

FORECLOSURE CHECKLIST MASSACHUSETTS

The purpose of this checklist is to help you determine whether a foreclosure was properly conducted. If you have any questions, if any of the answers to the below questions are in the negative, or if you're unsure of how certain documents should be treated, please contact your underwriter.

There are off-record documents that must be reviewed in order to determine if the foreclosure was properly conducted, including a copy of the Promissory Note to the originating Lender endorsed to the foreclosing mortgagee (or endorsed in blank), copies of the mortgagee's Notices of Sale sent to the mortgagors and all other interested parties pursuant to M.G.L. c. 244, § 14 ("Notices of Sale"), and proof of mailing of the same, such as certified mail receipts or USPS tracking numbers that can be tracked through the USPS system. You do not need to review copies of the "green cards" or proof that the Notice has been received.

___ Did the mortgagor have **good title** to the property at the time of granting the mortgage?

___ Was the **Mortgage** properly executed?

___ Were all owners of record named as mortgagors?

___ Did all named mortgagors execute the mortgage?

___ Was the mortgage properly acknowledged?

___ Did the mortgage contain a satisfactory legal description of the property?¹

___ If the mortgagor is an entity, did the signor have appropriate authority to execute the mortgage?

___ Do the terms of the Mortgage include a statutory **Power of Sale**?

___ Has the mortgage been **assigned**? If so:

___ do all assignments include the correct recording reference to the original mortgage?

___ do the assignments properly chain the original mortgage to the foreclosing mortgagee as being holder of record of the mortgage?

___ were all assignments in the chain recorded prior to the time of mailing of the Notices of Sale, if the Notices were mailed November 1, 2012 or after?

___ were all assignments executed by an officer/employee of the assignor who purports to hold one of the positions listed in M.G.L. c. 183, § 54B?

___ were all assignments properly acknowledged?

___ If the first publication of the Notice of Sale was November 1, 2012 or after, were **affidavits pursuant to M.G.L. c. 244, §§ 35B and 35C** recorded?²

¹ Reference to the address or the tax id number of the parcel is not satisfactory.

² Affidavits under M.G.L. c. 244, §§ 35B and C may be combined into one document.

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- ____ Was the affidavit dated prior to the first publication of the Notice of Sale?
- ____ Was the affidavit made under oath or as a sworn statement?
- ____ Was the affidavit made of the affiant's own personal knowledge?
- ____ Did the affidavit contain a detailed description of the basis of the affiant's personal knowledge with reference to the sources of the information relied upon, as well as why those sources can be relied upon?
- ____ Was the affidavit signed under the penalties of perjury?
- ____ Was the affidavit acknowledged using a jurat?
- ____ With respect to § 35B, did the affidavit recite that either:
- the requirements of § 35B have been complied with, or
 - § 35B is not applicable to the foreclosed mortgage?³
- ____ With respect to § 35C, did the affidavit recite that the foreclosing mortgagee is either:
- the holder of the promissory note secured by the foreclosed mortgage, or
 - the authorized agent of the holder of said promissory note?
- ____ Was the affiant either:
- an officer/employee of the foreclosing mortgagee who purports to hold one of the positions listed in M.G.L. c. 183, § 54B; or
 - an officer/employee of a third-party servicer purporting to hold one of the positions listed under M.G.L. c. 183, §54B, and if so, is there a power of attorney valid at the time of the execution of the affidavit from the foreclosing mortgagee to said third-party servicer authorizing the servicer to execute the affidavit on behalf of the foreclosing mortgagee?
- ____ If there was an assignment of the foreclosed mortgage recorded subsequent to the recording of the c. 244, §§ 35B and 35C Affidavit/s, was a subsequent Affidavit/s naming the new mortgagee recorded?
- ____ Has an **Order of Notice under the Servicemember's Civil Relief Act** ("SCRA") been recorded?
- ____ If the SCRA action was filed after January 14, 2013, was the mortgagee of record named as the plaintiff?
- ____ Are all individuals who are owners of the equity of redemption, including any heirs or devisees of a deceased owner, named as defendants?^{4 5}

³ M.G.L. c. 244, § 35B applies to "certain mortgage loans" as that term is defined under the statute. If the mortgage loan is not considered to be one of those "certain mortgage loans", compliance with the statute as well as recording of an affidavit of compliance is not required under the statute. However, because it is difficult to ascertain from the recorded mortgage whether a mortgage loan falls under that definition of "certain mortgage loan", in that instance, an affidavit stating that § 35B is not applicable is required to be recorded.

