

1 TO THE HONORABLE SENATE:

2 The Committee on Judiciary to which was referred House Bill No. 431  
3 entitled “An act relating to mediation in foreclosure actions” respectfully  
4 reports that it has considered the same and recommends that the Senate  
5 propose to the House that the bill be amended by striking all after the enacting  
6 clause and inserting in lieu thereof the following:

7 Sec. 1. 12 V.S.A. chapter 163, subchapter 9 is amended to read:

8 Subchapter 9. Mediation in Foreclosure Actions

9 § 4631. MEDIATION PROGRAM ESTABLISHED

10 (a) This subchapter establishes a program to assure the availability of  
11 mediation and application of ~~the federal Home Affordable Modification~~  
12 ~~Program (“HAMP”)~~ government loss mitigation program requirements in  
13 actions for foreclosure of a mortgage on any dwelling house of four units or  
14 less that is occupied by the owner as a principal residence.

15 (b) The requirements of this subchapter shall apply ~~only~~ to all foreclosure  
16 actions ~~involving loans that are subject to the federal HAMP guidelines on~~  
17 dwelling houses of four units or less that are occupied by the owner as a  
18 principal residence unless:

19 (1) the loan involved is not subject to any government loss mitigation  
20 program requirements;

1           (2) prior to commencing the foreclosure action, the mortgagee or a  
2           representative of the mortgagee met with or made reasonable efforts to meet  
3           with the mortgagor in person in Vermont to discuss any applicable loss  
4           mitigation options; and

5           (3) the plaintiff in the foreclosure action certifies in a separate document  
6           filed with its complaint that the requirements of subdivisions (1) and (2) of this  
7           subsection have been satisfied and describes its efforts to meet with the  
8           mortgagor in person to discuss applicable loss mitigation efforts.

9           (c) To be qualified to act as a mediator under this subchapter, an individual  
10          shall be licensed to practice law in the ~~state~~ State and shall be periodically  
11          required to ~~have taken a take~~ specialized, continuing legal education training  
12          ~~course~~ courses on foreclosure prevention or loss mitigation approved by the  
13          Vermont Bar Association.

14          (d) This subchapter shall not apply to a commercial loan.

15          (e) As used in this subchapter:

16               (1) “Commercial loan” means any loan described in 9 V.S.A. § 46(1),  
17               (2), or (3).

18               (2) “Government loss mitigation program” means:

19                       (A) the federal Home Affordable Modification Program (“HAMP”);

20                       (B) any loss mitigation program for loans owned or guaranteed by  
21               government-sponsored entities such as the Federal National Mortgage

1 Association (Fannie Mac), the Federal Home Loan Mortgage Corporation  
2 (Freddie Mac), the U.S. Federal Housing Administration, or the  
3 U.S. Department of Veterans Affairs;

4 (C) any loss mitigation program for loans guaranteed by the  
5 U.S. Department of Agriculture-Rural Development that are not owned by an  
6 instrumentality of the United States or the State of Vermont; or

7 (D) a settlement agreement with a government entity, or any state or  
8 federal law or regulation, regarding the notification, consideration, or offer of  
9 loss mitigation options.

10 § 4632. OPPORTUNITY TO MEDIATE

11 (a) In an action for foreclosure ~~of a mortgage on any dwelling house of four~~  
12 ~~units or less that is occupied by the owner as a principal residence~~ subject to  
13 this subchapter, whenever the mortgagor ~~enters an appearance in the case or~~  
14 requests mediation prior to four months after judgment is entered and before  
15 the end of the redemption period specified in the decree, the court shall refer  
16 the case to mediation pursuant to this subchapter, except that the court may:

17 (1) for good cause, shorten the four-month period or thereafter decline  
18 to order mediation; or

19 (2) decline to order mediation if the mortgagor requests mediation after  
20 judgment has been entered and the court determines that the mortgagor is

1 attempting to delay the case, or the court may for good cause decline to order  
2 mediation if the mortgagor requests mediation after judgment has been entered.

3 (b) Unless the mortgagee ~~agrees~~ and mortgagor agree otherwise or the  
4 court so orders for good cause shown, all mediation shall be completed prior to  
5 the expiration of the redemption period specified in the decree and within 120  
6 days of the mediator's appointment. The redemption period shall not be stayed  
7 on account of pending mediation.

