THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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MARTHA COAKLEY
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July 30, 2009

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex T)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Comment of Massachusetts Attorney General Martha Coakley concerning Mortgage Acts and Practices Rulemaking, Rule No. R911004

Dear Commissioners of the Federal Trade Commission:

Thank you for the opportunity to comment on the Mortgage Acts and Practices Rulemaking, Rule No. R911004 ("Rulemaking Notice").

I. General Overview of Comment

We applaud the Federal Trade Commission's willingness to examine the activities that occur at each step of the life-cycle of a mortgage loan. Unfair and deceptive mortgage lending and sales practices have directly led to the foreclosure crisis and should be prevented in the future through government intervention, regulation and enforcement. Where Massachusetts and federal regulations have recently been promulgated with respect to mortgage origination, advertising and appraisal practices, this Comment focuses on mortgage servicing practices, particularly because such practices are exacerbating the continuing foreclosure crisis. We welcome and appreciate, however, any future opportunity to comment on proposed regulations on mortgage origination, advertising, appraisal, and servicing practices that the Federal Trade Commission ("FTC") considers in the future.

Today, after more than two years, the foreclosure crisis continues, with little signs of abating. Delinquencies are now spreading beyond subprime loans into Alt-A loans and prime loans. Borrowers seeking relief enter into loan modifications only to re-default on these loan modifications at high percentages--with some re-defaults occurring within the first few months of the new modification.[1] The continuing trend of ongoing delinquencies combined with re-defaulting loan modifications underscores the need for regulation of the mortgage servicing industry.

I, as well as other State Attorneys General, have long advocated to the mortgage servicing industry ("servicers") that the ongoing foreclosure crisis can and should be mitigated by some basic, common sense steps. First, servicers should be engaging in loan modifications in situations where it is more profitable for the servicer, or ultimately the investor, to offer a borrower a loan modification than to foreclose upon the borrower's loan. Second, to the extent servicers do offer a borrower a loan modification, workout agreement, forbearance agreement or other repayment plan (collectively a "loan modification"), these loan modifications should be fair, sustainable, and based on a borrower's ability to pay. Third, in general, servicers should engage in fair and responsive servicing practices, and enhance their resources as necessary to provide homeowners with effective loan servicing.

While servicers' practices have slightly improved with the advent of increased government intervention, such as President Obama's Making Home Affordable Program ("HAMP"), meaningful wide-spread loan modifications have not been occurring. Servicers continue to lose money on behalf of mortgage holders, while borrowers, neighbors, governments and taxpayers continue to suffer the harm and costs of unnecessary foreclosures.

We applaud the FTC's past enforcement actions against servicers and its willingness to closely examine servicing practices. Notwithstanding existing federal laws and regulations that regulate certain select elements of servicing practices, it is apparent that the servicing industry needs further regulation to stem the foreclosure crisis. Thus, in this Comment, we urge the FTC to consider the following general requirements or prohibitions:

- require servicers to take commercially reasonable steps to avoid foreclosure by offering a borrower a loan modification at an affordable monthly payment if it is more profitable to the creditor than the losses the creditor will incur by foreclosing on the borrower's loan; and

- prohibit servicers from arranging a loan modification, unless the servicer reasonably believes that the borrower can repay the loan, as modified, according to its scheduled payments.

Further, we encourage the FTC to consider regulating general servicing practices with respect to fees, customer relations and legal proceedings, including:

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[1] Office of the Comptroller of Currency and Office of Thrift Supervision, *OCC and OTS Mortgage Metrics Report*, (June 2009), available at: http://www.occ.treas.gov/ftp/release/2009-77a.pdf. This report tracks performance data on first lien residential mortgages serviced by national banks and federally regulated thrifts. Such mortgages constitute approximately 64% of all mortgages serviced in the United States.

- prohibit servicers from imposing unearned, unauthorized, or estimated fees, and require that all fees be properly disclosed and itemized to borrowers;

- prohibit servicers from improperly applying partial payments or using suspense accounts, misrepresenting an account's terms or status, or making unsubstantiated claims to borrowers about their accounts;

- prohibit servicers from engaging in or taking any legal action against borrowers based on information servicers know or should know is inaccurate or false; and

- prohibit servicers from requiring unrepresented borrowers to enter into a broad release of all possible claims and/or waive certain rights borrowers have with respect to bankruptcy or foreclosure proceedings in loan modification agreements or similar agreements.

