

HOUSE No. 01219

The Commonwealth of Massachusetts

PRESENTED BY:

Steven M. Walsh

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 passage of the accompanying bill:

An Act to prevent unlawful and unnecessary foreclosures.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Steven M. Walsh</i>	<i>11th Essex</i>
<i>Frank I. Smizik</i>	<i>15th Norfolk</i>
<i>Stephen R. Canessa</i>	<i>12th Bristol</i>
<i>Timothy J. Toomey, Jr.</i>	<i>26th Middlesex</i>
<i>Chris Walsh</i>	<i>6th Middlesex</i>
<i>Carolyn C. Dykema</i>	<i>8th Middlesex</i>
<i>Cory Atkins</i>	<i>14th Middlesex</i>
<i>Jennifer L. Flanagan</i>	<i>Worcester and Middlesex</i>
<i>Denise Andrews</i>	<i>2nd Franklin</i>
<i>Christine E. Canavan</i>	<i>10th Plymouth</i>
<i>Michael D. Brady</i>	<i>9th Plymouth</i>
<i>James J. O'Day</i>	<i>14th Worcester</i>
<i>Sean Garballey</i>	<i>23rd Middlesex</i>
<i>Brian Ashe</i>	<i>2nd Hampden</i>
<i>Denise Provost</i>	<i>27th Middlesex</i>
<i>Kathi-Anne Reinstein</i>	<i>16th Suffolk</i>
<i>Linda Dorcena Forry</i>	<i>12th Suffolk</i>

John W. Scibak

2nd Hampshire

Carlo Basile

1st Suffolk

Jennifer E. Benson

37th Middlesex

Bruce J. Ayers

1st Norfolk

HOUSE No. 01219

By Mr. Steven M. Walsh of Lynn, petition (accompanied by bill, House, No. 01219) of Linda Dorcena Forry and others relative to preventing unlawful and unnecessary foreclosures. Joint Committee on 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:

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

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

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

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

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

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

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

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

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

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

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

52 (d) Prior to commencing foreclosure on certain mortgage loans, the creditor must certify
53 compliance with this Section in an affidavit based on personal knowledge. The creditor shall
54 record this affidavit based upon personal knowledge with the appropriate registry of deeds, or for

55 registered land, with the land court prior to providing a borrower with notice under section
56 fourteen of this Chapter.

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

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

59 For purposes of this section:

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

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

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

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

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

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

- 75 (iv) did not require full documentation of income or assets;
- 76 (v) prepayment penalties;
- 77 (vi) the loan was a refinance of an existing loan that occurred within twelve months of the
78 most recent mortgage loan;
- 79 (vii) the loan was underwritten with a Loan-to-Value ratio at or above 90%;
- 80 (viii) the loan was underwritten as a component of a loan transaction wherein the combined
81 Loan-to-Value ratio was above 95% or
- 82 (ix) the loan was underwritten where the ratio of the borrower's debt, including all housing-
83 related and recurring monthly debt, to the borrower's income exceeded 38%.
- 84 "Mortgage loan", a loan to a natural person made primarily for personal, family or household
85 purposes secured wholly or partially by a mortgage on residential property
- 86 "Owner-occupied residential property" shall mean real property located in the commonwealth
87 having thereon a dwelling house with accommodations for four or less separate households and
88 occupied, or to be occupied, in whole or in part by the obligor on the mortgage debt. This
89 definition shall be limited to the principal residence of a person, and not an investment property
90 or second home.

91

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

94 Section 35C. Prohibited Conduct In Connection with Foreclosure

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

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

106 (c) No misrepresentations. A creditor violates this Chapter if it makes statements to a state or
107 federal court related to foreclosure or compliance with this Chapter, orally or in writing, that it
108 knows or should know are false, including, without limitation, statements about the offering of a
109 loan modification, the borrower's history of payments, the validity of the assignment of the
110 mortgage loan, that the creditor is the record holder of the mortgage loan, or the creditor's
111 compliance with any other requirements of this Chapter.

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

115 (e) Business Referrals. No person shall give and no person shall accept any fee, kickback, or
116 thing of value pursuant to any agreement or understanding, oral or otherwise, incident to or a part

117 of a foreclosure involving a mortgage loan for having referred foreclosure business or services to
118 any person.

