

## **New 90-Day Right to Reinstate Notice Required for Massachusetts Residential Foreclosures Effective May 1, 2008**

In 2007 Partridge Snow & Hahn LLP alerted our clients and colleagues to the new Massachusetts Chapter 206 of the Acts of 2007 “An Act Protecting and Preserving Homeownership”, a law designed to address the problem of unprecedented mortgage defaults and the subprime mortgage crisis ([“New Massachusetts Foreclosure Legislation”, November 27, 2007](#), and [“Massachusetts Governor Signs Foreclosure Mortgage Origination Legislation”, December 5, 2007](#)). This is the third alert updating these changes.

The new law makes changes to a number of current Massachusetts laws which affect foreclosure practice and post-foreclosure accounting, post-foreclosure evictions, loan origination, loan modification, and mortgage lender/broker loan officer licensing. The effective date for the foreclosure provisions is May 1, 2008, while the other provisions have varying effective dates. A summary of the changes to Massachusetts foreclosure practice follows.

We have attached [various documents](#) including a suggested 90-day right to reinstate letter, a suggested form of affidavit asserting compliance with the 90-day right to reinstate, a suggested form for accounting for the proceeds of the completed foreclosure sale, and a copy of the Massachusetts Division of Bank’s (the DOB’s) [“Frequently Asked Questions Concerning Chapter 206 of the Acts of 2007”](#). Note that these forms are suggested only. We anticipate that the DOB, the Massachusetts Attorney General and the courts will test the sufficiency of these suggested forms.

### **90-day Right of Reinstatement to Cure Monetary Default Before Acceleration**

- Amends Massachusetts General Laws, Chapter 244, §35A and applies to residential mortgage loans in default, encumbering borrower-occupied, 1 to 4-family homes accelerated after May 1, 2008;
- Borrower is entitled to a one-time, 90-day right to cure a monetary default before the loan can be accelerated, and borrower allowed such right one time in 5 years;
- The burden is on the mortgage holder or servicer to determine if borrower is occupying the home; do not rely upon the occupancy status of the property when the loan originated;
- The DOB and the Massachusetts Attorney General’s Office vow to strictly enforce the 90-day right to reinstate;
- An undecided issue remains regarding whether or not a borrower is entitled to a 90-day right to reinstate when the loan was a business-purpose loan, which included a personal guaranty secured by a mortgage on a residential property. According to Chapter 244, §35A, the borrower in the example is entitled to a 90-day right to reinstate (even though the loan was a business-purpose or commercial loan);

- The 90-day notice must be mailed (“served”) by first class mail to the last known address of borrower or mortgagor and, during the 90-day cure period, mortgage holders and servicers are prohibited from commencing foreclosure, from charging or collecting any attorneys’ fees or other costs of collection except late fees or per diem interest. A DOB representative has stated that mortgage holders and servicers can pay taxes, insurance, and other municipal charges during the 90 days, although this is not clear in the statute;
- An unresolved issue currently being considered by DOB is whether the legal fees and costs incurred during the 90-day period for entering into a loan modification agreement or a deed-in-lieu of foreclosure, may be charged to the borrower or mortgagor.

**The 90-Day Letter Must Include:**

- A description of the default and amount needed to cure; the actual date by which the borrower or mortgagor must cure (90 days after service of the notice) and consequences if borrower or mortgagor fails to reinstate (acceleration);
- The name, address and local or toll free phone number for a **person** to whom payment must be made and the name, address and local or toll free phone number for the **person** in the department to whom disputes about the arrearage or default should be addressed. This requirement raises a potential problem for the privacy and safety of the “persons” who are named. The industry wants to substitute “collection manager” or a like title for a “person’s” name (the DOB and industry representatives are studying this issue);
- The name of any current or former mortgage broker who was involved in the loan and, after July 1, 2008, the name of any loan originator who was involved in the loan;
- A statement that the mortgagor or borrower may be eligible for assistance from MassHousing and the DOB, and the toll free or local phone numbers of those agencies. Mortgage holders and servicers may want to include HUD counseling information and VA information.

