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## Industry Guidance

By the [Division of Banks](#)

### Guidance on Compliance with Chapter 194 of the Acts of 2012, An Act Preventing Unlawful and Unnecessary Foreclosures

**August 3, 2012**

#### 1. Introduction

On August 3, 2012, Governor Deval Patrick signed Chapter 194 of the Acts of 2012, An Act Preventing Unlawful and Unnecessary Foreclosures, into law. The Act contains an emergency preamble which makes the law effective immediately. There are a number of provisions that establish additional requirements for mortgage creditors in the mortgage foreclosure process but the most immediate issue is how mortgage lenders initiating a foreclosure after the effective date of Chapter 194 comply with the requirements of the new Section 35B of General Laws chapter 244. Section 35B requires that mortgage creditors, prior to beginning the foreclosure process, send a notice of the right to pursue a mortgage loan modification to a borrower who is deemed to have a "certain mortgage loan" as defined by the statute. At the request of banks, credit unions, and licensed mortgage lenders, this guidance is intended to promote a consistent response to the new requirements of Chapter 194.

#### 2. Certain Mortgage Loans

"Certain mortgage loan" is defined in the statute as a loan to a natural person made primarily for personal, family or household purposes secured wholly or partially by a mortgage on an owner-occupied residential property with 1 or more of the following loan features:

- a. An introductory interest rate granted for a period of 3 years or less and such introductory rate is at least 2 per cent lower than the fully indexed rate;
- b. Interest-only payments for any period of time, except in the case where the mortgage loan is an open-end home equity line of credit or is a construction loan;
- c. A payment option feature, where any 1 of the payment options is less than principal and interest fully amortized over the life of the loan;
- d. The loan did not require full documentation of income or assets;
- e. Prepayment penalties that exceed section 56 of chapter 183 or applicable federal law;
- f. The loan was underwritten with a loan-to-value ratio at or above 90 per cent and the ratio of the borrower's debt, including all housing-related and recurring monthly debt, to the borrower's income exceeded 38 per cent; or
- g. The loan was underwritten as a component of a loan transaction, in which the combined loan-to-value ratio exceeded 95 per cent.

However, the law also requires that a loan will be considered as a certain mortgage loan if a creditor is unable to determine whether the loan has 1 or more of the loan features in clauses (i) to (vii) above. The law also determines that loans financed by the Massachusetts Housing Finance Agency and loans originated through programs administered by the Massachusetts Housing Partnership Fund board shall not be certain mortgage loans.

#### 3. Timing of Section 35B Notice

Under Section 35B, the creditor must send the borrower a notice of the borrower's right to pursue a mortgage loan modification if the loan qualifies as a "certain mortgage loan" as defined in the statute. This notice must be sent concurrently for any loans which the right to cure notice under General Laws chapter 244, Section 35A is sent on or after the effective date of the Act. It is the Division's position that a creditor is in compliance with the Act if it sends the borrower a Section 35B notice at the same time that

it sends a Section 35A notice from the effective date of the Act (August 3, 2012).

On all loans where the Section 35A notice has been sent prior to August 3, 2012, no Section 35B notice is required. On loans which have proceeded through the foreclosure process such as a complaint being filed in the Land Court or Superior Court, or for which a foreclosure notice has been mailed or published, there is no requirement for the creditor to send a Section 35B notice.

4. Documentation of Determination of "Certain Mortgage Loan" under Section 35B

Since a determination must be made by a creditor whether a mortgage loan has certain features that qualify the loan as a "certain mortgage loan" for purposes of receiving a Section 35B notice, the Division would expect each creditor to maintain written documentation in each loan file so that Division examiners may review the creditor's determination whether or not the loan qualifies as a certain mortgage loan.

5. Form of Section 35B Notice

Subsection (d) of Section 35B requires that the Section 35B notice shall be similar in form and substance to the notice promulgated by the Division of Banks under Section 35A. The Division would recommend that creditors use the header of the form for the Section 35A notice found at 209 CMR 50.04, including the five languages, but revise the body of the form to inform the borrower of his/her right to pursue a mortgage loan modification. The notice must also request the specific information required to be sent by the borrower to the creditor in order to determine whether the borrower qualifies for a loan modification.

