

# D R A F T

## SUMMARY

Requires person that brings suit to foreclose residential trust deed to enter into mediation with grantor before bringing suit. Provides exceptions.

Requires person to serve on or mail to grantor notice of mediation at least 120 days before bringing suit to foreclose residential trust deed.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to foreclosures; amending ORS 88.010 and sections 2, 3, 4 and 4a,  
3 chapter 112, Oregon Laws 2012; and declaring an emergency.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** Section 2, chapter 112, Oregon Laws 2012, is amended to  
6 read:

7 **Sec. 2.** (1) As used in this section and sections 3 and 4a, **chapter 112,**  
8 **Oregon Laws 2012,** [*of this 2012 Act,*] “foreclosure avoidance measure”  
9 means an agreement between a beneficiary and a grantor that uses one or  
10 more of the following methods to modify an obligation that is secured by a  
11 trust deed:

12 (a) The beneficiary defers or forbears from collecting one or more pay-  
13 ments due on the obligation.

14 (b) The beneficiary modifies, temporarily or permanently, the payment  
15 terms or other terms of the obligation.

16 (c) The beneficiary accepts a deed in lieu of foreclosure from the grantor.

17 (d) The grantor conducts a short sale.

18 (e) The beneficiary provides the grantor with other assistance that ena-  
19 bles the grantor to avoid a foreclosure.

1 (2)(a) Except as provided in paragraph (d) of this subsection, a beneficiary  
2 that seeks to foreclose a residential trust deed under ORS 86.735 or **88.010**  
3 shall enter into mediation with the grantor for the purpose of negotiating a  
4 foreclosure avoidance measure in accordance with the provisions of this  
5 section.

6 (b) The Attorney General shall:

7 (A) Appoint a mediation service provider to coordinate a mediation pro-  
8 gram and shall enter into an agreement to pay the mediation service provider  
9 for the mediation service provider's services from the Foreclosure Avoidance  
10 Mediation Fund established in section 4, **chapter 112, Oregon Laws 2012**  
11 [*of this 2012 Act*]. The appointment and the agreement are not subject to  
12 ORS chapter 279A or 279B.

13 (B) Prescribe qualifications, training and experience requirements for  
14 mediators by rule.

15 (C) Set the schedule of fees for the mediation by rule.

16 (c) The beneficiary and the grantor shall share the cost of the mediation,  
17 except that the grantor's portion of the cost may not exceed \$200. The  
18 mediator may waive the grantor's portion of the fee in accordance with rules  
19 that the Attorney General adopts to describe circumstances that permit a  
20 waiver.

21 (d) The requirement to enter into mediation with a grantor does not ap-  
22 ply:

23 (A) To an individual, a financial institution, as defined in ORS 706.008,  
24 a mortgage banker, as defined in ORS 86A.100, or a licensee, as defined in  
25 ORS 725.010, if the individual, financial institution, mortgage banker or  
26 licensee provides to the Attorney General a sworn affidavit that states that  
27 during the preceding calendar year the individual, financial institution,  
28 mortgage banker or licensee did not commence or cause an affiliate or agent  
29 of the individual, financial institution, mortgage banker or licensee to com-  
30 mence more than a total of 250 actions to foreclose a residential trust deed  
31 by advertisement and sale under ORS 86.735 or a residential mortgage by suit

1 under ORS 88.010. An individual, financial institution, mortgage banker or  
2 licensee that intends to claim an exemption under this subparagraph shall  
3 file the affidavit either:

4 (i) [*Within 30 days after the operative date specified in section 11 of this*  
5 *2012 Act to claim the exemption for calendar year 2012 and*] Not later than  
6 January 31 in any [*subsequent*] calendar year in which the individual, fi-  
7 nancial institution, mortgage banker or licensee intends to claim the ex-  
8 emption; or

9 (ii) At the time the individual, financial institution, mortgage banker or  
10 licensee files a notice of default under ORS 86.735 **or at least 120 days be-**  
11 **fore the individual, financial institution, mortgage banker or licensee**  
12 **or an agent of the individual, financial institution, mortgage banker**  
13 **or licensee brings suit to foreclose a residential trust deed under ORS**  
14 **88.010.**

15 (B) If the grantor fails to confirm that the grantor will enter into medi-  
16 ation by the date specified under subsection (3)(c) of this section.

