Comments of Nadine Cohen of Greater Boston Legal Services
Related to The Division of Banks Proposed Regulations Required by
***Chapter 194, An Act Preventing Unlawful and Unnecessary Foreclosures*.**

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My name is Nadine Cohen. I am the Managing Attorney of the Consumer Rights Unit at Greater Boston Legal Services (GBLS). We appreciate the Division of Banks giving us this opportunity to comment on proposed regulations required under the new foreclosure law. These comments are made on behalf of the low income clients of GBLS who are facing foreclosure, often because of a bank's refusal to modify loans so that homeowners can make affordable payments and remain in their homes. Our clients are in need of a fair and adequate process to be considered for loan modifications.

I can tell you that the current loan modification programs are not working. Borrowers have to send in the same documents on average six times. Banks lose documents, keep requiring the same information, do not give answers in a timely manner, give contradictory information, unnecessarily deny modification that borrowers qualify for, initiate foreclosures before completing the loan modification review process, and often drag out the modification process for over a year, and often two years. In a recent *New York Times* editorial, ("Slim Recovery for Housing" August 24, 2012) it was stated that the anti-foreclosure policies put forward "fell short, hampered in large part by a shield-the-banks approach that precluded mass loan modifications." The editorial went on to say that "the most important recent relief initiative was an administration plan to reduce the principal balances on some half a million troubled loans."

Under Chapter 194 of the Acts of 2012, we have the opportunity in Massachusetts to create a better, more timely and efficient modification process, not only for the "certain" loans covered by the new law, but for all loans. In line with the national trend, the Division of Banks (DOB) should be encouraging loan modifications on all eligible loans and should also be encouraging principal reductions where possible. DOB has an obligation to issue regulations that are understandable and consumer friendly. Banks are much more sophisticated than homeowners and banks and consumers are not in an equal position. The DOB must adopt regulations that will protect consumers, as well as be fair to banks. The DOB also must ensure that the new loan modification process is complied with and that there are remedies for banks failure to act in good faith to seriously consider loan modifications, including those with principal reductions.

In answer to the specific questions regarding proposed regulations that the DOB has set forth, please find the following comments:

- What should be minimum requirement for borrowers to respond to notice?

  Minimum requirement should be return of form saying borrower wishes to be considered for a modification. A stamped, addressed return envelope should be provided. The return form should be in duplicate – where borrower keeps one copy and sends one copy to the lender. Lender should be required to send an acknowledgement form with the date of receipt and the date the modification application is due along with what other documents will be required. If there is a dispute as to whether form was sent

- Should the Division of Banks define good faith efforts by creditor? If so, what should those be?

  Good faith is defined in the statute. Greater concern is what if lender does not do the NPV analysis within the required 30 days and does not respond to the borrower. If that happens the right to cure period must be extended and the lender should be prohibited from foreclosing. Also, how far prior to publication of foreclosure notice must the creditor conduct the NPV analysis. How long after borrow is notified can the lender begin in the foreclosure process. Can they find a negative NPV and begin foreclosure the next day before borrower has any opportunity to dispute accuracy. Need an appeal process for borrowers who are told they do not qualify for a loan modification.

- Should the Division of Banks define safe harbor? If so, what should those be?

  NO

- Should the Division of Banks develop a model form under 35B? If so, what should those be?

  Form with checklist for identifying certain loans – if cannot with certainty certify it is <u>not</u> a certain loan, then must send out notice.

- Should the Division of Banks define the process for determining if a loan is a "certain mortgage loan"?

Again there needs to be a checklist setting out the criteria from the statute. For LTV figures – were original loan application docs looked at – can creditor certify that LTV was not 90% or above or combined LTV was 95% or above. Lender must describe how they know that information, what documents were reviewed etc.

- Should the Division of Banks further define Net Present Value or NPV by regulation?

  NPV does not need to be further defined but lenders can be provided with the NPV requirements under HAMP, FDIC, MHFA etc.

- Should the Division of Banks issue separate 35B regulations or combine with 35A?