8 (c) In an action for foreclosure of a mortgage ~~on any dwelling house of four~~  
9 ~~units or less that is occupied by the owner as a principal residence~~ subject to  
10 this subchapter, the mortgagee shall serve upon the mortgagor two copies of  
11 the notice described in subsection (d) of this section with the summons and  
12 complaint. The ~~supreme court~~ Supreme Court may by rule consolidate this  
13 notice with other foreclosure-related notices as long as the consolidation is  
14 consistent with the content and format of the notice under this subsection.

15 (d) The notice required by subsection (c) of this section shall:

16 (1) be on a form approved by the court administrator;

17 (2) advise the homeowner of the homeowner's rights in foreclosure  
18 proceedings under this subchapter;

19 (3) state the importance of participating in mediation even if the  
20 homeowner is currently communicating with the mortgagee or servicer;

21 (4) provide contact information for legal services; and

1           (5) incorporate a form that can be used by the homeowner to request  
2 mediation from the court.

3           (c) ~~The court may, on motion of a party, find that the requirements of this~~  
4 ~~subchapter have been met and that the parties are not required to participate in~~  
5 ~~mediation under this subchapter if the mortgagee files a motion and establishes~~  
6 ~~to the satisfaction of the court that it has complied with the applicable~~  
7 ~~requirements of HAMP and supports its motion with sworn affidavits that:~~

8           ~~(1) include the calculations and inputs required by HAMP and employed~~  
9 ~~by the mortgagee; and~~

10           ~~(2) demonstrate that the mortgagee or servicer met with the mortgagor in~~  
11 ~~person or via videoconferencing or made reasonable efforts to meet with the~~  
12 ~~mortgagor in person.~~

13           The Vermont Bar Association (VBA) shall have the authority to establish a  
14 fair and neutral mediator-selection process. If the mortgagee and mortgagor  
15 are unable to select a mediator through the selection process established by the  
16 VBA, the court shall appoint a qualified mediator for the case.

17 § 4633. MEDIATION

18           (a) During all mediations under this subchapter:

19           (1) The parties shall address the available foreclosure prevention tools  
20 and, if disputed, the amount due on the note for the principal, interest, and  
21 costs or fees.

1           ~~(1)~~(2) the The mortgagee shall use and consider available foreclosure  
2           prevention tools, including reinstatement, loan modification, forbearance, and  
3           short sale, and the ~~calculations, assumptions, and forms established by the~~  
4           ~~HAMP guidelines, including all HAMP-related~~ applicable government loss  
5           mitigation program requirements and any related “net present value”  
6           calculations used in considering a loan modification conducted under this  
7           subchapter;

8           ~~(2)~~(3) the The mortgagee shall produce for the mortgagor and mediator  
9           ~~documentation of its consideration of the options available in this subdivision~~  
10          ~~and subdivision (1) of this subsection, including the data used in and the~~  
11          ~~outcome of any HAMP-related “net present value” calculation; and;~~

12           (A) if a modification or other agreement is not offered, an  
13          explanation why the mortgagor was not offered a modification or other  
14          agreement; and

15           (B) for any applicable government loss mitigation program, the  
16          criteria for the program and the inputs and calculations used in determining the  
17          homeowner’s eligibility for a modification or other program.

18          ~~(3)~~(4) where Where the mortgagee claims that a pooling and servicing  
19          or other similar agreement prohibits modification, the mortgagee shall produce  
20          a copy of the agreement. All agreement documents shall be confidential and  
21          shall not be included in the mediator’s report.

1           (b)(1) In all mediations under this subchapter, the mortgagor shall make a  
2 good faith effort to provide to the mediator ~~20 days prior to the first mediation,~~  
3 ~~or~~ within a time determined by the ~~mediator to be appropriate in order to allow~~  
4 ~~for verification of the information provided by the mortgagee~~ court or  
5 mediator, information on his or her household income, and any other  
6 information required by ~~HAMP unless already provided~~ any applicable  
7 government loss mitigation program.

