Mortgage Banking/Consumer Finance Commentary

Massachusetts’ New Mortgage Payoff and Discharge Reform Law

Perceiving a need for tighter regulation, Massachusetts has made major adjustments to the process of paying off and discharging mortgages with its enactment of Chapter 63 of the Acts of 2006, “An Act Providing Remedies to Consumers for Clearing Title after Payoff of Mortgages” (“Chapter 63”).

Among the new obligations that Chapter 63 imposes on mortgage lenders and servicers are (1) mortgage loan servicers and note holders can be legally obligated to furnish payoff statements and provide mortgage discharges to persons paying off mortgages; (2) written payoff statements must be provided within five business days of receipt of a payoff request; (3) oral payoff statements are no longer acceptable; (4) each payoff statement not timely provided could cost $500; and (5) each discharge not timely provided could cost $2,500.

Mortgages must be discharged within 45 days of receipt of full loan payoff by recording and furnishing a copy of the discharge with corresponding recording information or providing a proper discharge to the person paying off the loan. Merely sending the discharge to the local registry of deeds for recording and providing a copy of the discharge to the closing attorney without recording information does not constitute compliance. A lender or servicer who sends an original mortgage discharge to the borrower (rather than the closing attorney or settlement agent) must also send the consumer a transmittal letter with the original discharge containing specified language in 10-point type which describes the necessity for recording the discharge at the registry of deeds and admonishes the recipient of the discharge to record it. Documentary proof is needed to establish the authority of a servicer or note holder to discharge a mortgage. Servicers or note holders of one to four family residential mortgages may document their authority through corroborating documentation of a less formal nature than a recorded power of attorney or assignment of mortgage.

Chapter 63 also reduces the current 50-year statute of limitations in Massachusetts to enforce a mortgage without a stated term to 35 years from recording. Lenders who hold or service 40-year mortgages will need to ensure the term is stated on the mortgage or develop a strategy to amend the mortgages or put a notice on record indicating the 40-year term.

The provisions of Chapter 63 become effective on October 1, 2006 (except for certain regulatory burden relief provisions repealing Mass. G.L. c.184, §§17C and 17D and modifying Mass. G.L. c.184, §17B, which take effect on July 1, 2006). The changes in Massachusetts law initiated by Chapter 63 will apply to all Massachusetts mortgages (i.e., mortgages recorded before and after the October 1, 2006 effective date). While some provisions apply to only one to four family residential mortgage loans, most of the key provisions relating to issuance of payoffs and discharges apply to all mortgage loans—commercial and residential, multifamily and single family. All references to Mass. G.L. c.183 in this Alert refer to that chapter as modified by Chapter 63 of the Acts of 2006, effective October 1, 2006.
TO WHOM THE LAW APPLIES

Chapter 63 imposes certain obligations upon mortgagees, note holders (who might not have the benefit of a recorded assignment of mortgages) and mortgage servicers. This Alert will refer to a party performing any of those functions as a Lender Party. A mortgage company or bank can be a Lender Party by virtue of its status as (a) a “mortgagee” with respect to mortgages either originated by it or assigned by recorded instrument to it; (b) a “note holder” with respect to mortgages beneficially owned by it but standing in the name of an originating mortgagee or other party and (c) a “servicer” with respect to mortgages for which it performs loan servicing.

OBLIGATION OF LENDER PARTIES TO FURNISH A LOAN PAYOFF STATEMENT

Mass. G.L. c.183, §54D imposes new statutory obligations on Lender Parties to issue loan payoff statements on all Massachusetts mortgage loans—commercial and residential.

Request for Loan Payoff

The obligor on a note or an authorized person (a person acting for the obligor under a written document) may by written request ask a mortgagee, mortgage servicer or note holder who is receiving payments under a mortgage note (i.e., a Lender Party) to provide a written payoff statement “sufficient to enable the mortgagor or the authorized person to conclusively make full payment of the outstanding indebtedness under the mortgage . . . as of a certain payment date which shall be specified in the request and which shall be no more than 30 days from the date of request.”

