

HOUSE BILL NO. 358

INTRODUCED BY R. FARRIS-OLSEN

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4 A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING A MONTANA HOMEOWNER'S BILL OF RIGHTS  
5 ACT; PROVIDING METHODS OF RECOURSE FOR OWNERS OF RESIDENTIAL PROPERTY IN THREAT OF  
6 DEFAULT OR FORECLOSURE; PROVIDING PROCEDURES FOR CONTACTING OWNERS IN THREAT OF  
7 DEFAULT; PROVIDING FORECLOSURE PREVENTION ALTERNATIVES; ESTABLISHING TIMETABLES FOR  
8 NOTICES OF DEFAULT, FORECLOSURE, AND SALE OF PROPERTY; ESTABLISHING PENALTIES AND  
9 FINES FOR PARTIES THAT VIOLATE A HOMEOWNER'S RIGHTS; PROVIDING RULEMAKING AUTHORITY;  
10 AND AMENDING SECTIONS 71-1-313 AND 71-1-315, MCA."

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12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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14 NEW SECTION. **Section 1. Short title.** [Sections 1 through 10] may be cited as the "Montana  
15 Homeowner's Bill of Rights Act".

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17 NEW SECTION. **Section 2. Purpose -- limitations.** (1) The purpose of [sections 1 through 10] is to  
18 ensure that borrowers are included as active participants in the nonjudicial foreclosure process and have a  
19 meaningful opportunity to obtain available loss mitigation options. Loss mitigation options may include loan  
20 modifications or other alternatives to foreclosure. Nothing in [sections 1 through 10] may be interpreted to require  
21 a particular result of the process.

22 (2) Unless otherwise provided, [sections 1 through 10] apply only to first lien mortgages or deeds of trust  
23 that are secured by owner-occupied residential real property containing no more than four dwelling units.

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25 NEW SECTION. **Section 3. Definitions.** As used in [sections 1 through 10], the following definitions  
26 apply:

27 (1) "Borrower" means a natural person who is a mortgagor or grantor of a deed of trust under a  
28 residential mortgage loan. The term does not include a natural person who has:

29 (a) surrendered the secured property as evidenced by a letter confirming the surrender or by delivery  
30 of the keys to the property to the mortgagee, trustee, beneficiary, or authorized agent;

1 (b) contracted with an organization, person, or entity whose primary business is advising people who  
2 have decided to leave their homes on how to extend the foreclosure process and avoid their contractual  
3 obligations to mortgagees or beneficiaries; or

4 (c) filed a case under Title 11, chapter 7, 11, 12, or 13, of the United States Code and the bankruptcy  
5 court has not entered an order closing or dismissing the bankruptcy case or granting relief from a stay of  
6 foreclosure.

7 (2) "First lien" means the most senior mortgage or deed of trust on the property that is the subject of the  
8 notice of default or notice of sale.

9 (3) "Foreclosure" has the meaning provided in 71-1-221.

10 (4) "Foreclosure prevention alternative" means a first lien loan modification or another available loss  
11 mitigation option.

12 (5) (a) "Mortgage servicer" means a person or entity who directly services a loan or who is responsible  
13 for interacting with the borrower, managing the loan account on a daily basis including collecting and crediting  
14 periodic loan payments, managing any escrow account, or enforcing the note and security instrument, either as  
15 the current owner of the promissory note or as the current owner's authorized agent.

16 (b) The term does not include:

17 (i) a trustee under a deed of trust; or

18 (ii) the trustee's authorized agent acting under a power of sale pursuant to a deed of trust.

19 (6) "Owner-occupied" means property that is the principal residence of the borrower and is security for  
20 a loan made for personal, family, or household purposes.

21 (7) "Residential mortgage loan" has the meaning provided in 33-12-102.

22  
23 **NEW SECTION. Section 4. Communications and documentation required for notice of default.**

24 (1) A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent may not record a notice of default  
25 as provided in 71-1-313 until:

26 (a) 30 days after initial contact is made as required in subsection (3)(a); or

27 (b) 30 days after satisfying the due diligence requirements described in subsection (3)(d).

28 (2) A mortgage servicer complies with subsection (1) if the borrower has provided a complete first lien  
29 loan modification application as provided in [section 5].

