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VIA REGULAR AND E-MAIL

Mr. William R. Breetz, Jr.
Chairman, Uniform Law Commission Drafting Committee
on Residential Real Estate Mortgage Foreclosure Process and Protections
University of Connecticut School of Law
Knight Hall Room 202
35 Elizabeth Street
Hartford, CT 06105

Re: Abandoned Residential Mortgaged Property and Application of Holder in Due Course to Residential Mortgage Notes

Dear Mr. Breetz:

I attended the November 2nd and 3rd meetings of the Uniform Law Commission's Drafting Committee on Residential Real Estate Mortgage Foreclosure Process and Protections ("Committee"). This letter comments about two aspects of the Committee's work: (1) whether to expedite the foreclosure process for abandoned residential mortgaged property and (2) whether to end the application of the holder in due course rule to residential mortgage notes. My interest in these topics is informed by my research, as well as living and working in Cleveland, Ohio, a community severely impacted by mortgage foreclosures. These are my personal views, and not those of the Federal Reserve Bank of Cleveland or the Board of Governors of the Federal Reserve System. I would appreciate distribution of this letter to members of the Committee and other participants in the February 15th and 16th meetings to discuss the Committee's draft of Uniform Real Estate Mortgage Foreclosure Process and Protections Act ("Act").

1. Abandoned Residential Mortgaged Property

Generally, an expedited mortgage foreclosure process makes sense when a homeowner has truly abandoned the property. When a home is abandoned, efforts to protect the homeowner through a judicial foreclosure process can create costs without corresponding benefits. Borrowers that walk away from their home do not benefit from a long and protracted foreclosure process. At the same time, the ability of creditors to take possession and sell the property is unnecessarily impeded. The costs of foreclosing on abandoned property certainly include legal fees, but costs can arise from other sources, such as physical damage to the property by weather or thieves, damage to public safety and health, and downward pressure on surrounding property values. Costs without benefits, or deadweight losses, should be minimized whenever possible. Fast-tracking the transfer of abandoned property into the hands of new owners benefits the creditor, community, and market without incremental cost to the borrower. A growing number of states legislatures have already reached this conclusion.

At least six states have passed laws speeding up the mortgage foreclosure process for abandoned homes.[1] Most of these statutes only apply to residential real property. They authorize the sale of the property within 35 to 120 days after a court determination that it is abandoned. Several of these states also shorten the statutory redemption period for abandoned property.[2] Some statutes establish a prima facie evidence of abandonment upon a showing of one or two conditions such as overgrown vegetation, boarded-up doors, or disconnection of utilities. Some statutes only require a single observation of these conditions, while others require observation over a period of time. Buildings under construction or occupied seasonally, and property used in agricultural production are often given exemptions.[3] Two of the statutes require clear and convincing evidence of abandonment.[4] Variations also exist with respect to who can file a motion or petition to expedite the foreclosure process. Current laws fall along a spectrum: Colorado's statute limits those who may request the accelerated process to the holder of the first lien on a residential mortgage loan.[5] Indiana's law is more expansive, allowing a government official to intervene in foreclosure proceedings to establish abandonment.[6]

Turning to the initial draft of the Act, I offer the following specific comments on the draft language. First, the Reporter's Drafting Comment 2 to Section 505 notes that the conditions giving rise to prima facie evidence of abandonment closely track the criteria set forth in the Indiana statute authorizing expedited foreclosure proceedings for abandoned residential mortgaged property.[7] However, as I noted during the discussion at the November meetings, section 505 as drafted does not authorize a governmental entity to initiate an expedited foreclosure proceeding. As discussed below, I believe that it should. For example, the Indiana statute, which includes such authority, provides as follows:[8]

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1 Colo. Rev. Stat. §§ 38-38-901 *et seq.* (2010); 735 ILCS 5/15-1108, 15-1200.5, 15-1200.7, 15-1219, 15-1504, 15-1504.1, 15-1505, 15-1505.8, and 15-1508 (2013); Ind. Code Ann.. §§ 32-29-7-3 and 32-30-10.6-1 *et seq.* (2012); Ky.. Rev. Stat. § 426.205 (2012);; N.J. Stat. § 2A:50-73 (2013);; and Wis. Stat. §846.102 (2012).

