

**HOUSE . . . . . No. 4096**

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House bill No. 4087, as changed by the committee on Bills in the Third Reading and as amended and passed to be engrossed by the House. May 16, 2012.

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The Commonwealth of Massachusetts

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**In the Year Two Thousand Twelve**  
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An Act preventing 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:*

1           SECTION 1. Chapter 244 of the General Laws is hereby amended by striking out  
2 section 14, as appearing in the 2010 Official Edition, and inserting in place thereof the following  
3 section:-

4           Section 14. The mortgagee or person having estate in the land mortgaged, or a person  
5 authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the  
6 legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee  
7 or person, may, upon breach of condition and without action, perform all acts authorized or  
8 required by the power; but no sale under such power shall be effectual to foreclose a mortgage,  
9 unless, previous to such sale, notice thereof has been published once in each of 3 successive  
10 weeks, the first publication to be not less than 21 days before the day of sale, in a newspaper, if  
11 any, published in the town where the land lies or in a newspaper with general circulation in the  
12 town where the land lies and notice thereof has been sent by registered mail to the owner or  
13 owners of record of the equity of redemption as of 30 days prior to the date of sale, said notice to

14 be mailed by registered mail at least 14 days prior to the date of sale to said owner or owners to  
15 the address set forth in section 61 of chapter 185, if the land is then registered or, in the case of  
16 unregistered land, to the last address of the owner or owners of the equity of redemption  
17 appearing on the records of the holder of the mortgage, if any, or if none, to the address of the  
18 owner or owners as given on the deed or on the petition for probate by which he acquired title, if  
19 any, or if in either case no owner appears, then mailed by registered mail to the address to which  
20 the tax collector last sent the tax bill for the mortgaged premises to be sold, or if no tax bill has  
21 been sent for the last preceding 3 years, then mailed by registered mail to the address of any of  
22 the parcels of property in the name of said owner of record which are to be sold under the power  
23 of sale and unless a copy of said notice of sale has been sent by registered mail to all persons of  
24 record as of 30 days prior to the date of sale holding an interest in the property junior to the  
25 mortgage being foreclosed, said notice to be mailed at least 14 days prior to the date of sale to  
26 each such person at the address of such person set forth in any document evidencing the interest  
27 or to the last address of such person known to the mortgagee. Any person of record as of 30 days  
28 prior to the date of sale holding an interest in the property junior to the mortgage being  
29 foreclosed may waive at any time, whether prior or subsequent to the date of sale, the right to  
30 receive notice by mail to such person under this section and such waiver shall be deemed to  
31 constitute compliance with such notice requirement for all purposes. If no newspaper is  
32 published in such town, or if there is no newspaper with general circulation in the town where  
33 the land lies, notice may be published in a newspaper published in the county where the land lies,  
34 and this provision shall be implied in every power of sale mortgage in which it is not expressly  
35 set forth. A newspaper which by its title page purports to be printed or published in such town,  
36 city or county, and having a circulation therein, shall be sufficient for the purpose.

37           The following form of foreclosure notice may be used and may be altered as  
38 circumstances require; but nothing herein shall be construed to prevent the use of other forms.

39           (Form.)

40           MORTGAGEE'S SALE OF REAL ESTATE.

41           By virtue and in execution of the Power of Sale contained in a certain mortgage given  
42 by..... to..... dated..... and recorded with

43           .....

44           Deeds, Book....., page....., of which mortgage the undersigned is the present  
45 holder,.....

46           (If by assignment, or in any fiduciary capacity, give reference to the assignment or  
47 assignments recorded with .....Deeds, Book....., page....., of which mortgage the  
48 undersigned is the present holder,.....)

49           for breach of the conditions of said mortgage and for the purpose of foreclosing the same  
50 will be sold at Public Auction at.....o'clock,..... M. on the..... day of..... A.D.  
51 (insert year),..... (place)..... all and singular the premises described in said mortgage,

52           (In case of partial releases, state exceptions.)

53           To wit: "(Description as in the mortgage, including all references to title, restrictions,  
54 encumbrances, etc., as made in the mortgage.)"

55 Terms of sale: (State here the amount, if any, to be paid in cash by the purchaser at the  
56 time and place of the sale, and the time or times for payment of the balance or the whole as the  
57 case may be.)