**Additional Requirements**

- An affidavit certifying compliance with Chapter 244, §35A and a copy of the 90-day letter must be filed with Land Court complaint. The affidavit must be signed by an individual at the mortgage holder or servicer attesting to the mailing of the 90-day letter. A representative of the DOB suggests that the affidavit be signed by a mailroom employee or other employee with personal knowledge of the mailing of the 90-day letter;
- The Massachusetts Land Court has alerted foreclosure attorneys that, in the event a foreclosure complaint is not accompanied by the required affidavit and 90-day letter, it will require a statement explaining why no 90-day letter accompanies the

complaint (e.g., the loan was a business purpose loan; the property is more than 4 units; the borrower does not live there; the borrower already received one 90-day right to reinstate within a 5-year period and is not entitled to another one). As of this writing, it is uncertain as to whether the Land Court will refuse to accept for filing complaints that do not include this information;

- Chapter 244, §35A requires that within 5 business days of filing a foreclosure complaint in the Land Court (referred to by the DOB in the attached FAQ's as a "petition under the Soldiers' and Sailors' Civil Relief Act), a copy of the 90-day letter be filed with the DOB. The DOB has stated it will not accept any papers in connection with this requirement by facsimile, by mail or in person. Instead, to comply with the DOB filing requirement, the information must be input electronically in an on-line database which the DOB is currently developing. The DOB's representative stated that only foreclosures that are actually commenced by filing in Land Court are to be input into the database; the database is not set up for input on every 90-day letter sent;
- The DOB hopes to have the database up and running by May 1, 2008 (go to [www.mass.gov/dob](http://www.mass.gov/dob)); however, of concern to the industry is the DOB's statement that the password used to create the record (when the first filing is input) will be the only password that will later be able to access the record in the database to input the foreclosure sale results (also required by the new law). Thus, it is crucial that the party who made the initial input of information into the DOB database either be the same party or that the initial password utilized is readily available to the party who must input additional information when the foreclosure is complete;
- Mortgage holders and servicers may continue to expect inquiries from the DOB requesting a 60-day stay of foreclosure upon inquiry from a borrower, and
- The Governor, the DOB, the Attorney General, legislators, and consumer advocates believe that mortgage holders and servicers have an absolute obligation to reach out to borrowers during the 90-day period to explore loan modifications, forbearance agreements, loan restructuring, refinancing and other avenues to avoid foreclosure and loss of property.

### **Accounting for Disposition of Proceeds**

- Mass. Gen. Laws Chapter 183 §27 is amended to provide that the mortgage holder or "representative of the mortgage holder" (could be a servicer or foreclosure attorney) must, **within 60 days** of receipt of the proceeds from a foreclosure, provide an itemized written accounting to the mortgagor or borrower mailed to his last known address setting forth an accounting of the sales proceeds. The accounting must include sales price, legal fees, auctioneer fees, publication fees, "other fees" and amount of surplus, if any. This provision was effective **November 29, 2007**.

- In addition to providing an accounting to the mortgagor or borrower, the mortgage holder or servicer is required to notify the DOB, in writing, of the date of the foreclosure sale and the purchase price at the foreclosure sale. As stated earlier, the DOB will not accept any facsimiles, mail or in person delivery of the written documentation that is required by the new law. The sole means of compliance will be for mortgage holders and servicers (or their representatives) to input the required information into the DOB's database – recall the concern that the first password that created the record when the foreclosure was commenced is the **only password** that can go back in to the database and add the additional required information to the record. Thus, it will be absolutely crucial that the original party who opened the record on a foreclosure keep track of the password that was utilized to open the initial record.

The 90-day right to reinstate requirements of Chapter 244, §35A take effect on May 1, 2008 and apply to applicable mortgages which have been accelerated or where foreclosures are completed prior to **May 1, 2008**. Note again that the accounting requirements of Chapter 183 §27 took effect on **November 29, 2007**.

### **Identification of Mortgage Brokers and Mortgage Loan Originators on Recorded Mortgages and Assignments**

- Chapter 183, §6D provides that for any mortgage loan originated after **November 29, 2007**, mortgages and assignments of mortgages on 1-4 family owner-occupied homes must include either an endorsement of the name, post office address and license number of the mortgage broker involved in the loan, the loan originator responsible for placing the loan or a notation that “no mortgage broker or loan originator is involved.” The loan originator identification requirement is not effective until July 1, 2008 because that is the date that loan originators must be licensed by Massachusetts. The DOB has stated that in the event of a complaint on this requirement, a statement from the mortgage holder or servicer that it has no information and cannot determine if a mortgage broker or loan originator was involved will not be acceptable to the DOB; and
- Chapter 183, §6D states that the failure to include the required information on the mortgage or assignment will not affect the validity of the documents so that the Registries of Deeds should not reject deficient documents for recording. In spite of the statutory reference, we have been advised that there are Registries that are refusing to accept deficient documents for recording.

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