

SENATE No. 2298

Senate, June 4, 2012 – Text of the Senate amendment, printed as amended, to the House bill to prevent unlawful and unnecessary foreclosures (House, No. 4087)

The Commonwealth of Massachusetts

—
In the Year Two Thousand Twelve
—

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, a person
5 authorized by the power of sale, the attorney duly authorized by a writing under seal or the legal
6 guardian or conservator of such mortgagee or person acting in the name of such mortgagee or
7 person, may, upon breach of condition and without action, perform all acts authorized or
8 required by the power of sale; provided however, that no sale under such power shall be effectual
9 to foreclose a mortgage, unless, previous to such sale, notice of the sale has been published once
10 in each of 3 successive weeks, the first publication of which shall be not less than 21 days before
11 the day of sale, in a newspaper published in the city or town where the land lies or in a
12 newspaper with general circulation in the city or town where the land lies and notice of the sale
13 has been sent by registered mail to the owner or owners of record of the equity of redemption as
14 of 30 days prior to the date of sale, said notice to be mailed by registered mail at least 14 days
15 prior to the date of sale to said owner or owners to the address set forth in section 61 of chapter
16 185, if the land is then registered or, in the case of unregistered land, to the last address of the

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

39 The following form of foreclosure notice may be used and may be altered as
40 circumstances require; but nothing in this section shall be construed to prevent the use of other
41 forms.

42 (Form.)

43 MORTGAGEE’S SALE OF REAL ESTATE.

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

46

47 Deeds, Book....., page....., of which mortgage the undersigned is the present
48 holder,.....

49 (If by assignment, or in any fiduciary capacity, give reference to the assignment or
50 assignments recorded withDeeds, Book....., page....., of which mortgage the
51 undersigned is the present holder,.....)

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

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

56 To wit: “(Description as in the mortgage, including all references to title, restrictions,
57 encumbrances, etc., as made in the mortgage.)”

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

61 Other terms to be announced at the sale.

62 (Signed) _____

63 Present holder of said mortgage. ____

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

75 For purposes of this section and section 21 of chapter 183, in the event a mortgagee holds
76 a mortgage under an assignment no notice under this section shall be valid unless (i) at the time
77 such notice is mailed, a valid affidavit, an assignment, or a chain of assignments, evidencing the
78 assignment of the mortgage to the foreclosing mortgagee has been duly recorded in the registry
79 of deeds for the county or district where the land lies and (ii) the recording information for all

80 recorded assignments is referenced in the notice of sale required in this section. The notice shall
81 not be defective if any holder within the chain of assignments either changed its name or merged
82 into another entity during the time it was the mortgage holder; provided, that recited within the
83 body of the notice is the fact of any merger, consolidation, amendment, conversion or acquisition
84 of assets causing the change in name or identity, the recital of which shall be conclusive in favor
85 of any bona fide purchaser, mortgagee, lienholder or encumbrancer of value relying in good faith
86 on such recital.

87 SECTION 2. Said chapter 244 is hereby further amended by inserting after section 35A
88 the following 3 sections:-

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

91 “Affordable monthly payment”, monthly payments on a mortgage loan, which, taking
92 into account the borrower’s current circumstances, including verifiable income, debts, assets and
93 obligations enable a borrower to make the payments. “Borrower”, a mortgagor of a
94 mortgage loan.

95 “Certain mortgage loan,” a loan to a natural person made primarily for personal, family
96 or household purposes secured wholly or partially by a mortgage on an owner-occupied
97 residential property with 1 or more of the following loan features: (i) an introductory interest
98 rate granted for a period of 3 years or less and such introductory rate is at least 2 per cent lower
99 than the fully indexed rate, (ii) interest-only payments for any period of time, except in the case
100 where the mortgage loan is an open-end home equity line of credit or is a construction loan, (iii)
101 a payment option feature, where any 1 of the payment options is less than principal and interest

102 fully amortized over the life of the loan, (iv) the loan did not require full documentation of
103 income or assets, (v) prepayment penalties that exceed section 56 of chapter 183 or applicable
104 federal law, (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 (vii) the loan was underwritten as a component of a
107 loan transaction, in which the combined loan-to-value ratio exceeded 95 per cent; provided,
108 however that a loan shall be a certain mortgage loan if, after the performance of reasonable due
109 diligence, a creditor is unable to determine whether the loan has 1 or more of the loan features in
110 clause (i) through (vii), inclusive.

