

112TH CONGRESS
1ST SESSION

S. 489

To require certain mortgagees to evaluate loans for modifications, to establish a grant program for State and local government mediation programs, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 3, 2011

Mr. REED (for himself, Mr. DURBIN, Mr. MERKLEY, Mr. WHITEHOUSE, Mr. FRANKEN, and Mr. LEAHY) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

A BILL

To require certain mortgagees to evaluate loans for modifications, to establish a grant program for State and local government mediation programs, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Preserving Homes and
5 Communities Act of 2011”.

6 **SEC. 2. DEFINITION.**

7 In this Act, the term “Secretary” means the Sec-
8 retary of Housing and Urban Development.

1 **SEC. 3. LOAN MODIFICATION REQUIREMENTS.**

2 (a) DEFINITIONS.—In this section—

3 (1) the term “covered mortgagee” means—

4 (A) an original lender under a federally re-
5 lated mortgage loan;

6 (B) any servicer, affiliate, agent, sub-
7 sidiary, successor, or assignee of a lender under
8 a federally related mortgage loan; and

9 (C) any purchaser, trustee, or transferee of
10 any mortgage or credit instrument issued by an
11 original lender under a federally related mort-
12 gage loan;

13 (2) the term “covered mortgagor”—

14 (A) means an individual—

15 (i) who—

16 (I) is a mortgagor under a feder-
17 ally related mortgage loan—

18 (aa) made by a covered
19 mortgagee; and

20 (bb) secured by the principal
21 residence of the mortgagor; or

22 (II) is eligible to assume a feder-
23 ally related mortgage loan described
24 in clause (I) in a manner described in
25 paragraph (3), (5), (6), or (7) of sec-
26 tion 341(d) of the Garn-St Germain

1 Depository Institutions Act of 1982
2 (12 U.S.C. 1701j-3(d)), if the prin-
3 cipal residence of the individual is the
4 principal residence securing the feder-
5 ally related mortgage loan; and

6 (ii) who cannot make payments on a
7 federally related mortgage loan due to fi-
8 nancial hardship, as determined by the
9 Secretary, in consultation with the Sec-
10 retary of the Treasury and the Director of
11 the Bureau of Consumer Financial Protec-
12 tion; and

13 (B) does not include an individual who the
14 Secretary, in consultation with the Secretary of
15 the Treasury and the Director of the Bureau of
16 Consumer Financial Protection, determines has
17 abandoned the principal residence securing the
18 federally related mortgage loan;

19 (3) the term “federally related mortgage loan”
20 has the same meaning as in section 3 of the Real
21 Estate Settlement Procedures Act of 1974 (12
22 U.S.C. 2602);

23 (4) the term “home loan modification protocol”
24 means a home loan modification protocol that—

1 (A) is developed under a home loan modi-
2 fication program developed or put into effect by
3 the Secretary of the Treasury, the Secretary, or
4 the Director of the Bureau of Financial Protec-
5 tion;

6 (B) includes principal reduction; and

7 (C) to the extent possible, in the case of
8 real property on which there is a first lien and
9 a subordinate lien securing a federally related
10 mortgage loan, requires that any principal re-
11 duction with respect to the first lien be accom-
12 panied by a proportional principal reduction
13 with respect to the subordinate lien;

14 (5) the term “qualified loan modification”
15 means a modification to the terms of a mortgage
16 agreement between a covered mortgagee and a cov-
17 ered mortgagor that—

18 (A) is made pursuant to a determination
19 by the covered mortgagee using a home loan
20 modification protocol that a modification
21 would—

22 (i) produce a greater net present value
23 than not modifying the loan to—

24 (I) the covered mortgagee; or

1 (II) in the aggregate, all persons
2 that hold an interest in the mortgage
3 agreement; and

4 (ii) produce mortgage payments that,
5 at a minimum, are reduced to an afford-
6 able and sustainable amount, based on a
7 debt-to-income ratio that takes into ac-
8 count the total housing debt and gross
9 household income of the covered mort-
10 gator;

