

# Enrolled Senate Bill 558

Sponsored by Senators BOQUIST, BEYER, ROSENBAUM, HASS; Senators BATES, COURTNEY, DEVLIN, EDWARDS, MONNES ANDERSON, ROBLAN, SHIELDS, Representatives GALLEGOS, HOLVEY

CHAPTER .....

## AN ACT

Relating to foreclosures of residential trust deeds; creating new provisions; amending ORS 86.735, 86.740, 88.010, 646.607 and 646.638 and sections 2, 4 and 4a, chapter 112, Oregon Laws 2012; repealing sections 2a and 3, chapter 112, Oregon Laws 2012; and declaring an emergency.

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

**SECTION 1.** Sections 2, 3, 4, 5 and 6 of this 2013 Act are added to and made a part of ORS 86.705 to 86.795.

**SECTION 2.** (1)(a) Except as provided in paragraph (b) of this subsection, a beneficiary that intends to foreclose a residential trust deed shall first request a resolution conference with the grantor before the beneficiary or the trustee files a notice of default under ORS 86.735 or before the beneficiary brings suit under ORS 88.010.

(b)(A) The requirement to request or participate in a resolution conference with a grantor in accordance with subsection (2) or (3) of this section does not apply to a beneficiary if the beneficiary submits to the Attorney General a sworn affidavit that states that during the preceding calendar year the beneficiary did not commence or cause an affiliate, subsidiary or agent of the beneficiary to commence more than 175 actions to foreclose a residential trust deed by advertisement and sale under ORS 86.735 or by suit under ORS 88.010. A beneficiary that is a trustee shall include as part of the total number of foreclosure actions that the beneficiary commenced in the previous calendar year all foreclosure actions that the beneficiary commenced under ORS 86.735 or 88.010 in the beneficiary’s capacity as a trustee. A beneficiary that intends to claim an exemption under this subparagraph shall submit the affidavit in a form and with the contents the Attorney General specifies by rule either:

(i) Not later than January 31 in any calendar year in which the beneficiary intends to claim the exemption for the remainder of the calendar year; or

(ii) At the time the beneficiary files a notice of default under ORS 86.735 or brings suit under ORS 88.010.

(B) An exemption under subparagraph (A) of this paragraph expires at the end of the calendar year in which the beneficiary claims the exemption.

(c) A beneficiary that claims an exemption under this subsection is not exempt from the requirements set forth in section 4a, chapter 112, Oregon Laws 2012.

(2) The beneficiary shall request a resolution conference through the service provider. The beneficiary shall submit the request to the service provider electronically, by facsimile or by mail and shall submit a processing fee in an amount and in a manner that the Attorney

General specifies by rule. The service provider shall pay to the Attorney General, for deposit into the Foreclosure Avoidance Fund established under section 4, chapter 112, Oregon Laws 2012, moneys the service provider receives from the beneficiary under this subsection. The beneficiary's request under this subsection must identify the residential trust deed that the beneficiary intends to foreclose and list the name, title, address, telephone number and other available contact information for:

- (a) The beneficiary;
- (b) Any agent of the beneficiary that will attend the resolution conference;
- (c) Any person other than a person identified in paragraph (a) or (b) of this subsection that will receive, on the beneficiary's behalf, notices or other communications related to the resolution conference; and
- (d) The grantor.

(3)(a) If a beneficiary does not request a resolution conference under subsection (1) of this section, a grantor may request a resolution conference with the beneficiary if:

(A) The beneficiary or the trustee has not filed a notice of default under ORS 86.735 or the beneficiary has not commenced a suit under ORS 88.010; and

(B) The grantor first obtains from a housing counselor a certification in writing that the grantor is more than 30 days in default on the obligation that the residential trust deed secures or, if the grantor is not in default, that the grantor has a financial hardship that the housing counselor believes may qualify the grantor for a foreclosure avoidance measure.

(b) A grantor shall request a resolution conference through the service provider. The grantor shall submit the request to the service provider electronically, by facsimile or by mail and shall enclose with the request the written certification the housing counselor provides under paragraph (a)(B) of this subsection. The Attorney General by rule shall specify the information that the request must include.

(c) A beneficiary that receives a notice from a service provider after the service provider receives a request from a grantor under paragraph (b) of this subsection is subject to the requirements set forth in this section and sections 3, 4 and 5 of this 2013 Act and section 4a, chapter 112, Oregon Laws 2012.

(d) This subsection does not apply to a beneficiary that has submitted an affidavit and is exempt under subsection (1)(b) of this section.

(4) A beneficiary that submitted an affidavit in accordance with subsection (1)(b) of this section may, without waiving the exemption the beneficiary claimed in the affidavit, request a resolution conference with a grantor. The beneficiary shall submit a request under this subsection in accordance with the requirements set forth in subsection (2) of this section, except that submitting the request does not require a processing fee.

**SECTION 3.** (1)(a) Within 10 days after a service provider receives a request for a resolution conference under section 2 of this 2013 Act, the service provider shall schedule the resolution conference and mail a notice to the beneficiary and to the grantor. The service provider shall schedule the resolution conference to occur within 75 days after the date on which the service provider sends the notice.