8           (2) Within 45 days of appointment, the mediator shall hold a  
9 premediation telephone conference to help the mortgagee and mortgagor  
10 complete any necessary document exchange and address other premediation  
11 issues. At the premediation telephone conference, the mediator shall at a  
12 minimum document and maintain records of the progress the mortgagee and  
13 mortgagor are making on financial document production, any review of  
14 information that occurs during the conference, any request for additional  
15 information, the anticipated time frame for submission of any additional  
16 information and the lender's review of the information, the scheduling of the  
17 mediation session, and which of the persons identified in subdivision (d)(1) of  
18 this section will be present in person at the mediation or that the parties and the  
19 mediator have agreed pursuant to subsection (e) of this section that personal  
20 presence at the mediation is not required.

1           (3) During the mediation, the mediator shall document and maintain  
2 records of:

3           (A) agreements about information submitted to the mediator;

4           (B) whether a modification or other foreclosure alternative is  
5 available and, if so, the terms of the modification;

6           (C) if a modification or other foreclosure alternative is not available,  
7 the reasons for the unavailability; and

8           (D) the steps necessary to finalize the mediation.

9           (c) The parties to a mediation under this subchapter shall cooperate in good  
10 faith under the direction of the mediator to produce the information required by  
11 subsections (a) and (b) of this section in a timely manner so as to permit the  
12 mediation process to function effectively.

13           (d)(1) The following persons shall participate in person or by telephone in  
14 any mediation under this subchapter:

15           (A) the mortgagee, or any other person, including the mortgagee's  
16 servicing agent, who meets the qualifications required by subdivision (2) of  
17 this subsection;

18           (B) counsel for the mortgagee; and

19           (C) the mortgagor, and counsel for the mortgagor, if represented.



1           (2) The mortgagee or mortgagee’s servicing agent, if present, shall have:

2                   (A) authority to agree to a proposed settlement, loan modification, or  
3 dismissal of the foreclosure action;

4                   (B) real time access during the mediation to the mortgagor’s account  
5 information and to the records relating to consideration of the options available  
6 in subdivisions ~~(a)(1) and (2)~~ (a)(2) and (a)(3) of this section, including the  
7 data and factors considered in evaluating each such foreclosure prevention  
8 tool; and

9                   (C) the ability and authority to perform ~~necessary HAMP-related~~  
10 government loss mitigation program-related “net present value” calculations  
11 and to consider other options available in subdivisions ~~(a)(1) and (2)~~ (a)(2) and  
12 (a)(3) of this section during the mediation.

13           (e) The mediator may permit a party identified in subdivision (d)(1) of this  
14 section to participate in mediation by telephone or videoconferencing. The  
15 mortgagee and mortgagor shall each have at least one of the persons identified  
16 in subdivision (d)(1) of this section present in person at the mediation unless  
17 all parties and the mediator agree otherwise in writing.

18           (f) The mediator may include in the mediation process under this  
19 subchapter any other person the mediator determines would assist in the  
20 mediation.

1 (g) Unless the ~~parties~~ mortgagee and mortgagor agree otherwise, all  
2 mediations under this subchapter shall take place in the county in which the  
3 foreclosure action is brought pursuant to subsection ~~4523(a)~~ 4932(a) of this  
4 title.

5 § 4634. MEDIATION REPORT

6 (a) Within seven days of the conclusion of any mediation under this  
7 subchapter, the mediator shall report in writing the results of the process to the  
8 court and both parties, and shall provide a copy of the report to the Office of  
9 the Attorney General for data collection purposes. The report submitted to the  
10 Attorney General's office shall include, in addition to the information  
11 identified in subsection (b) of this section, all applicable government loss  
12 mitigation program criteria, inputs, and calculations performed prior to or  
13 during the mediation and all information related to the requirements in  
14 subsection 4633(a) of this title. The report submitted to the Attorney General's  
15 office shall otherwise be confidential, and shall be exempt from public copying  
16 and inspection under 1 V.S.A. § 317, provided that any public report by the  
17 Attorney General may include information in aggregate form.

18 (b) The report required by subsection (a) of this section shall not disclose  
19 the mediator's assessment of any aspect of the case or substantive matters  
20 discussed during the mediation, except as is required to report the information  
21 required by this section. The report shall contain all of the following items:

1           (1) The date on which the mediation was held, including the starting and  
2 finishing times.

3           (2) The names and addresses of all persons attending, showing their role  
4 in the mediation and specifically identifying the representative of each party  
5 who had decision-making authority.

