



## 96TH GENERAL ASSEMBLY

### State of Illinois

2009 and 2010

SB2438

Introduced 3/19/2009, by Sen. Jacqueline Y. Collins

#### SYNOPSIS AS INTRODUCED:

See Index

Amends the Code of Civil Procedure by adding an Article that may be cited as the Mortgage Foreclosure Prevention Law of 2009. Provides that an eligible borrower has a right to defer a judicial sale for a specified period by providing an affidavit to the foreclosing lender. When the deferment period ends or the deferment is lost, a lender may schedule a sale by publishing a specified newspaper notice and serving a copy on those on the premises, 4 weeks before the sale. Provides a formula to set the borrower's monthly payment. Provides that a borrower loses the right to deferment if he or she ceases to reside on the premises. Provides for mortgage foreclosure counselors. Provides that a foreclosing lender and a borrower must negotiate in good faith. Provides that a borrower may dispute a deferment cancellation through arbitration. Provides that lenders shall send to borrowers a mandated notice about deferment. Provides that a lender who acts in bad faith or recklessly in violation of these provisions is liable to a person injured for actual damages, statutory damages up to \$25,000, punitive damages, costs, and attorney's fees. Makes other changes. Effective 7 days after becoming law.

LRB096 09625 AJO 19786 b

HOUSING  
AFFORDABILITY  
IMPACT NOTE ACT  
MAY APPLY

A BILL FOR

1 AN ACT concerning civil law.

2 **Be it enacted by the People of the State of Illinois,**  
3 **represented in the General Assembly:**

4 Section 5. The Code of Civil Procedure is amended by adding  
5 Part 18 to Article XV as follows:

6 (735 ILCS 5/Art. XV Pt. 18 heading new)

7 ARTICLE XV Pt. 18. Foreclosure Prevention

8 (735 ILCS 5/15-1801 new)

9 Sec. 15-1801. Part title. This Part may be cited as the  
10 Mortgage Foreclosure Prevention Law of 2009.

11 (735 ILCS 5/15-1805 new)

12 Sec. 15-1805. Definitions. In this Part:

13 "Part" means the Mortgage Foreclosure Prevention Law of  
14 2009.

15 "Deferment payment" means the monthly amount that is due to  
16 the foreclosing lender by an eligible foreclosed borrower under  
17 Section 15-1820 to maintain the right to deferment.

18 "Deferment period" means the period that begins on the  
19 effective date of the effective date of this amendatory Act of  
20 the 96th General Assembly and expires one year following the  
21 effective date of the this amendatory Act of the 96th General

1 Assembly.

2 "Deferment right" means the relief provided to an eligible  
3 foreclosed borrower in Section 15-1810.

4 "Eligible foreclosed loan" means a residential mortgage  
5 loan for which a foreclosing lender has scheduled a judicial  
6 sale under this Article or schedules a judicial sale during the  
7 deferment period if it is a subprime loan or a loan with  
8 negative amortization for which the required minimum payment of  
9 principal and interest increased after the date the loan was  
10 originated. An eligible foreclosed loan does not include a loan  
11 originated by a State or federally chartered bank, savings  
12 bank, or credit union, or an organization majority owned by one  
13 or more credit unions.

14 "Eligible foreclosed borrower" means a borrower who:

15 (1) is a mortgagor under an eligible foreclosed loan;

16 (2) resides at the mortgaged property and intends to  
17 reside at the mortgaged property at least until the end of  
18 the deferment period;

19 (3) has a household adjusted gross income of less than  
20 \$250,000 per year according to the borrower's most recent  
21 federal income tax return, provided that if the borrower  
22 was not required to file a federal income tax return, the  
23 borrower must qualify by providing the return that the  
24 borrower would have filed if required; and

25 (4) is a legal United States resident. A borrower does  
26 not reside at the property unless the property has been the

1 borrower's primary residence for 6 months prior to the date  
2 of the affidavit of deferment.

3 "Foreclosing lender" means the mortgagee who is  
4 foreclosing the mortgage of an eligible foreclosed borrower.

5 "Fully indexed rate" equals the index rate prevailing at  
6 the time a residential mortgage loan is originated, plus the  
7 margin that will apply after the expiration of an introductory  
8 interest rate.