(b) A notice under this subsection must:

(A) Specify a range of dates within which and a location at which the resolution conference will occur;

(B) State that the beneficiary and the grantor each must pay the facilitator's fees for the resolution conference;

(C) List and describe the documents that the beneficiary and the grantor must submit to the service provider;

(D) State that the grantor must consult a housing counselor before attending the resolution conference unless the grantor notifies the service provider that the grantor could not obtain an appointment with a housing counselor before the date of the resolution conference;

(E) State that the grantor may have an attorney or housing counselor present to represent the grantor at the resolution conference, and that the attorney or housing counselor must attend the resolution conference in person unless there are compelling circumstances that prevent attendance in person; and

(F) Include any other information the Attorney General requires by rule.

(2) Within 25 days after the date on which the service provider sends a notice under subsection (1) of this section:

(a) The grantor shall pay a fee to the service provider in an amount and in a manner that the Attorney General specifies by rule. The grantor's fee may not exceed \$200. Within five days after receiving the fee from the grantor, the service provider shall send a written notice to the grantor and the beneficiary that specifies the date, time and location of the resolution conference.

(b) The service provider shall pay to the Attorney General, for deposit into the Foreclosure Avoidance Fund established under section 4, chapter 112, Oregon Laws 2012, moneys the service provider receives from the grantor under paragraph (a) of this subsection.

(c) The grantor shall submit to the service provider:

(A) Information about the grantor's income, expenses, debts and other obligations;

(B) A description of the grantor's financial hardship, if any;

(C) Documents that verify the grantor's income; and

(D) Any other information the Attorney General requires by rule.

(3) The grantor shall consult a housing counselor before attending the resolution conference unless the grantor cannot obtain an appointment with a housing counselor before the date of the resolution conference.

(4) Within 25 days after the service provider makes the information the grantor submitted under subsection (2) of this section available to the beneficiary, the beneficiary shall:

(a) Pay a fee to the service provider in an amount that is not more than \$600 and in a manner that the Attorney General specifies by rule. The service provider shall pay to the Attorney General, for deposit into the Foreclosure Avoidance Fund established under section 4, chapter 112, Oregon Laws 2012, moneys the service provider receives from the beneficiary under this paragraph.

(b) Submit to the service provider:

(A) Copies of:

(i) The residential trust deed; and

(ii) The promissory note that is evidence of the obligation that the residential trust deed secures and that the beneficiary or beneficiary's agent certifies is a true copy;

(B) The name and address of the person that owns the obligation that is secured by the residential trust deed;

(C) A record of the grantor's payment history for the longer of the preceding 12 months or since the beneficiary last deemed the grantor current on the obligation;

(D) An itemized statement that shows:

(i) The amount the grantor owes on the obligation, itemized to reflect the principal, interest, fees, charges and any other amounts included within the obligation; and

(ii) The amount the grantor must pay to cure the grantor's default;

(E) A document that identifies:

(i) The input values for each net present value model that the beneficiary or the beneficiary's agent uses; and

(ii) The output values that each net present value model produces;

(F) The appraisal or price opinion the beneficiary relied on most recently to determine the value of the property that is the subject of the residential trust deed;

(G) The portion of any pooling agreement, servicing agreement or other agreement that the beneficiary cites as a limitation or prohibition on modifying the terms of the obligation,

together with a statement that describes the extent to which the beneficiary sought to have the limitation or prohibition waived;

(H) A description of any additional documents the beneficiary requires to evaluate the grantor's eligibility for a foreclosure avoidance measure; and

(I) Any other information the Attorney General requires by rule.

(5)(a) The service provider may postpone or reschedule a resolution conference that the service provider scheduled under subsection (1) of this section if:

(A) The beneficiary and the grantor agree to a new date;

(B) The beneficiary or the grantor requests a new date in writing that is not more than 30 days after the original date scheduled for the resolution conference and can show good cause for the request; or

(C) The beneficiary does not pay the fee required under subsection (4)(a) of this section by the date the fee is due. The service provider may wait until the beneficiary has paid the fee before rescheduling the resolution conference.

(b) The service provider shall cancel a resolution conference that the service provider scheduled under subsection (1) of this section if the grantor does not pay the fee required under subsection (2)(a) of this section by the date the fee is due.

(6)(a) A resolution conference conducted in accordance with this section and sections 2, 4 and 5 of this 2013 Act is not subject to ORS chapter 36 and does not preclude mediation that a court or another provision of law requires.

(b) A facilitator is not subject to a subpoena and cannot be compelled to testify in any proceeding that is related to a resolution conference, other than a proceeding against a facilitator for an act or omission for which the facilitator may be liable under paragraph (c) of this subsection.

(c) A facilitator is not civilly liable for any act or omission done or made while engaged in efforts to assist or facilitate a resolution conference unless the facilitator acted or made an omission in bad faith, with malicious intent or in a manner that exhibited a willful or wanton disregard of the rights, safety or property of another person.

(d) The limitations on liability provided by this subsection apply to the officers, directors, employees and agents of the service provider and any dispute resolution program engaged in facilitating resolution conferences.

(e) Information that a beneficiary or grantor submits under this section is not subject to ORS 192.410 to 192.505.