We believe that FTC regulation in the above areas is appropriate, prudent, and would be justified under Section 5 of the FTC Act. Such intervention could have a significant national impact to the benefit of borrowers, servicers, and the public, and stem the continuing harm of the foreclosure crisis.

II. The Massachusetts Attorney General's Experiences Concerning Profit-Maximizing Loan Modifications

As a basic premise, most servicers, investors, policymakers, and other stakeholders generally agree that a servicer should offer a borrower a loan modification if it is more profitable to do so than foreclosing on the borrower's loan ("profit-maximizing loan modifications"). In fact, most agreements between servicers and investors that dictate how servicers should service loans, *i.e.*, pooling and servicing agreements, require servicers to maximize profits for investors. Profit-maximizing loan modifications have also been a popular public option because motivating servicers and investors to act in their own best interest should require minimal taxpayer funds.

For over two years now, government officials have urged servicers to engage in profit-maximizing loan modifications. As early as the summer of 2007, I, with several other state attorneys general and state banking regulators formed the State Foreclosure Prevention Working Group to work with servicers to prevent unnecessary foreclosures and encourage profit-maximizing loan modifications. We received information from the largest non-federally chartered servicers and the State Foreclosure Prevention Working Group issued three reports in 2008 detailing servicers' progress, or lack thereof with respect to loan modifications.[2] In early 2009, President Barack Obama embarked on a

[2] Copies of the three reports of the State Foreclosure Prevention Working Group, which are respectively dated February 2008, April 2008 and September 2008, are available at: http://www.csbs.org/Content/NavigationMenu/Home/StForeclosureMain.htm.

similar effort through his HAMP Plan, a plan that is also centered upon the same principle of encouraging profit-maximizing loan modifications.[3]

Today, however, my Office receives daily consumer complaints and anecdotal evidence showing that servicers are not engaging in profit-maximizing loan modifications on a meaningful basis. Last month the Federal Reserve Bank of Boston issued a policy paper ("Federal Reserve Bank June 2009 Report") wherein the authors, after surveying two years of loan data from 2007 to 2008, concluded that lenders rarely renegotiate loans.[4] Likewise, the quarterly report issued by the Office of the Comptroller of Currency and Office of Thrift Supervision in June 2009 ("OCC/OTS June 2009 Report") showed that during the first quarter of 2009 there were approximately three times as many foreclosure proceedings, including those initiated, in process, or completed, as compared to new loan modifications and payment plans.[5]

The data suggests that wide-spread profit-maximizing loan modifications are not occurring at potential levels and mortgage holders continue to lose money on foreclosures. Notwithstanding the variety of reasons offered as to why profit-maximizing loan modifications are not occurring, the harm from the lack of these modifications is borne not only by servicers and investors, but also by borrowers, the communities where foreclosures occur, and the public in general.

Undeniably, foreclosures are happening at a great price to our nation. Significant negative externalities occur from foreclosures including impacts on families, homelessness for borrowers and tenants, abandoned housing, decreased neighboring property values, decreased tax bases, increased crime, significant costs to local government, and depressed property values. According to a report issued by the Joint Economic Committee of Congress over two years ago, the average cost of a foreclosure totaled approximately $80,000, with the following parties bearing that cost: homeowner: $7,000; lender: $50,000; local government: $19,000; and impact on neighboring home values: $1,500.[6] These numbers have likely increased over the past two years. Moreover, beyond the average costs of foreclosures suffered by innocent bystanders, massive government resources have been allocated to initiating foreclosure relief programs, abandoned housing initiatives; and funding financial institutions with troubled mortgage assets through the Troubled Asset Relief Program ("TARP"), among other relief programs.

At a certain point, government officials can no longer simply urge servicers to help themselves and the public by extending profit-maximizing loan modifications. Allowing servicers to engage in voluntary efforts with minimal federal regulatory

[3] A servicer need not offer a loan modification if the net present value test shows that foreclosure is more profitable than a loan modification. Answers to Frequently Asked Questions for the HAMP Program, Answer to Question 19, available at: https://www.hmpadmin.com/portal/docs/sd0901faqs.pdf.

[4] Federal Reserve Bank of Boston Report, *Why Don't Lenders Renegotiate More Home Mortgages? Redefaults, Self-Cures, and Securitization*, 09-4 (July 2009).

[5] OCC/OTS Report, pp. 5, 8.

