HOUSE . . . . . No. 4087

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 is hereby amended by striking out section 14, as appearing in the 2010 Official Edition, and inserting in place thereof the following section:-

Section 14. The mortgagee or person having estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person, may, upon breach of condition and without action, perform all acts authorized or required by the power; provided, however, that no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale, notice thereof has been published once in each of 3 successive weeks, the first publication to be not less than 21 days before the day of sale, in a newspaper, if any, published in the town where the land lies or in a newspaper with general circulation in the town where the land lies and notice thereof has been sent by registered mail to the owner or owners of record of the equity of redemption as of 30 days prior to the date of sale, said notice to be mailed by registered mail at least 14 days prior to the date of sale to said owner or owners to the address set forth in section 61 of chapter 185, if the land is then registered or, in the case of unregistered land, to the last address of the owner or owners of the equity of redemption appearing on the records of the holder of the mortgage, if any, or if none, to the address of the owner or owners as given on the deed or on the petition for probate by which he acquired title, if any, or if in either case no owner appears, then mailed by registered mail to the 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 3 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 30 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 or assignments 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.

59 (Signed)
60 _____

61 Present holder of said mortgage.___

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

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

85 SECTION 2. Chapter 244 of the General Laws, as appearing in the 2010 Official Edition,
86 is hereby amended by adding the following section:

87 Section 35B. (a) As used in this section, the following words shall, unless the context
88 clearly requires otherwise, have the following meanings:

89 "Affordable monthly payment", a borrower's ability to make monthly payments on a
90 mortgage loan, taking into account the borrower's current circumstances including income, debts
91 and obligations.

92 "Borrower", a mortgagor of a mortgage loan.

93 "Certain mortgage loan," shall mean a loan to a natural person made primarily for
94 personal, family or household purposes secured wholly or partially by a mortgage on an owner-
95 occupied residential property that bears 1 or more of the following loan features:

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

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

99 (iii) a payment option feature, where any 1 of the payment options is less than
100 principal and interest fully amortized over the life of the loan;

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

102 (v) prepayment penalties that exceed section 56 of chapter 183 or applicable federal
103 law;

104 (vi) the loan was underwritten with a loan-to-value ratio at or above 90 per cent and
105 the ratio of the borrower's debt, including all housing-related and recurring monthly debt, to the
106 borrower's income exceeded 38 per cent; or

107 (vii) the loan was underwritten as a component of a loan transaction wherein the
108 combined loan-to-value ratio was above 95 per cent.

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

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

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

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

126 “Net present value”, the present net value of a residential property based on a calculation
127 using 1 of the following: (i) the federal Home Affordable Modification Program Base Net
128 Present Value Model, (ii) the Federal Deposit Insurance Corporation’s Loan Modification
129 Program, (iii) the Massachusetts Housing Finance Agency’s loan program used solely by the
130 agency to compare the expected economic outcome of a loan with or without a modified
131 mortgage loan, or (iv) any model approved by the division of banks to consider the total present
132 value of a series of future cash flows relative to a mortgage loan.

133 “Residential property”, real property located in the commonwealth having thereon a
134 dwelling house with accommodations for 4 or less separate households and occupied, or to be
135 occupied, in whole or in part by the obligor on the mortgage debt; provided, however, that
136 residential property shall be limited to the principal residence of a person; provided further, that
137 residential property shall not include an investment property or residence other than a primary
138 residence; provided further, that residential property shall not include residential property taken
139 in whole or in part as collateral for a commercial loan; and provided further, that residential
140 property shall not include a property subject to condemnation, receivership, or proceedings in
141 United States bankruptcy court.

142 (b) A creditor shall not publish notice of a foreclosure sale, as required by section 14,
143 upon certain mortgage loans unless it has first taken reasonable steps and made a good faith
144 effort to avoid foreclosure. The determination of whether a creditor has taken reasonable steps
145 and made a good faith effort to avoid foreclosure shall mean that the creditor has considered: (i)
146 an assessment of the borrower’s current circumstances including, without limitation, the
147 borrower’s current income, total debts and obligations; (ii) the net present value of receiving
148 payments pursuant to a modified mortgage loan as compared to the anticipated net recovery
149 following foreclosure; and (iii) the interests of the creditor, including, without limitation,
150 investors.

151 (1) Except as otherwise specified in a contract, a servicer of pooled residential mortgages
152 may determine whether the net present value of the payments on the modified mortgage loan is
153 likely to be greater than the anticipated net recovery that would result from foreclosure to all
154 investors and holders of beneficial interests in such investment, but not to any individual or
155 groups of investors or beneficial interest holders, and shall be deemed to act in the best interests
156 of all such investors or holders of beneficial interests if the servicer agrees to or implements a
157 modified mortgage loan or takes reasonable loss mitigation actions that comply with this section.
158 Any modified mortgage loan offered to the borrower shall comply with current federal and state
159 law, including, without limitation, all rules and regulations pertaining to mortgage loans and the
160 borrower shall be able to reasonably afford to repay the modified mortgage loan according to its
161 scheduled payments.