2 Minn. Stat. § 582.032 (2010)); N.J Stat. § 2A:50-63 (1995), and Wash. Rev. Code. §61.12.093 (2012).

3 Minn. Stat. § 582.032 (2010); N.J. Stat. § 2A:50-73 (2013); and Wash. Rev. Code. § 61.12.095 (1965).

4 Colo. Rev. Stat. § 38-38-903(3) (2010) and N.J. Stat. § 2A:50-73 (2013).

5 Colo. Rev. Stat. §§ 38-38-902(1)(a) and 38-38-901(2) (2010).

6 Ind. Code § 32-30-10.6-3(b) (2012).

7 Ind. Code § 32-30-10.6-5(a)(2) through (9).

8 Ind. Code § 32-30-10.6-3(b).

> At any time during a mortgage foreclosure action, the enforcement authority that has jurisdiction in the location of the mortgaged property may petition the court for a determination that the mortgaged property is abandoned by filing a motion to intervene in the foreclosure action in the manner prescribed by the Indiana Rules of Trial Procedure. The motion to intervene must: (1) include a statement of the enforcement authority's jurisdiction in the location of the mortgaged property; (2) allege that the mortgaged property is abandoned; and (3) include evidence that one or more of the conditions set forth in section 5(a) or 5(b) of this chapter apply.

I argued for inclusion of such authority in section 505 because of the impact of abandoned property on surrounding property owners and public safety and health.

I see the devastation of neighborhoods exacerbated by the mortgage foreclosure crisis every day on my way to work in downtown Cleveland. Cleveland, like other old industrial cities primarily in the Northeast and Midwest, face unique challenges due to population loss. Numerous community development practitioners report that the housing stock in the high-poverty neighborhoods in central cities and inner-ring suburbs is more sensitive to physical damage (due to weather or looting) when remaining vacant during a protracted foreclosure than housing in the low-poverty suburbs. This is supported by the data: the average homes sell out of REO in Cleveland and its inner ring suburbs for 10 to 30 percent of their prior estimated market values.[9] After the housing located in weaker markets falls into disrepair during foreclosure, it remains vacant long after foreclosure. Five years after a sheriff's sale, over 30% of foreclosed homes remain unoccupied in weak-market neighborhoods, while less than 15% of foreclosed homes remain unoccupied in middle- and strong-market neighborhoods.[10] Together, prolonged vacancy and abandonment robs nearby home sellers of tens of millions of dollars in equity every year.[11]

The impact of abandoned property on public safety and health is recognized by Section 507(c), which requires a creditor that has commenced ordinary foreclosure proceedings to maintain the mortgaged property if a governmental entity issues a citation finding that the mortgaged property is abandoned property in a condition that poses a threat to public safety or health. The Act also should allow governmental entities to further mitigate the social costs of abandoned property by initiating the expedited foreclosure. Giving a government entity the right to expedite the foreclosure process would impose certain property maintenance obligations upon the creditor, but, as I argue below, I think that section 507 strikes an appropriate balance between interests of communities and creditors.

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[9] Claudia Coulton, Michael Schramm, and April Hirsh, "REO and Beyond: The Aftermath of the Foreclosure Crisis in Cuyahoga County, Ohio" in REO & Vacancy Properties, Strategies for Neighborhood Stabilization (Federal Reserve Board and Banks of Boston & Cleveland, 2010).

[10] Stephan Whitaker "Foreclosure-Related Vacancy Rates," Federal Reserve Bank of Cleveland Economic Commentary No. 2011-12 (2011).

[11] Stephan Whitaker and Thomas J. Fitzpatrick IV, "The Impact of Vacant, Tax-Delinquent, and Foreclosed Property on Sales Prices of Neighboring Homes," Federal Reserve Bank of Cleveland Working Paper No. 11-23R (2012).