**SECTION 4.** (1)(a) Except as provided in paragraph (b) of this subsection, a beneficiary that must request a resolution conference with a grantor under section 2 of this 2013 Act shall attend and participate in the resolution conference in person.

(b)(A) A beneficiary may send an agent to the resolution conference if the agent attends the resolution conference in person and has complete authority to negotiate on the beneficiary's behalf and commit the beneficiary to a foreclosure avoidance measure or, if the agent who attends the resolution conference in person does not have complete authority, the beneficiary also requires the participation, by remote communication, of a person who does have complete authority to negotiate on the beneficiary's behalf and commit the beneficiary to a foreclosure avoidance measure.

(B) A grantor may have an attorney or a housing counselor, or both, present to represent the grantor at the resolution conference, but the grantor, or any individual that a court appoints to act on the grantor's behalf, must attend the resolution conference in person unless there are compelling circumstances that prevent attendance in person.

(2) If the beneficiary agrees to a foreclosure avoidance measure with the grantor, the beneficiary and the grantor shall sign a written document that sets forth the terms of the foreclosure avoidance measure.

(3) A facilitator may suspend or postpone a resolution conference after the resolution conference has begun:

(a) One time only on the facilitator's initiative or in response to a request for a suspension or postponement from the beneficiary or the grantor;

(b) After a suspension or postponement under paragraph (a) of this subsection only if the beneficiary and the grantor agree to the additional suspension or postponement; or

(c) If the beneficiary or the grantor needs additional time to write or sign a document that sets forth the terms of a foreclosure avoidance measure.

(4) After the resolution conference concludes, the facilitator shall submit to the service provider a written report that:

(a) Lists the date or dates on which the resolution conference occurred;

(b) Lists the name, title, address, telephone number and other available contact information for each person that participated in the resolution conference, noting whether the person attended the resolution conference in person or participated by remote communication;

(c) States whether the beneficiary or the agent of the beneficiary who attended the resolution conference had complete authority to negotiate and commit to a foreclosure avoidance measure;

(d) Summarizes the terms of the foreclosure avoidance measure to which the beneficiary and the grantor agreed or notes that the beneficiary and the grantor did not agree to a foreclosure avoidance measure; and

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

**SECTION 5.** (1)(a) The service provider shall issue, within five days after receiving a report from a facilitator under section 4 (4) of this 2013 Act, a certificate of compliance to a beneficiary that:

(A) Complied with sections 2, 3 and 4 of this 2013 Act;

(B) Submitted the materials required under section 3 (4) of this 2013 Act to the service provider;

(C) Appeared in person at, or sent an agent in person to, the resolution conference with complete authority to negotiate on the beneficiary's behalf and commit the beneficiary to a foreclosure avoidance measure or, if the beneficiary or agent did not have complete authority, required the participation by remote communication of a person with complete authority to negotiate on the beneficiary's behalf and commit the beneficiary to a foreclosure avoidance measure; and

(D) Signed a document that sets forth the terms of any foreclosure avoidance measure to which the beneficiary and the grantor agreed.

(b) A certificate of compliance expires one year after the date on which the service provider issues the certificate of compliance under paragraph (a) of this subsection.

(c) The service provider shall notify a beneficiary that failed to meet a requirement to which the beneficiary was subject under section 2, 3 or 4 of this 2013 Act that the service provider will not issue a certificate of compliance, explaining in the notice why the service provider will not issue the certificate of compliance. The service provider shall provide a copy of the notice under this paragraph to the grantor and to the Attorney General.

(2) Notwithstanding the requirements set forth in subsection (1) of this section, if a service provider cancels a resolution conference under section 3 (5)(b) of this 2013 Act, the service provider shall issue a certificate of compliance to the beneficiary within five days after canceling the resolution conference.

**SECTION 6.** (1) The Attorney General shall:

(a) Appoint and enter into an agreement with a service provider to coordinate and manage a program to implement the provisions of sections 2, 3, 4 and 5 of this 2013 Act.

(b) Enter into an agreement for information technology goods or services.

(c) Receive affidavits submitted under section 2 (1)(b) of this 2013 Act and copies of notices sent under section 4a (1), chapter 112, Oregon Laws 2012.

(d) Specify the amount a beneficiary must pay to the service provider under sections 2 (2) and 3 (4)(a) of this 2013 Act and the amount that the grantor must pay to the service provider under section 3 (2)(a) of this 2013 Act.

(e) Prescribe qualifications, training and experience requirements for facilitators that conduct or assist resolution conferences.

(f) Specify procedures and guidelines for conducting a resolution conference.

(g) Adopt additional rules to implement sections 2, 3, 4 and 5 of this 2013 Act and sections 4 and 4a, chapter 112, Oregon Laws 2012.

(2) The Attorney General shall pay for the service provider's services and for information technology goods and services from the Foreclosure Avoidance Fund established under section 4, chapter 112, Oregon Laws 2012. The Attorney General is not subject to ORS chapter 279A, 279B or 279C in appointing a service provider or entering into an agreement under subsection (1)(a) or (b) of this section.

(3) In addition to and not in lieu of any other penalty provided by law, violation of section 2 (1)(a) or (2), 3 (4) or 4 (1) or (2) of this 2013 Act by a beneficiary is an unlawful practice under ORS 646.607 that is subject to enforcement under ORS 646.632.