58 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 registry

77 of deeds for the county or district where the land lies, and (ii) the recording information for all  
78 recorded assignments is referenced in the notice of sale required in this section. The notice shall  
79 not be defective if any holder within the chain of assignments either changed its name or merged  
80 into another entity during the time it was the mortgage holder; provided, that it is recited within  
81 the body of the notice the fact of any merger, consolidation, amendment, conversion or  
82 acquisition of assets causing the change in name or identity, the recital of which shall be  
83 conclusive in favor of any bona fide purchaser, mortgagee, lienholder or encumbrancer of value  
84 relying in good faith thereon.

85 SECTION 2. Said chapter 244 is hereby further amended by adding the following two  
86 sections:-

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,  
91 debts and obligations.

92 “Borrower”, a mortgagor of a mortgage loan.

93 “Certain mortgage loan,” a loan to a natural person made primarily for personal, family  
94 or household purposes secured wholly or partially by a mortgage on an owner-occupied  
95 residential property with 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, except in the case where the  
99 mortgage loan is an open-end home equity line of credit;

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

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

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

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

108           (vii)   the loan was underwritten as a component of a loan transaction wherein the  
109 combined loan-to-value ratio was above 95 per cent. For the purposes of this section, loans  
110 financed by the Massachusetts Housing Finance Agency, established by Chapter 708 of the Acts  
111 of 1966, as amended, and loans originated through programs administered by the Massachusetts  
112 Housing Partnership Fund Board established in Section 35 of Chapter 405 of the Acts of 1985, as  
113 amended, shall not be certain mortgage loans;

114           “Creditor”, a person or entity that holds or controls, partially, wholly, indirectly, directly,  
115 or in a nominee capacity, a mortgage loan securing an owner-occupied residential property,  
116 including, without limitation, an originator, holder, investor, assignee, successor, trust, trustee,  
117 nominee holder, Mortgage Electronic Registration System or mortgage servicer, including the  
118 Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation.

119 “Creditor” shall also include any servant, employee or agent of a creditor. Notwithstanding the  
120 forgoing, the bodies politic and corporate and public instrumentalities of the Commonwealth  
121 established by Chapter 708 of the Acts of 1966, as amended, and established in section 35 of  
122 Chapter 405 of the Acts of 1985, as amended, shall not be a Creditor for purposes of this section.

123 “Creditor’s representative”, a person who has the authority to negotiate and approve the  
124 terms of and modify a mortgage loan.

125 “Modified mortgage loan”, a mortgage modified from its original terms including, but not  
126 limited to, a loan modified pursuant to 1 of the following: (i) the Home Affordable Modification  
127 Program; (ii) the Federal Deposit Insurance Corporation’s Loan Modification Program; (iii) any  
128 modification program that a lender uses which is based on accepted principles and the safety and  
129 soundness of the institution and authorized by the National Credit Union Administration, the  
130 division of banks or any other instrumentality of the commonwealth; (iv) the Federal Housing  
131 Administration; or (v) a similar federal loan modification plan.

132 “Mortgage loan”, a loan to a natural person made primarily for personal, family or  
133 household purposes secured wholly or partially by a mortgage on residential property.

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

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

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

159 (1) Except as otherwise specified in a contract, a servicer of pooled residential mortgages  
160 may determine whether the net present value of the payments on the modified mortgage loan is  
161 likely to be greater than the anticipated net recovery that would result from foreclosure to all  
162 investors and holders of beneficial interests in such investment, but not to any individual or  
163 groups of investors or beneficial interest holders, and shall be deemed to act in the best interests

164 of all such investors or holders of beneficial interests if the servicer agrees to or implements a  
165 modified mortgage loan or takes reasonable loss mitigation actions that comply with this section.  
166 Any modified mortgage loan offered to the borrower shall comply with current federal and state  
167 law, including, without limitation, all rules and regulations pertaining to mortgage loans and the  
168 borrower shall be able to reasonably afford to repay the modified mortgage loan according to its  
169 scheduled payments.

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

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

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

179 (iii) conducts an analysis comparing the net present value of the modified mortgage loan  
180 and the creditor's anticipated net recovery that would result from foreclosure, such analysis shall  
181 be deemed compliant if in accordance with the formula presented in 1 of the following: (i) the  
182 Home Affordable Modification Program; (ii) the Federal Deposit Insurance Corporation's Loan  
183 Modification Program; (iii) any modification program that a lender uses which is based on  
184 accepted principles and the safety and soundness of the institution and authorized by the National  
185 Credit Union Administration, the division of banks or any other instrumentality of the

186 commonwealth; (iv) the Federal Housing Administration; or (v) a similar federal loan  
187 modification plan; and

188 (iv) either (A) in all circumstances where the net present value of the modified mortgage  
189 loan exceeds the anticipated net recovery at foreclosure, agrees to modify the loan in a manner  
190 that provides for the affordable monthly payment, or (B) in circumstances where the net present  
191 value of the modified mortgage loan is less than the anticipated net recovery of the foreclosure,  
192 or does not meet the borrower's affordable monthly payment, notifies the borrower that no  
193 modified mortgage loan will be offered and provides a written summary of the creditor's net  
194 present value analysis and the borrower's current ability to make monthly payments, after which  
195 the creditor may proceed with the foreclosure process in conformity with this chapter.