[6] Special Report by the Joint Economic Committee of the U.S. Congress, *Sheltering Neighborhoods from the Subprime Foreclosure Storm*, April 11, 2007.

oversight has come at an enormous price to borrowers, neighbors, governments, and taxpayers. The continuing collateral damage to these innocent bystanders is simply too great and, at this point, government officials must begin to require servicers to engage in better practices.

In January of 2009, I sponsored a Massachusetts bill titled "*An Act to Require Commercially Reasonable Efforts to Avoid Foreclosure,*" which is legislation aimed at putting forth the best interests of servicers, creditors, borrowers and taxpayers. *See* 2009 SB 1848 (Mass. 2009), *An Act to Require Commercially Reasonable Efforts to Avoid Foreclosure,*" attached as Exhibit 1. The legislation requires creditors, which is defined to include servicers, to undertake commercially reasonable steps prior to foreclosure on certain loans, thereby ensuring that servicers maximize the value of their loans while avoiding unnecessary foreclosures. *Id.* at proposed MASS. GEN. LAWS ch. 244 § 35B "Definitions." These steps include, among others, a "net present value test" wherein a servicer shall offer a borrower a loan modification at an affordable monthly mortgage payment when such a modification is more profitable than foreclosing upon the loan. *Id.* at § 35B(a),(d). Of note, since my Office proposed this legislation, the HAMP Program has set forth similar requirements, with a net present value test also being a key linchpin as to whether a servicer is required to provide a loan modification.

We urge the FTC to consider requiring servicers to engage in profit-maximizing loan modifications that take into account a net present value analysis. Such a requirement could seamlessly merge with the existing requirements under the HAMP Plan, namely the profit-maximizing loan modification requirement. Where several of the federally-chartered servicers are HAMP participants and should already be complying with a profit-maximizing loan modification requirement, FTC regulations requiring the same would level the playing field with respect to those non-HAMP non-federally-chartered entities. More important, such a requirement would provide the FTC with the necessary tools to ensure that profit-maximizing loan modifications occur.

III. The Massachusetts Attorney General's Experiences Concerning the Terms of Loan Modifications

Equally important to the debate surrounding loan modifications are the terms of those loan modifications that do occur. To date, many loan modifications have been made that contain unfair, unsustainable terms resulting in predictably high re-default rates. As a result, rolling waves of foreclosures continue to occur that involve loan modifications. While servicers and investors may point to these high re-default rates to justify the wisdom of, or economic basis for, proceeding with foreclosures rather than entering into modifications, those conclusions are questionable in light of the prevalence of unfair, unsustainable loan modifications that create a self-fulfilling prophecy of severe re-defaults. The FTC should consider regulating loan modifications so to prohibit servicers from arranging a loan modification, unless the servicer reasonably believes the borrower can repay the loan, as modified, according to its scheduled payments.

We believe that loan modifications should be guided by the basic bedrock lending principle under federal and Massachusetts law: a lender should not originate a loan unless it reasonably believes the borrower can repay the loan according to its scheduled terms.[7] In 2003 the OCC cautioned that when a loan is made based on the foreclosure value of the collateral as opposed to the borrower's ability to repay the loan, the result is predatory and abusive lending, and "foreclosure rates higher than the norm."[8] Likewise, loan modifications that are extended without regard for borrowers' repayment abilities will suffer from the same fate of abnormally high default and foreclosure rates.[9]

My Office has seen too many loan modifications that simply increase borrowers' monthly payment by capitalizing interest arrearages, fees and other costs without regard for a borrower's ability to pay the new monthly modified payment. The OCC/OTS June 2009 Report highlights that from March 2008 to March 2009, approximately 64% to 46% of all loan modifications have actually <u>increased</u> or left unchanged a borrower's monthly loan payment.[10] While that percentage has decreased, it remains unacceptably high. During that same time period, approximately 60% to 35% of all loan modifications were in some stage of delinquency or foreclosure, with that percentage likewise lessening over time.[11] We still remain deeply concerned that unfair, if not predatory, loan modifications will continue to exacerbate the duration and severity of the foreclosure crisis.

