

SENATE No. 653

The Commonwealth of Massachusetts

PRESENTED BY:

Adam Gomez

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 adoption of the accompanying bill:

An Act establishing a Massachusetts foreclosure prevention program.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	
<i>Adam Gomez</i>	<i>Hampden</i>	
<i>Christine P. Barber</i>	<i>34th Middlesex</i>	
<i>Peter Capano</i>	<i>11th Essex</i>	
<i>James B. Eldridge</i>	<i>Middlesex and Worcester</i>	<i>3/6/2023</i>
<i>David Henry Argosky LeBoeuf</i>	<i>17th Worcester</i>	<i>3/20/2023</i>
<i>Patricia D. Jehlen</i>	<i>Second Middlesex</i>	<i>3/24/2023</i>
<i>Joanne M. Comerford</i>	<i>Hampshire, Franklin and Worcester</i>	<i>4/4/2023</i>
<i>Patricia A. Duffy</i>	<i>5th Hampden</i>	<i>5/9/2023</i>
<i>Rebecca L. Rausch</i>	<i>Norfolk, Worcester and Middlesex</i>	<i>7/11/2023</i>

SENATE No. 653

By Mr. Gomez, a petition (accompanied by bill, Senate, No. 653) of Adam Gomez, Christine P. Barber, Peter Capano and James B. Eldridge for legislation to establish a Massachusetts foreclosure prevention program. Financial Services.

The Commonwealth of Massachusetts

**In the One Hundred and Ninety-Third General Court
(2023-2024)**

An Act establishing a Massachusetts foreclosure prevention program.

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. Chapter 244 of the Massachusetts General Laws is hereby amended by
2 inserting after section 35C the following section: -

3 Section 35D. FORECLOSURE PREVENTION PROGRAM

4 Section 35D. (a) As used in this section, the following words shall, unless the context
5 clearly requires otherwise, have the following meanings:-

6 “Massachusetts Foreclosure Prevention Program”, the program established by this
7 section, that provides supervised conferences where parties make a good faith effort to avoid
8 foreclosure through application of sustainable foreclosure prevention alternatives.

9 “Covered loans”, all loans secured by 1 or more liens placed with the borrower’s consent
10 on real property that serves as the borrower’s primary residence, including properties with up to
11 4 rental units provided that the property also serves as the borrower’s primary residence,

12 including voluntary liens and liens created under terms of a deed of trust or mortgage, including
13 loans secured by reverse mortgages, condominium, and cooperative units; provided further that
14 covered loans shall not include judgment liens, tax liens, liens for municipal services, or any
15 liens imposed by a governmental unit in connection with an assessment or penalty. This section
16 applies to loans secured by reverse mortgages, condominium, and cooperative units.

17 “Creditor”, a person or entity that holds or controls, partially, wholly, indirectly, directly
18 or in a nominee capacity, a mortgage loan securing an owner-occupied residential property,
19 including, but not limited to, an originator, holder, investor, assignee, successor, trust, trustee,
20 nominee holder, Mortgage Electronic Registration System or mortgage servicer, including the
21 Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation;
22 provided, that "creditor" shall also include any servant, employee or agent of a creditor; and
23 provided, further, that the bodies politic and corporate and public instrumentalities of the
24 commonwealth established in chapter 708 of the acts of 1966 and in section 35 of chapter 405 of
25 the acts of 1985 shall not be a creditor.

26 “Creditor’s representative”, a person who has the authority to negotiate and approve the
27 terms of and modify a mortgage loan, or a person who, under a servicing agreement, has the
28 authority to negotiate and approve the terms of and modify a mortgage loan, and has the
29 authority to appear on behalf of the creditor at the foreclosure prevention conferences, and has
30 the authority and ability to communicate loss mitigation decisions at the foreclosure prevention
31 conference; provided further that the creditor’s representative may not be the attorney
32 representing the creditor of the loan in the foreclosure.

33 “Eligible borrowers”, a mortgagor of a mortgage loan, or successor in interest to a
34 mortgagor, who meet 1 or more of the following: (i) borrowers with covered loans who are
35 served with a notice of right to cure pursuant to section 35A and elect to participate in the
36 conference program; (ii) borrowers with covered loans who have not been served with a notice
37 of right to cure pursuant to section 35A, including borrowers who are current in mortgage
38 payments, but who are at imminent risk of default and elect to participate in the conference
39 program; (iii) borrowers who are referred to the conference program by a judge at any time; (iv)
40 borrowers in active bankruptcy cases whose loans are in default or are at imminent risk of default
41 and are eligible to participate in the conference program so long as the bankruptcy court, either
42 in the individual case or through a standing order, has granted relief from the automatic stay to
43 all parties for the purpose of participating in the conferences, provided further that the
44 borrower’s prior discharge of personal liability on the underlying loan debt does not preclude
45 participation in the conferences.

