

Massachusetts Releases Form for 150-day Right to Cure Notice

January 2012 by [Patricia Antonelli, Esquire](#)

The Massachusetts Division of Banks has released new regulations entitled “Right to Cure a Mortgage Default.” The new “Right to Cure Regulations” are found at 209 CMR 56:00, and they include a form to be utilized by mortgage holders and loan servicers for providing the 150-day right to cure notice (or 90-day right to cure notice if applicable) which must be sent to borrowers prior to the commencement of foreclosure for certain consumer mortgages encumbering principal residence properties. The Right to Cure Regulations are effective February 3, 2012, and the new form of Right to Cure Notice may be used voluntarily starting on February 3, 2012. Use of the new form of Right to Cure Notice is not mandatory until April 23, 2012.

The Right to Cure Regulations are designed to assist commencement of foreclosure provisions found in Chapter 244, Section 35A of the Massachusetts General Laws, which requires the sending of a right to cure notice prior to the commencement of foreclosure proceedings for certain principal residence properties. Section 35A provides for a 150-day right to cure, or in the alternative, a 90-day Right To Cure Notice may be sent provided the mortgagee can demonstrate that it has negotiated in good faith with the borrower; the mortgagee certifies that it has negotiated to reach an alternative to foreclosure in good faith with the borrower; at least one meeting has taken place between the mortgagee and the borrower; the mortgagee provided loss mitigation information to the borrower before the meeting; and that after the meeting, the creditor is able to demonstrate that the mortgagee and the borrower were not able to reach a resolution (other than foreclosure). A 90-day right to cure notice would also be acceptable if the mortgagee can demonstrate that the borrower failed to respond within 30 days to the mortgagee’s offer to negotiate.

Note that in spite of the ability to give a 90-day right to cure, most mortgagees and their servicers choose to give borrowers a 150-day right to cure because of the additional, unclear requirements and potential pitfalls associated with giving only a 90-day right to cure.

Form of Right to Cure Notice

The earliest version of Section 35A of Massachusetts foreclosure law requiring mortgagees extend a 90-day right to cure to borrowers prior to commencing foreclosure was effective May 1, 2008 (and later amended on August 7, 2010 to

provide for a 150-day right to cure). With no official form, mortgagees and their loan servicers have been using their own forms of right to cure notices in order to comply with Section 35A. Mortgagees and their loan servicers are advised that effective April 23, 2012, they may no longer use their own forms. Instead, use of the form of Right to Cure Notice found in the Right to Cure Regulations is mandatory as of April 23, 2012.

The new Right to Cure Notice includes a header box with a warning to consumers urging them to have it translated. The statement has been translated into Spanish, Portuguese, French, and Chinese to ensure there is adequate understanding by consumers of the importance of the notice and its content. The rest of the form is self-explanatory, although we caution mortgagees and their representatives who will use the form to be clear on whether you are choosing to send a 150-day or 90-day notice, and to make sure that the notice includes the same 150-day or 90-day period in all sections of the notice.

The new form of Right to Cure Notice includes the loan balance and a cure amount -- those amounts must be broken down and itemized; contact information for the "payment contact" must be provided; contact information for the Home Preservation Foundation and the Division of Banks' foreclosure prevention program must be provided; a statement of the date on which the 150-day right to cure expires (or expiration for the 90-day right to reinstate if applicable), a statement that failure to pay the past due balance by the expiration date could result in foreclosure and eviction, and contact information for the mortgagee's representative who can discuss the borrower's dispute of the right to cure amount.

Definition of "Residential Property" and its Effect on Commercial Loan Defaults

The Right to Cure Regulations help to resolve the issue of whether or not commercial mortgages encumbering certain properties that are residential or that contain residential dwelling units are included in the reach of Section 35A and are therefore subject to the requirement that a Right to Cure Notice be sent prior to the commencement of foreclosure. The definition of "Residential Property" found in the Right to Cure Regulations at 209 CMR 56.02 supports the proposition that collateral for commercial loans is not included in the types of collateral subject to the Right to Cure Regulations.

"Residential Property" is defined in the Right to Cure Regulations as a dwelling house with four or less units, occupied in whole or in part by the borrower, provided that the property is the principal residence of the borrower. The definition goes on to state: ". . . provided further, that residential property shall not

include an investment property or residence other than a primary residence; and provided further, that residential property shall not include residential property taken in whole or in part as collateral for a commercial loan.” We interpret this statement to mean that even if the property is “residential” (meaning it is a one-to four-family dwelling house and it has somehow become the principal residence of the borrower after the loan was made), the fact that it was taken as collateral for a commercial loan removes it from the definition of “Residential Property,” and therefore no Right to Cure Notice is required by Section 35A and the Right to Cure Regulations.

FAQ’s Expected from the Division of Banks

A representative of the Division of Banks has advised us that the Division will release a set of Frequently Asked Questions (“FAQ’s”) that address the new Regulations and the form. Look for the FAQ’s before the effective date of February 3, 2012 on the Division’s website at www.mass.gov/dob.

[Click here for a copy of the Regulations and the Form](#)

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