111 "Creditor", a person or entity that holds or controls, partially, wholly, indirectly, directly
112 or in a nominee capacity, a mortgage loan securing an owner-occupied residential property,
113 including, but not limited to, an originator, holder, investor, assignee, successor, trust, trustee,
114 nominee holder, mortgage electronic registration system or mortgage servicer, including the
115 Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation;
116 provided, that "creditor" shall also include any servant, employee or agent of a creditor.

117 "Creditor's representative", a person who has the authority to negotiate and approve the
118 terms of and modify a mortgage loan, under a servicing agreement.

119 "Modified mortgage loan", a mortgage modified from its original terms including, but not
120 limited to, a loan modified under 1 of the following: (i) the Home Affordable Modification
121 Program (ii) the Federal Deposit Insurance Corporation's Loan Modification Program, (iii) any
122 modification program that a lender uses which is based on accepted principles and the safety and
123 soundness of the institution and authorized by the National Credit Union Administration, the

124 division of banks or any other instrumentality of the commonwealth, (iv) the Federal Housing
125 Administration or (v) a similar federal loan modification plan; provided however, that if a
126 particular federal or state loan modification program applies to the loan, the creditor shall, at a
127 minimum, perform the net present value analysis for the loan under the applicable federal or state
128 modification program.

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

131 “Net present value”, the present net value of a residential property based on a calculation
132 using 1 of the following: (i) the federal home affordable modification program base net present
133 value model, (ii) the Federal Deposit Insurance Corporation’s loan modification program, (iii)
134 the Massachusetts Housing Finance Agency’s loan program used solely by the agency to
135 compare the expected economic outcome of a loan with or without a modified mortgage loan or
136 (iv) any model approved by the division of banks to consider the total present value of a series of
137 future cash flows relative to a mortgage loan.

138 “Residential property”, real property located in the commonwealth, on which there is a
139 dwelling house with accommodations for 4 or fewer separate households and occupied, or to be
140 occupied, in whole or in part by the obligor on the mortgage debt; provided, however, that
141 residential property shall be limited to the principal residence of a person; provided, further, that
142 residential property shall not include an investment property or residence other than a primary
143 residence; provided, further, that residential property shall not include residential property taken
144 in whole or in part as collateral for a commercial loan; and provided, further, that residential
145 property shall not include a property subject to condemnation or receivership..

146 (b) A creditor shall not publish notice of a foreclosure sale, as required by section 14,
147 upon certain mortgage loans unless it has first taken reasonable steps and made a good faith
148 effort to avoid foreclosure. A creditor shall have taken reasonable steps and made a good faith
149 effort to avoid foreclosure if the creditor has considered: (i) an assessment of the borrower's
150 ability to make an affordable monthly payment, (ii) the net present value of receiving payments
151 under a modified mortgage loan as compared to the anticipated net recovery following
152 foreclosure and (iii) the interests of the creditor, including, but not limited to, investors.

153 (1) Except as otherwise specified in a contract, a servicer of pooled residential mortgages
154 may determine whether the net present value of the payments on the modified mortgage loan is
155 likely to be greater than the anticipated net recovery that would result from foreclosure to all
156 investors and holders of beneficial interests in such investment, but not to any individual or
157 groups of investors or beneficial interest holders. The servicer shall act in the best interests of all
158 such investors or holders of beneficial interests if the servicer agrees to or implements a modified
159 mortgage loan or takes reasonable loss mitigation actions that comply with this section. Any
160 modified mortgage loan offered to the borrower shall comply with current federal and state law,
161 including, but not limited to, all rules and regulations pertaining to mortgage loans and the
162 borrower shall be able to reasonably afford to repay the modified mortgage loan according to its
163 scheduled payments.

