

DRAFT
FOR DISCUSSION ONLY

HOME FORECLOSURE PROCEDURES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

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WITH DRAFTERS' NOTES

HOME FORECLOSURE PROCEDURES ACT

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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June 5, 2014

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HOME FORECLOSURE PROCEDURES

TABLE OF CONTENTS

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE.	1
SECTION 102. DEFINITIONS.	1
SECTION 103. SCOPE.	7
SECTION 104. DUTY OF GOOD FAITH; COMMERCIAL REASONABLENESS.	7
SECTION 105. CERTAIN ACTS PROHIBITED.	8
SECTION 106. APPLICATION OF LOCAL REGULATIONS.	8
SECTION 107. SERVICERS.	9
SECTION 108. NO WAIVER.	9
SECTION 109. NOTICES AND KNOWLEDGE.	9
SECTION 110. SUPPLEMENTAL PRINCIPLES OF LAW.	10

[ARTICLE] 2

NOTICES; RIGHT TO CURE

SECTION 201. NOTICE OF DEFAULT AND RIGHT TO CURE.	11
SECTION 202. MANNER OF NOTICE DELIVERY.	13
SECTION 203. RIGHT TO CURE DEFAULT.	14
SECTION 204. UNKNOWN.	15

[ARTICLE] 3

EARLY RESOLUTION

SECTION 301. EARLY RESOLUTION PROGRAM ESTABLISHED.	16
SECTION 302. NOTICE OF EARLY RESOLUTION.	17
SECTION 303. ELIGIBILITY; PARTICIPATION IN EARLY RESOLUTION.	19
SECTION 304. FORECLOSURE ACTIONS DURING EARLY RESOLUTION.	22
APPENDIX TO ARTICLE 3 - MODEL EARLY RESOLUTION PROGRAM RULES	24

[ARTICLE] 4

RIGHT TO FORECLOSE; SALE PROCEDURES

SECTION 401. RIGHT TO FORECLOSE.	28
SECTION 402. ASSIGNMENT OF MORTGAGE UNNECESSARY.	31
SECTION 403. LOST, DESTROYED, OR STOLEN NEGOTIABLE INSTRUMENT; AFFIDAVIT.	32
SECTION 404. PUBLIC ADVERTISEMENT OF FORECLOSURE SALE.	36

SECTION 405. NOTICE OF FORECLOSURE SALE.	39
SECTION 406. POSTPONEMENT OR CANCELLATION OF SALE.....	39
[SECTION 407. CONFIRMATION OF FORECLOSURE SALE.	40

[ARTICLE] 5

ACCELERATED DISPOSITIONS

SECTION 501. NEGOTIATED TRANSFER OF MORTGAGED PROPERTY IN SATISFACTION OF OBLIGATION.	42
SECTION 502. NOTICE OF NEGOTIATED TRANSFER.....	44
SECTION 503. HEARING ON OBJECTION TO NEGOTIATED TRANSFER.....	45
SECTION 504. EFFECT OF NEGOTIATED TRANSFER.	46
SECTION 505. ABANDONED PROPERTY.....	49
SECTION 506. DETERMINATION OF ABANDONMENT IN JUDICIAL FORECLOSURE.	51
SECTION 507. DETERMINATION OF ABANDONMENT IN NONJUDICIAL FORECLOSURE.	52
SECTION 508. WITHDRAWAL OF ABANDONED PROPERTY PROCEEDING.	55
SECTION 509. FORECLOSURE OF ABANDONED PROPERTY.	55
SECTION 510. MAINTENANCE OF ABANDONED PROPERTY.	57

[ARTICLE] 6

REMEDIES

SECTION 601. EFFECT OF VIOLATION.	60
SECTION 602. DEFENSE OR REMEDY UNDER OTHER LAW.	63
SECTION 603. PROCEDURE FOR ASSERTING DEFENSE IN NONJUDICIAL FORECLOSURE.	63
SECTION 604. ATTORNEY’S FEES AND COSTS.	64
SECTION 605. ENFORCEMENT BY [ATTORNEY GENERAL].....	64
SECTION 606. EFFECT OF THE HOLDER IN DUE COURSE RULE.	64

[ARTICLE] 7

MISCELLANEOUS PROVISIONS

SECTION 701. PRE-EFFECTIVE DATE TRANSACTIONS.....	68
SECTION 702. REPEALER.	68
SECTION 703. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	69
SECTION 704. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.....	69
SECTION 705. EFFECTIVE DATE.....	69

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 with
11 reasonable diligence to completion;

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

14 (C) physically secured and the subject of a probate action, action to quiet title, or
15 other litigation in which ownership is contested.

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 commences a foreclosure or has the right to foreclose
23 a mortgage under Section 401(b). [The term does not include a person that does not own, hold or

1 service more than five mortgages at the time the notice required by Section 201 is sent.]

2 **Note – an alternative to making a broad exception from the entire act for**
3 **lenders owning 5 or less mortgages would be to exempt these lenders from**
4 **the obligation to participate in the ‘early resolution’ process of Article 3.**
5

6 (4) “Early resolution” means the assistance of a third-party neutral at an in-person
7 meeting or other communication where the parties and third- party neutral can simultaneously
8 hear one another with the objective of reaching an agreement between the creditor and obligor
9 for a commercially reasonable alternative to foreclosure.

10 (5) “Early resolution agency” means [the administrative or judicial agency designated by
11 the state to supervise early resolution of foreclosure].

12 (6) “Expenses of foreclosure” means the lesser of:

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

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

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

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

23 (9) “Homeowner” means a person that owns an interest in mortgaged property, other than
24 a mortgage, lien, easement, servitude, or leasehold, whether or not the person is an obligor.

25 (10) “Knowledge” means actual knowledge. “Knows” has a corresponding meaning.

1 (11) “Loss mitigation” means an alternative to foreclosure offered by a creditor to a
2 homeowner in default or facing imminent default.

3 (12) “Mortgage” means a consensual interest in residential property which secures an
4 obligation. The term does not include a lien that secures an obligation owed to a homeowners’
5 association in a common-interest community.

6 (13) “Mortgage agreement” means a record that creates a mortgage.

7 (14) “Mortgage registry” means an electronic registry of owners or holders of mortgages
8 and obligations, created pursuant to federal or state law, which maintains the records of those
9 mortgages and obligations pursuant to standards designed to ensure that the record of each
10 mortgage and obligation is unique, identifiable, and unalterable.

11 (15) “Mortgaged property” means residential property that is subject to a mortgage, and
12 any personal property held or used in connection with the residential property that is subject to
13 the mortgage.

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

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

18 (18) “Obligation” means a debt or other duty or liability of an obligor secured by a
19 mortgage.

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

21 (A) owes payment or performance of the obligation;

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

1 (C) has signed a mortgage agreement with respect to the mortgaged property; or

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

3 (20) "Person" means an individual, estate, business or nonprofit entity, public
4 corporation, government or governmental subdivision, agency or instrumentality, or other legal
5 entity.

6 (21) "Public sale" means a sale by auction authorized by law of this State other than this
7 [act].

8 (22) "Record", used as a noun, means information that is inscribed on a tangible medium
9 or is stored in an electronic or other medium and is retrievable in perceivable form.

10 (23) "Residential property" means real property improved with not more than four
11 dwelling units. The term includes an attached single-family unit, a single-family manufactured-
12 housing unit treated as real property under law of this state, a time share in residential property if
13 that time share is treated as real property under law of this state, real property on which
14 construction of not more than four dwelling units has commenced, and a single-family unit in a
15 common-interest community. The term does not include real property that was used or was
16 intended to be used primarily for non-residential purposes such as farming, commercial, or
17 industrial use when a mortgage was created.

18 (24) "Servicer" means a person responsible for servicing an obligation, including a
19 person that holds or owns an obligation or originates a mortgage loan if that person also services
20 the obligation.

21 (25) "Servicing" means:

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

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

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

6 (D) evaluating an obligor for loss mitigation or communicating to an obligor with
7 respect to loss mitigation.

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

11 **Legislative Note:** *In states that allow one or more types of nonjudicial foreclosure of residential*
12 *mortgages, a reference to the relevant statute or statutes should be added to the definition of*
13 *“nonjudicial foreclosure.” In states that do not allow nonjudicial foreclosure, this definition*
14 *should be deleted, along with references to “nonjudicial foreclosure” elsewhere in this Act.*
15

Drafters’ Notes

16 1. The definition of “abandoned property” works in tandem with the
17 factors listed in Section 505(a). Whether mortgaged property is “abandoned
18 property” is determined by the facts of each case. The Section 505(a) factors are
19 not exclusive; they serve an evidentiary purpose. The core question is whether the
20 homeowner is presently in possession of the property. The question must be
21 answered by evaluating the facts related to the homeowner’s use of the property.
22

23 2. The definition of “early resolution” requires at least one “in-person”
24 meeting or other communication between the parties and a third-party neutral.
25 The alternative requirements of either an “in-person” meeting or other form of
26 electronic communication contemplates the continuation of the practice in many
27 jurisdictions that, as an alternative to a “face-to-face” meeting, the parties may
28 meet by telephone, video conference or other electronic means so long as all the
29 parties and the neutral are able to simultaneously hear or communicate with one
30 another.
31

32 3. The definition of “expenses of foreclosure” limits the expenses that a
33 foreclosing party may impose on a borrower in connection with the foreclosure
34 process to ‘reasonable’ expenses, even if other law of the state would allow

1 expenses which would otherwise not satisfy that standard. The definition
2 contemplates that these allowable expenses would include the reasonable costs of
3 all typical foreclosure expenses, including such costs as sending notices,
4 advertising, title searches, inspections and examinations of the mortgaged
5 property, management and securing of the mortgaged property, insurance, filing
6 and recording fees, attorney's fees and litigation expenses incurred to the extent
7 provided in the mortgage or authorized by other law, appraisal fees, the fee of the
8 person conducting the sale in the case of a foreclosure by auction, the fee of a
9 court-appointed receiver, and other expenses reasonably necessary to the
10 foreclosure.

11
12 4. The definition of "holder" is taken from revised Article 1: UCC § 1-
13 201(b)(21)(A) and the terms "bearer" and "identified person" have the same
14 meanings in this act as in the UCC. The definition of "holder" in unrevised
15 Article 1 has slightly different language, but is the same in substance.

16
17 5. "loss mitigation" includes such actions as a repayment plan, forbearance
18 agreement, loan modification, short sale, partial mortgage insurance claim,
19 negotiated transfer and deed in lieu of foreclosure.

20
21 6. The term "mortgage" refers to the lien held by the creditor, which
22 secures payment of the obligation, whereas the term "mortgage agreement" refers
23 to the writing or other record that memorializes the parties' agreement and creates
24 the mortgage. Depending upon local usage and custom, the mortgage agreement
25 may be denominated as a mortgage, deed of trust, trustee deed, security deed,
26 deed to secure debt, or the like.

27
28 In some states, a land sale installment contract does not constitute a
29 'mortgage', with all the attendant consequences for homeowners and creditors,
30 until a specified percentage of the original principal amount has been paid to the
31 creditor. In Illinois, for example, that percentage is 50% of the original principal
32 amount. In those States where the issue arises, statutory drafters should make
33 appropriate amendments to this act to track existing practice in that state.

34
35 7. The definitions of "mortgage" and "obligor" refer to the payment of an
36 obligation, and do not use the phrasing found in UCC Article 9 definitions that
37 includes "payment or other performance" of obligations. Almost always the basis
38 for a residential mortgage foreclosure is the failure to pay a monetary obligation.

39
40 8. The definition of an obligation includes a non-recourse debt, whether
41 the debt is non-recourse due to the application of anti-deficiency judgment
42 legislation, agreement of the parties or for other reasons.