It is the position of the Division that such notice contain a disclosure advising the borrower that he/she has 30 days from the delivery of the Section 35B notice to respond to the creditor or be subject to a right to cure period of 90 days instead of 150 days.

6. Reverse Mortgage In-Person Counseling Requirement for Certain Borrowers Extended

The requirement for certain reverse mortgage borrowers to complete an in person counseling session has been extended to August 1, 2014. This change became effective August 3, 2012.

Chapter 258 of the Acts of 2010 included a provision that certain applicants for reverse mortgage loans, that is, those with a gross income of less than 50% of the area median income and with assets valued at less than \$120,000 (excluding primary residence), would be required to complete an in person counseling session effective as of August 1, 2012.

For reverse mortgage applications taken from August 1, 2012 through August 2, 2012 from borrowers meeting these parameters, lenders should ensure that the borrower(s) attend an in person counseling session prior to making the loan.

Massachusetts law has historically required counseling for all reverse mortgage loan borrowers and, in addition, requires that the third party counseling organization/program be approved by the Massachusetts Executive Office of Elder Affairs. The following is a link to the approved list. <http://www.mass.gov/elders/housing/reverse-mortgage-counselors.html>

## **Right to Request a Mortgage Loan Modification: Process**

- (1) Right to Request a Mortgage Loan Modification Notice:
  - (a) A creditor must send a Right to Request a Mortgage Loan Modification notice which conforms to the Right to Request a Mortgage Loan Modification – Sample Notice to a borrower who has a certain mortgage loan concurrently with the Right to Cure Notice.
  - (b) A creditor shall request a statement of the borrower's income and a complete list of debts and obligations concurrently with the Right to Request a Mortgage Loan Modification notice. A creditor may use the Required Documents for Loan Modification Application form or a similar form.
  - (c) A copy of the Right to Request a Mortgage Loan Modification notice shall be filed with the attorney general's office.
- (2) Borrower Eligibility. The right to request a mortgage loan modification shall be granted to a borrower once during any three (3) year period, regardless of mortgage holder.
- (3) Delivery. The creditor shall deliver the Right to Request a Mortgage Loan Modification notice to the mortgagor by:
  - (a) hand-delivery; or
  - (b) certified mail or similar service provided by a private carrier to the mortgagor at the address last known to the creditor or anyone holding thereunder.
- (4) Authorization to Send the Notice. A creditor may not send the Right to Request to a Mortgage Loan Modification notice unless it has been authorized to collect on the default.
- (5) Borrower's Response to Notice.
  - (a) A borrower shall notify the creditor of the borrower's intent to request a mortgage loan modification not more than 30 days following delivery of the notice to the borrower, and provide the creditor with:
    - (1) a completed Mortgage Modification Options form with one of the options selected;
    - (2) a completed Request for Modification Assistance Form or creditor's current loan modification application;
    - (3) documentation requested by creditor on Required Documents For Loan Modification Application or similar form;
    - (4) delivery of the Mortgage Modification Options form and other documentation to the creditor by hand-delivery; or certified mail or similar service provided by a private carrier.
  - (b) A borrower who holds a certain mortgage loan and fails to respond to the creditor within 30 days of delivery of the Right to Request a Mortgage Loan Modification notice shall be considered to have forfeited the 150 day right to cure period and shall be subject to a right to cure period of 90 days.