Second, I agree with comments made by others during the discussion related to the conditions for a finding of abandonment. It may make sense to add criteria for a prima facie finding of abandonment such as government determination and extremely low utility consumption. On the other hand, given the significant homeowner rights terminated by a foreclosure proceeding, I also agree with other comments that an abandonment determination should require a finding of more than one condition. One or two of the conditions listed in Section 505(b) may exist when a homeowner still occupies the property or otherwise wants to preserve ownership. Three criteria should be present for prima facie evidence of abandonment. On a related note, Tom Fitzpatrick also suggested at the November meetings that these criteria be observed at more than one point in time. Based upon detailed discussions with the largest field servicer in the country, he informs me that it is standard practice for field servicers to "check on" homes once a month, starting from the time the loan is 45 days delinquent – well before a foreclosure is filed. This should provide the opportunity to determine whether a home is vacant on more than one occasion without being a material burden. This also seems prudent given the potential termination of rights. Furthermore, adding to Section 505(b) exclusions from a finding of abandonment for seasonal homes and homes under construction would protect homeowners and promote judicial economy, avoiding the need for homeowners of such property to present evidence to counter the evidence of abandonment.

Finally, I think that the Reporter's Drafting Comments for Section 507 comes close to striking an appropriate balance between the interests of the community and creditors. The actual language of Section 507 needs work, but the Reporter's Drafting Comments state that the initiation of the expedited foreclosure process does not impose general duties on the creditor of a mortgagee in possession. The obligations imposed on creditors should be limited to those stated in the act, such as failing to care for the exterior of the property, failing to take action to prevent trespassers or squatters from remaining on the property, failing to take action to prevent mosquito larvae from growing in standing water, or other conditions the create a public or private nuisance. Yet, even without the creditor initiation of the expedited process, and even without a judicial finding of abandonment, these obligations should be imposed on a creditor that has commenced ordinary foreclosure proceedings if a governmental entity issues a citation finding that the mortgaged property is abandoned property in a condition that poses a threat to public safety or health. There is some benefit in this mix of obligations and limitations for both creditors and communities. I believe that the objectives expressed by the Reporters can be clarified through changes in the language of the section itself.

2. Holder in Due Course

I am pleased that the Committee plans to allocate substantial time at its February 15th and 16th meetings to discuss the negotiability of and the application of the holder in due course rule to notes secured by residential mortgages.[12] It is my understanding that James Smith, one of the reporters for the Act, is preparing a memorandum summarizing the arguments for and against the application of the HDC Rule to residential mortgage notes. Mr. Smith's memorandum will be an important addition to the materials on this subject submitted to you by George Holler, Tom Cox, and Fred Miller after the November meetings. While negotiability is a pre-condition to the applicability of the holder in due course rule, I am not going to

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[12] See Memorandum to Drafting Committee Members, Reporters, Advisors, and Observers from Bill Breetz dated December 27, 2012, which attaches the following: (1) Paper from George Holler dated Oct. 31, 2012, Exhibit 4, (2) Memorandum from Tom Cox dated Nov. 5. 2012, Exhibit 5, and (3) Memorandum from Fred Miller dated Dec. 14, 2012, Exhibit 6.

address the issue of the negotiability of residential mortgage notes.[13] Rather, my comments focus on the holder in due course rule itself ("HDC Rule"). Several commentators advocate the elimination of application of the HDC Rule to negotiable mortgage notes.[14] I also favor abrogation of the HDC Rule in the context of home mortgage notes. My reasons fall into three categories: (1) lack of convincing policy justification, (2) changes in the parties to negotiable instruments, and (3) changes in the residential mortgage market. After addressing these matters, I will make a few specific comments about Section 401 of the Act.

