SENATE DOCKET, NO. 1293 FILED ON: 1/20/2011

SENATE . . . . . No. 868

The Commonwealth of Massachusetts

PRESENTED BY:

Karen E. Spilka

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 to prevent unlawful and unnecessary foreclosures .

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Karen E. Spilka	
Sal N. DiDomenico	*Middlesex, Suffolk, and Essex*
Stephen R. Canessa	*12th Bristol*
Marc R. Pacheco	
Carolyn C. Dykema	*8th Middlesex*
Cory Atkins	*14th Middlesex*
Jennifer L. Flanagan	
Elizabeth A. Malia	*11th Suffolk*
Mark C. Montigny	
Benjamin Swan	*11th Hampden*
Attorney General Martha Coakley	*One Ashburton Place*

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By Ms. Spilka, a petition (accompanied by bill, Senate, No. 868) of Karen E. Spilka, Sal N. DiDomenico, Stephen R. Canessa, Marc R. Pacheco and other members of the General Court for legislation to prevent unlawful and unnecessary foreclosures. Financial Services.

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

An Act to prevent unlawful and unnecessary foreclosures .

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

SECTION 1. Section 35 of chapter 244 of the General Laws, as appearing in the 2010 Official Edition, is hereby amended by adding the following new subsection:-

Section 35B. Prerequisite to Commencing Foreclosure Proceedings For Certain Mortgage Loans; Reasonable Steps and Good Faith Efforts; Safe Harbor; Regulatory Authority.

(a) Commercially Reasonable Efforts to Avoid Foreclosures. (1) A creditor shall not commence foreclosure upon certain mortgage loans pursuant to this Chapter unless it has first taken reasonable steps and good faith efforts to avoid foreclosure. The determination whether a creditor has taken reasonable steps and good faith efforts prior to commencing foreclosure shall consider, without limitation: (i) an assessment of the borrower's current circumstances, including without limitation the borrower's current income, debts and obligations; (ii) the net present value of receiving payments pursuant to a modified mortgage

13 loan as compared to the anticipated net recovery following foreclosure; (iii) the interests of the
14 creditor, including, without limitation, investors and, in the event the creditor has received
15 federal or state money, taxpayers.

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

31 (b) Safe Harbor. A creditor shall be deemed to comply with subsection (a), if,
32 prior to commencing foreclosure on certain mortgage loans, the creditor:

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

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

40 (iii) conducts an analysis comparing the net present value
41 of the modified loan and the creditor's anticipated net recovery that would result from
42 foreclosure; and

43 (iv) either (a) in all circumstances where the net present
44 value of the modified loan exceeds the anticipated net recovery at foreclosure, offers and agrees
45 to modify the loan in a manner that provides the affordable monthly payment, or (b) in
46 circumstances where the net present value of the modified loan is less than the anticipated net
47 recovery of the foreclosure, notifies the borrower that no loan modification will be offered and
48 provides a written summary of the creditor's net present value analysis, after which the creditor
49 may proceed with the foreclosure process in conformity with Section 35A of this chapter.

50 (c) The Attorney General may adopt, amend or repeal rules and regulations to
51 aid in the administration and enforcement of this Section, including regulations that determine
52 further requirements for reasonable steps and good faith efforts to avoid foreclosures as required
53 by subsection (a) and that provide safe harbors for compliance in addition to that set forth in
54 subsection (b).

55 (d) Prior to commencing foreclosure on certain mortgage loans, the creditor
56 must certify compliance with this Section in an affidavit based on personal knowledge. The
57 creditor shall record this affidavit based upon personal knowledge with the appropriate registry
58 of deeds, or for registered land, with the land court prior to providing a borrower with notice
59 under section fourteen of this Chapter.

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

61 (f) This Act shall take effect upon its passage.

62 For purposes of this section:

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

69 “Borrower” shall mean a mortgagor of a mortgage loan.