Issuance of Loan Payoffs

A Lender Party must provide a payoff statement in written form to the requesting party within five business days of receipt of the payoff request. If the requesting party gives only a mailing address, the Lender Party must mail and postmark the payoff to the requesting party within five business days. If the requesting party gives the Lender Party a fax number or e-mail address, the Lender Party is obligated to “ensure receipt by the requesting party” within the five business day period. This apparently means that a Lender Party can send the payoff statement by facsimile or e-mail, rather than regular mail, if the requesting party has furnished a fax number or e-mail address.

Contents of Payoff Statement

A payoff statement must specify (1) an amount certain as of the payoff date that will pay off all indebtedness secured by the mortgage (or a lesser amount sufficient to obtain a partial release) and (2) a per diem amount or formula to cover payoffs made after the specified payoff date. An oral statement of the payoff amount is no longer acceptable. A payoff statement may condition the payoff amount or any additional payoff amount due beyond the specified payoff date on any escrow or other disbursements that the Lender Party may be permitted or required under the mortgage to make between the payoff date specified in the request and 30 days thereafter provided that the payoff statement specifies the nature, amount and anticipated payment date for those disbursements, if known or reasonably ascertainable by the Lender Party providing the payoff statement.

Payoffs Valid for 30 Days

A Lender Party may impose a time limit on the validity of a payoff statement of no less than 30 days from issuance. If full payment of a loan is made in accordance with the payoff statement, the Lender Party receiving the payoff then has the obligation to record or provide a proper discharge to the person providing the loan payoff in accordance with Mass. G.L. c.183, §55(a).

Correcting Payoffs

If a Lender Party providing a payoff statement determines that the stated payoff amount when provided was or subsequently has become inaccurate, it can provide a corrected payoff “to the person to whom the initial payoff statement was sent.” If that person (a) receives and (b) has a reasonable opportunity to act upon the corrected statement before making payment, the corrected payoff statement supersedes the original.
Whether a closing attorney had a reasonable opportunity to act upon a corrected payoff statement will be a fact issue. A Lender Party will be in the best position to establish that a closing attorney had a reasonable opportunity to act upon a corrected payoff statement by keeping good records documenting the receipt of the corrected payoff statement by the closing attorney.

**Estoppel / Detrimental Reliance—HELOC/Future Advance Exception**

A Lender Party is bound and cannot deny the accuracy of an erroneous payoff amount against any person who “reasonably and detrimentally” relied upon the erroneous payoff amount in the payoff statement. This detrimental reliance rule does not apply to mortgages securing lines of credit (i.e., home equity lines of credit [HELOCs]) or future advances (i.e., construction type loans) unless the Lender Party providing the payoff statement has received either with a payoff request or on or before the payoff date specified in the payoff request a written request signed by at least one obligor of the mortgage loan to terminate or freeze the credit facility. Advances under HELOC and future advance credit facilities are excepted from the detrimental reliance rule because a mortgagor may have the contractual right to increase the loan balance after the payoff is issued by making subsequent draws under a HELOC or construction loan without the mortgagee’s consent.

**Penalties for Failure to Provide Payoff**

A Lender Party who without reasonable cause fails to provide a timely payoff statement may be liable to the mortgagor for the greater of $500 or the mortgagor’s actual damages caused by the failure plus reasonable attorney’s fees and costs. What constitutes “reasonable cause” sufficient to be a defense against payment of the $500 penalty is unclear.

**Payoff Statement Fees**

One payoff statement can be requested by a mortgagor or his authorized person “without charge” during any six month period. The Lender Party providing the payoff statement can include a reasonable charge for responding to subsequent payoff requests during that six month period. Unless prohibited by applicable law or the respective loan documents, the payoff statement provider may charge a reasonable fee for the cost of delivery of the payoff statement and the fee may be added to the payoff amount. This appears to mean that a Lender Party can pass along its out-of-pocket costs for express mail, FedEx, facsimile, or similar delivery charges incurred in transporting a payoff statement. The statute is not clear whether a reasonable charge for the cost of delivery is allowed when the borrower is entitled to such a copy without a charge (i.e., first copy during any six month period). Presumably, it is. No guidance is provided as to what constitutes a “reasonable charge.”

**STATUTORY OBLIGATION TO PROVIDE DISCHARGE**

**Provision of Discharge to Closing Attorney**

A Lender Party who receives full payment and satisfaction of a mortgage loan shall, within 45 days of receipt of the full loan payoff,

- Record the discharge and furnish a copy thereof to the closing attorney, settlement agent (or other person transmitting the payoff) with the specific information as to where the discharge is recorded. (If recording information about the payoff is not provided with a copy of the discharge, the Lender Party has not complied.); or

- Provide the settlement agent with the original discharge. (The settlement agent then has an obligation to record the discharge).