To address this issue in Massachusetts, the legislation titled "*An Act to Require Commercially Reasonable Efforts to Avoid Foreclosure*" that my Office sponsored requires that any loan modification offered to a borrower must comply with current federal and Massachusetts law, and the borrower must be able to reasonably afford to repay the loan, as modified, according to its scheduled payments. *See* Exhibit 1 at proposed MASS. GEN. LAWS ch. 244 § 35B(a)(2). Further, in order to benefit from the legislation's proposed safe harbor, any loan modification must be based on an affordable monthly payment that takes into account the borrower's current financial circumstances. *Id.* at § 35B(d)(1). This affordability-based approach is consistent with HAMP's waterfall of options that begin with a determination of the borrower's affordable monthly payment based on his or her current financial circumstances.

We urge the FTC to consider regulating loan modifications so to prohibit servicers from arranging a loan modification, unless the servicer reasonably believes that the borrower can repay the loan, as modified, according to its scheduled payments. Like

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[7] MASS. REGS. CODE tit. 940, § 8.06(15), provides that it is an unfair or deceptive act or practice for a mortgage broker or mortgage lender to arrange a loan, unless the mortgage broker or mortgage lender reasonably believes the borrower can repay the loan. Likewise, the Federal Reserve Board recently promulgated regulations at 12 C.F.R. 226 *et seq.* that contain a similar prohibition for higher-priced loans.
[8] OCC Advisory Letter 2003-2, p. 3
[9] In Massachusetts, a lender has an obligation to extend a loan only where it reasonably believes a borrower is able to repay the loan according to the scheduled repayment terms. <u>Commonwealth v. Fremont</u>, 452 Mass. 733, 897 N.E.2d 548 (2008). It is unfair and a violation of the Massachusetts Consumer Protection Law to originate loans in such a manner that would lead predictably to a borrower's default and foreclosure, even if such loans are underwritten with the assumption that borrowers could refinance out of such loans. <u>Id</u>.
[10] OCC/OTS June 2009 Report at p. 25.
[11] *Id.* at p 26.

the failure to provide profit-maximizing loan modifications, providing unfair loan modifications causes substantial injury, there are no countervailing benefits, and borrowers cannot reasonably avoid the injury associated with such loan modifications.

Similar to a profit-maximizing loan modification requirement, a reasonable ability-to-pay requirement could integrate well with the affordability-based HAMP requirement. Where several federally-chartered entities are HAMP servicer participants, FTC regulations with similar requirements would level the playing field with respect to those non-HAMP participants. Then, the FTC would have the necessary tools to ensure that profit-maximizing loan modifications are occurring, and on reasonable and sustainable terms.

IV. The Massachusetts Attorney General's Experiences Concerning Servicing Conduct

We appreciate the FTC's close examination of general servicing practices that harm borrowers and detrimentally impact the nation's recovery from the foreclosure crisis. To that end, we offer our comments and experiences with respect to three servicing areas raised by the FTC: fees and related charges; customer relations; and legal proceedings (foreclosure, loss mitigation and bankruptcy).

A. Fees and Related Charges

The FTC should consider regulating servicers' practices regarding fees, particularly in the instance of unauthorized, unearned and "estimated" fees, and the disclosure of such fees through itemized statements. In 2007, my Office supported the passage of a new Massachusetts law that requires lenders to provide borrowers with a notice specifying, *inter alia*, the amount needed to cure the mortgage upon which the borrower is defaulting, before the lender could initiate foreclosure proceedings.[12] My support for this law was based, in part, on the fact that many borrowers did not, but should have received adequate or correct information with respect to the amounts servicers claim they owe on their mortgage loans.

Unfortunately, at times, borrowers are charged for fees that are not actually earned, or "estimated." For example, servicers may include estimated fees for foreclosure attorney fees in a loan payoff to a borrower, even though foreclosure proceedings have not been initiated. This is particularly troubling where borrowers have little ability to contest whether the fees were earned, authorized by contract or state law, and/or are only "estimated." Further, when borrowers seek clarification from servicers regarding such fees, their requests often go unanswered. We acknowledge that borrowers may request similar information through a qualified written request under the Real Estate Settlement Procedures Act or other related laws, however, based on our experience, servicers often do not respond in a timely fashion to such requests. The delay or non-production of such information can be extremely problematic, particularly when a borrower is attempting to pay their monthly mortgage bill, cure his or her default, obtain

[12] MASS. GEN. LAWS ch. 244 § 35A.

a loan modification, obtain refinancing or pursue another loss mitigation strategy preferable to foreclosure such as a short sale.

