

SENATE No. 1848

The Commonwealth of Massachusetts

In the Year Two Thousand Nine

An Act to Require Commercially Reasonable Efforts to Avoid Foreclosure..

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

1 SECTION 1. Section 35 of chapter 244 of the General Laws, as appearing in the 2008
2 Official Edition, is hereby amended by adding the following new subsection:-

3 Section 35B. Prerequisite to Commencing Foreclosure Proceedings; Reasonable Steps
4 and Good Faith Efforts; Safe Harbor; Regulatory Authority.

5 (a) Commercially Reasonable Efforts to Avoid Foreclosures. (1) A creditor shall not
6 commence foreclosure upon a mortgage loan pursuant to this Chapter unless it has first taken
7 reasonable steps and good faith efforts to avoid foreclosure. The determination whether a
8 creditor has taken reasonable steps and good faith efforts prior to commencing foreclosure shall
9 consider, without limitation: (i) an assessment of the borrower’s current circumstances,
10 including without limitation the borrower’s current income, debts and obligations; (ii) the net
11 present value of receiving payments pursuant to a modified mortgage loan as compared to the
12 anticipated net recovery following foreclosure; (iii) the interests of the creditor, including,
13 without limitation, investors and taxpayers, in the event the creditor has received federal or state
14 money. The Attorney General may adopt, amend, or repeal rules and regulations, which may

15 include further methods of determining reasonable steps and good faith efforts to avoid
16 foreclosure, to assist the implementation of this Section.

17 (2) In interpreting this subsection (a), except as specified in a contract, a servicer of
18 pooled residential mortgages may determine whether the net present value of the payments on
19 the loan, as modified, is likely to be greater than the anticipated net recovery that would result
20 from foreclosure to all investors and holders of beneficial interests in such investment, but not to
21 any individual or groups of investors or beneficial interest holders, and shall be deemed to act in
22 the best interests of all such investors or holders of beneficial interests if the servicer agrees to or
23 implements a loan modification or takes reasonable loss mitigation actions that comply with this
24 Section. Further, any loan modification offered to the borrower must comply with current
25 federal and state law, including, without limitation, 940 C.M.R. 8.00 et seq., and the borrower
26 must be able to reasonably afford to repay the loan, as modified, according to its scheduled
27 payments. Nothing in this subsection shall be construed to prevent a creditor from offering or
28 accepting alternatives to foreclosure, such as a short sale or deed-in-lieu of foreclosure, if the
29 borrower requests such alternatives, rejects a loan modification offered pursuant to this
30 subsection, or does not qualify for a loan modification pursuant to this subsection.

31 (b) Proper documentation prior to foreclosure. A creditor violates subsection (a) if it
32 commences foreclosure when it knows or should know that it does not own the mortgage loan,
33 including without limitation, commencing foreclosure without possessing a written, signed and
34 dated assignment evidencing the assignment of the mortgage loan prior to the commencement of
35 foreclosure.

36 (c) No misrepresentations. A creditor violates subsection (a) if it makes statements to a
37 state or federal court related to foreclosure or compliance with this Chapter, orally or in writing,
38 that it knows or should know are false, including, without limitation, statements about the
39 borrower's history of payments, the validity of the assignment of the mortgage loan, and the
40 creditor's compliance with the requirements of Chapter 244.

41 (d) Safe Harbor. A creditor shall be deemed to comply with subsection (a), if, prior to
42 commencing foreclosure, the creditor:

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

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

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

52 (iv) either (a) in all circumstances where the net present value of the modified loan
53 exceeds the anticipated net recovery at foreclosure, offers and agrees to modify the loan in a
54 manner that provides the affordable monthly payment, or (b) in circumstances where the net
55 present value of the modified loan is less than the anticipated net recovery of the foreclosure,
56 notifies the borrower that no loan modification will be offered and provides a summary of the

57 creditor's net present value analysis, after which the creditor may proceed with the foreclosure
58 process in conformity with Section 35A of this chapter.

59 (e) The Attorney General may adopt, amend or repeal rules and regulations to aid in the
60 administration and enforcement of this Section, including regulations that provide safe harbors
61 for compliance in addition to that set forth in subsection (d) and including regulations that assist
62 in the implementation of the requirement for commercially reasonable steps to avoid foreclosure
63 required by subsection (a).

64 (f) Prior to commencing foreclosure, the creditor must certify compliance with this
65 Section in an affidavit. This affidavit shall be filed with the 90-day notice required by Chapter
66 244 Section 35A (b) to the commissioner of the division of banks.

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

68 (h) This Act shall take effect upon its passage.

69 For purposes of this section:

70 "Creditor" shall mean any person or entity that holds or controls, partially, wholly,
71 indirectly, directly, or in a nominee capacity, a mortgage loan securing a residential property,
72 including, without limitation, an originator, holder, investor, assignee, successor, trust, trustee,
73 nominee holder, Mortgage Electronic Registration System, or mortgage servicer. This definition
74 shall also include any servant, employee, or agent of a creditor.

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

76 “Mortgage loan” shall mean a loan to a natural person made primarily for personal,
77 family or household purposes secured wholly or partially by a mortgage on residential property
78 that bear one or more of the following loan features:

79 an introductory interest rate of a duration of five years or less, which term is followed by
80 a period where the interest rate may exceed the introductory rate;

81 interest-only payments for any period of time;

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

84 did not require full documentation of income or assets;

85 prepayment penalties;

86 the loan was a refinance of an existing loan that occurred within twelve months of the
87 most recent mortgage loan;

88 the loan was underwritten with a Loan-to-Value ratio at or above 90%;

89 the loan was underwritten as a component of a loan transaction wherein the complete
90 Loan-to-Value ratio was above 95% or

91 the loan was underwritten where the ratio of the borrower’s debt, including all housing-
92 related and recurring monthly debt, to the borrower’s income exceeds 38%.

93 “Residential property” shall mean real property located in the commonwealth having
94 thereon a dwelling house with accommodations for four or less separate households and
95 occupied, or to be occupied, in whole or in part by the obligor on the mortgage debt. This

96 definition shall be limited to the principal residence of a person, and not an investment property
97 or second home.