HOUSE DOCKET, NO. 3329 FILED ON: 1/21/2011

HOUSE . . . . . No. 2766

The Commonwealth of Massachusetts

PRESENTED BY:

Timothy R. Madden

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 updating the law relative to discharge of certain mortgages.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Timothy R. Madden	*Barnstable, Dukes and Nantucket*

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HOUSE . . . . . No. 2766

By Mr. Madden of Nantucket, a petition (accompanied by bill, House, No. 2766) of Timothy R. Madden relative to updating the law relative to discharge of certain mortgages. Financial Services.

The Commonwealth of Massachusetts

An Act updating the law relative to discharge of certain mortgages.

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 10 of chapter 140D of the General Laws is hereby amended by striking the section in its entirety and inserting in place thereof the following section:-

"Section 10.

(a) Except as otherwise provided in this section, in the case of any consumer credit transaction, including opening or increasing the credit limit for an open-end-credit plan, in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required by this chapter, whichever is later, by notifying the creditor, in accordance with regulations of the commissioner, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the commissioner, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the commissioner, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section. No finance or other charge shall begin to accrue on any such transaction until the termination of the rescission period provided for in this section.

(b) When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within twenty days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any action

24 necessary or appropriate to reject the termination of any security interest created under the
25 transaction. If the creditor has delivered any property to the obligor, the obligor may retain
26 possession of it. Upon the performance of the creditor's obligations under this section, the
27 obligor shall tender the property to the creditor, except that if return of the property in kind
28 would be impractical or inequitable, the obligor shall tender its reasonable value. Tender shall
29 be made within one hundred and twenty days at the location of the property or at the residence of
30 the obligor, or as otherwise agreed between creditor and obligor. If the creditor does not take
31 possession of the property within twenty days after tender by the obligor, ownership of the
32 property rests in the obligor without obligation on his part to pay for it. If the obligor's
33 rescission is contested by the creditor, it shall be the creditor's obligation to file a civil action in a
34 court of competent jurisdiction in the county where the property is located and to thereafter seek
35 a judicial determination of the rights of the respective parties on or before the expiration of the
36 one hundred and twenty day period. If the creditor fails to do so, the obligor's rescission shall be
37 deemed valid one hundred and twenty one days from the date of the rescission and the creditor's
38 obligations under this section shall be required to be performed. If the creditor does not perform
39 its obligations under this section within the specified period, ownership of the property rests in
40 the obligor without obligation to pay his part for it and nothing in this section shall prevent
41 obligor from asserting any other claims as against the creditor. The procedures prescribed by this
42 subsection shall apply except when otherwise ordered by a court.

43 (c) Written acknowledgment of receipt of any disclosures required under this chapter, or
44 any rule or regulation issued thereunder, by a person to whom information, forms, and a
45 statement is required to be given pursuant to this section does no more than create a rebuttable
46 presumption of delivery thereof.

47 (d) The commissioner may, if he finds that such action is necessary in order to permit
48 homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing
49 the modification or waiver of any rights created under this section to the extent and under the
50 circumstances set forth in those regulations.

51 (e)(1) This section shall not apply to:

52 (A) a residential mortgage transaction as defined in section one;

53 (B) a transaction which constitutes a refinancing or consolidation, with no new money
54 advanced to the obligor that increases the amount of the principal balance then due and any
55 accrued and unpaid finance charges of an existing extension of credit by the same creditor
56 secured by an interest in the same property;

57 (C) a transaction in which an agency of the commonwealth or any subdivision thereof, is
58 the creditor;

59 (D) advances under a preexisting open-end-credit plan if a security interest has already
60 been retained or acquired and such advances are in accordance with a previously established
61 credit limit for such plan.

62 (f) An obligor's right of rescission shall expire four years after the date of consummation
63 of the transaction or upon the sale of the property, whichever occurs first, notwithstanding that
64 the information and forms required under this section or any other disclosures required under this
65 chapter have not been delivered to the obligor, except where violation(s) of the requirements of
66 this chapter alleged by the obligor were not discovered until after the four year period under this
67 section had expired in which case the right of rescission shall be extended to a maximum of six
68 (6) years, and also where:

69 (1) the commissioner institutes a proceeding to enforce the provisions of this section
70 within four years after the date of consummation of the transaction,

71 (2) the commissioner finds a violation of this section, and

72 (2) the obligor's right to rescind is based in whole or in part on any matter involved in
73 such proceeding, then the obligor's right of rescission shall expire as stated in subsection (f) of
74 this section or upon the expiration of one year following the conclusion of the proceeding, or any
75 judicial review or period for judicial review thereof, whichever is later.

