

MEMORANDUM

TO: DRAFTING COMMITTEE MEMBERS, REPORTERS, ADVISORS AND OBSERVERS

**THE UNIFORM RESIDENTIAL REAL ESTATE MORTGAGE FORECLOSURE
PROCESS AND PROTECTIONS ACT**

FROM: Bill Breetz, Chair

DATE: March 27, 2013

RE: OUR UPCOMING MEETING – APRIL 5-6, 2013

I. First, I write to transmit several documents bearing on our work. They are:

A. A letter from Attorney Stephanie Heller describing her thoughts on how this Act might be amended to reflect the possibility of a federally- sponsored electronic recording system; her letter is attached to the transmittal email. She writes, in part:

[T]his is an opportune time to contemplate a legal infrastructure that supports a movement away from paper mortgage notes and mortgages while ensuring reliable information exists on which to determine rights and obligations, that allows for the transfer of rights in a manner that better supports the originate-to-distribute business model and securitization, and that is oriented to protect the interests of all who are interested in mortgage finance, including borrowers. A national mortgage note and mortgage registry and transfer system could advance these goals.

**** Ideally, in my view, the national registry and transfer system would image or otherwise capture in electronic form all of the information contained in the mortgage note and mortgage at the time that they are deposited into the system. After performing robust integrity checks on the data, the national registry would destroy the paper so that the electronic note was the only continuing obligation. From that point forward, the appropriate book entries in the national registry and transfer system would effect the transfer of "ownership" of the note along with the corresponding legal right to enforce the mortgage.

To accommodate such a national system, a subsection might be added to Section 401 to state that foreclosure could also be accomplished by the person who is entitled to enforce the obligation as shown on the records of a federally-established registry of mortgage loans.

Attorney Heller posits a number of other potential issues that the Act might address, without suggesting specific language for any amendments.

In response to her letter and in order to advance the dialog, the Reporters, the ABA Advisor and I have drafted language and commentary which appear in the April Draft as Section 401(g) and also in Section 405, with tracking language added in various subsections of Section 401. We assume that additional review by the Drafting Committee next week will consider the various nuances that Attorney Heller's proposal raises, both in Section 401 and in other sections. Nevertheless, we thought this a sound first step and welcome the Drafting Committee's reactions to this letter.

B. Attorney Teresa Harmon, the appointed advisor to the drafting committee from the American Law Institute, has sent a letter describing her thoughts on the effect of possible amendments to this Act regarding the Holder In Due Course doctrine which were proposed by Attorney George Holler in early March; his proposals have been substantially incorporated into Article 6 of the April draft for purposes of discussion. Her letter also addresses other aspects of the February version of the Act. She writes, in part:

Holder in Due Course Issues: I am still digesting George Holler's detailed remedies section, which attempts to address the holder in due course issue, and as a result there is not much I can provide in terms of formal comments at this time. I do, however, want to underscore for you that the holder in due course provision in Mr. Holler's proposal, along with any other change to the holder in due course doctrine, would be viewed by the American Law Institute as requiring the involvement not only of the Permanent Editorial Board for the UCC, but also of the ALI acting alone. ***

As we discussed in more detail at the February meeting, I believe further consideration also needs to be given to the Constitutional and choice of law issues raised by the proposed change to existing holder in due course protections.

Attorney Harmon makes specific observations regarding sections 401, 402 and sections 502 through 504 regarding negotiated transfers. She also points out that various representatives of the securitization industry have recently taken note of the Act. I commend her letter to you.

While the April draft of the Act does not address the specifics of Attorney Harmon's letter, I expect we will spend considerable time next week discussing the new provisions in Article 6 concerning consumer remedies, including the proposed abrogation of the Holder In Due Course doctrine contained in that article.

C. On March 21, 2013 the Office of the Inspector General of the Federal Housing Finance Agency published a report entitled **“Enhanced FHFA Oversight Needed to Improve Mortgage Servicer Compliance with Consumer Complaint Requirements”**.

In its Report, the OIG asserts that between October 2011 and November, 2012, Freddie Mac and its eight largest mortgage servicers had collectively received more than 34,000 serious – or so-called ‘enhanced’ – complaints from consumers. OIG concludes that these servicers had failed to report any of those enhanced complaints to Freddie Mac, despite their obligation to do so under FHFA's ‘Servicing Alignment Initiative’ or SAI.

Further, according to the OIG, Freddie Mac had failed to require servicer compliance with these reporting requirements. And, finally, according to the OIG, “FHFA did not identify the foregoing problems through its own examination of Freddie Mac’s implementation of the SAI.”