9 "Mortgage foreclosure counselor" means an individual who  
10 provides mortgage foreclosure counseling on behalf of a  
11 nonprofit or government agency.

12 "Negative amortization" occurs when the borrower's  
13 compliance with any repayment option offered pursuant to the  
14 terms of the residential mortgage loan is insufficient to  
15 satisfy the interest accruing on the loan, resulting in an  
16 increase in the loan balance. Negative amortization does not  
17 occur when a residential mortgage loan is originated,  
18 subsidized, or guaranteed by or through a State, local  
19 government, or nonprofit organization, and bears one or more of  
20 the following nonstandard payment terms that substantially  
21 benefit the borrower: payments vary with income; payments of  
22 principal and interest are deferred until the maturity date of  
23 the loan or the sale of the residence; principal or interest is  
24 forgivable under specified conditions; or where no interest or  
25 an annual interest rate of 2% or less is charged in connection  
26 with the loan.

1       "Residential mortgage loan" means a loan secured primarily  
2 by either: (1) a mortgage on residential real property; or (2)  
3 certificates of stock or other evidence of ownership interest  
4 in and proprietary lease from corporations, partnerships, or  
5 other forms of business organizations formed for the purpose of  
6 cooperative ownership of residential real property.

7       "Residential mortgage servicer" or "servicer" means a  
8 person who engages in the activity of servicing a residential  
9 mortgage.

10       "Residential real property" or "residential real estate"  
11 means real property improved or intended to be improved by a  
12 structure designed principally for the occupancy of from one to  
13 4 families, whether or not the owner occupies the real  
14 property.

15       "Secretary" means the Secretary of the Department of  
16 Financial and Professional Regulation.

17       "Subprime loan" means, in the case of an adjustable rate  
18 loan secured by a first lien on a dwelling that can increase in  
19 interest rate but not decrease in interest rate below the fully  
20 indexed rate at the time of origination, a loan for which the  
21 annual percentage rate (APR) is greater than 2 percentage  
22 points above the yield on United States Treasury securities  
23 having comparable periods of maturity, as of the 15th day of  
24 the preceding month if the rate is set between the first and  
25 the 14th day of the month and as of the 15th day of the current  
26 month if the rate is set on or after the 15th day.

1       For all other loans secured by a first lien on a dwelling,  
2 the term means a loan for which the APR is greater than 3  
3 percentage points above the yield on United States Treasury  
4 securities having comparable periods of maturity, as of the  
5 15th day of the preceding month if the rate is set between the  
6 first and the 14th day of the month and as of the 15th day of  
7 the current month if the rate is set on or after the 15th day.

8       For loans secured by a subordinate lien on a dwelling, the  
9 term means a loan for which the APR is greater than 5  
10 percentage points above the yield on United States Treasury  
11 securities having comparable periods of maturity, as of the  
12 15th day of the preceding month if the rate is set between the  
13 first and the 14th day of the month and as of the 15th day of  
14 the current month if the rate is set on or after the 15th day.

15       For purposes of this Section, the annual percentage rate  
16 has the meaning given in title 12, Code of Federal Regulations,  
17 part 226.

18       (735 ILCS 5/15-1810 new)

19       Sec. 15-1810. Right to foreclosure deferment. An eligible  
20 foreclosed borrower has the right to defer a judicial sale  
21 under this Article until the expiration of the deferment period  
22 by providing an affidavit of deferment to the foreclosing  
23 lender in accordance with Section 15-1815. A foreclosing lender  
24 shall cancel a judicial sale if the eligible foreclosed  
25 borrower has submitted to the foreclosing lender an affidavit

1 of deferment prior to or at the time of the judicial sale,  
2 unless the lender has served a notice of denial in accordance  
3 with Section 15-1825. A foreclosing lender shall also provide  
4 written notice of receipt of an affidavit of deferment to all  
5 parties with a recorded request for notice of mortgage  
6 foreclosure under this Article or who are listed as a holder of  
7 a security interest in the subject property in the affidavit of  
8 deferment. A lender is not required to cancel a judicial sale  
9 if a borrower has previously obtained a deferment under this  
10 Part. Upon expiration of the deferment period or the loss of  
11 the deferment, a foreclosing lender may schedule a deferred  
12 judicial sale by publishing the notice of judicial sale once in  
13 the newspaper in which the original advertisement was published  
14 and by serving a copy of the notice of judicial sale in a like  
15 manner as a summons in a civil action in the circuit court upon  
16 the person in possession of the mortgaged premises, if the same  
17 are actually occupied, at least 4 weeks prior to the sale.

