

D R A F T

FOR DISCUSSION ONLY

# HOME FORECLOSURE PROCEDURES ACT

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NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAW

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MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SECOND YEAR  
BOSTON, MASSACHUSETTS  
JULY 6 - JULY 12, 2013

# HOME FORECLOSURE PROCEDURES ACT

*WITH DRAFTERS' NOTES*

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By

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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June 4, 2013

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1                                   **HOME FORECLOSURE PROCEDURES ACT**

2   **[ARTICLE] 1**

3   **GENERAL PROVISIONS**

4                   **SECTION 101. SHORT TITLE.** This [act] may be cited as the Home Foreclosure  
5 Procedures Act.

6                   **SECTION 102. DEFINITIONS.** In this [act]:

7                   (1) “Abandoned property” means mortgaged property with respect to which the  
8 homeowner and persons claiming through the homeowner, including tenants, have relinquished  
9 possession. The term does not include unoccupied residential property that is:

10                                   (A) undergoing construction, renovation, or rehabilitation that is proceeding  
11 diligently to completion; or

12                                   (B) used or held for use by the homeowner as a vacation home or seasonal home;  
13 and

14                                   (C) is secured and in substantial compliance with the law of this state and all  
15 applicable ordinances, codes, and rules.

16                   (2) “Common interest community” means real property with respect to which a person,  
17 by virtue of ownership of a unit, is obligated to pay real property taxes, insurance premiums,  
18 maintenance, or improvement of other real property or for services described in a declaration or  
19 other governing document, however denominated. A common interest community includes  
20 properties held by a cooperative housing corporation. In this paragraph, “ownership” includes a  
21 leasehold interest, if the period of the lease is at least [20] years, including renewal options.

22                   (3) “Creditor” means a person that owns or has the right to enforce an obligation. The  
23 term does not include a person that owns no more than five mortgage loans at the time the notice

required by Section 201 is sent.

### **Drafters' Notes**

1. The last sentence of the definition of 'creditor' is an attempt to address Dale Whitman's and other comments to exclude 'mom & pop' lenders or one-off seller financing.

2. The alternative (i.e., the "or has the right to enforce" clause) is useful for the time being due to the alternatives for section 401. We could define creditor as a person who has commenced foreclosure, but that doesn't work because we are imposing some duties on lenders before commencing foreclosure. We dropped the language referring to agents, services, and assigns: It is now "buried" in "other person"; to the extent we need to address issues involving services, agents, and assigns, we think it belongs elsewhere.

3. We should consider the status of mortgage insurers, and other cases; perhaps we can define guarantors separately and then include them in substantive provisions only when appropriate.

(4) "Expenses of foreclosure" means the lesser of:

(A) the reasonable expenses incurred by a foreclosing creditor to the extent provided in the mortgage; or

(B) the maximum amount permitted by law of this state other than this [act] as expenses in connection with a foreclosure.

### **Drafters' Note**

This definition limits the expenses that a foreclosing party may impose on a borrower in connection with the foreclosure process to 'reasonable' expenses, even if other law of the state would allow expenses which would otherwise not satisfy that standard. The definition contemplates that these allowable expenses would include the reasonable costs of all typical foreclosure expenses, including such costs as sending notices, advertising, title searches, inspections and examinations of the mortgaged property, management and securing of the mortgaged property, insurance, filing and recording fees, attorney's fees and litigation expenses incurred to the extent provided in the mortgage or authorized by other law, appraisal fees, the fee of the person conducting the sale in the case of a foreclosure by auction, the fee of a court-appointed receiver, and other expenses reasonably necessary to the foreclosure.

(5) “Facilitation” means the assistance of a third-party neutral at an in-person meeting between the parties with the objective of reaching an agreement between the creditor and the homeowner for a commercially reasonable alternative to foreclosure.

#### **Drafters’ Note**

The definition of ‘Facilitation’ requires at least one ‘in-person’ meeting between the parties and a third-party neutral. The requirement of an ‘in-person’ meeting contemplates the continuation of the practice in many jurisdictions that, as an alternative to a ‘face-to-face’ meeting, the parties may meet by telephone or other electronic means so long as all the parties and the neutral are able to simultaneously hear or communicate with one another.

(6) “Facilitation agency” means [the administrative or judicial agency designated by the state to supervise foreclosure facilitation].

(7) “Foreclosure” means a process, proceeding, or action by a creditor to terminate a homeowner’s interest in mortgaged property or obtain possession of mortgaged property for the creditor. The term does not include a voluntary transfer by a homeowner or an action to recover possession of property after a completed foreclosure sale.

(8) “Good faith” means honesty in fact and the observance of reasonable standards of fair dealing in the mortgage industry.

(9) “Holder” means the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession of a negotiable instrument.

#### **Drafters’ Note**

The definition of ‘holder’ is taken from revised Article 1: UCC § 1-201(b)(21)(A) and the terms ‘bearer’ and ‘identified person’ have the same meanings in this act as in the UCC. The definition of ‘holder’ in unrevised Article 1 has slightly different language, but is the same in substance.

(10) “Homeowner” means a person owning an interest in mortgaged property, other than



1 a mortgage, lien, easement, servitude, or leasehold, whether the person is also an obligor.

2 **Drafters' Notes**

3  
4 1. We need to consider to whom the Act requires 'notice' to be provided  
5 to a 'homeowner' v. an 'obligor' and how the creditor is able to identify each; *see*  
6 the proposed amendments to Sec. 401.

7  
8 2. At the November meeting, there were suggestions from several persons  
9 for more expansive comments; to the extent these notes are inadequate, please let  
10 the Reporters know of any desired additional comments.  
11

12 (11) "Loss mitigation" means a program a creditor offers to a homeowner that is in  
13 default or facing imminent default as an alternative to foreclosure.

14 **Drafters' Note**

15  
16 The comments will be expanded to make clear that 'loss mitigation' includes such  
17 actions as a repayment plan, forbearance agreement, loan modification, short sale,  
18 partial mortgage insurance claim, negotiated transfer and deed in lieu of  
19 foreclosure.

20  
21 (12) "Mortgage" means a consensual interest in residential property that secures an  
22 obligation created by a mortgage agreement.

23 (13) "Mortgage agreement" means a record that creates or provides for a mortgage.

24 **Drafters' Note**

25  
26 In this Act the term "mortgage" refers to the lien held by the creditor, which  
27 secures payment of the obligation, whereas the term "mortgage agreement" refers  
28 to the writing or other record that memorializes the parties' agreement and creates  
29 the mortgage. Depending upon local usage and custom, the mortgage agreement  
30 may be denominated as a mortgage, deed of trust, trustee deed, security deed,  
31 deed to secure debt, or the like.

32  
33 (14) "Mortgage registry" means an electronic registry of holders of the right to enforce  
34 mortgages and obligations secured by mortgages, operated under federal statutes or regulations,  
35 which maintains the records of such mortgage loans pursuant to standards designed to ensure that  
36 the record of each mortgage and obligation is unique, identifiable, and unalterable.

(15) “Mortgaged property” means residential property, together with any personal property held or used in connection with the residential property, which is subject to a mortgage.

(16) “Negotiable instrument” means a negotiable instrument as defined in [U.C.C. Section 3-104].

(17) “Nonjudicial foreclosure” means a foreclosure that proceeds without judicial process pursuant to [insert statutory reference].

#### **Drafters’ Note**

In states that allow one or more types of nonjudicial foreclosure of residential mortgages, the drafter should insert a reference to the relevant statute or statutes here. In states that do not allow nonjudicial foreclosure, this definition should be deleted, along with references to “nonjudicial foreclosure” elsewhere in this Act.

(18) “Obligation” means a debt or other duty or liability that is secured by a mortgage.

(19) “Obligor” means a person that, with respect to an obligation:

(A) owes payment of the obligation; or

(B) has provided property other than the mortgaged property to secure payment of the obligation; or

(C) is otherwise accountable in whole or in part for payment of the obligation.

(20) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency or instrumentality, or other legal entity.

(21) “Record”, used as a noun, means information that is inscribed on a tangible medium or is stored in an electronic or other medium and is retrievable in perceivable form.

(22) “Residential property” means real property improved with not more than four dwelling units, including structures ancillary to a unit. The term includes an attached single-family unit, a single-family manufactured-housing unit treated as real property under [insert

reference to applicable state statute], real property on which construction of not more than four dwelling units has commenced, and a single-family unit in a common-interest community.

(23) “Servicer” means a person responsible for servicing an obligation, including a person that makes, holds or owns an obligation if that person also services the obligation.

(24) “Servicing” means:

(A) receiving a scheduled periodic payment from a homeowner or obligor under the terms of an obligation, including an amount received for an escrow account; or

(B) making or advancing a payment to the owner of an obligation on account of an amount due from the homeowner or obligor under the terms of the mortgage servicing loan documents or a servicing contract, or

(C) in the case of a home equity conversion mortgage or reverse mortgage, making payments to the homeowner or obligor

#### **Drafters’ Note**

The definitions of ‘Servicer’ and ‘Servicing’ are adapted from the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq* (“RESPA”), 24 C.F.R. § 3500.2 (b).

(25) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

#### **Drafters’ Notes**

1. In some states, a land sale installment contract does not constitute a ‘mortgage’, with all the attendant consequences for homeowners and creditors, until a specified percentage of the original principal amount has been paid to the creditor. In Illinois, for example, that percentage is 50% of the original principal amount. In those States where the issue arises, statutory drafters should make appropriate amendments to this act to track existing practice in that state.

2. Whether mortgaged property is “abandoned property” is determined by

1 the facts of each case. The factors listed in Section 505(a) are not exclusive. The  
2 core question is whether the homeowner is presently in possession of the  
3 property. The question must be answered by evaluating the facts related to the  
4 homeowner's use of the property.  
5

6 3. The definitions of "mortgage" and "obligor" refer to the payment of an  
7 obligation, and do not use the phrasing found in UCC Article 9 definitions that  
8 includes "payment or other performance" of obligations. Almost always the basis  
9 for a residential mortgage foreclosure is the failure to pay a monetary obligation.  
10

11 **SECTION 103. SCOPE.** This [act] applies to the foreclosure of a mortgage on  
12 residential property in this state.

### 13 **Drafters' Notes**

14  
15 1. This Act applies whenever a creditor forecloses on a mortgage on  
16 residential property, whether by judicial process or by non-judicial measures. The  
17 definition of "foreclosure" in Section 1-103 must be consulted to determine which  
18 actions taken by creditors have the legal effect of making the Act applicable to the  
19 parties to a mortgage.  
20

21 2. The term "residential property" is defined in Section 1-103 as real  
22 property improved with one-to-four dwelling units. Thus, this Act applies to the  
23 foreclosure of a mortgage on any one to four family property used for residential  
24 purposes, regardless of whether the homeowner occupies or intends to occupy one  
25 or more of the units as a principal residence or other residence. This means that  
26 this Act covers all rental properties of this type. The Act, however, does not  
27 apply if the mortgage covers five or more dwelling units, even if the homeowner  
28 personally occupies one or more of those units.  
29

30 **Example:** Buyer purchases a residential condominium unit, financing the  
31 purchase with a mortgage. A foreclosure of the mortgage is within the scope of  
32 this Act, regardless of Buyer's intended use or actual use of the property.  
33 Similarly, if Buyer purchases five units in the same condominium community,  
34 each financed with a separate mortgage, a foreclosure of any of those mortgages  
35 is within the scope of this Act.  
36

37 3. However, the Act also makes clear that while this Act would apply to  
38 the foreclosure of mortgages created before the effective date of this Act, it would  
39 not apply to a foreclosure action that the creditor had commenced before the  
40 effective date of the Act; this is made clear in Section 701, describing the  
41 'Effective Date' of the Act.

**SECTION 104. DUTY OF GOOD FAITH.** A creditor, servicer, obligor, or homeowner shall comply in good faith with the requirements of this [act].

**SECTION 105. CERTAIN ACTS PROHIBITED.** A creditor, servicer, or an agent of either, may not:

(1) Make an oral or written statement to a homeowner or obligor that would discourage a reasonable person from participating in loss mitigation or facilitation; and

(2) Misrepresent any aspect of a foreclosure process, including informing the homeowner or obligor that:

(A) a sale date is set when the procedure for setting a sale date has not been completed;

(B) the foreclosure has been stayed due to loss mitigation and at the same time continuing with the foreclosure process; or

(C) the homeowner or obligor is not eligible for loss-mitigation options when those options have not yet been evaluated.

**[ARTICLE] 2**

## NOTICES; RIGHT TO CURE

**SECTION 201. NOTICE OF INTENT TO FORECLOSE AND RIGHT TO CURE.**

(a) A creditor or servicer may not commence foreclosure until 30 days after the creditor or servicer sends separately to each homeowner and obligor a notice of intent to foreclose and right to cure.