43
44 9. Real property is "residential property" if its primary use is residential. It
45 includes but is not limited to owner-occupied principal residences and second or
46 vacation homes. The definition excludes parcels of real property that are used

1 primarily for non-residential business purposes but which also contain one-to-four
2 dwelling units, such as a farm with a farmhouse or a manufacturing facility that
3 includes a residence for the company’s chief executive officer. Likewise, the term
4 “residential mortgage” does not include a blanket mortgage that covers multiple
5 parcels containing more than four dwelling units in the aggregate.
6

7 10. The definitions of ‘servicer’ and ‘servicing’ are based in part on the
8 Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq*
9 (“RESPA”), 24 C.F.R. § 3500.2 (b).
10

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

13 **SECTION 104. DUTY OF GOOD FAITH; COMMERCIAL REASONABLENESS.**

14 (a) A creditor, servicer, obligor, or homeowner shall comply in good faith with the
15 requirements of this [act] and shall act in good faith throughout the foreclosure process. “Good
16 faith” means honesty in fact and the observance of reasonable commercial standards of fair
17 dealing. [This subsection does not create an independent cause of action for the failure of a
18 person to act in good faith.]

19 (b) A creditor or servicer shall proceed in a commercially reasonable manner in
20 complying with the requirements of this Act.

21 **Drafters’ Notes**
22

23 1. For statutory duties that include explicit and precise rules for their
24 performance, such as the time period for sending notices under §§201 and 402, a
25 creditor’s failure to implement a different rule cannot violate the “commercially
26 reasonable” standard when the precise rule has been followed. On the other hand,
27 the good faith standard would bar dishonest conduct that is literally in
28 compliance, for example, seeking an abandoned property determination under
29 §505 for a home the creditor knows is not abandoned, although it may meet the
30 statutory criteria that give rise to a presumption of abandonment.
31

32 2. The obligation to act in good faith set forth in subsection (a) relates to
33 the performance of specific duties and obligations imposed on persons by this act
34 and by their agreement. It is not the source of independent obligations to take or
35 refrain from taking certain actions.
36

1 **SECTION 105. CERTAIN ACTS PROHIBITED.** A creditor may not:

2 (1) Make a misleading oral or written statement to a homeowner or obligor that would
3 discourage a reasonable person from participating in loss mitigation or early resolution; or

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

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

8 (B) the foreclosure has been postponed, canceled or stayed due to loss mitigation
9 or early resolution while at the same time continuing with the foreclosure; or

10 (C) the obligor is not eligible for loss-mitigation options when loss-mitigation
11 options are available and the creditor has not evaluated those options .

12 **SECTION 106. APPLICATION OF LOCAL REGULATIONS.**

13 (a) [Notwithstanding (insert reference to any applicable “Home Rule” provisions under
14 the law of this state)] no ordinance or regulation of a municipality, county or other political
15 subdivision in this state may impose regulations, restrictions or limitations on the foreclosure
16 process or add to or vary the rights and obligations of creditors, servicers, homeowners, or
17 obligors set forth in this [act].

18 (b) Except as otherwise provided in subsection (a), the provisions of this [act] do not
19 invalidate or modify any provision of any zoning, subdivision, building or safety code, or any
20 other ordinance or regulation generally applicable to the use of real estate.

21 **Drafters’ Notes**

22
23 1. This section addresses local laws that regulate residential properties that are in
24 foreclosure or have been sold at foreclosure. During recent years, local governments in a
25 number of states have enacted ordinances that establish mediation or “dispute resolution”
26 programs or that regulate abandoned properties. Lenders have expressed concern that

1 such local programs are often burdensome, especially due to their limited geographical
2 scope. A number of state legislatures have passed statutes to preempt various types of
3 local legislation that affect mortgage lending and the enforcement of mortgages. This
4 section seeks to address the issue. The drafting committee discussed prior versions of this
5 section at its January 2014 and May 2014 meetings. One major decision is whether field
6 preemption or conflict preemption is more appropriate. Although the current language
7 reflects the former model, the committee has not yet made a decision. It will consider the
8 matter at its fall 2014 meeting.

9
10 2. Subsection (b) makes it clear that municipal ordinances generally applicable to
11 real property in a municipality would not be affected by this act, regardless of who owns
12 the property, and therefore will apply with equal force to property owned by homeowners
13 or lenders. Accordingly, for example, a local ordinance mandating the maintenance of
14 yards and blighted property would apply with equal force to a blighted property whether
15 or not owned by a homeowner or creditor, and an ordinance enabling a municipality to
16 repair blighted property and lien the property for the costs of the work, if it were
17 otherwise lawful under applicable state law, would not be barred by this section.

18
19 **SECTION 107. SERVICERS.** A creditor may perform any of its duties under this [act]
20 through a servicer. A servicer who is authorized to take action on behalf of a creditor is subject
21 to the duties imposed by this [act] on the creditor. Whether a creditor is liable for a servicer's
22 noncompliance with this [act] is determined by law other than this [act].

23 **SECTION 108. NO WAIVER.** Except as otherwise provided in Section 501, the effect
24 of provisions of this [act] that give rights to an obligor or homeowner or impose duties on a
25 creditor may not be waived or varied by agreement.

26 **Drafters' Note**

27 At its fall 2014 meeting the drafting committee will consider whether there are
28 other provisions of the Act that an obligor or homeowner should be permitted to
29 waive or vary by agreement, either generally or after default.

30 **SECTION 109. NOTICES AND KNOWLEDGE.**

31
32 (a) Subject to subsection (b), a person "receives" a notice or notification when:

33 (1) It comes to that person's attention; or

1 (2) It is duly delivered in a form reasonable under the circumstances at the place
2 of business through which the contract was made or at another location held out by that person as
3 the place for receipt of such communications.

4 (b) Notice, knowledge, or a notice or notification received by an organization is effective
5 for a particular transaction from the time it is brought to the attention of the individual
6 conducting that transaction and, in any event, from the time it would have been brought to the
7 individual's attention if the organization had exercised due diligence. An organization exercises
8 due diligence if it maintains reasonable routines for communicating significant information to the
9 person conducting the transaction and there is reasonable compliance with the routines. Due
10 diligence does not require an individual acting for the organization to communicate information
11 unless the communication is part of the individual's regular duties or the individual has reason to
12 know of the transaction and that the transaction would be materially affected by the information.

13 (c) "Organization" means a person other than an individual.

14 **Drafter's Note**

15 This Section incorporates without change those parts of Revised UCC § 1-202
16 that are relevant for this act.

17
18 **SECTION 110. SUPPLEMENTAL PRINCIPLES OF LAW.** Unless displaced by
19 the particular provisions of this [act], the principles of law and equity, including the law relative
20 to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion,
21 mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

22 **Drafters' Note**

23 This new section responds to comments made at our past Committee meetings
24 that our act should explicitly indicate that its provisions are to be supplemented by
25 general principles of law and equity, following UCC jurisprudence. Our
26 Committee discussion has focused particularly on making it clear that the law of
27 principal and agent applies as a general matter. The text above is taken verbatim

1 from Revised UCC § 1-103(b) with one modification – this Section omits the § 1-
2 103(b) reference to “the law merchant” on the basis that such principles are not
3 likely to apply to our subject matter.
4

5 **[ARTICLE] 2**

6 **NOTICES; RIGHT TO CURE**

7 **SECTION 201. NOTICE OF DEFAULT AND RIGHT TO CURE.**

8 (a) A creditor may not initiate the foreclosure process under [insert reference to state
9 foreclosure law other than this act] until 30 days after the creditor sends separately to each
10 obligor a notice of default and right to cure.

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

12 (1) the nature of the default, including a statement, as of the date of the notice, of
13 all past-due payments, fees, and other charges owed to the creditor;

14 (2) the specific action the obligor must take to cure any curable default, including
15 the exact amount that must be paid;

16 (3) the date by which the default must be cured, which shall be not less than 30
17 days after the date the notice is sent;

18 (4) that if the obligor does not cure, the creditor may demand payment of the full
19 amount due, not just past-due payments, and may foreclose the mortgaged property;

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

22 (6) that the obligor may dispute the default and raise any other defense to
23 foreclosure or payment of the obligation and how to exercise those rights;

24 (7) the names of (i) the creditor and the particular facts that establish the
25 creditor’s right to foreclose; (ii) the servicer, if different; and (iii) the legal owner of the

obligation if the creditor is not the legal owner;

(8) that the obligor may request a copy of the negotiable instrument or other evidence of the obligation and a copy of any record that demonstrates the right to foreclose as provided in Section 401; and

(9) if the creditor is relying on a lost, destroyed, or stolen negotiable instrument under Section 403, the information required by Section 403(b).

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

Drafters' Notes

1. The itemization of the amount due as of the notice date is a critical piece of information for the homeowner or obligor and should be stated as exactly as possible. The amount included for attorneys' fees should be limited to those accrued prior to the date of the notice, and thus should not include retainers or advances to attorneys that would be refunded in the event of a prompt cure.

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

3. This Act refers in several sections to the ‘foreclosure process’; see, for example, Sections 102(7), 104(a), 106 and this section 201. The notice of default under this Section is the beginning of the foreclosure process prescribed by this Act. However, the “first notice or filing” under federal regulations mandating a 120-day waiting period, 24 C.F.R. § 1024.41(f)(1), is the [Complaint or other first court filing in judicial state][Notice of Sale in non-judicial state]. Therefore the notice of default may be sent during the 120-day waiting period under the federal rule.

4. Items (1) through (6) are adapted from the elements of notice in the standard Fannie/Freddie mortgage negotiable instrument. Item (3) adds a specific deadline to cure the default. Items (7) and (8) are the ownership statement required by the national servicing settlement, and call for the servicer to identify its basis for standing at the outset of foreclosure proceedings, so that any disputes can be resolved promptly. This notice does not displace all state-specific aid

1 programs and counseling notices which necessarily will depend on state funding –
2 for example, Pennsylvania requires a separate 30-day notice of how to apply for
3 its Homeowner’s Emergency Mortgage Assistance Program.

4 5. In subsection (b)(2), the actions the homeowner needs to take in order
5 to cure the default are governed by § 203. If the default by its nature cannot be
6 cured, for example if the property has been forfeited or foreclosed by a senior
7 lienholder, the notice may simply state that the default may not be cured.
8

9 6. If a homeowner or obligor has cured a default, any subsequent
10 foreclosure based on a later default must be preceded by a new notice, subject to
11 the limitations on repeated defaults contained in Section 203. This is because a
12 cure restores the homeowner to the same legal position as if no default had
13 occurred, §203(c). If, on the other hand, as a result of early resolution or
14 otherwise, the homeowner has tendered payments under a forbearance plan or
15 other workout but has not fully cured the default that was the subject of the notice,
16 no new notice is required in the event the workout fails and the creditor chooses
17 to proceed with foreclosure.
18

19 [The Reporters intend to draft a ‘safe harbor’ notice for subsection (b)]
20

21 **SECTION 202. MANNER OF NOTICE DELIVERY.** A notice required by Section
22 201 or Section 302 must be sent by first-class mail to the last known address of each obligor. At
23 least one mailed notice must also be addressed to “occupant” at the address of the mortgaged
24 property. If the obligor or the obligor’s representative has requested notice by electronic mail and
25 has provided an electronic-mail address to the creditor, the notice also must be sent by electronic
26 mail to the electronic-mail address.

27 **Drafters’ Notes**

28

- 29 1. The complaint in a judicial foreclosure state, or notice of sale in a nonjudicial
30 foreclosure state, must be delivered according to existing law, usually by
31 personal service. The requirement for additional electronic mail notice does
32 not displace the paper notices required by this act or other law.
33
- 34 2. Notice must be sent by ordinary first class mail. First class mail has the
35 characteristic that it will be delivered to the last known address whether or not
36 the recipient accepts delivery in person. The creditor may supplement first
37 class mail with certified mail or overnight delivery but may not rely solely on
38 methods that require the recipient to accept delivery in person.
39

1 **SECTION 203. RIGHT TO CURE DEFAULT.**

2 (a) An obligor may cure a monetary default on an obligation by tendering in cash or
3 immediately available funds the amount specified in subsection (c) at any time after a notice
4 under Section 201 and not later than two business days before a scheduled or postponed
5 foreclosure sale.