⁴ SCRA applies to individuals only, including Trustees, but not corporations, LLCs, business trusts or other corporate entities, because only individuals can serve in the United States Armed Services. Therefore, if the owner of the equity of redemption is a corporation, LLC, business trust or other corporate-type entity, a SCRA Order of Notice and Judgment are not required.

⁵ If the owner of the equity of redemption is deceased, no probate filing is required. However, foreclosing mortgagees need to make a diligent search for the heirs or devisees, which may mean off-record searches to make a determination of who should be named as a

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_____ Has the **SCRA Judgment** been duly recorded?⁶
_____ Was the SCRA judgment issued prior to the date of the foreclosure auction and entry?
_____ Was the SCRA judgment recorded more than 3 years after it was issued?

_____ Has a **Certificate of Entry** been duly recorded?⁷
_____ Was the person making entry on behalf of the mortgagee either:
• an officer/employee of the foreclosing mortgagee who purports to hold one of the positions listed in M.G.L. c. 183, § 54B; or
• an officer/employee purporting to hold one of the positions listed in M.G.L. c. 183, § 54B for a third-party servicer or foreclosure counsel (or its assignee), and if so, is there a power of attorney, valid at the time of the entry, from the foreclosing mortgagee to said third-party servicer or foreclosure counsel (or assignee) authorizing them to make such entry?
_____ Is the Certificate signed by two (2) witnesses?
_____ Is the Certificate acknowledged using a jurat?

_____ Has the **Foreclosure Deed** been duly recorded?
_____ Was the Affidavit of Sale and a copy of the Notice of Sale advertised in the appropriate newspaper (aka the “tear sheet”) attached to the deed?
_____ If the high bid was assigned to a third-party, was an Assignment of Bid attached to the deed?
_____ Was the foreclosing mortgagee named as the grantor?
_____ Was the high bidder or high bidder’s assignee named in the Affidavit of Sale also named as the grantee?
_____ Was the consideration stated in the deed the same as the amount of the high bid recited in the Affidavit of Sale?
_____ Was the Foreclosure Deed executed by either:
• an officer/employee of the foreclosing mortgagee who purports to hold one of the positions listed in M.G.L. c. 183, § 54B; or
• an officer/employee purporting to hold one of the positions listed in M.G.L. c. 183, § 54B for a third-party servicer or foreclosure counsel (or its assignee), and if so, is there a

defendant, or who should be noticed.

⁶ Failure to comply with SCRA and obtain a judgment issued prior to the foreclosure auction causes a 20-year cloud on title, making title uninsurable. If a SCRA judgment does not appear in your title or is not issued prior to the foreclosure auction, contact your underwriter.

⁷ Foreclosure by entry is a different method of foreclosure under M.G.L. c. 244, §1, requiring the mortgagee to make an open and peaceable entry onto the property in order to recover possession of it. It is a distinct and separate means of foreclosure than by exercise of the statutory power of sale contained in a mortgage pursuant to § 11, et seq. Foreclosure by entry requires that the mortgagee record a Certificate of Entry in accordance with §2. The entry “ripens” once the Certificate of Entry has been recorded for 3 years. While a properly conducted entry and the recording of a Certificate of Entry is not required in order to complete a foreclosure done pursuant to the statutory power of sale, it is common practice to conduct the entry in conjunction with it as an alternate means of foreclosure in the event a foreclosure does not comply with the statutory power of sale and is found to be invalid.

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power of attorney, valid at the time of the execution of the deed, from the foreclosing mortgagee to said third-party servicer or foreclosure counsel (or assignee) authorizing them to execute the deed?

_____ Was the Foreclosure Deed properly acknowledged?

_____ Has the **Affidavit of Sale pursuant to M.G.L. c. 244, § 15** been duly executed?

_____ Was the Affidavit made under the penalties of perjury or under oath?

_____ Was the Affiant either:

- foreclosure counsel or its assignee;
- an officer/employee of the foreclosing mortgagee who purports to hold one of the positions listed in M.G.L. c. 183, § 54B; or
- an officer/employee purporting to hold one of the positions listed in M.G.L. c. 183, § 54B for a third-party servicer, and if so, is there a power of attorney valid at the time of the execution of the Affidavit to the third-party servicer which authorizes the servicer to execute the affidavit on behalf of the foreclosing mortgagee?

_____ Did the Affidavit indicate there was a default on the part of the mortgagor?

_____ Did the Affidavit state that the Notice of Sale, pursuant to M.G.L. c. 244, § 15, was:

_____ published once in each of 3 successive weeks?

_____ first published not less than 21 days prior to the day of auction?

_____ published in a newspaper published in the city or town where the land lies or in a newspaper with a general circulation in the city or town where the land lies?