A Lender Party like a mortgage servicer which actually receives the loan payoff has the statutory obligation under Mass. G.L. c.183, §55(a)(1) to provide the person paying off the mortgage an appropriate discharge of the mortgage. Although the discharge may be executed by the mortgagee of record, it is still the duty of the mortgage servicer (if it received the payoff) to provide a discharge. As described below, both Mass.
G.L. c.183, §54C (one to four family) and §55(b) authorize mortgage servicers to actually execute discharges on behalf of a mortgagee of record or note holder, if authorized, and that authorization is supported by appropriate documentation. Merely sending the discharge to the Registry of Deeds for recording and providing a copy of the discharge to the closing attorney without recording information does not constitute compliance with Mass. G.L. c.183, §55(a)(1).

Chapter 63 does not address whether a Lender Party can charge a borrower a fee for preparing or recording a discharge. While nothing in the statute expressly prohibits a Lender Party from charging a discharge preparation or recordation fee, Mass. G.L. c.183, §55 appears to unconditionally require a Lender Party to issue a discharge within 45 days of receipt of full payment of the mortgage. (A Lender Party may be able to recover a fee for preparing or recording a discharge if the loan documentation explicitly allows it.)

Required Transmittal Notice on Discharges Issued to Lay Persons

If a Lender Party elects to send the original discharge to the mortgagor or someone who is not a closing attorney rather than record the discharge itself, Mass. G.L. c.183, §55(a) has some special provisions. If a Lender Party receives a loan payoff from a person who is not a closing attorney or a settlement agent (e.g., an individual consumer/borrower) and then elects to send the original discharge to the person providing the loan payoff, the Lender Party must send the original discharge with a transmittal letter that contains a statement in 10-point type in substantially the following form:

“ENCLOSED WITH THIS LETTER IS A DISCHARGE OF YOUR MORTGAGE AND OTHER DOCUMENTATION IF NECESSARY TO SHOW THAT WE WERE THE HOLDER OF YOUR MORTGAGE WHEN IT WAS PAID. THESE ARE IMPORTANT LEGAL DOCUMENTS. IN ORDER TO RELEASE THE MORTGAGEE FROM THE TITLE TO THE PROPERTY, YOU MUST RECORD THE DISCHARGE AND ACCOMPANYING DOCUMENTATION, IF ANY, AT THE SAME REGISTRY OF DEEDS IN WHICH YOUR DEED WAS RECORDED.

“ALL RECORDING FEES THAT WE ARE REQUIRED TO PAY UNDER MASSACHUSETTS LAW HAVE BEEN INCLUDED IN THE ENCLOSED CHECK. THE RECORDING FEE FOR THE DISCHARGE ITSELF, UNLESS PAID BY YOU WITH THE LOAN PAYOFF, IS YOUR RESPONSIBILITY.

“IT IS IN YOUR BEST INTERESTS TO RECORD THE DISCHARGE AND ACCOMPANYING DOCUMENTATION AS SOON AS POSSIBLE. IF YOU ARE UNSURE WHAT TO DO, PLEASE SEEK THE ADVICE OF AN ATTORNEY OR A CLERK AT THE REGISTRY OF DEEDS.”

While primarily intended to alert lay persons of the need to record the discharge, this statement may also save Lender Parties the burden of dealing with subsequent requests for confirmatory discharges by mortgagors who never recorded the original discharge or understood the need to record it.

Elements of a Discharge

There are four elements specified in Mass. G.L. c.183, §§54-55 providing that a discharge must: (1) be in writing and duly executed and acknowledged before a notary public;10 (2) by its terms discharge a mortgage or acknowledge its payment or satisfaction;11 (3) should contain (a) the street address of the mortgaged property; (b) the recording data (i.e., book and page numbers or Land Court document number); and (c) the name of the original mortgagor;12 and (4) must be executed “by the holder of the mortgage and the note….or an authorized person or entity acting on behalf of the holder.”13

Required Supporting Authority Documentation for Servicers and Other Authorized Persons to Execute Discharges

If the discharge is executed by an “authorized person” (i.e., mortgage servicer, attorney-in-fact under a power of attorney or other agent) the person so authorized is also required to furnish the person paying off the mortgage “documentation in recordable form necessary to establish the authority” of the authorized per-
son to act for the mortgagee or note holder or to provide that person the recording information for that authority documentation if already recorded in the registry where the mortgage is recorded.