We believed that the imposition of unearned, unauthorized, or "estimated" fees, and/or fees that are not properly disclosed and itemized ("unfair fee charges") cause substantial injury and there is no countervailing benefit to allowing such conduct. Borrowers cannot reasonably avoid the injury associated with unfair fee charges because most borrowers typically lack a mechanism to contest such fees or force the timely disclosure of such information, particularly if they are unrepresented. Thus, we urge the FTC to consider comprehensive regulations with respect to unfair fee charges.

B. Customer Relations Practices

The FTC should consider regulating how mortgage servicers handle payments, amounts owed, or borrower disputes ("customer relations practices"). For many borrowers, simply reaching their servicers is a challenge. Receiving timely and accurate information from servicers, whether such information relates to partial payments, suspense accounts, amounts owed, status of loan modifications, or other related information to substantiate servicers' claims, is an even greater challenge. The availability to borrowers of adequate avenues of redress for disputes, particularly in the instance of large servicers, is even rarer. My Office has experienced this first hand in attempting to reach out to numerous servicers in attempting to resolve borrower complaints.

We support the FTC considering regulations with respect to prohibiting servicers from improperly handling partial payments or suspense accounts, misrepresenting an account's terms or status, making unsubstantiated claims to borrowers about their accounts, or failing to have adequate procedures to maintain the accuracy of information and handle customer disputes. In extreme examples, we have seen borrowers provide payments, including partial payments, to a servicer to obtain a loan modification or delay foreclosure, where it was unclear how those payments were applied, particularly when the servicer continued the foreclosure proceeding and/or failed to extend the promised loan modification. Accordingly, we urge the FTC to consider regulations with respect to customer relations practices.

C. Legal Proceedings

The FTC should consider generally regulating how mortgage servicers handle foreclosure proceeding, bankruptcy proceedings and other legal matters with borrowers, such as negotiating loan modifications. To this end, we support and propose two basic prohibitions for the FTC to consider: 1) prohibit servicers from engaging in or taking any legal action against borrowers based on information servicers know or should know is inaccurate or false; 2) prohibit servicers from requiring unrepresented borrowers to release broadly all claims and/or waive associated rights they have with respect to bankruptcy or foreclosure proceedings as part of any loan modification or other type of agreement.

Our experience in Massachusetts shows that servicers, whether in the context of foreclosure, eviction or bankruptcy proceedings, at times, rely upon information that they know or should know is incorrect or false. *See e.g., In re Nosek*, 406 B.R. 434 (D. Mass 2009) (upholding $600,000 in sanctions against a lender and two law firms for "egregious misrepresentations" they made in bankruptcy proceedings regarding the lender's status as "holder" of note and mortgage).

While foreclosure and eviction proceedings may differ by state, we do not believe that our experience in Massachusetts is unique. Indeed, as the FTC acknowledges in its Rulemaking Notice, the securitization process has greatly impacted the integrity of borrowers' loan information and often bankruptcy courts have dismissed foreclosure cases against borrowers because the foreclosure proponents have failed to show proof of ownership.

As a start to addressing such issues in Massachusetts, the legislation titled "*An Act to Require Commercially Reasonable Efforts to Avoid Foreclosure*" that my Office proposed, states that a creditor, which includes a servicer, is prohibited from:

- commencing foreclosure when it knows or should know that it does not own the mortgage loan, including without limitation, commencing foreclosure without possessing a written, signed and dated assignment evidencing the assignment of the mortgage loan prior to the commencement of foreclosure; and

- making statements to a state or federal court related to foreclosure or compliance with this Chapter, orally or in writing, that it knows or should know are false, including, without limitation, statements about the borrower's history of payments, the validity of the assignment of the mortgage loan, and the creditor's compliance with the requirements of Chapter 244.[13]

While these proposed prohibitions reference applicable Massachusetts state law, the FTC could consider similarly focused regulations. As a starting point, the FTC could consider prohibiting servicers engaging in or taking any legal action against borrowers based on information servicers know or should know is inaccurate or false. Clearly such practices may cause substantial injuries to borrowers and there are no countervailing benefits to allowing foreclosures to proceed based upon such misrepresentations. Borrowers cannot reasonably avoid this conduct, particularly if the borrowers lack legal counsel.