(b) The notice under subsection (a) must state:

(1) the nature of the default, including an itemization, as of the date of the notice, of all past-due payments, fees, and other charges owed to the creditor, servicer or the creditor's

1 or servicer's attorneys and an estimate of other amounts accrued but unknown in amount;

2 (2) the specific action the homeowner or obligor must take to cure the default,  
3 including the amount that must be paid;

4 (3) the date by which the default must be cured;

5 (4) that if the homeowner or obligor does not cure, the creditor or servicer may  
6 demand payment of the full amount due, not just past-due payments, and may foreclose the  
7 mortgaged property;

8 (5) the effect of curing the default, including the right to have the terms of the  
9 obligation and mortgage remain in effect;

10 (6) that the homeowner or obligor may dispute the default or raise any other  
11 defense to foreclosure and how to exercise that right;

12 (7) the specific basis for the right of the creditor or servicer to foreclose and, if the  
13 creditor or servicer is acting on behalf of the owner of the obligation, the identity of the owner;

14 (8) that the homeowner or obligor may request a copy of the homeowner's  
15 mortgage note or other evidence of the obligation and a copy of any record required to  
16 demonstrate the right to foreclose as provided in Section 401;

17 (9) that the homeowner or obligor will receive a separate notice of available  
18 foreclosure alternatives and facilitation; and

19 (10) if sent to an obligor, that the notice is being sent to the homeowner as well as  
20 any other obligor regardless of whether the obligor has an interest in the mortgaged property.

21 (c) The notice may state that additional sums may come due after the date of the notice.

## 22 **Drafters' Notes**

23  
24 1. The itemization of the amount due as of the notice date is a critical  
25 piece of information for the homeowner or obligor and should be stated as exactly

1 as possible. The amount included for attorneys' fees should be limited to those  
2 accrued prior to the date of the notice, and thus should not include retainers or  
3 advances to attorneys that would be refunded in the event of a prompt cure.  
4 Amounts chargeable to the homeowner or obligor for services by third parties  
5 such as title examiners should only be estimated if the exact amount is not readily  
6 ascertainable when the notice is prepared.  
7

8 2. The mortgage obligation may be accelerated by filing a complaint,  
9 scheduling a sale, or by separate notice of acceleration – the notice of intent to  
10 foreclose does not by itself accelerate the debt. The notice need not refer to  
11 acceleration if the creditor does not intend to accelerate the obligation, for  
12 example if it is fully matured. The definition of “foreclosure” in section 102  
13 includes other legal methods that may be used to terminate the homeowner's  
14 interest in the mortgaged property, such as a quiet title or ejectment action in the  
15 case of an installment land sale contract.  
16

17 3. Items (1) through (6) are adapted from the elements of notice in the  
18 standard Fannie/Freddie mortgage negotiable instrument. Item (3) adds a specific  
19 deadline to cure the default. Items (7) and (8) are the ownership statement  
20 required by the national servicing settlement, and call for the servicer to identify  
21 its basis for standing at the outset of foreclosure proceedings, so that any disputes  
22 can be resolved promptly. This notice would not displace all state-specific aid  
23 programs and counseling notices which necessarily will depend on state funding –  
24 for example, Pennsylvania requires a separate 30-day notice of how to apply for  
25 its Homeowner's Emergency Mortgage Assistance Program.

26 4. In subsection (b)(2), the actions the homeowner needs to take in order  
27 to cure the default are governed by § 203.  
28

29 5. In subsection (b)(7), the basis on which a particular creditor may assert  
30 the right to foreclose is specified in §401. The notice may, but is not required to,  
31 explain that the agent has full authority on behalf of the owner to negotiate with  
32 the homeowner.  
33

34 6. If a homeowner or obligor has cured a default, any subsequent  
35 foreclosure based on a later default must be preceded by a new notice. This is  
36 because a cure restores the homeowner to the same legal position as if no default  
37 had occurred. If, on the other hand, as a result of facilitation or otherwise, the  
38 homeowner has tendered payments under a forbearance plan or other workout but  
39 has not fully cured the default that was the subject of the notice, no new notice is  
40 required in the event the workout fails and the creditor chooses to proceed with  
41 foreclosure.  
42

43 **SECTION 202. MANNER OF NOTICE DELIVERY.** A notice required by Section

44 201 or Section 302 must be sent by first-class mail to each homeowner and obligor's last-known

1 address and to the address of the mortgaged property. At least one mailed notice must be  
2 addressed to the homeowner or to “occupant.” If the homeowner or obligor or the homeowner or  
3 obligor’s representative has requested to receive notice by electronic mail and has provided an  
4 electronic-mail address to the creditor, the notice also must be sent by electronic mail to the  
5 electronic-mail address.

#### 6 **Drafters’ Note**

7  
8 The complaint in a judicial foreclosure state, or notice of sale in a nonjudicial  
9 foreclosure state, must be delivered according to existing law, usually by personal  
10 service. The requirement for additional electronic mail notice does not displace  
11 the paper notices required by this act or other law. The creditor may, but is not  
12 required to, send the notice by certified mail as well as by ordinary first class  
13 mail.

#### 14 **SECTION 203. RIGHT TO CURE DEFAULT.**

15 (a) A homeowner or obligor may cure a default by tendering the amount or performance  
16 specified in subsection (c) at any time until 24 hours before a scheduled or postponed foreclosure  
17 sale.

18 (b) The right to cure may not be exercised more than three times in a calendar year.

19 (c) To cure a default under this section, a homeowner or obligor must:

20 (1) tender in cash or immediately available funds all sums that would have been  
21 due at the time of tender in the absence of acceleration;

22 (2) perform or tender performance of any other duty under the obligation and  
23 mortgage that would have been due in the absence of default or acceleration;

24 (3) tender in cash or immediately available funds all expenses of foreclosure that  
25 are specified in a record by the creditor and actually accrued prior to the date of tender; and

26 (4) tender any late fees, if provided for in the mortgage and permitted by [state  
27 law].



(d) Cure of a default under this section restores the homeowner and obligor to the same position under the mortgage and the obligation it secures as if the default had not occurred.

(e) A homeowner or obligor's right to cure may not be waived.

#### **Drafters' Notes**

1. The right of a homeowner or obligor to cure a default has the effect of de-accelerating the payments due after acceleration, but before a completed foreclosure sale. Once a sale is completed, the interests of potential purchasers militate against further extending the possibility of cure. The homeowner and obligor receive notice detailing the amounts needed to cure the default pursuant to Section 202, and identifying any nonpayment defaults, such as failure to maintain insurance. The right to cure is independent of any right to redeem.

2. This section does not alter contractual rights to cure that are stronger, but the statutory right to cure may not be waived by contract. In the event of a dispute between the creditor and a homeowner or obligor concerning the amounts needed to cure, or any nonmonetary performance that may be claimed as due, either party may seek declaratory relief from an appropriate court, and if appropriate, a temporary stay of any foreclosure sale to resolve the cure dispute.

3. If a default is cured, restoring the homeowner and obligor to the same position as if no default occurred means that if there is a later default, new notices must be sent prior to foreclosure. Conversely, if as a result of facilitation under Article 3 or otherwise, a settlement is reached but the homeowner or obligor does not fully cure the default, new notices are not required.

#### **SECTION 204. UNKNOWN HOMEOWNER OR OBLIGOR.**

(a) A creditor or servicer does not owe a duty under Sections 201 or 302 to notify a person that is a homeowner or obligor unless the creditor or servicer knows:

(1) That the person is a homeowner or obligor;

(2) The identity of the person; and

(3) where to send the notice.

(b) If the creditor or servicer knows the identity of a homeowner or obligor but does not know the homeowner or obligor's current address, notice to the homeowner or obligor must be delivered to the address of the mortgaged property.

1 **Drafters' Notes**

2  
3 1. Section 205 is based on UCC § 9-605. Its purpose is to relieve the  
4 creditor from duties owed to a homeowner or obligor if the creditor or servicer  
5 does not know about that person. This may be the case, for example, when an  
6 original homeowner has sold the property to a purchaser, or when the original  
7 homeowner has died and his or her interest has passed to an heir or devisee.  
8

9 2. In defining what it is that a creditor 'knows', this Section intends that  
10 the creditor or servicer must have actual knowledge of the facts described, as  
11 opposed to constructive knowledge. In that sense, the word 'knows' in this  
12 Section has the same meaning as it does under UCC Section 1-202 of revised  
13 UCC Article 1, which, in turn, derived from former UCC Section 1-201 (25-27).  
14

15 **[ARTICLE] 3**

16 **FACILITATION**

17  
18 **SECTION 301. FACILITATION PROGRAM ESTABLISHED.** [Name of court or  
19 agency serving as facilitation agency] is designated as the facilitation agency. The facilitation  
20 agency shall adopt rules pursuant to [insert reference to state administrative procedures act or, if  
21 the facilitation agency is the judicial system, to the rules of court] establishing procedures and  
22 standards for the facilitation process.

23 **Drafters' Notes**

24  
25 1. Facilitation is defined in Section 102 as the assistance of a third-party  
26 neutral at an in-person meeting between the parties with the objective of  
27 achieving a commercially reasonable alternative to foreclosure, resulting in an  
28 agreement between the creditor and homeowner.  
29

30 Between 2007 and 2012 eighteen states adopted statewide foreclosure  
31 diversion or mediation programs, and local jurisdictions in at least eight additional  
32 states have established similar programs. The programs vary greatly in their  
33 timing and design, and exist in both judicial and nonjudicial foreclosure states.  
34 Most programs in judicial foreclosure states call for intervention after a  
35 foreclosure complaint is filed. While most stakeholders recognize that starting  
36 mediation or facilitation earlier in the process would increase the chances of  
37 success and reduce costs, most existing state laws do not provide a means to  
38 initiate facilitation before the judicial process begins. Pre-foreclosure facilitation  
39 permits early sorting of foreclosure cases, into those where the homeowner wants  
40 to find a solution other than foreclosure, and those cases that are uncontested or

1 where there is no realistic alternative to foreclosure.

2  
3 2 The Act does not prescribe standards or procedures for the state  
4 facilitation program. Rather, the following best practices are recognized by lender  
5 and consumer advocates as well as mediation and facilitation program participants  
6 as necessary elements of a successful facilitation program.

7  
8 a. The goal of facilitation is to create commercially reasonable alternatives  
9 to foreclosure which achieve sustainable outcomes, including "graceful exits."

10  
11 b. The homeowner should have access to a housing counselor (or a  
12 lawyer) to assist in the facilitation process.

13  
14 c. The process of bringing the parties together to achieve an alternative to  
15 foreclosure is better understood as facilitation, not mediation, because some of the  
16 standards typically followed by mediators are not appropriate.

17  
18 d. Facilitation is not merely a requirement that parties "meet and confer, "  
19 i.e. a mandate merely for two-party settlement negotiations. The involvement of a  
20 neutral third party is critical to success.

21  
22 e. The neutral facilitator should disclose any conflicts of interest. A  
23 lawyer serving as a facilitator must inform unrepresented homeowners that the  
24 lawyer is not representing them.

25  
26 f. Facilitation should not unnecessarily delay the foreclosure process, but  
27 should provide adequate time for full consideration of alternatives to foreclosure.

28  
29 g. If the homeowner makes a timely request for facilitation, or in an opt-  
30 out system, when the lender initiates foreclosure, the relevant agency must initiate  
31 the facilitation process within 14 days.

32  
33 h. Documentation information exchange.

34  
35 i. The creditor or servicer must specify whatever documents it  
36 requires from the homeowner within [5] days after initiation of the facilitation  
37 process.

38  
39 ii. The homeowner must provide the income and other documents  
40 required by the servicer listed in (a) above to the servicer and the facilitator not  
41 less than [30] days before the scheduled first facilitation session. If the  
42 homeowner fails to substantially provide the documents specified by the creditor  
43 or servicer within the time frame required by this paragraph, the facilitation  
44 process terminates.

45  
46 iii. The creditor or servicer must provide to the homeowner and the

1 facilitation agency: (i) the homeowner's payment history from the date of default;  
2 (ii) itemized amounts due on the loan, including all fees.  
3

4 iv. The creditor or servicer should provide the facilitator its  
5 decision, including the inputs and results of any net present value calculations it  
6 relies on in deciding not to offer any particular loss mitigation alternative.  
7

8 i. The first facilitation session must take place within [XX] days after  
9 initiation of the facilitation process.

10 j. Participation – the creditor or servicer must have a lawyer and creditor  
11 or servicer representative present in person or by telephone or teleconference; the  
12 creditor or servicer must evaluate loss mitigation and make a decision as required  
13 by [the RESPA regulations of the Consumer Financial Protection Bureau.]  
14

15 k. The facilitation agency should clearly identify any eligibility restrictions  
16 for its program, such as property occupancy.  
17

18 l. Standards of practice for facilitators: There is consensus that facilitator  
19 conflicts of interest should be avoided or disclosed. Traditional mediator  
20 standards are problematic in some cases. For example, mediators traditionally do  
21 not disclose anything that takes place during facilitation or report to a court on the  
22 parties' conduct, whereas a facilitator may need to report on either party's  
23 conduct so that a court can decide whether to permit foreclosure to proceed, or to  
24 impose sanctions.  
25

26 m. Proceedings should be confidential, with appropriate exceptions to  
27 permit reporting outcomes and/or noncompliance with rules to the court or  
28 supervising agency.  
29

30 n. States should establish programs to provide appropriate training and  
31 continuing education of facilitators.  
32

33 o. All agreements for foreclosure alternatives should be memorialized in  
34 writing and signed by both parties to minimize later disputes.  
35

36 p. Facilitation agencies should collect enough data to determine the  
37 outcomes of facilitation and whether it is achieving its objectives.  
38

39 q. States should provide adequate funding to train and provide facilitators  
40 and for the associated agency or court supervision.  
41

42 r. Original copies of documents (as opposed to true copies) should not be  
43 needed during facilitation. Issues about authenticity and possession should be  
44 resolved separately in litigation if need be.