A mortgage servicer or other authorized person who furnishes documentation of its authority to issue a discharge for a mortgagee and/or note holder in recordable form rather than records and furnishes a copy of the authority documentation already recorded must provide the person paying off the loan all recording fees required by law to record the authority documents. Acceptable authority documentation can include a servicing agreement, power of attorney or other written authorization from the mortgagee and note holder to act on its behalf.

**Required Supporting Assignment Documentation for Note Holders Not of Record**

If the holder of the note is not a holder of record (i.e., there is no assignment of mortgage to the current note holder on record in the registry), it must specify in or with the discharge how it became the holder of the note and (a) specify where in the appropriate registry the required supporting documentation is recorded which supports the holder’s status as holder, (b) record the documentation supporting the holder’s status with the discharge, or (c) provide the person paying off the mortgage both the discharge and the documentation in recordable form necessary to establish the holder’s status of record. Acceptable documentation of assignment to a note holder not of record can include (a) the mortgage note, (b) any assignments, or (c) certificates of name changes or merger. When two mortgagees merge into a single entity or a mortgagee changes its legal name, Mass. G.L. c.183, §55(b) provides that the fact of the merger or name change can be recited in a discharge of a mortgage without the necessity of a recorded certificate of merger or change of name issued by a public official.

**Penalty on Lender Parties for Failure to Provide Discharge**

**Standard Penalty.** A Lender Party who (i) has accepted full payment of a mortgage in accordance with a payoff statement issued by it and (ii) fails to record or provide the closing attorney, settlement agent or person paying off the mortgage (a) a duly executed discharge or (b) the supporting authority or assignment documents needed to record the discharge within 45 days after acceptance, shall, in addition to all other remedies available at law, be liable to the mortgagor in an amount equal to the greater of $2,500 or the mortgagor’s actual damage plus attorney’s fees and costs.

**Reduced Penalty for Cure.** The $2,500 penalty will not apply and the liability of a Lender Party for failure to provide a discharge or required supporting documentation within 45 days of payment of a mortgage will be limited to the “actual damages sustained by the mortgagor” if, within 30 days of receipt of a written demand from the mortgagor or an authorized person on the mortgagor’s behalf, the Lender Party (a) provides a discharge and necessary supporting documentation required by Mass. G.L. c.183, §§54C and 55 and (b) pays the required recording fees (for any required supporting documentation) and “actual damages” as the mortgagor reasonably establishes are attributable to the Lender Party’s failure to comply with Mass. G.L. c.183, §§54C or 55. In other words, the $2,500 penalty provided under Mass. G.L. c.183, §55(c)(1)(i) is reduced to the mortgagor’s actual damages.

**Safe Harbor Exception.** A Lender Party who sends a discharge, necessary supporting documentation and the recording fees (for any required supporting documentation) to the closing attorney, settlement agent or person providing the payoff shall not be liable for any penalty if (a) it can reasonably demonstrate by documentation that it sent the discharge, the necessary supporting documents and any required recording fees to the closing attorney, settlement agent or person providing the payoff within the prescribed 45 day period or (b), if no records are available, compliance can be reasonably demonstrated by showing the Lender Party has established reasonable procedures to achieve compliance and that those procedures are routinely followed and have become an established business practice of the Lender Party provided the Lender Party also provides a confirmatory discharge within 30 days after receipt of the written demand. The Lender Party can charge for a confirmatory discharge in such a case.
Penalty on Settlement Agents for Failure to Record Discharge

A settlement agent, closing attorney or other person receiving a duly executed discharge in proper form after payoff must record the discharge within 45 days of receipt or be liable in damages to the mortgagor in an amount equal to the greater of $2,500 or the actual damages sustained by the mortgagor, plus attorney’s fees.19 The liability of a closing attorney or settlement agent for failure to record the discharge within 45 days is reduced from $2,500 to the actual damages sustained by the mortgagor if, within 30 days of receipt of written demand to record or give it to the mortgagor or another attorney closing a transaction on the property, the person in possession of the discharge either records or gives it to the mortgagor or other attorney making the demand together with any recording fees previously withheld from the mortgagor’s funds.20