**SECTION 7.** Section 2, chapter 112, Oregon Laws 2012, is amended to read:

**Sec. 2.** [(1)] As used in this section and [sections 3 and 4a of this 2012 Act,] sections 2, 3, 4, 5 and 6 of this 2013 Act and sections 4 and 4a, chapter 112, Oregon Laws 2012:

(1) "Facilitator" means a person that a service provider selects to conduct a resolution conference.

(2) "Foreclosure avoidance measure" means an agreement between a beneficiary and a grantor that uses one or more of the following methods to modify an obligation that is secured by a residential trust deed:

(a) The beneficiary defers or forbears from collecting one or more payments due on the obligation.

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

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

(d) The grantor conducts a short sale.

(e) The beneficiary provides the grantor with other assistance that enables the grantor to avoid a foreclosure.

(3) "Housing counselor" means a counselor employed by a nonprofit housing counseling agency that the Housing and Community Services Department or a successor state agency approves.

(4) "Resolution conference" means a meeting at which a grantor and a beneficiary attempt to negotiate and agree upon a foreclosure avoidance measure.

(5) "Service provider" means a person that the Attorney General appoints under section 6 of this 2013 Act to coordinate a program to implement the provisions of sections 2, 3, 4 and 5 of this 2013 Act.

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

[(b) The Attorney General shall:]

[(A) Appoint a mediation service provider to coordinate a mediation program and shall enter into an agreement to pay the mediation service provider for the mediation service provider's services from the Foreclosure Avoidance Mediation Fund established in section 4 of this 2012 Act. The appointment and the agreement are not subject to ORS chapter 279A or 279B.]

[(B) Prescribe qualifications, training and experience requirements for mediators by rule.]

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

[(c) The beneficiary and the grantor shall share the cost of the mediation, except that the grantor's portion of the cost may not exceed \$200. The mediator may waive the grantor's portion of the fee in

accordance with rules that the Attorney General adopts to describe circumstances that permit a waiver.]

*[(d) The requirement to enter into mediation with a grantor does not apply:]*

*[(A) To an individual, a financial institution, as defined in ORS 706.008, a mortgage banker, as defined in ORS 86A.100, or a licensee, as defined in ORS 725.010, if the individual, financial institution, mortgage banker or licensee provides to the Attorney General a sworn affidavit that states that during the preceding calendar year the individual, financial institution, mortgage banker or licensee did not commence or cause an affiliate or agent of the individual, financial institution, mortgage banker or licensee to commence more than a total of 250 actions to foreclose a residential trust deed by advertisement and sale under ORS 86.735 or a residential mortgage by suit under ORS 88.010. An individual, financial institution, mortgage banker or licensee that intends to claim an exemption under this subparagraph shall file the affidavit either:]*

*[(i) Within 30 days after the operative date specified in section 11 of this 2012 Act to claim the exemption for calendar year 2012 and not later than January 31 in any subsequent calendar year in which the individual, financial institution, mortgage banker or licensee intends to claim the exemption; or]*

*[(ii) At the time the individual, financial institution, mortgage banker or licensee files a notice of default under ORS 86.735.]*

*[(B) If the grantor fails to confirm that the grantor will enter into mediation by the date specified under subsection (3)(c) of this section.]*

*[(3) Within 30 days after the date on which the beneficiary caused a notice of mediation to be served or mailed as provided in ORS 86.740, the mediation service provider shall send a notice to the grantor and the beneficiary that:]*

*[(a) Schedules a date, time and location for the mediation. The date must be not earlier than 45 days and not later than 90 days after the date on which the notice of mediation was served or mailed as provided in ORS 86.740.]*

*[(b) Identifies and provides contact information for the mediation service provider.]*

*[(c) Specifies a date at least 30 days before the scheduled date of the mediation by which the grantor must contact the mediation service provider to confirm that the grantor will enter into mediation. The notice must state that the mediation service provider will deem the grantor to have declined to enter into mediation if the grantor fails to confirm by the specified date.]*

*[(d) Lists the costs of the mediation and specifies the portion of the costs for which the grantor is responsible.]*

*[(e) Provides any other information that the Attorney General requires by rule.]*

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

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

*[(A) The grantor's complete payment history for the obligation that is secured by the residential trust deed that the beneficiary seeks to foreclose;]*

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

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

*[(ii) Documents that show the chain of title for the property that is subject to the residential trust deed from the date of the original loan for which the beneficiary seeks foreclosure to the date of the*

*notices given under ORS 86.740, including conveyances, endorsements and assignments of the residential trust deed, the note and the security instrument, whether recorded or unrecorded;]*

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

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

*[(i) A servicing agreement the beneficiary entered into with another person; or]*

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

*[(E) Other documentation the Attorney General specifies by rule.]*

*[(c) The beneficiary or the beneficiary's agent that enters into mediation with the grantor must have or be able to obtain, before the initial mediation session concludes, authority to accept or reject a proposal for a foreclosure avoidance measure and authority to enter with the grantor into an agreement for a foreclosure avoidance measure.]*