17 (3) Within 30 days after the date on which the beneficiary caused a notice  
18 of mediation to be served or mailed as provided in ORS 86.740 **or 88.010**  
19 **(2)(b)(A)**, the mediation service provider shall send a notice to the grantor  
20 and the beneficiary that:

21 (a) Schedules a date, time and location for the mediation. The date must  
22 be not earlier than 45 days and not later than 90 days after the date on  
23 which the notice of mediation was served or mailed as provided in ORS  
24 86.740 **or 88.010 (2)(b)(A)**.

25 (b) Identifies and provides contact information for the mediation service  
26 provider.

27 (c) Specifies a date at least 30 days before the scheduled date of the me-  
28 diation by which the grantor must contact the mediation service provider to  
29 confirm that the grantor will enter into mediation. The notice must state  
30 that the mediation service provider will deem the grantor to have declined  
31 to enter into mediation if the grantor fails to confirm by the specified date.

1 (d) Lists the costs of the mediation and specifies the portion of the costs  
2 for which the grantor is responsible.

3 (e) Provides any other information that the Attorney General requires by  
4 rule.

5 (4)(a) If the grantor confirms by the date specified under subsection (3)(c)  
6 of this section that the grantor will enter into mediation, the beneficiary or  
7 the beneficiary's agent shall appear at the time and the location identified  
8 in the mediation service provider's notice under subsection (3) of this section  
9 with the documentation described in paragraph (b) of this subsection.

10 (b) The beneficiary or the beneficiary's agent must appear in person at  
11 the location of the mediation unless the mediator permits the beneficiary or  
12 the beneficiary's agent to appear in another manner for good cause shown.  
13 The fact that a beneficiary or beneficiary's agent is located outside this state  
14 does not alone constitute good cause for the purposes of this paragraph. The  
15 beneficiary or the beneficiary's agent must appear at the mediation with:

16 (A) The grantor's complete payment history for the obligation that is se-  
17 cured by the residential trust deed that the beneficiary seeks to foreclose;

18 (B) Evidence that the beneficiary is the real party in interest with respect  
19 to the obligation, including but not limited to:

20 (i) A true copy of the original debt instrument that is the basis for the  
21 right the beneficiary claims to foreclose the trust deed; and

22 *[(ii) Documents that show the chain of title for the property that is subject*  
23 *to the residential trust deed from the date of the original loan for which the*  
24 *beneficiary seeks foreclosure to the date of the notices given under ORS 86.740,*  
25 *including conveyances, endorsements and assignments of the residential trust*  
26 *deed, the note and the security instrument, whether recorded or unrecorded;]*

27 **(ii) Documents that show the chain of title for the property that is**  
28 **subject to the residential trust deed, including conveyances, endorse-**  
29 **ments and assignments of the residential trust deed, the note and the**  
30 **security instrument, over a period of time that begins on the date of**  
31 **the original loan the beneficiary seeks to foreclose and ends on the**

1 **date on which the notices were given under ORS 86.740 or 88.010**  
2 **(2)(b)(A);**

3 (C) A copy of the authorization from the beneficiary to the beneficiary's  
4 agent, if the beneficiary's agent appears at the mediation;

5 (D) A copy of any of the following documents that apply to the note or  
6 obligation that is secured by the trust deed:

7 (i) A servicing agreement the beneficiary entered into with another per-  
8 son; or

9 (ii) An agreement by means of which the beneficiary pledged as collateral  
10 for a security the beneficiary issued or sold all or a portion of the ownership  
11 interest in the note or other obligation; and

12 (E) Other documentation the Attorney General specifies by rule.