Failure to Record Discharge with Prepaid Fee

A Lender Party who has collected the recording fee for a discharge from the mortgagor on a one to four family residential property but fails to record the discharge shall, within 30 days of receipt of written demand by the mortgagor or authorized person, return all fees charged for recording the discharge with interest at 6%. A Lender Party who fails to comply will be liable to the mortgagor for the fees charged but not refunded or credited plus interest and (a) $2,500 or (b) the mortgagor’s actual damages, plus attorney’s fees and costs.21

Presumption of Notice

Under Mass. G.L. c.183, §55(f), notices are presumed to have occurred on the fifth day after postmark by first class mail or the actual receipt/delivery date for certified mail, commercial overnight or by hand delivery.

Self-Help Discharge by Attorney Affidavit—One to Four Family Residential Property Loans

Mass. G.L. c.183, §55 has included a “self-help” provision allowing closing attorneys to discharge mortgages which they paid off in certain circumstances. Mass. G.L. c.183, §55(g) rewrites and expands that authority on loans secured by one to four family residences.

Attorney Discharge Affidavit

If, in connection with a one to four family residential loan, (a) a Lender Party fails to provide the person paying off the loan within 45 days of receipt of the payoff a discharge and the supporting authority or title documentation required under Mass. G.L. c.183, §55(b), or (b) the discharge was provided but not recorded and is no longer available, an attorney licensed to practice law in Massachusetts, on behalf of the mortgagor or assignee or a mortgagee thereof, may execute and record in the registry where the mortgage is recorded an affidavit containing (1) a description of mortgage and any assignments, (2) the address of the mortgaged property and (3) the recording information for the mortgage and any assignments.

The affidavit must also contain certain specified details relative to the payoff of the mortgage and the attorney’s efforts to obtain the discharge. The notice from the attorney must be accompanied by a copy of the proposed affidavit, documentary evidence of payment and either the payoff statement or a statement that no payoff statement was available.22 The right for an attorney to record an affidavit discharging a loan under Mass. G.L. c.183, §55(g)(1) applies only to one to four family residential property mortgages.

Closing Attorney Notice of Intention to Record Discharge by Affidavit

Notwithstanding the process outlined in Mass. G.L. c.183, §55(g)(1), a closing attorney or settlement agent (but not other persons providing the funds) who transmits the full payoff amount prescribed in a payoff statement in accordance with a Lender Party’s instructions may include with the payoff a notice of intention to record a discharge by affidavit. The notice shall state that:

- Payment of the mortgage is being made in accordance with enclosed payoff statement;
- Within 45 days of receipt of the payoff, either a discharge of the mortgage or the recording information evidencing the recording of the discharge shall be provided by the recipient of the payoff to the closing attorney/settlement agent;
Failure to provide or record a discharge within 45 days shall expose the Lender Party to liabilities and remedies under Mass. G.L. c.183, §55 and entitle the affiant to record the executed affidavit discharging the mortgage;

A copy of the proposed affidavit with appropriate reference data about the mortgage is enclosed with the notice; and

The affidavit will be recorded and will discharge the mortgage, unless, within 45 days after receipt of notice, the affiant receives from the Lender Party a written notice of objection to the payoff specifying the inadequacy in payment or other reason for objection.23

Although the language of Mass. G.L. c.183, §55(g) is somewhat ambiguous, it would appear that the right of a closing attorney in subsection (g)(2) to notify a Lender Party of his intention to record an affidavit discharging the mortgage if he does not receive the discharge in 45 days also only applies to one to four family residential mortgage loans.

