HOUSE DOCKET, NO. 1447 FILED ON: 1/20/2011

HOUSE . . . . . No. 1219

The Commonwealth of Massachusetts

PRESENTED BY:

Steven M. Walsh

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying:

An Act to prevent unlawful and unnecessary foreclosures.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Steven M. Walsh	*11th Essex*
Frank I. Smizik	*15th Norfolk*
Stephen R. Canessa	*12th Bristol*
Timothy J. Toomey, Jr.	*26th Middlesex*
Chris Walsh	*6th Middlesex*
Carolyn C. Dykema	*8th Middlesex*
Cory Atkins	*14th Middlesex*
Jennifer L. Flanagan	*[District]*
Denise Andrews	*2nd Franklin*
Christine E. Canavan	*10th Plymouth*
Michael D. Brady	*9th Plymouth*
James J. O'Day	*14th Worcester*
Sean Garballey	*23rd Middlesex*
Brian M. Ashe	*2nd Hampden*
Denise Provost	*27th Middlesex*
Kathi-Anne Reinstein	*16th Suffolk*

Linda Dorcena Forry	*12th Suffolk*
John W. Scibak	*2nd Hampshire*
Carlo Basile	*1st Suffolk*
Jennifer E. Benson	*37th Middlesex*
Bruce J. Ayers	*1st Norfolk*

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HOUSE . . . . . No. 1219

By Mr. Walsh of Lynn, a petition (accompanied by bill, House, No. 1219) of Steven M. Walsh and others relative to preventing unlawful and unnecessary foreclosures. Financial Services.

The Commonwealth of Massachusetts

An Act to prevent unlawful and unnecessary foreclosures.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 35 of chapter 244 of the General Laws, as appearing in the 2010 Official Edition, is hereby amended by adding the following new subsection:-

Section 35B. Prerequisite to Commencing Foreclosure Proceedings For Certain Mortgage Loans; Reasonable Steps and Good Faith Efforts; Safe Harbor; Regulatory Authority.

(a) Commercially Reasonable Efforts to Avoid Foreclosures. (1) A creditor shall not commence foreclosure upon certain mortgage loans pursuant to this Chapter unless it has first taken reasonable steps and good faith efforts to avoid foreclosure. The determination whether a creditor has taken reasonable steps and good faith efforts prior to commencing foreclosure shall consider, without limitation: (i) an assessment of the borrower's current circumstances, including without limitation the borrower's current income, debts and obligations; (ii) the net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recovery following foreclosure; (iii) the interests of the creditor, including, without limitation, investors and, in the event the creditor has received federal or state money, taxpayers.

(2) In interpreting this subsection (a), except as otherwise specified in a contract, a servicer of pooled residential mortgages may determine whether the net present value of the payments on the loan, as modified, is likely to be greater than the anticipated net recovery that would result from foreclosure to all investors and holders of beneficial interests in such investment, but not to any individual or groups of investors or beneficial interest holders, and shall be deemed to act in the best interests of all such investors or holders of beneficial interests if the servicer agrees to or implements a loan modification or takes reasonable loss mitigation actions that comply with this Section. Further, any loan modification offered to the borrower must comply with current federal and state law, including, without limitation, 940 C.M.R. 8.00 et seq., and the borrower must be able to reasonably afford to repay the loan, as modified,

25 according to its scheduled payments. Nothing in this subsection shall be construed to prevent a
26 creditor from offering or accepting alternatives to foreclosure, such as a short sale or deed-in-lieu
27 of foreclosure, if the borrower requests such alternatives, rejects a loan modification offered
28 pursuant to this subsection, or does not qualify for a loan modification pursuant to this
29 subsection.