  Separate 35B regulations, with language based on the following:

  "Said notice shall include a declaration in the five most common languages other than English, appearing on the first page and stating: 'This is an important notice regarding a possible foreclosure of your home. Have it translated immediately.' Said notice shall also include the following language:

  "You are being sent this loan modification offer because your loan has been identified as having certain predatory characteristics. This is because of a new Massachusetts Law. It requires lenders holding loans with these characteristics to compare their losses from a loan modification you can afford with how much they lose if they foreclosure your mortgage. They must provide you an alternative to foreclosure if they would lose more by foreclosing your mortgage.

  "You must reply within 60 days of receipt of this notice to participate in this program; you must provide financial information as required. Your lender must respond in thirty days to your response. If you do not reply in time to meet this 60 day deadline or future deadlines specified in this process, your Right to Cure period may be shortened by as much as 60 days although you may still be eligible to apply for a loan modification not under this new law.

  "Keep proof of sending all materials in this process. If your lender claims not to have received them, your receipts of mailings is proof of compliance and may be used in legal action pre- or post- foreclosure."

- Should the Division of Banks issue regulations under 35C?
  - If so, what should they look like?
  - If so, should they be stand-alone or combined with 35A or 35B?

    Yes – there should be 35C regulations – see comments on affidavits bellow.

- Should the Division of Banks provide guidance through regulations on affidavit requirements in 35B? 35C(b)

  All affidavits must be based on first-hand knowledge and signed under the pains and penalties of perjury. (No "to the best of my knowledge" or "the documents state that this was done.")

  Affidavits shall provide details of what was done and not just "complied with 'the law'" (dates, who etc.)

  Affidavits should be actually filed with the Division of Banks as well as with the individual Registry of Deeds.

  - Should it be combined with 35A?

    No – there should be separate notices.

- Should the 35A notice be changed as a result of this legislation? If so, how should it be changed?

  No we should not change the 35A notice.

- Are there any other sections of Ch. 244 that, as a result of this legislation, create ambiguity in the foreclosure process?
  - If so, is there a way to address this through regulation?

    There needs to be clarification in Sec. 2 as to what constitutes "substantiating" documentation when a borrower makes a proposed counteroffer. In many cases borrowers will not have any documentation.

Good Faith Efforts by Borrower To Respond To Notice of Modification
Borrowers are deemed to have acted in good faith if they:

- Return notice of intent to participate within 30 days. Notice to have a copy that borrower can keep as proof that it was sent in. Creditor to send an acknowledgment of receipt of borrowers intent to participate, describing process and stating dates documents must be submitted by borrower. If there is a dispute as to whether borrower timely requested modification, the dispute will be resolved by the DOB.

- Borrowers submit a Request for Modification (RMA) type form – see attached. Form has income and expenses information and there is also a signed 4506 Tax Request Form to enable creditor to pull tax returns.

- Borrowers provide other requested information within 30 days of request, provided period for NPV analysis is extended by that amount of time.

GBLS would also like to briefly comment on some of the proposal made by the Massachusetts Mortgage Bankers Association, the Massachusetts Bankers Association and others.

- Creditors must meet standards of Massachusetts law as well as be in compliance with federal modification programs to be deemed to have acted in good faith.

- The DOB should not issue any regulations infringing on borrowers rights to file for bankruptcy protection. Filing for bankruptcy protection – even up to the last minute before a foreclosure auction – is a federally protected right that cannot be altered by state regulation.

- A borrowers who has had previous foreclosure mitigation efforts should not be denied their statutory rights under Chapter 194. The statute provides newly created rights for borrowers and does not exempt persons who have participated in other mitigation programs.

- Banks do not need protection from borrowers exercising their rights under this new foreclosure statute or any other MA foreclosure law – even if the exercise of those rights does result in a delay of the foreclosure process.

Thank you for your consideration of these comments. If you need clarification or further information, please feel free to contact Nadine Cohen at 617-603-1734 or ncohen@gbls.org.