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

200 (c) In accordance with this section, for certain mortgage loans, the creditor shall send  
201 notice, concurrently with the notice required by subsection (g) of section 35A, of the borrower's  
202 rights to pursue a modified mortgage loan. Said notice shall be deemed to be delivered to the  
203 mortgagor when sent by first class mail and certified mail or similar service by a private carrier  
204 to the mortgagor at the mortgagor's address last known to the mortgagee or anyone holding  
205 thereunder. A copy of said notice shall be filed with the commissioner of the division of banks  
206 and the office of the attorney general. The time frame for determining whether a modified  
207 mortgage loan is offered shall occur within 150 days. No more than 30 days following delivery

208 of the notice as provided for in this section, a borrower who holds a certain mortgage loan shall  
209 notify a creditor of (i) the borrower's intent to pursue a modified mortgage loan which shall  
210 include a statement of the borrower's income and a complete list of total debts and obligations at  
211 the time of receipt of the notice; (ii) the borrower's intent to pursue an alternative to foreclosure,  
212 including a short sale or deed in lieu of foreclosure; (iii) the borrower's intent not to pursue a  
213 modified mortgage loan and pursue the right to cure period described in section 35A; or (iv) the  
214 borrower's intent to waive the right to cure period and proceed to foreclosure. A borrower who  
215 holds a certain mortgage loan and fails to respond to the creditor within 30 days of delivery of  
216 the notice provided for in this section shall be deemed to have forfeited the right to cure period  
217 and shall be subject to a right to cure period of 90 days. A borrower shall be presumed to have  
218 notified the creditor if the borrower provides proof of delivery through the United States Postal  
219 Service or similar carrier. No more than 30 days following receipt of the borrower's notification  
220 that the borrower intends to pursue a modified mortgage loan, a creditor shall provide the  
221 borrower with its assessment in writing pursuant to subsection (b). The assessment shall include,  
222 but not be limited to: (i) a written statement of the borrower's income, debts and obligations as  
223 determined by the creditor; (ii) the creditor's net present value analysis of the mortgage loan; (iii)  
224 the creditor's anticipated net recovery at foreclosure; (iv) a statement of the interests of the  
225 creditor; and (v) a modified mortgage loan offer pursuant to the requirements of this section or  
226 notice that no modified mortgage loan will be offered. Where a modified mortgage loan is  
227 offered, the offer shall include the first and last name(s) and contact phone number(s) of the  
228 creditor's representative. The assessment shall be provided by first class and certified mail. A  
229 creditor shall be presumed to have provided the assessment to the borrower if the creditor  
230 provides proof of delivery through the United States Postal Service or similar carrier. A borrower

231 who receives a modified mortgage loan offer from a creditor shall respond within 30 days of  
232 receipt of the assessment and offer of a modified mortgage loan. The borrower may: (i) accept  
233 the offer of a loan modification as provided by the creditor; (ii) make a reasonable counteroffer;  
234 or (iii) state that the borrower wishes to waive the borrower's rights as provided by this section  
235 and proceed to foreclosure. The borrower's response shall be in writing and, where a  
236 counteroffer is proposed, shall include substantiating documentation in support of the  
237 counteroffer. The response shall be provided by first class and certified mail. A borrower shall  
238 be presumed to have responded if the borrower provides proof of delivery through the United  
239 States Postal Service or similar carrier. A borrower who fails to respond to the creditor within 30  
240 days of receipt of a modified mortgage loan offer shall be deemed to have forfeited the 150-day  
241 right to cure period and shall be subject to a right to cure period of 90 days. Where a counteroffer  
242 is proposed, the creditor shall accept, reject or propose a counteroffer to the borrower within 30  
243 days of receipt. Pursuant to this section, additional offers by both parties shall be considered  
244 during the right to cure period; provided, however, that a borrower may at any time state, in  
245 writing, that the borrower wishes to waive the borrower's rights as provided by this section and  
246 proceed to foreclosure. Nothing in this section shall be construed as preventing a creditor and a  
247 borrower from negotiating the terms of a modified mortgage loan by telephone or in person  
248 following the initial offer of a modified mortgage loan by a creditor; provided, however, that all  
249 offers, whether by a creditor or a borrower, shall be in writing and signed by the offeror. The  
250 right to a modified mortgage loan, as described in this section, shall be granted once during any  
251 3-year period, regardless of the mortgage holder.