30 (3) (a) A mortgage servicer shall contact the borrower in person or by telephone to assess the borrower's

1 financial situation and explore options for the borrower to avoid foreclosure. During the initial contact, the  
2 mortgage servicer shall advise the borrower of the borrower's right to request a subsequent meeting. If a meeting  
3 is requested, the mortgage servicer shall schedule the meeting to occur within 14 days. The assessment of the  
4 borrower's financial situation and discussion of options may occur during the first contact or at the subsequent  
5 meeting scheduled for that purpose.

6 (b) A mortgage servicer's loss mitigation personnel may participate by telephone during any contact  
7 required by this section.

8 (c) A borrower may give written consent to a housing counseling agency certified by the U.S. department  
9 of housing and urban development, to an attorney, or to another adviser to discuss with the mortgage servicer,  
10 on the borrower's behalf, the borrower's financial situation and options for the borrower to avoid foreclosure. The  
11 contact made at the direction of the borrower satisfies the contact requirements of subsection (3)(a). Any loan  
12 modification or workout plan offered at the meeting by the mortgage servicer is subject to approval by the  
13 borrower.

14 (d) A notice of default as provided in 71-1-313 may be recorded when a mortgage servicer is unable to  
15 contact a borrower as required in subsection (3)(a) despite the due diligence of the mortgage servicer. For  
16 purposes of this section, "due diligence" occurs when a mortgage servicer attempts to contact a borrower:

17 (i) by first-class letter that includes the toll-free telephone number made available by the U.S. department  
18 of housing and urban development to find a housing counseling agency certified by the department of housing  
19 and urban development; and

20 (ii) by telephone at least three times at different hours and on different days after mailing the letter  
21 required in subsection (3)(d)(i). Telephone calls must be made:

22 (A) to the primary telephone number on file; or

23 (B) if the primary number has been disconnected, to the secondary telephone number on file.

24 (4) If the borrower does not respond within 2 weeks after the contact requirements in subsection (3) have  
25 been satisfied, the mortgage servicer shall then send a certified letter, with return receipt requested.

26 (5) The mortgage servicer shall provide the borrower a means of contact in a timely manner, including  
27 a toll-free telephone number that provides access to a live representative during business hours.

28 (6) The mortgage servicer shall post on the home page of its internet website, if available, a prominent  
29 link to the following information:

30 (a) options that may be available to borrowers who are unable to afford their mortgage payments and

1 who wish to avoid foreclosure, and instructions to borrowers advising them on steps to take to explore the  
2 options;

3 (b) a list of financial documents borrowers should collect and be prepared to present to the mortgage  
4 servicer when discussing options for avoiding foreclosure;

5 (c) a toll-free telephone number for borrowers who wish to discuss options for avoiding foreclosure with  
6 their mortgage servicer; and

7 (d) the toll-free telephone number made available by the U.S. department of housing and urban  
8 development to find a housing counseling agency certified by the department of housing and urban development.

9 (7) This section applies only to mortgages or deeds of trust described in [section 2(2)].  
10

11 **NEW SECTION. Section 5. First lien loan modification -- application.** (1) If a borrower submits a  
12 complete application for a first lien loan modification offered by or through the borrower's mortgage servicer, a  
13 mortgage servicer, trustee, mortgagee, beneficiary, or authorized agent may not record a notice of default or  
14 notice of sale or conduct a trustee's sale while the complete first lien loan modification application is pending and  
15 until the borrower has been provided with a written determination by the mortgage servicer regarding that  
16 borrower's eligibility for the requested loan modification.

17 (2) If a foreclosure prevention alternative has been approved in writing prior to a notice of default, a  
18 mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent may not record a notice of default if:

19 (a) the borrower is in compliance with the terms of a written trial or permanent loan modification,  
20 forbearance, or repayment plan; or

21 (b) a foreclosure prevention alternative has been approved in writing by all parties, including but not  
22 limited to the first lien investor, junior lienholder, and mortgage insurer, as applicable, and proof of funds or  
23 financing has been provided to the servicer.

24 (3) If a foreclosure prevention alternative is approved in writing after a notice of default, a mortgage  
25 servicer, mortgagee, trustee, beneficiary, or authorized agent may not record a notice of sale or conduct a  
26 trustee's sale if:

27 (a) the borrower is in compliance with the terms of a written trial or permanent loan modification,  
28 forbearance, or repayment plan; or

29 (b) a foreclosure prevention alternative has been approved in writing by all parties, including but not  
30 limited to the first lien investor, junior lienholder, and mortgage insurer, as applicable, and proof of funds or

1 financing has been provided to the servicer.