Notice to Mortgagee of Record
In the case of a notice by an attorney to discharge by affidavit under Mass. G.L. c.183, §§55(g)(1) or (2), if the payoff and notice were sent to a servicer or note holder who was not a mortgagee of record, a similar notice must be sent to the mortgagee at its last known address. The mortgagee may object to the recording of the affidavit only if the mortgagee provides credible evidence to the affiant within 45 days after receiving the notice that it is the true holder of the note and that the payoff was (a) inadequate (and specifies the reasons therefor) or (b) erroneously made to someone not entitled to receive payment.24

Notice to Holder Not of Record
In the case of a discharge by an attorney affidavit recorded under Mass. G.L. c.183, §55(g)(2), an assignee not of record as of the date the payoff was made has no right to the notices set forth in Mass. G.L. c.183, §§55(g)(2) and (3) and no right to challenge the validity of the discharge against a bona fide purchaser or mortgagee for value even if an assignment is recorded before the affidavit is recorded.25

Recording of Attorney Affidavit
The attorney affiant is allowed to record an affidavit discharging the loan under Mass. G.L. c.183, §55(g) unless, within 45 days of receipt of notice, the Lender Party has given the affiant written notice of objection to the payoff with specifics. The attorney’s affidavit must be accompanied by a copy of the attorney’s notice of intent to discharge furnished to the Lender Party.26

Objections to Attorney Affidavit
If the attorney affiant is notified of an objection, he cannot record the affidavit until he determines that the mortgagor has complied with any request made by the Lender Party for additional payment or that any other objection has been satisfied, at least 15 days before the date of the affidavit without further objection being raised by the Lender Party. The affidavit must then be amended to include a copy of the written notice of objection by the Lender Party and to certify satisfaction of the objection with no further objections before it can be recorded.27

Necessary Data for Attorney Affidavit
An attorney’s affidavit must include the following reference data:

- The name and last known address of the mortgagor and a Lender Party;
- The date of the mortgage and the mortgage recording reference data; and
- The date and recording reference data for any recorded assignment.28
Effect of Recording Affidavit

The attorney affidavit, when recorded, discharges the mortgage and releases the lien created by the mortgage in favor of any bona fide purchaser, mortgagee, lien holder or encumbrancer for value without notice. Discharge of a lien by an attorney affidavit does not discharge the debt underlying the mortgage or release an obligor from personal liability.

False Attorney Affidavit

A person who creates a false attorney affidavit may be punished by criminal fine of up to $5,000 in addition to all other criminal and civil liability. Any person damaged by a false affidavit who prevails in a civil action is also entitled to recover attorney’s fees and costs in addition to any damage award.

SPECIAL RULES FOR ONE TO FOUR FAMILY RESIDENTIAL MORTGAGE DISCHARGES EXECUTED BY MORTGAGE SERVICERS OR NOTE HOLDERS NOT OF RECORD

One to Four Family Residential Mortgage Discharges Executed by Mortgage Servicers or Note Holders Not of Record

Massachusetts law now recognizes that valid discharges of mortgages on real estate can be executed not only by the mortgagee of record but also by a note holder not of record or an authorized mortgage servicer. The recordation of a duly executed discharge by a mortgagee, mortgage servicer or note holder (i.e., a Lender Party in this Alert) releases the lien of a mortgage. A discharge executed by a mortgage servicer or note holder who is not the holder of record must, however, be accompanied by evidence of the mortgage servicer’s authority or the note holder’s title to the loan required by Mass. G.L. c.183, §55(b). That supporting documentation requirement is significantly relaxed on a discharge for a one to four family residential property as set forth in the following paragraphs.

Discharge Executed by a Mortgage Servicer

A discharge of a mortgage on a one to four family residential property executed by a mortgage servicer must be supported by documentation “evidencing the authority of the mortgage servicer to service the mortgage” to be valid. Such supporting documentation may include an original or copy of the servicing agreement, a power of attorney, a servicing notice letter to the borrowers, a written payoff statement (including a facsimile or email payoff) issued to the mortgagor, closing attorney or settlement agent or other document evidencing the authority of the mortgage servicer to service the mortgage. The documentation of the servicer’s authority can be (a) “duly recorded with the discharge” or (b) attached to a title clearing affidavit under Mass. G.L. c.183, §5B which can be recorded after the discharge provided it contains all necessary recording information and the mortgagor’s name for indexing purposes. Supporting documentation of a mortgage servicer’s authority can be a copy of a document if it is certified to be true by a Lender Party or an attorney licensed in Massachusetts who has seen the original documentation. An original printout of a facsimile or an e-mail addressed to an attorney licensed in Massachusetts or his firm is treated as an original and recordable if certified by the attorney.

