

The EATON Decision and Underwriting Guidelines

CHICAGO AND COMMONWEALTH LAND TITLE INSURANCE COMPANIES

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TO: Massachusetts Agents and Approved Attorneys

FROM: J. Patrick Walsh, Regional Counsel
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RE: The EATON Decision and Underwriting Guidelines On June 22,
issued its unanimous decision in *Eaton v. Federal National Mortgage Association* 462 Mass. 569, 2012 WL 2349008 (2012). Going forward, the decision will require substantial changes in the way we insure titles coming through foreclosures. For power of sale mortgage foreclosures on or after June 22, 2012, it will now be necessary to record proper documentation which discloses that the foreclosing holder of the mortgage was also the holder of the note or conducted the foreclosure as the duly appointed agent of the note holder. In Footnote 28 of the decision, the SJC provides guidance for compliance with its ruling: "It would appear that at least with respect to unregistered land, a foreclosing mortgage holder such as Green Tree may establish that it either held the note or acted on behalf of the note holder at the time of a foreclosure sale by filing an affidavit in the appropriate registry of deeds pursuant to G.L.c. 183, §5B. The statute allows for the filing of an affidavit that is "relevant to the title to certain land and will be of benefit and assistance in clarifying the chain of title." Such an affidavit may state that the mortgagee either held the note or acted on behalf of the note holder at the time of the foreclosure sale. See G.L.c. 183, §54B." In response to the Eaton decision, we have formulated underwriting guidelines to address the following issues with respect to unregistered land: I) Where the foreclosing lender is the holder of the note, what evidence is sufficient to comply with Eaton? II) Where the foreclosing lender is a servicer or other agent, what additional evidence is necessary to comply with Eaton? III) Determining whether the Eaton requirements apply in recent foreclosures. IV) How does Eaton affect foreclosures by entry? V) In addition, a reminder concerning insuring titles coming through foreclosures where the borrowers or related parties are still in possession or asserting rights or claims in connection with the foreclosure proceedings. I. Where Foreclosing Lender is the Holder of both the Mortgage and the Note, the Agent must: 1) Record a properly executed affidavit by the mortgagee, whose signature complies with G.L.c. 183, §54B and is notarized in the form of a Jurat, which states: (a) that the mortgagee was the holder of the note at least as of the date of the commencement of the power of sale foreclosure proceeding and the date of making entry to foreclose; (b) that it had the right to enforce the instrument by conducting a statutory power of sale foreclosure and making an entry to foreclose; (c) together with a 5B Certificate by the attorney for the foreclosing mortgagee. Note that a Jurat is not the same as an acknowledgment; in Executive Order No. 455, effective May 15, 2004, it is defined as follows: "Jurat" means a notarial act in which an individual, at a single time and place: (a) appears in person before a notary public and presents a document; (b) is identified by the notary public through satisfactory evidence of identity; (c) signs the document in the presence of the notary public; and (d) takes an oath or affirmation before the notary vouching for the truthfulness or accuracy of the signed document (emphasis added). 2) Obtain and review a copy of the note, together with any amendments, endorsements or allonges, in order to verify the accuracy of the affidavit. Retain the copies in your title file; it is not necessary to record them. II. Where Foreclosing Lender is the Holder of the Mortgage and is acting on behalf of the Holder of the Note, the Agent must: 1) Record a properly executed affidavit by the holder of the note or its attorney in fact if applicable, whose signature complies with G.L.c. 183, §54B and is notarized in the form of a Jurat, which states: (a) that the party on whose behalf the mortgagee was acting was the holder of the note at least as of the date of the commencement of the power of sale foreclosure proceeding and the date of making entry to foreclose; (b) that it had the right to enforce the instrument; (c) that it duly authorized the holder of the mortgage to conduct the statutory power of sale foreclosure and make an entry to foreclose; (d) together with a 5B certificate by the attorney for the foreclosing mortgagee. (e) The affidavit must also include the power of attorney if applicable, and/or recite the relevant sections of the Servicing or other Agreement under which the holder of the mortgage is acting as the agent of the note holder. (f) The affidavit must also include a statement to the effect that the evidence of authority is in full force and effect and has not been altered, amended or revoked at all times relevant to the foreclosure proceedings. 2) Record a properly executed affidavit by the holder of the mortgage, whose signature complies with G.L.c. 183, §54B and is notarized in the form of a Jurat, which states: (a) that it acted on behalf of the holder of the note in conducting the power of sale foreclosure and making entry; (b) together with a 5B certificate by the attorney for the foreclosing mortgagee. 3) Obtain and review a copy of the note, together with any amendments, endorsements or allonges, in order to verify the accuracy of the relevant affidavits. Retain the copies in your title file; it is not necessary to record them. III. Determination of whether Eaton applies to recent foreclosures: The SJC states that the Eaton requirements apply "only to mortgage foreclosure sales for which the mandatory notice of sale has been given after the date of this opinion." As a result, there may be very recent foreclosures where the Eaton requirements will not apply. When insuring titles coming through foreclosures in which the auction was held on or after June 22, 2012, obtain and review copies of the receipts for certified mail and the green cards. If these establish that the date of mailing of the last required notices is prior to June 22, the Eaton requirements are not applicable. Please retain the copies of these receipts and green cards in your title file. IV. Foreclosures by Entry. The Eaton decision interprets the term "mortgagee" as it applies in G.L.c. 244, §14, G.L.c. 183, §21, and other statutes relative to foreclosures under the statutory power of sale. It does not specifically

discuss G.L.c. 244, §§1-2, applicable to foreclosures by entry. However, it is clear from the broad analysis of the provisions of c. 244 and cases cited, that the Eaton requirements also apply to foreclosures by entry conducted on or after June 22. Therefore, the Guidelines in I. and II. above include provisions which address foreclosures by entry as well as power of sale foreclosures. V. Insuring Foreclosures Where the Foreclosed Mortgagors or Related Parties are still in possession. The Eaton decision also is a reminder of the inherent risks of insuring titles coming through foreclosure where any of the foreclosed mortgagors or related parties are still in possession. This foreclosure does not appear to have been challenged until the summary process action was commenced to evict the mortgagor. Eaton responded by filing a counterclaim which challenged the validity of the foreclosure — see *Bank of N.Y. v. Bailey*, 460 Mass. 327 (2011). The Eaton litigation still continues at the Trial Court level, even after the SJC decision. Insuring titles coming through foreclosure in which foreclosed mortgagors or related parties are still in possession, or are continuing to assert rights, is an extra-hazardous title risk which our Companies are not willing to insure. Please obtain an affidavit from a foreclosing lender or its REO which is the seller, that the mortgagors or related parties are no longer in possession or asserting any rights or claims in connection with the foreclosure proceedings. If said seller is unwilling to execute such an affidavit, please contact the Company for further instructions. The Land Court has not yet issued updated Guidelines or rules applicable to registered land in response to the Eaton decision. Since the Registry Districts have not accepted 5B affidavits in the past, the Court may adopt a different approach with regard to registered land than the Eaton decision has suggested for unregistered land. However, until updated guidelines and/or rules are issued by the Court, please obtain the affidavits and supporting documentation described above and retain in your title file. Please do not hesitate to contact our Underwriting Staff with any questions or comments regarding the Eaton decision and its new requirements. There will no doubt be more developments as this new area of the law begins to evolve in the midst of what is still a very active foreclosure market; we will issue future Memos on these developments and updates of these Guidelines in response to them