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

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

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

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

127 For purposes of this section:

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

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

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

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

140 Section 14. The mortgagee or person having his estate in the land mortgaged, or a person
141 authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the
142 legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee
143 or person, may, upon breach of condition and without action, do all the acts authorized or
144 required by the power; but no sale under such power shall be effectual to foreclose a mortgage,
145 unless, previous to such sale, notice thereof has been published once in each of three successive
146 weeks, the first publication to be not less than twenty-one days before the day of sale, in a
147 newspaper, if any, published in the town where the land lies or in a newspaper with general
148 circulation in the town where the land lies and notice thereof has been served by delivering a
149 copy of the notice personally to the owner or owners of record of the equity of redemption as of
150 thirty days prior to the date of sale, said notice served by delivering a copy of the notice
151 personally at least thirty days prior to the date of sale to said owner or owners of to the address
152 set forth in section sixty-one of chapter one hundred and eighty-five, if the land is then registered
153 or, in the case of unregistered land, to the last owner or owners of the equity of redemption
154 appearing on the records of the holder of the mortgage, if any, or if none, to the owner or owners
155 as given on his deed or on the petition for probate by which he acquired title, if any, or if in
156 either case no owner appears, then mailed by registered mail to the address to which the tax
157 collector last sent the tax bill for the mortgaged premises to be sold, or if no tax bill has been sent
158 for the last preceding three years, then mailed by registered mail to the address of any of the
159 parcels of property in the name of said owner of record which are to be sold under the power of

160 sale and unless a copy of said notice of sale has been sent by registered mail to all persons of
161 record as of thirty days prior to the date of sale holding an interest in the property junior to the
162 mortgage being foreclosed, said notice to be mailed at least thirty days prior to the date of sale to
163 each such person at the address of such person set forth in any document evidencing the interest
164 or to the last address of such person known to the mortgagee. Any person of record as of thirty
165 days prior to the date of sale holding an interest in the property junior to the mortgage being
166 foreclosed may waive at any time, whether prior or subsequent to the date of sale, the right to
167 receive notice by mail to such person under this section and such waiver shall be deemed to
168 constitute compliance with such notice requirement for all purposes. If no newspaper is
169 published in such town, or if there is no newspaper with general circulation in the town where
170 the land lies, notice may be published in a newspaper published in the county where the land lies,
171 and this provision shall be implied in every power of sale mortgage in which it is not expressly
172 set forth. A newspaper which by its title page purports to be printed or published in such town,
173 city or county, and having a circulation therein, shall be sufficient for the purpose.

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

176 (Form.)

177 MORTGAGEE'S SALE OF REAL ESTATE.

178 By virtue and in execution of the Power of Sale contained in a certain mortgage given by.....

179 to..... dated..... and recorded with

180

181 Deeds, Book....., page....., of which mortgage the undersigned is the present
182 holder,.....

183 (If by assignment, or in any fiduciary capacity, give reference to the assignment(s) recorded with
184Deeds, Book....., page....., of which mortgage the undersigned is the present
185 holder,.....)

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

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

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

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

195 Other terms to be announced at the sale.

196 (Signed) _____

197 Present holder of said mortgage. ____

198 A notice of sale in the above form, published in accordance with the power in the mortgage and
199 with this chapter, together with such other or further notice, if any, as is required by the
200 mortgage, shall be a sufficient notice of the sale; and the premises shall be deemed to have been

201 sold, and the deed thereunder shall convey the premises, subject to and with the benefit of all
202 restrictions, easements, improvements, outstanding tax titles, municipal or other public taxes,
203 assessments, liens or claims in the nature of liens, and existing encumbrances of record created
204 prior to the mortgage, whether or not reference to such restrictions, easements, improvements,
205 liens or encumbrances is made in the deed; but no purchaser at the sale shall be bound to
206 complete the purchase if there are encumbrances, other than those named in the mortgage and
207 included in the notice of sale, which are not stated at the sale and included in the auctioneer's
208 contract with the purchaser.

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