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

*[(b) If the beneficiary or the beneficiary's agent agrees with the grantor on a foreclosure avoidance measure, the beneficiary or beneficiary's agent and the grantor shall set forth the terms of the foreclosure avoidance measure in a written agreement, a copy of which the beneficiary or beneficiary's agent shall provide to the Attorney General. The beneficiary may elect to pay the grantor's portion of the cost of the mediation or the grantor and the beneficiary may agree to include the cost of the mediation as part of and in accordance with any payment plan that is part of the foreclosure avoidance measure.]*

*[(c) If the beneficiary or the beneficiary's agent and the grantor do not agree on a foreclosure avoidance measure, the mediation service provider shall notify the Attorney General that the mediation did not result in an agreement.]*

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

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

*[(c) The mediation service provider shall provide a copy of the certificate the mediation service provider issues under paragraph (a) or (b) of this subsection to the grantor and to the Attorney General.]*

*[(7)(a) A grantor that is at risk of default before the beneficiary or the trustee has filed a notice of default for recording under ORS 86.735 may notify the beneficiary or trustee in the trust deed or the beneficiary's or trustee's agent that the grantor wants to enter into mediation. Within 15 days after receiving the request, the beneficiary or trustee or the beneficiary's or trustee's agent shall respond to the grantor's request and shall notify the Attorney General and the mediation service provider identified in subsection (2)(b) of this section. The response to the grantor must include contact information for the Attorney General and the mediation service provider.]*

*[(b) A grantor that requests mediation under paragraph (a) of this subsection may also notify the Attorney General and the mediation service provider of the request. The Attorney General shall post on the Department of Justice website contact information for the mediation service provider and an address or method by which the grantor may notify the Attorney General.]*

*[(c) Within 10 days after receiving notice of the request under paragraph (a) of this subsection, the mediation service provider shall send a notice to the grantor and the beneficiary that, except with re-*



spect to the date by which the mediation service provider must send the notice, is otherwise in accordance with the provisions of subsection (3) of this section.]

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

**SECTION 8.** Section 4, chapter 112, Oregon Laws 2012, is amended to read:

**Sec. 4.** (1) The Foreclosure Avoidance [*Mediation*] Fund is established in the State Treasury, separate and distinct from the General Fund. The **Foreclosure Avoidance** Fund consists of moneys the Attorney General collects or receives for the purpose of paying the expenses of coordinating a [*mediation program under section 2 of this 2012 Act and*] **program to implement the provisions of sections 2, 3, 4 and 5 of this 2013 Act and to pay** related expenses. The moneys in the fund are continuously appropriated to the Attorney General for the purposes of paying the expenses of coordinating [*the mediation program and*] **a program to implement sections 2, 3, 4 and 5 of this 2013 Act and paying** related expenses.

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

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

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

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

*[(B) At the time the individual, financial institution, mortgage banker or licensee files a notice of default under ORS 86.735.]*

**SECTION 9.** Section 4a, chapter 112, Oregon Laws 2012, is amended to read:

**Sec. 4a.** (1)(a) **Whether or not a beneficiary participates in a resolution conference under section 2 of this 2013 Act,** if [a] the beneficiary determines that a grantor of a residential trust deed is not eligible for [any] a foreclosure avoidance measure or that the grantor has not complied with the terms of a foreclosure avoidance measure to which the grantor has agreed, the beneficiary [*or the beneficiary's agent, at least 30 days before the date specified for the trustee's sale in a notice served under ORS 86.740 or 86.755 (2)(b), shall notify the grantor in writing of the beneficiary's determination and shall cause the notice to be served as provided in ORS 86.740 (1).]*] **shall mail a written notice to the grantor within 10 days after making the determination. The beneficiary shall mail a copy of the notice to the Department of Justice on the same date that the beneficiary mails the notice to the grantor.**

(b) The notice described in paragraph (a) of this subsection must in plain language explain the basis for the beneficiary's determination. The notice and any information in the notice are not subject to disclosure under ORS 192.410 to 192.505.

(c) This subsection does not impose an affirmative duty on the beneficiary to determine if a grantor is eligible for a foreclosure avoidance measure.

*[(b) The notice must in plain language explain the basis for the beneficiary's determination.]*

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

*[(3)(a) (2) At least [20] **five** days before [the date specified for the trustee's sale in a notice served under ORS 86.740 or 86.755 (2)(b),] **the trustee sells the property that is subject to foreclosure, the beneficiary [or the beneficiary's agent shall:]***

*[(A)] **shall** record in the mortgage records [for the property that is subject to the trustee's sale,] in the county or in one of the counties in which the property is located[,] an affidavit that states that the beneficiary has complied with the requirements set forth in **subsection (1) of this section.** [subsections (1) and (2) of this section; and]*

*[(B) Mail a copy of the affidavit to the department.]*

*[(b) The affidavit described in paragraph (a) of this subsection must:]*

*[(A) Identify the property that is the subject of the trustee's sale;]*

*[(B) Identify the grantor and, as of the date of the affidavit, the trustee and the beneficiary;]*

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

*[(D) Include proof of service on the grantor for the notice described in subsection (1) of this section.]*

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

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

**(3)(a) A beneficiary that fails to substantially comply with subsection (1)(b) of this section, or otherwise fails to comply with subsection (1)(a) or (2) of this section, is liable to the grantor in the amount of \$500 plus the amount of the grantor's actual damages for each failure.**

(b) A grantor may bring an action against a beneficiary *[or an agent of the beneficiary]* in a circuit court of this state to recover the amounts described in paragraph (a) of this subsection. The grantor shall commence the action within *[two years]* **one year** after the date on which the beneficiary *[or the beneficiary's agent]* should have complied, but did not comply, with the provisions of this section.

