HOUSE . . . . . No. 4083

The Commonwealth of Massachusetts

In the Year Two Thousand Twelve

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. Chapter 244 of the General Laws, as appearing in the 2010 Official Edition, is hereby amended by adding the following new section:

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

(a) As used in this section, the following words shall, unless the context clearly requires otherwise, have the following meanings:

"Borrower", a mortgagor of a mortgage loan.

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

(i) an introductory interest rate granted for a period of 3 years or less and such introductory rate is at least 2 percent lower than the fully indexed rate;

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

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

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

(v) prepayment penalties that exceed section 56 of chapter 183 of the General Laws or applicable federal law;

19 (vi) the loan was underwritten with a Loan-to-Value ratio at or above 90 percent and
20 the ratio of the borrower's debt, including all housing-related and recurring monthly debt, to the
21 borrower's income exceeded 38 percent; or

22 (vii) the loan was underwritten as a component of a loan transaction wherein the
23 combined Loan-to-Value ratio was above 95 percent.

24 "Creditor", a person or entity that holds or controls, partially, wholly, indirectly, directly,
25 or in a nominee capacity, a mortgage loan securing an owner-occupied residential property,
26 including, without limitation, an originator, holder, investor, assignee, successor, trust, trustee,
27 nominee holder, Mortgage Electronic Registration System or mortgage servicer, including the
28 Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation.
29 "Creditor" shall also include any servant, employee or agent of a creditor.

30 "Creditor's representative", a person who has the authority to negotiate and approve the
31 terms of and modify a mortgage loan.

32 "Modified mortgage loan", a mortgage modified from its original terms including, but not
33 limited to, a loan modified pursuant to 1 of the following: (i) the Home Affordable Modification
34 Program; (ii) the Federal Deposit Insurance Corporation's Loan Modification Program; (iii) any
35 modification program that a lender uses which is based on accepted principles and the safety and
36 soundness of the institution and authorized by the National Credit Union Administration, the
37 division of banks or any other instrumentality of the commonwealth; (iv) the Federal Housing
38 Administration; or (v) a similar federal loan modification plan.

39 "Mortgage loan", a loan to a natural person made primarily for personal, family or
40 household purposes secured wholly or partially by a mortgage on residential property.

41 "Net present value", the present net value of a residential property based on a calculation
42 using 1 of the following: (i) the federal Home Affordable Modification Program Base Net
43 Present Value Model, (ii) the Federal Deposit Insurance Corporation's Loan Modification
44 Program, (iii) the Massachusetts Housing Finance Agency's loan program used solely by the
45 agency to compare the expected economic outcome of a loan with or without a modified
46 mortgage loan, or (iv) any model approved by the division of banks to consider the total present
47 value of a series of future cash flows relative to a mortgage loan.

48 "Residential property", real property located in the commonwealth having thereon a
49 dwelling house with accommodations for 4 or less separate households and occupied, or to be
50 occupied, in whole or in part by the obligor on the mortgage debt; provided, however, that
51 residential property shall be limited to the principal residence of a person; provided further, that
52 residential property shall not include an investment property or residence other than a primary
53 residence; and provided further, that residential property shall not include residential property
54 taken in whole or in part as collateral for a commercial loan; and provided further that residential

55 property shall not include a property subject to condemnation, receivership, or proceedings in
56 United States Bankruptcy Court.

57 (b) A creditor shall not publish notice of a foreclosure sale, as required by section 14 of
58 this chapter, upon certain mortgage loans unless it has first taken reasonable steps and made a
59 good faith effort to avoid foreclosure. The determination of whether a creditor has taken
60 reasonable steps and made a good faith effort to avoid foreclosure shall mean that the creditor
61 has considered: (i) an assessment of the borrower's current circumstances including, without
62 limitation, the borrower's current income, total debts and obligations; (ii) the net present value of
63 receiving payments pursuant to a modified mortgage loan as compared to the anticipated net
64 recovery following foreclosure; and (iii) the interests of the creditor, including, without
65 limitation, investors.

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

77 (2) Safe Harbor. A creditor shall be presumed to have acted in good faith and deemed to
78 comply with subsection (b), if, prior to publishing a notice of a foreclosure sale, as required by
79 section 14 of this chapter, the creditor:

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

83 (ii) identifies a modified mortgage loan that achieves the borrower's affordable monthly
84 payment, which may include one or more of the following: reduction in principal; reduction in
85 interest rate; or an increase in amortization period but not more than a 15 year increase not to
86 exceed a 45 year period;

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

89 (iv) either (a) in all circumstances where the net present value of the modified mortgage
90 loan exceeds the anticipated net recovery at foreclosure, agrees to modify the loan in a manner

91 that provides the affordable monthly payment, or (b) in circumstances where the net present
92 value of the modified mortgage loan is less than the anticipated net recovery of the foreclosure,
93 or does not meet the borrower's affordable monthly payment, notifies the borrower that no
94 modified mortgage loan will be offered and provides a written summary of the creditor's net
95 present value analysis and the borrower's current ability to make monthly payments, after which
96 the creditor may proceed with the foreclosure process in conformity with this chapter.