70 “Certain mortgage loan” shall mean a loan to a natural person made primarily for
71 personal, family or household purposes secured wholly or partially by a mortgage on an owner-
72 occupied residential property that bear one or more of the following loan features:

73 (i) an introductory interest rate of a duration of five
74 years or less, which term is followed by a period where the interest rate may exceed the
75 introductory rate;

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

77 (iii) a payment option feature, where any one of the

78 payment options is less than principal and interest fully amortized over the life of the loan;

79 (iv) did not require full documentation of income or

80 assets;

81 (v) prepayment penalties;

82 (vi) the loan was a refinance of an existing loan that

83 occurred within twelve months of the most recent mortgage loan;

84 (vii) the loan was underwritten with a Loan-to-Value

85 ratio at or above 90%;

86 (viii) the loan was underwritten as a component of a loan

87 transaction wherein the combined Loan-to-Value ratio was above 95% or

88 (ix) the loan was underwritten where the ratio of the

89 borrower's debt, including all housing-related and recurring monthly debt, to the borrower's

90 income exceeded 38%.

91 "Mortgage loan", a loan to a natural person made primarily for personal, family or

92 household purposes secured wholly or partially by a mortgage on residential property

93 "Owner-occupied residential property" shall mean real property located in the

94 commonwealth having thereon a dwelling house with accommodations for four or less separate

95 households and occupied, or to be occupied, in whole or in part by the obligor on the mortgage

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

98

99 SECTION 2. Section 35 of chapter 244 of the General Laws, as appearing in
100 the 2010 Official Edition, is hereby amended by adding the following new subsection:-

101 Section 35C. Prohibited Conduct In Connection with Foreclosure

102 (a) Proper documentation prior to foreclosure. A creditor may not commence
103 foreclosure when it knows or should know that it is not the present holder of the mortgage loan,
104 including, without limitation, if the creditor is not the original mortgagee and commences
105 foreclosure without possessing a valid written, signed and dated assignment evidencing the
106 assignment of the mortgage, in accordance with section fourteen of chapter two hundred and
107 forty-four.

108 (b) No imposition of unfair costs. A creditor violates this Chapter if it imposes
109 upon a third party the cost of correcting, curing, or confirming documentation relating to the sale,
110 transfer, or assignment of a mortgage loan, including, without limitation, a creditor must bear the
111 costs related to curative actions taken because a foreclosure was commenced without the
112 creditor's possession of a valid, written, signed, and dated assignment evidencing the assignment
113 of the mortgage, in violation of section fourteen of chapter two hundred and forty-four.

114 (c) No misrepresentations. A creditor violates this Chapter if it makes
115 statements to a state or federal court related to foreclosure or compliance with this Chapter,
116 orally or in writing, that it knows or should know are false, including, without limitation,

117 statements about the offering of a loan modification, the borrower's history of payments, the
118 validity of the assignment of the mortgage loan, that the creditor is the record holder of the
119 mortgage loan, or the creditor's compliance with any other requirements of this Chapter.

120 (d) No imposition of fees for services not performed. A creditor violates this
121 Chapter if the creditor imposes a fee upon a borrower for goods not rendered or services not
122 performed in connection with a foreclosure.

123 (e) Business Referrals. No person shall give and no person shall accept any fee,
124 kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise,
125 incident to or a part of a foreclosure involving a mortgage loan for having referred foreclosure
126 business or services to any person.

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

131 (g) The Attorney General may adopt, amend or repeal rules and regulations to
132 aid in the administration and enforcement of this Section.

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

134 (i) This Act shall take effect upon its passage.

135 For purposes of this section:

136 "Creditor", a person or entity that holds or controls, partially, wholly, indirectly, directly,
137 or in a nominee capacity, a mortgage loan securing a residential property, including, without

138 limitation, an originator, holder, investor, assignee, successor, trust, trustee, nominee holder,
139 Mortgage Electronic Registration System or mortgage servicer, including the Federal National
140 Mortgage Association or the Federal Home Loan Mortgage Corporation. "Creditor" shall also
141 include any servant, employee or agent of a creditor.

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

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

145

146 SECTION 3. Section 14 of chapter 244 of the General Laws, as appearing in
147 the 2010 Official Edition, is hereby amended by replacing the existing Section 14 with the
148 following new Section:

149 Section 14. The mortgagee or person having his estate in the land mortgaged,
150 or a person authorized by the power of sale, or the attorney duly authorized by a writing under
151 seal, or the legal guardian or conservator of such mortgagee or person acting in the name of such
152 mortgagee or person, may, upon breach of condition and without action, do all the acts
153 authorized or required by the power; but no sale under such power shall be effectual to foreclose
154 a mortgage, unless, previous to such sale, notice thereof has been published once in each of three
155 successive weeks, the first publication to be not less than twenty-one days before the day of sale,
156 in a newspaper, if any, published in the town where the land lies or in a newspaper with general
157 circulation in the town where the land lies and notice thereof has been served by delivering a
158 copy of the notice personally to the owner or owners of record of the equity of redemption as of
159 thirty days prior to the date of sale, said notice served by delivering a copy of the notice