6 (b) An obligor may cure a default other than a monetary default at any time not later than
7 two business days before a scheduled or postponed foreclosure sale.

8 (c) To cure a default under this section, an obligor must:

9 (1) tender all sums that would have been due at the time of tender in the absence
10 of acceleration;

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

13 (3) tender all expenses of foreclosure that are specified in a record provided by
14 the creditor and that accrued before tender; and

15 (4) tender any late fees, if provided for in the mortgage or obligation and
16 permitted by other law.

17 (d) Cure of a default under subsection (c) restores the obligor to the same position under
18 the mortgage and the obligation it secures as if the default had not occurred.

19 (e) Nothing in the section impairs any greater right to cure a default that the obligor may
20 have under the terms of the mortgage agreement or the record that creates the obligation.

21 Nothing in this section limits the right of an obligor to redeem the mortgaged property by paying
22 the full amount of the accelerated obligation at any time prior to the completion of the
23 foreclosure sale.

1
2
3 **Drafters' Notes**

4 1. The right of a homeowner or obligor to cure a default on an obligation
5 secured by a mortgage has the effect of de-accelerating the payments due after
6 acceleration, but before a completed foreclosure sale. The homeowner and obligor
7 receive notice detailing the amounts needed to cure the default pursuant to Section
8 202, and identifying any nonpayment defaults, such as failure to maintain
9 insurance.

10 2. The right to cure as used in this Act includes the right to reinstate the
11 mortgage after acceleration. "Cure" is used in a broad sense here, similar to the
12 use of the term in the Bankruptcy Code, §1322(b)(5). Some state laws use the
13 term "redeem" to refer to payment of all amounts due prior to a foreclosure sale,
14 and those provisions are superseded by this right to cure.
15

16 3. The statutory right to cure provided by this section may not be waived
17 by contract. In the event of a dispute between the creditor and a homeowner or
18 obligor concerning the amounts needed to cure, or any nonmonetary performance
19 that may be claimed as due, either party may seek declaratory relief from an
20 appropriate court, and if appropriate, a temporary stay of any foreclosure sale to
21 resolve the cure dispute.
22

23 4. If a default is cured, restoring the homeowner and obligor to the same
24 position as if no default occurred means that if there is a later default, new notices
25 must be sent prior to foreclosure. Conversely, if as a result of early resolution
26 under Article 3 or otherwise, a settlement is reached but the homeowner or
27 obligor does not fully cure the default, new notices are not required. However,
28 nothing in this [act] requires a lender who properly assessed late fees or default
29 interest following a default to disgorge those fees if the default is subsequently
30 cured.
31

32 5. 'Immediately available funds' include certified checks, cashier's checks,
33 money orders, electronic transfers, and other payments that provide reasonable
34 certainty of prompt payment.
35

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

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

39 (1) that the person is a homeowner or obligor; and

40 (2) the identity of the person.

41 (b) If the creditor 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.

Drafters’ Notes

1. Section 204 is based on UCC § 9-605. Its purpose is to relieve the creditor from duties owed to a homeowner or obligor if the creditor or servicer does not know about that person. This may be the case, for example, when an original homeowner has sold the property to a purchaser, or when the original homeowner has died and his or her interest has passed to an heir or devisee.

[ARTICLE] 3

EARLY RESOLUTION

Chair’s Note: The Drafting Committee will continue to discuss the most appropriate name for the process created by this Article.

SECTION 301. EARLY RESOLUTION PROGRAM ESTABLISHED. [The court or agency serving as the early resolution agency] is designated the early resolution agency. The early resolution agency shall adopt rules pursuant to [insert reference to state administrative procedures act or, if the early resolution agency is the judicial system, to the rules of court] establishing procedures and standards for the early resolution process.

Drafters’ Notes

1. The Drafting Committee has spent considerable time discussing the subject of foreclosure mediation – now called early resolution. A number of members on the Committee believe that a successful process that screens potential workout alternatives to foreclosure offers the single best hope for homeowners in the continuing foreclosure crisis.

2. Early resolution is defined in Section 102 as the assistance of a third-party neutral at an in-person meeting between the parties with the objective of achieving a commercially reasonable alternative to foreclosure, resulting in an agreement between the creditor and homeowner.

Between 2007 and 2012 eighteen states adopted statewide foreclosure diversion or mediation programs, and local jurisdictions in at least eight additional states have established similar programs. The programs vary greatly in their timing and design, and exist in both judicial and nonjudicial foreclosure states.

1 Most programs in judicial foreclosure states call for intervention after a
2 foreclosure complaint is filed. While most stakeholders recognize that starting
3 mediation or early resolution earlier in the process would increase the chances of
4 success and reduce costs, most existing state laws do not provide a means to
5 initiate early resolution before the judicial process begins. Pre-foreclosure early
6 resolution permits early sorting of foreclosure cases, into those where the
7 homeowner wants to find a solution other than foreclosure, and those cases that
8 are uncontested or where there is no realistic alternative to foreclosure.

9
10 3 The Act does not prescribe standards or procedures for a state's early
11 resolution program. The Appendix to Article 3 sets forth model rules and best
12 practices that state agencies are urged to adopt.

13
14 4. Foreclosure early resolution is not mediation as defined in the Uniform
15 Mediation Act. The agency or court determination under §304 whether to permit
16 foreclosure to proceed requires reporting of information concerning the early
17 resolution process. The Uniform Mediation Act generally bars mediators from
18 making reports. Article 3 and the model rules in the Appendix to Article 3 do,
19 however, include some key principles from the Uniform Mediation Act, including
20 the protection of confidential information exchanged in early resolution and the
21 avoidance of conflicts of interest on the part of the neutral.

22 23 **SECTION 302. NOTICE OF EARLY RESOLUTION.**

24 (a) Not later than 30 days after a creditor has sent the notice of intent to foreclose
25 required by Section 201, or 30 days after a creditor has filed a mortgage foreclosure complaint,
26 as provided by agency rules, the creditor must send to the homeowner and obligor a notice of the
27 right to participate in early resolution under subsection (c), or must request that the early
28 resolution agency send the notice under subsection (b). However, a creditor is not required to
29 send or request a notice if there has been a determination that the property is abandoned under
30 Section 505. If a court or agency later determines that the property is not abandoned and a
31 foreclosure sale has not been completed, the creditor must request the notice under subsection (b)
32 or send the notice under subsection (c).

33 (b) If the early resolution agency establishes a procedure for the agency to send notice of
34 early resolution to homeowners, a creditor shall request the agency to send the notice to the

1 creditor and to each homeowner and obligor. Subject to the agency's rules, the notice may be
2 sent before or after commencement of a foreclosure action, but must be sent before a creditor
3 may request entry of a default or foreclosure judgment or give a notice of a judicial or
4 nonjudicial-foreclosure sale.

5 (c) If the early resolution agency does not establish a procedure for the agency to send
6 notice of early resolution, the creditor shall send notice to each homeowner and obligor, in the
7 same manner as required for the notice under Section 201, before the creditor or servicer may
8 request entry of a default or foreclosure judgment or give a notice of a judicial or nonjudicial-
9 foreclosure sale. Subject to the agency's rules, the notice shall be sent before or after
10 commencement of a foreclosure action.

11 (d) The notice of early resolution must include the following information:

12 (1) The name, address and telephone number of each housing counseling agency,
13 lawyer referral service and legal aid agency serving the homeowner's geographic area that is
14 designated by the early resolution agency.

15 (2) The name, address, telephone number, and electronic mail address of the
16 appropriate contact person or group assigned by the creditor or servicer to the homeowner or
17 obligor under rules of the federal Consumer Financial Protection Bureau.

18 (3) The fact that the homeowner or obligor may request an early resolution
19 meeting, the fact that the request must be made within 30 days of the sending of the notice, the
20 instructions to request early resolution, and all eligibility requirements under the early
21 resolution agency rules.

22 (4) A description of all documents the homeowner or obligor must bring to the
23 early resolution meeting, under the early resolution agency rules.

(5) A form prescribed by the agency for the homeowner or obligor to request early resolution and to affirm that the homeowner or obligor meets the eligibility requirements of Section 303.

Drafter's Notes

1. The timing of the notice of early resolution will depend on whether the early resolution agency is a court or other agency. Early resolution should begin at the earliest possible time after a notice of default. However, in states whose early resolution programs are operated by the courts, it may not be possible to begin early resolution until a foreclosure lawsuit has begun, in which case the second bracketed alternative language in subsection (a) should be used.

2. If the property is not abandoned, but the agency or court determines that the homeowner has rented the dwelling unit to a person other than a family member, the obligor and homeowner are not eligible for early resolution, under §303. However, the creditor or agency must still send the notice of early resolution. If the agency determines, based on the obligor's request for early resolution or other information, that the property is rental property, it must then permit foreclosure to proceed, under Section 304.

SECTION 303. ELIGIBILITY; PARTICIPATION IN EARLY RESOLUTION.

(a) If a homeowner or obligor makes a request for early resolution within 30 days of the sending of the notice that complies with the agency rules, the agency shall schedule a meeting in accordance with its rules, and appoint a neutral to conduct the meeting.

(b) When the agency schedules a meeting, the creditor and homeowner or obligor shall attend and participate in compliance with agency rules and any scheduling or other order established by the neutral or the agency.

(c) To be eligible for early resolution, the mortgaged property must not be abandoned property or rented to a person other than the obligor or homeowner [or an immediate family member of either]. If the mortgaged property contains more than one dwelling unit, early resolution is available only if at least one dwelling unit is occupied by the homeowner or obligor [or an immediate family member of either]. With the request for early resolution, the

1 homeowner or obligor shall submit to the agency an affirmation that the mortgaged property is
2 not abandoned and that it is occupied either by an obligor or homeowner [or an immediate family
3 member of either]. If the agency determines that the property is abandoned or is not occupied by
4 a obligor or homeowner [or an immediate family member of either], the agency will not schedule
5 a meeting, but instead must permit the creditor to proceed with foreclosure under Section 304.

6 (d) The creditor or servicer shall inform the homeowner and obligor and the agency of
7 the loss mitigation options that are available to the homeowner and obligor. The creditor or
8 servicer shall notify the homeowner and obligor and the neutral or agency of its willingness or
9 refusal to offer any loss mitigation option requested by the homeowner, the reasons for any
10 refusal, and the information on which a refusal is based.

11 (e) The creditor or servicer may not charge the homeowner or obligor a fee for the early
12 resolution process. The agency may charge a fee for the early resolution process to either or both
13 parties.

14 (f) A homeowner or obligor that elects to participate in early resolution shall provide
15 reasonably available financial and other information to permit the creditor to evaluate any loss-
16 mitigation options.

17 (g) Failure to comply with subsection (b) includes failing:

18 (1) without good cause to timely attend a meeting;

19 (2) without good cause to provide, before a scheduled meeting, documents and
20 information required by agency rules or reasonably requested by the neutral;

21 (3) to designate a person with authority to reach a settlement agreement, if the
22 authority exists;

23 (4) without good cause to pay any required early resolution fee; and

1 (5) on the part of a creditor or servicer, to advise the homeowner, obligor and the
2 neutral of any loss-mitigation option that is available to the homeowner or obligor or to consider
3 the homeowner or obligor for the loss-mitigation option before or during early resolution.

4 (h) Nothing in [this Act] or agency rules imposes or may impose a duty on a creditor or
5 servicer to provide a borrower with any specific loss mitigation option.

