



**Statement of Kevin M. Cuff, Executive Director, on the behalf of the
Massachusetts Mortgage Bankers Association
Regarding Legislation to Require Judicial Review; Temporary Moratoriums on Foreclosures; and
Requiring Just Cause for Eviction and Foreclosed Properties
Joint Committee on the Judiciary
Thursday, October 15, 2009**

Chairwoman Creem, Chairman O'Flaherty, members of the Joint Committee, my name is Kevin M. Cuff and I am Executive Director of the Massachusetts Mortgage Bankers Association (MMBA). The MMBA represents roughly 350 lending institutions made up of equal representation between depository institutions (banks and credit unions) and non-depository institutions (mortgage banker/lender companies, mortgage brokers and all ancillary companies which touch the mortgage transaction throughout the Commonwealth. I appreciate the opportunity to provide you with our views on numerous bills before you today that address judicial review, foreclosure moratoriums, and expanded tenants' rights provisions.

As demonstrated by our numerous actions over the last several years, the MMBA and its members share your concern with the rising number of residential mortgage foreclosures in the Commonwealth. We understand the emotional toll that foreclosures have on individual consumers and their families and we recognize the potential destabilizing impact on neighborhoods as well as the overall economy. The MMBA and our member institutions continue to work with legislators, city and town officials, state government, and advocacy groups to identify and implement a variety of solutions to these issues.

Our members are deeply involved in national and local foreclosure prevention programs as well as neighborhood revitalization efforts in individual cities and towns throughout the Commonwealth. In addition to working with individual borrowers, our members have donated monies to support homebuyer counseling and foreclosure prevention programs in Massachusetts. Many of our members participated in the "Opportunity Knocks" housing fairs held in ten communities and cosponsored by MassHousing, the Massachusetts Association of REALTORS®, the Massachusetts Housing Partnership, the Patrick Administration, and many others. Local lender (banks and mortgage companies) have also been the primary lender participants in local initiatives such as Buy Brockton, Buy Worcester, Boston's "First-Choice Lender" program, and many others. As a rule, most Massachusetts based banks and lenders aggressively seek to work with borrowers to avoid defaults and preserve and sustain homeownership.

General Comments

Over the years, the MMBA has worked closely with the Massachusetts Division of Banks, the Office of Consumer Affairs, the Office of the Attorney General and many non-profit and community-based organizations in a number of outreach efforts to minimize foreclosures and preserve homeownership for at-risk borrowers in Massachusetts. Representatives from the Association and several of our member banks participated in the Division of Banks' Mortgage Summit and Mortgage Working Groups, developing policy recommendations for regulators and legislators, a number of which are contained in Chapter 206 of the Acts of 2007, an Act Protecting and Preserving Homeownership, which was signed into law by Governor Patrick in November 2007.

This landmark legislation provided a number of new protections for at-risk homeowners and tenants in foreclosed properties and put in place the framework for dealing with this growing problem. Specifically, the law instituted the statutory 90-day right-to-cure, created a loan originator licensing system with strong educational and ethics standards, created a statewide foreclosure database and imposed the nation's first community reinvestment requirements on non-bank mortgage companies. In addition, Chapter 206 made all tenants in foreclosed properties subject to the "tenant-at-will" statutes and provided additional protections for tenants whose rent is subsidized by state or federal programs.

Since enactment of Chapter 206, there have also been a number of major policy initiatives enacted at the federal level that provide additional protections to homeowners and tenants in properties at risk of foreclosure. The Obama Administration has implemented a series of new programs, including the “Making Home Affordable” refinancing and modification programs. More than 500,000 borrowers throughout the nation and thousands across the Commonwealth have been granted loan modifications through this program, and many more have refinanced into more affordable mortgages.

There are also enhanced protections for tenants in foreclosed properties that were recently enacted in federal law. Provisions that require foreclosing lenders to honor existing leases and provide tenants with at least 90 days notice to vacate the property if the new owner intends to use it as a primary residence were included in major housing legislation that was signed into law earlier this year.

Given these changes in federal law and the creation of these new programs provide significant new protections for at-risk borrowers, we believe that many of the bills before you today are either duplicative of current initiatives or are unnecessary because of changes in federal law. Rather than providing additional protections, most of these proposals will simply delay the foreclosure and increase the costs and debt to the borrower and ultimately the lender.

Judicial Review (H 1729, S 1613, S 1778)

HB #1729, SB #1613, SB #1778 all implement a system of judicial review for all residential mortgage foreclosures. These bills allow any mortgage borrower in Massachusetts -- not just those with subprime loans -- to contest a foreclosure before a judge. As a result, this legislation adds a considerable cost and burden to local, community banks in protecting their assets and security interest in foreclosure situations. Ultimately, these costs will be borne by borrowers in the form of higher interest rates and higher fees on loans in the Commonwealth.