76 (g) In any action in which it is determined that a creditor has violated this section, in
77 addition to rescission a court may award relief under section thirty-two not relating to the right to
78 rescind.

79 (h) An obligor shall have no rescission rights arising solely from the form of written
80 notice used by the creditor to inform the obligor of the rights of the obligor under this section, if
81 the creditor provided the obligor the appropriate form of written notice published and adopted by
82 the commissioner, or a comparable written notice of the rights of the obligor, that was properly
83 completed by the creditor, and otherwise complied with all other requirements of this section
84 regarding notice.

85 (i)(1) Notwithstanding the provisions of section thirty-five, and subject to the time period
86 provided in subsection (f), in addition to any other right of rescission available under this section
87 for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the
88 primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to
89 rescind the transaction equivalent to other rescission rights provided by this section, if:

90 (a) a mortgage broker fee is not included in the finance charge in accordance with the
91 laws and regulations in effect at the time the consumer credit transaction was consummated;

92 (b) the form of notice of rescission for the transaction is not the appropriate form of
93 written notice published and adopted by the commissioner or a comparable written notice, and
94 otherwise complied with all the requirements of this section regarding notice.

95 (2) Notwithstanding the provisions of subsection (f) of section four, and subject to the
96 time period provided in subsection (f) of this section, for the purposes of exercising any
97 rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the
98 principal dwelling of the obligor securing an extension of credit, the disclosure of the finance
99 charge and other disclosures affected by any finance charge shall be treated as being accurate for
100 the purposes of this section if the amount disclosed as the finance charge does not vary from the
101 actual finance charge by more than thirty-five dollars or is greater than the amount required to be
102 disclosed under this chapter.

103 (3) Nothing in this section shall be construed so as to affect a consumer's right of
104 recoupment under the laws of the commonwealth.

105 (4) The provisions of this subsection shall apply to all consumer credit transactions in
106 existence or consummated on or after September thirtieth, nineteen hundred and ninety-five."

107 SECTION 2. Section 33 of chapter 140D of the General Laws is hereby amended by
108 striking the section in its entirety and inserting in place thereof the following section:-

109 "Section 33.

110 (a) Except as otherwise specifically provided in this chapter, or any rule or regulation
111 issued thereunder, any civil action for a violation of this chapter, or any rule or regulation issued
112 thereunder, or proceeding under section six which may be brought against a creditor may be
113 maintained against any voluntary assignee of such creditor. The applicable standard of review of
114 any claims brought by an obligor in any civil action under this chapter shall be to consider the
115 obligor's claims under a "least sophisticated consumer" standard in accordance with the Fair
116 Debt Collection Practices Act at 15 U.S.C. 1692, et seq.

117 (b) Except as provided in subsection (e) of section ten, in any action or proceeding by or
118 against any subsequent assignee of the original creditor without knowledge to the contrary by the
119 assignee when he acquires the obligation, written acknowledgement of the receipt by a person to
120 whom a statement is required to be given pursuant to this chapter, or any rule or regulation
121 issued thereunder, if and only if (i) said statement is executed by a person with actual knowledge,
122 (ii) under the pains and penalties of perjury, and (iii) said person provides competent evidence of
123 any required corporate or other authority to sign such a statement, and provided that (i) and (ii)
124 are complied with, such acknowledgement shall be conclusive proof of the delivery thereof and,
125 except as provided in section (a), of compliance with this chapter, or any rule or regulation
126 issued thereunder. This section does not affect the rights of an obligor in any action against the
127 original creditor.

128 (c) Any consumer who has the right to rescind a transaction under section ten may
129 rescind the transaction as against any assignee of the obligation.

130 (d)(1) Except as otherwise specifically provided in this chapter, or any rule or regulation
131 issued thereunder, any civil action against a creditor with respect to a consumer credit transaction
132 secured by real property for a violation of this chapter and any proceeding under section six may
133 be maintained against any voluntary assignee of such creditor..

134 (e)(1) A servicer of a consumer obligation arising from a consumer credit transaction
135 shall be treated as an assignee of such obligation for the purposes of this section where the
136 servicer is or was the owner of the obligation.