11 (B) applies for the remaining term of the
12 original mortgage agreement, prior to modifica-
13 tion or amendment; and

14 (C) permits the maximum amount of prin-
15 cipal reduction that produces a greater net
16 present value than foreclosure to the persons
17 described in subparagraph (A)(i); and

18 (6) the term “State” means any State of the
19 United States, the District of Columbia, any terri-
20 tory of the United States, Puerto Rico, Guam,
21 American Samoa, the Trust Territory of the Pacific
22 Islands, the Virgin Islands, and the Northern Mar-
23 iana Islands.

24 (b) LOAN MODIFICATION PROCEDURES.—

1 (1) INITIATION OF FORECLOSURE.—A covered
2 mortgagee may not initiate a nonjudicial foreclosure
3 or a judicial foreclosure against a covered mortgagor
4 that is otherwise authorized under State law un-
5 less—

6 (A) the covered mortgagee has used its
7 best efforts to determine whether the covered
8 mortgagor is eligible for a qualified loan modi-
9 fication;

10 (B) in the case of a covered mortgagor
11 who the covered mortgagee determines is eligi-
12 ble for a qualified loan modification, the covered
13 mortgagee has used its best efforts to promptly
14 offer a qualified loan modification to the cov-
15 ered mortgagor; and

16 (C) in the case of a covered mortgagor who
17 the covered mortgagee determines is not eligible
18 for a qualified loan modification, the covered
19 mortgagee has made available to the covered
20 mortgagor documentation of—

21 (i) a loan modification calculation or
22 net present value calculation, including the
23 information necessary to verify and evalu-
24 ate the calculation, made by the covered
25 mortgagee in relation to the federally re-

1 lated mortgage using a home loan modi-
2 fication protocol;

3 (ii) the loan origination, including any
4 note, deed of trust, or other document nec-
5 essary to establish the right of the mort-
6 gagee to foreclose on the mortgage, includ-
7 ing proof of assignment of the mortgage to
8 the mortgagee and the right of the mort-
9 gagee to enforce the relevant note under
10 the law of the State in which the real prop-
11 erty securing the mortgage is located;

12 (iii) any pooling and servicing agree-
13 ment that the covered mortgagee believes
14 prohibits a qualified loan modification;

15 (iv) the payment history of the cov-
16 ered mortgagor and a detailed accounting
17 of any costs or fees associated with the ac-
18 count of the covered mortgagor; and

19 (v) the specific alternatives to fore-
20 closure considered by the covered mort-
21 gagee, including qualified loan modifica-
22 tions, workout agreements, and short sales.

23 (2) FORECLOSURE IN PROGRESS.—If a covered
24 mortgagee initiated a nonjudicial foreclosure or a ju-
25 dicial foreclosure proceeding against a covered mort-

1 gagor before the date of enactment of this Act, the
2 covered mortgagee—

3 (A) shall use its best efforts to take all
4 steps necessary to—

5 (i) suspend the foreclosure or fore-
6 closure proceeding, as permitted under the
7 law of the State in which the real property
8 securing the federally related mortgage
9 loan is located, including the cancellation
10 of any sale date that has been scheduled
11 with respect to the real property securing
12 the federally related mortgage loan; and

13 (ii) toll any deadlines limiting the
14 rights of the covered mortgagor, whether
15 imposed by statute, scheduling order, or
16 otherwise, until the covered mortgagee has
17 complied with the requirements under this
18 section; and

19 (B) may not—

20 (i) conduct or schedule a sale of the
21 real property securing the federally related
22 mortgage loan; or

23 (ii) cause judgment to be entered
24 against the covered mortgagor.

1 (3) REEVALUATION OF APPLICATION FOR
2 QUALIFIED LOAN MODIFICATION.—If, after receiving
3 information under paragraph (1)(C), a covered
4 mortgagor is able to demonstrate that the covered
5 mortgagor is eligible for a qualified loan modifica-
6 tion, the covered mortgagee shall—

7 (A) promptly reevaluate the application by
8 the covered mortgagor for a qualified loan
9 modification; and

10 (B) if the covered mortgagor is eligible,
11 offer the covered mortgagor a qualified loan
12 modification.