These bills also gives judges broad authority to modify the underlying mortgage or “grant any other appropriate relief”. This is a significant increase in judicial power and will create uncertainty both for banks and for credit unions that hold mortgages in their portfolios as well as those loans that are sold into the secondary market. A mortgage is a contract between two parties -- the lender and the borrower -- the Committee should exercise caution before moving forward with legislation that allows judges to modify that contract unilaterally.

We are also concerned with a number of other issues in these measures. Specifically, the Massachusetts courts are already having trouble addressing the increased number of foreclosures. The judicial review requirement, without any additional funding or staffing resources, will overwhelm an already overburdened judicial system, slowing the process even further for lenders with legitimate rights to foreclose.

The legislature has rejected similar judicial review proposals in the last several years. We would urge the Committee to once again reject this legislation.

Foreclosure Moratoriums (H 1510, S 1751, H 4085)

Several bills before you today seek to place moratoriums on residential mortgage foreclosures in the Commonwealth if they meet the criteria contained in the legislation, whereby certain loans are presumed to be unfair simply because they meet even one of the criteria. While many proponents of these proposals claim that only subprime mortgages would be subject to the moratorium, the language in these bills is extremely broad and would clearly impact traditional mortgage products.

As an example, the proposed moratoriums would apply to all adjustable-rate mortgages (ARMs) with an initial term of three years or less. It also applies to all interest-only loans as well as all loans where the debt-to-income ratio is greater than 50 percent at the fully indexed rate. These criteria create an extremely low threshold for considering a mortgage loan “unfair” or even subprime. Thousands of prime mortgages would qualify for the moratorium under this definition. In addition, many of the criteria are so broadly written as to almost require some type of judicial interpretation of the loan terms to even determine whether the loan is subject to the moratorium. For example, all of the bills state that a loan is subject to the moratorium if it “was approved on a “stated-income” basis with no regard to a borrower’s ability to repay. Who will make a determination of whether the original mortgage broker or

lender made the loan with no regard to the consumer's ability to repay? Will there be any standards for this determination?

The legislation also prohibits lenders from charging any fees or even interest during the six-month moratorium. In virtually all instances, this is a blatant violation of the mortgage contract, and will have a significant safety and soundness risk for lenders that keep these mortgages in their portfolios. The prohibition on charging fees is so broad that lenders might not be able to pay delinquent property taxes, condominium association fees, or hazard insurance premiums. This would put the lender's asset at substantial risk of liens filed by municipal governments or condominium associations. It is also unclear whether the lender would ever be able to recoup these costs after the six-month period expires.

Finally, similar to some of the provisions in the judicial review legislation, this prohibition on charging fees and interest also potentially violates contracts in the secondary mortgage market that may limit the ability of the servicer to forgive these payments. Some servicers are required under the contract to pay insurance premiums and taxes. How would these payments be affected by the moratorium?

Tenant Protections in Foreclosed Properties (S 1609, S 1614, S 1847, H 4084, H 3522)

Lenders recognize that foreclosures are disruptive and painful to homeowners and tenants and are actively working to assist in providing transitional assistance. Local lenders work with borrowers who are delinquent before filing a foreclosure petition and in many cases will attempt to assist tenants who may be at risk of displacement.

The final group of bills we would offer comments on includes several measures that would mandate that tenants or occupants in a home in foreclosure could remain in the property unless a "just-cause" for eviction existed. The legislation grants broad new protections to tenants and even the owners of foreclosed properties, creating new tenant rights without a specific lease and giving borrowers who default the ability to stay in the property indefinitely. Under the bill, lenders would be required to notify, in writing, tenants or other occupants of the amount of the rent and to whom it should be paid prior to the foreclosure. However, lenders have no business relationship with the tenants and do not have access to their names, mailing addresses, or information regarding their tenancy. There is also no requirement that a tenant produce any proof of prior rent payments such as cancelled checks, a valid lease agreement, or information related to any security deposit that may or may not exist. All of that information resides with the owner of the property. As mentioned above, new federal protections were also recently enacted that apply to tenants in almost all properties in foreclosure. Under the new federal law, in the event of foreclosure, existing leases for renters must be honored to the end of the term of their lease.

Even in cases where tenants do not have a lease, tenants with leases terminable at will under state law, or where the owner acquiring the property will occupy it as a primary residence, existing tenants must receive a minimum of 90 days notice to vacate the property. These federal protections apply to all foreclosures initiated after May 20, 2009.

We believe these bills are overly broad and will have a significant negative impact on the banking industry here in Massachusetts. Lenders would be left with little or no recourse against tenants or owners who refuse to vacate foreclosed properties. A significant expansion of tenant protections far in excess of federal law is unwarranted given all of the potential problems it creates for lenders.

Conclusion

The MMBA and our member lenders will continue to work with borrowers, local communities, and elected officials on ways to sustain homeownership in this challenging housing markets. Chapter 206 was a major step forward in providing additional protections to homeowners.

Thank you for the opportunity to provide you with written testimony before the Committee.