1 **Drafters' Note**

2  
3 The Drafting Committee has spent considerable time discussing the subject of  
4 mediation – now called facilitation; a number of members on the Committee  
5 believe that a successful process that screens potential workout alternatives to  
6 foreclosure offers the single best hope for homeowners in the continuing  
7 foreclosure crisis.

8 **SECTION 302. NOTICE OF FACILITATION.**

9 (a) Before a creditor or servicer may request entry of a default or foreclosure judgment or  
10 issue a notice of a judicial or nonjudicial-foreclosure sale, the creditor or servicer must send each  
11 homeowner and obligor a notice of facilitation.

12 (b) If the facilitation agency establishes a procedure for the agency to send notice of  
13 facilitation to homeowners, a creditor or servicer shall request the agency to send the notice to  
14 the creditor or servicer and to each homeowner and obligor. If there is no procedure for the  
15 agency to send notice, the creditor or servicer shall send a notice of facilitation to each  
16 homeowner and obligor, in the same manner as required for the notice under Section 201.

17 (c) A notice of facilitation must be requested or sent not later than 30 days after the  
18 sending of the notice of intent to foreclose under Section 201.

19 (d) The notice of facilitation under subsection (a) must include the following:

20 (1) The name, address and telephone number of each housing counseling agency,  
21 lawyer referral service and legal aid agency serving the homeowner's geographic area that is  
22 designated by the facilitation agency.

23 (2) The name, address, telephone number, and e-mail address of any person  
24 designated by the creditor or servicer as the homeowner or obligor's single point of contact.

25 (3) The fact that the homeowner or obligor may request a facilitation meeting and  
26 the name and contact information for the person to contact to request facilitation.

(4) A description of all documents the homeowner or obligor must bring to the facilitation meeting, in accordance with rules promulgated by the facilitation agency.

**SECTION 303. DUTY TO PARTICIPATE IN FACILITATION IN GOOD FAITH.**

(a) Each party to a facilitation must participate in facilitation in good faith to seek a resolution other than a foreclosure sale. The parties shall comply with any scheduling order established by the facilitator or the facilitation agency.

(b) The creditor or servicer shall inform the homeowner and obligor of the loss mitigation options that are available to the homeowner and obligor. The creditor or servicer shall notify the homeowner and obligor and the facilitator or facilitation agency of its willingness or refusal to offer any loss mitigation option requested by the homeowner, the reasons for any refusal, and the information on which a refusal is based. The creditor or servicer may not charge the homeowner or obligor a fee for the facilitation process.

(c) A homeowner or obligor that elects to participate in facilitation shall provide reasonably available financial and other information to permit the creditor to evaluate any loss-mitigation options.

(d) Failure to participate in good faith includes failure:

- (1) without good cause to timely attend a meeting;
- (2) without good cause to provide, before a scheduled meeting, documents and information required by facilitation agency rules or reasonably requested by a facilitator;
- (3) to designate a person with authority to reach a settlement agreement;
- (4) without good cause to pay any required facilitation fee;
- (5) to implement or comply with a settlement agreement in connection with

1 foreclosure or facilitation; and

2 (6) on the part of a creditor or servicer to advise the homeowner, obligor and  
3 facilitator of any loss-mitigation option that is available to the homeowner or obligor and failure  
4 to consider the homeowner or obligor for the loss-mitigation option before or during facilitation.

#### 5 **Drafters' Notes**

6  
7 1. As provided in Section 303, the facilitation agency may impose  
8 additional requirements on the parties, for example requiring the creditor, servicer  
9 or its agent to appear in person or to have a person with authority to approve loss  
10 mitigation alternatives available by telephone at the time of the facilitation  
11 session, to perform a net present value analysis, to disclose the assumptions on  
12 which the analysis is based, or requiring homeowners to meet with a housing  
13 counselor to qualify for facilitation. The agency will also regulate procedural  
14 matters, such as time limits for exchanging documents, scheduling and concluding  
15 facilitation meetings, reports by facilitators, and the like. States should continue to  
16 have flexibility in the design and implementation of facilitation programs, but  
17 should establish and publish the standards as required by section 303. The best  
18 practices principles of facilitation set forth following Section 304 should aid state  
19 facilitation agencies in designing their programs.  
20

21 2. Facilitation cannot succeed in reaching a resolution other than a  
22 foreclosure sale unless both parties participate in good faith. This requires not  
23 only the participation of a person representing the creditor or servicer who has the  
24 authority to enter into a settlement agreement, but also the participation of  
25 necessary persons on the borrower's side - those who own the home and those  
26 who are liable on the mortgage debt. In simplest case, in which one person is  
27 both the homeowner and the obligor, obviously there is no difficulty in  
28 determining who must participate on the borrower's side. In the common situation  
29 in which married spouses both own the home and are liable on the debt,  
30 significant problems will be infrequent. Both spouses have the right to participate  
31 in facilitation under this Act. If only one chooses to attend a facilitation meeting,  
32 that ordinarily would not present a problem with respect to negotiation of a  
33 settlement acceptable to both homeowners/obligors. However, when the  
34 "homeowner" and "obligor" are not the same person or persons, care must be  
35 taken to involve both the homeowner and the obligor. Their interests might be  
36 compatible, but they might diverge in some circumstances. For example, pursuant  
37 to a divorce settlement an ex-wife may own the home, with the ex-husband  
38 having sole personal liability on the mortgage debt. The participation of both in  
39 facilitation ordinarily will be necessary for a loan modification that to avoid  
40 foreclosure. The homeowner's primary objective may be retaining the right to  
41 possess the home, while the obligor's primary objective may be minimizing  
42 financial liability on the debt.

1           **SECTION 304. NO FORECLOSURE DURING FACILITATION.**

2           (a) After a notice of facilitation has been sent to a homeowner or obligor, a creditor or  
3           servicer may not commence a judicial-foreclosure action, file a default or dispositive motion in a  
4           foreclosure action, or schedule or cause to be scheduled a foreclosure sale unless:

5                     (1) the homeowner or obligor does not respond to the facilitation notice, by either  
6           appearing at the scheduled facilitation session or by sending a written request for loss mitigation  
7           to the creditor or servicer not later than 60 days after sending the facilitation notice; or

8                     (2) the facilitation agency provides the creditor or servicer with a notice that the  
9           parties have negotiated in good faith and reached an impasse, or that the homeowner or obligor  
10          has failed to participate in facilitation or provide required information after a reasonable  
11          opportunity to do so.

12          (b) Notwithstanding subsection (a), a creditor or servicer may proceed to enforce the  
13          mortgage [90] days after sending the notice under Section 302, unless the parties agree to  
14          continue the facilitation process or the facilitation agency or court directs the parties to continue  
15          the facilitation process.

16                                     **Drafters' Note**

17  
18          Numerous states have recently enacted mandatory facilitation or loss mitigation  
19          laws whose object is to delay or prevent foreclosure until the homeowner has  
20          had the opportunity to request loss mitigation or facilitation: Arkansas Act 885  
21          (2011) Sec 3, Ark Code 18-50-104 (beneficiary must certify to selling attorney  
22          or trustee that it has notified homeowner of ineligibility for loss mitigation  
23          options before nonjudicial sale); California Assembly Bill 278 (enacted July 11,  
24          2012, prohibits foreclosure when loan modification request is pending); Idaho  
25          Code 45-1506, HB 331 Idaho now requires notice of right to apply for loan  
26          modification and bars nonjudicial sale until creditor responds to homeowner's  
27          request); Indiana Act 170 of 2011 (same; also prohibits servicer or attorney fees  
28          for facilitation or loss mitigation); Massachusetts Chapter 194 of Acts of 2012 ( creditor must offer mortgage modification prior to foreclosing, if modification  
29          would maximize value for mortgagee); Michigan Compiled Laws §3205a  
30          (amended Act 302 of 2011); Nevada Rev. Stat. §107.086; Washington Chapter  
31



1 58 Laws of 2011, amending RCW 61.24 (delays foreclosure 90 days if  
2 homeowner requests meeting with creditor to request loss mitigation, and for  
3 cases referred by housing counselor to facilitation, until the parties comply with  
4 duty to mediate in good faith). Requiring a complete facilitation process prior to  
5 initiation of foreclosure allows necessary foreclosures to go forward promptly  
6 and efficiently after cases suitable for other resolutions are identified and  
7 resolved.

8  
9 **[ARTICLE] 4**

10 **RIGHT TO FORECLOSE; SALE PROCEDURES.**

11  
12 **SECTION 401. RIGHT TO FORECLOSE.**

13  
14 (a) A person described in subsection (b) may commence a foreclosure only after default  
15 in the obligation and satisfaction of all conditions required by the mortgage agreement and law  
16 of this state other than this [act].

17 (b) The only person with the right to foreclose is:

18 (1) if the obligation is evidenced by a negotiable instrument, except as otherwise  
19 provided in paragraph (3):

20 (A) the holder of the negotiable instrument;

21 (B) a nonholder in possession of the negotiable instrument that has the  
22 rights of a holder under [U.C.C. Section 3-301], or

23 (C) a person not in possession of the negotiable instrument that  
24 establishes the right to enforce the instrument because of its loss or destruction by meeting the  
25 requirements of Section 403.

26 (2) if the obligation is not evidenced by a negotiable instrument, except as  
27 otherwise provided in subsection (d), the owner of the obligation; or

28 (3) whether or not the obligation is evidenced by a negotiable instrument, after the  
29 registration of the obligation in a mortgage registry, the person shown as entitled to enforce the

1 obligation and the mortgage on a certificate issued by a mortgage registry as of the time the  
2 foreclosure is commenced.

3 (c) In a judicial-foreclosure proceeding, the plaintiff must prove that it has the right to  
4 foreclose under subsection (b). If the plaintiff relies on a negotiable instrument under subsection  
5 (b)(1), the [complaint] must include:

6 (1) a copy of the negotiable instrument in its present condition including any  
7 endorsement or allonge; and

8 (2) a statement indicating who is in possession of the negotiable instrument or a  
9 statement that the negotiable instrument has been lost or destroyed, in which case the  
10 [complaint] must include a lost-negotiable-instrument affidavit that complies with [UCC Section  
11 \_\_\_\_].

12 (d) In a nonjudicial-foreclosure proceeding, the creditor or servicer must attest by  
13 affidavit to facts demonstrating that the creditor or servicer has the right to foreclose under  
14 subsection (b). The affidavit must be included with the notice of foreclosure required by Section  
15 201.

16 (e) In any foreclosure proceeding, a person that has the right to foreclose may exercise  
17 that right by authorizing, in an authenticated record, another person to foreclose. The [complaint]  
18 described in subsection (c) or the affidavit described in subsection (d) must disclose the name of  
19 each person.

20 (f) If an obligation is evidenced by a negotiable instrument and a person with the right to  
21 foreclose under subsection (b)(1) does not own the obligation, the [complaint] described in  
22 subsection (c) or the affidavit described in subsection (d) must disclose the name of the owner of  
23 the obligation.

## Drafters' Notes

1. The General Counsel's office of the Federal Reserve Bank of New York has recommended in its letter dated March 6, 2013 that the Act contemplate the possibility of an electronic recording system where all notes are electronically generated and where, as a consequence, there is no paper note which might be 'possessed' in order to satisfy the holder in due course requirements of UCC Article 3. This approach has been endorsed by the Federal Housing Finance Agency, by Prof. Dale Whitman and by others.

To accommodate this possibility, the draft added new subsection (b)(3); it serves as a starting point for Committee discussion of the feasibility of including in the Act such a provision for the registration of documents for residential mortgage loans. Under this draft, a certificate or record issued by the sponsoring organization is conclusive evidence that the person named in the certificate as owning the obligation, holding the negotiable instrument (if the obligation is evidenced by an negotiable instrument), or acting on behalf of the owner or holder, has the right to foreclose under Section 401.

The draft also makes conforming changes in subsections 401(a), 401 (b), 401(c) and 401(d) by making, in each case, appropriate references to subsection (g).

2. This section designates the "person entitled to enforce" a negotiable instrument under revised UCC Article 3 as the person with the right to foreclose the mortgage. Section 401(b)(1) follows the language of UCC § 3-301, which defines who is "person entitled to enforce" a negotiable instrument. When the payee of the negotiable instrument has retained possession of the instrument, that person has the right to foreclose. When the payee has transferred possession of the negotiable instrument to another person, the facts must be examined to determine who has the right to enforce the note. The subsequent possessor may become a holder under UCC Article 3 by obtaining a special endorsement or blank endorsement, but this section does not require that a subsequent possessor become a holder in order to acquire the right to foreclose. Such a subsequent possessor may be entitled to enforce the note, but will have to allege and prove facts that are sufficient to establish the right to enforce.