Discharge Executed by Note Holder, Not of Record

Residential mortgage loans are frequently sold in the secondary mortgage market without recorded assignments of the mortgages securing the loan. When the loans are subsequently repaid, title to the mortgages is still in the name of the original mortgagees, not the current holders of the notes who are not a “holder of record.” A discharge of a mortgage on a one to four family residential property executed by a note holder not of record must be supported by the original or a copy of the note with endorsements evidencing the note holder’s status as owner of the note to be valid. The note should be (i) attached as an exhibit to the discharge or (ii) marked “paid” by holder and attached to a title clearing affidavit under Mass. G.L. c.183, §5B if the note is recorded after the discharge and marginally referenced as set forth in Mass. G.L. c.183, §54C(a)(2). If a copy of the note is recorded as an exhibit to the discharge, it must be (a) certified by the holder as true or (b) accompanied by affidavit of a Massachusetts attorney that he has seen the original note with all endorsements and the copy is true.
Discharge Executed by Mortgage Servicer or Note Holder Without Adequate Supporting Documentation of Authority or Title

Mass. G.L. c.183, §54C anticipates that discharges may be issued by mortgage servicers or note holders who do not provide adequate supporting documentation of their authorization to issue the discharge. If that situation occurs with a mortgage on one to four family residential property, Mass. G.L. c.183, §54C(a)(3) nevertheless accepts the discharge executed by the mortgage servicer or note holder if it is supported by (a) an affidavit of the mortgagor or a subsequent owner/ successor to the mortgagor relative to the mortgage and (b) an affidavit by a Massachusetts attorney providing details of the payment of the loan.

Redaction of Personal Account and Identification Numbers

If a supporting document like a statement of account which is authorized for recordation to support a discharge contains a mortgagor’s personal identification numbers (e.g., social security number) or financial account numbers (e.g., bank account numbers), the information may be redacted and the document will still be recordable in the registry provided the obliteration does not substantially change the content, tenor or nature of the document.33

REGULATORY BURDEN RELIEF—MASS. G.L. C.184, §§17B, 17C AND 17D.

Sections 4A and 4B of Chapter 63 provide significant regulatory burden relief from the more onerous and duplicative disclosure provisions contained in Mass. G.L. c.184, §§17B-17D. These provisions predated and were no longer necessary after the federal Real Estate Settlement Procedures Act was enacted in 1974.

Section 17B is amended, effective July 1, 2006, to provide, that for every application for a mortgage loan on a one to four family owner occupied dwelling, there must be two statements in type at least two points larger than the other type used on the application which discloses that (i) the responsibility of the attorney for the mortgagor is to protect the interests of the mortgagee; and (ii) the mortgagor may, at his own expense, engage an attorney of his own selection to represent his own interests in the transaction. This restates the existing law. But the remaining and burdensome requirements of old Section 17B relative to the disclosure of the maturity date of the note and interest rate charged have been repealed and are no longer applicable effective July 1, 2006.

In addition, the provisions of Mass. G.L. c.184, §17C, which gave a mortgage applicant the right to request a copy of the appraisal report prepared for the lender, have been repealed effective July 1, 2006.

Finally, Mass. G.L. c.184, §17D, which required that a prospective borrower be furnished with a uniform mortgage cost worksheet and a Consumer’s Guide to Obtaining a Home Mortgage, has been repealed effective July 1, 2006.

SOME MISCELLANEOUS ISSUES

Chapter 63 contains a number of other important modifications to Massachusetts law in addition to its provisions dealing with payoff statements and discharges.

Discharge by Recordation of Note—One to Four Family Residential Mortgage

Mass. G.L. c.183, §55(h) allows a mortgage on a one to four family residential property to be discharged by recording the original note secured by the mortgage provided the note (a) is marked “paid” by its holder and (b), if not in recordable form, is attached as an exhibit to a title clearing affidavit under Mass. G.L. c.183, §5B. The recording of the original note method for discharging a mortgage under Mass. G.L. c.183, §55(h) is in addition to the other methods of discharging a mortgage authorized by Mass. G.L. c.183, §§54, 54C and 55. It may only be used to discharge a mortgage on a one to four family residential property.
Corporate Status and Name Changes

Mass. G.L. c.183, §55(i) simplifies the process for correcting or proving the name or status of corporate entities by providing that a recitation of a merger, name change or charter change in a recorded discharge or mortgage assignment may be relied upon to prove that fact without the need to record certificates of public officials as to the corporate change. This liberalization of proof of corporate authorization or status only applies to validate discharges or assignments of mortgages. The recital of the corporate change in the recorded instrument is conclusive in favor of any bona fide purchaser, mortgagee or encumbrancer for value relying upon the instrument in good faith.