2 (4) This section applies only to a depository institution chartered under state law or a person licensed  
3 in accordance with the Montana Mortgage Act provided for in Title 32, chapter 9, part 1.

4 (5) An application is considered "complete" when a borrower has supplied the mortgage servicer with  
5 all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage  
6 servicer.

7 (6) If a borrower has been approved in writing for a first lien loan modification or other foreclosure  
8 prevention alternative and the servicing of the borrower's loan is transferred or sold to another mortgage servicer,  
9 the subsequent mortgage servicer shall continue to honor any previously approved first lien loan modification or  
10 other foreclosure prevention alternative as provided in [sections 1 through 10].

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12 **NEW SECTION. Section 6. Loan modification plan -- duties of mortgage servicers.** (1) A mortgage  
13 servicer shall offer the borrower a loan modification or workout plan if such a modification or plan is consistent  
14 with the mortgage servicer's contractual or other authority.

15 (2) A mortgage servicer also has the duties provided in Title 32, chapter 9, part 1.

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17 **NEW SECTION. Section 7. Foreclosure prevention alternative -- single point of contact required.**

18 (1) When a borrower requests a foreclosure prevention alternative, a mortgage servicer shall promptly establish  
19 a single point of contact and provide to the borrower one or more direct means of communication with the single  
20 point of contact.

21 (2) The single point of contact is responsible for:

22 (a) communicating the process by which a borrower may apply for an available foreclosure prevention  
23 alternative and the deadline for any required submissions to be considered for the options;

24 (b) coordinating the receipt of all documents associated with available foreclosure prevention alternatives  
25 and notifying the borrower of any missing documents necessary to complete the application;

26 (c) having access to current information and personnel to inform the borrower of the current status of the  
27 foreclosure prevention alternative in a timely, accurate, and adequate method;

28 (d) ensuring that a borrower is considered for all foreclosure prevention alternatives offered by or through  
29 the mortgage servicer; and

30 (e) having access to individuals with the ability and authority to stop foreclosure proceedings when

1 necessary.

2 (3) The single point of contact shall remain assigned to the borrower's account until the mortgage servicer  
3 determines that all loss mitigation options offered by or through the mortgage servicer have been exhausted or  
4 the borrower's account becomes current.

5 (4) The mortgage servicer shall ensure that a single point of contact refers and transfers a borrower to  
6 an appropriate supervisor on request of the borrower, if the single point of contact has a supervisor.

7 (5) This section applies only to:

8 (a) mortgages or deeds of trust described in [section 2(2)]; and

9 (b) a depository institution chartered under state law or a person licensed in accordance with the  
10 Montana Mortgage Act provided for in Title 32, chapter 9, part 1.

11 (6) For purposes of this section, "single point of contact" means an individual or team of personnel each  
12 of whom has the ability and authority to perform the responsibilities described in subsection (2). The mortgage  
13 servicer shall ensure that each member of the team is knowledgeable about the borrower's situation and current  
14 status in the alternatives to foreclosure process.

15  
16 **NEW SECTION. Section 8. Notice of default -- procedure.** (1) The trustee, mortgagee, beneficiary,  
17 or any authorized agent shall record a notice of default after all methods of remedy provided in [section 4] have  
18 been exhausted.

19 (2) An entity may not record or cause a notice of default to be recorded or otherwise initiate the  
20 foreclosure process unless the entity is the holder of the beneficial interest under the mortgage or deed of trust,  
21 the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the  
22 beneficial interest. An agent of the holder of the beneficial interest under the mortgage or deed of trust, original  
23 trustee, or substituted trustee under the deed of trust may not record a notice of default or otherwise commence  
24 the foreclosure process except when acting within the scope of authority designated by the holder of the  
25 beneficial interest.

26 (3) A rebuttable presumption exists that the beneficiary actually knew of all unpaid loan payments on the  
27 obligation owed to the beneficiary and secured by the deed of trust or mortgage subject to the notice of default.  
28 However, the failure to include an actually known default does not invalidate the notice of sale, and the beneficiary  
29 is not precluded from asserting a claim to this omitted default or defaults in a separate notice of default.

