared to the final
83 foreclosure notices, and any trends or patterns relative to the geo-
84 graphic location of the residential properties, and interest rates. The
85 report shall be available to the public upon request, and the commis-
86 sioner shall make it available in any other manner that he may
87 choose.

1 SECTION 6. Section 2 of chapter 255E of the General Laws, as
2 so appearing, is hereby amended by striking out, in lines 34-39, the
3 words "or to any nonprofit agency or corporation incorporated under
4 the laws of the commonwealth for the purpose of assisting low to
5 moderate income households in the purchase or rehabilitation of
6 family residences of four units or less and which holds tax-exempt
7 status granted under the provisions of Section 501(c)(3) or 501(c)(4)
8 of the Internal Revenue Code,".

1 SECTION 7. Chapter 266 of the General Laws is hereby amended
2 by inserting after section 35 the following section:—

3 Section 35A. (a) For the purposes of this section, the following
4 terms shall have the following meanings:—

5 “Material omission”, the omission or concealment of a material
6 fact necessary in order to make the statement made, in the light of
7 the circumstances under which it is made, not misleading.

8 “Mortgage lending process”, the process through which a person
9 seeks or obtains a residential mortgage loan, including, but not lim-
10 ited to, solicitation, application or origination, negotiation of terms,
11 third-party provider services, underwriting, signing and closing, and
12 funding of the loan. Documents involved in the mortgage lending
13 process include, but are not limited to, uniform residential loan
14 applications or other loan applications; appraisal reports; HUD-1 set-
15 tlement statements; supporting personal documentation for loan
16 applications such as W-2 forms, verifications of income and employ-
17 ment, bank statements, tax returns, and payroll stubs; and any
18 required disclosures.

19 “Pattern of residential mortgage fraud”, 1 or more material mis-
20 statements, material misrepresentations, or material omissions made
21 during the mortgage lending process in connection with 3 or more
22 residential properties within a 5 year period, which have the same or
23 similar intents, results, participants, victims, or methods of commis-
24 sion or otherwise are interrelated by distinguishing characteristics.

25 “Person”, a natural person, corporation, company, limited liability
26 company, partnership, trustee, association, or any other entity.

27 “Residential mortgage loan”, a loan to a natural person made pri-
28 marily for personal, family or household purposes secured wholly or
29 partially by a mortgage on real property located in the common-
30 wealth containing a dwelling house with accommodations for 4 or
31 fewer separate households and occupied, or to be occupied, in whole
32 or in part by the obligor on the mortgage debt.

33 (b) A person commits the offense of residential mortgage fraud
34 when, with the intent to defraud, the person knowingly:

35 (1) makes or causes to be made any deliberate material misstate-
36 ment, material misrepresentation, or material omission during or in
37 connection with the mortgage lending process with the intention that
38 it be relied on by a mortgage lender, mortgagor, or any other party to
39 the mortgage lending process;

40 (2) uses or facilitates the use of any deliberate material misstate-
41 ment, material misrepresentation, or material omission during the
42 mortgage lending process with the intention that it be relied on by a
43 mortgage lender, mortgagor, or any other party to the mortgage
44 lending process;

45 (3) receives any proceeds or any other funds in connection with a
46 residential mortgage closing that the person knew resulted from a
47 violation of paragraph (1) or (2) of this subsection;

48 (4) coerces or induces a real estate appraiser to inflate the value of
49 real property used as collateral for a residential mortgage loan;

50 (5) represents or implies that a real estate appraiser will not be
51 selected to conduct an appraisal of the real property or selected for
52 future appraisal work unless the appraiser agrees in advance to a
53 value, range of values or minimum value for the real property;

54 (6) represents or implies that a real estate appraiser will not be
55 paid for an appraisal unless the appraiser agrees in advance to a
56 value, range of values or a minimum value for the real estate;

57 (7) conspires to violate any of the provisions of paragraphs (1)
58 through (6) of this subsection; or

59 (8) files or causes to be filed with the official registrar of deeds of
60 any county of the commonwealth any document that the person
61 knows to contain a deliberate material misstatement, material mis-
62 representation, or material omission.

63 (c) For the purpose of venue under this section, any act of resi-
64 dential mortgage fraud under this section shall be considered to have
65 been committed:

66 (1) in the county in which the residential property for which a
67 mortgage loan is being sought is located;

68 (2) in any county in which any act was performed in furtherance
69 of the violation;

70 (3) in any county in which any person alleged to have violated
71 this section had control or possession of any proceeds of the viola-
72 tion;

73 (4) if a closing occurred, in any county in which the closing
74 occurred; or

75 (5) in any county in which a document containing a deliberate
76 material misstatement, material misrepresentation, or material omis-
77 sion is filed with the official register of deeds.