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

167 (i) determines a borrower's current ability to make an affordable monthly
168 payment;

169 (ii) identifies a modified mortgage loan that achieves the borrower's affordable
170 monthly payment, which may include 1 or more of the following: reduction in principal,
171 reduction in interest rate or an increase in amortization period; provided however, that the
172 amortization period shall not be more than a 15-year increase; provided further, that no modified
173 mortgage loan shall have an amortization period that exceeds 45 years; and provided further, that
174 the creditor shall provide to the borrower a good faith estimate detailing the actual costs of all
175 principal and interest to be paid under the modification compared to the actual costs of all
176 principal and interest to be paid under the existing mortgage;

177 (iii) conducts a compliant analysis comparing the net present value of the modified
178 mortgage loan and the creditor's anticipated net recovery that would result from foreclosure;
179 provided, that the analysis shall be compliant if the analysis is in accordance with the formula
180 presented in at least 1 of the following: (A) the home affordable modification program, (B) the
181 Federal Deposit Insurance Corporation's loan modification program, (C) any modification
182 program that a lender uses which is based on accepted principles and the safety and soundness of
183 the institution and authorized by the National Credit Union Administration, the division of banks
184 or any other instrumentality of the commonwealth, (D) the Federal Housing Administration or
185 (E) a similar federal loan modification plan; and

186 (iv) either (A) in all circumstances where the net present value of the modified
187 mortgage loan exceeds the anticipated net recovery at foreclosure, agrees to modify the loan in a
188 manner that provides for the affordable monthly payment; or (B) in circumstances where the net

189 present value of the modified mortgage loan is less than the anticipated net recovery of the
190 foreclosure, or does not meet the borrower's affordable monthly payment, notifies the borrower
191 that no modified mortgage loan will be offered and provides a written summary of the creditor's
192 net present value analysis and the borrower's current ability to make monthly payments, after
193 which the creditor may proceed with the foreclosure process in conformity with this chapter.

194 (c) Under this section, for certain mortgage loans, the creditor shall send notice,
195 concurrently with the notice required by subsection (g) of section 35A, of the borrower's rights
196 to pursue a modified mortgage loan. Said notice shall be considered delivered to the borrower
197 when sent by first class mail and certified mail or similar service by a private carrier to the
198 borrower at the borrower's address last known to the mortgagee or anyone holding thereunder.
199 A copy of said notice shall be filed with the attorney general. The process for determining
200 whether a modified mortgage loan is offered shall take no longer than 150 days. Not more than
201 30 days following delivery of the notice as provided for in this subsection, a borrower who holds
202 a certain mortgage loan shall notify a creditor of (i) the borrower's intent to pursue a modified
203 mortgage loan which shall include a statement of the borrower's income and a complete list of
204 total debts and obligations, as requested by the creditor, at the time of receipt of the notice, (ii)
205 the borrower's intent to pursue an alternative to foreclosure, including a short sale or deed-in-lieu
206 of foreclosure, (iii) the borrower's intent not to pursue a modified mortgage loan and pursue the
207 right to cure period described in section 35A, (iv) the borrower's intent to waive the right to cure
208 period and proceed to foreclosure or (v) the borrower's intent to participate in the Massachusetts
209 foreclosure mediation program under section 35D. A borrower who holds a certain mortgage
210 loan and fails to respond to the creditor within 30 days of delivery of the notice provided for in
211 this subsection shall be considered to have forfeited the right to cure period and shall be subject

