



August 21, 2015

Mr. David J. Cotney
Commissioner
Massachusetts Division of Banks
1000 Washington St., 10th Fl.
Boston, MA 02118-6400

Re: Opinion 13-022, 209 CMR 18.00 & 209 CMR 56.00

Dear Commissioner Cotney:

On behalf of the members of the American Financial Services Association (“AFSA”),¹ thank you for the opportunity to provide input on the Massachusetts Division of Banks’ (“the Division”) regulations in advance of the formal regulatory amendment process. As stated in the Division’s notice, the regulation review is being held in connection with Executive Order 562,² issued by Governor Baker on March 31, the purpose of which is to relieve the Commonwealth from the burden of unnecessary regulation. We believe that the Division should reconsider Opinion 13-022,³ repeal 209 CMR 18.00,⁴ and amend 209 CMR 56.00,⁵ as they impose an unnecessary regulatory burden that is intended to be reduced by Executive Order 562.

Opinion 13-022

On January 31, 2014, the Division issued Opinion 13-022 to a motor vehicle sales finance company that takes assignment of a small number of retail installment sales contracts (“RISCs”) from dealers involving trade-ins with “negative equity” that is paid to the existing creditor and financed as part of the customer’s RISC. The Division opined that if negative equity in the amount of \$6,000 or less with an annual percentage rate (APR) in excess of 12 percent is included in the amount financed of the new RISC acquired, the creditor is required, pursuant to Massachusetts General Laws Ch. 140 § 96,⁶ to hold a Massachusetts small loan license (in addition to the motor vehicle sales finance company license already held). Specifically, the opinion references the law’s provision which provides that “any advance of money by such seller [of goods, services or insurance] or, by a person acting on his behalf, for the purpose of paying an existing indebtedness of such buyer or for any other purpose shall constitute a loan of money subject to the provisions of this section.”

¹ Founded in 1916 and based in Washington, D.C., the American Financial Services Association (AFSA), is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including mortgages, direct and indirect vehicle financing, mortgage loans, payment cards, and retail sales finance. AFSA members do not provide payday loans or vehicle title loans.

² Mass. Exec. Order No. 562 (Mar. 31, 2015)

³ Mass. Div. of Banks. Op. No. 13-022 (Jan. 31, 2014)

⁴ 209 Mass. Code Regs. § 18.00

⁵ 209 Mass. Code Regs. § 56.00

⁶ Mass. Gen. Laws ch. 140, § 96 (2000)

We believe the opinion that a sales finance licensee is required to obtain a small loan license if the licensee takes assignment of RISCs involving trade-ins with negative equity is inconsistent with the statutory intent of small loan license statute.⁷ The vehicle dealer, which is the original creditor, finances the negative equity and is responsible for paying off the prior lienholder. The vehicle dealer, *not the sales finance company acquiring the closed-end retail installment contract*, agrees to finance the negative equity in the amount of \$6,000 or less. The negative equity is included in the larger amount financed and is not a separate loan. Based on this understanding, we do not believe the sales finance licensee should be required to obtain the small loan license. Rather if the law's small loan license requirement should apply to anyone, it should apply to the vehicle dealer. As such, we ask that the Division reconsider its opinion on this matter.

209 CMR 18.00: Conduct of the Business of Debt Collectors and Loan Servicers

The requirements for debt collectors and third party loan servicers in 209 CMR 18.00, in particular 18.13 to 18.21A, are also unnecessarily burdensome, as debt collectors and mortgage servicers must already comply with identical or very similar provisions specified in the Massachusetts Attorney General Office's debt collection regulations⁸ and the federal Fair Debt Collection Practices Act ("FDCPA").⁹ The duplicative and similar nature of these provisions is outlined below.

- 209 CMR 18.13, Acquisition of Location Information, is duplicative of 940 CMR 7.06(1)(c) and 15 U.S.C. § 1692(e).
- 209 CMR 18.14(1)(a)(b)(c), Communication in Connection with Debt Collection, is duplicative of 15 U.S.C. § 1692(c), and 18.14(1)(d)(e) is duplicative of 940 CMR 7.05(3)(d).
- 209 CMR 18.15, Harassment or Abuse, is duplicative of 15 U.S.C. §1692(d) and 940 CMR 7.05.
- 209 CMR 18.16, False or Misleading Representations, is duplicative of 15 U.S.C. §1692(e) and 940 CMR 7.07.
- 209 CMR 18.17, Unfair Practices, is duplicative of 15 U.S.C. §1692(f) and 940 CMR 7.07
- 209 CMR 18.18, Validation of Debts, is duplicative of 15 U.S.C. §1692(g) and 940 CMR 7.08.
- 209 CMR 18.19, Multiple Debts, is duplicative of 15 U.S.C. §1692(h).
- 209 CMR 18.20, Furnishing Certain Deceptive Forms, is duplicative of 15 U.S.C. §1692(j) and similar to 940 CMR 7.07.
- 209 CMR 18.21A (e)-(h) requires compliance with the Consumer Financial Protection Bureau's Mortgage Servicing Rules, 12 C.F.R. §§1024.38–41. This regulation is unnecessary as third party loan servicers are already required to comply with these rules.