162 (2) A creditor shall be presumed to have acted in good faith and deemed to comply with
163 this subsection , if, prior to publishing a notice of a foreclosure sale, as required by section 14,
164 the creditor:

165 (i) determines a borrower's current ability to make monthly payments, reasonably taking
166 into account the borrower's current circumstances including income, debts and obligations;

167 (ii) identifies a modified mortgage loan that achieves the borrower's affordable monthly
168 payment, which may include 1 or more of the following: reduction in principal; reduction in
169 interest rate; or an increase in amortization period but not more than a 15 year increase not to
170 exceed a 45 year amortization period;

171 (iii) conducts an analysis comparing the net present value of the modified mortgage loan
172 and the creditor's anticipated net recovery that would result from foreclosure, such analysis shall
173 be deemed compliant if in accordance with the formula presented in one of the following: (i) the
174 Home Affordable Modification Program; (ii) the Federal Deposit Insurance Corporation's Loan
175 Modification Program; (iii) any modification program that a lender uses which is based on
176 accepted principles and the safety and soundness of the institution and authorized by the National
177 Credit Union Administration, the division of banks or any other instrumentality of the
178 commonwealth; (iv) the Federal Housing Administration; or (v) a similar federal loan
179 modification plan; and

180 (iv) either (a) in all circumstances where the net present value of the modified mortgage
181 loan exceeds the anticipated net recovery at foreclosure, agrees to modify the loan in a manner
182 that provides for the affordable monthly payment, or (b) in circumstances where the net present
183 value of the modified mortgage loan is less than the anticipated net recovery of the foreclosure,
184 or does not meet the borrower's affordable monthly payment, notifies the borrower that no
185 modified mortgage loan will be offered and provides a written summary of the creditor's net
186 present value analysis and the borrower's current ability to make monthly payments, after which
187 the creditor may proceed with the foreclosure process in conformity with this chapter.

188 (3) The division of banks may adopt, amend or repeal rules and regulations to aid in the
189 administration and enforcement of this section, including regulations that determine further
190 requirements for reasonable steps and good faith efforts to avoid foreclosures and that provide
191 safe harbors for compliance in addition to that set forth in this section.

192 (c) In accordance with this section, for certain mortgage loans, the creditor shall send
193 notice, concurrently with the notice required by subsection (g) of section 35A, of the borrower's
194 rights to pursue a modified mortgage loan. Said notice shall be deemed to be delivered to the
195 mortgagor when sent by first class mail and certified mail or similar service by a private carrier
196 to the mortgagor at the mortgagor's address last known to the mortgagee or anyone holding
197 thereunder. A copy of said notice shall be filed with the commissioner of the division of banks
198 and the office of the attorney general. The timeframe for determining whether a modified

199 mortgage loan is offered shall occur within 150 days. No more than 30 days following delivery
200 of the notice as provided for in this section, a borrower who holds a certain mortgage loan shall
201 notify a creditor of (i) the borrower's intent to pursue a modified mortgage loan which shall
202 include a statement of the borrower's income and a complete list of total debts and obligations at
203 the time of receipt of the notice; (ii) the borrower's intent to pursue an alternative to foreclosure,
204 including a short sale or deed in lieu of foreclosure; (iii) the borrower's intent not to pursue a
205 modified mortgage loan and pursue the 150 day right to cure period described in section 35A; or
206 (iv) the borrower's intent to waive the 150 day right to cure period and proceed to foreclosure. A
207 borrower who holds a certain mortgage loan and fails to respond to the creditor within 30 days of
208 delivery of the notice provided for in this section shall be deemed to have forfeited the 150 day
209 right-to-cure period and shall be subject to a right-to-cure period of 90 days. A borrower shall be
210 presumed to have notified the creditor if the borrower provides proof of delivery through the
211 United States postal service or similar carrier. No more than 30 days following receipt of the
212 borrower's notification that the borrower intends to pursue a modified mortgage loan, a creditor
213 shall provide the borrower with its assessment in writing pursuant to subsection (b). The
214 assessment shall include, but not be limited to (i) a written statement of the borrower's income,
215 debts and obligations as determined by the creditor; (ii) the creditor's net present value analysis
216 of the mortgage loan; (iii) the creditor's anticipated net recovery at foreclosure; (iv) a statement
217 of the interests of the creditor; and (v) a modified mortgage loan offer pursuant to the
218 requirements of this section or notice that no modified mortgage loan will be offered. Where a
219 modified mortgage loan is offered, the offer shall include the first and last name(s) and contact
220 phone number(s) of the creditor's representative. The assessment shall be provided by first class
221 and certified mail. A creditor shall be presumed to have provided the assessment to the borrower
222 if the creditor provides proof of delivery through the United States postal service or similar
223 carrier. A borrower who receives a modified mortgage loan offer from a creditor shall respond
224 within 30 days of receipt of the assessment and offer of a modified mortgage loan. The borrower
225 may (i) accept the offer of a loan modification as provided by the creditor; (ii) make a reasonable
226 counteroffer; or (iii) state that the borrower wishes to waive the borrower's rights as provided by
227 this section and proceed to foreclosure. The borrower's response shall be in writing and, where a
228 counteroffer is proposed, shall include substantiating documentation in support of the
229 counteroffer. The response shall be provided by first class and certified mail. A borrower shall
230 be presumed to have responded if the borrower provides proof of delivery through the United
231 States postal service or similar carrier. A borrower who fails to respond to the creditor within 30
232 days of receipt of a modified mortgage loan offer shall be deemed to have forfeited the 150 day
233 right-to-cure period and shall be subject to a right-to-cure period of 90 days. Where a
234 counteroffer is proposed, the creditor shall accept, reject or propose a counteroffer to the
235 borrower within 30 days of receipt. Pursuant to this section, additional offers by both parties
236 shall be considered during the 150 right-to-cure period provided, however, that a borrower may
237 at any time state, in writing, that the borrower wishes to waive the borrower's rights as provided
238 by this section and proceed to foreclosure. Nothing in this section shall be construed as