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

**SECTION 10.** ORS 86.735, as amended by section 6, chapter 112, Oregon Laws 2012, is amended to read:

86.735. A trustee may **not** foreclose a trust deed by advertisement and sale in the manner provided in ORS 86.740 to 86.755 *[if]* **unless:**

(1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in the mortgage records in the counties in which the property described in the deed is situated;

(2) There is a default by the grantor or other person that owes an obligation, the performance of which is secured by the trust deed, or by the grantor's or other person's successors in interest with respect to a provision in the deed that authorizes sale in the event of default of the provision;

(3) The trustee or beneficiary has filed for record in the county clerk's office in each county where the trust property, or some part of the trust property, is situated, a notice of default containing the information required by ORS 86.745 and containing the trustee's or beneficiary's election to sell the property to satisfy the obligation;

(4) The beneficiary [or the beneficiary's agent] has filed for recording in the official records of the county or counties in which the property that is subject to the residential trust deed is located [the certificate of compliance the beneficiary received under section 2, chapter 112, Oregon Laws 2012, if the beneficiary must enter into mediation with the grantor under section 2 (2)(a), chapter 112, Oregon Laws 2012;]:

(a) **A valid and unexpired certificate of compliance that a service provider issued to the beneficiary under section 5 of this 2013 Act; or**

(b) **A copy of the affidavit with which the beneficiary claimed, under section 2 (1)(b) of this 2013 Act, an exemption that has not expired;**

[5(a)] (5) The beneficiary [or the beneficiary's agent] has complied with the provisions of section 4a, chapter 112, Oregon Laws 2012; [and]

[b)] (6) The grantor [is not in compliance] **has not complied** with the terms of [a] **any** foreclosure avoidance measure upon which the beneficiary and the grantor have agreed; and

[6)] (7) An action has not been commenced to recover the debt or any part of the debt then remaining secured by the trust deed, or, if an action has been commenced, the action has been dismissed, except that:

(a) Subject to ORS 86.010 and the procedural requirements of ORCP 79 and 80, an action may be commenced to appoint a receiver or to obtain a temporary restraining order during foreclosure of a trust deed by advertisement and sale, except that a receiver may not be appointed with respect to a single-family residence that the grantor, the grantor's spouse or the grantor's minor or dependent child occupies as a principal residence.

(b) An action may be commenced to foreclose, judicially or nonjudicially, the same trust deed as to any other property covered by the trust deed, or any other trust deeds, mortgages, security agreements or other consensual or nonconsensual security interests or liens that secure repayment of the debt.

**SECTION 11.** ORS 86.740, as amended by section 7, chapter 112, Oregon Laws 2012, is amended to read:

86.740. [(1)(a)] (1) [Subsequent to] **After** recording a notice of default as provided in ORS 86.735 and at least 120 days before the day the trustee conducts the sale, notice of the sale with the contents described in ORS 86.745 must be served pursuant to ORCP 7 D(2) and 7 D(3) or mailed by both first class and certified mail with return receipt requested.

[b) If the sale is for the purpose of foreclosing a residential trust deed and the beneficiary in the trust deed must enter into mediation with the grantor under section 2 (2)(a), chapter 112, Oregon Laws 2012, a separate notice of mediation, in the form and with the contents described in section 3, chapter 112, Oregon Laws 2012, must be served or mailed in the manner provided in paragraph (a) of this subsection at least 60 days before the notice of sale described in paragraph (a) of this subsection is served or mailed.]

(2) The [notices] **notice** described in subsection (1) of this section must be served or mailed to the last-known address of the following persons or the legal representatives of the persons, if any:

(a) The grantor in the trust deed.

(b) Any successor in interest to the grantor whose interest appears of record, or of whose interest the trustee or the beneficiary has actual notice.

(c) Any person, including the Department of Revenue or another state agency, that has a lien or interest subsequent to the trust deed if the lien or interest appears of record or the beneficiary has actual notice of the lien or interest.

(d) A person that requests notice as provided in ORS 86.785.

[e) The mediation service provider that the Attorney General appoints under section 2 (2)(b), chapter 112, Oregon Laws 2012, if the notices are served or mailed under subsection (1)(b) of this section.]

(3) A notice served by mail under subsection (1) of this section is effective when the notice is mailed.

(4)(a) The disability, insanity or death of a person to whom the [notices] **notice** required under this section must be given does not delay or impair in any way the trustee's right under a trust deed to foreclose under the deed. If the disability, insanity or death occurs before the notice of default is recorded, the [notices] **notice** required under this section must be given instead to the guardian, the conservator of the estate of the person or the administrator or personal representative of the person in the manner and by the time set forth in this section.

(b) If the disability, insanity or death of a person to whom the [notices] **notice** required under this section must be given occurs on or after the notice of default is recorded, the trustee shall, if and when the trustee has knowledge of the disability, insanity or death, promptly give the guardian, the conservator of the estate or the administrator or personal representative **the** required [notices] **notice** by sending the [notices] **notice** by first class and certified mail with return receipt requested to the last-known address of the guardian, conservator or administrator or personal representative.