⁷ *Id.*

⁸ 209 Mass. Code. Regs. § 7.00

⁹ Fair Debt Collection Practices Act, 15 U.S.C. § 1692

Due to the duplicative nature of the regulation and unnecessary burden it imposes, AFSA respectfully requests that 209 CMR 18.00 be repealed or, at a minimum, amended to create a carve out for real estate lenders who are not subject to state licensing but must already comply with very similar provisions contained in the attorney general's debt collection regulations.

209 CMR 56.00: Foreclosure Prevention Options

In Section 56.02, "Borrower" is defined as "a mortgagor of a mortgage loan." We believe this definition should be clarified to indicate that it is applicable only to those parties obligated on the note and not non-obligated parties who do not have the right to independently request or accept a loan modification. Additionally, the definition of "Good Faith Effort to Negotiate a Commercially Reasonable Alternative to Foreclosure" currently includes the "net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recovery following foreclosure" as a deciding factor. This definition fails to take into account the fact that net present value (NPV) is not applicable in all situations. This includes, but is not limited to, programs that do not utilize NPV as a decision tool for modifications, where the owner of the loan does not allow the servicer to modify the loan or where the borrower's payment is already affordable so there would be no modified terms to input into an NPV tool. Accordingly, we ask that the NPV requirement be removed from the definition.

Section 56.05(1)(c) requires a creditor to file a copy of the Right to Request a Modified Mortgage Loan notice with the attorney general's office concurrent with its delivery to the borrower. Requiring mortgage holders and loan servicers to provide copies of Right to Cure (RTC) notice is a very onerous requirement, particularly given that creditors are required to "strictly comply" with the state mandated form RTC notice detailed in Section 56.04. AFSA would like clarification from the Division as to what information is gleaned from the copies of these notices and also asks the Division to consider other methods of reporting the relevant information without actually submitting copies of the form.

Section 56.08 identifies three "safe harbors" under which creditors are deemed in compliance with Massachusetts General Laws, Ch. 244 § 35B(b), without issuing the required notice and written assessment. The safe harbors outlined in the regulation do not currently include situations when a borrower is offered foreclosure avoidance programs and then fails to fully perform under the program. For example, when a borrower makes a trial payment, but then either does not make all trial payments, or fails to return executed final modification documents. We ask that 56.08 be amended to apply the safe harbor in these situations.

We believe the intent of 209 CMR 56.00 is to ensure creditors are working with borrowers to avoid foreclosure through alternative options. However, the complexity of the current process imposes so many restrictions, that the loan servicer's ability to enact controls to drive the process is hindered, resulting in significant delays in solicitation for this option and extending delinquencies. Additionally, certain programs like re-payment plans, forbearance plans, and streamlined modification programs are not contemplated by the statute and do not fit cleanly into the requirements.

Many of the requirements contained in 209 CMR 56.00 are now unnecessary because they are met through creditors' compliance with the Consumer Financial Protection Bureau's (CFPB) Mortgage Servicing Rules.¹⁰ Compliance with the CFPB's rules ensures that creditors handle any request for foreclosure avoidance appropriately. AFSA recommends that the Division rely on the CFPB's requirements for the specific review of loss mitigation options¹¹ and also adapt the counter-offer to the creditor's mortgage modification proposal to the CFPB's appeal on approval process.¹² These changes would ensure consistent mortgage servicing for borrowers, and also reduce the regulatory burden for creditors.

Thank you in advance for your consideration of these concerns and suggestions. If you have questions or would like to further discuss our perspective, please do not hesitate to contact me by phone at 952-922-6500 or email at dfagre@afsamail.org.

Respectfully,



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¹⁰ CFPB Real Estate Settlement Procedures Act, 12 C.F.R. § 1024

¹¹ CFPB Real Estate Settlement Procedures Act, 12 C.F.R. § 1024.41 (2014)

¹² *Id.*