30 (b) Safe Harbor. A creditor shall be deemed to comply with subsection (a), if, prior to
31 commencing foreclosure on certain mortgage loans, the creditor:

32 (i) determines a borrower's current ability to make monthly payments (the "affordable
33 monthly payment"), reasonably taking into account the borrower's current circumstances
34 including income, debts and obligations;

35 (ii) identifies a loan modification that achieves the borrower's affordable monthly
36 payment ("modified loan"), which loan modification may include one or more of the following:
37 reduction in principal; reduction in interest rate, or an increase in amortization period but not
38 more than a ten year increase not to exceed a forty year period;

39 (iii) conducts an analysis comparing the net present value of the modified loan and the
40 creditor's anticipated net recovery that would result from foreclosure; and

41 (iv) either (a) in all circumstances where the net present value of the modified loan
42 exceeds the anticipated net recovery at foreclosure, offers and agrees to modify the loan in a
43 manner that provides the affordable monthly payment, or (b) in circumstances where the net
44 present value of the modified loan is less than the anticipated net recovery of the foreclosure,
45 notifies the borrower that no loan modification will be offered and provides a written summary
46 of the creditor's net present value analysis, after which the creditor may proceed with the
47 foreclosure process in conformity with Section 35A of this chapter.

48 (c) The Attorney General may adopt, amend or repeal rules and regulations to aid in the
49 administration and enforcement of this Section, including regulations that determine further
50 requirements for reasonable steps and good faith efforts to avoid foreclosures as required by
51 subsection (a) and that provide safe harbors for compliance in addition to that set forth in
52 subsection (b).

53 (d) Prior to commencing foreclosure on certain mortgage loans, the creditor must certify
54 compliance with this Section in an affidavit based on personal knowledge. The creditor shall
55 record this affidavit based upon personal knowledge with the appropriate registry of deeds, or for
56 registered land, with the land court prior to providing a borrower with notice under section
57 fourteen of this Chapter.

58 (e) A violation of this Section constitutes a violation of G. L. c. 93A, § 2(a).

59 (f) This Act shall take effect upon its passage.

60 For purposes of this section:

61 “ "Creditor", a person or entity that holds or controls, partially, wholly, indirectly,
62 directly, or in a nominee capacity, a mortgage loan securing a residential property, including,
63 without limitation, an originator, holder, investor, assignee, successor, trust, trustee, nominee
64 holder, Mortgage Electronic Registration System or mortgage servicer, including the Federal
65 National Mortgage Association or the Federal Home Loan Mortgage Corporation. "Creditor"
66 shall also include any servant, employee or agent of a creditor.

67 “Borrower” shall mean a mortgagor of a mortgage loan.

68 “Certain mortgage loan” shall mean a loan to a natural person made primarily for
69 personal, family or household purposes secured wholly or partially by a mortgage on an owner-
70 occupied residential property that bear one or more of the following loan features:

71 (i) an introductory interest rate of a duration of five years or less, which term is
72 followed by a period where the interest rate may exceed the introductory rate;

73 (ii) interest-only payments for any period of time;

74 (iii) a payment option feature, where any one of the payment options is less than
75 principal and interest fully amortized over the life of the loan;

76 (iv) did not require full documentation of income or assets;

77 (v) prepayment penalties;

78 (vi) the loan was a refinance of an existing loan that occurred within twelve months of
79 the most recent mortgage loan;

80 (vii) the loan was underwritten with a Loan-to-Value ratio at or above 90%;

81 (viii) the loan was underwritten as a component of a loan transaction wherein the
82 combined Loan-to-Value ratio was above 95% or

83 (ix) the loan was underwritten where the ratio of the borrower’s debt, including all
84 housing-related and recurring monthly debt, to the borrower’s income exceeded 38%.

85 “Mortgage loan”, a loan to a natural person made primarily for personal, family or
86 household purposes secured wholly or partially by a mortgage on residential property

87 “Owner-occupied residential property" shall mean real property located in the
88 commonwealth having thereon a dwelling house with accommodations for four or less separate
89 households and occupied, or to be occupied, in whole or in part by the obligor on the mortgage
90 debt. This definition shall be limited to the principal residence of a person, and not an
91 investment property or second home.