46 “Foreclosure prevention program administrator”, a government or non-profit organization
47 designated by the attorney general to administer the Massachusetts Foreclosure Prevention
48 Program. The administrator shall develop guidelines and standards for conference monitor
49 trainings to ensure monitors have a working knowledge of all federal and state programs
50 available to help homeowners retain their homes.

51 “Foreclosure prevention program conference monitors”, individuals appointed by the
52 administrator and trained to facilitate foreclosure prevention conferences, who may include (i)
53 active retired justices or judges who may be assigned by the respective chief justice or justice of
54 the court; (ii) people educated or experienced in the professions of law, real estate, accounting, or
55 mediation, or (iii) people who have worked with homeowners or creditors. Conference monitors

56 will be immune from civil liability for performance of their duties under this section, except for
57 gross negligence.

58 “Good faith”, honesty in fact and the observance of reasonable commercial standards of
59 fair dealing, required by creditors participating in foreclosure prevention conferences in
60 evaluating borrowers for all available foreclosure prevention options, in compliance with all state
61 and federal laws, rules, and regulations,

62 “Certificate of compliance”, certificate issued by the administrator upon finding that (i)
63 the creditor made a good faith effort to reach a mutually agreeable commercially reasonable
64 alternative to foreclosure, or (ii) despite reasonable notice, the borrower declined to participate in
65 the foreclosure prevention program.

66 “Loss mitigation”, systematic consideration of all alternatives to a foreclosure sale that
67 will minimize losses to creditors in the covered loan and avoid foreclosure where possible.

68 (b) Conference procedure: The creditor of a covered loan and eligible borrower shall
69 engage in good faith in the Foreclosure Prevention Program conferences as set out in this section.

70 (1) Notice of intention to foreclose. The creditor of a covered loan who serves a borrower
71 with the notice of right to cure under section 35A shall concurrently serve the Administrator with
72 a copy of the notice.

73 (2) Notice of conference. Within 5 business days of the Administrator’s receipt of the
74 copy of the notice of right to cure, or a request from an eligible borrower to participate in the
75 foreclosure prevention program, the Administrator shall mail to the borrower a notice of right to
76 participate in a supervised foreclosure prevention conference. The notice shall describe the rules

77 and procedures for the conference and provide the borrower with referral information for HUD-
78 certified housing counselors approved by the Administrator. The notice shall describe the state
79 law foreclosure procedures and timeline.

80 (3) Election to proceed with conference. The notice of the conference shall include a
81 check-box for the borrower to indicate an election to participate. The notice will also include a
82 check-box for the borrower to indicate election for all parties to participate in-person rather than
83 by videoconference. The notice shall indicate that the election form must be returned to the
84 Administrator within 30 days of service in order to preserve the right to participate, but
85 additional time may be granted for good cause. The Administrator will promptly notify the
86 creditor of the borrower's election.

87 (4) Appointment of conference monitor. Upon receipt of the borrower's election to
88 participate, the Administrator shall designate a conference monitor for the matter.

89 (5) Notice to the parties. Within 10 days of the Administrator's receipt of the borrower's
90 election to participate, the conference monitor shall notify in writing the creditor or creditor's
91 attorney and the borrower of the Foreclosure Prevention Program and inform the parties of the
92 identity of the conference monitor, the requirements of the program, and the date, time and
93 location of the initial phone conference. Sending the notice shall constitute the beginning of the
94 conference process as set forth in this section. Together with the notice the Administrator shall
95 provide a list of documents that the creditor will be required to provide to the monitor and the
96 borrower before the conference. The monitor shall set deadlines for the submission of
97 documents.

98 (6) Notice to non-foreclosing lien holders of covered loans. The Administrator shall
99 provide written notice of the conference sessions and procedures to all non-foreclosing lien
100 holders of a covered loan identifiable from public land records and invite their participation. The
101 notice shall inform such lienholders that their rights could be affected by the loss mitigation
102 conferences.

103 (7) Communication and document exchange. To the extent feasible and accessible by all
104 parties, the monitor shall use secure internet portals or document storage sites for the exchange
105 of documents. These shall be under the control of the Administrator and not the parties.
106 Borrowers will not be denied access to the Program because they provided documents to the
107 monitor and the parties by a method other than an internet portal or document storage site.