13 (4) DISPUTE RESOLUTION.—Not later than 90
14 days after the date of enactment of this Act, the
15 Secretary of the Treasury, the Secretary, and the
16 Director of the Bureau of Financial Protection shall
17 ensure that any home loan modification protocol es-
18 tablished by the Secretary of the Treasury, the Sec-
19 retary, or the Director of the Bureau of Financial
20 Protection, respectively, includes a procedure with a
21 neutral third party to resolve disputes between cov-
22 ered mortgagors and covered mortgagees regarding
23 applications for qualified loan modifications.

24 (5) NO WAIVER OF RIGHTS.—A covered mort-
25 gagee may not require a covered mortgagor to waive

1 any right of the covered mortgagor as a condition of
2 making a qualified loan modification.

3 (6) CERTIFICATION REQUIRED PRIOR TO SALE
4 OF REAL PROPERTY SECURING MORTGAGE.—

5 (A) CERTIFICATION.—A covered mort-
6 gagee shall submit to the appropriate State en-
7 tity in the State in which the real property se-
8 curing a federally related mortgage loan is lo-
9 cated a certification that the covered mortgagee
10 has complied with all requirements of this sec-
11 tion, before—

12 (i) the covered mortgagee may sell the
13 real property; or

14 (ii) a purchaser at sale may file an ac-
15 tion to recover possession of the real prop-
16 erty.

17 (B) RECORDATION OF DEED PROHIBITED
18 WITHOUT CERTIFICATION.—The government of-
19 ficial responsible for recording deeds and other
20 transfers of real property in a jurisdiction may
21 not permit the recordation of a deed transfer-
22 ring title after a foreclosure relating to a feder-
23 ally related mortgage loan in the jurisdiction
24 unless the government official certifies that—

1 (i) the person conducting the sale has
2 demonstrated that the requirements of this
3 subsection have been met with respect to
4 the federally related mortgage loan; or

5 (ii) the requirements of this sub-
6 section do not apply to the federally re-
7 lated mortgage loan.

8 (C) VOIDING OF SALE.—A sale of property
9 in violation of this subsection is void.

10 (D) REGULATIONS.—The Secretary, in
11 consultation with the Secretary of the Treasury
12 and Director of the Bureau of Consumer Fi-
13 nancial Protection, shall issue regulations estab-
14 lishing the content of the certification under
15 this subparagraph.

16 (7) BAR TO FORECLOSURE.—Failure to comply
17 with this subsection is a bar to foreclosure under the
18 applicable law of a State.

19 (8) RULE OF CONSTRUCTION.—Nothing in this
20 subsection may be construed to prevent a covered
21 mortgagee from offering or making a loan modifica-
22 tion with a lower payment, lower interest rate, or
23 principal reduction beyond that required by a modi-
24 fication made using a home loan modification pro-
25 tocol with respect to a covered mortgagor.

1 (c) FEES PROHIBITED.—

2 (1) LOAN MODIFICATION FEES PROHIBITED.—

3 A covered mortgagee may not charge a fee to a cov-
4 ered mortgagor for carrying out the requirements
5 under subsection (b).

6 (2) FORECLOSURE-RELATED FEES.—

7 (A) IN GENERAL.—Except as provided in
8 subparagraph (B) and (C), a covered mortgagee
9 may not charge a foreclosure-related fee to a
10 covered mortgagor before—

11 (i) the covered mortgagee has made a
12 determination under subsection (b)(1); and

13 (ii) the mortgage has entered the fore-
14 closure process.

15 (B) DELINQUENCY FEES.—A covered
16 mortgagee may charge 1 delinquency fee for
17 each late payment by a covered mortgagor, if
18 the fee is specified by the mortgage agreement
19 and permitted by other applicable Federal and
20 State law. A delinquency fee may be collected
21 only once on an installment however long it re-
22 mains in default.