212 to a right to cure period of 90 days. A borrower shall be presumed to have notified the creditor if
213 the borrower provides proof of delivery through the United States Postal Service or similar
214 carrier. Not more than 30 days following receipt of the borrower's notification that the borrower
215 intends to pursue a modified mortgage loan, a creditor shall provide the borrower with its
216 assessment, in writing, under subsection (b). The assessment shall include, but not be limited to:
217 (i) a written statement of the borrower's income, debts and obligations as determined by the
218 creditor, (ii) the creditor's net present value analysis of the mortgage loan, (iii) the creditor's
219 anticipated net recovery at foreclosure, (iv) a statement of the interests of the creditor and (v) a
220 modified mortgage loan offer under the requirements of this section or notice that no modified
221 mortgage loan will be offered. If a creditor offers a modified mortgage loan, the offer shall
222 include the first and last names and contact phone numbers of the creditor's representative;
223 provided, that the creditor shall not assign more than 2 creditor's representatives responsible for
224 negotiating and approving the terms of and modifying the mortgage loan. The assessment shall
225 be provided by first class and certified mail. A creditor shall be presumed to have provided the
226 assessment to the borrower if the creditor provides proof of delivery through the United States
227 Postal Service or similar carrier. A borrower who receives a modified mortgage loan offer from
228 a creditor shall respond within 30 days of receipt of the assessment and offer of a modified
229 mortgage loan. The borrower may: (i) accept the offer of a loan modification as provided by the
230 creditor, (ii) make a reasonable counteroffer or (iii) state that the borrower wishes to waive the
231 borrower's rights as provided by this section and proceed to foreclosure. The borrower's
232 response shall be in writing and, if a counteroffer is proposed, shall include substantiating
233 documentation in support of the counteroffer. The response shall be provided by first class and
234 certified mail. A borrower shall be presumed to have responded if the borrower provides proof

235 of delivery through the United States Postal Service or similar carrier. A borrower who fails to
236 respond to the creditor within 30 days of receipt of a modified mortgage loan offer shall be
237 considered to have forfeited the 150 day right to cure period and shall be subject to a right to
238 cure period of 90 days. Where a counteroffer is proposed, the creditor shall accept, reject or
239 propose a counteroffer to the borrower within 30 days of receipt. Under this section, additional
240 offers by both parties shall be considered during the right to cure period; provided, however, that
241 a borrower may at any time state, in writing, that the borrower wishes to waive the borrower's
242 rights as provided by this section and proceed to foreclosure. Nothing in this section shall be
243 construed as preventing a creditor and a borrower from negotiating the terms of a modified
244 mortgage loan by telephone or in person following the initial offer of a modified mortgage loan
245 by a creditor; provided, however, that all offers, whether by a creditor or a borrower, shall be in
246 writing and signed by the offeror. The right to a modified mortgage loan, as described in this
247 section, shall be granted once during any 3-year period, regardless of the mortgage holder.

248 (d) The notice required in subsection (c) shall, at a minimum, include the appropriate
249 contact information for modification assistance within the office of the attorney general;
250 provided, that, the notice shall be similar in substance and form to the notice promulgated by the
251 division of banks under section 35A.

252 (e) Nothing in this section shall prevent a creditor from offering or accepting an
253 alternative to foreclosure, such as a short sale or deed-in-lieu of foreclosure, if the borrower
254 requests such alternative, rejects a modified mortgage loan offer or does not qualify for a
255 modified mortgage loan under this section.

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

261 The affidavit certifying compliance with this section shall be conclusive evidence in
262 favor of an arm's-length third party purchaser for value, at or subsequent to the resulting
263 foreclosure sale, that the foreclosing party identified or referred to as the holder of the foreclosed
264 mortgage in the affidavit has fully complied with this section and is entitled to proceed with
265 foreclosure of the subject mortgage under the power of sale contained in the mortgage and any 1
266 or more of the foreclosure procedures authorized in this chapter; provided that, the arm's-length
267 third party purchaser for value relying on such affidavit shall not be liable for any failure of the
268 foreclosing party to comply and title to the real property thereby acquired shall not be set aside
269 on account of such failure. The filing of such affidavit shall not relieve the affiant, or other
270 person on whose behalf the affidavit is executed, from liability for failure to comply with this
271 section, including by reason of any statement in the affidavit. For purposes of this subsection,
272 the term "arm's-length, third party purchaser for value" shall include such purchaser's heirs,
273 successors and assigns.

