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February 11, 2013

Via Electronic and Regular Mail

Alfred M. Pollard
General Counsel, Federal Housing Finance Agency
Constitution Center
400 7th Street, S.W.
Washington, D.C. 20024

Re: Notice Concerning Non-Compliance with M.G.L. c. 244 §§14, 35B-35C, “An Act Preventing Unlawful and Unnecessary Foreclosures”

Dear Mr. Pollard:

I write to respond to your January 31 letter on behalf of the Federal Housing Finance Agency (“FHFA”) concerning the servicing and loss mitigation policies of government sponsored enterprises (“GSE” or “GSEs”) Fannie Mae and Freddie Mac, and GSE compliance with Massachusetts law.

Our Office remains troubled by certain GSE policies and conduct and the extent to which they appear to violate provisions of the new Massachusetts law to prevent unlawful and unnecessary foreclosures, codified at M.G.L. c. 244, §§14, 35B-35C. The purpose of the law is to prevent unnecessary foreclosures of “certain mortgage loans” by requiring loan modifications when they make economic sense for all stakeholders, including a creditor’s investors. M.G.L. c. 244, §35B(b)(2)(iv). Over the past three months since the law became effective, we have been able to review implementation and to observe early successes as well as deficiencies. This experience, and our experience over the past year working directly with banks and servicers to obtain loan modifications and other forms of relief sensible to both borrowers and lenders, informs our comments.

GSEs are “creditors” under the law and, thus, we expect Fannie Mae and Freddie Mac to comply with the law’s statutory obligations as they conduct business in Massachusetts. In a January 11th phone call, we expressed our concern with GSE policies that prohibit homeowner “buyback” of properties. Current GSE policy is to condition both short sales and sales of foreclosed (REO) properties on proof that the transaction was at “arm’s length.” Specifically, the GSEs require an attestation to the following:



"There are no agreements, understandings or contracts between the parties that the Borrower will remain in the [property] as a tenant or later obtain title or ownership of the [property], except to the extent that the Borrower is permitted to remain as a tenant on the [property] for a short term, as is common and customary in the market but no longer than ninety (90) days, in order to facilitate relocation."

This policy contravenes M.G.L. c. 244, §35C(h), which prohibits creditors from imposing such restrictions on the sale or transfer of property to a tax-exempt entity (whether via a short sale or post-foreclosure sale):

[N]o creditor shall require as a condition of sale or transfer to any such entity any affidavit, statement, agreement or addendum limiting ownership or occupancy of the residential property by the borrower and, if obtained, such affidavit, statement, agreement or addendum shall not provide a basis to avoid a sale or transfer nor shall it be enforceable against such acquiring entity or any real estate broker, borrower or settlement agent named in such affidavit, statement or addendum.

This provision facilitates market transfers of housing stock to qualified buyers, including sales to non-profit entities that assist qualified homeowners who qualify for the repurchase of their homes.

In your letter, you confirmed that the GSEs continue to adhere to this "arm's length transaction" policy and expressed your concern that its elimination may foster the creation of "sham nonprofits" and cause homeowners to decline loan modifications where they could instead "repurchase from a nonprofit at a larger discount." However, you provide no information, evidence or statistics to support this speculation. We, of course, must all guard against any form of mortgage fraud and avoid creating adverse incentives that hurt the housing market and investors. However, based on our actual experience in Massachusetts, the buybacks facilitated by area non-profit groups have helped stabilize neighborhoods and keep qualified homeowners in their homes, at no additional cost to the creditor or its investors (who receive the fair market price). We cannot accept that a GSE would prefer taking an approach that would leave a family homeless and keep a distressed property on its books rather than accept a non-profit's purchase offer at fair market value.

The Massachusetts Legislature has prohibited the GSEs from rejecting an otherwise valid offer to purchase property at fair market value simply because the purchaser might later sell the property back to the original homeowner. We expect the GSEs immediately to adjust their policies and remove restrictions that violate Section 35C(h).

In your October 2012 letter to General Coakley, you stated that the FHFA and GSEs "strongly share your goals for assisting homeowners and the housing market" and that "it is very much in everyone's interest that a financially-challenged homeowner, with a willingness to pay, be offered an affordable payment option to help them remain in their home." The sales recognized by the buyback provision of the Massachusetts foreclosure law do just that. Because of our shared goals, we expect the GSEs to remove any purported "arm's length" transaction requirement so that GSE investors can get paid the value of their investment and families can stay in their homes, thereby stabilizing our neighborhoods and the housing market.

This issue comes on the heels of concerns we previously expressed to FHFA regarding its failure to support principal reduction. Though it is just one among many loan modification options, principal reduction has proven to be highly effective in restoring stability to the market, to creditors and to distressed homeowners. By refusing to undertake principal reduction (unlike nearly all other creditors), FHFA exacerbates the vexatious problem of negative equity, which greatly impairs the housing recovery. We continue to urge you to reconsider this policy.

We look forward to working together to alleviate the insidious and ongoing effects of the housing crisis.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Claire Masinton', with a stylized flourish at the end.

M. Claire Masinton
Assistant Attorney General
Special Counsel, HomeCorps

cc: Stephanie Kahn (Chief, Consumer Protection Division, AGO)