78 (d) District attorneys and the attorney general shall have the
79 authority to conduct the criminal investigation and prosecution of all
80 cases of residential mortgage fraud under this section.

81 (e)(1) Any person committing the offense of residential mortgage
82 fraud under this section shall be guilty of a felony and, upon conviction,
83 shall be punished by imprisonment in state prison for up to 5
84 years or in a house of correction for up to 2 ½ years, by a fine not to
85 exceed \$10,000 for a natural person or \$100,000 for any other
86 person, or by both such fine and imprisonment.

87 (2) If an act of residential mortgage fraud under this section
88 involves engaging or participating in a pattern of residential mortgage
89 fraud or a conspiracy or endeavor to engage or participate in a
90 pattern of residential mortgage fraud, the violation shall be punishable
91 by imprisonment in state prison for up to 15 years, by a fine not to
92 exceed \$50,000 for a natural person or \$500,000 for any other
93 person, or by both such fine and imprisonment.

94 (3) Each residential property transaction that effects a residential
95 mortgage fraud under this section shall constitute a separate offense
96 and shall not merge with any other crimes set forth in this section.

97 (f) All real and personal property used or intended for use in the
98 course of, derived from, or realized through, an act of residential
99 mortgage fraud under this section shall be subject to forfeiture to the
100 commonwealth. Forfeiture shall be had by the procedure set forth in
101 section 47 of chapter 94C. District attorneys and the attorney general
102 may commence forfeiture proceedings under this section.

1 SECTION 8. Notwithstanding section 35DD of chapter 10 of the
2 General Laws, as inserted by section 1 of this act, for fiscal years
3 2008, 2009 and 2010, moneys deposited in the Division of Banks
4 Trust Fund that are unexpended at the end of the fiscal year shall
5 remain in the fund.

1 SECTION 9. This act shall take effect upon its passage.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, SS

HOUSING COURT DEPARTMENT
WESTERN DIVISION

DOCKET NO. 11-SP-3713

FEDERAL NATIONAL MORTGAGE
ASSOCIATION,

Plaintiff

v.

DOREEN LAMOUREUX, ET AL,

Defendants

RULING AND ORDER ON
CROSS-MOTIONS FOR
SUMMARY JUDGMENT

1. The above-captioned post-foreclosure summary process case is before the court on the parties' cross-motions for summary judgment. Despite voluminous filings, counsel have helpfully winnowed the issues to a single (albeit compound) dispositive question: is delivery of a right to cure notice under G.L. c. 244, §35A (§35A) required prior to exercising the statutory power of sale and, if so, was the §35A notice in this case sufficient? I rule as a matter of law that delivery of a §35A notice is required, and that the notice in this case did not comply with the statutory requirements. Summary judgment shall therefore enter in favor of the defendants.

2. **Facts:** The material facts are very few, and undisputed. On March 8, 2004 the defendants Doreen and Mark Lamoureux (Lamoureuxes) purchased the subject property, in the course of which transaction they executed a promissory note in the amount of \$120,600 to Fleet

National Bank (Lender), secured by a mortgage which identified Mortgage Electronic Registration Systems, Inc. (MERS) as the "mortgagee," "solely as nominee for Lender." On or about November 4, 2010, MERS assigned and transferred the mortgage to PHH Mortgage Corporation ("PHH"). On May 17, 2011, PHH conducted a foreclosure sale at which the plaintiff Federal National Mortgage Association (FNMA) was the high bidder. A foreclosure deed from PHH to FNMA was recorded on June 28, 2011.

3. On March 22, 2010, prior to assignment of the mortgage from MERS to PHH, PHH sent a notice of default to the Lamoureuxes. The notice provided in pertinent part as follows: "The current holder of the mortgage is: PHH Mortgage Corporation." As of March 22, 2010, PHH was the servicer of the mortgage, but was not the holder of the mortgage.

4. **Discussion:** G.L. c. 244, §35A, as in effect at the time relevant hereto, provided in pertinent part as follows:

...(b) The mortgagee, or anyone holding thereunder, shall not accelerate maturity of the unpaid balance of such mortgage obligation or otherwise enforce the mortgage because of a default...until at least 90 days after the date a written notice is given by the mortgagee to the mortgagor...