3. Subsection (b)(2) includes situations in which the secured obligation is evidenced by an instrument that is not negotiable and situations in which the obligation is not evidenced by any type of instrument authenticated by the debtor. As an example of the former, an owner may sign a promissory note that has terms that makes the note nonnegotiable. As an example of the latter, under the law of some states an installment land contract creates a mortgage relationship between the parties, in which the vendee's obligation to pay the price usually is not reflected in a negotiable instrument. In all such cases, the owner of the obligation who has the right to foreclose will be either the original obligee or an assignee.

1           4. In judicial foreclosure, under existing law the creditor generally must  
2 confirm possession or account for possession of the original note at the time of  
3 filing or prior to the foreclosure sale. In some nonjudicial foreclosure states, the  
4 law appears not to require confirmation of possession of the original note prior to  
5 commencement of foreclosure proceedings or the sale. This section requires that  
6 the foreclosing person have possession of the negotiable instrument prior to the  
7 commencement of foreclosure, whether the proceeding is judicial or nonjudicial,  
8 unless that person prepares a lost note affidavit meeting the requirements of  
9 Section 4-103.

10  
11           5. The decision in subsection (b)(1) to require foreclosure by the holder of  
12 a negotiable instrument, paired with the decision in subsection (b)(2) to require  
13 foreclosure by the owner of other obligations, seeks to reach an appropriate  
14 balance between the interests and expectations of borrowers, lenders, and their  
15 assignees. It recognizes the traditional importance of qualifying as a holder of a  
16 negotiable instrument under Article 3, and seeks to protect borrowers by ensuring  
17 that proceeds of foreclosure sales will discharge the obligation. With respect to  
18 obligations evidenced by non-negotiable instruments and other writings,  
19 possession of those writings, although sometimes important, generally has less  
20 significance. Thus, section (b)(2), by authorizing foreclosure by the owner of  
21 such an obligation, makes irrelevant the possession of a non-negotiable  
22 promissory note or another writing such as the mortgage agreement or an  
23 installment land contract.

24  
25           Although this distinction seems beneficial, the two-tier system does have  
26 some costs, including but not limited to complexity. By authorizing the holder of  
27 a negotiable instrument to foreclose, sometimes the power is conferred upon a  
28 person who has no economic stake in the obligation or the collateral. The holder,  
29 however, will usually have an obligation, created by contract or other law, to the  
30 owner who does have an economic stake, giving it some incentive to behave  
31 properly.

32  
33           The two-tiered system makes it necessary to determine whether a  
34 promissory note is negotiable for some cases. Uncertainty as to whether the note  
35 is negotiable creates cost. If a single person both possesses the note and owns the  
36 obligation, the problem is not major. If it is unclear whether the secured  
37 obligation is evidenced by a negotiable instrument or by an instrument that is not  
38 negotiable, the creditor may choose to proceed by complying with both  
39 subsections (b)(1) and (b)(2). If, however, different persons possess the note and  
40 own the obligation, the problem is harder. For example, consider a promissory  
41 note secured by a mortgage and payable to the order of Creditor. Creditor enters  
42 into a signed contract with Assignee pursuant to which Creditor sells the  
43 promissory note to Assignee. Assignee pays Creditor, but Creditor retains  
44 possession of the promissory note (and is not possessing the note as agent for  
45 Assignee). If the promissory note is a negotiable instrument under UCC Article 3,  
46 Creditor can commence a foreclosure under this Section, but Assignee cannot

1 (because Creditor is the holder of the note). If the promissory note is not a  
2 negotiable instrument, however, Assignee is its owner and can commence a  
3 foreclosure, but Creditor cannot. If Creditor and Assignee cannot reliably  
4 determine, before foreclosure, whether the promissory note meets the standards  
5 for negotiability, neither one will hold a clear right to foreclose. The uncertainty  
6 can be cleared up only by litigation or their agreement to make a further transfer  
7 (Creditor delivers the note to Assignee, or Assignee resells the note to Creditor).  
8

9 6. This section does not state a separate rule for determining when a  
10 creditor who holds a security interest in a note to secure an obligation owed to the  
11 creditor has the right to foreclose. UCC Article 9 covers both sales of instruments  
12 and assignments of instruments that secure an obligation of the assignor. A  
13 creditor who takes possession of a negotiable instrument will acquire the right to  
14 foreclose. Other law determines when a creditor who takes possession of an  
15 instrument that is not negotiable to secure an obligation owed to the creditor  
16 acquires the right to foreclose. For example, UCC § 9-607(a) and (b) provide  
17 rules indicating when a secured party has the right to collect on collateral and to  
18 enforce the debtor's rights with respect to property that secures obligation owed to  
19 the debtor (i.e., the obligation to pay the mortgage loan to the debtor).  
20

21 7. Multiple persons may hold the right to foreclose a mortgage. Other law,  
22 including UCC Article 3 and the law of agency, determines whether the right to  
23 foreclose may be exercised by fewer than all such persons.  
24

25 8. When the obligation is owned by a trust, the owner of the obligation for  
26 purposes of this Section is the trustee, not the beneficial owner or owners of the  
27 trust property.  
28

29 9. Under subsection (c) the creditor's production of the original negotiable  
30 instrument is not necessary at the time of the filing of a complaint in a judicial  
31 foreclosure. Production of the original would later become appropriate if, during  
32 the course of the proceedings, the homeowner or obligor seeks further  
33 demonstration of the copy's authenticity or the whereabouts of the original.  
34 Similarly, in a nonjudicial foreclosure, if there are subsequent judicial  
35 proceedings, a court may decide to order production of the original instrument if  
36 necessary to resolve a particular issue.  
37

38 10. Subsection (e) authorizes the person who has the right to foreclose to  
39 exercise that right through an agent. By requiring a description of the agency it  
40 does not permit the principal to remain undisclosed. An agent authorized to  
41 foreclose may be a loan servicer who has a pre-existing contractual relationship  
42 with the creditor, or any other person appointed at any time. If the secured  
43 obligation is evidenced by a negotiable instrument, the agent or the principal (the  
44 person entitled to enforce the note) may hold and retain possession of the note.  
45 Subsection (e) is not intended to change existing laws that authorize a third  
46 person, such as a trustee under a deed of trust, to foreclose in nonjudicial

1 proceedings. In such circumstances, subsection (e) allows the beneficiary to  
2 appoint an agent, but does not speak to the procedure for appointing a substitute  
3 trustee.  
4

5 11. Section 401 as drafted, allowing an agent or representative to  
6 foreclose, is consistent with the standing decision in *Sprint Communications Co.*  
7 *v. APCC Services, Inc.*, 554 U.S. 269 (2008). There, payphone operators had  
8 assigned claims for compensation from long-distance carriers to collection firms.  
9 In *Sprint* the Court permitted an assignee of a legal claim for money to pursue that  
10 claim in federal court, even when the assignee had promised to remit the proceeds  
11 of the litigation to the assignor.  
12

### 13 **SECTION 402. TRANSFER OF RIGHT TO ENFORCE MORTGAGE.**

14 (a) A transfer of a right to enforce an obligation secured by a mortgage also operates to  
15 transfer the mortgage.

16 (b) If a transfer of the right to enforce an obligation is accompanied by a separate  
17 assignment of the mortgage, the assignment may be recorded in the [office in which mortgages  
18 are recorded], but recordation is not required for the assignee to foreclose the mortgage pursuant  
19 to Section 401.

### 20 **Drafters' Notes**

21 1. Subsection (a) adopts the principle stated in UCC § 9-203(g), which  
22 provides that an Article 9 transfer of a negotiable instrument also transfers the  
23 mortgage (more formally, § 9-203(g) provides that attachment of a security  
24 interest in a right to payment or performance secured by personal or real property  
25 automatically transfers the security interest to the secured party). Section 9-  
26 203(g) covers sales of negotiable instruments, other instruments, and payment  
27 intangibles, as well as lending transactions in which those rights serve as  
28 collateral to secure an obligation of the transferor.  
29

30 Subsection (a) is broader than § 9-203(g); it applies regardless of whether  
31 the transferee obtains an attached Article 9 security interest. It also encompasses  
32 involuntary transfers such as inheritance and judicial sales. Restatement (Third)  
33 of Property (Mortgages) § 5.4(a) (1997) proposes a similar rule: “A transfer of an  
34 obligation secured by a mortgage also transfers the mortgage unless the parties to  
35 the transfer agree otherwise.” Under the Restatement rule, parties to the transfer  
36 may agree otherwise, but this section does not permit severance of the obligation  
37 from the mortgage, following UCC § 9-203(g) and common-law authorities in a  
38 number of states.

1           2. When the foreclosing party is not the originating creditor there is  
2 conflicting state law, both in judicial foreclosure and nonjudicial foreclosure  
3 states, as to (1) whether the foreclosing party must have an express assignment of  
4 the mortgage, or a chain of assignments running back to the original mortgagee,  
5 and (2) whether that assignment or the chain of assignments must be recorded in  
6 the county land records.  
7

8           In some states, a statute explicitly requires a recorded assignment. E.g.,  
9 Ga. Code § 44-14-162: “The security instrument or assignment thereof vesting the  
10 secured creditor with title to the security instrument shall be filed prior to the time  
11 of sale in the [county land records].” In many states, judicial decisions going in  
12 both directions interpret statutes that do not on their face provide immediately  
13 obvious answers to these questions. E.g, In re Vasquez, 266 P.3d 1053 (Ariz.  
14 2011) (recording assignments of deeds of trust is not required, although trustee  
15 must record notice of trustee’s sale); U.S. Bank Nat. Ass’n v. Ibanez, 941 N.E.2d  
16 40 (Mass. 2011) (requiring written chain of assignments).  
17

18           Subsection (b) adopts the position that an express assignment is  
19 unnecessary; note that subsection (a) implies an assignment upon a transfer of the  
20 obligation. In addition, subsection (b) adopts the position that recordation of an  
21 assignment (or notice of an implied assignment) is not a prerequisite for  
22 foreclosure.  
23

24           3. By allowing foreclosure by an assignee or transferee who qualifies as  
25 the person to foreclose under Section 401, without a requirement of recording any  
26 documents in the real property records, this Act makes it unnecessary to follow  
27 the procedure authorized by UCC § 9-607(b), which grants a secured party the  
28 right to record a copy of the security agreement and an affidavit in the real  
29 property records. Compliance with the requirements of Section 401 is sufficient.  
30

### 31           **SECTION 403. LOST OR DESTROYED NEGOTIABLE INSTRUMENT;**

#### 32           **AFFIDAVIT.**

#### 33                           **Alternative A**

34           (a) If a negotiable instrument secured by a mortgage has been lost or destroyed and the  
35 obligation is not registered in a mortgage registry, the creditor or servicer may foreclose the  
36 mortgage only if the creditor or servicer makes an affidavit attesting to the facts stated in UCC  
37 Section 3-309(a)(1) through (3).

1 **Alternative B**

2 (a) If a negotiable instrument secured by a mortgage has been lost or destroyed and the  
3 obligation is not registered in a mortgage registry, the creditor may foreclose the mortgage only  
4 if the creditor was entitled to enforce the negotiable instrument when loss of possession occurred  
5 and makes an affidavit attesting to the facts stated in UCC Section 3-309(a) (1) through (3).

6 **End of Alternatives**

7 (b) If a creditor or servicer makes an affidavit pursuant to subsection (a), the homeowner  
8 or obligor is entitled to adequate protection against loss that might occur by reason of a claim by  
9 another person to enforce the negotiable instrument. The creditor must provide in a record an  
10 indemnity against loss by the homeowner or obligor. Whether adequate protection requires more  
11 than the indemnity is determined by the facts of each case. On motion by the homeowner or  
12 obligor, a court may require that additional adequate protection be provided by any reasonable  
13 means.

14 (c) In a judicial-foreclosure proceeding, the creditor or servicer shall file the affidavit  
15 described in subsection (a) with the [complaint].

16 (d) In a nonjudicial-foreclosure proceeding, the creditor or servicer shall include:

- 17 (i) the affidavit described in subsection (a); and  
18 (ii) the notice of foreclosure required by Section 201; and  
19 (iii) a statement that the homeowner or obligor has the right to petition the [name  
20 of appropriate court] where the mortgaged property is located for an order requiring the creditor  
21 to provide adequate protection against a claim by another person.

