The Commonwealth of Massachusetts

Office of the Commissioner of Banks
One South Station
Boston, Massachusetts 02110

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

DANIEL O'CONNELL
SECRETARY OF HOUSING AND ECONOMIC DEVELOPMENT

DANIEL C. CRANE
DIRECTOR, OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

STEVEN L. ANTONAKES
COMMISSIONER OF BANKS

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To All Interested Parties:

The Division of Banks ("Division") has been addressing several questions relative to the implementation of Chapter 206 of the Acts of 2007 ("Chapter 206" or the "Act"). These are answered in Frequently Asked Questions that are on the Division's website. One remaining question is what, if any, fees or charges may be charged during the 90-Day Right to Cure. The two most significant matters regarding this question relate to fees for a modification of the loan and payments made to maintain the priority of the mortgagee's lien status.

The questions are raised as a result of the provisions in subsection (d) of section 35A of Chapter 244 of the General Laws, as inserted by SECTION 11 of the Act. Subsection (d), in part, states that "To cure a default prior to acceleration under this section, a mortgagor shall not be required to pay any charge, fee, or penalty attributable to the exercise of the right to cure a default." The only exceptions provided in subsection (d) are for late fees and per diem interest. In implementing new Acts, the Division has a long history of attributing to the Legislature an intelligible policy of fitting new statutes into existing law and for a new Act to be read as a whole.

In reviewing the totality of Chapter 206, the Division has noted that two SECTIONS of the Act amend the revision of terms statute, section 63A of chapter 183 of the General Laws. One amendment clarifies that an adjustable rate mortgage could be changed to a fixed rate mortgage. The other amendment, inserted by SECTION 6 of the Act, increases the fee that may be charged for a revision of terms from ½ of 1 percent to 1 percent of the outstanding balance of the existing note and mortgage as of the date of any such revision or of the revised balance pursuant to such revision, whichever is greater.

The Division and numerous state government and federal agencies have continuously encouraged lenders and servicers to work with homeowners who are in default to pursue to the greatest extent possible a modification of an existing loan which makes financial sense to both the homeowner and the lender or servicer. Consistent with the intent of Chapter 206 and giving great weight to the amendment to the revision of terms statute which increases the amount to be charged for a modification, it is the position of the Division that all fees charged for a modification and any related filings are not precluded during the 90-day Right to Cure. A meaningful loan modification during the 90-day period should result in home ownership being preserved while maintaining a payment stream for the lender. The Division also recognizes the need to obtain the loan modification during the 90-day period since the Act provides such a right to cure a default of a required payment only once in a five year period.

Although said SECTION 6 permits charging a fee to revise terms, the Division continues to encourage lenders and servicers to pursue loan modifications, in order to avoid unnecessary foreclosures, and make those loan modifications accessible to as many borrowers as feasible. Because any fees charged for a revision of terms may serve to make loan modifications less financially feasible to borrowers, the Division encourages loan modification approaches that are motivated by avoiding the full costs related to foreclosures and not driven by the fees that may be charged.

As noted above, the provision of the 90-day Right to Cure prohibits a mortgagor from being "required to pay any charge, fee, or penalty, attributable to the exercise of the right to cure a default." It is the position of the Division that the prohibition runs solely to the curing of the default. Accordingly, in response to numerous inquiries, the Division concludes that payments made to maintain the mortgagee's property lien status, such as payments that include, but are not limited to the following, may be paid by the lender or servicer and charged to the borrower during the 90-day period:

- real estate taxes;
- hazard insurance;
- condominium fees;
- condominium special assessments; and
- other municipal charges such as water, sewer and electric.

It is the Division's conclusion after review of Chapter 206 that no provision of the Act seeks to change or jeopardize the status of the mortgagee's lien status. Accordingly, the mortgagee may charge the necessary expenditures to protect its lien.

The Division strongly encourages lenders and servicers to advise a homeowner in default, preferably at the time of the Notice of 90-day Right to Cure, that the homeowner remains responsible for other mortgage covenants such as the payments specified above. Homeowners should also be advised that if necessary, a lender will take steps to protect its lien status which would lead to additional charges to the homeowner.

Very truly yours,

Steven L. Antonakes
Commissioner of Banks

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