(c) If there is no administrator or personal representative of the estate of the person to whom the [notices] **notice** required under this section must be given, the [notices] **notice** may be given instead to the heirs at law or devisees of the deceased person in the manner and by the time set forth in this section.

(5) If the owner of real property subject to foreclosure dies and the real property is also subject to a transfer on death deed, as provided by ORS 93.948 to 93.979, the [notices] **notice** required under this section must be given to the beneficiary designated under the transfer on death deed.

**SECTION 12.** ORS 88.010 is amended to read:

88.010. (1) Except as otherwise provided by law, a lien upon real or personal property, other than that of a judgment, whether created by mortgage or otherwise, [shall] **must** be foreclosed, and the property adjudged to be sold to satisfy the debt [secured thereby] **the lien secures**, by [a] **bringing** suit. Except as provided in ORS 88.070, in addition to the judgment of foreclosure and sale, if **the lien debtor or another person, as principal or otherwise, has given** a promissory note or other personal obligation for the payment of the debt [has been given by the lien debtor or any other person as principal or otherwise], the court also shall enter a judgment for the amount of the debt against the [person or persons] **lien debtor or other person**. The provisions of this chapter as to liens upon personal property [are not intended to] **do not** exclude a person [having such] **that has** a lien from any other remedy or right [in regard to such property] **that the person otherwise has with respect to the property**.

(2)(a) **A complaint in a suit to foreclose a residential trust deed under this section must include as an attachment a true copy of:**

(A) **A valid and unexpired certificate of compliance that a service provider issued to a beneficiary under section 5 of this 2013 Act;**

(B) **The affidavit the person submitted under section 2 (1)(b) of this 2013 Act, provided that the exemption the person claimed in the affidavit has not expired; or**

(C) **The notice the beneficiary received under section 5 (1)(c) of this 2013 Act.**

(b)(A) **A court on the court's own motion or in response to a motion from a defendant may dismiss without prejudice a suit that a person brings under this section to foreclose a residential trust deed, or may stay proceedings on the suit, if the person:**

(i) **Fails to file with the court the certificate described in paragraph (a)(A) of this subsection or the affidavit described in paragraph (a)(B) of this subsection; or**

(ii) **Files with the court the notice described in paragraph (a)(C) of this subsection.**

(B) **The court may release a stay the court granted under subparagraph (A) of this paragraph if the person files with the court the certificate described in paragraph (a)(A) of this subsection or the affidavit described in paragraph (a)(B) of this subsection.**

(C) **The court may award a defendant that prevails on a motion under this paragraph reasonable costs and attorney fees associated with bringing the motion and any other relief the court deems proper.**

**SECTION 13.** ORS 646.607 is amended to read:

646.607. A person engages in an unlawful practice *[when]* **if** in the course of the person's business, vocation or occupation the person:

(1) Employs any unconscionable tactic in connection with *[the sale, rental or other disposition]* **selling, renting or disposing** of real estate, goods or services, or *[collection or enforcement of]* **collecting or enforcing** an obligation;

(2) Fails to deliver all or any portion of real estate, goods or services as promised, and *[upon request of the customer]* **at a customer's request**, fails to refund *[any]* money that *[has been received from the customer that was for the purchase of]* **the customer gave to the person to purchase** the undelivered real estate, goods or services and that *[is not retained by the seller pursuant to]* **the person does not retain pursuant to** any right, claim or defense *[asserted]* **the person may assert** in good faith. This subsection does not create a warranty obligation and does not apply to a dispute over the quality of real estate, goods or services delivered to a customer;

(3) Violates ORS 401.965 (2);

(4) Violates a provision of ORS 646A.725 to 646A.750;

(5) Violates ORS 646A.530; *[or]*

(6) Employs a collection practice that is unlawful under ORS 646.639[.]; **or**

**(7) Is a beneficiary that violates section 2 (1)(a) or (2), 3 (4) or 4 (1) or (2) of this 2013 Act.**

**SECTION 14.** ORS 646.638 is amended to read:

646.638. (1) Except as provided in subsections (8) and (9) of this section, *[any]* **a person** *[who]* **that** suffers *[any]* **an** ascertainable loss of money or property, real or personal, as a result of *[willful use or employment by]* another *[person]* **person's willful use or employment** of a method, act or practice declared unlawful *[by]* **under** ORS 646.608, may bring an individual action in an appropriate court to recover actual damages or statutory damages of \$200, whichever is greater. The court or the jury*[, as the case may be,]* may award punitive damages and the court may provide *[the]* **any** equitable relief the court considers necessary or proper.

(2) *[Upon commencement of any action brought]* **A person that brings an action** under subsection (1) of this section *[the party bringing the action]* shall mail a copy of the complaint or other initial pleading to the Attorney General **at the time the action commences** and, upon entry of any judgment in the action, shall mail a copy of the judgment to the Attorney General. Failure to mail a copy of the complaint *[shall not be]* **is not** a jurisdictional defect, but a court may not enter judgment for the plaintiff until proof of mailing is filed with the court. Proof of mailing may be by affidavit or by return receipt of mailing.