18 (735 ILCS 5/15-1815 new)

19 Sec. 15-1815. Affidavit of deferment.

20 (a) Affidavit of deferment. The affidavit of deferment  
21 shall state the name of the eligible foreclosed borrower, the  
22 address of the property in foreclosure, and contain the  
23 following statements:

24 "(1) I am the borrower on a mortgage loan on  
25 residential property located at [address of property]

1       (hereinafter "subject property").

2       (2) A judicial sale has been scheduled on the subject  
3 property.

4       (3) I currently reside at the subject property.

5       (4) I have resided at the subject property as my  
6 primary residence for 6 months prior to the date of this  
7 affidavit.

8       (5) If permitted to reside at the subject property, I  
9 intend to reside at the subject property until at least  
10 [end of deferment period].

11       (6) I have sought the assistance of a mortgage  
12 foreclosure counselor and during the deferment I agree to  
13 continue to use the assistance of a mortgage foreclosure  
14 counselor to negotiate in good faith with the foreclosing  
15 lender to modify the terms of the mortgage on the subject  
16 property.

17       (7) I believe that the mortgage loan on the subject  
18 property is either:

19               (i) a subprime loan; or

20               (ii) a loan with negative amortization for which  
21 the required minimum payment has increased."

22       The affidavit shall be signed by at least one eligible  
23 foreclosed borrower who is the mortgagor of the residential  
24 real property being foreclosed. The affidavit also shall be  
25 signed by a mortgage foreclosure counselor solely to certify  
26 that the borrower has sought the assistance of the mortgage



1 foreclosure counselor.

2 (b) Service on foreclosing lender. An affidavit of  
3 deferment shall be served by personal service, United States  
4 mail, or other reliable delivery service to the address  
5 provided in the notice of right to deferment or to the address  
6 of the counsel for the mortgagee in the notice of foreclosure.

7 (c) Acknowledgment by foreclosing lender. Unless the  
8 foreclosing lender has served a notice of denial under Section  
9 15-1825, the foreclosing lender shall, within 10 days after  
10 receiving the affidavit of deferment, provide to the eligible  
11 foreclosed borrower a written acknowledgment that it has  
12 received the affidavit of deferment. The acknowledgment shall  
13 state the following:

14 (1) that the judicial sale has been canceled;

15 (2) the deferment payment amount that is due by the  
16 eligible foreclosed borrower;

17 (3) the date that the first deferment payment is due;

18 (4) the date that each subsequent deferment payment is  
19 due; and

20 (5) the address to which the borrower should send the  
21 deferment payment or the payment delivery methods that are  
22 acceptable to the foreclosing lender.

23 The acknowledgment shall be on a single sheet of paper,  
24 shall use plain language, and no other documents shall be  
25 included with the acknowledgment. The bottom of the  
26 acknowledgment shall include the following disclosure in bold,

1 14-point type:

2 "The cancellation of the judicial sale on your property  
3 is the result of a law passed by the Illinois General  
4 Assembly in 2009. You must make the monthly payment in full  
5 by the due dates listed in this letter. If you do not make  
6 the payments on time, we will have the right to schedule a  
7 judicial sale on your property."

8 (d) Charges prohibited. A foreclosing lender shall not  
9 charge an eligible foreclosed borrower any amount other than  
10 the deferment payment for exercising the deferment right.

11 (735 ILCS 5/15-1820 new)

12 Sec. 15-1820. Borrower payment and residency requirements.

13 (a) Borrower payment required. An eligible foreclosed  
14 borrower who has a deferment right shall make monthly payments  
15 to the foreclosing lender. The payment shall be made no later  
16 than the 15th day of each month. The first payment is not due  
17 until the 15th day of the month that is a minimum of 30 days  
18 after the date that the foreclosing lender sends the  
19 acknowledgment required by paragraph (c) of Section 15-1815.