- (6) Creditor's Response to Borrower's Request for Modification. Not more than 30 days following receipt of a borrower's notification that the borrower intends to request a mortgage loan modification, a creditor shall provide the borrower with a written assessment of the borrower's ability to make an affordable monthly payment. This assessment shall include the following:
- (a) a written statement of the borrower's income, debts and obligations as determined by the creditor;
  - (b) the creditor's net present value analysis of a modified mortgage loan;
  - (c) the creditor's anticipated net recovery at foreclosure;
  - (d) a statement of the interests of the creditor, provided that a modified mortgage loan serves the interests of the creditor in all circumstances where the net present value of the modified mortgage loan equals or exceeds the anticipated net recovery at foreclosure and provides for an affordable monthly payment for the borrower; and
  - (e) a modified mortgage loan offer or a notice that no modified mortgage loan will be offered.
- (7) Modified Mortgage Loan Offer. If a creditor offers a modified mortgage loan, the creditor shall provide the borrower with the first and last names and contact phone numbers of not more than 2 creditor's representatives responsible for negotiating and approving the terms of and modifying the mortgage loan. A creditor shall be presumed to have provided the written assessment to the borrower if the creditor provides proof of delivery through the United States Postal Service or similar carrier.
- (8) Response to Modified Mortgage Loan Offer. A borrower who receives a modified mortgage loan offer from a creditor shall respond within 30 days of receipt of the assessment and offer of a modified mortgage loan.
- (a) The borrower may:
    - (1) accept the offer of a loan modification;
    - (2) make a reasonable counteroffer; or
    - (3) waive the borrower's rights and proceed to foreclosure.
  - (b) The borrower's response shall be in writing, and, if a counteroffer is proposed, shall include substantiating documentation in support of the counteroffer
  - (c) .A borrower who fails to respond to creditor within 30 days of a modified mortgage loan offer shall be deemed to have forfeited the 150 day right to cure period and shall be subject to a cure period of 90 days
  - (d) Where a counteroffer is proposed by a borrower, a creditor shall accept, reject or propose a counteroffer to the borrower within 30 days of receipt of the counteroffer.
- (9) A creditor shall report, on a semi-annual basis, to the Division of Banks the final outcome of each mortgage loan modification on all mortgage loans for which the creditor sent to a borrower a notice of the right to request a modified mortgage loan.
- (10) Enforcement of the Mandatory Right to Request a Mortgage Loan Modification Notice. The Right to Request a Mortgage Loan Modification –Sample Notice may be used until the Division of Banks has promulgated final regulations. Once the Division of Banks has published final regulations, use of the Right to Request a Mortgage Loan Modification notice as published in the regulation will become mandatory.

## Right to Request a Mortgage Loan Modification - Sample Notice

- **This is an important notice concerning your right to live in your home. Have it translated at once.**
- **Esta carta explica sus derechos legales para permanecer en su propiedad de vivienda. Por favor traduzca esta notificacion inmediatamente.**
- **Este é um aviso importante em relação ao seu direito de morar na sua residência. Por favor, tem traduzido imediatamente.**
- **C'est une notification importante concernant votre droit de vivre chez vous. Faites-la traduire immédiatement.**
- **这是一则关于您居住权的重要通知, 请儘快安排翻译**

### RIGHT TO REQUEST A MODIFIED MORTGAGE LOAN

[DATE]

[POSTAL DELIVERY METHOD]

[BORROWER NAME(S)]  
[STREET ADDRESS]  
[CITY, ST ZIP CODE]

RE: [PROPERTY ADDRESS]; loan [ACCOUNT NO.] with [CREDITOR]:

To [NAME OF BORROWER(S)]:

We are contacting you because our records indicate that you are eligible under Massachusetts law to request a modification of your mortgage with [CREDITOR]. If you want to request a loan modification or other foreclosure alternative option, you must complete and return the enclosed Mortgage Modification Options form along with any supporting information no later than [30 DAYS FROM DATE OF THIS NOTICE]. The Mortgage Modification Options form and any supporting documents must be returned by certified mail or similar service to [CREDITOR]. We will respond to your request within 30 days of its receipt.

Please be aware this notice of Right to Request a Modified Mortgage Loan is different from the Right to Cure Your Mortgage Default notice that you may have already received. *This Right to Request a Modified Mortgage Loan notice and the enclosed Mortgage Modification Options form provide you with different choices. These choices impact the options under the Right to Cure notice that you received and should be carefully considered.* If you do not want to request a loan modification, you must still return the enclosed Mortgage Modification Options form. Please keep a copy of everything you send to us.

**If you do not return the enclosed Mortgage Modification Options form by [30 DAYS FROM DATE OF THIS NOTICE] your right to cure your mortgage default will be reduced from 150 days to 90 days and your right to cure period would end on [90 DAYS FROM DATE OF THIS NOTICE].**

If you have questions, please contact [CREDITOR] at [LOCAL OR TOLL FREE TELEPHONE NUMBER, EXTENSION NUMBER] or [ADDRESS]. If you would like assistance from the Attorney General's Office, you may contact the HomeCorps hotline at 617-573-5333 to speak with a loan modification specialist who can assist you. We suggest you mention this notice when you call.