22 **Drafters' Notes**

23  
24 1. The policy choice facing the Drafting Committee, of course, is the  
25 extent to which this Act should give license to foreclosing creditors who sign



1 “lost” or “destroyed” note affidavits without ever having possessed either the  
2 original or a certified copy of the note, and without any evidence of a written  
3 assignment of the underlying mortgage to that creditor. For comparison purposes,  
4 even under the “business records” exception to conventional hearsay rules, it is  
5 not clear that unsigned contracts would be admissible evidence that the parties  
6 named in the contract would be entitled to enforce it. Further, if one is to speak of  
7 “moral hazard,” there is little doubt that a liberal “lost note” affidavit policy offers  
8 a powerful incentive to the first note holder intentionally to discard the original  
9 note and thereby avoid the cost and uncertainty of maintaining thousands of  
10 original paper notes. It would be useful for the Drafting Committee to discuss  
11 this subject, in light of the potential for fraud against an obligor.  
12

13 2. Subsection (a) offers two alternatives to deal with the problem of lost or  
14 destroyed promissory notes, both of which interface with the UCC Article 3  
15 treatment of lost or destroyed negotiable instruments. The first alternative is  
16 compatible with the 2002 amendments to Article 3. In specifying when a creditor  
17 is entitled to enforce a negotiable instrument secured by a mortgage  
18 notwithstanding its inability to confirm possession of the instrument, subsection  
19 (a) tracks the requirements of UCC § 3-309 (2002). In states that have adopted  
20 the 2002 amendments to Article 3, Section 3-309 makes it clear that the person  
21 who lost possession may be a predecessor of the creditor who seeks to enforce the  
22 instrument.  
23

24 3. Alternative # 2 to subsection (a) is consistent with the text of UCC § 3-  
25 309 prior to the 2002 amendments. Most states have not yet adopted the 2002  
26 amendments. Most of these states follow the 1990 Official Text of Article 3. In  
27 these states there are a few cases holding that the affidavit must be signed by the  
28 person who lost the note. Other cases, however, interpret that version of Article 3  
29 to allow enforcement by a successor. See, e.g., *Atlantic Nat. Trust, LLC v.*  
30 *McNamee*, 984 So. 2d 375 (Ala. 2007) (examining prior cases; holding that  
31 assignee of promissory note that was not in possession when lost may enforce the  
32 note). Alternative #2 requires the creditor who forecloses be the person who lost  
33 or destroyed the note and who executes the affidavit.

34 4. In some states, the circumstances in which a creditor is allowed to  
35 enforce an unavailable negotiable instrument are broader than under either the  
36 2002 version or the earlier version of UCC § 3-309. E.g, Va. Code § 55-59.1(B)  
37 (“[i]f a note or other evidence of indebtedness secured by a deed of trust is lost or  
38 for any reason cannot be produced”). In some states, the circumstances are more  
39 restricted because the creditor’s affidavit must attest to additional facts. E.g., Md.  
40 Code § 7-105.1 (affidavit not sufficient unless it “(1) Identifies the owner of the  
41 debt instrument and states from whom and the date on which the owner acquired  
42 ownership; (2) States why a copy of the debt instrument cannot be produced; and  
43 (3) Describes the good faith efforts made to produce a copy of the debt  
44 instrument.”).

1           5. When the loan documents executed by the parties did not include a  
2 negotiable instrument, the creditor seeking to foreclose may or may not possess  
3 an original writing or record (including a counterpart) that evidences the  
4 obligation. This section does not require an affidavit for a creditor who lacks  
5 possession of such an original record. Some states require “lost note affidavits”  
6 under these circumstances. E.g., Va. Code § 8.01-32 (“any past-due lost bond,  
7 note, contract, open account agreement, or other written evidence of debt”); Va.  
8 Code § 55-59.1(B) (“note or other evidence of indebtedness”).  
9

10           6. This section does not discuss the evidentiary effect of the affidavit in  
11 judicial proceedings. Some states have statutory law on point. For example, an  
12 Alabama statute provides that a lost note affidavit “must be received as  
13 presumptive evidence both of the contents and loss or destruction of such  
14 negotiable instrument, unless the defendant by answer, verified by affidavit,  
15 denies the execution of such bond, note or bill or the endorsement, acceptance, or  
16 the contents thereof, in which case proof of such execution, endorsement,  
17 acceptance, or contents must be made by the plaintiff.” Ala. Code § 6-5-284.  
18

19           7. Some statutes dealing with lost note affidavits appear to require an  
20 affidavit only if the creditor is unable to produce the original *or a copy* of the  
21 instrument.  
22

23           8. Subsection (b) follows UCC § 3-309(b), which requires adequate  
24 protection for the obligor from the risk that at some point in the future the  
25 instrument will surface and its possessor will assert the right to be paid. (UCC §  
26 3-309(b) was not affected by the 2002 amendments to Article 3.) Subsection (b)  
27 requires that the affidavit include a written indemnity, binding the creditor, to  
28 protect all obligors against the risk that a person other than the creditor will seek  
29 to enforce the instrument. This indemnity serves to reinforce the rights that the  
30 obligor already has under principles of restitution and unjust enrichment. See,  
31 e.g., Restatement (Third) of Restitution and Unjust Enrichment § 6 (2011):  
32 “*Payment of Money Not Due*. Payment by mistake gives the payor a claim in  
33 restitution against the recipient to the extent payment was not due.” In appropriate  
34 cases, a court may require a bond in addition to a written indemnity.  
35

#### 36           **SECTION 404. PUBLIC ADVERTISEMENT OF FORECLOSURE SALE.**

37           (a) Mortgaged property may be sold at a public sale only after a commercially reasonable  
38 public advertisement of the sale. Whether the method or timing of publication of the  
39 advertisement is commercially reasonable is a question of fact. The public advertisement is  
40 commercially reasonable:

41           (1) if published both in a newspaper having general circulation in the [county]

1 where the mortgaged property is located and on an Internet website that is reasonably expected  
2 to be viewed by persons having an interest in purchasing the mortgaged property;

3 (2) for a newspaper advertisement, if published once per week for three  
4 consecutive weeks before the sale, with the first publication not more than 30 days before the  
5 sale; and

6 (3) for an Internet website, if published at least 21 days before the sale and the  
7 Internet posting remains regularly available between the time of posting and the time of sale.

8 (b) A public advertisement under subsection (a) must indicate:

9 (1) the name of the homeowner and, if not the same, the name of the person that  
10 signed the mortgage agreement;

11 (2) the name of the person that will conduct the sale;

12 (3) the date, time, and place of the sale;

13 (4) the street address or, if there is no street address, other information identifying  
14 where the mortgaged property is located;

15 (5) any improvements and personal property that are included in the sale, if that  
16 information is readily discernable by the creditor;

17 (6) whether the mortgaged property is to be sold subject to senior indebtedness;

18 (7) the material terms of the sale, including payment terms required of the  
19 successful bidder at the completion of the auction;

20 (8) whether access to the mortgaged property for the purpose of inspection is  
21 available to prospective bidders before the sale; and

22 (9) a telephone number and electronic address from which a person may obtain  
23 additional information concerning the mortgaged property and the sale.

1 (c) The public advertisement under subsection (a) need not contain a legal description of  
2 the mortgaged property or recording information for the mortgage or other instruments of record.

3 (d) The public advertisement under subsection (a) or other information pertaining to the  
4 sale may be posted at the location of the mortgaged property.

5 (e) A creditor or servicer must send a copy of the public advertisement under subsection  
6 (a) to the homeowner and to each obligor. The notice of public advertisement may be sent with  
7 the notice of commencement of foreclosure or may be sent separately.

### 8 **Drafters' Notes**

9 1. This section allows a public sale of the mortgaged property only if the  
10 creditor first gives a commercially reasonable public advertisement. The purpose  
11 is to ensure that the public has a meaningful opportunity to learn of the proposed  
12 sale in order to appear and engage in competitive bidding. This section supersedes  
13 existing state laws covering advertisements for public sales for all foreclosures  
14 that are within the scope of this act.

15  
16 2. This section does not specify the person who is obligated to give the  
17 advertisement of sale. In many states, that person will be the creditor, but in other  
18 states, another person such as a trustee or sheriff performs that function. This act  
19 does not mandate a change in who is responsible for advertising the sale.

20 3. This act does not require the accomplishment of foreclosure by a public  
21 auction sale. If other state law allows alternative methods of foreclosure, such  
22 methods remain permissible. For example, Connecticut law allows strict  
23 foreclosure without a sale of the property.

24  
25 4. Subsection (b) states minimum requirements for the public  
26 advertisement. An advertisement that lacks any of the information set forth in  
27 subsection (b) is insufficient as a matter of law. An advertisement may contain  
28 additional information about the mortgaged property or the sale.

29  
30 5. Traditionally the law required the advertisement of foreclosure sales in  
31 local newspapers. Subsection (a) allows the creditor to continue that practice, but  
32 no longer specifies newspaper advertisement as required or sufficient in all cases.  
33 Whether a newspaper advertisement alone is sufficient depends upon whether it is  
34 commercially reasonable under the facts, which must be determined based upon  
35 the nature of the property, the newspaper, and other local circumstances.  
36 Similarly, whether it is commercially reasonable for a creditor *not* to publish a  
37 newspaper advertisement, relying instead on other outlets, depends upon the facts.

1 In many communities, newspaper advertisements are no longer an effective  
2 means of informing the public about upcoming foreclosure sales. Under these  
3 circumstances, a creditor's decision not to publish in a newspaper benefits both  
4 the creditor and the homeowner and any obligors by saving the expense.

5 Subsection (a) also creates three safe harbors regarding circumstances when  
6 an advertisement would be commercially reasonable. First, the method of  
7 publication is commercially reasonable if the creditor publishes the public  
8 advertisement both in a local newspaper and with an appropriate Internet website.  
9 The Internet site may be one operated by the newspaper or by any other person,  
10 whether or not located in the jurisdiction where the mortgaged property is located.  
11 The Internet site, however, must be one that has characteristics suggesting that  
12 interested members of the public are likely to find and to read the posting. There  
13 are two safe harbors with respect to timing for newspaper advertisements and  
14 Internet advertisements, which seek to ensure public access to the advertisement  
15 for approximately one month preceding the date of sale.  
16

17 6. Subsection (c) adopts a bright-line rule with respect to legal descriptions  
18 of the real property and recording information. The failure to include such  
19 information does not make the public advertisement insufficient. This  
20 information is seldom of importance to a person who reads a foreclosure  
21 advertisement for the purpose of deciding whether the person has potential  
22 interest. Anyone who develops a potential interest is highly likely to investigate  
23 further before appearing at the sale to bid. That investigation may include title  
24 information, which will disclose the legal description and recording references for  
25 the mortgage and other recorded instruments in the chain of title, and typically  
26 will include other information as well bearing on the property.  
27

28 7. Subsection (d) authorizes the creditor to post the public advertisement  
29 or a sign on the property, regardless of whether that right is reserved in the  
30 mortgage.  
31

32 **SECTION 405. NOTICE OF FORECLOSURE SALE.** A creditor shall give  
33 each homeowner and obligor written notice of the date, time, and place of a scheduled  
34 foreclosure sale. Notice of sale must be sent by first-class mail to the last-known  
35 addresses of each homeowner and obligor and be personally delivered to the property  
36 address. Notice of sale must be mailed or delivered at least 30 days before the sale date.

37 **Drafters' Note**

38 This section requires that the creditor notify the homeowner and any obligors of  
39 the date, time, and place of the foreclosure sale. The section requires a 30-day

1 notice of the originally scheduled sale. One notice must be mailed, and a second  
2 copy of the notice must be personally delivered to the residence.  
3

4 **SECTION 406. POSTPONEMENT OR CANCELLATION OF SALE.**

5 (a) A person conducting a foreclosure sale may postpone or cancel the sale for  
6 any reason. Announcement of a postponement must include the date, time, and place of  
7 the rescheduled sale. If oral announcement of the postponement is made at the date, time,  
8 and place advertised for the sale, a new public advertisement is not required under  
9 Section 404 unless the sale is postponed for longer than 30 days from the date originally  
10 advertised.

11 (b) If a foreclosure sale is postponed the creditor shall promptly give each  
12 homeowner and obligor commercially reasonable notice of the postponement. The notice  
13 must include the date, time, and place of the rescheduled sale.

14 (c) If a foreclosure sale is cancelled, the creditor promptly shall notify each  
15 homeowner and obligor by first-class mail in the manner provided in Section 405. The  
16 notice must include a telephone number and electronic mail address from which a person  
17 may obtain additional information concerning the creditor's plan with respect to the  
18 mortgaged property, including any new sale date.

19 **Drafters' Note**

20 Once a foreclosure sale is scheduled, the creditor may elect to postpone or cancel  
21 the sale for any reason the person considers appropriate. A postponement might  
22 also take place for other reasons, such as a judicial order or an automatic stay in  
23 bankruptcy. Homeowners and obligors should receive prompt notice of any  
24 postponement or cancellation. The rules of Section 405 do not apply to notices of  
25 postponement or cancellation. Subsection (b) covers notices of postponement and  
26 cancellation, requiring that the notice be commercially reasonable under the facts  
27 and circumstances. A postponement may be as short as one day. An oral  
28 announcement of the postponement, made at the time and place of the originally  
29 scheduled sale, would suffice if the homeowner and any obligor were present, in  
30 which event no written or additional notice would be necessary.

1 [ARTICLE] 5

2  
3 ACCELERATED DISPOSITIONS;

4 ASSOCIATION LIENS IN COMMON INTEREST COMMUNITIES

5  
6 SECTION 501. NEGOTIATED TRANSFER OF MORTGAGED PROPERTY IN

7 SATISFACTION OF OBLIGATION.

8 (a) A homeowner and creditor may negotiate a transfer of mortgaged property to the  
9 creditor in satisfaction of the homeowner's obligation to the creditor secured by the mortgaged  
10 property if:

11 (1) The homeowner and creditor agree to the transfer in a record after the  
12 homeowner's default;

13 (2) notice is sent to the persons entitled to notice under Section 502; and

14 (3) the person who sent the notice under Section 502 does not receive an objection  
15 to the proposed transfer from any person entitled to notice under Section 502 within 20 days after  
16 notice was sent to the person.