274 (g) Within 30 days of the end of each calendar quarter of the completion of the loan
275 modification process under this section, a creditor shall report the final outcome of each loan
276 modification on all mortgage loans for which the creditor sent to a borrower a notice of the right
277 to pursue a modified mortgage loan to the division of banks.

278 (h) The division of banks shall adopt, amend or repeal regulations to aid in the
279 administration and enforcement of this section, including the minimum requirements which
280 constitute a good faith effort by the borrower to respond to the notice required under subsection
281 (c); provided, that, such regulations may include requirements for reasonable steps and good
282 faith efforts of the creditor to avoid foreclosure and safe harbors for compliance in addition to
283 those under this section. The division of banks shall make any available net present value
284 models accessible to all creditors.

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

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

288 "Creditor", a person or entity that holds or controls, partially, wholly, indirectly, directly
289 or in a nominee capacity, a mortgage loan securing a residential property, including, but not
290 limited to, an originator, holder, investor, assignee, successor, trust, trustee, nominee holder,
291 mortgage electronic registration system or mortgage servicer, including the Federal National
292 Mortgage Association or the Federal Home Loan Mortgage Corporation. The term creditor shall
293 also include any servant, employee or agent of a creditor.

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

296 “Residential property”, real property located in the commonwealth on which there is a
297 dwelling house with accommodations for 4 or fewer separate households and occupied, or to be
298 occupied, in whole or in part by the obligor on the mortgage debt; provided, however, that
299 residential property shall be limited to the principal residence of a person; provided, further, that

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

303 (b) A creditor shall not publish notice of foreclosure, under section 14, when the creditor
304 knows or should know that such creditor is not the present holder of the mortgage loan,
305 including, but not limited to, if the creditor is not the original mortgagee and commences
306 foreclosure without possessing a valid written, signed and dated assignment evidencing the
307 assignment of the mortgage.

308 (c) A creditor violates this chapter if the creditor imposes upon a third party the cost of
309 correcting, curing or confirming documentation relating to the sale, transfer or assignment of a
310 mortgage loan, including, but not limited to, costs related to curative actions taken because a
311 foreclosure was commenced without the creditor's possession of a valid, written, signed and
312 dated assignment evidencing the assignment of the mortgage, in violation of section 14. A third
313 party may recover all of the third party's costs including reasonable attorneys' fees for having to
314 correct, cure or confirm documentation.

315 (d) A creditor violates this chapter if the creditor makes statements to a state or federal
316 court related to foreclosure or compliance with this chapter, orally or in writing, that it knows or
317 should know are false, including, but not limited to, statements about the offering of a loan
318 modification, the borrower's history of payments, the validity of the assignment of the mortgage
319 loan, that the creditor is the record holder of the mortgage loan or the creditor's compliance with
320 any other requirements of this chapter.

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

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

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

328 (h) In all circumstances in which an offer to purchase either a mortgage loan or
329 residential property is made by an entity with a tax-exempt filing status under section 501 (c)(3)
330 of the Internal Revenue Code, or an entity controlled by an entity with such tax exempt filing
331 status, no creditor shall require as a condition of sale or transfer to any such entity any affidavit,
332 statement, agreement or addendum limiting ownership or occupancy of the residential property
333 by the borrower and, if obtained, such affidavit, statement, agreement or addendum shall not
334 provide a basis to avoid a sale or transfer nor shall it be enforceable against such acquiring entity
335 or any real estate broker, borrower or settlement agent named in such affidavit, statement or
336 addendum.

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

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

340 “Creditor”, a person or entity that holds or controls, partially, wholly, indirectly, directly
341 or in a nominee capacity, a mortgage loan securing an owner-occupied residential property,

342 including, but not limited to, an originator, holder, investor, assignee, successor, trust, trustee,
343 nominee holder, mortgage electronic registration system or mortgage servicer, including the
344 Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation;
345 provided, that “creditor” shall also include any servant, employee or agent of a creditor.