6 (i) The homeowner or obligor may be accompanied by an attorney, housing counselor or
7 other person at the early resolution session.

8 (j) Personal financial information exchanged during early resolution is confidential and
9 not subject to disclosure under [state FOIA or sunshine laws]. Neither the agency nor the neutral
10 shall be required to respond to any discovery requests in any litigation other than the foreclosure
11 action, where the discovery seeks personal financial information of a homeowner or obligor
12 exchanged during early resolution.

13 (k) Neutrals shall disclose potential conflicts of interest, as provided by the agency rules.

14 **Drafters' Notes**

15
16 1. Abandoned properties are not eligible for early resolution and no
17 notice of early resolution to an abandoned property is required. Investors who are
18 renting a property otherwise covered by this Act are also ineligible for early
19 resolution, but notice must be sent to the property prior to foreclosure. A
20 homeowner must certify that the property is not a rental property (or, if it is, that
21 the homeowner or obligor [or an immediate family member of either] occupies at
22 least one unit) in order to request early resolution. Existing foreclosure mediation
23 programs generally limit eligibility to owner-occupants. *E.g.* N.Y. C.P.L.R.
24 §3408 (“foreclosure . . . in which the defendant is a resident of the property”);
25 Conn. Public Act No. 11-201 (applies to residential real property defined as “a
26 one-to-four family dwelling occupied as a residence by a mortgagor”); see also 12
27 C.F.R. §1024.30(c)(2) (loss mitigation notice and appeal rules only apply to a
28 mortgage loan that is secured by a property that is a borrower’s principal
29 residence).

30
31 2. As provided in Section 301, the agency rules and orders may
32 impose additional requirements on the parties, for example requiring the creditor,
33 servicer or its agent to appear in person or to have a person with authority to

1 approve loss mitigation alternatives available by telephone at the time of the early
2 resolution session, to perform a net present value analysis, to disclose the
3 assumptions on which the analysis is based, or requiring homeowners to meet
4 with a housing counselor to qualify for early resolution. The agency will also
5 regulate procedural matters, such as time limits for exchanging documents,
6 scheduling and concluding early resolution meetings, reports by neutrals, and the
7 like. States should continue to have flexibility in the design and implementation
8 of early resolution programs, but should establish and publish the standards as
9 required by section 301. The model rules and best practices principles of early
10 resolution set forth following Section 304 were developed by the Uniform Laws
11 Commission after extensive collaboration with a number of state agency heads
12 and outside consultants, and should aid state new early resolution agencies in
13 designing their programs.
14

15 **SECTION 304. FORECLOSURE ACTIONS DURING EARLY RESOLUTION.**

16 (a) After the agency or creditor has sent notice of early resolution to a homeowner or
17 obligor, a creditor may, subject to other law of this state other than this [act], commence a
18 foreclosure, but may not file a default or dispositive motion in a foreclosure action, or schedule
19 or cause to be scheduled a foreclosure sale, unless:

20 (1) the homeowner or obligor does not respond to the early resolution notice by
21 making a request for early resolution to the agency not later than 30 days after the sending of the
22 notice;

23 (2) the agency provides the creditor with a notice that the parties have participated
24 in the meeting required by Section 303(a) and reached an impasse, or that the homeowner or
25 obligor has failed to participate in early resolution, provide required information after a
26 reasonable opportunity to do so, or to materially comply with agency rules; or

27 (3) the court or agency enters an order on good cause shown permitting the
28 creditor to proceed with foreclosure. If the court or agency determines that the property is
29 abandoned or used as rental property, the court or agency shall enter an order permitting the
30 creditor to proceed with foreclosure.

1 (b) Notwithstanding subsection (a), a creditor may proceed to enforce the mortgage [90]
2 days after sending the notice required by Section 302, unless the parties agree in a record to
3 continue the early resolution process or the agency or court directs the parties to continue the
4 early resolution process.

5 (c) The agency or court may impose appropriate conditions on the parties, including the
6 payment of reasonable fees and costs of early resolution to the agency or the tender of periodic
7 payments by the homeowner to the lender.

8 **Drafters' Notes**

9
10 1. Numerous states have recently enacted mandatory early resolution or
11 loss mitigation laws. Under various names and structures, the consistent object of
12 these programs is to delay or prevent foreclosure until the homeowner has had the
13 opportunity to request some form of loss mitigation: See, e.g., Arkansas Act 885
14 (2011) Sec 3, Ark Code 18-50-104 (beneficiary must certify to selling attorney or
15 trustee that it has notified homeowner of ineligibility for loss mitigation options
16 before nonjudicial sale); California Assembly Bill 278 (enacted July 11, 2012,
17 prohibits foreclosure when loan modification request is pending); Idaho Code 45-
18 1506, HB 331 Idaho now requires notice of right to apply for loan modification
19 and bars nonjudicial sale until creditor responds to homeowner's request); Indiana
20 Act 170 of 2011 (same; also prohibits servicer or attorney fees for mediation or
21 loss mitigation); Massachusetts Chapter 194 of Acts of 2012 (creditor must offer
22 mortgage modification prior to foreclosing, if modification would maximize value
23 for mortgagee); Michigan Compiled Laws §3205a (amended Act 302 of 2011);
24 Nevada Rev. Stat. §107.086; Washington Chapter 58 Laws of 2011, amending
25 RCW 61.24 (delays foreclosure 90 days if homeowner requests meeting with
26 creditor to request loss mitigation, and for cases referred by housing counselor to
27 early resolution, until the parties comply with duty to mediate in good faith).
28 Requiring a process that includes an exchange of information between borrower
29 and creditor, an explanation of various loss mitigation options and some form of
30 meeting with a third party neutral before a foreclosure is begun allows necessary
31 foreclosures to go forward promptly and efficiently after cases suitable for other
32 resolutions are identified and resolved.

33
34 2. Subsection (a)(3) contemplates a variety of situations where,
35 notwithstanding the 90-day waiting period before foreclosure may be commenced
36 under subsection (b), either the court or early resolution agency may enter an
37 order permitting foreclosure to proceed in less than 90 days. Examples of
38 particular situations that might warrant such an order may include a case where
39 the homeowner has already agreed to vacate the property, or has failed to

1 participate in early resolution, or if emergency conditions short of abandonment
2 would justify an accelerated foreclosure.
3

4 3. Subsection (b) contemplates a variety of situations where the 90 day
5 waiting period before foreclosure may be finalized should be extended. Examples
6 of particular situations that might warrant such an order include cases where the
7 servicer has failed to evaluate a homeowner's completed request for loss
8 mitigation in a timely manner, has failed to comply with material aspects of
9 federal servicing regulations, *see* 12 C.F.R. §1024.41, or has requested additional
10 documents from the homeowner late in the early resolution process.
11

12 4. Subsection (c) authorizes the agency to charge the parties fees sufficient
13 to fund the costs of the early resolution program, a funding mechanism used in
14 several states. States may wish to include more specific provisions about the fees
15 the agency may impose. Subsection (c) also authorizes the agency to direct the
16 homeowner to tender periodic payments during the early resolution process.
17 Lenders should benefit because the payment requirement may filter out borrowers
18 who simply want to buy time, with no realistic expectation that retaining the
19 property is possible.
20

21 **APPENDIX TO ARTICLE 3**

22 **MODEL EARLY RESOLUTION PROGRAM RULES**

23 1. These rules apply to the foreclosure early resolution program under [Article 3 of the Home
24 Foreclosure Procedures Act.] "Agency" means the early resolution agency. The agency is
25 [name of court or agency]. All provisions referring to "creditor" include "servicer" as defined in
26 [the HFPA].
27

28 2. The purpose of the foreclosure early resolution program is to assist a creditor and a
29 homeowner to reach a voluntary agreement that avoids foreclosure and achieves a sustainable
30 early resolution or mitigates damages in cases where foreclosure is unavoidable.
31

32 3. The early resolution notice required by §302 of the HFPA may be sent [at any time no later
33 than 30 days after the creditor sends the notice required by §201][no later than 30 days after the
34 creditor files a complaint in foreclosure.] The notice shall instruct the homeowner to contact the
35 agency to request early resolution at the telephone number [or electronic mail address]
36 designated from time to time on the [agency web site][official journal].
37

38 4. If a homeowner requests early resolution, the agency shall open a foreclosure early resolution
39 case. Within five days of the request the agency shall send notice to the homeowner and creditor
40 [by mail, by electronic mail] to provide the agency with required documents and information for
41 the early resolution process. The document exchange notice to the homeowner shall also include
42 a list of available housing counseling agencies that can assist the homeowner.
43

44 5. The agency shall schedule a meeting within 60 days after the homeowner's request for early

1 resolution.

2
3 6. The document exchange notice to the homeowner shall instruct the homeowner to submit to
4 the agency and the creditor necessary and relevant documents including

5
6 a) Documents showing income qualification for a loan modification, including copies of pay
7 stubs, W-2 forms, social security or disability income, retirement income, child support
8 income, or other income that the homeowner believes is relevant to the homeowner's ability
9 to repay the mortgage,

10 b) Documents supporting any dispute regarding the existence or amount of any mortgage
11 loan default,

12 c) Documents relating to any prior loan modification or other prior agreement regarding the
13 mortgage loan and

14 d) Documents relating to any pending request to modify the loan or negotiate a settlement of
15 the delinquency.

16
17 7. Homeowners who do not occupy the property being foreclosed are not eligible for early
18 resolution. The notice to the homeowner shall state that if the homeowner or obligor is not
19 occupying the property is not eligible for early resolution, and that the homeowner must return a
20 signed non-investor certification form provided by the agency, together with any required fee, in
21 order to participate in early resolution.

22
23 8. The document exchange notice to the creditor shall instruct the creditor to submit to the
24 agency and the homeowner necessary and relevant documents including

25
26 a) Any 45-day notice and 5-day notices required by CFPB rule 12 CFR §1024.39(b) and
27 §1024.41(b)(2)(i)(B) previously sent to the homeowner in connection with the current
28 default,

29 b) Any prior offers of loss mitigation, forbearance, modification or other agreements made
30 with the homeowner in connection with the current default,

31 c) A list of documents required by the creditor to evaluate the homeowner's request for loss
32 mitigation,

33 d) The homeowner's payment history from the date of default,

34 e) Itemization of all amounts due on the loan, including all fees,

35 f) copies of the promissory note, signed by the mortgagor, including any endorsements,
36 allonges, amendments, or riders that show the mortgage debt,

37 g) Any lost note affidavit the creditor will rely on to foreclose the mortgage.

38
39 9. The agency or neutral may request additional documents from either party as appropriate.
40 Either originals or copies of documents may be exchanged for the early resolution. The neutral
41 and the agency will not resolve disputes regarding authenticity of documents.

42
43 10. The homeowner and creditor shall provide the documents requested by the agency no later
44 than 10 days after the sending of the document exchange notice.

45
46 11. The creditor shall communicate to the agency and the homeowner the identity of the

1 individual who will represent the creditor at the early resolution session at the time it provides
2 the required documents.