252 (d) The notice required in subsection (c) shall, at a minimum, include the appropriate  
253 contact information for modification assistance within the office of the attorney general. The

254 division of banks shall adopt regulations in accordance with this subsection. including the  
255 minimum requirements which constitute a good faith effort by the borrower to respond to the  
256 notice. The notice shall be similar in substance and form to the notice promulgated by the  
257 division of banks in accordance with section 35A.

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

262 (g) Prior to publishing a notice of a foreclosure sale, as required by section 14, the  
263 creditor, or where the creditor is not a natural person, an officer or duly authorized agent of the  
264 creditor, shall certify compliance with this section in an affidavit based upon a review of the  
265 creditor's business records. The creditor, or an officer or duly authorized agent of the creditor,  
266 shall record this affidavit with the registry of deeds for the county or district where the land lies.

267 The affidavit shall be conclusive evidence in favor of an arm's-length third party  
268 purchaser for value, at or subsequent to the resulting foreclosure sale, that the foreclosing party  
269 identified or referred to as the holder of the foreclosed mortgage in the affidavit has fully  
270 complied with this section and is entitled to proceed with foreclosure of the subject mortgage  
271 pursuant to the power of sale contained in the mortgage and any one or more of the foreclosure  
272 procedures authorized in this chapter. For purposes of this subsection, the term "arm's-length,  
273 third party purchaser" shall include such purchaser's heirs, successors and assigns.

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

276 “Borrower”, a mortgagor of a mortgage loan.

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

283 “Mortgage loan”, a loan to a natural person made primarily for personal, family or  
284 household purposes secured wholly or partially by a mortgage on residential property.

285 “Residential property”, real property located in the commonwealth having thereon a  
286 dwelling house with accommodations for 4 or less separate households and occupied, or to be  
287 occupied, in whole or in part by the obligor on the mortgage debt; provided, however, that  
288 residential property shall be limited to the principal residence of a person; provided, further, that  
289 residential property shall not include an investment property or residence other than a primary  
290 residence; and provided, further, that residential property shall not include residential property  
291 taken in whole or in part as collateral for a commercial loan.

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

297 (c) A creditor violates this chapter if it imposes upon a third party the cost of correcting,  
298 curing, or confirming documentation relating to the sale, transfer, or assignment of a mortgage  
299 loan, including, without limitation, a creditor shall bear the costs related to curative actions taken  
300 because a foreclosure was commenced without the creditor's possession of a valid, written,  
301 signed, and dated assignment evidencing the assignment of the mortgage, in violation of section  
302 14. A third party may recover all of its costs including its reasonable attorney's fees for having  
303 to correct, cure, or confirm documentation.

304 (d) A creditor violates this chapter if it makes statements to a state or federal court related  
305 to foreclosure or compliance with this chapter, orally or in writing, that it knows or should know  
306 are false, including, without limitation, statements about the offering of a loan modification, the  
307 borrower's history of payments, the validity of the assignment of the mortgage loan, that the  
308 creditor is the record holder of the mortgage loan, or the creditor's compliance with any other  
309 requirements of this chapter.

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

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

315 (g) The division of banks may adopt, amend or repeal rules and regulations for the  
316 administration and enforcement of this section.

317 (h) In all circumstances in which an offer to purchase either a mortgage loan or  
318 residential property is made by an entity with a tax-exempt filing status under Section 501 (c )(3)

319 of the Internal Revenue Code, or an entity controlled by an entity with such tax exempt filing  
320 status, no Creditor shall require as a condition of sale or transfer to any such entity any affidavit,  
321 statement, agreement or addendum limiting ownership or occupancy of the residential property  
322 by the Borrower and, if obtained, such affidavit, statement, agreement or addendum shall not  
323 provide a basis to avoid a sale or transfer nor shall it be enforceable against such acquiring entity  
324 or any real estate broker, Borrower, or settlement agent named in such affidavit, statement or  
325 addendum.

326 SECTION 3. The division of banks shall, in consultation with the office of the attorney  
327 general, annually track the resolution of certain mortgage loans and provide a report of said  
328 results to the joint committee on financial services within 90 days of the end of each calendar  
329 year through December 31, 2017.

330 SECTION 4. The law shall take effect upon its passage. Said sections 2 shall not apply  
331 to such mortgages where the notice pursuant to section 35A of chapter 244 has been sent.