



COMMONWEALTH OF MASSACHUSETTS

Office of Consumer Affairs and Business Regulation

DIVISION OF BANKS

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July 1, 2020

Nanci L. Weissgold
Alston & Bird
950 F Street, NW
Washington, DC 20004

Dear Ms. Weissgold:

The Division of Banks (Division) is in receipt of your correspondence dated March 2, 2020 in which you request an opinion as to the applicability of Massachusetts General Laws chapter 244, section 35B (Section 35B) to a loan that is owned, guaranteed, insured, payable to, or administered on behalf of the Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, Ginnie Mae, the Federal Housing Authority, United States Department of Agriculture, Department of Veterans Affairs, or other federal or state agency or authority (collectively referred to as "Agency or GSE Loans").

As noted in your correspondence, Section 35B requires a servicer to, in relevant part, (i) conduct a net present value (NPV) analysis, for all loans subject to Section 35B, and (ii) provide the NPV analysis in the written assessment required by Section 35B(c), and (b) if a NPV analysis is required, the NPV formula needs to either fall within the list of approved NPV formulas in Section 35B(b)(2)(iii) or be approved by the Division. As further set forth in Section 35B(b)(2)(iii), an NPV analysis is compliant if the analysis is in accordance with the formula presented in at least one of the following: (A) the Home Affordable Modification Program; (B) the Federal Deposit Insurance Corporation's Loan Modification Program; (C) any modification program that a lender uses which is based on accepted principles and the safety and soundness of the institution and authorized by the National Credit Union Administration, the Division of Banks or any other instrumentality of the Commonwealth; (D) the Federal Housing Administration; or (E) a similar federal loan modification plan.

In 2018, an Assurance of Discontinuance (AOD) was entered into between the Massachusetts Attorney General and Nationstar Mortgage LLC (Nationstar). Your inquiry to the Division was presented based upon your awareness of the AOD, but did not indicate that you had any direct involvement then or now on behalf of Nationstar in the matter that was the subject of the AOD. Based on your review of this AOD, you noted that there appears to be a carve out for Agency and GSE Loans from Section 35B's loan modification evaluation requirements. Specifically, on page 3 of the AOD, the term "Covered Mortgage Loan" is defined as a "closed-end, first mortgage loan serviced by Nationstar as of the filing of this AOD that is secured by a property that is located in the Commonwealth of Massachusetts, and is not owned, guaranteed, insured, payable to or administered on behalf of the Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, Ginnie Mae, the Federal Housing Authority, United States Department of Agriculture, Department of Veterans Affairs, or other federal or state agency or authority."

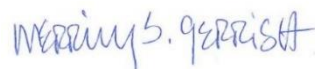
It is important to note the difference between the terms “Certain Mortgage Loan” and “Covered Mortgage Loan.” Certain Mortgage Loan is a term defined by statute and regulation and incorporated into the AOD while Covered Mortgage Loan does not appear in Section 35B or the implementing regulation, and is a term defined explicitly for the AOD. The term “Certain Mortgage Loan” is defined identically in Section 35B(a) and the Division’s implementing regulation 209 CMR 56.02. If a loan has one or more of the loan features listed in subparts (i) through (vii) of the definition included in Section 35B(a), it is a “Certain Mortgage Loan.” Additionally, where due diligence cannot determine whether a particular loan has one or more of the above loan features, it is deemed to be a “Certain Mortgage Loan.” However, all residential mortgage loans financed by the Massachusetts Housing Finance Agency (MassHousing) as well as loans originated through programs administered by the Massachusetts Housing Partnership Fund (MHPF) are excluded from the definition of “Certain Mortgage Loan.” The AOD created a definition of “Covered Mortgage Loan” to describe the entirety of the first lien closed-end mortgage loan portfolio serviced by Nationstar. The use of the “Covered Mortgage Loan” term in this AOD is not prescriptive as to future enforcements as a matter of law.

As a general matter, although the Division recognizes the potential normative force of an AOD, corrective measures set forth in AODs and other agreements entered into by individuals or entities with the Massachusetts Attorney General do not amend the underlying law or redefine terms that are codified by statute. The definition and usage of certain terms in these types of agreements often reflect the results of an extensive negotiation between the parties. As set forth above, the definition of the term “Certain Mortgage Loan” includes only two ‘entity-based’ exclusions from the definition whereby residential mortgage loans financed by MassHousing or originated by the MHPF, which may include one or more of the loan features described in subparts (i) through (vii) of the Certain Mortgage Loan definition, are nevertheless not deemed Certain Mortgage Loans based upon the entity that financed or originated the mortgage loan.

Although Agency and GSE Loans could have also been included as additional ‘entity-based’ exclusions in the statute, they have not been. While Agency and GSE Loans may often lack any of the loan features described in subparts (i) through (vii) of the Certain Mortgage Loan definition, the Division would not recognize the Agency and GSE Loans as an additional general exclusion from the Certain Mortgage Loan definition and requirements of Section 35B. The Division could find no language within the relevant statutes that would exempt Agency and GSE Loans from the requirements of Section 35B. Therefore, the terms of each Agency and GSE loan and an evaluation of whether the mortgage loan contains any of the loan features described in subparts (i) through (vii) of the Certain Mortgage Loan definition will be determinative of whether the mortgage loan is subject to the requirements of Section 35B.

The conclusions reached in this letter are based solely on the facts presented. Fact patterns which vary from that presented may result in a different position statement by the Division.

Sincerely,



Merrily S. Gerrish
Deputy Commissioner of Banks
and General Counsel