160 personally at least thirty days prior to the date of sale to said owner or owners of to the address
161 set forth in section sixty-one of chapter one hundred and eighty-five, if the land is then registered
162 or, in the case of unregistered land, to the last owner or owners of the equity of redemption
163 appearing on the records of the holder of the mortgage, if any, or if none, to the owner or owners
164 as given on his deed or on the petition for probate by which he acquired title, if any, or if in
165 either case no owner appears, then mailed by registered mail to the address to which the tax
166 collector last sent the tax bill for the mortgaged premises to be sold, or if no tax bill has been sent
167 for the last preceding three years, then mailed by registered mail to the address of any of the
168 parcels of property in the name of said owner of record which are to be sold under the power of
169 sale and unless a copy of said notice of sale has been sent by registered mail to all persons of
170 record as of thirty days prior to the date of sale holding an interest in the property junior to the
171 mortgage being foreclosed, said notice to be mailed at least thirty days prior to the date of sale to
172 each such person at the address of such person set forth in any document evidencing the interest
173 or to the last address of such person known to the mortgagee. Any person of record as of thirty
174 days prior to the date of sale holding an interest in the property junior to the mortgage being
175 foreclosed may waive at any time, whether prior or subsequent to the date of sale, the right to
176 receive notice by mail to such person under this section and such waiver shall be deemed to
177 constitute compliance with such notice requirement for all purposes. If no newspaper is
178 published in such town, or if there is no newspaper with general circulation in the town where
179 the land lies, notice may be published in a newspaper published in the county where the land lies,
180 and this provision shall be implied in every power of sale mortgage in which it is not expressly
181 set forth. A newspaper which by its title page purports to be printed or published in such town,
182 city or county, and having a circulation therein, shall be sufficient for the purpose.

183 The following form of foreclosure notice may be used and may be altered as

184 circumstances require; but nothing herein shall be construed to prevent the use of other forms.

185 (Form.)

186 MORTGAGEE'S SALE OF REAL

187 ESTATE.

188 By virtue and in execution of the Power of Sale contained in a

189 certain mortgage given

190 by..... to..... dated..... and recorded

191 with

192 .....

193 Deeds, Book....., page....., of which mortgage the

194 undersigned is the present

195 holder,.....

196 (If by assignment, or in any fiduciary capacity, give reference to the assignment(s)

197 recorded with .....Deeds, Book....., page....., of which mortgage the undersigned is the

198 present holder,.....)

199 for breach of the conditions of said mortgage and for the purpose of foreclosing the same

200 will be sold at Public Auction at.....o'clock,..... M. on the..... day of..... A.D.

201 (insert year),..... (place)..... all and singular the premises described in said mortgage,

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

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

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

208 Other terms to be announced at the sale.

209 (Signed)

210 _____

211 Present holder of said mortgage.___

212 A notice of sale in the above form, published in accordance with the power in the
213 mortgage and with this chapter, together with such other or further notice, if any, as is required
214 by the mortgage, shall be a sufficient notice of the sale; and the premises shall be deemed to have
215 been sold, and the deed thereunder shall convey the premises, subject to and with the benefit of
216 all restrictions, easements, improvements, outstanding tax titles, municipal or other public taxes,
217 assessments, liens or claims in the nature of liens, and existing encumbrances of record created
218 prior to the mortgage, whether or not reference to such restrictions, easements, improvements,
219 liens or encumbrances is made in the deed; but no purchaser at the sale shall be bound to
220 complete the purchase if there are encumbrances, other than those named in the mortgage and
221 included in the notice of sale, which are not stated at the sale and included in the auctioneer's
222 contract with the purchaser.

223 In the event a mortgagee holds a mortgage pursuant to an assignment, for purposes of this
224 section and section twenty-one of chapter one hundred and eighty-three, a mortgagee shall
225 establish that it is the present record holder of the mortgage intended to be foreclosed upon,
226 ensure that the chain of assignments establishing that the mortgagee is the present holder have
227 been duly recorded in the appropriate registry of deeds or, for registered land, with the land
228 court, and reference all assignments in the notice of sale required in this section.