Massachusetts Alliance Against Predatory Lending

maaplinfo@yahoo.com *www.MAAPL.info*

Comments of Grace C Ross of the Mass Alliance Against Predatory Lending Related to The Division of Banks Proposed Regulations 209 CMR 56.00: Right To Cure A Mortgage Default.

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Grace Ross from the Mass Alliance Against Predatory Lending. We want to thank, again, the Commissioner and representatives from the Division of Banks for having this hearing regarding the regulations, the implementation of Mass General Laws 244 35A and 35B. We want to thank you very much for the diligence of your work.

I have some very general comments and some very specific comments. Most of our comments I will address in order in which material appears in 209 CMR 56.

First, however, three general comments:

A) The 56.08 "Safe Harbor" for compliance by the lenders raises grave concerns to us: both subsection 1 and subsection 2. These imply that a previous loan modification process that does not meet the standards required under this statute nor has any indication that it would be affordable nor provide a commercially reasonable alternative to the cost of foreclosure to the lender is potentially being allowed to be substituted for this very specific loan modification process; this process was created in response to the specific characteristics identified for these certain loans. As such we do not feel the loan modifications and certainly the denial of a different type of modification is an appropriate substitution; it has none of the required specific modification characteristics nor the oversight by the state nor meets the specific requirements of loans that are situated in this way. In fact, HAMP allows for re-applications because a borrower's situation may change.

The purpose of the "Safe Harbor" was not to create a complete exemption from meeting the new legal requirements of this statute. This statute was created for a specific modification offer for loans with characteristics that have raised specific serious concerns in recent years. Characteristics associated with loans "doomed to fail"; while simply having one such characteristics does not mean a loan is indeed "doomed to fail" but since such loans at least skirt the edges of such loan types found to be presumptively unfair by the Supreme Judicial Court and thus against state law, we do not believe any blanket safe harbor should be created.

We were present for the lobbying and discussion of this legislation; the purpose of a safe harbor is not to eliminate completely application of the new law in cases with a number of non-comparable loan modification procedures.

B) We do want to identify that under the definition of "good faith effort" the minimum requirements of the creditor's efforts is explained, but not minimal requirements of good faith effort on behalf of the borrower. I address this in detail in that section of the regulations.

C) Specifically an issue that we had raised when initial commentary was requested at the August 29 hearing 2012, that we were concerned that there has been no real guidance provided for the net recovery following foreclosure segment of the net present value calculation. It is our understanding that this element of the NPV tests is often identified as proprietary in the industry and yet, for the borrower to have an understanding of this critical part of the calculations underlying the offer they may receive or be denied, we believe some transparent guidance and reporting to the borrower is necessary.

As such, we would recommend the following specific elements of the expenses related to foreclosure be included in that definition:

i. costs from projected delinquency, interest, fees by date of foreclosure based on current actual length of foreclosure process in Massachusetts,

ii. costs associated with all legally required actions to foreclose and percentage loss from foreclosure sale,

iii. costs to meet all sanitary code requirements, property maintenance and

iv. costs associated with eviction if part of standard operating procedure for creditor and

v. other ownership costs until projected sale or re-sale to third party purchaser

<u>In order of appearance, specific feedback</u>

"Mortgagee"[1]

[1] At the Commissioner's request from the hearing, I went back and reviewed the statute Mass General Laws chapter 244 section 35A. While there is a separate definition section at the beginning of 244 35A that definition of section does not include a specific definition of mortgagee. It does discuss more generally what the term creditor might apply to; while the definition of creditor includes a wide range of possible entities that is not the definition that we were recommending in our testimony be changed.

See recommendations above. They reflect the repeated occurrence in the statute, Mass General Laws chapter 244 section 35A, to "mortgagee or one holding thereunder". The courts have clarified in a few rulings now that "mortgagee or one holding thereunder" is not referring to a servicer, but referring to a mortgagee, their nominee presumably and certainly their successor and assigns.

We understand that the Division had not chosen at this time to reopen this matter. We felt, however, that bringing the definition of mortgagee in line with current understanding – as the entity holding both the mortgage and the note for the purposes of foreclosure – and certainly not referring to the servicer of the mortgage as a potential mortgagee by definition would be helpful.

This would provide clarification for lenders and hopefully a single standard reflected in the courts as well.

While this was not a change to the previous regulations for 244 35a, we want to flag for the Division the definition of "mortgagee". We would encourage a change. At present it states "mortgagee is an entity to whom property is mortgaged, the mortgage creditor or lender including but not limited to mortgage servicers, etc." Mortgage servicers is not part of the common understanding of what it means to be a mortgagee in that a mortgagee is expected to actually hold the mortgage not just service it.

We would recommend that the Division break out its definition to reflect that. We believe this would clarify both for 244 35A and certainly 244 35B the relationship of the mortgage holder and the mortgage servicer more clearly.

"Borrower's representative"
Likewise, we are not sure, is there a reason why the definition of the borrower's representative does not include the possibility of a legal advocate?

56.02 referring to streamlined refinance.
The language at the end of this section seems to exempt all loans that have since been bought by Fannie or Freddie. No such exemption exists in the statute. From the Division's comments at the hearing, this does not seem to be the Division's intent. There was some more limited reference intended here; please clarify the language.

56.05 subsection 1. c,
Under "Right to Request a Loan Modification Process", we thought it would be helpful to clarify when a copy of the Right to Request a Mortgage Loan Modification notice should be filed through the Attorney General's office; it should be sent concurrent with the delivery of said notice to the borrower.