(3) The court may award reasonable attorney fees and costs at trial and on appeal to a prevailing plaintiff in an action under this section. The court may award reasonable attorney fees and costs at trial and on appeal to a prevailing defendant only if the court finds *[there was no]* **that an** objectively reasonable basis for bringing the action or asserting the ground for appeal **did not exist**.

(4) The court may not award attorney fees to a prevailing defendant under the provisions of subsection (3) of this section if the action under this section is maintained as a class action pursuant to ORCP 32.

(5) Any permanent injunction or final judgment or order *[of]* the court *[made]* **makes** under ORS 646.632 or 646.636 is prima facie evidence in an action brought under this section that the respondent used or employed a method, act or practice declared unlawful *[by]* **under** ORS 646.608, but an assurance of voluntary compliance, whether or not approved by the court, *[shall not be]* **is not** evidence of the violation.

(6) Actions brought under this section *[shall]* **must** be commenced within one year *[from]* **after** the discovery of the unlawful method, act or practice. *[However, whenever any complaint is filed by]* **Notwithstanding this limitation, if** a prosecuting *[attorney]* **attorney filed a complaint** to prevent, restrain or punish *[violations]* **a violation** of ORS 646.608, *[running of]* **the complaint tolls** the statute of limitations with respect to every private right of action under this section *[and]* **that is** based in whole or in part on any matter **set forth in the prosecuting attorney's complaint for**

**the period of time in which the proceeding that the prosecuting attorney initiated is pending** [*complained of in said proceeding shall be suspended during the pendency thereof*].

(7) Notwithstanding subsection (6) of this section, in any action [*brought by*] **that** a seller or lessor **brings** against a purchaser or lessee of real estate, goods or services, the purchaser or lessee may assert any counterclaim **that** the purchaser or lessee has arising out of a violation of ORS 646.605 to 646.652.

(8) A class action may be maintained under this section. In any class action under this section:

(a) Statutory damages under subsection (1) of this section may be recovered on behalf of class members only if the plaintiffs in the action establish that the members have sustained an ascertainable loss of money or property as a result of a reckless or knowing use or employment by the defendant of a method, act or practice declared unlawful by ORS 646.608;

(b) The trier of fact may award punitive damages; and

(c) The court may award appropriate equitable relief.

(9) This section does not apply to:

(a) Any method, act or practice described in ORS 646.608 (1)(aa). Actions for violation of laws relating to odometers are provided under ORS 815.410 and 815.415.

(b) A violation of section 2 (1)(a) or (2), 3 (4) or 4 (1) or (2) of this 2013 Act.

**SECTION 15.** Sections 2a and 3, chapter 112, Oregon Laws 2012, are repealed.

**SECTION 16.** (1) Sections 2 to 6 of this 2013 Act, the amendments to ORS 86.735, 86.740, 88.010, 646.607 and 646.638 and sections 2, 4 and 4a, chapter 112, Oregon Laws 2012, by sections 7 to 14 of this 2013 Act and the repeal of sections 2a and 3, chapter 112, Oregon Laws 2012, by section 15 of this 2013 Act become operative 61 days after the effective date of this 2013 Act.

(2) The Attorney General may take any action before the operative date specified in subsection (1) of this section that is necessary to enable the Attorney General to exercise, on and after the operative date specified in subsection (1) of this section, all of the duties, functions and powers conferred on the Attorney General by sections 2 to 6 of this 2013 Act and the amendments to ORS 86.735, 86.740, 88.010, 646.607 and 646.638 and sections 2, 4 and 4a, chapter 112, Oregon Laws 2012, by sections 7 to 14 of this 2013 Act. At least 30 days before the operative date specified in subsection (1) of this section, the Attorney General shall publish and make available to interested persons copies of any draft rules the Attorney General proposes to adopt under this section.

**SECTION 17.** Sections 2 to 6 of this 2013 Act, the amendments to ORS 86.735, 86.740, 88.010, 646.607 and 646.638 and sections 2, 4 and 4a, chapter 112, Oregon Laws 2012, by sections 7 to 14 of this 2013 Act and the repeal of sections 2a and 3, chapter 112, Oregon Laws 2012, by section 15 of this 2013 Act apply to requests for resolution conferences that a beneficiary or grantor submits, to notices of sale that a trustee or beneficiary or an agent of the trustee or beneficiary sends, and to suits to foreclose a residential trust deed that commence, on or after the operative date specified in section 16 of this 2013 Act.

**SECTION 18.** The Attorney General may use moneys in the Foreclosure Avoidance Fund established under section 4, chapter 112, Oregon Laws 2012, to pay the remaining expenses of the program established under sections 2, 2a, 3, 4 and 4a, chapter 112, Oregon Laws 2012.

**SECTION 19.** This 2013 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect on its passage.

**Passed by Senate April 16, 2013**

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Robert Taylor, Secretary of Senate

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Peter Courtney, President of Senate

**Passed by House May 22, 2013**

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Tina Kotek, Speaker of House

**Received by Governor:**

.....M,....., 2013

**Approved:**

.....M,....., 2013

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John Kitzhaber, Governor

**Filed in Office of Secretary of State:**

.....M,....., 2013

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Kate Brown, Secretary of State