13 (c) The beneficiary or the beneficiary's agent that enters into mediation  
14 with the grantor must have or be able to obtain, before the initial mediation  
15 session concludes, authority to accept or reject a proposal for a foreclosure  
16 avoidance measure and authority to enter with the grantor into an agree-  
17 ment for a foreclosure avoidance measure.

18 (5)(a) The beneficiary or the beneficiary's agent must enter into mediation  
19 in accordance with mediation guidelines the Attorney General establishes  
20 by rule.

21 (b) If the beneficiary or the beneficiary's agent agrees with the grantor  
22 on a foreclosure avoidance measure, the beneficiary or beneficiary's agent  
23 and the grantor shall set forth the terms of the foreclosure avoidance meas-  
24 ure in a written agreement, a copy of which the beneficiary or beneficiary's  
25 agent shall provide to the Attorney General. The beneficiary may elect to  
26 pay the grantor's portion of the cost of the mediation or the grantor and the  
27 beneficiary may agree to include the cost of the mediation as part of and in  
28 accordance with any payment plan that is part of the foreclosure avoidance  
29 measure.

30 (c) If the beneficiary or the beneficiary's agent and the grantor do not  
31 agree on a foreclosure avoidance measure, the mediation service provider

1 shall notify the Attorney General that the mediation did not result in an  
2 agreement.

3 (6)(a) At the conclusion of the mediation, if the beneficiary has complied  
4 with the requirements of subsections (4) and (5) of this section, the mediation  
5 service provider shall provide the beneficiary or the beneficiary's agent with  
6 a certificate of compliance in a form and with contents that the Attorney  
7 General specifies by rule. The certificate must state that the beneficiary has  
8 complied with the requirements of this section.

9 (b) If the grantor does not confirm by the date specified under subsection  
10 (3)(c) of this section that the grantor will enter into mediation, the mediation  
11 service provider shall provide the beneficiary or the beneficiary's agent with  
12 a certificate of compliance in a form and with contents that the Attorney  
13 General specifies by rule. The certificate must state that the grantor declined  
14 to enter into mediation with the beneficiary.

15 (c) The mediation service provider shall provide a copy of the certificate  
16 the mediation service provider issues under paragraph (a) or (b) of this sub-  
17 section to the grantor and to the Attorney General.

18 (7)(a) [*A grantor that is at risk of default*] **If, before the beneficiary or the**  
19 **trustee has filed a notice of default for recording under ORS 86.735 or**  
20 **brought suit to foreclose the residential trust deed under ORS 88.010,**  
21 **the grantor has failed for 30 days or more to make a regular periodic**  
22 **payment for the obligation that is secured by the residential trust deed**  
23 **or the grantor is otherwise at risk of default, the grantor** may notify  
24 the beneficiary or trustee in the trust deed or the beneficiary's or trustee's  
25 agent that the grantor wants to enter into mediation. Within 15 days after  
26 receiving the request, the beneficiary or trustee or the beneficiary's or  
27 trustee's agent shall respond to the grantor's request and shall notify the  
28 Attorney General and the mediation service provider identified in subsection  
29 (2)(b) of this section. The response to the grantor must include contact in-  
30 formation for the Attorney General and the mediation service provider.

31 (b) A grantor that requests mediation under paragraph (a) of this sub-

1 section may also notify the Attorney General and the mediation service  
2 provider of the request. The Attorney General shall post on the Department  
3 of Justice website contact information for the mediation service provider and  
4 an address or method by which the grantor may notify the Attorney General.

5 (c) Within 10 days after receiving notice of the request under paragraph  
6 (a) of this subsection, the mediation service provider shall send a notice to  
7 the grantor and the beneficiary that, except with respect to the date by  
8 which the mediation service provider must send the notice, is otherwise in  
9 accordance with the provisions of subsection (3) of this section.

10 (d) A beneficiary or beneficiary's agent that receives a request under  
11 paragraph (a) of this subsection is subject to the same duties as are described  
12 in subsections (2), (4) and (5) of this section.