The entire OIG report is found at http://fhfaoig.gov/Content/Files/AUD-2013-007_0.pdf; it is also attached to the email which transmitted this memorandum to you.

The Report concludes that the current federal regulatory system is not effective in resolving the consumer complaints that are regularly received by the GSEs and by their servicers.

The implication of this conclusion for the Drafting Committee is what mechanism, if any, this Act should provide to consumers as an alternative means for addressing consumer complaints.

II Finally, I have recently learned that the securitization community has taken an interest in the Drafting Committee’s work. On March 13, I received this thread of several emails from Teresa Harmon:

“In case you have not spoken with Martin Fingerhut from the American Bar Association’s Securitization and Structured Finance Committee directly, I wanted to pass this email along to you. The embedded email confirms that Martin’s committee intends to submit comments regarding the ULC’s residential mortgage foreclosure project. Martin’s committee has also reached out to the ABA Trust Indentures and Indenture Trustee’s committee. The notice to that indenture-related committee is below. This should be a helpful step in getting you the feedback you wanted from the securitization industry.”

The embedded email to which Attorney Harmon refers reads as follows:

“From: Trust Indentures and Indenture Trustees Committee [mailto:BL-TRUSTINDENTURES@MAIL.AMERICANBAR.ORG] ***On Behalf Of*** Cristeena Naser
Sent: Wednesday, March 13, 2013 12:17 PM
To: BL-TRUSTINDENTURES@MAIL.AMERICANBAR.ORG
Subject: Pending Legislative Initiative re: Residential Mortgage Securitization

*Hi all,
I’ve attached an e-mail from Martin Fingerhut, chair of the ABA’s Securitization and Structured Finance Committee concerning an effort to create a uniform state law regarding residential mortgage foreclosure processes. Martin indicates that, based on proceedings so far, it would appear that several pieces of the proposed legislation could impact the securitization of residential mortgages. His committee will comment on this initiative, and we can discuss it at our Committee meeting on Saturday, April 6, at 10am.*

We will have a call-in line for those of you unable to attend in person, and I’ll forward that number when it becomes available. Kind regards, Cris

*Cristeena G. Naser
Vice President and Senior Counsel*

Center for Securities, Trust & Investment
American Bankers Association

Building Success. Together.

Associate General Counsel
ABA Securities Association

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Finally, the American Bankers Association was forwarding this email to its distribution list:

"Message from "Fingerhut, Martin" <mfingerhut@CASSELSBROCK.COM> on Wed, 13 Mar 2013 12:07:01 -0500 -----

Dear Securitization and Structured Finance Committee Members,

I wanted to bring a potentially significant initiative to your attention, and invite you to participate in the Committee's response.

The Uniform Law Commission is coordinating an effort to create a uniform state law regarding residential mortgage foreclosure processes. Based on proceedings so far, it would appear that several pieces of the proposed legislation could impact the securitization of residential mortgages. Included among the proposals are the following:

- 1. Expanding transferee liability and foreclosure defenses, in part by taking away holder in due course protections*
- 2. Requiring either mandatory or optional mediation prior to foreclosure*
- 3. Establishing required notices and other steps prior to foreclosure*
- 4. Requiring that only holders of mortgage notes or those who could provide lost note affidavits with indemnity support (or their agents), can foreclose (this would include mortgage notes that are negotiable instruments)*
- 5. Requiring recording of mortgages prior to foreclosure and, perhaps, requiring recording of all mortgage transfers.*

*More extensive explanations of the committee's work and the most recent draft law – which is in the process of being revised – can be found at the following link:
<http://www.uniformlaws.org/Committee.aspx?title=Residential Real Estate Mortgage Foreclosure Process and Protections>*

The next meeting of the ULC Drafting Committee will be held Friday, April 5 and Saturday, April 6 at the L'Enfant Plaza Hotel in Washington, DC.

The SSF Committee has decided to comment on this initiative, and I would welcome your participation. Please let me know by this Friday if you would like to be involved.

Best regards,

Martin”

After an extended series of telephone calls and emails, I anticipate that several representatives of the securitization community will meet with Barry Nekritz and me and perhaps others on Thursday, April 4 to explore the concerns expressed in Attorney Fingerhut’s email. I will report to you regarding that meeting on Friday morning, April 5. I also expect to receive written comments from the securitization community regarding this subject, which I will distribute to the Drafting Committee and Observers when I receive them.

I will shortly distribute an agenda for our meeting, and look forward to seeing you all again next week.

Bill Breetz

March 27, 2013