20 (b) Amount of payment. For an eligible foreclosed borrower  
21 with a subprime loan, the amount of payment shall be the lesser  
22 of: (1) the monthly payment of principal and interest on the  
23 date the loan was originated; or (2) 65% of the monthly payment  
24 of principal and interest at the time the borrower defaulted  
25 prior to foreclosure. For an eligible foreclosed borrower with

1 a negative amortization loan that is not also a subprime loan,  
2 the amount of payment would be the minimum monthly payment on  
3 the date the loan was originated.

4 (c) Payment advice notice. The foreclosing lender shall  
5 provide to the eligible foreclosed borrower monthly written  
6 payment advice notices. The notice shall be sent by the first  
7 day of each month until the expiration of the deferment period  
8 or the loss of the deferment under paragraph (d). Each notice  
9 shall state (1) the amount of payment owed from the eligible  
10 foreclosed borrower; (2) the address to which the borrower  
11 should send the deferment payment; and (3) the date that the  
12 payment must be received to avoid loss of the deferment right  
13 under paragraph (d). The payment advice notice shall be on a  
14 single sheet of paper, shall use plain language, and no other  
15 documents shall be included with the notice. The bottom of the  
16 notice shall include the following disclosure in bold, 14-point  
17 type:

18 "The deferment of the judicial sale on your property is  
19 the result of a law passed by the Illinois General Assembly  
20 in 2009. You must continue to make the monthly payment in  
21 full by the 15th day of each month. If you do not make the  
22 payments on time, we will have the right to schedule a  
23 judicial sale on your property. The deferment period will  
24 end on (last day of deferment period). By the end of the  
25 deferment period, you will need to pay the entire amount  
26 that has been deferred plus other costs allowed by law in

1 order to avoid a judicial sale."

2 (d) Borrower failure to pay. An eligible foreclosed  
3 borrower who fails to make payments in the amount required and  
4 by the date required under this Section shall lose the  
5 deferment right.

6 (e) Borrower residency requirement. An eligible foreclosed  
7 borrower loses the right to deferment if the borrower ceases to  
8 reside at the mortgaged property during the deferment period.

9 (735 ILCS 5/15-1825 new)

10 Sec. 15-1825. Resolution of disputes; effect of deferral.

11 (a) Dispute as to eligible foreclosed loan status. If the  
12 foreclosing lender determines after a reasonable investigation  
13 and in good faith that the person submitting an affidavit of  
14 deferment is not the mortgagor under an eligible foreclosed  
15 loan, the foreclosing lender shall provide a notice of denial  
16 of deferment to the person submitting the affidavit of  
17 deferment and to all parties with a recorded request for notice  
18 of mortgage foreclosure under this Article or who are listed as  
19 a holder of a security interest in the subject property in the  
20 affidavit of deferment. The foreclosing lender must send a  
21 notice of denial by certified mail through the United States  
22 mail within 10 business days after receiving the affidavit of  
23 deferment. The notice is effective on mailing. The notice of  
24 denial shall be on a single sheet of paper and no other  
25 documents shall be included with the notice. The notice must

1 include an explanation, in plain language, of the reasons that  
2 the loan is not an eligible foreclosed loan. The notice must  
3 also inform the person who executed the affidavit of deferment  
4 that the person has the right to apply to the court for an  
5 order deferring the judicial sale. A copy of the notice also  
6 must be sent by any means to the loan counselor who signed the  
7 affidavit of deferment.

8 (b) Other disputes. For any other dispute about the  
9 deferment right or other rights or requirements under this  
10 Part, other than the arbitration of a dispute of good-faith  
11 negotiation under Section 15-1830, a person can apply to the  
12 circuit court in the county where the property is located for  
13 an order establishing the rights of the parties to the dispute.