13 **SECTION 2.** Section 3, chapter 112, Oregon Laws 2012, is amended to  
14 read:

15 **Sec. 3.** The notice of mediation required under ORS 86.740 (1)(b) **or 88.010**  
16 **(2)(b)(A)** must be in a form and with the contents the Attorney General  
17 specifies by rule and must:

18 (1) List the name, address, telephone number and other contact informa-  
19 tion for the grantor or other person named in the residential trust deed.

20 (2) Specify the account number or other means by which the beneficiary  
21 or trustee or an agent of the beneficiary or trustee identifies the obligation  
22 that is secured by the residential trust deed.

23 (3) Provide the address, telephone number and other contact information  
24 for:

25 (a) The beneficiary or an agent of the beneficiary that the beneficiary  
26 authorizes to negotiate on the beneficiary's behalf;

27 (b) The Oregon State Bar's Lawyer Referral Service;

28 (c) Service agencies or other providers that offer free or low-cost legal  
29 services from a list of agencies or providers that the Attorney General adopts  
30 by rule; and

31 (d) A list of not-for-profit housing counselors approved by the United

1 States Department of Housing and Urban Development or an agency of this  
2 state.

3 (4) State that section 2, **chapter 112, Oregon Laws 2012**, [*of this 2012*  
4 *Act*] requires the beneficiary to enter into mediation with the grantor for the  
5 purpose of negotiating a foreclosure avoidance measure.

6 (5) List the documents the grantor must bring to the mediation. The At-  
7 torney General by rule shall specify the documents the grantor must bring.

8 (6) State that the grantor may choose to have an attorney or a housing  
9 counselor approved by the United States Department of Housing and Urban  
10 Development represent the grantor at the mediation.

11 (7) State the costs of the mediation and specify the maximum cost for  
12 which the grantor will be responsible.

13 (8) State that the mediation and mediation communications, as defined in  
14 ORS 36.110, are confidential in accordance with and to the extent provided  
15 in ORS 36.220 to 36.238.

16 (9) State that within 30 days after the date of the notice a mediation  
17 service provider will send another notice to the grantor with a date, time  
18 and location for the mediation and with the other information specified in  
19 section 2 (3), **chapter 112, Oregon Laws 2012** [*of this 2012 Act*].

20 **SECTION 3.** Section 4, chapter 112, Oregon Laws 2012, is amended to  
21 read:

22 **Sec. 4.** (1) The Foreclosure Avoidance Mediation Fund is established in  
23 the State Treasury, separate and distinct from the General Fund. The  
24 **Foreclosure Avoidance Mediation** Fund consists of moneys the Attorney  
25 General collects or receives for the purpose of paying the expenses of coor-  
26 dinating a mediation program under section 2, **chapter 112, Oregon Laws**  
27 **2012**, [*of this 2012 Act*] and related expenses. The moneys in the fund are  
28 continuously appropriated to the Attorney General for the purposes of paying  
29 the expenses of coordinating the mediation program and related expenses.

30 (2) The Attorney General may receive moneys for the purposes set forth  
31 in subsection (1) of this section from any public or private source.



1 (3)(a) Except as provided in paragraph [(b)] (c) of this subsection, a  
2 trustee or beneficiary that files a notice of default under ORS 86.735 shall  
3 pay to the county clerk that records the notice \$100 in addition to and not  
4 in lieu of any fee that the county clerk charges for recording the notice of  
5 default. The county clerk at the end of each month shall forward the pro-  
6 ceeds of the \$100 charge to the Attorney General for deposit into the fund  
7 described in subsection (1) of this section.

8 **(b) Except as provided in paragraph (c) of this subsection, a bene-**  
9 **ficiary that brings suit to foreclose a residential trust deed under ORS**  
10 **88.010 shall on the same date on which the beneficiary brings the suit**  
11 **remit to the Attorney General a fee of \$100, which the Attorney Gen-**  
12 **eral shall deposit into the fund described in subsection (1) of this sec-**  
13 **tion.**