(c) The notice required in subsection (b) shall inform the mortgagor of the following...

(4) the name and address of the mortgagee, or anyone thereunder, and the telephone number of a representative of the mortgagee whom the mortgagor may contact if the mortgagor disagrees with the mortgagee's assertion that a default has occurred...

5. A number of trial court decisions have addressed the general issue framed in this case, namely whether "strict compliance" with §35A is required prior to exercising the statutory power of sale. After considerable reflection, I conclude that strict compliance is required, essentially for the reasons articulated by my colleagues who have ruled similarly. *E.g. Maria Bravo-Buenrostro*

v. Onewest Bank, F.S.B., Suffolk Superior Court, Docket No. 11-03951 (May 31, 2011)(Fahey, J.); *FNMA v. Reynolds*, Northeast Division Housing Court, Docket No. 12-SP-0638 (March 20, 2013)(Kerman, J.); *Federal Home Loan Mortgage Corporation v. O'Connor*, Worcester Division Housing Court, Docket No. 12-SP-3164 (February 20, 2013)(Horan, J.); *Greenwich Investors XXIV REO, LLC v. Rangel*, Western Division Housing Court, Docket No. 12-SP-2975 (April 2, 2013)(Fields, J.). In so concluding, I am persuaded by the analyses set forth in these decisions and the cases upon which they rely, to which I add the following.

6. Massachusetts is a non-judicial foreclosure state, such that a mortgagee may foreclose a mortgagor's equitable right of redemption, sell the mortgaged property, and transfer title following sale, all without prior judicial authorization. The consequences of foreclosure are significant, and the only protections that exist for consumer homeowners and the public at large are those self-effectuating statutory procedures established by the Legislature. Importantly, it is in the context of non-judicial foreclosure that the Legislature has enacted, and refined over time, the statutory power of sale. Requiring strict compliance with the statutory power of sale is therefore sound public policy, as it assures the necessary measure of confidence that foreclosures are legally justified, and that the transfers which result from foreclosure sales are sound and not subject to collateral challenge. *See U.S. Bank National Association v. Ibanez*, 458 Mass. 637 (2011).

7. The right to cure notice required under §35A is part and parcel of this statutory scheme. I therefore respectfully disagree with the conclusion that "substantial compliance" with §35A is sufficient. *E.g. HBC Bank USA v. Brown*, Boston Division Housing Court, Docket No. 12-SP-3218 (July 16, 2013)(Wink, J.). While the notion of "substantial compliance" has persuasive

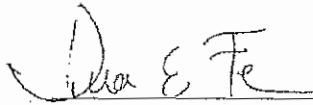
appeal - as a practical matter the mortgagor generally deals with the servicer on issues of payment and therefore a right to cure notice which identifies the servicer instead of the mortgagee should suffice - that argument is for the Legislature to consider, not for the courts to impose. Whether shifting patterns in the home mortgage industry reduce the importance of distinguishing between the mortgagee and the servicer, or rather reinforce the importance of maintaining that distinction, are questions for the Legislature to contemplate in the exercise of its constitutional role. As courts, our role is to afford statutory language its plain meaning.

8. Having concluded that strict compliance with §35A is necessary, I turn to the notice in this case. There is no dispute that PHH was not the mortgagee when it was identified as such in the right to cure notice. I conclude as well that the phrase "or anyone holding thereunder" in §35A(b) refers to an assignee of the mortgage, and does not extend to a servicer. I base this conclusion on the analysis set forth in *Maria Bravo-Buenrostro v. Onewest Bank, F.S.B.*, cited above. In addition, relying on basic principles of statutory construction, I would note that §35A(c)(4) requires "the name and address of the mortgagee, or anyone holding thereunder, *and* the telephone number of a representative of the mortgagee whom the mortgagor may contact..." (emphasis added), distinguishing the "representative of the mortgagee" (here, arguably, the servicer) from "the mortgagee, or anyone holding thereunder." I therefore conclude that PHH was neither the mortgagee or "anyone holding thereunder," that the right to cure notice failed to comply with §35A, and that PHH thereby failed to comply strictly with the statutory power of sale.

9. **Order:** The plaintiff's motion for summary judgment is denied and the defendants'

motion for summary judgment is allowed. Judgment for possession shall enter in favor of the defendants.

So entered this 27th day of August, 2013.



Dina E. Fein
First Justice