346 “Creditor’s representative”, a person who has the authority to negotiate and approve the
347 terms of and modify a mortgage loan, under a servicing agreement.

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

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

357 “Net present value”, the present net value of a residential property based on a calculation
358 using 1 of the following: (i) the federal home affordable modification program base net present
359 value model, (ii) the Federal Deposit Insurance Corporation’s loan modification program, (iii)
360 the Massachusetts Housing Finance Agency’s loan program used solely by the agency to
361 compare the expected economic outcome of a loan with or without a modified mortgage loan or
362 (iv) any model approved by the division of banks to consider the total present value of a series of
363 future cash flows relative to a mortgage loan.

364 “Residential property”, real property located in the commonwealth, on which there is a
365 dwelling house with accommodations for 4 or fewer separate households and occupied, or to be
366 occupied, in whole or in part by the obligor on the mortgage debt; provided, however, that
367 residential property shall be limited to the principal residence of a person; provided, further, that
368 residential property shall not include an investment property or residence other than a primary
369 residence; provided, further, that residential property shall not include residential property taken
370 in whole or in part as collateral for a commercial loan.

371 (b) There shall be a Massachusetts foreclosure mediation program administered by the
372 Massachusetts office of public collaboration at the University of Massachusetts at Boston.

373 (c) A creditor shall, concurrently with the notice sent to the borrower of residential
374 property under section 35A, give notice to the borrower of the borrower’s right to participate in
375 the Massachusetts foreclosure mediation program by attaching to the right to cure default notice
376 (i) notice of the availability of foreclosure mediation, in such form as the office of public
377 collaboration prescribes and (ii) a foreclosure mediation request form, in such form as the office
378 of public collaboration prescribes. The notice shall include a declaration in the 5 most common
379 languages other than English, appearing on the first page and stating: “This is an important
380 notice regarding a possible foreclosure on your home. Have it translated immediately.”

381 A borrower may request foreclosure mediation by submitting the foreclosure mediation
382 request form to the creditor not more than 30 days after receipt of the notice.

383 (d) An in-person mediation session shall be conducted by a neutral third-party mediator
384 between the borrower, the borrower’s representative or housing counselor and the creditor’s
385 representative, who shall have the authority to negotiate an alternative to foreclosure, including,

386 but not limited to, (i) a modified mortgage loan, (ii) a reduction in principal, (iii) a reduction in
387 interest rate or (iv) an increase in the amortization period of the mortgage loan; provided,
388 however, that an alternative form of meeting may be mutually agreed upon by the mortgagor, the
389 mortgagee and the mediator. As early as possible, but not later than 5 days before the scheduled
390 mediation, the creditor shall provide proof of ownership, a written net present value analysis and
391 the creditor's anticipated net recovery at foreclosure to the borrower and the Massachusetts
392 foreclosure mediation program. When required, the creditor shall bring additional documents
393 supporting the net present value analysis to the mediation session. If the initial mediation does
394 not result in an agreement, the parties may agree to a second mediation session. If mediation
395 results in an agreement, the borrower shall have not fewer than 7 days to review and sign the
396 mediation agreement and return it to the Massachusetts foreclosure mediation program and the
397 creditor. Not later than 5 days after the mediation session is complete, the mediator shall write a
398 report setting forth the result of the mediation and send a copy of the report to the borrower and
399 the creditor. The mediation period shall conclude not more than 120 days after the borrower
400 elects to participate in mediation. The right to foreclosure mediation under this section shall be
401 granted once during any 3-year period, regardless of the mortgage holder.