14 [(b)] (c) An individual, a financial institution, as defined in ORS 706.008,  
15 a mortgage banker, as defined in ORS 86A.100, or a licensee, as defined in  
16 ORS 725.010, is not subject to the \$100 charge described in paragraph (a) **or**  
17 **(b)** of this subsection if the individual, financial institution, mortgage banker  
18 or licensee provides to the county clerk a sworn affidavit that states that  
19 during the preceding calendar year the individual, financial institution,  
20 mortgage banker or licensee did not commence or cause an affiliate or agent  
21 of the individual, financial institution, mortgage banker or licensee to com-  
22 mence more than a total of 250 actions to foreclose a residential trust deed  
23 by advertisement and sale under ORS 86.735 or a residential mortgage by suit  
24 under ORS 88.010. An individual, financial institution, mortgage banker or  
25 licensee that intends to claim an exemption under this paragraph shall pro-  
26 vide the affidavit either:

27 (A) [*Within 30 days after the operative date specified in section 11 of this*  
28 *2012 Act to claim the exemption for calendar year 2012 and*] Not later than  
29 January 31 in any [*subsequent*] calendar year in which the individual, fi-  
30 nancial institution, mortgage banker or licensee intends to claim the ex-  
31 emption; or

1 (B) At the time the individual, financial institution, mortgage banker or  
2 licensee files a notice of default under ORS 86.735 **or brings suit to fore-**  
3 **close a residential trust deed under ORS 88.010.**

4 **SECTION 4.** Section 4a, chapter 112, Oregon Laws 2012, is amended to  
5 read:

6 **Sec. 4a.** (1)(a) If a beneficiary determines that a grantor is not eligible  
7 for any foreclosure avoidance measure or that the grantor has not complied  
8 with the terms of a foreclosure avoidance measure to which the grantor has  
9 agreed, the beneficiary or the beneficiary's agent, at least 30 days before the  
10 date specified for the trustee's sale in a notice served under ORS 86.740 or  
11 86.755 (2)(b)[,] **or at least 30 days before the first scheduled proceeding**  
12 **in a suit to foreclose the residential trust deed under ORS 88.010,** shall  
13 notify the grantor in writing of the beneficiary's determination and shall  
14 cause the notice to be served as provided in ORS 86.740 (1).

15 (b) The notice must in plain language explain the basis for the  
16 beneficiary's determination.

17 (2) The beneficiary or the beneficiary's agent shall mail a copy of the  
18 notice of the determination described in subsection (1) of this section to the  
19 Department of Justice on the same date on which the notice is served.

20 (3)(a) At least 20 days before the date specified for the trustee's sale in  
21 a notice served under ORS 86.740 or 86.755 (2)(b)[,] **or at least 20 days be-**  
22 **fore the first scheduled proceeding in a suit to foreclose the residential**  
23 **trust deed under ORS 88.010,** the beneficiary or the beneficiary's agent  
24 shall:

25 (A) Record in the mortgage records for the property that is subject to the  
26 trustee's sale, in the county or in one of the counties in which the property  
27 is located, an affidavit that states that the beneficiary has complied with the  
28 requirements set forth in subsections (1) and (2) of this section; and

29 (B) Mail a copy of the affidavit to the department.

30 (b) The affidavit described in paragraph (a) of this subsection must:

31 (A) Identify the property that is the subject of the trustee's sale;

1 (B) Identify the grantor and, as of the date of the affidavit, the trustee  
2 and the beneficiary;

3 (C) State that the beneficiary or beneficiary's agent has complied with the  
4 requirements set forth in subsections (1) and (2) of this section; and

5 (D) Include proof of service on the grantor for the notice described in  
6 subsection (1) of this section.

7 (4) The Attorney General by rule shall specify a form for and the contents  
8 of the notice of the determination described in subsection (1) of this section  
9 and shall identify an address to which the beneficiary or beneficiary's agent  
10 must mail the copy of the notice under subsection (2) of this section and the  
11 affidavit under subsection (3) of this section.

12 (5)(a) A beneficiary or an agent of the beneficiary that fails to comply  
13 with the provisions of this section is liable to the grantor in the amount of  
14 \$500 plus the amount of the grantor's actual damages for each failure to  
15 comply with a provision of this section.