14 (c) Effect of deferral right. Nothing in this Part shall  
15 alter contractual rights of the parties to the mortgage loan  
16 other than providing the right to defer a judicial sale. A bona  
17 fide purchaser of an interest in real property mortgaged by an  
18 eligible foreclosed loan takes the interest in the real  
19 property not subject to any claims of ownership by a party  
20 based on any rights under this Part. No act, agreement, or  
21 deferment granted under this Part alters the rights of other  
22 parties or lenders with an interest in the subject property. An  
23 order confirming a judicial sale is prima facie evidence of  
24 compliance with this Part, provided that the eligible  
25 foreclosed homeowner has the remedies for monetary relief under  
26 Section 15-1840 for a reckless or bad faith violation of this

1 Part.

2 (d) Mortgage foreclosure counselors. A mortgage  
3 foreclosure counselor, and the person employing or paying the  
4 mortgage foreclosure counselor, shall not be liable to any  
5 person for signing or failing to sign an affidavit of deferment  
6 under this Part.

7 (735 ILCS 5/15-1830 new)

8 Sec. 15-1830. Right to revoke deferment following  
9 good-faith negotiation.

10 (a) Cancellation of deferment. If the foreclosing lender  
11 has negotiated in good faith to modify the eligible foreclosed  
12 loan, the foreclosing lender may send a notice of deferment  
13 cancellation to the eligible foreclosed borrower and, no less  
14 than 30 days after sending the notice, publish a notice of  
15 judicial sale in accord with Section 15-1810. The notice shall  
16 be on a single sheet of paper and shall include the name and  
17 contact information for an employee or representative of the  
18 foreclosing lender. The notice must include an explanation, in  
19 plain language, of the reasons that the deferment is being  
20 canceled. The notice must prominently state the date the notice  
21 is mailed to the eligible foreclosed borrower and the bottom of  
22 the notice shall include the following disclosure in bold,  
23 14-point type:

24 "If you do not agree that we have negotiated in good  
25 faith to modify your loan, you may request that an

1 arbitrator be appointed to review your case. The arbitrator  
2 will be a volunteer who will work at no cost to you. You  
3 have until (insert date 30 days after date of notice) to  
4 complete and mail the attached request for arbitration form  
5 to the address listed on the form. The State of Illinois  
6 encourages you to contact a mortgage foreclosure counselor  
7 right away to discuss your options."

8 The foreclosing lender shall include a copy of the written  
9 loan modification that the foreclosing lender offered as part  
10 of a good-faith negotiation offer under paragraph (b). No  
11 documents other than the written loan modification offer and  
12 the arbitration request form required by paragraph (b) shall be  
13 included with the notice. A copy of the notice also must be  
14 sent by any means to the mortgage foreclosure counselor who  
15 signed the affidavit of deferment.

16 (b) Arbitration of disputes.

17 (1) The eligible foreclosed borrower may dispute a  
18 notice of deferment cancellation by sending to the  
19 Secretary a request for arbitration form along with a copy  
20 of the notice of deferment cancellation, including a copy  
21 of the written loan modification that the foreclosing  
22 lender asserts is a good-faith negotiation offer under this  
23 paragraph (b). The request for arbitration must be  
24 delivered or postmarked within 30 days after the date of  
25 the notice of deferment cancellation. The deferment  
26 continues pending resolution of the dispute.

1           (2) On receipt of a timely request for arbitration, the  
2           Secretary shall appoint a volunteer arbitrator to resolve  
3           the dispute as to whether the foreclosing lender negotiated  
4           with the eligible foreclosed borrower in good faith. The  
5           Secretary may appoint any person the Secretary deems  
6           qualified to act as a volunteer arbitrator.

7           (3) The volunteer arbitrator may request additional  
8           documents or appearances from either the foreclosing  
9           lender or the eligible foreclosed borrower prior to making  
10           a determination. The decision of the arbitrator is binding  
11           on both the foreclosing lender and the eligible foreclosed  
12           borrower.

13           (4) The appointed arbitrator shall act as a volunteer  
14           and may not charge any person for the arbitrator's services  
15           or costs related to the arbitration.

16           (c) Good-faith negotiation by foreclosing lender.

17           (1) A foreclosing lender has not negotiated in good  
18           faith unless it offers in writing to modify the terms of  
19           repayment of the eligible foreclosed loan to permit the  
20           eligible foreclosed borrower to make monthly payments that  
21           the borrower would have had the reasonable ability to pay  
22           as of the date the loan was originated or, if the  
23           borrower's income and financial resources have increased  
24           since the loan was originated, monthly payments that the  
25           borrower has the current reasonable ability to pay.