Second, my Office often sees servicers requiring borrowers, who are typically unrepresented, to release all claims and/or waive certain rights they have with respect to bankruptcy or foreclosure proceedings in loan modifications or other similar agreements, such as forbearance agreements, workout plans, "trial" modifications, or any combination thereof. Often, such agreements are offered by servicers on a "take it or leave it" basis,

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[13] 2009 SB 1848 (Mass. 2009) at proposed MASS. GEN. LAWS ch. 244 § 35B(b)(c), attached at Exhibit 1.

with borrowers having little opportunity or ability to negotiate any of the terms, including these boilerplate releases or waivers. Such waivers and releases are based the product of one-sided bargaining, *i.e.*, large financial institutions negotiating with distressed, unsophisticated borrowers in foreclosure, and require borrowers to give up important rights. Requiring the release or waiver of such rights is particularly problematic in light of the fact that a majority of the borrowers are unrepresented and may suffer from acknowledged servicing abuses in the context of legal proceedings, such as bankruptcy proceedings.

Here too, requiring such waivers or releases from unrepresented borrowers can cause substantial injuries and there are no countervailing benefits to allowing such terms. Unrepresented borrowers cannot reasonably avoid these terms, particularly in light of the disparity of bargaining power between a servicer and an unrepresented borrower. We strongly urge the FTC to consider prohibiting loan modifications or similar agreement terms that require unrepresented borrowers to release all claims or waive certain, if not all, rights they have with respect to bankruptcy or foreclosure proceedings.

V. Conclusion

The FTC has a tremendous opportunity to institute meaningful changes to the benefit of borrowers and servicers alike, as well as the general public. I am pleased and encouraged by the FTC's willingness to take strong steps with respect to servicing practices.

I also recognize that the FTC's intervention is not enough, and that state and federal enforcers must work together for the benefit of the public. My Office remains committed to using regulatory, enforcement and other tools to stem the continuing foreclosure crisis. I will continue to work with all federal authorities, State Attorneys General, and other State regulators to leverage our resources and talent, to best serve the public. If I can provide any further information or assistance related to the FTC's Rulemaking Notice, or any other of our common objectives, please contact me.

Respectfully Submitted,

Martha Coakley
Attorney General
Commonwealth of Massachusetts

cc: U.S. Senator Edward Kennedy
U.S. Senator John Kerry
U.S. Representative Edward J. Markey
U.S. Representative John Olver
U.S. Representative Richard Neal
U.S. Representative James P. McGovern
U.S. Representative Barney Frank
U.S. Representative Niki Tsongas
U.S. Representative John Tierney
U.S. Representative William Delahunt
U.S. Representative Michael Capuano
U.S. Representative Stephen Lynch
Commissioner Steven Antonakes, Massachusetts Division of Banks
Members of the State Foreclosure Prevention Working Group

APPENDIX OF ATTACHMENTS

COMMENT OF ATTORNEY GENERAL MARTHA COAKLEY
TO THE FEDERAL TRADE COMMISSION

1. 2009 SB 1848 (Mass. 2009), *An Act to Require Commercially Reasonable Efforts to Avoid Foreclosure.*

SENATE DOCKET, NO. 1872 FILED ON: 1/14/2009

SENATE . . . . No. 1848

The Commonwealth of Massachusetts

PRESENTED BY:

Susan C. Tucker

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 Require Commercially Reasonable Efforts to Avoid Foreclosure.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Susan C. Tucker	Second Essex and Middlesex
Attorney General Martha Coakley	
Steven M. Walsh	11th Essex
Anthony D. Galluccio	Middlesex, Suffolk and Essex
Michael W. Morrissey	Norfolk and Plymouth
Patricia D. Jehlen	Second Middlesex
Vincent A. Pedone	15th Worcester
Michael F. Kane	5th Hampden
John D. Keenan	7th Essex
Paul J. Donato	35th Middlesex
Carlo P. Basile	1st Suffolk
Katherine Clark	32nd Middlesex
Martin J. Walsh	13th Suffolk
Denise Provost	27th Middlesex
William N. Brownsberger	24th Middlesex
John J. Binienda	17th Worcester
James Arciero	2nd Middlesex
Robert F. Fennell	10th Essex
James T. Welch	6th Hampden

Jeffrey Sánchez	15th Suffolk
Karen E. Spilka	Second Middlesex and Norfolk
Barbara A. L'Italien	18th Essex
Elizabeth A. Malia	11th Suffolk
Garrett J. Bradley	3rd Plymouth
Allen J. McCarthy	7th Plymouth
Kevin G. Honan	17th Suffolk
Mark C. Montigny	Second Bristol and Plymouth
William Lantigua	16th Essex
Jay R. Kaufman	15th Middlesex
Jennifer Benson	37th Middlesex
Michael F. Rush	10th Suffolk
Linda Dean Campbell	15th Essex

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT TO REQUIRE COMMERCIALLY REASONABLE EFFORTS TO AVOID FORECLOSURE.