a. Lack of Convincing Policy Justification

First, I do not believe that there is a convincing policy reason to justify the continuing application of the HDC Rule to residential mortgage notes. The HDC Rule departs from the usual rule for assignment of contracts pursuant to which the assignee "stands in the shoes" of the assignor with the rights and obligations of the assignor. Mr. Holler used the Latin phrase for this rule, *nemo dat quod non habet,* "no one gives what he doesn't have." Ordinarily, the rights and obligations of the assignor are transferred to the assignee and defenses to contractual obligations that were good against the assignor are also good against the assignee. The HDC Rule is an exception to this rule.[15] An assignee that qualifies as a holder in due course acquires rights superior to those of the assignor. Is there a convincing policy reason for this exception in the current market for residential mortgage notes?

A few years ago, Tom Fitzpatrick and I wrote a paper that investigated the history of negotiable instruments and the HDC Rule. A copy of the paper is attached at Exhibit 1.[16] We considered the policy justifications for the HDC Rule, beginning with Lord Mansfield's 1758 justification for the rule as a money substitute in an economy without paper money or adequate coinage.[17] The HDC Rule became a well-established part of the law of the United States through state adoption of the Uniform Negotiable Instruments Law in the early 1900s.[18] In the 1950s, the Uniform Law Commission approved the Uniform Commercial Code ("UCC"). Eventually, it was adopted by all the states. The drafters of the UCC included the HDC Rule without questioning it and without explicit policy justification for it.[19] Beginning in the 1940s, the concerns of state legislators and courts about lack of consumer knowledge, bargaining power, and financial resources led them to render the HDC Rule inapplicable to some consumer transactions.[20] This state law trend eventually spilled over into action by federal regulators and legislators. In 1975, the Federal Trade Commission ("FTC") promulgated a rule preserving consumer claims and defenses related to personal property installment sale contracts ("FTC Holder Rule").[21] In 1994, the Home Ownership and Equity Protection Act imposed assignee liability on the high-cost mortgage market in order to prompt the

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[13] For a discussion of the negotiability of residential mortgage notes, see Dale Whitman, How Negotiability Has Fouled Up the Secondary Mortgage Market, and What to Do About It, 37 Pepp. L. Rev. 737, 752 (2010); ASF White Paper, Transfer and Assignment of Residential Mortgage Loans in the Secondary Market, 9 (Nov. 16, 2010); and Ronald J. Mann, Searching for Negotiability in Payment and Credit Systems, 44 UCLA L. Rev. 951 (1997).

[14] See, e.g., Kurt Eggert, Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine, 35 Creighton L. Rev. 503 (2002) and Alex M. Johnson, Jr., Preventing a Return Engagement: Eliminating the Mortgage Purchasers' Status as a Holder-in-Due Course: Properly Aligning Incentives among the Parties, 37 Pepp. L. Rev. 529 (2010).

[15] UCC § 3-302 defines a "holder in due course." UCC § 3-305 protects a holder in due course from most claims and defenses.

[16] Mark B. Greenlee and Thomas J. Fitzpatrick IV, Reconsidering the Application of the Holder in Due Course Rule to Home Mortgage Notes, 41 UCCLJ 225 (2009).

[17] Miller v. Race, 1 Burr. 452, 97 Eng. Rep. 398 (K.B. 1758). See also, Greenlee and Fitzpatrick at 229.

[18] Id. at 230.

[19] Id. at 227, 230-35.

[20] Id. at 240-43.

[21] Id. at 243-44.

market to police itself.[22] Yet, the HDC Rule embodied in the UCC continues to be available for assertion by assignees of most residential mortgage notes. As Grant Gilmore, a member of the UCC drafting staff in the 1950s said, "Time seems to have been suspended, nothing has changed, the late twentieth century law of negotiable instruments is still the law for clipper ships and their exotic cargoes from the Indies."[23]

Lord Mansfield protected good faith purchasers of bank notes and bills of exchange to support the need for currency and to facilitate trade. Today, bills and promissory notes are no longer needed as a money substitute to pay debts. Current financial systems provide many means of payment, including paper money, checks, wire transfers, and other means of electronic payment. Financial institutions use notes as a means of funding credit transactions, rather than as currency substitutes. Therefore, the policy reasons supporting negotiability offered by Lord Mansfield are no longer relevant.