_____ Did the Affidavit state that the foreclosing mortgagee complied with M.G.L. c. 244, § 14 by mailing the required Notices of Sale by certified mail, return receipt requested?

_____ If the IRS held one or more liens junior to the foreclosed mortgage, did the Affidavit state that the required Notice of Sale was mailed to the IRS in accordance with 26 U.S.C. § 7425(c)?

_____ Did the Affidavit state that the foreclosing mortgagee caused the premises to be sold at the time and place advertised in the Notice of Sale? If sold at a later date, did the Affidavit state that the sale was postponed by public proclamation to a certain future date?⁸

_____ Did the Affidavit state that the auction was conducted by a licensed auctioneer?

_____ Did the Affidavit state that the property was sold to the highest bidder?⁹

_____ Did the Affidavit identify the name of the highest bidder?

_____ Did the Affidavit state the amount of the highest bid?

_____ Was the Affidavit acknowledged using a jurat?

_____ Has the Affidavit of Sale been recorded for 3 years or more?¹⁰

⁸ Several postponements of the sale may result in a chilling of the sale because bidders may be discouraged from attending subsequent scheduled auctions, resulting in less bidders and the property being sold at a lower bid than would normally be made. In the event the sale has been postponed more than 5 times, please consult your underwriter.

⁹ If the Affidavit states that the property was sold to anyone other than the high/highest bidder, the Affidavit must contain a recitation of why the high bidder is not perform. If the bidder is simply referred to as a successful bidder, the Affidavit is defective, and you should contact your underwriter.

¹⁰ Substantial changes to M.G.L. c. 244, § 15 took effect on December 31, 2015, and established a statute of repose for 3 years after recording of the Affidavit of Sale such that upon the passing of 3 years, without challenge as specified in § 15(d)(i) or (ii), the Affidavit serves as conclusive evidence in favor of an arm's length third party purchaser for value at or subsequent to the foreclosure

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_____ Did the **advertised and published Notice of Sale:**

- _____ include all of the recording information for the foreclosed mortgage and, if the Notice of Sale was published on November 1, 2012 or later, all assignments and/or modifications of record?
_____ state the date and time of the auction?
_____ state the location of the auction to be the location of the premises?
_____ include the same legal description of the property as was included in the foreclosed mortgage?
_____ include the terms of the sale?
_____ include any encumbrances and/or liens to which the high bidder will take the property subject to?

_____ If the Notice of Sale was mailed or published after June 22, 2012, was a post-foreclosure **“Eaton” Affidavit** recorded?¹¹

- _____ Was the affidavit made under oath or as a sworn statement?
_____ Was the affiant either:
- an officer/employee of the foreclosing mortgagee who purports to hold one of the positions listed in M.G.L. c. 183, § 54B; or
 - an officer/employee purporting to hold one of the positions listed in M.G.L. c. 183, § 54B for a third-party servicer, and if so, is there a power of attorney valid at the time of the execution of the Affidavit to the third-party servicer which authorizes the servicer to execute the affidavit on behalf of the foreclosing mortgagee?
- _____ Was the affidavit made of the affiant’s own personal knowledge?
_____ Did the affidavit contain a detailed description of the basis of the affiant’s personal knowledge with reference to the sources of the information relied upon, as well as why those sources can be relied upon?
_____ Was the affidavit signed under the penalties of perjury?
_____ Was the affidavit acknowledged using a jurat?
_____ Was the affidavit executed after the date of the foreclosure sale?
_____ Did the Affidavit identify the name of the foreclosing mortgagee?
_____ Did the Affidavit state that at the time of the foreclosure sale, the foreclosing mortgagee was either:
- the holder of the promissory note; or
 - the authorized agent of the holder of the promissory note?

_____ Was a **“Pinti” Affidavit** recorded?¹²

sale that the foreclosure complied with the statutory power of sale. It is imperative that the Affidavit shows that the requirements of the power of sale and law have been complied with in all respects. Oftentimes, if there is a defect in the foreclosure, the passage of 3 years will cure a foreclosure such that one that is uninsurable may become insurable. However, in that instance, please contact your underwriter.

¹¹ *Eaton v. Federal National Mortgage Association*, 462 Mass. 569 (2012)

¹² *Pinti v. Emigrant Mortgage Company, Inc.*, 472 Mass. 226 (2015). The *Pinti* decision is applicable to all foreclosures where notices of default were sent on or after July 17, 2015. However, because it is difficult, if not impossible, to determine from the record title when the notices of default were sent, generally speaking if a SCRA complaint and the recording of the Order of Notice took place after July 17, 2015, a *Pinti* affidavit is required.