239 preventing a creditor and a borrower from negotiating the terms of a modified mortgage loan by
240 telephone or in person following the initial offer of a modified mortgage loan by a creditor;
241 provided, however, that all offers, whether by a creditor or a borrower, shall be in writing and
242 signed by the offeror. The right to a modified mortgage loan, as described in this section, shall be
243 granted once during any 3 year period, regardless of the mortgage holder.

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

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

251 (g) Prior to publishing a notice of a foreclosure sale, as required by section 14, the
252 creditor, or where the creditor is not a natural person, an officer or duly authorized agent of the
253 creditor, shall certify compliance with this section in an affidavit based upon a review of the
254 creditor's business records. The creditor, or an officer or duly authorized agent of the creditor,
255 shall record this affidavit with the appropriate registry of deeds, or for registered land, with the
256 land court.

257 SECTION 3. Chapter 244 of the General Laws, as so appearing, is hereby amended by
258 adding the following section:-

259 Section 35C. As used in this section, the following words shall, unless the context
260 clearly requires otherwise, have the following meanings:

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

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

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

270 "Residential property", real property located in the commonwealth having thereon a
271 dwelling house with accommodations for 4 or less separate households and occupied, or to be
272 occupied, in whole or in part by the obligor on the mortgage debt; provided, however, that
273 residential property shall be limited to the principal residence of a person; provided further, that

274 residential property shall not include an investment property or residence other than a primary
275 residence; and provided further, that residential property shall not include residential property
276 taken in whole or in part as collateral for a commercial loan.

277 (a) A creditor shall not publish notice of foreclosure, pursuant to section 14, when it
278 knows or should know that it is not the present holder of the mortgage loan, including, without
279 limitation, if the creditor is not the original mortgagee and commences foreclosure without
280 possessing a valid written, signed and dated assignment evidencing the assignment of the
281 mortgage.

282 (b) A creditor violates this chapter if it imposes upon a third party the cost of correcting,
283 curing, or confirming documentation relating to the sale, transfer, or assignment of a mortgage
284 loan, including, without limitation, a creditor shall bear the costs related to curative actions taken
285 because a foreclosure was commenced without the creditor's possession of a valid, written,
286 signed, and dated assignment evidencing the assignment of the mortgage, in violation of section
287 14. A third party may recover all of its costs for having to correct, cure, or confirm
288 documentation.

289 (c) A creditor violates this chapter if it makes statements to a state or federal court related
290 to foreclosure or compliance with this chapter, orally or in writing, that it knows or should know
291 are false, including, without limitation, statements about the offering of a loan modification, the
292 borrower's history of payments, the validity of the assignment of the mortgage loan, that the
293 creditor is the record holder of the mortgage loan, or the creditor's compliance with any other
294 requirements of this chapter.

295 (d) A creditor violates this chapter if the creditor imposes a fee upon a borrower for
296 goods not rendered or services not performed in connection with a foreclosure.

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

300 (f) The division of banks may adopt, amend or repeal rules and regulations for the
301 administration and enforcement of this section.

302 SECTION 4. The division of banks shall, in consultation with the office of the attorney
303 general, annually track the resolution of certain mortgage loans and provide a report of said
304 results to the joint committee on financial services not later than December 31.

305 SECTION 5. Section 2 shall take effect on October 1, 2012 and shall apply to all
306 mortgages of residential property located in the commonwealth which secures a loan before, on
307 or after the effective date of this act. Said section 2 shall not apply to such mortgages accelerated

308 or whose statutory condition has been violated under the terms of the mortgage to secure the note
309 prior to the effective date of this act.