108 (8) The foreclosure prevention conference:

109 (i) The monitor shall schedule a conference which will be held virtually via a
110 videoconferencing platform unless the borrower requests that all parties attend an in-person
111 conference. The creditor's representative and the borrower may appear with counsel. The
112 borrower may appear with a housing counselor or other individual designated by the borrower.

113 (ii) The creditor's representative shall provide, 10 days prior to the conference, relevant
114 information concerning the loan and the property required for a loss mitigation review, in a form
115 to be developed by the Administrator.

116 (iii) During the conference the parties must first engage in evaluating the borrower for all
117 options to retain the home. When home retention options have been exhausted or if the borrower
118 wishes to exit the property, the creditor must review for non-retention options such as a short

119 sale or deed-in-lieu of foreclosure. This section does not mandate the implementation of a
120 specific loss mitigation option under a particular set of circumstances.

121 (iv) If the creditor appears for the conference with appropriate authority, has provided all
122 required documents, made a good-faith effort to agree to a commercially reasonable alternative
123 to foreclosure, and has reviewed all loss mitigation options without reaching an agreement, the
124 monitor shall issue a Certificate of Compliance with the conference program. If the borrower
125 declines the election to participate, or fails to appear at a conference without cause, there shall be
126 a basis to certify the creditor's compliance with this section.

127 (v) Continuance of a conference for cause may be granted once by the conference
128 monitor and thereafter only upon agreement of all parties. Notice of continuance dates shall be
129 provided to all interested parties, including non-foreclosing lien holders of a covered loan.

130 (vi) As a pre-condition to conducting a valid judicial or non-judicial foreclosure sale the
131 creditor must first record in the registry of deeds of the county where the property is located a
132 Certificate of Compliance with the provisions of this section. The Certificate must bear the
133 signature of a duly authorized conference monitor or a judge. If the conference monitor does not
134 issue a Certificate of Compliance, the creditor will be prohibited from continuing with the
135 foreclosure process.

136 (vii) A foreclosure sale of a covered loan shall not pass title to the purchaser unless the
137 Certificate of Compliance was recorded before the sale.

138 (viii) Conducting a foreclosure sale without having obtained and recorded a Certificate of
139 Compliance shall constitute an unfair and deceptive business practice under section 2, chapter
140 93A of the General Laws.

141 (ix) If the borrower does not elect to participate in the Program and does not pursue a
142 modified mortgage loan under section 35B, if eligible, foreclosure may proceed under this
143 chapter. If a borrower elects to participate in the Program, a creditor shall not accelerate the note
144 or otherwise initiate foreclosure proceedings unless the conference monitor has issued a
145 Certificate of Compliance to show that the creditor participated in the program in good faith.

146 (9) Conference Report. The conference monitor shall complete a Conference Report and
147 provide a copy of the Report to the parties and the Administrator within 5 business days of the
148 date of the conference. The Report shall state the names and addresses of attendees and the dates
149 and times of all conferences, list the documents presented, and summarize the options
150 considered. If an agreement was reached in full or partial settlement, the Report shall summarize
151 the terms of the agreement. If the agreement provides for a trial modification or forbearance
152 plan, the Report shall schedule an appropriate review date to monitor the finalization of the
153 agreement. The Report shall state with specificity the grounds for the monitor's decision to
154 provide or decline to provide a Certificate of Compliance. The Report shall not be a matter of
155 public record.

156 (c) Judicial enforcement and sanctions. Either party may seek judicial enforcement of this
157 section.

158 (1) If a creditor or their attorney fails to attend a conference or to make a good faith effort
159 to participate in the Foreclosure Prevention Program, including review for all loss mitigation
160 options, the court may impose appropriate sanctions. In determining the nature and extent of
161 appropriate sanctions, the court shall consider the need for deterrence of similar future conduct
162 by the entity being sanctioned and by others and may take into account prior orders imposing

163 sanctions upon the sanctioned party, whether in the same case or in other previous cases. The
164 imposition of any sanction does not bar any independent action by a defendant to seek recovery
165 with respect to the actions giving rise to the order of sanctions.

166 (2) Sanctions. The court may impose sanctions upon the creditor. The sanctions may
167 apply prospectively to compel compliance or retroactively to punish past non-compliance, or the
168 court may impose sanctions that operate both prospectively and retroactively. Sanctions may
169 include: tolling of interest and other charges pending good faith completion of the conferences,
170 per diem monetary penalties, assessment of costs and fees, assessment of reasonable attorney
171 fees, entry of judgment, dismissal without prejudice, dismissal without prejudice with a
172 prohibition on refileing the foreclosure action for a stated period of time, dismissal with prejudice
173 or reduction or release of the lien, or any other sanctions the court deems appropriate. Sanctions
174 assessed to a creditor shall not be shifted to the borrower.