Joint and Several Liability

Mass. G.L. c.183, §55(j) provides that liability established under Section 55 against multiple parties shall be joint and several.

Redactions of Personal Identifiers Permitted

Mass. G.L. c.183, §55(k) has a provision similar to that contained in Section 54C(b) allowing references to personal account or identification numbers to be redacted when documents containing those numbers need to be recorded as documentation in support of a discharge. Any such redaction may not make the document illegible or substantially alter or change the content, tenor or nature of the document.


Section 5 of Chapter 63 of the Acts of 2006 amends Mass. G.L. c.240, §15 which relates to judicial proceeds to adjudicate mortgages in several respects. First, if there is an outstanding mortgage which a mortgagor or its successor in interest claims has been fully paid, but the holder refuses to issue a discharge, the mortgagor or successor will be able to petition the Land Court or the Superior Court to seek a determination that the mortgage has been fully paid. Second, Mass. G.L. c.140, §15(b) simplifies the procedure to allow a mortgagor or its successor, who does not have direct evidence of full payment of an outstanding mortgage but has been in uninterrupted possession of the land for a significant period of time, to file a petition in court to have the mortgage discharged. This will be useful in clearing title to older mortgages to missing or deceased mortgages.

Statute of Limitations for Mortgages Shortened

Section 6 of Chapter 63 of the Acts of 2006 amends Mass. G.L. c.260, § 33 to reduce the current 50-year statute of limitations to enforce a mortgage to (a) 35 years from recording if the mortgage has no stated term or (b) 5 years from its stated term or maturity date unless the mortgage is extended by an amendment or affidavit. Mortgages which extend beyond the statute of limitations are automatically discharged. Section 7 of Chapter 63 also amends Mass. G.L. c.260, §35 to extend the statute of limitations on mortgages to registered land.

If a Lender Party holds or services any 40-year mortgages without a stated maturity date, it will need to develop a strategy to amend them or put a notice on record indicating the 40-year term.

Applicability of Chapter 63 Modifications to Existing Mortgages

Section 8 of Chapter 63 of the Acts of 2006 provides that other provisions relating to mortgage discharges contained in Sections 1 to 7 of Chapter 63 shall apply to all mortgages, whether recorded before, on or after the October 1, 2006 effective date of the Act, except that the term of a mortgage which as a result of the change in the 50-year statute of limitations would expire within one year after October 1, 2006, shall be extended for a period of one year from October 1, 2006. Mortgagees with outstanding 40-year mortgages with no stated term (as recorded) will need to consider recording an extension, or acknowledgement or affidavit for such mortgages to note that maturity date to prevent the statute of limitations invalidating the mortgage after 35 years. It is also important to note that most (but not all) of the provisions in Mass. G.L. c.183 §§54-55 apply to all mortgages and not just mortgages secured by one to four family residential properties.
Estoppel.

Mass. G.L. c.183, §54(b). The discharge of a mortgage by a holder of record is valid “notwithstanding the fact that the party signing the instrument may have assigned the note or other evidence of debt to another party, unless the assignment had been duly recorded before the instrument discharging the mortgage.”

If you have any questions about this Alert, please contact Stanley V. Ragalevsky (617.951.9203 / sragalevsky@klng.com), Nanci Weissgold (202.778.9314 / nweissgold@klng.com), or any member of K&LNG’s Mortgage Banking/Consumer Finance Group.
ENDNOTES

2 Mass. G.L. c.183, §54D(c).
3 Mass. G.L. c.183, §54D(c).
5 Mass. G.L. c.183, §54D(d).
6 Mass. G.L. c.183, §54D(e).
12 Mass. G.L. c.183, §54(b).
15 Mass. G.L. c.183, §§55(b) and (i).
26 Mass. G.L. c.183, §55(g)(5).
29 Mass. G.L. c.183, §55(g)(8).
31 Mass. G.L. c.183, §54C.
35 Mass. G.L. c.183, §54C(b).
MORTGAGE BANKING/CONSUMER FINANCE PRACTICE

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