16 (b) A grantor may bring an action against a beneficiary or an agent of  
17 the beneficiary in a circuit court of this state to recover the amounts de-  
18 scribed in paragraph (a) of this subsection. The grantor shall commence the  
19 action within two years after the date on which the beneficiary or the  
20 beneficiary's agent should have complied, but did not comply, with the pro-  
21 visions of this section.

22 (c) Notwithstanding an agreement to the contrary, a court may award  
23 reasonable attorney fees, costs and disbursements to a grantor that obtains  
24 a final judgment in the grantor's favor.

25 **SECTION 5.** ORS 88.010 is amended to read:

26 88.010. (1) Except as otherwise provided by law, a lien upon real or per-  
27 sonal property, other than that of a judgment, whether created by mortgage  
28 or otherwise, [*shall*] **must** be foreclosed, and the property adjudged to be  
29 sold to satisfy the debt [*secured thereby*] **the lien secures**, by [*a*] **bringing**  
30 suit. Except as provided in ORS 88.070, in addition to the judgment of fore-  
31 closure and sale, if **the lien debtor or another person, as principal or**

1 **otherwise, has given** a promissory note or other personal obligation [*for the*  
 2 *payment of*] **to repay** the debt [*has been given by the lien debtor or any other*  
 3 *person as principal or otherwise*], the court also shall enter a judgment for  
 4 the amount of the debt against the [*person or persons*] **lien debtor or other**  
 5 **person**. The provisions of this chapter as to liens upon personal property  
 6 [*are not intended to*] **do not** exclude a person [*having such*] **that has a** lien  
 7 from any other remedy or right [*in regard*] **with respect** to [*such*] **the**  
 8 property **that the person otherwise has**.

9 **(2)(a) A person may not proceed under this section with a suit to**  
 10 **foreclose a residential trust deed unless the person has complied with**  
 11 **applicable provisions of sections 2, 3, 4 and 4a, chapter 112, Oregon**  
 12 **Laws 2012, or unless the person is exempt under section 2 (2)(d),**  
 13 **chapter 112, Oregon Laws 2012, from a requirement to enter into me-**  
 14 **diation with the grantor.**

15 **(b) For the purposes of the requirement in paragraph (a) of this**  
 16 **subsection, a person has not complied with applicable requirements**  
 17 **of sections 2, 3, 4 and 4a, chapter 112, Oregon Laws 2012, if the person**  
 18 **has not:**

19 **(A) Served a notice of mediation in the form and with the contents**  
 20 **described in section 3, chapter 112, Oregon Laws 2012, as provided in**  
 21 **ORCP 7 D(2) and 7 D(3), or mailed the notice by both first class and**  
 22 **certified mail with return receipt requested, at least 120 days before**  
 23 **bringing suit under this section;**

24 **(B) Responded to a grantor's request for mediation as provided in**  
 25 **section 2 (7), chapter 112, Oregon Laws 2012;**

26 **(C) Filed for recording in the official records of the county or**  
 27 **counties in which the property that is subject to the residential trust**  
 28 **deed is located the certificate of compliance the person received under**  
 29 **section 2, chapter 112, Oregon Laws 2012; or**

30 **(D) Remitted to the Attorney General the fee described in section**  
 31 **4 (3)(b), chapter 112, Oregon Laws 2012, unless the person is exempt**

1 **from the fee under section 4 (3)(c), chapter 112, Oregon Laws 2012.**

2 **(c) Notwithstanding a person's exemption under section 2 (2)(d),**  
3 **chapter 112, Oregon Laws 2012, from the requirement to enter into**  
4 **mediation with a grantor, the person may not proceed with a suit to**  
5 **foreclose a residential trust deed under this section unless the person**  
6 **has complied with the provisions of section 4a, chapter 112, Oregon**  
7 **Laws 2012.**

8 **SECTION 6. This 2013 Act being necessary for the immediate pres-**  
9 **ervation of the public peace, health and safety, an emergency is de-**  
10 **clared to exist, and this 2013 Act takes effect on its passage.**

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