175 (3) A creditor's violation of the provisions of this section shall constitute an unfair and
176 deceptive act in commerce and a violation of chapter 93A of the General Laws.

177 (4) Either party may seek judicial relief to compel a party to execute a written agreement
178 embodying the terms of a conference settlement;

179 (5) The borrower may bring an action to enforce the provisions of this section, including
180 the requirements for creditor participation, the designation of a creditor's representative, and the
181 production of documents. The borrower may also bring an action to enforce program time frames
182 or to require compliance with an agreement reached in the course of the conference process.

183 (6) Breach of settlement agreement. If the creditor claims that the borrower breached the
184 terms of a conference agreement and wishes to foreclose, the creditor may notify the monitor and

185 borrower of the creditor's claim of breach and intention to proceed with a foreclosure. The
186 conference monitor shall provide the borrower with at least 10 days to object to the creditor's
187 request. If the borrower does not timely object, the monitor shall issue a certificate of compliance
188 allowing the foreclosure to proceed and so notify the parties and the Administrator. If the
189 borrower objects, the monitor shall schedule a further conference to determine whether a breach
190 occurred and whether the creditor should be given certification to foreclose. The rules contained
191 in this section for conferences shall apply to such a conference, except that additional
192 documentation and the scope of the conference shall be limited to evidence of the alleged breach
193 of agreement.

194 (7) Use of conference information. The information discussed in or presented during a
195 conference session shall be kept confidential and shall not be used in any legal proceeding,
196 except for actions to enforce this section or if the information can be obtained from sources
197 outside the Program.

198 (8) Data reporting. The monitor shall submit copies of conference records, including
199 document checklists, conference scheduling orders, conference reports, and settlement
200 agreements, to the Administrator. These records shall not be available to the public. However,
201 the Administrator or its designee may, consistent with the policy of protecting participant
202 confidentiality, review the conference records for research purposes. The Administrator shall
203 review conference records on a regular basis in order to provide the legislature and publicly
204 posted a summary of Program data including (a) the number of borrowers who are notified of the
205 program; (b) the participation rate for borrowers and creditors; and (c) the number of Certificates
206 of Compliance issued, and any other relevant data.

207 (d) Program Funding

208 (1) Costs. In addition to the charge currently assessed for filing a complaint under the
209 Servicemembers Civil Relief Act (SCRA) under chapter 57 of the acts of 1943, as amended
210 through Chapter 142 of the Acts of 1998, the creditor shall pay a fee in an amount and manner to
211 be determined by the attorney general upon the filing of each Servicemember case. This cost
212 shall not be shifted to the borrower. The Administrator will deposit these funds into a segregated
213 fund known as the “Foreclosure Prevention Fund.”

214 (2) Foreclosure prevention fund. (i) The funds deposited into the Foreclosure Prevention
215 Fund shall be designated primarily for costs of administration of the Foreclosure Prevention
216 Program and payment of monitor fees. Any remaining funds shall be applied to cover costs of
217 administration of the program, as well as outreach directed to homeowners at risk of foreclosure
218 or in foreclosure. The Administrator shall implement a plan for outreach that will include
219 mailings and phone contact designed to encourage participation in the supervised conference
220 program.

221 (ii) The funds deposited in the Foreclosure Prevention Fund, including interest earned,
222 shall be used solely for the purposes outlined in this section and shall not be transferred to the
223 state’s general fund.

224 (iii) Fee shifting barred. Other than the filing fee surcharge, the parties participating in
225 foreclosure prevention conferences shall bear their own costs for participation. Unless ordered as
226 a sanction for non-compliance by a court, a creditor shall not shift its costs of participation to the
227 borrower, including costs for attorney’s fees or the conference program fee. Creditors may not
228 charge borrowers fees as a condition of agreement to a loss mitigation option.

229 (e) Implementation. The provisions of this section will apply to all foreclosures in which
230 the creditor gives an initial foreclosure notice or notices of acceleration 60 days after the date of
231 enactment of this section.

232 (f) Relation to other laws. This section does not preclude courts from enforcing other
233 state and federal statutes, common law remedies, and equitable doctrines that might bar
234 foreclosure in particular circumstances, or require implementation of a loss mitigation option. As
235 set forth in section 4, a court is authorized to impose sanctions on the creditor of a covered loan
236 or the creditor's attorney, upon finding that the creditor failed to participate in the conference
237 process in good faith as defined in section 2.8. Unless expressly provided for in the terms of a
238 written agreement, by participating in the conferences under this section the parties do not waive
239 existing and future legal claims arising from the loan transaction.