

Memo: G.L. c. 244 §§ 35B & 35C Affidavits

To: All Registry Districts, Registered Land Division
From: Edmund A. Williams, Chief Title Examiner
Date: June 14, 2018
Subject: 35B & 35C Affidavits

As provided for in our previous Memo dated November 1, 2012 (attached hereto), the responsibility for the review of Affidavits pursuant to G.L. c. 244 §§ 35 B and 35C (“35 B/C Affidavits”) would eventually be given to the Registry Districts in stages.

Stage One: Effective immediately, Registry Districts will be responsible for the initial review of all 35B/C Affidavits. In order to facilitate this transition, the following **Affidavit Checklist** and **Verification Process** are provided herein. We anticipate that there will be issues presented that are not covered by this Memo, and in all such cases, questions as to the suitability of any 35B/C Affidavit shall be directed to the Chief Title Examiner, or his designee. Stage Two of this transition, which will be forthcoming, will involve the Registry Districts’ responsibility for the review of the Eaton/Continuing Note Holder Status Affidavits.

Generally speaking, 35B Affidavits address compliance with a mortgagor’s right to a modification in certain circumstances, while 35C Affidavits address whether the foreclosing mortgagee is either the holder of the promissory note, or is the authorized agent of the holder of the promissory note.

As you are aware, the 35B/C Affidavits may be presented as a combined document, or as separate documents. Either format is acceptable, but in all such cases, the 35B/C Affidavits must include all of the following:

A. Affidavit Checklist:

- ___1. Property address;
- ___2. Name(s) of mortgagor(s)
NOTE: At this time, if any mortgagor is deceased, refer the Affidavit to a Land Court Title Examiner for approval;
- ___3. Current Certificate of Title;
- ___4. Mortgage Document Number;
- ___5. Name of Affiant (beginning, signature and/or notary section(s))
- ___6. Title/Position of Affiant (beginning, signature and/or notary section(s))
(See G.L.c. 183 § 54B - any questions about the Affiant’s title should be referred to the Chief Title Examiner, or his designee, prior to rejection);
- ___7. Based upon personal knowledge;

- _____8. Based upon a review of the business records of the creditor, as defined by the statute;
- _____9. Executed under the pains and penalties of perjury
NOTE: “certify” is not a substitute for pains and penalties of perjury;
- _____10. *Jurat* or equivalent language (sworn/subscribed) in notary clause;
- _____11. State and County of Notary; and
- _____12. Same date of signature and *Jurat*.

B. Verification Process

- _____1. Verify the Foreclosing Mortgagee listed in the 35B/C Affidavit is the current mortgagee, as noted on the encumbrance sheet;
NOTE: The 35B/C Affidavits *may* recite, but are not required to, a chronology of assignments and, if applicable, modifications. If provided, verify all listed assignments/modifications.
- _____2. Verify the Affiant is one of the following:
 - i. An employee of the Foreclosing Mortgagee; or
 - ii. Acting on behalf of the Foreclosing Mortgagee as servicer, sub-servicer, agent, or acting under a power of attorney (“POA”) or limited power of attorney (LPOA”):

Signature Section:

- 1. Listed as the Servicer/Sub-Servicer: If the Affiant signs on behalf of the foreclosing mortgagee as servicer or sub-servicer, no further documentation is required. If the Affiant signs on behalf of the foreclosing mortgagee as servicer or sub-servicer, and the document also references a POA/LPOA, the POA/LPOA is not required to be registered.
- 2. Authorized Agent: If the Affiant signs on behalf of the foreclosing mortgagee as agent, no further documentation is required. If the Affiant signs on behalf of the foreclosing mortgagee as agent, and the document also references a POA/LPOA, the POA/LPOA is not required to be registered.
- 3. POA/LPOA: If the Affiant is signing solely under a POA/LPOA, and a recorded or registered reference to a POA/LPOA is provided on the document, verify the book and page or document number to ensure the POA/LPOA is applicable, and has not terminated by its own terms. If the reference to a book and page or document number is from another Registry District, you must be furnished with a copy. You do not need a certified or attested copy, nor must you register the POA or LPOA, if it is already on record at any Massachusetts Registry District, and has been

verified by the Registered Land Department of the Registry District where the Affidavit is being submitted.

4. If the POA or LPOA is neither registered nor recorded, a certified or attested copy (as determined by the Registry District) must be presented for registration, and said POA or LPOA must be registered in conjunction with the Affidavit.

In all instances where there is a reference to a POA/LPOA, check the document. If it is not registered or recorded in your Registry District, ask for a copy.

Do I need to register a certified copy of the POA/LPOA?

If the only reference to the Affiant's authority to sign the Affidavit is under a POA/LPOA, then yes, you need to register a certified copy of the document. If the Affiant is signing in their capacity as servicer or agent as well as under the POA/LPOA, then you just need to review it, not register it.

What if the POA/LPOA has since expired? The POA/LPOA needs to be in effect at the time of registration.

- ____ 3. Verify that there is a statement that the Affiant has acquired personal knowledge, or is based upon personal knowledge.
- ____ 4. Verify that the Affidavit is based upon the review of the business records.

NOTE: If any of the above criteria are missing or incorrect, return the document to the submitter, setting forth the specific reason(s) for the return.

PRACTICE NOTES: 35B/C Affidavits are only required and applicable with respect to residential property, as limited and defined by the statutes. Generally, the mortgage referenced in the Affidavit is the principal residence of a person and excludes the following:

1. investment property (35B & 35C);
2. a residence other than a primary residence (35B & 35C);
3. residential property used as collateral for a commercial loan (35B & 35C); and
4. property subject to condemnation or receivership (35B only).

The 35B Affidavits may provide that the mortgage is not a “*certain mortgage loan*.” This is an acceptable designation, as 35B only applies to a “certain mortgage loan” as defined by the statute.

PRACTICE NOTE: 35B/C Affidavits may be registered prior to, or at the time the foreclosure documents are presented for registration; provided, however, 35B/C Affidavits **must be executed prior to the first date of the foreclosure publication** which can be found in the

foreclosure affidavit (of sale) and tear sheet (newspaper clipping) both of which set forth the identical three dates of publication. You will not be able to determine if the execution requirement of the 35 B/C Affidavits has been complied with until such time as the foreclosure package is presented for registration. Further reference will be made in the Eaton/Continuing Note Holder Affidavit to follow.

PRACTICE NOTE: If the only Affidavit presented for registration is the Eaton/Continuing Note Holder Status Affidavit, this Affidavit will set forth a reason as to why 35B/C is/are inapplicable (e.g., non-residential, commercial, farmland, abandoned). Should you have any questions, contact a Title Examiner regarding any Affidavit's suitability for registration.