23 (C) OTHER FEES.—A covered mortgagee
24 may charge a covered mortgagor 1 property

1 valuation fee and 1 title search fee in connec-
2 tion with a foreclosure.

3 (3) FEES NOT IN CONTRACT.—A covered mort-
4 gagee may charge a fee to a covered mortgagor only
5 if—

6 (A) the fee was specified by the mortgage
7 agreement before a modification or amendment;
8 and

9 (B) the fee is otherwise permitted under
10 this subsection.

11 (4) FEES FOR EXPENSES INCURRED.—

12 (A) IN GENERAL.—A covered mortgagee
13 may charge a fee to a covered mortgagor only—

14 (i) for services actually performed by
15 the covered mortgagee or a third party in
16 relation to the mortgage agreement, before
17 a modification or amendment; and

18 (ii) if the fee is reasonably related to
19 the actual cost of providing the service.

20 (B) HOME PRESERVATION SERVICES.—A
21 covered mortgagee may charge a fee to a cov-
22 ered mortgagor for home preservation services,
23 only if the covered mortgagor has not submitted
24 a payment under the federally related mortgage

1 during the 60-day period ending on the date the
2 fee is charged.

3 (5) FORCEPLACED INSURANCE.—

4 (A) FEE PERMITTED.—If a home insur-
5 ance policy on the real property securing a fed-
6 erally related mortgage loan lapses due to the
7 failure of a covered mortgagor to make a pay-
8 ment, a covered mortgagee may charge the cov-
9 ered mortgagor a fee in an amount equal to the
10 actual cost of continuing or re-establishing the
11 home insurance policy on the same terms in ef-
12 fect before the lapse.

13 (B) RECOVERY OF FEE.—A covered mort-
14 gagee may recover the fee described in subpara-
15 graph (A)—

16 (i) by establishing an escrow account
17 in accordance with section 10 of the Real
18 Estate Settlement Procedures Act of 1974
19 (12 U.S.C. 2609); or

20 (ii) in equal monthly amounts during
21 one 12-month period.

22 (6) PENALTY.—The Director of the Bureau of
23 Consumer Financial Protection shall collect from
24 any covered mortgagee that charges a fee in viola-

1 tion of this subsection an amount equal to \$6,000
2 for each such fee.

3 (d) REGULATIONS.—Not later than 3 months after
4 the date of enactment of this Act, the Secretary, in con-
5 sultation with the Secretary of the Treasury and the Di-
6 rector of the Bureau of Consumer Financial Protection,
7 shall issue by notice any requirements to carry out this
8 section. The Secretary shall subsequently issue, after no-
9 tice and comment, final regulations to carry out this sec-
10 tion.

11 (e) BUREAU OF CONSUMER FINANCIAL PROTECTION
12 HOME LOAN MODIFICATION PROTOCOL.—Not later than
13 90 days after the date of enactment of this Act, the Direc-
14 tor of the Bureau of Consumer Financial Protection shall
15 develop a home loan modification protocol.

16 (f) TREASURY AND HUD HOME LOAN MODIFICA-
17 TION PROTOCOLS.—Not later than 90 days after the date
18 of enactment of this Act, the Secretary of the Treasury
19 and the Secretary shall make any changes to the home
20 loan modification protocol of the Secretary of the Treasury
21 and the Secretary, respectively, that are necessary to carry
22 out this Act.

23 **SEC. 4. MEDIATION INITIATIVES.**

24 (a) DEFINITIONS.—In this section—

1 (1) the term “mortgagee” includes the agent of
2 a mortgagee; and

3 (2) the term “mediation” means a process in
4 which a neutral third party presides over discussions
5 between mortgagors and mortgagees to review and
6 discuss available loss mitigation options in order to
7 avoid foreclosure.