The primary reasons given for preserving the application of the HDC Rule to residential mortgage notes in contemporary debate are increased availability and decreased cost of credit. Conversely, proposals to eliminate the application of the HDC Rule are met with predictions of decreased availability and increased cost for residential mortgage loans. For instance, Mr. Miller's memorandum to Tom Cox argued that the increase in risk for investors caused by barring the application of the HDC Rule to notes secured by mortgages on residential property would be offset by higher borrowing costs or higher borrower qualification standards. Theoretically, this argument is sound: eliminating the HDC Rule should result in increased costs because of the additional risk born by lenders and note purchasers. The real question is whether these costs meaningfully interfere with the market for consumer credit.

The data I have suggests that eliminating the holder in due course rule will not meaningfully interfere with consumer credit markets. The expansion of liability for the purchasers of consumer debt instruments brought on by the FTC Holder Rule prompted predictions of the demise of consumer credit markets.[24] However, the outstanding loan data graphed in Exhibit 2 shows that the non-revolving consumer credit market continued to grow despite the expansion in liability in 1975.[25] Reviews of the FTC Holder Rule by the FTC, legislators, and commentators concluded that the elimination of the HDC Rule did not have the catastrophic impact some feared.[26]

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22 Senate Report No. 103-169, at 28, 1912 (1994), reprinted in 1994 U.S.C.C.A.N. 188, 1912 (1994).

23 Grant Gilmore, Formalism and the Law of Negotiable Instruments, 13 Creighton L. Rev. 441, 228 (1979).

24 Federal Reserve Chairman Arthur Burns predicted the consumer-credit business would be "seriously disrupted" by the FTC Holder Rule. Robert D. Hershey, Jr., Washington & Business: The Shifting Onus of Consumer Credit, N.Y. Times, Oct. 7, 1976, at 84.

25 Non-revolving consumer credit includes secured and unsecured credit other than credit secured by real estate.

26 Federal Trade Commission, Termination of Review, 57 Red. Reg. 28,814 (June 29, 1992): "After carefully considering the comments, the Commission believes that they do not present a sufficient basis to conclude that the Holder Rule has had a significant impact on a substantial number of small entities." Senate Report No. 103-169, at 28, 1912 (1994), reprinted in 1994 U.S.C.C.A.N. 188, 1912 (1994): The FTC Holder Rule did not "significantly restrict the flow of consumer credit or interfere with the securitization of auto loans." James J. White and Robert S. Summers, Uniform Commercial Code 503 (4th ed. 1995): The FTC Holder Rule "caused some adjustments in the market, largely unseen, but it surely has not had the catastrophic impact upon consumer markets that some predicted." See also, Edward L. Rubin, Learning from Lord Mansfield: Toward a Transferability Law for Modern Commercial Practice, 31 Idaho L. Rev. 775, 789 (1995): "What is striking is that the financial community has not been particularly perturbed by the FTC Rule…").

Turning to residential mortgage loans, a 2007 study examined the impact of new anti-predatory lending laws on the subprime mortgage market.[27] The authors analyzed the impact of the breadth of coverage, substantive restrictions, and enforcement provisions in laws on loan applications, originations, and rejections. The enforcement component included laws with provisions for government enforcement, authorization of private right of action, and assignee liability.[28]

The study found that stronger enforcement resulted in marginally higher subprime originations. While applications for subprime credit fell after anti-predatory laws were enacted, more of the applicants satisfied the criteria necessary to obtain credit. This, and other research, supports the hypothesis that offering additional consumer protection through assignee liability encourages applications from qualified applicants that may have otherwise not applied out of fear of being taken advantage of.[29]