92

93 SECTION 2. Section 35 of chapter 244 of the General Laws, as appearing in the 2010
94 Official Edition, is hereby amended by adding the following new subsection:-

95 Section 35C. Prohibited Conduct In Connection with Foreclosure

96 (a) Proper documentation prior to foreclosure. A creditor may not commence foreclosure
97 when it knows or should know that it is not the present holder of the mortgage loan, including,
98 without limitation, if the creditor is not the original mortgagee and commences foreclosure
99 without possessing a valid written, signed and dated assignment evidencing the assignment of the
100 mortgage, in accordance with section fourteen of chapter two hundred and forty-four.

101 (b) No imposition of unfair costs. A creditor violates this Chapter if it imposes upon a
102 third party the cost of correcting, curing, or confirming documentation relating to the sale,
103 transfer, or assignment of a mortgage loan, including, without limitation, a creditor must bear the
104 costs related to curative actions taken because a foreclosure was commenced without the
105 creditor's possession of a valid, written, signed, and dated assignment evidencing the assignment
106 of the mortgage, in violation of section fourteen of chapter two hundred and forty-four.

107 (c) No misrepresentations. A creditor violates this Chapter if it makes statements to a
108 state or federal court related to foreclosure or compliance with this Chapter, orally or in writing,
109 that it knows or should know are false, including, without limitation, statements about the
110 offering of a loan modification, the borrower's history of payments, the validity of the
111 assignment of the mortgage loan, that the creditor is the record holder of the mortgage loan, or
112 the creditor's compliance with any other requirements of this Chapter.

113 (d) No imposition of fees for services not performed. A creditor violates this Chapter if
114 the creditor imposes a fee upon a borrower for goods not rendered or services not performed in
115 connection with a foreclosure.

116 (e) Business Referrals. No person shall give and no person shall accept any fee,
117 kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise,
118 incident to or a part of a foreclosure involving a mortgage loan for having referred foreclosure
119 business or services to any person.

120 (f) Splitting charges: No person shall give and no person shall accept any portion, split, or
121 percentage of any charge made or received for the rendering of a service in connection with a
122 transaction involving a foreclosure upon a mortgage loan other than for services actually
123 performed.

124 (g) The Attorney General may adopt, amend or repeal rules and regulations to aid in the
125 administration and enforcement of this Section.

126 (h) A violation of this Section constitutes a violation of G. L. c. 93A, § 2(a).

127 (i) This Act shall take effect upon its passage.

128 For purposes of this section:

129 "Creditor", a person or entity that holds or controls, partially, wholly, indirectly, directly,
130 or in a nominee capacity, a mortgage loan securing a residential property, including, without
131 limitation, an originator, holder, investor, assignee, successor, trust, trustee, nominee holder,
132 Mortgage Electronic Registration System or mortgage servicer, including the Federal National
133 Mortgage Association or the Federal Home Loan Mortgage Corporation. "Creditor" shall also
134 include any servant, employee or agent of a creditor.

135 “Borrower” shall mean a mortgagor of a mortgage loan.

136 “Mortgage loan”, a loan to a natural person made primarily for personal, family or
137 household purposes secured wholly or partially by a mortgage on residential property.

138

139 SECTION 3. Section 14 of chapter 244 of the General Laws, as appearing in the 2010
140 Official Edition, is hereby amended by replacing the existing Section 14 with the following new
141 Section:

142 Section 14. The mortgagee or person having his estate in the land mortgaged, or a person
143 authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the
144 legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee
145 or person, may, upon breach of condition and without action, do all the acts authorized or
146 required by the power; but no sale under such power shall be effectual to foreclose a mortgage,
147 unless, previous to such sale, notice thereof has been published once in each of three successive
148 weeks, the first publication to be not less than twenty-one days before the day of sale, in a
149 newspaper, if any, published in the town where the land lies or in a newspaper with general
150 circulation in the town where the land lies and notice thereof has been served by delivering a
151 copy of the notice personally to the owner or owners of record of the equity of redemption as of
152 thirty days prior to the date of sale, said notice served by delivering a copy of the notice
153 personally at least thirty days prior to the date of sale to said owner or owners of to the address
154 set forth in section sixty-one of chapter one hundred and eighty-five, if the land is then registered
155 or, in the case of unregistered land, to the last owner or owners of the equity of redemption
156 appearing on the records of the holder of the mortgage, if any, or if none, to the owner or owners
157 as given on his deed or on the petition for probate by which he acquired title, if any, or if in
158 either case no owner appears, then mailed by registered mail to the address to which the tax
159 collector last sent the tax bill for the mortgaged premises to be sold, or if no tax bill has been sent
160 for the last preceding three years, then mailed by registered mail to the address of any of the