8 (b) GRANT PROGRAM ESTABLISHED.—The Secretary
9 shall establish a grant program to make competitive
10 grants to State and local governments to establish medi-
11 ation programs that assist mortgagors facing foreclosure.

12 (c) MEDIATION PROGRAMS.—A mediation program
13 established using a grant under this section shall—

14 (1) require participation in the program by—

15 (A) any mortgagee that seeks to initiate or
16 has initiated a judicial or nonjudicial fore-
17 closure; and

18 (B) any mortgagor who is subject to a ju-
19 dicial or nonjudicial foreclosure;

20 (2) require that a representative of the mort-
21 gagee who has authority to decide on loss mitigation
22 options (including loan modification) participate, in
23 person, in scheduled sessions;

24 (3) require any mortgagee or mortgagor re-
25 quired to participate in the program to make a good

1 faith effort to resolve promptly, through mediation,
2 issues relating to the default on the mortgage;

3 (4) if mediation is not made available to the
4 mortgagor before a foreclosure proceeding is initi-
5 ated, allow the mortgagor to request mediation at
6 any time before a foreclosure sale;

7 (5) provide that any proceeding to foreclose
8 that is initiated by the mortgagee shall be stayed
9 until the mediator has issued a written certification
10 that the mortgagee complied in good faith with its
11 obligations under the mediation program established
12 under this section;

13 (6) provide for—

14 (A) supervision by a State court (or a
15 State court in conjunction with an agency or
16 department of a State or local government) of
17 the mediation program;

18 (B) selection and training of neutral, third-
19 party mediators by a State court (or an agency
20 or department of the State or local govern-
21 ment);

22 (C) penalties to be imposed by a State
23 court, or an agency or department of a State or
24 local government, if a mortgagee fails to comply
25 with an order to participate in mediation; and

1 (D) consideration by a State court (or an
2 agency or department of a State or local gov-
3 ernment) of recommendations by a mediator re-
4 lating to penalties for failure to fulfill the re-
5 quirements of the mediation program;

6 (7) require that each mortgagee that partici-
7 pates in the mediation program make available to
8 the mortgagor, before and during participation in
9 the mediation program, documentation of—

10 (A) a loan modification calculation or net
11 present value calculation, including the informa-
12 tion necessary to verify and evaluate the cal-
13 culation, made by the mortgagee in relation to
14 the mortgage using a home loan modification
15 protocol;

16 (B) the loan origination, including any
17 note, deed of trust, or other document nec-
18 essary to establish the right of the mortgagee to
19 foreclose on the mortgage, including proof of
20 assignment of the mortgage to the mortgagee
21 and the right of the mortgagee to enforce the
22 relevant note under the law of the State in
23 which the real property securing the mortgage
24 is located;

1 (C) any pooling and servicing agreement
2 that the mortgagee believes prohibits a loan
3 modification;

4 (D) the payment history of the mortgagor
5 and a detailed accounting of any costs or fees
6 associated with the account of the mortgagor;
7 and

8 (E) the specific alternatives to foreclosure
9 considered by the mortgagee, including loan
10 modifications, workout agreements, and short
11 sales;

12 (8) prohibit a mortgagee from shifting the costs
13 of participation in the mediation program, including
14 the attorney's fees of the mortgagee, to a mortgagor;

15 (9) provide that—

16 (A) any holder of a junior lien against the
17 property that secures a mortgage that is the
18 subject of a mediation—

19 (i) be notified of the mediation; and

20 (ii) be permitted to participate in the
21 mediation; and

22 (B) any proceeding initiated by a holder of
23 a junior lien against the property that secures
24 a mortgage that is the subject of a mediation
25 be stayed pending the mediation;

1 (10) provide information to mortgagors about
2 housing counselors approved by the Secretary; and

3 (11) be free of charge to the mortgagor and
4 mortgagee.

5 (d) RECORDKEEPING.—A State or local government
6 that receives a grant under this section shall keep a record
7 of the outcome of each mediation carried out under the
8 mediation program, including the nature of any loan modi-
9 fication made as a result of participation in the mediation
10 program.

