

**SENATE . . . . . No. 00868**

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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 passage of the accompanying bill:

An Act to prevent unlawful and unnecessary foreclosures .

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Karen E. Spilka</i>	<i>Second Middlesex and Norfolk</i>
<i>Sal N. DiDomenico</i>	<i>Middlesex, Suffolk, and Essex</i>
<i>Stephen R. Canessa</i>	<i>12th Bristol</i>
<i>Marc R. Pacheco</i>	<i>First Plymouth and Bristol</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>Elizabeth A. Malia</i>	<i>11th Suffolk</i>
<i>Mark C. Montigny</i>	<i>Second Bristol and Plymouth</i>
<i>Benjamin Swan</i>	<i>11th Hampden</i>
<i>Attorney General Martha Coakley</i>	<i>One Ashburton Place</i> <input type="checkbox"/> <i>Boston, MA 02108</i>

**SENATE . . . . . No. 00868**

By Ms. Spilka, petition (accompanied by bill, Senate, No. 868) of Swan, Montigny, Malia and other members of the General Court for legislation to prevent unlawful and unnecessary foreclosures [Joint Committee on the Judiciary].

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  
2 Official Edition, is hereby amended by adding the following new subsection:-

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

5 (a) Commercially Reasonable Efforts to Avoid Foreclosures. (1) A creditor shall not  
6 commence foreclosure upon certain mortgage loans pursuant to this Chapter unless it has first  
7 taken 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  
16 contract, a servicer of pooled residential mortgages may determine whether the net present value  
17 of the payments on the loan, as modified, is likely to be greater than the anticipated net recovery  
18 that would result from foreclosure to all investors and holders of beneficial interests in such  
19 investment, but not to any individual or groups of investors or beneficial interest holders, and  
20 shall be deemed to act in the best interests of all such investors or holders of beneficial interests  
21 if the servicer agrees to or implements a loan modification or takes reasonable loss mitigation  
22 actions that comply with this Section. Further, any loan modification offered to the borrower  
23 must comply with current federal and state law, including, without limitation, 940 C.M.R. 8.00 et  
24 seq., and the borrower must be able to reasonably afford to repay the loan, as modified,  
25 according to its scheduled payments. Nothing in this subsection shall be construed to prevent a  
26 creditor from offering or accepting alternatives to foreclosure, such as a short sale or deed-in-lieu  
27 of foreclosure, if the borrower requests such alternatives, rejects a loan modification offered  
28 pursuant to this subsection, or does not qualify for a loan modification pursuant to this  
29 subsection.

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

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

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

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

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

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

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

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

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

60 For purposes of this section:

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

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

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

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

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

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

76 (iv) did not require full documentation of income or assets;

77 (v) prepayment penalties;

78 (vi) the loan was a refinance of an existing loan that occurred  
79 within twelve months of the most recent mortgage loan;

80 (vii) the loan was underwritten with a Loan-to-Value ratio at or  
81 above 90%;

82 (viii) the loan was underwritten as a component of a loan  
83 transaction wherein the combined Loan-to-Value ratio was above 95% or

84 (ix) the loan was underwritten where the ratio of the borrower's  
85 debt, including all housing-related and recurring monthly debt, to the borrower's income  
86 exceeded 38%.

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

89 "Owner-occupied residential property" shall mean real property located in the commonwealth  
90 having thereon a dwelling house with accommodations for four or less separate households and  
91 occupied, or to be occupied, in whole or in part by the obligor on the mortgage debt. This  
92 definition shall be limited to the principal residence of a person, and not an investment property  
93 or second home.

94

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

97           Section 35C. Prohibited Conduct In Connection with Foreclosure

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

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

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

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

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

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

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

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

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

131 For purposes of this section:

132 "Creditor", a person or entity that holds or controls, partially, wholly, indirectly, directly, or in a  
133 nominee capacity, a mortgage loan securing a residential property, including, without limitation,  
134 an originator, holder, investor, assignee, successor, trust, trustee, nominee holder, Mortgage  
135 Electronic Registration System or mortgage servicer, including the Federal National Mortgage



136 Association or the Federal Home Loan Mortgage Corporation. "Creditor" shall also include any  
137 servant, employee or agent of a creditor.

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

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

141

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

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

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

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

181

(Form.)

182

MORTGAGEE'S SALE OF REAL ESTATE.

183

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

184 mortgage given

185

by..... to..... dated..... and recorded with

186

.....

187

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

188 is the present

189

holder,.....

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

191 .....Deeds, Book....., page....., of which mortgage the undersigned is the present

192 holder,.....)

193 for breach of the conditions of said mortgage and for the purpose of foreclosing the same will be

194 sold at Public Auction at.....o'clock,..... M. on the..... day of..... A.D. (insert

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

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

197 To wit: "(Description as in the mortgage, including all references to title, restrictions,

198 encumbrances, etc., as made in the mortgage.)"

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

202 Other terms to be announced at the sale.

203 (Signed) \_\_\_\_\_

204 Present holder of said mortgage. \_\_\_\_

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

216 In the event a mortgagee holds a mortgage pursuant to an assignment, for purposes of this  
217 section and section twenty-one of chapter one hundred and eighty-three, a mortgagee shall  
218 establish that it is the present record holder of the mortgage intended to be foreclosed upon,  
219 ensure that the chain of assignments establishing that the mortgagee is the present holder have

220 been duly recorded in the appropriate registry of deeds or, for registered land, with the land  
221 court, and reference all assignments in the notice of sale required in this section.