402 (e) If the borrower does not elect to participate in mediation and does not pursue a
403 modified mortgage loan under section 35B, if eligible, foreclosure may proceed under this
404 chapter. If a borrower elects to participate in the Massachusetts foreclosure mediation program,
405 a creditor shall not accelerate the note or otherwise initiate foreclosure proceedings unless the
406 mediator has certified that the creditor participated in the Massachusetts foreclosure mediation
407 program and engaged in mediation in good faith, made all reasonable efforts to find an

408 alternative to foreclosure and any agreement is in full compliance with all state and federal
409 guidelines.

410 (f) Any costs necessary to establish and operate the Massachusetts foreclosure mediation
411 program shall be borne by the parties to the mediation under the guidelines developed under
412 subsection (g) and by a \$50 surcharge on the filing fee for foreclosure complaints filed under the
413 Servicemembers Civil Relief Act. A borrower's portion of the mediation fee shall not exceed 15
414 per cent of the total cost of the mediation. A borrower's inability to pay for mediation shall not
415 be a bar to participation in the Massachusetts foreclosure mediation program.

416 (g) The Massachusetts office of public collaboration shall develop guidelines for the
417 mediation process, subject to approval by the attorney general.

418 (h) The borrower's or creditor's rights or defenses in the foreclosure action are not
419 waived by participating in the foreclosure mediation program.

420 (i) Nothing in this section shall require a creditor to modify a mortgage or change the
421 terms of payment of a mortgage.

422 SECTION 2A. Section 13 of chapter 258 of the acts of 2010 is hereby amended by
423 striking out the date "August 1, 2012" and inserting in place thereof the following date:- "August
424 1, 2014".

425 SECTION 2B. There is hereby established a task force to consist of 13 members; 1 of
426 whom shall be a representative of the Massachusetts Bankers Association; 1 of whom shall be
427 the attorney general, or a designee; 2 of whom shall be the chairs of the joint committee on
428 housing; 2 of whom shall be the chairs of the joint committee on financial services; 2 of whom

429 shall be the chairs of the joint committee on the judiciary; and 5 of whom shall be appointed by
430 the governor, 2 of whom shall be representatives of a legal organization which represents
431 consumers or homeowners in the commonwealth. The task force shall study ways in which the
432 commonwealth can encourage the prevention of unnecessary vacancies following foreclosures.
433 This shall include, but not be limited to, the feasibility of allowing a foreclosed homeowner to
434 continue to occupy the foreclosed property, in whole or in part, until a binding purchase and sale
435 agreement has been executed with a purchaser who intends to occupy the housing
436 accommodation as such purchaser's primary residence and who is not a foreclosing owner. The
437 task force shall study the feasibility in which these situations would be subject to landlord/tenant
438 law in the commonwealth and where the foreclosure sale purchaser may initiate eviction
439 proceedings against the foreclosed homeowner under the chapter 239 of the General Laws in
440 possession of the property.

441 SECTION 3. The division of banks shall, in consultation with the attorney general,
442 annually track the final outcome of the loan modification process on all certain mortgage loans
443 for which the creditor sent to a borrower a notice of the right to pursue a modified mortgage loan
444 under section 35B of chapter 244 of the General Laws and provide a report of said results to the
445 joint committee on financial services within 90 days of the end of each calendar year.

446 SECTION 4. The division of banks shall adopt, amend or repeal regulations to aid in the
447 administration and enforcement of section 35B of chapter 244 of the General Laws, including the
448 minimum requirements which constitute a good faith effort by the borrower to respond to the
449 notice required under subsection (c) of said section 35B of said chapter 244; provided, that, such
450 regulations may include requirements for reasonable steps and good faith efforts of the creditor

451 to avoid foreclosure and safe harbors for compliance in addition to those under said section 35B
452 of said chapter 244.

453 SECTION 5. Notwithstanding the effective date of section 2, the provisions of section 2
454 shall apply to any person receiving notice under section 35A of chapter 244 of the General Laws
455 after the effective date of this act.

456 SECTION 6. Section 3 is hereby repealed.

457 SECTION 7. Sections 1, 2 and 3 shall take effect 90 days after the effective date of this
458 act.

459 SECTION 8. Section 6 shall take effect on December 31, 2017.