In sum, the data suggests that eliminating the HDC Rule for consumer home loan purchases will not result in materially higher credit costs, or a lower supply of credit. In fact, it suggests that demand may increase as consumers realize they will not be left without options if an originator takes advantage of them, and supply will follow. While credit costs may increase, evidence suggests the increase will not affect the market.

b. Changes in the Parties to Negotiable Instruments

Second, I do not believe that commercial institutions should be protected from the claims and defenses that may arise in the origination of residential mortgages notes with individual consumers. The 18th Century obligors of negotiable notes and bills of exchange were commercial parties. They regularly issued notes knowing that they would circulate. Lord Mansfield established the HDC Rule assuming that the parties to most transactions involving the notes and bills would be on relatively equal footing. The parties to negotiable instruments have expanded with the advent of consumer lending in the early 1900s and growth of consumer lending in the latter half of the 20th Century. Today, many consumers become mortgage note obligors once or twice in a lifetime, and these notes are sold in the secondary market. These consumers become obligors in order to facilitate large purchases, but they have little or no knowledge that the transfer of notes can result in the loss of rights against the holders of the notes.

Commercial parties possess greater knowledge, bargaining power, and financial resources than consumers. Lawyers who draft residential mortgage notes are quite cognizant of the meaning and consequences of the negotiable instruments drafted for the financial institutions they represent. Consumers not only lack knowledge, they lack the bargaining power and financial resources of commercial parties who purchase securitized mortgages. Consumers are less likely to be able pay for the legal assistance needed to defend against a foreclosure action on the basis of the holder's lack of qualification as a holder in due course. Because the unequal footing of the parties to residential mortgage notes undermines the assumptions underpinning the HDC Rule, it should not be applied to residential mortgage notes. This exception to the way contracts and markets ordinarily work should be eliminated.

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[27] Raphael W. Bostic, Kathleen C. Engel, Patricia A. McCoy, Anthony Pennington-Cross and Susan M. Wachter, Working Paper, August 7, 2007. State and Local Anti-Predatory Lending Laws: The Effect of Legal Enforcement Mechanisms.

[28] The authors defined "assignee liability" as laws that allow borrowers to sue (or at least raise defenses against) investors who have bought their loans. In other words, they measured the impact of potential liability that purchasers or other assignees of mortgages have for wrongdoing by originators. Id. at 11 and 13.

[29] Giang Ho and Anthoy Pennington-Cross, The Varying Effects of Predatory Lending Laws on High-Cost Mortgage Applications, 89 Federal Reserve Bank of St. Louis Review 39 (2007).

c. Changes in the Residential Mortgage Market

Finally, I believe that changes in the residential mortgage market create incentives that should be eliminated. The problem arises from the structure of the contemporary mortgage market. The originate-and-hold model of mortgage lending has given way to the originate-to-sell model of mortgage lending. This newer model for financing home ownership is closely connected to the securitization of mortgages that began in the 1980s. While securitization has benefits, it also creates new problems.[30] In the originate-to-hold model of home financing, a single lender solicited, underwrote, originated, funded, serviced, and retained residential mortgage notes. The HDC Rule did not come into play with this lending model. In the originate-to-sell model, the various lending functions are divided among many parties, and the mortgage note is assigned to a purchaser. The sale of a mortgage note raises the possibility for application of the HDC Rule. The rule discourages assignees from investigating originator procedures and practices. The less an assignee knows about a loan origination, the less likely they are to discover default, fraud, misrepresentation, or violation of law that would prevent them from taking advantage of the protection from claims and defenses available to holders in due course. Prior to the imposition of requirements that originators retain some risk, originators did not care whether the loans they processed would be repaid. They were rewarded for originating loans; the more loans they made, the greater the fees they earned. Similar fee incentives up the securitization chain caused the aggregators of loans for securitization to continue financing originators with bad lending practices to satisfy investor appetite for mortgage backed securities.[31]

Removing the application of the HDC Rule from the residential mortgage market would re-align the incentives of originators, aggregators, and assignees. Without the protection of the HDC Rule assignees would face increased liability unless they policed the practices of aggregators and originators. Assignee oversight would decrease originator misconduct and drive bad actors out of the mortgage loan business. This dynamic motivated the promulgation of the FTC Holder Rule. I believe that it will have the same impact on the residential mortgage market.