6           (3) A summary of any substitute arrangement made regarding  
7 attendance at the mediation.

8           ~~(4) All HAMP related “net present value” calculations and other  
9 foreclosure avoidance tool applicable government loss mitigation program  
10 criteria, inputs, and calculations performed prior to or during the mediation and  
11 all information related to the requirements in subsection 4633(a) of this title.~~  
12 (Repealed).

13           (5) The results of the mediation, stating whether full or partial  
14 settlement was reached and appending any agreement of the parties.

15           (6)(A) A statement as to whether any person required under  
16 subsection ~~(d)~~ of section 4633(d) of this title to participate in the mediation  
17 failed to:

18                   (i) attend the mediation;

19                   (ii) make a good faith effort to mediate; or

20                   (iii) supply documentation, information, or data as required by

21 subsections 4633(a)–(c) of this title.

1           (B) If a statement is made under subdivision (6)(A) of this  
2 subsection (b), it shall be accompanied by a brief description of the applicable  
3 reason for the statement.

4       § 4635. COMPLIANCE WITH OBLIGATIONS

5           (a) Upon receipt of a mediator's report required by subsection 4634(a) of  
6 this title, the court shall determine whether the mortgagee or servicer has  
7 complied with all of its obligations under subsection 4633(a) of this title, and,  
8 at a minimum, with any ~~modification obligations under HAMP~~ applicable  
9 government loss mitigation program requirements. The court may make such  
10 a determination without a hearing unless the court, in its discretion, determines  
11 that a hearing is necessary.

12           (b) If the mediator's report includes a statement under subdivision  
13 ~~4635(b)(6)~~ 4634(b)(6) of this title, or if the court makes a determination of  
14 noncompliance with the ~~obligations~~ requirements under subsection 4635(a) of  
15 this title, the court may impose appropriate sanctions against the noncomplying  
16 party, including:

- 17           (1) tolling of interest, fees, and costs;  
18           (2) reasonable attorney's fees;  
19           (3) monetary sanctions;  
20           (4) dismissal without prejudice; and

1           (5) prohibiting the mortgagee from selling or taking possession of the  
2 property that is the subject of the action with or without opportunity to cure as  
3 the court deems appropriate.

4           (c) No mediator shall be required to testify in an action subject to this  
5 subchapter.

6       § 4636. ~~EFFECT OF MEDIATION PROGRAM ON FORECLOSURE~~

7                     ~~ACTIONS FILED PRIOR TO EFFECTIVE DATE~~

8       ~~The court shall, on request of a party prior to judgment or on request of a~~  
9 ~~party and showing of good cause after judgment, require mediation in any~~  
10 ~~foreclosure action on a mortgage on any dwelling house of four units or less~~  
11 ~~that is occupied by the owner as a principal residence that was commenced~~  
12 ~~prior to the effective date of this subchapter but only up to 30 days prior to the~~  
13 ~~end of the redemption period. [Repealed.]~~

14       § 4637. NO WAIVER OF RIGHTS; COSTS OF MEDIATION

15           (a) The parties' rights in a foreclosure action are not waived by their  
16 participation in mediation under this subchapter.

17           (b) The mortgagee shall pay the required costs for any mediation under this  
18 subchapter except that the mortgagor shall be responsible for mortgagor's own  
19 costs, including the cost of mortgagor's attorney, if any, and travel costs.

20           (c) If the foreclosure action results in a sale with a surplus, the mortgagee  
21 may recover the full cost of mediation to the extent of the surplus. Otherwise,

1 the mortgagee may not shift to the mortgagor the costs of the mortgagee's or  
2 the servicing agent's attorney's fees or travel costs related to mediation but  
3 may shift up to one-half of the costs of the mediator.

4 Sec. 2. REPEAL

5 Sec. 13 of No. 132 of the Acts of the 2009 Adj. Sess. (2010) (repeal of  
6 Vermont mortgage foreclosure mediation program on date federal HAMP  
7 program is repealed) is repealed.

8 Sec. 3. EFFECTIVE DATE

9 This act shall take effect on December 1, 2013 and shall apply to any  
10 mortgage foreclosure proceeding instituted after that date.

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16 (Committee vote: \_\_\_\_\_)

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Senator [surname]

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FOR THE COMMITTEE