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 2008 Official Edition, is hereby amended by adding the following new subsection:-

Section 35B. Prerequisite to Commencing Foreclosure Proceedings; 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 a mortgage loan 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 loan as compared to the anticipated net recovery following foreclosure; (iii) the interests of the creditor, including, without limitation, investors and taxpayers, in the event the creditor has received federal or state money. The Attorney General may adopt, amend, or repeal rules and regulations, which may include further methods of determining reasonable steps and good faith efforts to avoid foreclosure, to assist the implementation of this Section.

(2) In interpreting this subsection (a), except as specified in a contract, a servicer of pooled residential mortgages may determine whether the net present value of the payments on the loan, as modified, is likely to be greater than the anticipated net recovery that would result from foreclosure to all investors and holders of beneficial interests in such investment, but not to any individual or groups of investors or beneficial interest holders, and shall be deemed to act in the best interests of all such investors or holders of beneficial interests if the servicer agrees to or

implements a loan modification or takes reasonable loss mitigation actions that comply with this Section. Further, any loan modification offered to the borrower must comply with current federal and state law, including, without limitation, 940 C.M.R. 8.00 *et seq.*, and the borrower must be able to reasonably afford to repay the loan, as modified, according to its scheduled payments. Nothing in this subsection shall be construed to prevent a creditor from offering or accepting alternatives to foreclosure, such as a short sale or deed-in-lieu of foreclosure, if the borrower requests such alternatives, rejects a loan modification offered pursuant to this subsection, or does not qualify for a loan modification pursuant to this subsection.

(b) *Proper documentation prior to foreclosure.* A creditor violates subsection (a) if it commences foreclosure when it knows or should know that it does not own the mortgage loan, including without limitation, commencing foreclosure without possessing a written, signed and dated assignment evidencing the assignment of the mortgage loan prior to the commencement of foreclosure.

(c) *No misrepresentations.* A creditor violates subsection (a) if it makes statements to a state or federal court related to foreclosure or compliance with this Chapter, orally or in writing, that it knows or should know are false, including, without limitation, statements about the borrower's history of payments, the validity of the assignment of the mortgage loan, and the creditor's compliance with the requirements of Chapter 244.

(d) *Safe Harbor.* A creditor shall be deemed to comply with subsection (a), if, prior to commencing foreclosure, the creditor:

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

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

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

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

(e) The Attorney General may adopt, amend or repeal rules and regulations to aid in the administration and enforcement of this Section, including regulations that provide safe harbors for compliance in addition to that set forth in subsection (d) and including regulations that assist in the implementation of the requirement for commercially reasonable steps to avoid foreclosure required by subsection (a).

(f) Prior to commencing foreclosure, the creditor must certify compliance with this Section in an affidavit. This affidavit shall be filed with the 90-day notice required by Chapter 244 Section 35A (b) to the commissioner of the division of banks.

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

(h) This Act shall take effect upon its passage.

For purposes of this section:

"Creditor" shall mean any person or entity that holds or controls, partially, wholly, indirectly, directly, or in a nominee capacity, a mortgage loan securing a residential property, including, without limitation, an originator, holder, investor, assignee, successor, trust, trustee, nominee holder, Mortgage Electronic Registration System, or mortgage servicer. This definition shall also include any servant, employee, or agent of a creditor.

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

"Mortgage loan" shall mean a loan to a natural person made primarily for personal, family or household purposes secured wholly or partially by a mortgage on residential property that bear one or more of the following loan features:

(i) an introductory interest rate of a duration of five years or less, which term is followed by a period where the interest rate may exceed the introductory rate;
(ii) interest-only payments for any period of time;
(iii) a payment option feature, where any one of the payment options is less than principal and interest fully amortized over the life of the loan;
(iv) did not require full documentation of income or assets;
(v) prepayment penalties;
(vi) the loan was a refinance of an existing loan that occurred within twelve months of the most recent mortgage loan;
(vii) the loan was underwritten with a Loan-to-Value ratio at or above 90%;
(viii) the loan was underwritten as a component of a loan transaction wherein the complete Loan-to-Value ratio was above 95% or

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

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