137 (2) A servicer of a consumer obligation arising from a consumer credit transaction shall
138 be treated as the owner of such obligation for the purposes of this section on the basis of an
139 assignment of said obligation from the creditor or another assignee to the servicer whether or not
140 solely for the administrative convenience of the servicer in servicing the obligation. Within
141 twenty days of a written request by the obligor, the servicer shall provide the obligorwith the full
142 name, current address and current telephone number of the owner of the obligation or the master
143 servicer thereof.

144 (3) If the owner of the consumer obligation is a securitized trust for the pooling of
145 residential mortgages, the servicer shall also provide within the twenty day period, the full name
146 of the trust, and further, if so requested by the obligor, provide, within sixty days, true, certified
147 copies of any loan documents, in their current condition, that may be associated with the
148 obligation including, but not limited to any disclosures required by this or any other chapter, the
149 obligor's note and mortgage, any HUD-1 settlement statement, Notice(s) of Rights to Cancel,
150 Truth in Lending Disclosure(s), Good Faith Estimate(s) and any other closing documents
151 executed by the obligor at the consummation of the transaction as well as any and all mortgage
152 securitization documents that purport to establish ownership of the obligor's loan by the party or
153 entity identified by the servicer. The servicer may not charge the obligor for copies of documents
154 requested under this section.

155 (4) For the purposes of this section, the word "servicer" shall have the same meaning as
156 in section 6(I)(2) of the Federal Real Estate Settlement Procedures Act of 1974.

157 (5) This paragraph shall apply to all consumer credit transactions in existence or
158 consummated on or after September thirtieth, nineteen hundred and ninety-five."

159 SECTION 3. Section 4 of chapter 183 of the General Laws is hereby amended by striking
160 the section in its entirety and inserting in place thereof the following section:-

161

162 “Section 4. A conveyance of an estate in fee simple, which shall include but not be
163 limited to mortgages and any debt(s) due thereunder as well as assignments of mortgage and the
164 debt(s) due thereunder, fee tail or for life, or a lease for more than seven years from the making
165 thereof or an assignment of rents or profits from an estate or lease, shall not be valid as against
166 any person, except the grantor or lessor, his heirs and devises and persons having actual notice of
167 it, unless it, or an office copy as provided in section thirteen of chapter thirty-six, or, with respect
168 to such a lease or an assignment of rents or profits, a notice of lease or a notice of assignment of
169 rents or profits, as hereinafter defined, is recorded in the registry of deeds for the county or
170 district in which the land to which it relates lies. A "notice of lease", as used in this section, shall
171 mean an instrument in writing executed by all persons who are parties to the lease of which
172 notice is given and shall contain the following information with reference to such lease:- the date
173 of execution thereof and a description, in the form contained in such lease, of the premises
174 demised, and the term of such lease, with the date of commencement of such term and all rights
175 of extension or renewal. A "notice of assignment of rents or profits", as used in this section,
176 shall mean an instrument in writing executed by the assignor and containing the following
177 information: — a description of the premises, the rent or profits of which have been assigned,
178 adequate to identify the premises, the name of assignee, and the rents and profits which have
179 been assigned. A provision in a recorded mortgage assigning or conditionally assigning rents or
180 profits or obligating the mortgagor to assign or conditionally assign existing or future rents or
181 profits shall constitute a "notice of assignment of rents or profits".”

182 SECTION 4. Section 30 of chapter 183 of the General Laws is hereby amended by
183 striking the section in its entirety and inserting in place thereof the following section:-

184 “Section 30. The acknowledgment of a deed or other written instrument required to be
185 acknowledged shall be by one or more of the grantors or by the attorney executing it. The officer
186 before whom the acknowledgment is made shall endorse upon or annex to the instrument a
187 certificate thereof. Such acknowledgment may be made —

188 (a) If within the commonwealth, before a justice of the peace or notary public provided
189 however that (i) the acknowledgement (or jurat as the case may be) shall strictly comply with the
190 most current form of acknowledgement (or jurat) promulgated by the governor of the
191 commonwealth by executive order or otherwise, and (ii) that all information required by the
192 acknowledgement (or jurat as the case may be) shall be provided therein and thereon and shall be
193 in all respects complete and legible.

194 (b) If without the commonwealth, in any state, territory, district or dependency of the
195 United States, before a justice of the peace, notary public, magistrate or commissioner appointed
196 therefor by the governor of this commonwealth, or, if a certificate of authority in the form
197 prescribed by section thirty-three is attached thereto, before any other officer therein authorized
198 to take acknowledgments of deeds provided however that (i) any acknowledgment (or jurat as
199 the case may be) shall indicate the state and county where the acknowledgment was made and be

200 made before a justice of the peace, notary public or magistrate duly authorized to execute
201 acknowledgments in such jurisdiction, (ii) that the acknowledgement (or jurat) shall strictly
202 comply with the then-current form of acknowledgement promulgated by the governor of the
203 commonwealth by executive order or otherwise, and (iii) that all information required in the
204 acknowledgement (or jurat) shall be provided therein and thereon and shall be in all respects
205 complete and legible.