3
4 12. Within fourteen days after receiving the homeowner's request, the agency shall send [mail,
5 electronic] notice to the creditor and homeowner that shall include:

- 6
7 (1) The name and contact information of the assigned neutral,
8 (2) The date, time, and location of the early resolution session,
9 (3) Information about the conduct of the early resolution session, and
10 (4) Consequences and penalties for noncompliance with program rules.
11

12 13. Before accepting appointment as neutral, the neutral shall (a) make an inquiry that is
13 reasonable under the circumstances to determine whether there are any known facts that a
14 reasonable individual would consider likely to affect the impartiality of the neutral, including a
15 financial or personal interest in the outcome of the early resolution and an existing or past
16 relationship with a party to the early resolution or foreseeable participant in the early resolution,
17 and (b) disclose such known fact to the parties as soon as is practical before the first early
18 resolution meeting. If, after accepting a early resolution, a neutral learns any fact that a
19 reasonable individual would consider likely to affect the impartiality of the neutral, including a
20 financial or personal interest in the outcome of the early resolution and an existing or past
21 relationship with a party to the early resolution or foreseeable participant in the early resolution,
22 the neutral shall disclose it as soon as is practical.
23

24 14. The neutral's role is to assist the parties with information exchange, communication and
25 negotiation to insure that every reasonable effort has been made to reach a voluntary agreement
26 to resolve the alleged mortgage default in some manner other than a foreclosure sale.
27

28 [15. The neutral may charge each party a fee of [\$200]].
29

30 16. At least [10] days prior to the early resolution session, the creditor must notify the neutral
31 and homeowner of any decision to offer or not offer any loss mitigation options to the
32 homeowner. The creditor shall provide the neutral with documentation supporting its decision
33 not to offer a loss mitigation alternative to the homeowner. The creditor shall also provide the
34 neutral with inputs and the results of the net present value calculations relied upon in reaching its
35 decision. The neutral may request the creditor to provide additional documentation to support its
36 decision.
37

38 17. The homeowner is entitled to have an attorney, housing counselor or other person of the
39 homeowner's choosing accompany the homeowner to and participate in the early resolution
40 meeting.
41

42 Note – The term 'housing counselor' is included only as an example and without
43 a definition because the term 'other person' would include any representative the
44 homeowner chooses
45

46 18. If the homeowner fails without good cause to substantially and timely provide the

documents specified by the neutral or the agency, or to attend the early resolution meeting, or if the agency determines that the homeowner requesting early resolution is not occupying the property, the agency shall [enter an order][request the court to enter an order] terminating the early resolution process and permitting foreclosure to proceed pursuant to the HFPA §304.

19. If the creditor fails without good cause to substantially and timely provide the documents specified by the neutral or the agency, or to appear at the early resolution meeting with authority to act on any available loss mitigation alternatives, the agency shall [enter an order][request the court to enter an order] extending the early resolution period and the stay of foreclosure pursuant to the HFPA §304.

20. The parties are required to appear in person at the early resolution session and shall have the authority to enter into a settlement to resolve the dispute. The creditor's representative must have the ability to evaluate loss mitigation and to have the authority to make a decision as required by the RESPA regulations of the Consumer Financial Protection Bureau. However, upon written request provided to the neutral at least 30 days prior to the early resolution session, the neutral may waive the requirement of having the parties physically present at the session and allow them to appear by telephone or teleconference.

21. The parties shall create a signed record of any agreements reached during early resolution. The neutral shall ensure that any agreement reached by the parties at the early resolution session or during early resolution is promptly confirmed in a record and signed by all parties.

22. Within ten days from the conclusion of the early resolution session, the neutral shall file a record with the agency, reporting whether the parties were present at the session, complied with Section 303 of the Act and all program rules, and whether the parties reached any agreement. The neutral shall also send the record to the parties.

23. Upon receipt of the neutral's report, the agency shall close the case.

24. Sanctions for violations of these rules, pursuant to Article 6 of the HFPA, may be imposed only by a court of competent jurisdiction upon motion of either party and after notice and an opportunity to be heard.

25. All personal financial information as defined by [section of Act] disclosed by the parties in the course of the early resolution is confidential and not subject to public disclosure under [state freedom of information or sunshine laws] or any other state law.

26. The agency shall provide ongoing training for neutrals. This includes participation by all neutrals in a mandatory training session on an annual basis.

27. The agency shall prepare and submit to the legislature annually, twenty days prior to the convening of each regular session, a report containing an evaluation of the operation and effects of the program. The report shall include a summary of the cases handled by the program, including the type and frequency of different outcomes, recommendations for changes, modifications, or repeal of the program or parts thereof with accompanying reasons and data.

1 28. The agency or neutral may recommend or require in appropriate cases that the homeowner
2 tender monthly payments equal to at least 50% of the contractual mortgage payment to the lender
3 or to the agency as a condition of the early resolution.
4

5 29. The lender or creditor may at any time request, pursuant to HFPa §302(a)(2), an order
6 permitting the foreclosure to proceed on the basis that the homeowner has materially failed to
7 comply with rules and requirements of early resolution. The agency shall act on the request no
8 later than 30 days after receiving the request.
9

10 [30. Court early resolution programs in judicial foreclosures. The appearance of the homeowner
11 or obligor at an early resolution session will constitute an entry of appearance in the foreclosure
12 action.]
13

14 **[ARTICLE] 4**

15 **RIGHT TO FORECLOSE; SALE PROCEDURES**

16 **SECTION 401. RIGHT TO FORECLOSE.**

17
18
19 (a) A person described in subsection (b) may commence a foreclosure only after default
20 in the obligation and satisfaction of all conditions required by the mortgage agreement and by
21 law.

22 (b) (1) Except as otherwise provided in paragraph (2) and in subsection (e), only a
23 person entitled to enforce the obligation secured by the mortgage, as determined by law other
24 than this [act], may commence a foreclosure.

25 (2) If the obligation is registered in a mortgage registry, the only person who may
26 commence a foreclosure is the person designated as owner or holder of the obligation by the
27 mortgage registry as of the time the foreclosure is commenced.

28 (c) In a judicial-foreclosure proceeding, the creditor must plead that it has the right to
29 foreclose under subsection (b).

30 (1) If the obligation is evidenced by a negotiable instrument, the [complaint] must
31 include:

32 (A) a copy of the negotiable instrument in its present condition including

1 any indorsement or allonge and a statement indicating who is in possession of the negotiable
2 instrument; or

3 (B) a statement that the negotiable instrument has been lost, destroyed, or
4 stolen and a copy of the negotiable instrument in its last known condition, in which case the
5 [complaint] must include a lost-negotiable-instrument affidavit that complies with Section 403.

6 (2) If the obligation is not evidenced by a negotiable instrument, the [complaint]
7 must include a copy or printout of the records evidencing the obligation and the creditor's right
8 to enforce the obligation.

9 (d) In a foreclosure proceeding, the creditor may, in a record, authorize another person to
10 foreclose. The [complaint] described in subsection (c) must disclose the name of both the
11 creditor and the name of the person authorized by the creditor to foreclose.

12 (e) If an obligation is evidenced by a negotiable instrument and a creditor does not own
13 the obligation, the [complaint] described in subsection (c) must disclose the name of the legal
14 owner of the obligation.

15 **Drafters' Notes**

16 1. This act does not define events of default. Instead, like UCC Article 9,
17 this act leaves the definition of default to contract law. The obligation may be
18 stated in a promissory note (i.e., an obligation to make monthly installment
19 payments) or in another instrument such as the mortgage agreement.
20

21 2. The conditions referred to in subsection (a) are those indicated in the
22 mortgage agreement or under this act and other law as necessary to accomplish
23 before the commencement of foreclosure.
24

25 3. Subsection (b)(1) resolves the problem of who has standing to foreclose
26 by designating the person who is entitled to enforce the obligation, to be
27 determined under other law. When the obligation is evidenced by a negotiable
28 instrument, Article 3 of the Uniform Commercial Code provides the governing
29 rules. When the obligation is not evidenced by a negotiable instrument, law other
30 than UCC Article 3 will determine who is entitled to enforce the obligation. One
31 example of other law is the Uniform Electronic Transactions Act (UETA), which

1 grants to a person having control of a “transferable record” the rights to enforce a
2 promissory note evidenced by an “electronic record,” as those terms are defined
3 in that act.
4

5 4. Subsection (b)(2) authorizes foreclosure by a person identified as the
6 owner or holder of the obligation in a mortgage registry, a term defined in Article
7 1. A mortgage registry does not presently exist, but there is substantial interest in
8 its creation. Thus, the Act contemplates the possibility of an electronic recording
9 system where all notes are electronically generated and where, as a consequence,
10 there is no paper note which might be “possessed in order to satisfy the holder in
11 due course requirements of UCC Article 3.
12

13 Under this section, a certificate or record issued by the sponsoring
14 organization is conclusive evidence that the person named in the certificate as
15 owning the obligation, holding the negotiable instrument (if the obligation is
16 evidenced by an negotiable instrument), or acting on behalf of the owner or
17 holder, has the right to foreclose under Section 401.
18

19 5. When the obligation is evidenced by a negotiable instrument, subsection
20 (c) requires that the complaint identify the possessor of the instrument. The
21 creditor may possess the instrument through an agent. If the agent is not an
22 employee of the creditor and has a place of business in a location other than an
23 office of the creditor, the complaint should identify the agent as the possessor.
24

25 6. This section does not state a separate rule for determining when a
26 creditor who holds a security interest in a note to secure an obligation owed to the
27 creditor has the right to foreclose. UCC Article 9 covers both sales of instruments
28 and assignments of instruments that secure an obligation of the assignor. A
29 creditor who takes possession of a negotiable instrument will acquire the right to
30 foreclose. Other law determines when a creditor who takes possession of an
31 instrument that is not negotiable to secure an obligation owed to the creditor
32 acquires the right to foreclose. For example, UCC § 9-607(a) and (b) provide
33 rules indicating when a secured party has the right to collect on collateral and to
34 enforce the debtor’s rights with respect to property that secures obligation owed to
35 the debtor (i.e., the obligation to pay the mortgage loan to the debtor).
36

37 7. Multiple persons may hold the right to foreclose a mortgage. Other law,
38 including UCC Article 3 and the law of agency, determines whether the right to
39 foreclose may be exercised by fewer than all such persons.
40

41 8. When the obligation is owned by a trust, the owner of the obligation for
42 purposes of this Section is the trustee, not the beneficial owner or owners of the
43 trust property.
44

45 9. Under subsection (c) the creditor’s production of the original negotiable
46 instrument is not necessary at the time of the filing of a complaint in a judicial

1 foreclosure. Production of the original would later become appropriate if, during
2 the course of the proceedings, the homeowner or obligor seeks further
3 demonstration of the copy's authenticity or the whereabouts of the original.
4 Similarly, in a nonjudicial foreclosure, if there are subsequent judicial
5 proceedings, a court may decide to order production of the original instrument if
6 necessary to resolve a particular issue.

7 10. Subsection (d) authorizes the person who has the right to foreclose to
8 exercise that right through an agent. By requiring a description of the agency it
9 does not permit the principal to remain undisclosed. An agent authorized to
10 foreclose may be a loan servicer who has a pre-existing contractual relationship
11 with the creditor, or any other person appointed at any time. If the secured
12 obligation is evidenced by a negotiable instrument, the agent or the principal (the
13 person entitled to enforce the note) may hold and retain possession of the note.
14 Subsection (d) is not intended to change existing laws that authorize a third
15 person, such as a trustee under a deed of trust, to foreclose in nonjudicial
16 proceedings. In such circumstances, subsection (d) allows the beneficiary to
17 appoint an agent, but does not speak to the procedure for appointing a substitute
18 trustee.
19

20 In allowing an agent or representative to foreclose, this section is
21 consistent with the standing decision in *Sprint Communications Co. v. APCC*
22 *Services, Inc.*, 554 U.S. 269 (2008). There, payphone operators had assigned
23 claims for compensation from long-distance carriers to collection firms. In *Sprint*
24 the Court permitted an assignee of a legal claim for money to pursue that claim in
25 federal court, even when the assignee had promised to remit the proceeds of the
26 litigation to the assignor.
27

28 **SECTION 402. ASSIGNMENT OF MORTGAGE UNNECESSARY.** A person
29 entitled to foreclose a mortgage pursuant to Section 401 does not have to obtain or record an
30 assignment of mortgage from the initial holder of the obligation.

31 **Drafters' Notes**

32 1. Existing state law conflicts as to (1) whether the foreclosing party must
33 have an express assignment of the mortgage, or a chain of assignments running
34 back to the original mortgagee, and (2) whether that assignment or the chain of
35 assignments must be recorded in the county land records.