17 (b) If the homeowner or a person claiming under the homeowner is in possession of the  
18 mortgaged property, the agreement must specify the date and time when the homeowner is to  
19 surrender possession to the creditor. If there is any person entitled to notice under section 502,  
20 the homeowner is not obligated to surrender possession before the 20-day period described in  
21 subsection (a)(2) has elapsed.

22 **Drafters' Notes**

23  
24 1. This section authorizes a transfer from the homeowner to the creditor in  
25 satisfaction of the debt or other obligation. In so doing, it provides a framework  
26 for existing workout arrangements such as cash-for-keys agreements and deed-in-  
27 lieu of foreclosure transactions. This section and the following two sections  
28 provide for a safe harbor by specifying the effect of a transfer that meets the  
29 requirements of this section. This section is based in part on UCC § 9-620, which

1 provides for the acceptance of personal property mortgaged property by a secured  
2 party in full or partial satisfaction of a secured obligation. The important  
3 innovations here are, first, to provide an expedited procedure to discharge junior  
4 liens on the property without the need for a foreclosure sale; and second, to  
5 resolve a number of collateral issues that flow from the expedited procedure, as  
6 detailed in Section 504.

7  
8 2. This section does not specify a minimum consideration to be received  
9 by the homeowner in exchange for the homeowner's agreement to transfer the  
10 mortgaged property in satisfaction of the obligation. The sole exception is that if  
11 the homeowner is in possession and there are third parties entitled to notification  
12 of the proposed transfer, the agreement may not require the homeowner to vacate  
13 possession prior to the expiration of the period for notified persons to submit an  
14 objection.

15  
16 As a consequence, this section as now drafted confers a substantial benefit  
17 on mortgage creditors in the form of a new mechanism for converting every 'deed  
18 in lieu' transaction into an accelerated means of clearing title of junior  
19 encumbrancers without the need for a more traditional judicial foreclosure. In  
20 doing so, the section does not require any minimum benefit on homeowners, other  
21 than the general statement of effects of such an agreement contained in Section  
22 504 and the rights of possession noted in paragraph 2 above,

## 23 24 **SECTION 502. NOTICE OF NEGOTIATED TRANSFER.**

25 (a) If a negotiated transfer pursuant to Section 501 is proposed when a judicial-  
26 foreclosure proceeding is pending with respect to the mortgaged property, the court must send  
27 notice of the proposed negotiated transfer to all parties, except for the homeowner and the  
28 creditor that is foreclosing.

29 (b) If a negotiated transfer pursuant to Section 501 is proposed when a judicial  
30 foreclosure proceeding is not pending with respect to the mortgaged property, the creditor must  
31 send notice of the proposed transfer to:

32 (1) any person from which the creditor has received, before the homeowner and  
33 the creditor agreed to the proposed transfer, notice of a claim of an interest in the mortgaged  
34 property; and

35 (2) any person that, 10 days before the homeowner and creditor agreed to the



1 proposed transfer, held a perfected interest in the mortgaged property that is subordinate to the  
2 mortgage that is the subject of the proposed transfer.

### 3 **Drafters' Notes**

4  
5 1. This section is based on UCC § 9-621, which provides for a notification  
6 procedure for an acceptance of personal property by a secured party in full or  
7 partial satisfaction of a secured obligation.

8  
9 2. Subsection (a) provides for the court to notify parties to the foreclosure  
10 proceeding of an agreement proposed by the homeowner and creditor for a  
11 transfer in full satisfaction of the debt or other obligation. If there are no parties  
12 to the action, other than the homeowner and the creditor, then there is no one to  
13 notify. Holders of subordinate interests in the mortgaged property should have  
14 been joined as necessary parties to the foreclosure action.

15  
16 3. Subsection (b) provides for the creditor to notify persons who have  
17 subordinate interests in the mortgaged property of an agreement proposed by the  
18 homeowner and creditor for a transfer in full satisfaction of the obligation. Such  
19 subordinate interest holders may have their rights terminated by the negotiated  
20 transfer, and therefore they have the right to request protection pursuant to  
21 Section 503.

### 22 **SECTION 503. HEARING ON OBJECTION TO NEGOTIATED TRANSFER.**

23  
24  
25 (a) If a judicial-foreclosure proceeding is pending with respect to mortgaged property  
26 and the court receives an objection from a person holding an interest in the mortgaged property  
27 which would be affected by a negotiated transfer under Section 504, the court promptly shall  
28 schedule a hearing on the objection.

29 (b) If a hearing is held under subsection (a) and the proposed transferee demonstrates by  
30 appraisal or otherwise that there is no equity in the mortgaged property available to satisfy  
31 the interests of the objecting interest holder, the court shall overrule the objection.

32 (c) If a hearing is held under subsection (a) and the objecting party demonstrates by  
33 appraisal or otherwise that there is equity in the mortgaged property available to satisfy the  
34 interest of the objecting interest holder, the court shall set a date not later than [30] days after the

1 date of the hearing by which the objecting party may tender to the creditor that is a party to the  
2 proposed transfer a sum equal to the obligation owed to the creditor, including interest and court  
3 costs. If the objecting party tenders that sum to the creditor within the time set by the court, the  
4 objecting party is entitled to the benefit of the proposed negotiated transfer. Otherwise, the rights  
5 of the objecting party under this section are extinguished.

6 (d) If a creditor that sent a notice under Section 502(b) receives an objection from a  
7 person holding an interest in the mortgaged property which would be affected by the negotiated  
8 transfer, the negotiated transfer may not proceed unless the creditor initiates a judicial  
9 proceeding seeking a hearing on the objection. The hearing shall be conducted as provided by  
10 subsections (b) and (c).

#### 11 **SECTION 504. EFFECT OF NEGOTIATED TRANSFER.**

12 (a) A homeowner's transfer of mortgaged property pursuant to Section 501 to a creditor  
13 in satisfaction of an obligation to the creditor:

14 (1) discharges the obligation in full;

15 (2) transfers to the creditor all of the homeowner's rights in the mortgaged  
16 property except for any right of the homeowner to continue to occupy the mortgaged property  
17 pursuant to an agreement between the homeowner and the creditor which is incorporated into the  
18 negotiated transfer agreement;

19 (3) discharges the mortgage held by the creditor and any mortgage or other lien  
20 which is junior in priority to the mortgage held by the creditor; and

21 (4) terminates any other subordinate interest.

22 (b) A subordinate interest is discharged or terminated under subsection (a), even in the  
23 event of noncompliance with the requirements of this [act], but a creditor who fails to comply

1 with the requirements of this [act] is liable for damages in the amount of any loss caused by its  
2 failure to comply.

3 (c) If a homeowner and creditor have agreed that the homeowner has the right to continue  
4 to occupy the mortgaged property for a fixed time after a transfer, the agreement creates a license  
5 unless the parties have agreed in a record to enter into a landlord-tenant relationship.

6 (d) A transfer of the mortgaged property pursuant to Section 501 waives all rights of the  
7 creditor to obtain a personal judgment for the obligation, including attorneys' fees, costs, and  
8 other expenses, against the homeowner and any other person liable for the obligation secured by  
9 the property.

10 (e) A transfer of the mortgaged property pursuant to Section 501 waives all rights of the  
11 homeowner to redeem the property.

12 (f) Nothing in Sections 501 through 504 prevents a homeowner and creditor from  
13 entering into any other agreement, but the effects of a negotiated transfer described in this  
14 section do not apply to an agreement that fails to state that the agreement is made pursuant to  
15 Section 501.

16 (g) Nothing in this [article] affects the rights of a creditor holding an interest in the  
17 mortgaged property which has priority over the interests of a creditor that takes title to the  
18 mortgaged property under this section.

#### 19 **Drafters' Notes**

20  
21 1. This section is based in part on UCC § 9-622, which specifies the effect  
22 of acceptance of personal property by a secured party in full or partial satisfaction  
23 of a secured obligation.

24  
25 Subsection (a) specifies that the effect of a transfer of the mortgaged  
26 property is full satisfaction of the secured obligation. The transfer to which it  
27 refers is one that results from performance of the agreement made by the  
28 homeowner and the creditor. If a timely objection is received by the court or by

1 the creditor from a person entitled to notification, then neither this subsection nor  
2 subsection (b) applies. Paragraph (1) expresses the fundamental consequence of  
3 accepting the mortgaged property in full satisfaction of the secured obligation—  
4 the obligation is discharged.

5  
6 2. Paragraphs (2) through (4) indicate the effects of a transfer on various  
7 property rights and interests. Under paragraph (2), the creditor acquires “all of the  
8 homeowner’s rights in the mortgaged property.” Under paragraph (3), all junior  
9 encumbrances are discharged. Paragraph (4) provides for the termination of other  
10 subordinate interests. Under existing law, a deed-in-lieu of foreclosure accepted  
11 by a creditor does not terminate subordinate mortgages, subordinate liens, or other  
12 subordinate property rights. This Act changes that result by authorizing a transfer  
13 in full satisfaction of the obligation, which terminates junior interests.

14  
15 3. Subsection (c) specifies that the status of the homeowner who continues  
16 to occupy the property after entering into an agreement to transfer the property to  
17 the creditor in full satisfaction of the obligation is that of a licensee. The parties’  
18 agreement and other state law determine the rights and obligations of the parties  
19 as licensor and licensee.

20  
21 4. As drafted, the sentence authorizes homeowners and creditors to enter  
22 into any other type of agreement that they might desire, but no such agreement –  
23 presumably including a traditional ‘deed in lieu’ arrangement – would confer the  
24 benefits of Section 504 unless the agreement expressly provided that it was made  
25 pursuant to Section 501.

26  
27 The converse of the policy is reflected in this observation from Reporter  
28 Smith:

29 “I believe the better policy is to displace existing state laws on “deed in  
30 lieu” transactions within the scope of this act. Among other problems, if  
31 we keep both, there will be transactions in which the lender has not clearly  
32 documented whether the intent to proceed under this act or under other  
33 law.”

## 34 35 **SECTION 505. ABANDONED PROPERTY.**

36 (a) A governmental agency’s determination, finding, or order that mortgaged property is  
37 abandoned, or the presence of not less than [three] of the following conditions, establishes a  
38 presumption that the property is abandoned property:

39 (1) One or more doors to the property are boarded up, closed off, smashed  
40 through, broken off, unhinged, or continuously unlocked, or multiple windows are boarded up or

1 closed off; or multiple window panes are broken.

2 (2) Gas service, electric service, water service, or other utility service to the  
3 property has been terminated or utility consumption is extremely low so as to indicate that the  
4 property is not regularly occupied.

5 (3) Rubbish, trash, or debris has accumulated on the property.

6 (4) The property is deteriorating so as to constitute a serious threat to public  
7 health or safety.

8 (5) A creditor has changed the locks on the property and, for at least 30 days after  
9 the changing of the locks, the homeowner has not requested entrance to the property.

10 (6) One or more written statements signed by the homeowner indicate a clear  
11 intent to abandon the property.

12 (7) A law enforcement agency has received at least two reports of trespassers or  
13 of vandalism or other illegal acts being committed on the property.

14 (8) The homeowner has died and there is no evidence that a survivor or an heir of  
15 the homeowner is in actual possession of the property.

16 (b) In a judicial-foreclosure proceeding, the plaintiff or a governmental subdivision in  
17 which the mortgaged property is located may petition the court for a determination that the  
18 property is abandoned property. If the property is located in a common-interest community, the  
19 association that governs that community may intervene in the proceeding.

20 (c) In a judicial-foreclosure proceeding, after notice and hearing, the court may issue an  
21 order finding that the mortgaged property is abandoned property.

22 (d) In a non judicial-foreclosure proceeding, a creditor or a governmental subdivision in  
23 which the mortgaged property is located may seek a determination that the property is abandoned

1 property by submitting a request accompanied by an affidavit from the party seeking a  
2 determination to [government official]. In addition:

3 (1) The person seeking the determination must send a notice to each homeowner  
4 and other person entitled to notice under Section 201. The notice must include a copy of the  
5 request and the affidavit, describe the consequences that will follow from a determination of  
6 abandonment, and inform the recipient that the recipient may contact the [government official] to  
7 obtain further information or to object to the proposed determination of abandonment.

8 (2) After personal inspection of the property, which must include entry into any  
9 dwelling unit on the property, the [government official] may issue a determination in a record  
10 that the property is abandoned property. The [government official] shall send the determination  
11 to the creditor, the homeowner, and any other person entitled to notice under Section 201.

12 (3) The determination or the refusal of the [government official] to issue a  
13 determination is subject to de novo judicial review.

#### 14 **Drafters' Notes**

15  
16 1. This Act authorizes an expedited foreclosure procedure for abandoned  
17 properties for both judicial foreclosure and for nonjudicial foreclosures. An  
18 expedited procedure is appropriate for two reasons. First, the homeowner is no  
19 longer making a valuable economic use of the property to provide shelter for the  
20 homeowner or the homeowner's family or someone claiming under the  
21 homeowner, such as a tenant. A foreclosure sale will not result in a possessor  
22 being forced to relocate to other housing. Second, properties that are facing  
23 foreclosure and that are vacant have significant negative impacts on  
24 neighborhoods and the surrounding communities. Vacancies reduce the market  
25 values of neighboring properties. Neighborhood crime increases. The vacant  
26 properties tend to suffer from lack of repair and maintenance, creating public  
27 health risks, including infestations by vermin, mosquitoes, and other insects.  
28 There are fiscal impacts on local governments, who find property taxes on vacant  
29 properties often become delinquent; yet the governments are faced with added  
30 expenses to provide essential services to blighted neighborhoods, such as police  
31 and fire protection. By providing for an expedited foreclosure procedure, this Act  
32 seeks to return abandoned properties to the stock of occupied, well-maintained  
33 housing as soon as reasonably possible.