The Committee is in a position to recognize the structure of the mortgage lending market in the 21st Century and propose a uniform law that aligns the incentives of market participants. However, the initial draft of the Act does not support this objective.

d. Section 401 of the Act

UCC Section 3-305 protects the holder of a negotiable instrument from most claims and defenses, including failure of consideration, fraud in the inducement, breach of warranties, misrepresentation, and unfair or deceptive acts or practices. The initial draft of the Act seems to have incorporated the HDC Rule without explicitly mentioning it. As drafted, Section 401(b)(1) grants a creditor the right to foreclosure if all of the conditions required by the mortgage are satisfied and if the person is the holder of the

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30 Thomas C. Baxter, General Counsel and Executive Vice President, Federal Reserve Bank of New York described the development of this new model of mortgage lending at Committee meetings in June and November 2012 in connection with his advocacy for a national electronic system for recording and transferring residential mortgage notes and mortgages. Mr. Baxter briefly addresses the changes in the market in his letter to William R. Breetz, Jr., dated October 29, 2012, which has been circulated to the Committee.

31 Kathleen Engel and Thomas J. Fitzpatrick IV, Complexity, Complicity, and Liability Up the Securitization Food Chain: Investor and Arranger Exposure to Consumer Claims, 2 Harv. Bus. L. Rev. 101 (2012), fn 151 and 152.

instrument. "Instrument" is defined by Section 102(8) of the Act as a "negotiable instrument as defined in UCC 3-104. "Holder" is not defined by the Act, but a similar incorporation of the UCC definition was probably intended.

I agree with the opposition of George Holler and Tom Cox to incorporation of the HDC Rule into the Act. Mr. Holler warns against conflation of remedies at law and in equity. He makes an historical argument that the right to foreclosure should be limited to the owner of the debt and not the holder of the note that evidences the debt. He supports this argument with the difference in the ways that notes and mortgages facilitate the flow of credit: The negotiability of the notes facilities credit because negotiability makes the instrument more liquid, while the mortgage facilitates credit because the collateral increases the likelihood of repayment. Mr. Cox also argues that only the owners of mortgage loans should be allowed to foreclose on a homeowner's property. He objects to the application of the HDC Rule to residential mortgage foreclosures because the rule was one of the prime causes of the present foreclosure crisis. Therefore, he argues that UCC 3-305 should not be available to a party pursuing a residential mortgage foreclosure. Whatever the decision the Committee makes about the persons entitled to foreclose, it is my opinion that the Committee should not import the concepts of negotiability and holder into the Act if it brings with it protections from claims and defenses available to a holder in due course for the reasons stated earlier.

Conclusion

The policy choices I advocate in this letter aim to improve the efficiency of the housing finance market. This objective ties together the two major matters addressed in this letter: (1) Eliminating the application of the HDC Rule improves market efficiency at the front end of the financing process, and (2) expediting the sale of abandoned property improves market efficiency at the tail end of the financing process. The Committee must make some difficult choices in light of the competing interests of homeowners, creditors, government-sponsored enterprises, investors, and communities. But I believe that eliminating the application of the HDC Rule to residential mortgage notes and expediting the sale of abandoned residential mortgaged property would benefit all stakeholders by improving the efficiency of the residential mortgage market. It is time for state legislatures to take the lead to eliminate the application of the HDC Rule to residential mortgages notes. The Uniform Law Commission can facilitate this effort through the promulgation of the Act. I look forward to discussing these matters further with the Committee and others at the upcoming meetings on February 15th and 16th.

Sincerely,

Mark B Greenlee

Mark B. Greenlee
Counsel

Enclosure

cc: Ms. Lucy Grelle
Mr. John Sebert