206 (c) If without the United States or any dependency thereof, before a justice of the peace,
207 notary, magistrate or commissioner as above provided, or before an ambassador, minister,
208 consul, vice consul, charge d'affaires or consular officer or agent of the United States accredited
209 to the country where the acknowledgment is made; if made before an ambassador or other
210 official of the United States, it shall be certified by him under his seal of office."

211 SECTION 5. Section 54B of chapter 183 of the General Laws is hereby amended by
212 striking the section in its entirety and inserting in place thereof the following section:-

213 "Section 54B. Notwithstanding any law to the contrary, (1) no discharge of mortgage; (2)
214 no release, partial release or assignment of mortgage; (3) no instrument of subordination, non-
215 disturbance, recognition, or attornment by the holder of a mortgage; (4) no instrument for the
216 purpose of foreclosing a mortgage and conveying the title resulting therefrom, including but not
217 limited to notices, deeds, affidavits, certificates, votes, assignments of bids, confirmatory
218 instruments and agreements of sale; and (5) no power of attorney given for any of the foregoing
219 purposes or for the purpose of servicing a mortgage, and in either case, no instrument executed
220 by the attorney-in-fact pursuant to such power, which shall, in any case, be executed before a
221 notary public, justice of the peace or other officer entitled by law to acknowledge instruments,
222 whether executed within or without the commonwealth and provided that the execution of such
223 notary acknowledgment meets all of the requirements of the laws of the commonwealth and the
224 requirements of chapter 183 section 30 as may be amended from time to time, by a person
225 purporting to hold the position of president, vice president, treasurer, clerk, secretary, cashier,
226 loan representative, principal, investment, mortgage or other officer, agent, asset manager, or
227 other similar office or position, including assistant to any such office or position, of the entity
228 holding such mortgage, or otherwise purporting to be an authorized signatory for such entity, or
229 acting under such power of attorney on behalf of such entity, acting in its own capacity or as a
230 general partner or co-venturer of the entity holding such mortgage, shall be entitled to be
231 recorded in the Registry of Deeds unless a.) such document(s) are subscribed to and sworn under
232 the pains and penalties of perjury by a signer or attorney-in-fact who acknowledges that the
233 contents thereof are true, accurate and correct and are made with the personal knowledge of said
234 signer, and b.) any signer or attorney-in-fact for any entity executing such documents shall attach
235 thereto a vote of such entity or other authority affirming the signer or attorney-in-fact's authority
236 to act on behalf of such entity."

237 SECTION 6. Chapter 183 of the General Laws is hereby amended by inserting the
238 following new section:-

239 "Section 69. Recording of Mortgage

240 No mortgage or assignment of mortgage that identifies the mortgagee as any person or
241 entity other than the present lender or present holder of the loan shall be recorded in any registry
242 district in the commonwealth. The term mortgagee shall have the same meaning as defined in
243 chapter 244 section 14B."

244 SECTION 7. Chapter 244 of the General Laws is hereby amended by inserting the
245 following new section:-

246 "Section 14B. Foreclosure; Definition of Mortgagee

247 (1) For the purposes of any action or proceeding brought under this chapter, or under
248 the laws of the commonwealth or the laws of the united states, a "mortgagee" shall be defined as
249 and required to be (a) the current holder of the mortgage whether by valid assignment or
250 otherwise, and (b) the current holder in due course of the promissory note due under the
251 mortgage as that term is defined under chapter 106, s. 3-302,.

252 Notwithstanding anything in this chapter, section or the laws of the commonwealth or of
253 the united states to the contrary, no foreclosure of a mortgage, whether judicial or non-judicial,
254 conducted under this chapter or under the laws of the commonwealth or of the united states shall
255 be valid unless the party for whom the foreclosure is being conducted is the mortgagee as
256 defined in this section and as recorded in the registry of deeds for the county or district in which
257 the land to which the mortgage relates to lies, at the earliest of, (a) the time of the acceleration of
258 any debt due under a mortgage, (b) the time any judicial proceeding is commenced to begin a
259 foreclosure, or (c) the time of the publication of a foreclosure sale in accordance with this
260 chapter."