1           2. The conditions giving rise to prima facie evidence of abandonment set  
2 forth in Subsection (a) through (a) closely track the criteria set forth in Ind. Code  
3 § 32-30-10.6-5(a) (effective March 16, 2012). A government agency's issuance  
4 of a determination that the mortgaged property is abandoned by itself constitutes  
5 prima facie evidence of abandonment. The government's determination, finding,  
6 or order might not use the word "abandoned"; it might, for example, refer to the  
7 property as vacant. Of course, the homeowner or another person has the right to  
8 challenge the correctness of the governmental determination.  
9

10           With respect to the statutory conditions listed in Subsection (a)(1) through  
11 (a)(8), the presence of [three] or more of such conditions constitutes prima facie  
12 evidence, giving rise to a presumption of abandonment. Such conditions are not  
13 conclusive on the issue of abandonment. Many residential properties will exhibit  
14 at least one such condition, when the homeowner is still in possession of the  
15 property. If the homeowner or another person holding under the homeowner is in  
16 actual possession of the mortgage property, the property is not abandoned  
17 notwithstanding the existence of such conditions. Likewise, mortgaged property  
18 may be abandoned under this Section notwithstanding the absence of any of the  
19 statutory conditions.  
20

21           3. Mortgaged property often becomes vacant, both under standard  
22 mortgage and reverse mortgage transactions, when the homeowner dies. Under  
23 Subsection (a)(8) proof of death of the homeowner constitutes prima facie  
24 evidence that the mortgaged property is abandoned, provided that there is no  
25 evidence that an heir or other beneficiary of the homeowner's estate is in actual  
26 possession. Of course if there are multiple homeowners, this condition is met  
27 only if all the homeowners have died.  
28

29           4. In a nonjudicial foreclosure proceeding, the creditor may treat the  
30 mortgaged property as abandoned only by submitting evidence of abandonment to  
31 an independent third party. Subsection (c) provides for the submission of evidence  
32 to a person, who as part of the decision making process must personally visit the  
33 property and enter the dwelling unit. Normally jurisdictions enacting this Act will  
34 designate an employee of local government, such as a building inspector, who is  
35 responsible for evaluating the physical condition of dwelling units.  
36

37           Judicial review of the decision is available to any interested person.  
38 Subsection (c) does not specify the nature of that action, which in many  
39 jurisdictions will be a mandamus action.

## 40           **SECTION 506. FORECLOSURE OF ABANDONED PROPERTY.**

41           (a) In a judicial-foreclosure proceeding, if a court renders an order under Section 505(c)  
42 finding that mortgaged property is abandoned property and the court has previously rendered or

1 at the same time renders a judgment of foreclosure, the court shall order a public sale of the  
2 abandoned property not earlier than [30] days but not later than [60] days after entry of the order.

3 (b) In a non judicial-foreclosure proceeding, on the issuance of a determination under  
4 Section 505(d) that the mortgaged property is abandoned property, a creditor may conduct an  
5 expedited public sale of the property. The sale may take place not earlier than [30] days but not  
6 later than [60] days after the issuance of the determination, unless judicial review of the  
7 determination is commenced. The creditor shall comply with the notice requirements of Section  
8 405, except that [15]-days advance notice of the sale is sufficient.

9 (c) After a judicial order or a determination in a record finding that the mortgaged  
10 property is abandoned property under Section 505(c) or (d), the creditor shall take necessary and  
11 appropriate action to cause the foreclosure sale to be completed within a reasonable time unless  
12 the creditor releases its mortgage and files the release in the [land records]. Unless the creditor  
13 releases its mortgage, the creditor may not seek to end its obligation to maintain the property  
14 under Section 507 by dismissing, terminating, or suspending the foreclosure proceeding.

15 (d) The completion of a foreclosure sale pursuant to subsection (a) or (b) terminates the  
16 rights of the homeowner or any other person to redeem the property under other law of this state.

#### 17 **Drafters' Notes**

18  
19 1. This Section provides for an expedited public sale of the mortgaged  
20 property after a determination that the mortgaged property is abandoned. In a  
21 judicial foreclosure, the court must order the sale to take place no longer than \_\_\_\_  
22 days after the court enters its order finding the property to be abandoned, unless  
23 the creditor agrees to a later sale date. In a nonjudicial foreclosure, the creditor  
24 may select the date, provided it is no sooner than [\_\_\_\_] days after the written  
25 determination of abandonment.

26  
27 2. This Section does not authorize a disposition of abandoned property  
28 other than public sale, but other dispositions are available under other sections of  
29 this Act. For example, the homeowner and creditor may agree to a negotiated  
30 transfer to the creditor in lieu of foreclosure pursuant to Sections 501 to 504 [cash



1 for keys agreement].

2  
3 3. Once a creditor decides to take advantage of the expedited foreclosure  
4 procedure allowed by this Section, there is a public interest in ensuring that the  
5 property becomes occupied as soon as reasonably possible. For this reason  
6 subsection (c) does not allow the creditor to suspend indefinitely its efforts to  
7 consummate the foreclosure. There may be exceptional circumstances in which it  
8 is not feasible to hold the foreclosure sale within 60 days of the judicial order or  
9 written determination finding the property to be abandoned, as required by  
10 subsection (a) and (b). In that event, subsection (c) provides an outside limit of  
11 [four months] to complete the sale.

12  
13 Subsection (c) poses the substantial question of what consequences should  
14 flow from the failure of the creditor to comply with its requirements. On the one  
15 hand, it would clearly be inappropriate to impose an obligation on a creditor to  
16 repair the property subject to the mortgage before the creditor has taken  
17 possession or an official determination is made that the property is abandoned.  
18 Certainly, the lending community would object to a statutory duty to maintain  
19 property on which it holds a mortgage in those instances where the lender would  
20 prefer to release its mortgage and forego any interest in that property.

21  
22 On the other hand, the consequences of a creditor's failure to either  
23 commence and complete a foreclosure action or to release its mortgage, on other  
24 stakeholders in the abandoned property – including the fee owner, the  
25 municipality and neighbors in which the abandoned property is located, and  
26 where appropriate, a homeowners association - are very real. The act as drafted  
27 resolves these conflicting policies by offering the lender a choice of how it wishes  
28 to proceed.

29  
30 4. In states that afford the homeowner and other persons a statutory right  
31 of redemption after completion of a foreclosure sale, subsection (d) serves to  
32 terminate those redemption rights.

### 33 **SECTION 507. MAINTENANCE OF ABANDONED PROPERTY.**

34  
35 (a) In this Section, “maintain” means to:

36 (1) care for the yard and exterior of any building on the property, including  
37 removing excessive foliage growth that diminishes the value of surrounding properties;

38 (2) prevent trespassers or squatters from remaining on the property;

39 (3) prevent mosquito larvae from growing in standing water; and

40 (4) take any other actions needed to prevent conditions on the property that create

1 a public or private nuisance.

2 (b) In a judicial-foreclosure proceeding, a creditor shall maintain abandoned property  
3 beginning when an order finding that the mortgaged property is abandoned property pursuant to  
4 Section 505(c) is rendered.

5 (c) In a nonjudicial-foreclosure proceeding, a creditor shall maintain abandoned property  
6 beginning when a determination in a record that the mortgaged property is abandoned property  
7 pursuant to Section 505(c) is issued.

8 (d) In the absence of a judicial order under subsection (b) or a determination under  
9 subsection (c), a creditor that has commenced foreclosure proceedings shall maintain the  
10 mortgaged property beginning when a governmental entity issues a citation finding the  
11 mortgaged property is abandoned property in a condition that poses a threat to public safety or  
12 health.

13 (e) The creditor's obligation to maintain abandoned property continues until the the  
14 property is conveyed through foreclosure to a purchaser other than the creditor or until the  
15 creditor records a release of its mortgage.

16 (f) A creditor that has the obligation to maintain abandoned property may enter the  
17 property peacefully and cause others to enter the property peacefully for the limited purpose of  
18 inspection, repair, and maintenance as required by this section. All reasonable expenses incurred  
19 by a creditor pursuant to this section are the obligation of the homeowner and are secured by the  
20 mortgage.

21 (g) A person that enters abandoned property for a purposes described in subsection (f) is  
22 not liable to the homeowner for trespass or for damage to the property.

23 (h) The following persons have the right to enforce the obligations created by this section

1 in an action:

2 (1) a governmental subdivision that has jurisdiction of the mortgaged property;

3 and

4 (2) a homeowners association, condominium association, or cooperative  
5 association, if the property is subject to the rules of the association.

6 (i) The obligation of a creditor to maintain abandoned property is limited to that stated in  
7 this section. If a creditor becomes the owner of the property, the creditor's obligations with  
8 respect to the property are determined by law of this state other than this [act]. A creditor does  
9 not become a mortgagee in possession of the property by virtue of the creditor's performance of  
10 the obligations stated in this section.

#### 11 **Drafters' Notes**

12  
13 1. This Section requires creditors to maintain abandoned properties under  
14 certain circumstances. The obligation may arise based upon action of the creditor  
15 or action of the municipality or other governmental entity where the property is  
16 located. The creditor does not become obligated to maintain merely by  
17 commencing foreclosure proceedings at a time when the dwelling unit is vacant.  
18 Rather, the obligation arises when the creditor seeks to use the expedited  
19 foreclosure procedure authorized by Section 505 and obtains either a judicial  
20 order or official determination that the property is abandoned. Under subsection  
21 (c) the obligation may also arise any time after the creditor has commenced  
22 foreclosure proceedings if the municipality or other local governmental entity  
23 cites the property as both abandoned and presenting a threat to public safety or  
24 health.

25  
26 2. Subsection (e) defines the scope of the creditor's obligation to maintain  
27 abandoned property. The focus is on the outward appearance of the property,  
28 including yards and other exterior spaces, and other conditions that are likely to  
29 have significant impacts on the neighborhood, such as interior spaces frequented  
30 by squatters or persons engaged in criminal activities. This subsection is modeled  
31 closely on Cal. Civ. § 2929.3(b), enacted in 2008.

32  
33 3. Subsection (f) grants a license to the creditor and to its agents or  
34 contractors to enter abandoned property for the purpose of inspection, repair, and  
35 maintenance, regardless of whether that right is reserved in the mortgage.  
36 Similarly, this subsection authorizes the addition of the creditor's reasonable

1 maintenance expenses under this section to the debt secured by the mortgage,  
2 regardless of whether the mortgage contains a provision to that effect.

3 4. Subsection (h) provides for enforcement by the local government that  
4 has jurisdiction over the abandoned property. When the property is located in a  
5 common-interest community, it also provides standing for the association as a  
6 means to protect neighboring property owners whose interests are likely to be  
7 harmed by the creditor's failure to maintain the property. In conferring standing  
8 both to the local government and to owners' associations, this subsection follows  
9 the approach taken by N.Y. Real Prop. Acts. § 1307(3), enacted in 2009. This  
10 subsection does not grant a direct enforcement right to neighbors. If negatively  
11 impacted, such persons may have a remedy under other laws, such as public or  
12 private nuisance.

13  
14 5. At common law a creditor who takes possession of mortgaged property  
15 prior to the completion of foreclosure becomes a "mortgagee in possession," who  
16 by virtue thereof undertakes a number of obligations to the homeowner with  
17 respect to maintenance and care of the property. Subsection (i) expressly  
18 provides that a creditor who enters the property for the purpose of complying with  
19 its obligations under this Section does not assume the liabilities of a mortgagee in  
20 possession.

## 21 22 **SECTION 508. LIEN FOR SUMS DUE ASSOCIATION; ENFORCEMENT.**

### 23 **Drafter's Notes**

24  
25 Other than necessary style matters, this section incorporates all the  
26 relevant language of Sec. 3-116 of the Uniform Common Interest Ownership Act,  
27 with two exceptions:

28  
29 First, subsection (c) limits the association's legal fees in an uncontested  
30 matter to a sum equal to 3 months of the association's common charges;

31  
32 Second, subsection (d) provides that if a mortgage foreclosure is not  
33 completed in 12 months, then, in addition to the existing 6 month priority granted  
34 to associations, the association would thereafter begin to add a month's priority  
35 for every additional month, beginning in month 13.

36  
37 (a) A homeowner's association has a statutory lien on a dwelling unit for any assessment  
38 attributable to that unit based on the periodic budget adopted by the association pursuant to the  
39 documents creating the association and the law of this state authorizing creation of the common  
40 interest community in which the dwelling unit is located-and fines imposed against its unit  
41 owner. Unless the declaration otherwise provides, reasonable attorneys' fees and costs, other

1 fees, charges, late charges, fines and interest charged pursuant to other law and any other sums  
2 due to the association under the declaration or as a result of an administrative, arbitration,  
3 mediation or judicial decision, are enforceable in the same manner as unpaid assessments under  
4 this section. If an assessment described in this section is payable in installments, the lien is for  
5 the full amount of the assessment from the time the first installment thereof becomes due.