36 In some states, a statute explicitly requires a recorded assignment. E.g.,
37 Ga. Code § 44-14-162: "The security instrument or assignment thereof vesting the
38 secured creditor with title to the security instrument shall be filed prior to the time
39 of sale in the [county land records]." In many states, judicial decisions going in
40 both directions interpret statutes that do not on their face provide immediately
41 obvious answers to these questions. E.g., *In re Vasquez*, 266 P.3d 1053 (Ariz.

1 2011) (recording assignments of deeds of trust is not required, although trustee
2 must record notice of trustee's sale); U.S. Bank Nat. Ass'n v. Ibanez, 941 N.E.2d
3 40 (Mass. 2011) (requiring written chain of assignments).

4
5 This section resolves the conflict by following the principle that a transfer
6 of an interest in an obligation secured by a mortgage also operates to transfer a
7 corresponding interest in the mortgage. UCC 9-203(g). If a transfer of the right
8 to enforce an obligation is accompanied by a separate assignment of the
9 mortgage, the assignment may be recorded in the office in which mortgages are
10 recorded. However, the creditor is not required to obtain a mortgage assignment,
11 nor to record any assignment, in order to establish a right to foreclose the
12 mortgage. The requirements of section 401 are all that is needed to establish
13 standing to foreclose.

14 2. By allowing foreclosure by an assignee or transferee who qualifies as
15 the person to foreclose under Section 401, without a requirement of recording any
16 documents in the real property records, this Act makes it unnecessary to follow
17 the procedure authorized by UCC § 9-607(b), which grants a secured party the
18 right to record a copy of the security agreement and an affidavit in the real
19 property records. Compliance with the requirements of Section 401 is sufficient.
20

21 **SECTION 403. LOST, DESTROYED, OR STOLEN NEGOTIABLE**

22 **INSTRUMENT; AFFIDAVIT.**

23 (a) If a negotiable instrument secured by a mortgage has been lost, destroyed, or stolen,
24 the creditor may foreclose the mortgage only if:

25 (1) either (A) the creditor was entitled to enforce the instrument when loss of
26 possession occurred, or (B) the creditor has directly or indirectly acquired ownership of the
27 instrument from a person who was entitled to enforce the instrument when loss of possession
28 occurred;

29 (2) the loss of possession was not the result of a transfer by the creditor or a
30 lawful seizure; and

31 (3) the creditor cannot reasonably obtain possession of the instrument because the
32 instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful
33 possession of an unknown person or a person that cannot be found or is not amenable to service

1 of process.

2 (b) If a creditor relies upon subsection (a) as the basis for its right to foreclose, the notice
3 of intent to foreclose sent under Section 201 must state that the instrument is unavailable and
4 provide information indicating the creditor's right to foreclose under subsection (a). In a
5 nonjudicial-foreclosure proceeding, the notice must also:

6 (1) state that there may be a risk that a person other than the creditor will seek to
7 enforce the instrument, that the homeowner or obligor has the right to adequate protection
8 against a claim by another person, and that the homeowner or obligor has the right to petition the
9 [name of appropriate court] where the mortgaged property is located for an order requiring the
10 creditor to provide adequate protection; and

11 (2) include the indemnity described in subsection (c).

12 (c) If a creditor relies upon subsection (a) as the basis for its right to foreclose, the
13 homeowner or obligor is entitled to adequate protection against loss that might occur by reason
14 of a claim by another person to enforce the negotiable instrument. The creditor must provide in a
15 record an indemnity against loss by the homeowner or obligor. Whether adequate protection
16 requires more than the indemnity is determined by the facts of each case. In a judicial-
17 foreclosure proceeding, the court may require additional protection. In a nonjudicial-foreclosure
18 proceeding, the homeowner or obligor may petition the [name of appropriate court] where the
19 mortgaged property is located for an order requiring the creditor to provide adequate protection
20 against a claim by another person.

21 (d) In a judicial-foreclosure proceeding, the creditor shall file with the [complaint] an
22 affidavit attesting to facts that establish the creditor's right to foreclose under subsection (a). The
23 creditor shall provide the indemnity described in subsection (c) no later than the foreclosure sale.

1 A particular phrasing of the affidavit is not required. The following form of affidavit, when
2 completed, provides sufficient information:

3 **FORM OF LOST NOTE AFFIDAVIT**

4
5 [Name of affiant] (Affiant) being duly sworn deposes and says:

6
7 1. Affiant is [officer] of [name of creditor] (Lender) and is authorized to make this
8 affidavit on Lender's behalf.

9
10 2. Lender is the legal owner of a promissory note (Note) executed by [name of obligor(s)]
11 in the original principal amount of \$ [dollar amount], dated [date] and secured by [name
12 of instrument], recorded in [recording reference]. Lender has not sold, assigned, pledged,
13 or otherwise transferred the Note to any person. The Note is free and clear of all claims
14 and encumbrances.

15
16 3. The Note is lost, destroyed, or stolen and for this reason cannot be produced.

17
18 4. On [insert date] Affiant made a diligent search for the Note by personal examination of
19 the books and records of Lender [describe search efforts including the books and records
20 examined by affiant].

21
22 (e) The destruction of a negotiable instrument in connection with its registration in a
23 mortgage registry is not destruction of the instrument for purposes of this section.

24 **Legislative Note:** Subsection (a) incorporates the language of Section 3-309 of Revised UCC
25 Article 3 (2002). This language is recommended both for States that have adopted Revised
26 Article 3 and those that have adopted a prior version of UCC Article 3.

27 **Drafter's Notes**

28
29
30 1. This section requires a lost-note affidavit in a judicial foreclosure
31 proceeding, thus following the procedure adopted by most states in their judicial
32 foreclosure laws. The substance of this requirement follows the 2002
33 amendments to Article 3. In specifying when a creditor is entitled to enforce a
34 negotiable instrument secured by a mortgage notwithstanding its inability to
35 confirm possession of the instrument, subsection (a) tracks the requirements of
36 UCC § 3-309 (2002). In states that have adopted the 2002 amendments to Article
37 3, Section 3-309 makes it clear that the person who lost possession may be a
38 predecessor of the creditor who seeks to enforce the instrument. UCC § 9-109,
39 Comment 5 provides a result similar to the 2002 Article 3 amendment ("Also, the
40 right under Section 3-309 to enforce a lost, destroyed, or stolen negotiable
41 promissory note may be sold to a purchaser who could enforce that right by
42 causing the seller to provide the proof required under that section.").

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

12
13 3. When the loan documents executed by the parties did not include a
14 negotiable instrument, the creditor seeking to foreclose may or may not possess
15 an original writing or record (including a counterpart) that evidences the
16 obligation. This section does not require an affidavit for a creditor who lacks
17 possession of such an original record. Some states require “lost note affidavits”
18 under these circumstances. E.g., Va. Code § 8.01-32 (“any past-due lost bond,
19 note, contract, open account agreement, or other written evidence of debt”); Va.
20 Code § 55-59.1(B) (“note or other evidence of indebtedness”).

21
22 4. This section does not discuss the evidentiary effect of the affidavit in
23 judicial proceedings. Some states have statutory law on point. For example, an
24 Alabama statute provides that a lost note affidavit “must be received as
25 presumptive evidence both of the contents and loss or destruction of such
26 negotiable instrument, unless the defendant by answer, verified by affidavit,
27 denies the execution of such bond, note or bill or the endorsement, acceptance, or
28 the contents thereof, in which case proof of such execution, endorsement,
29 acceptance, or contents must be made by the plaintiff.” Ala. Code § 6-5-284.

30
31 5. This section does not require the preparation of a lost-note affidavit in a
32 non-judicial foreclosure proceeding. If an action is filed to contest or to confirm a
33 non-judicial foreclosure, the court should have the discretion to decide what proof
34 of a lost, destroyed, or stolen negotiable instrument is sufficient.

35
36 6. Subsection (b) requires the creditor to disclose that the negotiable
37 instrument is lost, destroyed, or stolen when it sends notice of intent to foreclose
38 under Section 201. In a non-judicial foreclosure proceeding, the additional content
39 for the notice is required because the homeowner or obligor is unlikely to
40 appreciate the risk associated with lost instruments, and it is unlikely that a court
41 will consider the issue unless the homeowner or obligor initiates consideration.

42
43 7. Subsection (c) follows UCC § 3-309(b), which requires adequate
44 protection for the obligor from the risk that at some point in the future the
45 instrument will surface and its possessor will assert the right to be paid. (UCC §
46 3-309(b) was not affected by the 2002 amendments to Article 3.) Subsection (b)

1 requires that the affidavit include a written indemnity, binding the creditor, to
2 protect all obligors against the risk that a person other than the creditor will seek
3 to enforce the instrument. This indemnity serves to reinforce the rights that the
4 obligor already has under principles of restitution and unjust enrichment. See,
5 e.g., Restatement (Third) of Restitution and Unjust Enrichment § 6 (2011):
6 “*Payment of Money Not Due*. Payment by mistake gives the payor a claim in
7 restitution against the recipient to the extent payment was not due.” In appropriate
8 cases, a court may require a bond in addition to a written indemnity.
9

10 8. Subsection (d) describes the affidavit required in a judicial-foreclosure
11 proceeding and includes a safe-harbor form. The affidavit must be based upon the
12 affiant’s personal knowledge and must describe the efforts made to locate the
13 negotiable instrument. A bare assertion that the instrument is lost or cannot be
14 found is not sufficient. The court should apply its normal standards for
15 determining the sufficiency of the affidavit.
16

17 **SECTION 404. PUBLIC ADVERTISEMENT OF FORECLOSURE SALE.**

18 (a) Mortgaged property may be sold at a public sale only after the creditor has published
19 a commercially reasonable public advertisement of the sale. Whether the method or timing of
20 publication of the advertisement is commercially reasonable is a question of fact. A public
21 advertisement is commercially reasonable if:

22 (1) published in a newspaper having general circulation in the [county] where the
23 mortgaged property is located once per week for three consecutive weeks before the sale, with
24 the first publication not more than 30 days before the sale; or

25 (2) posted on an Internet website that is reasonably expected to be viewed by
26 persons having an interest in purchasing the mortgaged property at least 21 days before the sale
27 and the Internet posting remains regularly available between the time of posting and the time of
28 sale.

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

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

- 1 (2) the name of the person that will conduct the sale;
- 2 (3) the date, time, and place of the sale;
- 3 (4) the street address or, if there is no street address, other information identifying
- 4 where the mortgaged property is located;
- 5 (5) any improvements and personal property included in the sale, if that
- 6 information is readily discernable by the creditor;
- 7 (6) whether the mortgaged property is to be sold subject to senior indebtedness;
- 8 (7) the material terms of the sale, including payment terms required of the
- 9 successful bidder at the completion of the auction;
- 10 (8) whether access to the mortgaged property for the purpose of inspection is
- 11 available to prospective bidders before the sale; and
- 12 (9) a telephone number and electronic mail address from which a person may
- 13 obtain additional information concerning the mortgaged property and the sale.
- 14 (c) The public advertisement under subsection (a) need not contain a legal description of
- 15 the mortgaged property or recording information for the mortgage or other instruments of record.
- 16 (d) The public advertisement under subsection (a) or other information pertaining to the
- 17 sale may be posted at the location of the mortgaged property.
- 18 (e) A creditor must send a copy of the public advertisement under subsection (a) to the
- 19 homeowner and to each obligor no later than the date of publication or posting. The notice of
- 20 public advertisement may be sent with the notice of commencement of foreclosure or may be
- 21 sent separately.