parcels of property in the name of said owner of record which are to be sold under the power of sale and unless a copy of said notice of sale has been sent by registered mail to all persons of record as of thirty days prior to the date of sale holding an interest in the property junior to the mortgage being foreclosed, said notice to be mailed at least thirty days prior to the date of sale to each such person at the address of such person set forth in any document evidencing the interest or to the last address of such person known to the mortgagee. Any person of record as of thirty days prior to the date of sale holding an interest in the property junior to the mortgage being foreclosed may waive at any time, whether prior or subsequent to the date of sale, the right to receive notice by mail to such person under this section and such waiver shall be deemed to constitute compliance with such notice requirement for all purposes. If no newspaper is published in such town, or if there is no newspaper with general circulation in the town where the land lies, notice may be published in a newspaper published in the county where the land lies, and this provision shall be implied in every power of sale mortgage in which it is not expressly set forth. A newspaper which by its title page purports to be printed or published in such town, city or county, and having a circulation therein, shall be sufficient for the purpose.

The following form of foreclosure notice may be used and may be altered as circumstances require; but nothing herein shall be construed to prevent the use of other forms.

(Form.)

MORTGAGEE'S SALE OF REAL ESTATE.

By virtue and in execution of the Power of Sale contained in a certain mortgage given by..... to..... dated..... and recorded with

.....

Deeds, Book....., page....., of which mortgage the undersigned is the present holder,.....

(If by assignment, or in any fiduciary capacity, give reference to the assignment(s) recorded with .....Deeds, Book....., page....., of which mortgage the undersigned is the present holder,.....)

for breach of the conditions of said mortgage and for the purpose of foreclosing the same will be sold at Public Auction at.....o'clock,..... M. on the..... day of..... A.D. (insert year),..... (place)..... all and singular the premises described in said mortgage,

(In case of partial releases, state exceptions.)

To wit: "(Description as in the mortgage, including all references to title, restrictions, encumbrances, etc., as made in the mortgage.)"

Terms of sale: (State here the amount, if any, to be paid in cash by the purchaser at the time and place of the sale, and the time or times for payment of the balance or the whole as the case may be.)

Other terms to be announced at the sale.

(Signed)

_____

Present holder of said mortgage.___

A notice of sale in the above form, published in accordance with the power in the mortgage and with this chapter, together with such other or further notice, if any, as is required by the mortgage, shall be a sufficient notice of the sale; and the premises shall be deemed to have been sold, and the deed thereunder shall convey the premises, subject to and with the benefit of all restrictions, easements, improvements, outstanding tax titles, municipal or other public taxes, assessments, liens or claims in the nature of liens, and existing encumbrances of record created prior to the mortgage, whether or not reference to such restrictions, easements, improvements, liens or encumbrances is made in the deed; but no purchaser at the sale shall be bound to complete the purchase if there are encumbrances, other than those named in the mortgage and included in the notice of sale, which are not stated at the sale and included in the auctioneer's contract with the purchaser.

In the event a mortgagee holds a mortgage pursuant to an assignment, for purposes of this section and section twenty-one of chapter one hundred and eighty-three, a mortgagee shall establish that it is the present record holder of the mortgage intended to be foreclosed upon, ensure that the chain of assignments establishing that the mortgagee is the present holder have been duly recorded in the appropriate registry of deeds or, for registered land, with the land court, and reference all assignments in the notice of sale required in this section.