6 (b) A lien under this section is prior to all other liens and encumbrances on a dwelling  
7 unit in a common-interest community except (1) liens and encumbrances recorded before the  
8 recordation of the declaration, (2) a first mortgage on the dwelling unit recorded before the date  
9 on which the assessment or other charge sought to be enforced became delinquent, and (3) liens  
10 for real estate taxes and other governmental assessments or charges against the dwelling unit.

11 (c) A lien under this section is also prior to first mortgages described in subdivision (2) of  
12 subsection (b) to the extent of (1) the “priority amount,” that is, an amount equal to the common  
13 expense assessments based on the periodic budget adopted by the association pursuant the  
14 declaration and the statutes of this state authorizing creation of the common interest community  
15 in which the unit is located which would have become due in the absence of acceleration during  
16 the six months immediately preceding institution of an action to enforce either the association's  
17 lien or a mortgage described in subdivision (2) of subsection (b); and (2) the association's costs  
18 and attorney's fees in enforcing its lien. However, if (i) an action to enforce the association's lien  
19 is uncontested or (ii) no defense to the association's priority is raised in a creditor's action to  
20 foreclose a first mortgage on a dwelling unit, the amount of the association's attorney's fee for  
21 which this subsection grants a priority over a first mortgage may not exceed a sum equal to  
22 [three] months of the common expense assessment due from that dwelling unit based on the  
23 periodic budget adopted by the association.

1 (d) In addition to the priority amount over a first mortgage as described in subsection (c),  
2 if a creditor commences a civil action to foreclose a first mortgage described in subsection (b)(2)  
3 against a dwelling unit in a common interest community and if [twelve] months passes after the  
4 date the action is commenced without judgment having entered in that action and title to the  
5 dwelling unit having passed pursuant to that judgment, the amount of the association's lien  
6 which has priority over the first mortgage shall thereafter automatically increase by an additional  
7 month of common expense assessment based on the periodic budget adopted by the association  
8 on that dwelling unit for each additional month or part thereof that subsequently passes until  
9 judgment enters and title passes to the creditor or the purchaser of that dwelling unit.

10 (e) This section does not affect the priority of mechanics' or materialmen's liens or the  
11 priority of liens for other assessments made by the association. A lien under this section is not  
12 subject to [insert appropriate reference to state homestead, dower and curtesy, or other  
13 exceptions].

14 (f) Unless the declaration otherwise provides, if two or more associations have liens for  
15 assessments created at any time on the same property under this section, those liens have equal  
16 priority.

17 (g) Recording of the declaration constitutes record notice and perfection of the lien. No  
18 further recordation of any claim of lien for assessment under this section is required.

19 (h) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien  
20 are instituted within three years after the full amount of the assessments becomes due.

21 (i) This section does not prohibit actions against unit owners to recover sums for which  
22 subsection (a) of this section creates a lien or prohibit an association from taking a deed in lieu of  
23 foreclosure.

(j) Unless the declaration provides for a lesser interest rate, a statutory lien under this section shall accrue interest at the rate of one percent per month.

## **[ARTICLE] 6**

### **REMEDIES**

#### **SECTION 601. EFFECT OF VIOLATION.**

(a) In a judicial foreclosure proceeding, if a creditor or servicer is shown to have committed a material violation of this [act], the court shall dismiss the action or stay the action on appropriate terms and conditions until the violation is cured. Dismissal must be without prejudice unless the court determines that a new foreclosure action would unfairly burden the homeowner due to a creditor's repeated violations or other aggravating circumstances.

(b) In a non judicial-foreclosure proceeding, if a creditor or servicer is shown to have committed a material violation of this Act, the homeowner or obligor may initiate an action to enjoin or restrain the foreclosure. The court may allow foreclosure to continue after the violation is cured, unless the court determines that the continuation of foreclosure would unfairly burden the homeowner due to a creditor's repeated violations or other aggravating circumstances.

(c) If a material violation of this [act] is established pursuant to subsection (a) or (b), the creditor may not add to the amount of the obligation attorney's fees and costs incurred before it cures the violation.

(d) A homeowner or obligor injured by a violation of this [act] may bring an action in [court] for actual damages sustained by the homeowner or obligor against a person that caused the violation.

(e) In addition to damages recoverable under subsection (d), a homeowner or obligor may recover \$[200] in each case from the person violating this [act].

(f) In addition to the damages recoverable under subsections (d) and (e), a homeowner or obligor may recover additional damages as the court may allow, but not exceeding \$[15,000] per obligor and homeowner. In determining the amount of liability under this subsection, the court shall consider, among other relevant factors:

(1) the frequency and persistence of noncompliance by the creditor, servicer, or agent;

(2) the nature of the noncompliance, and

(3) the extent to which the noncompliance was intentional.

(g) An action brought under this section must be commenced not later than one year after the violation on which it is based. In mitigation of damages established by the obligor or homeowner, the creditor, servicer or its agent may show that:

(1) the violation was due to a mistake, other than a mistake of law, that occurred notwithstanding reasonable procedures established to preclude such mistakes, or

(2) before the action was brought the violation was discovered by the creditor, servicer, or its agent, and cured.

[(h) No class action shall be permitted pursuant to sub-sections (e) and (f) of this section].

#### **Drafters' Notes**

1. Actual damages may include damages for emotional distress.

2. Prior to confirmation of the foreclosure sale, the homeowner may raise a material violation of the statute, for example a materially inaccurate notice of the amounts needed to cure a default, to prevent the foreclosure sale (or confirmation), until the violation has been corrected and remedied. After a foreclosure sale the homeowner's remedy for violations of the statute is to seek damages from the foreclosing creditor, and a bona fide sale purchaser is entitled to rely on the conclusive effect under Section 407. If a violation by the creditor can be cured timely so that full compliance is achieved, the foreclosure may proceed.



**SECTION 602. DEFENSE OR REMEDY UNDER OTHER LAW.** Nothing in this [act] displaces any defense or remedy a homeowner or obligor may have under law other than this [act].

**Drafter's Note**

This act preserves rights and defenses available to homeowners and obligors under other state statutes, regulations, common law, and federal law. In many states, such rights and defenses include payment or tender of payment; discharge; contract law defenses, including forgery, lack of capacity, duress, absence or failure of consideration, fraud, misrepresentation, unconscionability, failure of a condition precedent; equitable defenses such as estoppel, laches, or unclean hands; release by cancellation of debt; a violation by a creditor, servicer, their predecessors in interest, or their agents of unfair and deceptive trade practices statutes and other consumer protection statutes; a defect in a mortgage resulting from a failure to comply with statutory requirements for the execution of mortgages; a determination that the creditor or its predecessor in interest was not licensed under state mortgagee licensing statutes or was not legally authorized to make the loan under federal law; and breach of the duty of good faith and fair dealing.

**SECTION 603. PROCEDURE FOR ASSERTING DEFENSE IN NONJUDICIAL FORECLOSURE.**

(a) A homeowner or obligor may bring an action against a creditor or its agents asserting a defense to a nonjudicial foreclosure.

(b) In an action under this section, if the court determines that a defense to the nonjudicial foreclosure exists, the court may render an order that is just and equitable under the circumstances.

**SECTION 604. ATTORNEY'S FEES AND COSTS.** In an action in which a party seeks a remedy under Section 601 based on a violation of this [act], or asserts a defense or remedy under Section 602 or a defense under Section 603, the court shall award the costs of the action and reasonable attorney's fees to the prevailing party.

**SECTION 605. ENFORCEMENT BY [ATTORNEY GENERAL].** In addition to

1 enforcing any remedies available under other law, the [attorney general or other state official or  
2 agency] may bring an action to enjoin a pattern of violating this [act]. In such an action the court  
3 may issue an injunction or order, which may include requiring steps to be taken to remedy  
4 violations or the payment of damages to aggrieved homeowners. In such an action, the court may  
5 assess a civil penalty of not less than \$[\_\_\_\_\_] nor more than \$[\_\_\_\_\_]. The injunction or order  
6 may bind a creditor, servicer, their agents, or any other person violating this [act].

7 **SECTION 606. EFFECT OF THE HOLDER IN DUE COURSE RULE IN**  
8 **FORECLOSURES.**

9 **Chairman's Note**

10  
11 The Drafting Committee for the Home Foreclosure Procedures Act has  
12 discussed but has not taken a position on the proper role, if any, of the Holder in  
13 Due Course rule, as articulated in Article 3 of the Uniform Commercial Code,  
14 with respect to residential real estate loans.

15  
16 The April 5, 2013 draft of this act set out three basic positions on what the  
17 Drafting Committee might do with the rule and the related waiver of defenses  
18 concept (together, the "Doctrine") in the Act; that is:

- 19  
20 ▶ abolish the Doctrine as it applies to residential loans;  
21 ▶ keep it unchanged; or  
22 ▶ propose some undefined middle position  
23

24 The Drafting Committee discussed but did not take a position on these  
25 alternatives. In order to further the discussion, the Chair of the committee then  
26 appointed a subcommittee composed of Commissioners Walters, Miller and  
27 Lisman; their charge was to study the matter further and present a report for the  
28 annual meeting to consider.

29  
30 The sub-committee's Report appears in the separate policy paper which  
31 the Reporters, Committee Chair and the Advisor from the American Bar  
32 Association have prepared and which is being separately distributed.

33  
34 To assist the Commissioners with respect to the issues surrounding the  
35 Holder In Due Course doctrine, Professor James Charles Smith, one of the  
36 Drafting Committee's co-Reporters, has prepared a memorandum summarizing  
37 several aspects of the doctrine; it is attached to the sub-committee's Report in the  
38 Policy paper.

1 In addition, those seeking additional information concerning this subject  
2 and the policy positions surrounding it will find a range of thoughtful comments  
3 provided by various stakeholders – consumer representatives, regulators,  
4 academic writers and the securitization industry – on the ULC website for the  
5 Drafting Committee.  
6

## 7 **[ARTICLE] 7**

### 8 **MISCELLANEOUS PROVISIONS**

#### 9 **SECTION 701. PRE-EFFECTIVE DATE TRANSACTIONS.**

10 (a) Except as otherwise provided in this Section, this [a Act] applies to the foreclosure of  
11 a mortgage within its scope, even if the mortgage was created before this [act] takes effect.

12 (b) This [act] does not affect a foreclosure commenced before this [act] takes effect.

#### 13 **Drafters' Note**

14  
15 This Act applies to the foreclosure of mortgages created before the effective date  
16 of this Act, unless the creditor has taken action to foreclose before the effective  
17 date.  
18

#### 19 **SECTION 702. REPEALER.**

20 (a) The following acts and parts of acts are hereby repealed:

21 [List statutes and parts of statutes to be repealed.]

22 (b) In addition to the statutes specifically repealed under subsection (a), all other acts and  
23 parts of acts inconsistent with this Act are hereby repealed.

#### 24 **Drafters' Notes**

25  
26 1. Subsection (a) of this section should be separately prepared for each  
27 state. In each state it is necessary to pay careful attention to how this Act is to be  
28 blended with existing state law. The statutes to be specifically repealed will  
29 include statutes relating to notices of default, intent to accelerate, and the right to  
30 cure to be sent to homeowners; notices and standards for mediation and other  
31 types of facilitation; determination of who has the right to commence foreclosure;  
32 and advertisement and notices of foreclosure sales; confirmation of sales. Given  
33 the scope of this Act, which is limited to residential foreclosures, care should be  
34 taken not to repeal statutes to the extent they should continue to apply to non-  
35 residential foreclosures. In some instances, instead of repeal it may be useful to

1 amend other state statutes to limit their scope to foreclosures that are not within  
2 the scope of this Act.

3  
4 2. At the same time, this Act was drafted with the expectation that existing  
5 state foreclosure procedures would remain in place. This Act is not intended to  
6 displace all existing foreclosure laws in each state, but rather to be an overlay on  
7 existing law. For example, and most fundamentally, the Act does not anticipate  
8 or provide that a state employ a judicial foreclosure process when the customary  
9 practice is to foreclose under a power of sale procedure, nor does the Act  
10 contemplate that a state should enact a non-judicial foreclosure process in the  
11 absence of existing state laws. It is for that reason that the legislative drafters in  
12 each state should carefully consider how best to integrate the provisions of the  
13 Act with existing state laws governing the foreclosure process.

14  
15 3. In addition to the listed specific sections repealed by this Act,  
16 subsection (b) provides for the repeal of all other legislation in this state which is  
17 inconsistent with this Act. This provision is necessary to resolve those matters  
18 that may ultimately be presented to a court in construing the Act in cases where  
19 the specific repealer in subsection (a) fails to note an existing state statute which  
20 the court concludes is inconsistent with a provision of this Act.

21  
22 **SECTION 703. UNIFORMITY OF APPLICATION AND CONSTRUCTION.**

23 In applying and construing this uniform act, consideration must be given to the need to  
24 promote uniformity of the law with respect to its subject matter among states that enact it.

25 **SECTION 704. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**  
26 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the  
27 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but  
28 does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or  
29 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15  
30 U.S.C. Section 7003(b).

31 **SECTION 705. EFFECTIVE DATE.** This Act takes effect on [insert date].