Drafters' Notes

23 1. This section allows a public sale of the mortgaged property only if the

24 creditor first gives a commercially reasonable public advertisement. The purpose

1 is to ensure that the public has a meaningful opportunity to learn of the proposed
2 sale in order to appear and engage in competitive bidding. This section supersedes
3 existing state laws covering advertisements for public sales for all foreclosures
4 that are within the scope of this act.
5

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

10 3. This act does not require the accomplishment of foreclosure by a public
11 auction sale. If other state law allows alternative methods of foreclosure, such
12 methods remain permissible. For example, Connecticut law allows strict
13 foreclosure without a sale of the property.
14

15 4. Subsection (b) states minimum requirements for the public
16 advertisement. An advertisement that lacks any of the information set forth in
17 subsection (b) is insufficient as a matter of law. An advertisement may contain
18 additional information about the mortgaged property or the sale.
19

20 5. Subsection (a) requires a commercially reasonable advertisement of a
21 public law. Traditionally the law required the advertisement of foreclosure sales
22 in local newspapers. Subsection (a) allows the creditor to continue that practice,
23 but no longer specifies newspaper advertisement as required. In many
24 communities, newspaper advertisements are no longer an effective means of
25 informing the public about upcoming foreclosure sales. Under these
26 circumstances, a creditor's decision not to publish in a newspaper benefits both
27 the creditor and the homeowner and any obligors by saving the expense.

28 Subsection (a) also creates a safe harbor regarding circumstances when an
29 advertisement would be commercially reasonable. Specifically, the method of
30 publication is commercially reasonable if the creditor publishes the public
31 advertisement either in a local newspaper or with an appropriate Internet website.
32 The Internet site may be one operated by the newspaper or by any other person,
33 whether or not located in the jurisdiction where the mortgaged property is located.
34 The Internet site, however, must be one that has characteristics suggesting that
35 interested members of the public are likely to find and to read the posting. The
36 safe harbor exists, however, only if period of time for newspaper and Internet
37 advertisements, satisfies the standards in the act, which seek to ensure public
38 access to the advertisement for approximately one month preceding the date of
39 sale.

40 6. Subsection (c) adopts a bright-line rule with respect to legal descriptions
41 of the real property and recording information. The failure to include such
42 information does not make the public advertisement insufficient. This
43 information is seldom of importance to a person who reads a foreclosure
44 advertisement for the purpose of deciding whether the person has potential

1 interest. Anyone who develops a potential interest is highly likely to investigate
2 further before appearing at the sale to bid. That investigation may include title
3 information, which will disclose the legal description and recording references for
4 the mortgage and other recorded instruments in the chain of title, and typically
5 will include other information as well bearing on the property.
6

7 7. Subsection (d) authorizes the creditor to post the public advertisement
8 or a sign on the property, regardless of whether that right is reserved in the
9 mortgage. This changes the law in some states, in which posting foreclosure sale
10 signs at the property is mandatory.
11

12 **SECTION 405. NOTICE OF FORECLOSURE SALE.** A creditor shall send

13 each homeowner and obligor notice of the date, time, and place of a scheduled
14 foreclosure sale. Notice of sale must be sent by first-class mail to the last-known address
15 of each homeowner and obligor and a separate copy must be hand delivered to the
16 property address. Notice of sale must be mailed or delivered at least 30 days before the
17 sale date.

18 **Drafters' Note**

19 This section requires that the creditor notify the homeowner and any
20 obligors of the date, time, and place of the foreclosure sale. The section
21 requires a 30-day notice of the originally scheduled sale. One notice must
22 be mailed, and a second copy of the notice must be personally delivered to
23 the residence.
24

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

26 (a) A person conducting a foreclosure sale may postpone or cancel the sale for
27 any good faith reason. Announcement of a postponement must include the date, time, and
28 place of the rescheduled sale. If announcement of the postponement is made at the date,
29 time, and place advertised for the sale, a new public advertisement is not required under
30 Section 404 unless the sale is postponed for longer than 30 days after the date originally
31 advertised. If there is no such announcement of postponement, a new public
32 advertisement under Section 404 is required.

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

4 (c) If a foreclosure sale is cancelled, the creditor promptly shall notify each
5 homeowner and obligor in the manner provided in Section 405. The notice must include a
6 telephone number and electronic mail address from which a person may obtain additional
7 information concerning the creditor's plan with respect to the mortgaged property,
8 including any new sale date.

9 **Drafters' Notes**

10 1. In this section the terms "postponement" and "cancellation" are
11 mutually exclusive. A postponement means a decision not to hold a scheduled
12 sale coupled with the designation of a specific later date for the sale. A decision
13 not to hold a scheduled sale, with no new date then designated, is a cancellation,
14 even if the creditor intends to go forward with foreclosure and select or obtain a
15 new date.

16
17 2. Once a foreclosure sale is scheduled, the creditor may elect to postpone
18 or cancel the sale for any reason the person considers appropriate. A
19 postponement might also take place for other reasons, such as a judicial order or
20 an automatic stay in bankruptcy. Homeowners and obligors should receive
21 prompt notice of any postponement or cancellation. The rules of Section 405 do
22 not apply to notices of postponement or cancellation. Subsection (b) covers
23 notices of postponement and cancellation, requiring that the notice be
24 commercially reasonable under the facts and circumstances. A postponement may
25 be as short as one day. An oral announcement of the postponement, made at the
26 time and place of the originally scheduled sale, would suffice if the homeowner
27 and any obligor were present, in which event no written or additional notice
28 would be necessary.

29 **[SECTION 407. CONFIRMATION OF FORECLOSURE SALE.]**

30
31 (a) Within 30 days after an auction sale of mortgaged property pursuant to an order or
32 judgment of a court, the person conducting the sale shall file a report of sale with the court,
33 which must name the purchaser and describe the property, the amount bid, the amount paid to

1 date, the expenses of the sale, and any other material terms.

2 (b) The creditor may file a motion for confirmation of a foreclosure sale within one year
3 after the sale of the mortgaged property. The motion shall be served on all parties and the person
4 who conducted the sale.

5 (c) The court shall grant an order confirming the sale unless it finds:

6 (1) there was a material procedural irregularity such as the failure to give required
7 notices to parties;

8 (2) the terms of sale were unconscionable; or

9 (3) the sale was conducted fraudulently.

10 (d) If the court fails to confirm the sale and a party makes a motion to set aside the sale,
11 the court may order a resale of the property.

12 (e) A final and nonappealable order confirming the sale pursuant to subsection (c)
13 conclusively establishes compliance with this [act] in favor of a purchaser of the mortgaged
14 property in good faith for value. For purposes of this subsection, the foreclosing creditor is not a
15 good faith purchaser for value.

16 (f) Confirmation of the sale is not required. Unless the creditor files a motion for
17 confirmation of the sale, entry of the judgment of foreclosure concludes the judicial-foreclosure
18 proceeding, subject to law of this state governing finality and appeal.]

19 **Legislative Note:** *In some but not all states, the law of judicial foreclosure requires that the*
20 *court confirm the foreclosure sale. Although confirmation is mandatory, in the vast majority of*
21 *the cases, no objection to confirming the sale is made. This section provides for an optional*
22 *confirmation procedure, which allows the creditor the choice to seek confirmation or to treat the*
23 *sale as ending the proceeding, assuming that no other party makes a post-sale challenge to the*
24 *judgment or the sale. The creditor generally will seek confirmation only if it desires the*
25 *conclusive effect that a confirmed sale has for title passing to a bona fide purchaser or if it*
26 *anticipates that another party is likely to challenge the sale based upon alleged defects in post-*
27 *judgment procedures. This section is recommended only for states that presently require*
28 *confirmation of foreclosure sale in judicial-foreclosure proceedings.*

1 **Drafters' Note**

2 Subsection (e) provides that confirmation of the sale has conclusive effect on the
3 transfer of title to the mortgaged property to a bona fide purchaser. The
4 foreclosing creditor is not entitled to benefit from the conclusive effect of the sale.
5 If a defect results in avoidance of the sale, the creditor is protected by
6 reinstatement of the obligation and the mortgage. A creditor may not obtain
7 conclusive effect by purchasing the mortgaged property through an agent,
8 nominee, or affiliate, such as a subsidiary corporation.
9

10 **[ARTICLE] 5**

11 **ACCELERATED DISPOSITIONS**

12 **SECTION 501. NEGOTIATED TRANSFER OF MORTGAGED PROPERTY IN**
13
14 **SATISFACTION OF OBLIGATION.**

15 (a) A homeowner and creditor may negotiate a transfer of mortgaged property to the
16 creditor in full satisfaction of the obligation to the creditor secured by the mortgaged property if:

17 (1) The homeowner and creditor agree to the transfer in a record after default by
18 the homeowner or obligor;

19 (2) the agreement states it is made pursuant to this Section;

20 (3) notice of the proposed negotiated transfer is sent to the persons entitled to
21 notice under Section 502; and

22 (4) the person who sent the notice under Section 502 does not receive an objection
23 to the proposed transfer in a record from any person entitled to notice under Section 502 within
24 20 days after notice was sent to the person.
25

26 (b) If the homeowner or a person claiming under the homeowner is in possession of the
27 mortgaged property, the agreement must specify the date and time when the homeowner is to
28 surrender possession to the creditor. If there is any person entitled to notice under Section 502,
29 the homeowner is not obligated to surrender possession before the 20-day period described in

1 subsection (a)(3) has elapsed, regardless of the terms of the proposed transfer.

2 (c) This section does not authorize a transfer of the mortgaged property to the creditor in
3 partial satisfaction of the obligation it secures.

4 **Drafters' Notes**

5
6 1. This section authorizes a transfer from the homeowner to the creditor in
7 satisfaction of the debt or other obligation. In so doing, it provides a framework
8 for existing workout arrangements such as cash-for-keys agreements and deed-in-
9 lieu of foreclosure transactions. This section and the following two sections
10 provide for a safe harbor by specifying the effect of a transfer that meets the
11 requirements of this section. This section is based in part on UCC § 9-620, which
12 provides for the acceptance of personal property mortgaged property by a secured
13 party in full or partial satisfaction of a secured obligation. The important
14 innovations here are, first, to provide an expedited procedure to discharge junior
15 liens on the property without the need for a foreclosure sale; and second, to
16 resolve a number of collateral issues that flow from the expedited procedure, as
17 detailed in Section 504.

18
19 2. This section does not specify a minimum consideration to be received
20 by the homeowner in exchange for the homeowner's agreement to transfer the
21 mortgaged property in satisfaction of the obligation. The sole exception is that if
22 the homeowner is in possession and there are third parties entitled to notification
23 of the proposed transfer, the agreement may not require the homeowner to vacate
24 possession prior to the expiration of the period for notified persons to submit an
25 objection.

26
27 As a consequence, this section as now drafted confers a substantial benefit
28 on mortgage creditors in the form of a new mechanism for converting every 'deed
29 in lieu' transaction into an accelerated means of clearing title of junior
30 encumbrancers without the need for a more traditional judicial foreclosure. In
31 doing so, the section does not require any minimum benefit on homeowners, other
32 than the general statement of effects of such an agreement contained in Section
33 504 and the rights of possession noted in the preceding paragraph.

34
35 3. The second sentence of Section 501(b) contemplates a circumstance
36 where, for example, the lender and homeowner had agreed, in a common 'cash for
37 keys' agreement, that the homeowner would move within a short period in return
38 for a sum of money. If there are junior lienholders, however, the possibility exists
39 that there may be an objection to the proposed transfer, that the agreement would
40 not be approved, and that the benefits contemplated by a homeowner under
41 Section 504 from an early move-out would not be realized. This sentence makes
42 certain that the homeowner need not be displaced, even voluntarily, until the
43 parties knew whether there would be objection from a junior lienholder.