30

1            NEW SECTION. **Section 9. Foreclosure procedure.** (1) If a trustee's deed upon sale has not been  
2 recorded, a borrower may bring an action for injunctive relief if the borrower believes a violation of [sections 1  
3 through 10] has occurred.

4            (2) An injunction must remain in place and a trustee's sale must be enjoined until the court determines  
5 that the mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent has corrected and remedied the  
6 violation or violations giving rise to the action for injunctive relief. An enjoined entity may move to dissolve an  
7 injunction based on a showing that the material violation has been corrected and remedied.

8            (3) After a trustee's deed upon sale has been recorded, a mortgage servicer, mortgagee, trustee,  
9 beneficiary, or authorized agent is liable to a borrower for actual damages resulting from a material violation of  
10 [sections 1 through 10] by that mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent if the  
11 violation was not corrected and remedied prior to the recordation of the trustee's deed upon sale.

12            (4) A violation of [sections 1 through 10] constitutes an unlawfully deceptive or unfair act as provided in  
13 30-14-103.

14            (5) A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent is not liable for any violation  
15 that it has corrected and remedied prior to the recordation of the trustee's deed upon sale or that has been  
16 corrected and remedied by third parties working on its behalf prior to the recordation of the trustee's deed upon  
17 sale.

18            (6) A violation of [sections 1 through 10] does not affect the validity of a sale in favor of a bona fide  
19 purchaser and any of its encumbrancers for value without notice.

20            (7) A third party encumbrancer is not relieved of liability resulting from violations of [sections 1 through  
21 10] committed by that third-party encumbrancer that occurred prior to the sale of the subject property to the bona  
22 fide purchaser.

23            (8) The rights, remedies, and procedures provided by [sections 1 through 10] are in addition to and  
24 independent of any other rights, remedies, or procedures under any other law. Nothing in this section may be  
25 construed to alter, limit, or negate any other rights, remedies, or procedures provided by law.

26            (9) A court may award a prevailing borrower reasonable attorney fees and costs in an action brought  
27 pursuant to [sections 1 through 10]. A borrower is considered to have prevailed if the borrower obtained injunctive  
28 relief or was awarded damages pursuant to [sections 1 through 10].

29

30            NEW SECTION. **Section 10. Rulemaking.** The department of administration may adopt rules for the

1 implementation of [sections 1 through 9]. Rules must include the creation of documentation required in [sections  
2 1 through 9].

3

4 **Section 11.** Section 71-1-313, MCA, is amended to read:

5 **"71-1-313. Conditions for foreclosure by advertisement and sale.** The trustee may foreclose a trust  
6 indenture by advertisement and sale under this part if:

7 (1) the trust indenture, any assignments of the trust indenture by the trustee or the beneficiary, and any  
8 appointment of a successor trustee are recorded in the office of the clerk and recorder of each county in which  
9 the property described in the trust indenture or some part thereof is situated;

10 (2) there is a default by the grantor or other person owing an obligation or by their successors in interest,  
11 the performance of which is secured by the trust indenture, with respect to any provision in the indenture which  
12 authorizes sale in the event of default of such provision; and

13 (3) the trustee or beneficiary shall have filed for record in the office of the clerk and recorder in each  
14 county where the property described in the indenture or some part thereof is situated a notice of sale, duly  
15 executed and acknowledged by such trustee or beneficiary, setting forth:

16 (a) the names of the grantor, trustee, and beneficiary in the trust indenture and the name of any  
17 successor trustee;

18 (b) a description of the property covered by the trust indenture;

19 (c) the book and page of the mortgage records where the trust indenture is recorded;

20 (d) the default for which the foreclosure is made;

21 (e) the sum owing on the obligation secured by the trust indenture;

22 (f) a declaration that the mortgage servicer has contacted the borrower or has tried with due diligence  
23 to contact the borrower as provided in [section 4], or a declaration that no contact was required because the  
24 individual did not meet the definition of "borrower" as provided in [section 3];

25 (f)(g) the trustee's or beneficiary's election to sell the property to satisfy the obligation;

26 (g)(h) the date of sale, which shall not be less than 120 days subsequent to the date on which the notice  
27 of sale is filed for record, and the time of sale, which shall be between the hours of 9 a.m. and 4 p.m., mountain  
28 standard time; and

29 (h)(i) the place of sale which shall be at the courthouse of the county or one of the counties where the  
30 property is situated or at the location of the property or at the trustee's usual place of business if within the county



1 or one of the counties where the property is situated."