56.05, subsection 5b
We are very concerned that no good faith effort to meet the 30 days requirement by the borrower is enumerated. We believe the intent of the legislation was for the Division to provide a good faith standard for borrowers who might not specifically meet the exact letter of the language of providing all information as requested within the 30 days of delivery. This is a significant oversight and is repeated later in the regulations.

Section 2(h) of the Bill states that the DOB shall adopt regulations that include the minimum requirements which constitute a good faith effort by the borrower to respond to the notice required under subsection (c).

Proposed sec. 56.06 contains itemized documentation requirements and states that that the borrower shall be "deemed to have made a good faith effort to respond" if the borrower provides the listed documents within 30 days of the creditor's notice.

Subsection (2) of section 56.06 sets out the alternative documentation requirement (the non-HAMP alternative). As our lawyers who work in this area have pointed out to me: this list is unduly burdensome. Many borrowers will be unable to assemble these documents in 30 days.

Under subsection (3) of section 56.06 the borrower may submit the documentation required under HAMP in order to meet the minimal good faith standard. This may be a fair standard. However, HAMP is set to expire at the end of 2013. To address this fact, and to avoid the possibility that creditors will argue that this provision only applies to HAMP eligible loans. The regulation needs to make clear that this standard can apply to *any* loan, regardless of whether it is a HAMP-eligible loan, and regardless of whether the HAMP program is still in effect. The reference is presumably to the Treasury non-GSE HAMP Handbook. It would be helpful to cite the Handbook section and state that if no longer in effect, the relevant standard is in the most recent or final version of the Handbook.

The use of presumptions implies that the borrower can satisfy the good faith standard by an alternative means, and the regulations should say this expressly. Any list is likely to take on a life of its own. There should be a (4) catch-all stating that a borrower can show good faith by other means. Specifically, a borrower who simply cannot obtain documents because they do not exist or the borrower cannot reasonably obtain them, should be able to meet the good faith standard, as determined on a case by case basis.

56.05 subsection 6C
We would just point out that once again the anticipated net recovery post-foreclosure components of that calculation are not enumerated, and refer you again to what we would recommend.

56.05 subsection 8A-3
The regulations refer to waiving the borrower's rights and proceeding to foreclosure. We would like clarification here that the borrower is waiving their rights to the loan modification process defined in this section not other rights.

56.05 subsection 8B
In our commentary and in the commentary provided by the Mass Bankers Association during the initial comments on August 29, we express concern about the use of the word "substantiating" documentation in support of a counteroffer because it was not clear what "substantiating" meant. We would like to here recommend that the Division defines "substantiating" to be any documentation required to correct inputs to the Net Present Value and other calculations provided in the "Creditor's response" and can include a basis to correct the calculation to the costs to the lender to foreclose if any such documentation is needed and available to the borrower.

It must be made clear that "substantiating" documentation where it does not exist is not required and in some cases, no substantiating documentation is even appropriate – such as in the case of a counter-offer which is still financially beneficial to the lender based on calculations they provide.

Negotiation by Mail
We are concerned that the regulations do not address an extensive part of our commentary from the first hearing related to the unrealistic nature of the 30 days "negotiation by mail" timeline.

The following elements remain unaddressed:

1) What happens if a borrower responds within 30 days, provides the information as required to the best of their understanding but something goes wrong, something gets lost in the mail and does not get received in a timely fashion or there's some misunderstanding about the documentation required. There is nothing in the regulations that address what happens to the timeline under such a circumstance.

2) Similarly, while the borrower if they fail to meet the 30 days deadline lose their opportunity to negotiate the loan modification; there remains no regulatory expectations or even perhaps, as might be needed, sanctions about what happens if the lender does not meet the 30 days requirement in the legislation. We had suggested a tolling of the 150 days right to cure period if such a thing happens.

3) There is no clarification to the borrower of what their rights are if the lender does not respond within the required 30 days; there's no clarification of what action is required on their part.

4) There is a reference at 56.07 subsection 5B that additional information may be required from the borrower for the creditor to complete its assessment within the applicable 30 days period; however, there are in fact no explicit steps laid out here if additional information is requested from the borrower about when it needs to get back to the creditor and what that does to the timeline in the by mail negotiation process itself.

56.07 subsection 8
This again references the term "substantiating" documentation without a definition. We addressed this above, I merely point out that it reappears here.

Right to Request a Modified Loan Notice
In the language of the right to request a modified mortgage loan notice itself we welcome much of the language here as it is very clear and very streamlined. The Division did an excellent job. We reference here changes needed in the paragraph that begin "…please be aware this notice of a right to request a modified mortgage loan is different from the right to cure, etc…" the fourth line down says "…the enclosed mortgage modification options form provide you with different choices…" it's not clear what that's referring to; we think it might actually muddy the water. Instead we would recommend "provides you with four choices; you must choose one and return".

In addition, at the end of the paragraph that says "please keep a copy of everything you send to us," in addition, it should say "keep proof of mailing the materials to us." That proof is the one statutorily defined proof that a borrower must have that they have attempted to comply with the process. As such, we believe it should be explicitly referenced.

Under the mortgage modification options, again, we very much appreciate the clarification of options and the way they were written by the Division. The fourth one on this list however, we would clarify that the second sentence by saying "... I waive my right to any right to cure period".

Again, we at the Mass Alliance Against Predatory Lending make ourselves available in any way that we can be of assistance in clarifying further any of our comments or any other questions that have arisen in the process of defining these regulations. We thank you again for your time and attention to this matter.

Grace C Ross, Coordinator
Mass Alliance Against Predatory Lending