97 (3) The division of banks may adopt, amend or repeal rules and regulations to aid in the
98 administration and enforcement of this section, including regulations that determine further
99 requirements for reasonable steps and good faith efforts to avoid foreclosures as required by
100 subsection (b) and that provide safe harbors for compliance in addition to that set forth in this
101 section.

102 (c) In accordance with this section, for certain mortgage loans, the creditor shall send
103 notice, concurrently with the notice required by subsection (g) of section 35A of this chapter, of
104 the borrower's rights to pursue a modified mortgage loan. Said notice shall be deemed to be
105 delivered to the mortgagor when sent by first class mail and certified mail or similar service by a
106 private carrier to the mortgagor at the mortgagor's address last known to the mortgagee or
107 anyone holding thereunder. A copy of said notice shall also be filed with the commissioner of the
108 division of banks and the office of the attorney general. The timeframe for determining whether a
109 modified mortgage loan is offered shall occur within 150 days as follows. No more than 30 days
110 following delivery of the notice as provided for in this section, a borrower who holds a certain
111 mortgage loan shall notify a creditor of (i) the borrower's intent to pursue a modified mortgage
112 loan which shall include a statement of the borrower's income and a complete list of total debts
113 and obligations at the time of receipt of the notice; (ii) the borrower's intent to pursue an
114 alternative to foreclosure, including a short sale or deed in lieu; (iii) the borrower's intent not to
115 pursue a modified mortgage loan and pursue the 150 day right to cure period described in section
116 35A of this chapter ; or (iv) the borrower's intent to waive the 150 day right to cure period and
117 proceed to foreclosure. A borrower who holds a certain mortgage loan and fails to respond to the
118 creditor within 30 days of delivery of the notice provided for in this sectionshall be deemed to
119 have forfeited the 150 day right-to-cure period and shall be subject to a right-to-cure period
120 lasting 90 days. A borrower shall be presumed to have notified the creditor if the borrower
121 provides proof of delivery through the United States Postal Service or similar carrier. No more
122 than 30 days following receipt of the borrower's notification that the borrower intends to pursue
123 a modified mortgage loan, a creditor shall provide the borrower with its assessment in writing
124 pursuant to subsection (b). The assessment shall include, but not be limited to (i) a written
125 statement of the borrower's income, debts and obligations as determined by the creditor; (ii) the
126 creditor's net present value analysis of the mortgage loan; (iii) the creditor's anticipated net
127 recovery at foreclosure; (iv) a statement of the interests of the creditor; and (v) a modified
128 mortgage loan offer pursuant to the requirements of this section or notice that no modified
129 mortgage loan will be offered. Where a modified mortgage loan is offered, the offer shall include

130 the first and last name(s) and contact phone number(s) of the creditor's representative. The
131 assessment shall be provided by first class and certified mail. A creditor shall be presumed to
132 have provided the assessment to the borrower if the creditor provides proof of delivery through
133 the United States Postal Service or similar carrier. A borrower who receives a modified mortgage
134 loan offer from a creditor shall respond within 30 days of receipt of the assessment and offer of a
135 modified mortgage loan. The borrower may (i) accept the offer of a loan modification as
136 provided by the creditor; (ii) make a reasonable counteroffer; or (iii) state that the borrower
137 wishes to waive the borrower's rights as provided by this section and proceed to foreclosure. The
138 borrower's response shall be in writing and, where a counteroffer is proposed, shall include
139 substantiating documentation in support of the counteroffer. The response shall be provided by
140 first class and certified mail. A borrower shall be presumed to have responded if the borrower
141 provides proof of delivery through the United States Postal Service or similar carrier. A
142 borrower who fails to respond to the creditor within 30 days of receipt of a modified mortgage
143 loan offer shall be deemed to have forfeited the 150 day right-to-cure period and shall be subject
144 to a right-to-cure period lasting 90 days. Where a counteroffer is proposed, the creditor shall
145 accept, reject or propose a counteroffer to the borrower within 30 days of receipt. Pursuant to
146 this section, additional offers by both parties shall be considered during the 150 right-to-cure
147 period provided, however, that a borrower may at any time state, in writing, that the borrower
148 wishes to waive the borrower's rights as provided by this section and proceed to foreclosure.
149 Nothing in this section shall be construed as preventing a creditor and a borrower from
150 negotiating the terms of a modified mortgage loan by telephone or in person following the initial
151 offer of a modified mortgage loan by a creditor provided, however, that all offers, whether by a
152 creditor or a borrower, shall be in writing and signed by the offeror. The right to a modified
153 mortgage loan, as described in this section, shall be granted once during any 3 year period,
154 regardless of the mortgage holder.

155 (d) The notice required in subsection (c) shall, at a minimum, include the appropriate
156 contact information for modification assistance within the office of the attorney general. The
157 division of banks shall adopt regulations in accordance with this subsection.

158 (e) Nothing in this section shall prevent a creditor from offering or accepting alternatives
159 to foreclosure, such as a short sale or deed-in-lieu of foreclosure, if the borrower requests such
160 alternatives, rejects a modified mortgage loan offer or does not qualify for a modified mortgage
161 loan pursuant to this section.