26           (2) For purposes of this Section, "monthly payments"



1 includes principal, interest, real estate taxes,  
2 homeowner's insurance, assessments, and mortgage insurance  
3 premiums, as applicable.

4 (3) For purposes of this Section, "reasonable ability  
5 to pay" shall be determined based on the following:

6 (A) the income and financial resources available  
7 to the borrower at the time the loan was originated,  
8 provided that tax returns, payroll receipts, bank  
9 records, or other similarly reliable documents that  
10 verify the borrower's income and financial resources  
11 at the time of origination shall replace unverified  
12 statements of income or financial resources contained  
13 in the loan application, and the verified information  
14 shall serve as the basis for computing the borrower's  
15 reasonable ability to make monthly payments; or

16 (B) if the borrower's income and other financial  
17 resources have increased since the loan was  
18 originated, the borrower's current income and other  
19 financial resources to the extent the information can  
20 be verified by tax returns, payroll receipts, bank  
21 records, or other similarly reliable documents.

22 (4) There is a presumption that the borrower has the  
23 reasonable ability to pay if the monthly payments do not  
24 exceed a combined debt-to-income ratio of 41% based on the  
25 borrower's documented and verified monthly gross income,  
26 provided the borrower has sufficient residual income as

1 defined in title 38, Code of Federal Regulations, Section  
2 36.4337(e).

3 (735 ILCS 5/15-1835 new)

4 Sec. 15-1835. Notice of right to deferment.

5 (a) Notice requirement; form and delivery of notice. Every  
6 foreclosing lender shall send to each borrower who has an  
7 eligible foreclosed loan a notice of right to deferment. The  
8 notice of right to deferment shall be in the form of, and  
9 subject to the delivery requirements specified in this Part.  
10 The notice of right to deferment must also indicate an address  
11 at which the foreclosing lender will accept service of an  
12 affidavit of deferment under paragraph (b) of Section 15-1815.  
13 No notice is required for a foreclosure commenced on or before  
14 the effective date.

15 (b) Content. The notice required by this Section must  
16 appear substantially as follows:

17 "Emergency Help For Homeowners in Foreclosure:

18 IMPORTANT: You are eligible to have the foreclosure of  
19 your home stopped until at least (end of deferment period).

20 The State of Illinois recently passed a law that lets  
21 homeowners stop a judicial sale.

22 To qualify, you must currently live at the home in  
23 foreclosure and intend to live at the home until the end of  
24 the deferment period. You will also need to complete and  
25 sign a special form (called an "affidavit") and provide

1 that affidavit to us at the following address: (insert  
2 address in the State of Illinois).

3 There are many government agencies and nonprofit  
4 organizations that can help you complete this affidavit.  
5 For the name and telephone number of an organization near  
6 you, please call the Consumer Hotline of the Illinois  
7 Department of Financial and Professional Regulation at  
8 (insert telephone number and Web site). The State does not  
9 guarantee the advice of these agencies.

10 Do not delay dealing with the foreclosure because your  
11 options for foreclosure deferment end with the judicial  
12 sale."

13 (735 ILCS 5/15-1840 new)

14 Sec. 15-1840. Bad faith or reckless violation. A  
15 foreclosing lender who acts in bad faith or recklessly in  
16 violation of Sections 15-1810 to 15-1835 shall be liable to a  
17 person injured by the violation for actual damages, statutory  
18 damages of up to \$25,000, punitive damages in an amount  
19 determined by the court, costs, and reasonable attorney's fees.

20 Section 99. Effective date. This Act takes effect upon  
21 becoming law.

1 INDEX

2 Statutes amended in order of appearance

3 735 ILCS 5/Art. XV Pt. 18

4 heading new

5 735 ILCS 5/15-1801 new

6 735 ILCS 5/15-1805 new

7 735 ILCS 5/15-1810 new

8 735 ILCS 5/15-1815 new

9 735 ILCS 5/15-1820 new

10 735 ILCS 5/15-1825 new

11 735 ILCS 5/15-1830 new

12 735 ILCS 5/15-1835 new

13 735 ILCS 5/15-1840 new