11 (e) TARGETING.—A State that receives a grant under
12 this section may establish—

13 (1) a statewide mediation program; or

14 (2) a mediation program in a specific locality
15 that the State determines has a high need for such
16 program due to—

17 (A) the number of foreclosures in the local-
18 ity; or

19 (B) other characteristics of the locality
20 that contribute to the number of foreclosures in
21 the locality.

22 (f) FEDERAL SHARE.—The Federal share of the cost
23 of a mediation program established using a grant under
24 this section may not exceed 50 percent.

1 (g) AUTHORIZATION OF APPROPRIATIONS.—There
2 are authorized to be appropriated to carry out this section
3 such sums as may be necessary for each of fiscal years
4 2011 through 2014.

5 **SEC. 5. OVERSIGHT OF PUBLIC AND PRIVATE EFFORTS TO**
6 **REDUCE MORTGAGE DEFAULTS AND FORE-**
7 **CLOSURES.**

8 (a) DEFINITIONS.—In this section—

9 (1) the term “heads of appropriate agencies”
10 means the Comptroller of the Currency, the Board
11 of Governors of the Federal Reserve System, the
12 Federal Deposit Insurance Corporation, the National
13 Credit Union Administration, the Director of the
14 Bureau of Consumer Financial Protection, the Di-
15 rector of the Office of Financial Research of the De-
16 partment of the Treasury, and a representative of
17 State banking regulators selected by the Secretary;

18 (2) the term “mortgagee” means—

19 (A) an original lender under a mortgage;

20 (B) any servicers, affiliates, agents, sub-
21 sidiaries, successors, or assignees of an original
22 lender; and

23 (C) any subsequent purchaser, trustee, or
24 transferee of any mortgage or credit instrument
25 issued by an original lender; and

1 (3) the term “servicer” means any person who
2 collects on a home loan, whether such person is the
3 owner, the holder, the assignee, the nominee for the
4 loan, or the beneficiary of a trust, or any person act-
5 ing on behalf of such person.

6 (b) MONITORING OF HOME LOANS.—

7 (1) IN GENERAL.—The Secretary, in consulta-
8 tion with the heads of appropriate agencies, shall de-
9 velop and implement a plan to monitor—

10 (A) conditions and trends in homeownership
11 and the mortgage industry, in order to pre-
12 dict trends in foreclosures to better understand
13 other critical aspects of the mortgage market;
14 and

15 (B) the effectiveness of public and private
16 efforts to reduce mortgage defaults and fore-
17 closures.

18 (2) REPORT TO CONGRESS.—Not later than 1
19 year after the development of the plan under para-
20 graph (1), and each year thereafter, the Secretary
21 shall submit a report to Congress that—

22 (A) summarizes and describes the findings
23 of the monitoring required under paragraph
24 (1); and

1 (B) includes recommendations or proposals
2 for legislative or administrative action nec-
3 essary—

4 (i) to increase the authority of the
5 heads of appropriate agencies to levy pen-
6 alties against any mortgagee, or other per-
7 son or entity, who fails to comply with the
8 requirements described in this section;

9 (ii) to improve coordination between
10 public and private initiatives to reduce the
11 overall rate of mortgage defaults and fore-
12 closures; and

13 (iii) to improve coordination between
14 initiatives undertaken by Federal, State,
15 and local governments.

16 **SEC. 6. HOUSING TRUST FUND.**

17 From funds received or to be received by the Sec-
18 retary of the Treasury from the sale of warrants under
19 title I of the Emergency Economic Stabilization Act of
20 2008 (12 U.S.C. 5211 et seq.), the Secretary of the Treas-
21 ury shall transfer and credit \$1,000,000,000 to the Hous-
22 ing Trust Fund established under section 1338 of the
23 Federal Housing Enterprises Financial Safety and Sound-

1 ness Act of 1992 (12 U.S.C. 4568) for use in accordance
2 with such section.

○