Sincerely,

[NAME OF SIGNER]  
[TITLE OF SIGNER]

Enclosed with this notice, there may be additional important disclosures related to applicable laws and requirements that you should carefully review.

Enclosures:

- Mortgage Modification Options form
- Request for Modification Assistance form or [CREDITOR]'s current loan modification application
- Required Documents For Loan Modification Application, or similar form]

## MORTGAGE MODIFICATION OPTIONS

You must return this form in the enclosed envelope by [30 DAYS FROM DATE OF NOTICE]

**[BORROWER NAME(S)]**  
**[STREET ADDRESS]**  
**[CITY, ST ZIP CODE]**

RE: [PROPERTY ADDRESS]; loan [ACCOUNT NO.] with [CREDITOR]

To [NAME OF BORROWER/S]:

You must check one of the following boxes to notify [CREDITOR] of how you would like to proceed.

- I would like to request a loan modification. I have attached a complete statement of my income and list of total debts and obligations as requested by the creditor in the form(s) which accompanied the Right to Request a Mortgage Loan Modification notice. I maintain my right to a 150 day period to cure my mortgage default.
- I would like to request a different foreclosure alternative such as a short sale or deed-in lieu of foreclosure. I maintain my right to a 150 day period to cure my mortgage default.
- I do not want to request a loan modification or any foreclosure alternative. I maintain my right to a 150 day period to cure my mortgage default.
- I want to waive my right to cure the default on my mortgage loan and proceed to foreclosure. I understand that by choosing this option I waive my right to any cure period.

**IF YOU DO NOT RETURN THE ENCLOSED MORTGAGE MODIFICATION OPTIONS FORM BY [30 DAYS FROM DATE OF THE NOTICE] YOUR RIGHT TO CURE YOUR MORTGAGE DEFAULT WILL BE REDUCED FROM 150 DAYS TO 90 DAYS AND YOUR RIGHT TO CURE PERIOD WOULD END ON [90 DAYS FROM DATE OF NOTICE].**

\_\_\_\_\_  
Borrower Name

\_\_\_\_\_  
Date

\_\_\_\_\_  
Borrower Telephone Name

## REQUIRED DOCUMENTS FOR LOAN MODIFICATION APPLICATION

<input type="checkbox"/> <b>All Borrowers</b>	<input type="checkbox"/> An application that includes a complete list of monthly income and expenses, if required by the creditor <input type="checkbox"/> Provide signed Internal Revenue Service Form 4506-T (Individual Tax Return Transcript Form) or Internal Revenue Service Form 4506T-EZ (Short Form for Individual Tax Return Transcript) <input type="checkbox"/> Provide copy of last two years' tax returns, with all schedules including Schedule E, if applicable <input type="checkbox"/> Provide copy of 2 most recent bank account statements <input type="checkbox"/> Provide proof of expenses and monthly obligations <input type="checkbox"/> Provide copy of utility bill showing homeowner name and property address <input type="checkbox"/> Provide copy of credit card statements showing payments due on all balances <input type="checkbox"/> Provide copy of mortgage statements for other mortgages on the property, if applicable
<input type="checkbox"/> <b>For people who earn a wage</b>	<input type="checkbox"/> Provide a copy of most recent pay stubs reflecting at least 30 days of year-to-date income of borrower or co-borrower
<input type="checkbox"/> <b>For people who are self-employed</b>	<input type="checkbox"/> Provide a copy of the most recent signed and dated quarterly or year-to-date profit and loss statement
<input type="checkbox"/> <b>For people who receive alimony, child support, or separation maintenance payments</b>	<input type="checkbox"/> Provide documentation of alimony, child support, and/or separation payments  <i>Notice: Alimony, child support or separate maintenance income need not be disclosed if you do not choose to have it considered for repaying your mortgage debt.</i>
<input type="checkbox"/> <b>For people who receive income from other sources</b>	<input type="checkbox"/> Provide documentation of tips, commissions, bonuses, housing allowance or overtime; and/or <input type="checkbox"/> Provide documentation of unemployment income and/or social security income, death benefits, pension, public assistance, or adoption assistance; and/or <input type="checkbox"/> Provide documentation of income from rental properties, including copy of any lease agreement