162 (f) The division of banks shall, in consultation with the office of the attorney general,
163 track the resolution of certain mortgage loans and provide a report of said results to the joint
164 committee on financial services on December 31, 2013, and each subsequent year on December
165 31, through the year 2017.

166 (g) Prior publishing a notice of a foreclosure sale, as required by section 14 of this
167 chapter, the creditor, or where the creditor is not a natural person, an officer or duly authorized

168 agent of the creditor, must certify compliance with this section in an affidavit based upon a
169 review of the creditor's business records. The creditor, or an officer or duly authorized agent of
170 the creditor, shall record this affidavit with the appropriate registry of deeds, or for registered
171 land, with the land court.

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

174 Section 35C. Prohibited Conduct In Connection with Foreclosure

175 For purposes of this section, the following words shall have the following meanings:

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

182 "Borrower" shall mean a mortgagor of a mortgage loan.

183 "Mortgage loan", a loan to a natural person made primarily for personal, family or
184 household purposes secured wholly or partially by a mortgage on residential property.

185 "Residential property", real property located in the commonwealth having thereon a
186 dwelling house with accommodations for 4 or less separate households and occupied, or to be
187 occupied, in whole or in part by the obligor on the mortgage debt; provided, however, that
188 residential property shall be limited to the principal residence of a person; provided further, that
189 residential property shall not include an investment property or residence other than a primary
190 residence; and provided further, that residential property shall not include residential property
191 taken in whole or in part as collateral for a commercial loan.

192 (a) Proper documentation prior to foreclosure. A creditor shall not publish notice of
193 foreclosure, pursuant to section 14 of this chapter, when it knows or should know that it is not
194 the present holder of the mortgage loan, including, without limitation, if the creditor is not the
195 original mortgagee and commences foreclosure without possessing a valid written, signed and
196 dated assignment evidencing the assignment of the mortgage, in accordance with section 14 of
197 chapter 244.

198 (b) No imposition of unfair costs. A creditor violates this chapter if it imposes upon a
199 third party the cost of correcting, curing, or confirming documentation relating to the sale,
200 transfer, or assignment of a mortgage loan, including, without limitation, a creditor must bear the
201 costs related to curative actions taken because a foreclosure was commenced without the
202 creditor's possession of a valid, written, signed, and dated assignment evidencing the assignment

203 of the mortgage, in violation of section fourteen of chapter two hundred and forty-four. Further,
204 a third party may recover all of its costs for having to correct, cure, or confirm documentation.

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

211 (d) No imposition of fees for services not performed. A creditor violates this chapter if
212 the creditor imposes a fee upon a borrower for goods not rendered or services not performed in
213 connection with a foreclosure.

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

218 (f) The Division of Banks may adopt, amend or repeal rules and regulations to aid in the
219 administration and enforcement of this Section.

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

223 Section 14. The mortgagee or person having his estate in the land mortgaged, or a person
224 authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the
225 legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee
226 or person, may, upon breach of condition and without action, do all the acts authorized or
227 required by the power; but no sale under such power shall be effectual to foreclose a mortgage,
228 unless, previous to such sale, notice thereof has been published once in each of 3 successive
229 weeks, the first publication to be not less than 21 days before the day of sale, in a newspaper, if
230 any, published in the town where the land lies or in a newspaper with general circulation in the
231 town where the land lies and notice thereof has been sent by registered mail to the owner or
232 owners of record of the equity of redemption as of 30 days prior to the date of sale, said notice to
233 be mailed by first class and certified mail at least 14 days prior to the date of sale to said owner
234 or owners to the address set forth in section 61 of chapter 185, if the land is then registered or, in
235 the case of unregistered land, to the last address of the owner or owners of the equity of
236 redemption appearing on the records of the holder of the mortgage, if any, or if none, to the
237 address of the owner or owners as given on his deed or on the petition for probate by which he
238 acquired title, if any, or if in either case no owner appears, then mailed by registered mail to the
239 address to which the tax collector last sent the tax bill for the mortgaged premises to be sold, or if

no tax bill has been sent 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 30 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 14 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 21 of chapter 183, no notice pursuant to this section shall be valid unless (i) at the time such notice is mailed, an assignment (or a chain of assignments) evidencing the assignment of the mortgage to the foreclosing mortgagee has been duly recorded in the appropriate registry of deeds or, for registered land, with the land court, and (ii) the recording information for all recorded assignments is referenced in the notice of sale required in this section. The notice shall not be defective if any holder within the chain of assignments either changed its name or merged into another entity during the time it was the mortgage holder, provided it is recited within the body of the notice the fact of any merger, consolidation, amendment, conversion or acquisition of assets causing the change in name or identity, the recital of which shall be conclusive in favor of any bona fide purchaser, mortgagee, lienholder or encumbrancer of value relying in good faith thereon.

SECTION 4. Section 1 shall take effect on October 1, 2012 and apply to all mortgages of residential property located in the commonwealth which secures a loan before, on or after the effective date of this act. Said section 1 shall not apply to such mortgages accelerated or whose statutory condition has been violated under the terms of the mortgage to secure the note prior to the effective date of this act.