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____ Was the affidavit made under oath or as a sworn statement?

____ Was the affiant either:

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- an officer/employee purporting to hold one of the positions listed in M.G.L. c. 183, § 54B for a third-party servicer, and if so, is there a power of attorney valid at the time of the execution of the Affidavit to the third-party servicer which authorizes the servicer to execute the affidavit on behalf of the foreclosing mortgagee?

____ Was the affidavit made of the affiant's own personal knowledge?

____ Did the affidavit contain a detailed description of the basis of the affiant's personal knowledge with reference to the sources of the information relied upon, as well as why those sources can be relied upon?

____ Was the affidavit signed under the penalties of perjury?

____ Was the affidavit acknowledged using a jurat?

____ Did the affidavit state that either:

- the notice of default required under the terms of the foreclosed mortgage was sent prior to July 18, 2015; or
- all notices, requirements and conditions precedent to foreclosure under the terms of the foreclosed mortgage were done in strict compliance with the terms of the mortgage?

____ Were **Notices of Sale** mailed to all interested parties pursuant to M.G.L. c. 244, § 14?

____ Did the Notice of Sale:

____ include all of the recording information for the foreclosed mortgage and, if the Notice of Sale was published on November 1, 2012 or later, all assignments and/or modifications of record?

____ state the date and time of the auction?

____ state the location of the auction to be the location of the premises?

____ include the same legal description of the property as was included in the foreclosed mortgage?

____ include the terms of the sale?

____ include any encumbrances and/or liens to which the high bidder will take the property subject to?

____ Were the Notices of Sale sent by registered or certified mail?

____ Were the Notices of Sale mailed no less than 14 days prior to the sale to:

____ all owners of the equity of redemption, including any heirs or devisees of deceased owners, appearing of record as of 30 days prior to the date of sale?

____ all persons and entities holding an interest junior to the foreclosed mortgage appearing of

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record as of 30 days prior to the date of sale, if any?¹³¹⁴

_____ Were the Notices of Sale mailed no less than 25 days prior to the sale to the IRS if the IRS held a federal tax lien junior to the foreclosed mortgage appearing of record as of 30 days prior to the date of sale?¹⁵

_____ If one of the owners of the equity of redemption is deceased less than 10 years prior to the date of sale, were Notices of Sale mailed no less than 14 days prior to the sale to the Massachusetts Estate Tax Recovery Unit?

_____ Did the mortgagor file for **Bankruptcy** protection prior to the foreclosure auction?¹⁶

_____ If so, did the mortgagor either:

- petition for and receive relief from the automatic stay from the Bankruptcy Court; or
- wait until the mortgagor's Bankruptcy case was closed or dismissed?¹⁷

_____ Has the property remained **unoccupied** at the time of the auction and thereafter?¹⁸

_____ Was the foreclosure initiated between March 1, 2020 and July 31, 2021, when either the Massachusetts **Covid-19 foreclosure moratorium** under Chapter 65 of the Acts of 2020 (April 20, 2020 through October 17, 2020) or the federal moratoria under the CARES Act or other federal acts or regulations (March 18, 2020 through July 31, 2021) were in effect? If yes, contact your underwriter for approval.

¹³ A junior lienholder may waive notice of the sale either prior to or after the sale, and said waiver must be recorded.

¹⁴ For liens recorded under M.G.L. c. 61A, c. 61B, c. 40L, and restrictions under c. 184, § 33, additional notices are required. If a lien or restriction under these chapters is recorded, please consult your underwriter.

¹⁵ The IRS holds a right to redeem the property for 120 days after the foreclosure sale pursuant to 26 U.S.C. § 7425(d)(1). However, under § 7425(c)(2), the IRS may consent to the sale. If there is a junior federal tax lien appearing of record as of 30 days prior to the date of sale, and it has been less than 120 days from the foreclosure sale, unless the IRS has consented and that consent has been recorded, either a proper exception needs to be taken for the IRS' right to redeem or is it not insurable until after the 120 days expires.

¹⁶ Check PACER (<https://pacer.uscourts.gov/>); do not rely upon the Bankruptcy records kept through the Registry of Deeds.

¹⁷ A foreclosure undertaken or continued without Court approval while a Bankruptcy is pending is invalid and is not insurable. Talk to your underwriter if this is the situation.

¹⁸ Any property where the mortgagor either occupied the property at the time of foreclosure or continues to occupy thereafter is uninsurable. However, any property where a holdover tenant of the mortgagor continues to occupy the property after the foreclosure may be insurable. In either circumstance, please consult your underwriter for more information.

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