2

3 **Section 12.** Section 71-1-315, MCA, is amended to read:

4 **"71-1-315. Notice -- sale -- payment.** A trust deed may be foreclosed by advertisement and sale in the  
5 following manner:

6 (1) The trustee shall give notice of the sale in the following manner:

7 (a) At least 120 days before the date fixed for the trustee's sale, a copy of the recorded notice of sale  
8 must be mailed by certified mail to:

9 (i) the grantor, at the grantor's address as set forth in the trust indenture or if the grantor's address is not  
10 set forth in the trust indenture at the grantor's last-known address;

11 (ii) each person designated in the trust indenture to receive notice of sale whose address is set forth in  
12 the trust indenture, at that address;

13 (iii) each person who has filed for record a request for a copy of notice of sale within the time and in the  
14 manner provided in this section, at the address of the person as set forth in the request;

15 (iv) any successor in interest to the grantor whose interest and address appear of record at the filing date  
16 and time of the notice of sale, at that address;

17 (v) any person who has a lien or interest subsequent to the interest of the trustee and whose lien or  
18 interest and address appear of record at the filing date and time of the notice of sale, at that address.

19 (b) At least 20 days before the date fixed for the trustee's sale, a copy of the recorded notice of sale must  
20 be posted in some conspicuous place on the property to be sold. Upon request of the trustee, the notice of sale  
21 must be posted by a sheriff or constable of the county in which the property to be sold is located.

22 (c) A copy of the notice of sale must be published in a newspaper of general circulation published in any  
23 county in which the property or some part of the property is situated, at least once each week for 3 successive  
24 weeks. If there is no newspaper of general circulation published in the county, then copies of the notice of sale  
25 must be posted in at least three public places in each county in which the property or some part of the property  
26 is situated. The posting or the last publication must be made at least 20 days before the date fixed for the  
27 trustee's sale.

28 (2) On or before the date of sale, there must be recorded in the office of the clerk and recorder of each  
29 county where the property or some part of the property is situated, affidavits of mailing, posting, and publication  
30 showing compliance with the requirements of this section.

1 (3) On the date and at the time and place designated in the notice of sale, the trustee or the trustee's  
2 attorney shall sell the property at public auction to the highest bidder. The property may be sold in one parcel or  
3 in separate parcels, and any person, including the beneficiary under the trust indenture but excluding the trustee,  
4 may bid at the sale. The person making the sale may, for any cause the person considers expedient, postpone  
5 the sale for a period not exceeding 15 days by public proclamation at the time and place fixed in the notice of  
6 sale. ~~No other notice of the postponed sale need be given.~~ If a sale cannot be held at the scheduled time by  
7 reason of the automatic stay provision of the United States Bankruptcy Code, 11 U.S.C. 362, or of a stay order  
8 issued by any court of competent jurisdiction, the person making the sale may, as often as the person considers  
9 expedient, postpone the sale. Each postponement may not exceed 30 days, and all postponements, in the  
10 aggregate, may not exceed 120 days. Each postponement must be effected by a public proclamation at the time  
11 and place fixed in the notice of sale or fixed by previous postponement. ~~No other notice of the postponed sale~~  
12 ~~need be given.~~

13 (4) If the person making the sale postpones the sale in any manner provided in subsection (3), the  
14 trustee shall notify the borrower by telephone and shall provide written notice to the borrower within 3 business  
15 days following the postponement.

16 ~~(4)~~(5) The purchaser at the sale shall pay the price bid in cash, and upon receipt of payment, the trustee  
17 shall execute and deliver a trustee's deed to the purchaser. If the purchaser refuses to pay the purchase price,  
18 the person conducting the sale has the right to resell the property at any time to the highest bidder. The party  
19 refusing to pay is liable for any loss occasioned by the refusal, and the person making the sale may also reject  
20 any other bid of the refusing person."

21  
22 NEW SECTION. Section 13. Codification instruction. [Sections 1 through 10] are intended to be  
23 codified as an integral part of Title 32, chapter 9, and the provisions of Title 32, chapter 9, apply to [sections 1  
24 through 10].

25 - END -