1 In those cases where there are no junior lienholders or other holders of
2 subordinate interests, it is likely that the parties would often choose to use a
3 traditional deed in lieu of foreclosure to accomplish their agreement, instead of
4 following this statutory negotiated transfer procedure; *see* section 504(f).
5

6 4. When there are multiple owners of the mortgaged property, all the
7 owners need to consent to a negotiated transfer. The act does not authorize a
8 forced transfer outside of foreclosure for a non-consenting co-owner.
9

10 **SECTION 502. NOTICE OF NEGOTIATED TRANSFER.**

11 (a) If a negotiated transfer under Section 501 is proposed when a judicial- foreclosure
12 proceeding is pending with respect to the mortgaged property, the homeowner and creditor must
13 request that the court send notice of the proposed negotiated transfer to all parties other than the
14 homeowner and creditor. The court promptly shall send the notice.

15 (b) If a negotiated transfer under Section 501 is proposed when a judicial-foreclosure
16 proceeding is not pending with respect to the mortgaged property, the creditor must send notice
17 of the proposed transfer to:

18 (1) any person from which the creditor has received, before the homeowner and
19 the creditor agreed to the proposed transfer, notice of a claimed interest in the mortgaged
20 property; and

21 (2) any person that, [10 days] before the homeowner and creditor agreed to the
22 proposed transfer, held a recorded interest in the mortgaged property that is subordinate to the
23 mortgage that is the subject of the proposed transfer.

24 **Drafters' Notes**

25
26 1. This section is based in part on UCC § 9-621, which provides for a
27 notification procedure for an acceptance of personal property by a secured party
28 in satisfaction of a secured obligation.
29

30 2. Subsection (a) provides for the court to notify parties to the foreclosure
31 proceeding of an agreement proposed by the homeowner and creditor for a
32 transfer in full satisfaction of the debt or other obligation. If there are no parties

1 to the action, other than the homeowner and the creditor, then there is no one to
2 notify. Holders of subordinate interests in the mortgaged property should have
3 been joined as necessary parties to the foreclosure action.
4

5 3. Subsection (b) provides for the creditor to notify persons who have
6 subordinate interests in the mortgaged property of an agreement proposed by the
7 homeowner and creditor for a transfer in full satisfaction of the obligation. Such
8 subordinate interest holders may have their rights terminated by the negotiated
9 transfer, and therefore they have the right to request protection pursuant to
10 Section 503.
11

12 **SECTION 503. HEARING ON OBJECTION TO NEGOTIATED TRANSFER.** 13

14 (a) If a judicial-foreclosure proceeding is pending with respect to mortgaged property
15 and the court receives an objection from a person holding an interest in the mortgaged property
16 which would be affected by a negotiated transfer under Section 504, the court promptly shall
17 schedule a hearing on the objection. The hearing must be held not later than [20] days after the
18 objection is received.

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

24 (c) If a hearing is held under subsection (a) and if the court finds, based on an appraisal or
25 other evidence, that that there is no equity in the mortgaged property available to satisfy the
26 interest of the objecting interest holder, the court shall overrule the objection. In that event, the
27 rights of the objecting party and all other interests subordinate to the interest of the creditor that
28 is a party to the proposed transfer under this section are extinguished effective on the date of the
29 court's determination.

30 (d) If a hearing is held under subsection (a) and if the court finds, based on an appraisal

1 or other evidence, that there is equity in the mortgaged property available to satisfy the interest
2 of the objecting interest holder, the court shall set a date not later than [30] days after the date of
3 the hearing by which the objecting party may tender to the creditor that is a party to the proposed
4 transfer a sum equal to the obligation owed to the creditor. If the objecting party tenders that
5 sum to the creditor within the time set by the court, the objecting party is entitled to the benefit of
6 the proposed negotiated transfer, and all interests subordinate to the interest of the objecting
7 creditor are extinguished effective on the date of tender. Otherwise, the rights of the objecting
8 party and all other interests subordinate to the interest of the creditor that is a party to the
9 proposed transfer under this section are extinguished, effective on the date set by the court by
10 which the tender could have been made.

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 a 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 that is subordinate to the mortgage held by the creditor; and

21 (4) terminates any other subordinate interest that is not protected from termination
22 by other law.

23 (b) A subordinate interest is discharged or terminated under subsection (a), even

1 in the event of noncompliance with the requirements of this [act]. A creditor that fails to
2 comply with the requirements of this [act] is liable for damages in the amount of any loss
3 caused by its failure to comply.

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

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

11 (e) Transfer of the mortgaged property pursuant to Section 501 terminates all rights of the
12 homeowner and other persons to redeem the property.

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

16 (g) Nothing in this [article] affects the rights of a person 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) of subsection (a) indicate the effects of a
7 transfer on various property rights and interests. Under paragraph (2), the creditor
8 acquires “all of the homeowner’s rights in the mortgaged property.” Under
9 paragraph (3), all junior encumbrances are discharged. Paragraph (4) provides for
10 the termination of other subordinate interests. Under existing law, a deed-in-lieu
11 of foreclosure accepted by a creditor does not terminate subordinate mortgages,
12 subordinate liens, or other subordinate property rights. This Act changes that
13 result by authorizing a transfer in full satisfaction of the obligation, which
14 terminates junior interests.

15
16 3. Subsection (a)(4) terminates subordinate interests, but with a savings
17 clause for a subordinate “protected from termination by other law.” The clearest
18 examples are the common provisions in state statutes providing that various kinds
19 of residential leasehold interests are not automatically terminated by a
20 foreclosure, but may only be terminated by the creditor when they would be
21 terminable under the terms of the lease itself in the absence of foreclosure. This
22 act does not overturn the results under those statutes.

23
24 4. Subsection (c) specifies that the status of the homeowner who continues
25 to occupy the property after entering into an agreement to transfer the property to
26 the creditor in full satisfaction of the obligation is that of a licensee. The parties’
27 agreement and other state law determine the rights and obligations of the parties
28 as licensor and licensee.

29
30 5. Subsection (f) authorizes homeowners and creditors to enter into any
31 other type of agreement that they might desire, but no such agreement –
32 presumably including a traditional ‘deed in lieu’ arrangement – would confer the
33 benefits of Section 504 unless the agreement expressly provided that it was made
34 pursuant to Section 501.

35
36 6. The act does not require notice of the proposed negotiated transfer to a
37 senior creditor because the interest of the senior creditor will not be affected by
38 that transfer. It may well be that a negotiated transfer would result in a violation
39 of a ‘due on sale’ clause in the senior mortgage, but whether or not such a
40 violation results would not be affected by notice to a senior creditor, and the act
41 should not suggest a contrary result.

42
43 Moreover, a practical concern for the junior creditor and borrower may be
44 that after receiving notice, the senior creditor may intervene in the hearing and
45 seek to impose a charging order on any consideration offered by the junior
46 creditor in connection with the negotiated transfer, a tactic that might jeopardize

1 the entire transfer. A junior creditor may well be willing to satisfy the senior debt
2 but more eager to quickly clear subordinate liens; no valid purpose would be
3 served by requiring more notice to senior lien holders than would be required in a
4 conventional foreclosure.

5
6 **SECTION 505. ABANDONED PROPERTY.**

7 (a) A governmental agency's determination, finding, or order that mortgaged property is
8 abandoned, or the presence of not fewer than three of the following conditions, establishes a
9 presumption that the property is abandoned property:

10 (1) One or more doors to the property are boarded up, closed off, smashed
11 through, broken off, unhinged, or continuously unlocked; multiple windows are boarded up or
12 closed off; or multiple window panes are broken.

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

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

16 (4) A governmental entity has issued an order or finding declaring that the
17 property is unfit for occupancy or constitutes a serious threat to public health or safety.

18 (5) A creditor has changed the locks or otherwise secured the property and, for at
19 least 30 days after the changing of the locks, the homeowner has not contacted the creditor to
20 request entrance to the property.

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

23 (7) A law enforcement agency has received at least two separate reports of
24 trespass, vandalism or other illegal acts being committed on the property in the 180 days before
25 determination of abandonment is made.

26 (8) The homeowner has died and there is no evidence that a survivor or an heir of

1 the homeowner is in actual possession of the property.

2 (b) If a person executes an affidavit attesting to the presence of conditions described in
3 subsection (a) or to other facts bearing on abandonment, the affidavit shall be signed by and
4 based on personal knowledge of the affiant and shall state the basis for that personal knowledge.
5 Photographic or other documentary evidence that demonstrates the supporting facts shall be
6 attached to the affidavit. A party or person may submit multiple affidavits as evidence of
7 abandonment. An affidavit may be given by any person having personal knowledge, including a
8 contractor, government employee, or neighbor of the mortgaged property.

9 **Drafters' Notes**

10
11 1. This Act authorizes an expedited foreclosure procedure for abandoned
12 properties for both judicial foreclosure and for nonjudicial foreclosures. An
13 expedited procedure is appropriate for two reasons. First, the homeowner is no
14 longer making a valuable economic use of the property to provide shelter for the
15 homeowner or the homeowner's family or someone claiming under the
16 homeowner, such as a tenant. A foreclosure sale will not result in a possessor
17 being forced to relocate to other housing. Second, properties that are facing
18 foreclosure and that are vacant have significant negative impacts on
19 neighborhoods and the surrounding communities. Vacancies reduce the market
20 values of neighboring properties. Neighborhood crime increases. The vacant
21 properties tend to suffer from lack of repair and maintenance, creating public
22 health risks, including infestations by vermin, mosquitoes, and other insects.
23 There are fiscal impacts on local governments, who find property taxes on vacant
24 properties often become delinquent; yet the governments are faced with added
25 expenses to provide essential services to blighted neighborhoods, such as police
26 and fire protection. By providing for an expedited foreclosure procedure, this Act
27 seeks to return abandoned properties to the stock of occupied, well-maintained
28 housing as soon as reasonably possible.

29 2. The conditions giving rise to prima facie evidence of abandonment set
30 forth in Subsection (a) through (a) closely track the criteria set forth in Ind. Code
31 § 32-30-10.6-5(a) (effective March 16, 2012). A government agency's issuance
32 of a determination that the mortgaged property is abandoned by itself constitutes
33 prima facie evidence of abandonment. In some localities, after such a
34 determination the government will mark the property as abandoned. The
35 government's determination, finding, or order might not use the word
36 "abandoned"; it might, for example, refer to the property as vacant. Of course, the
37 homeowner or another person has the right to challenge the correctness of the
38 governmental determination.

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

11
12 3. Mortgaged property often becomes vacant, both under standard
13 mortgage and reverse mortgage transactions, when the homeowner dies. Under
14 Subsection (a)(8) proof of death of the homeowner is one of the conditions that
15 may give rise to a presumption that the mortgaged property is abandoned,
16 provided that there is no evidence that an heir or other beneficiary of the
17 homeowner's estate is in actual possession. Of course if there are multiple
18 homeowners, this condition is met only if all the homeowners have died.

19
20 **SECTION 506. DETERMINATION OF ABANDONMENT IN JUDICIAL**

21 **FORECLOSURE.**

22 (a) In a judicial-foreclosure proceeding, a party or a governmental subdivision in which
23 the mortgaged property is located may make a motion for a determination that the property is
24 abandoned property. If the property is located in a common-interest community, the association
25 that governs that community may intervene in the proceeding.

26 (b) The party filing the motion must send separately to each homeowner and obligor a
27 notice that provides the following:

28 (1) a copy of the motion;

29 (2) a copy of any affidavit attesting to abandonment, or a government agency's
30 determination, finding, or order that the property is abandoned, that the party will submit as
31 evidence;

32 (3) a description of the consequences that will follow from a determination of
33 abandonment; and

1 (4) a statement that the recipient may contact the [applicable government official]
2 to obtain further information or object to the proposed determination of abandonment.

3 (c) The notice required by subsection (b) may be combined with the notice required by
4 Section 201.

5 (d) In a judicial-foreclosure proceeding, the party filing the motion shall personally serve,
6 or make two attempts to personally serve, the notice described in subsection (b) on a homeowner
7 at the mortgaged property, which attempts must be at least 72 hours apart, and during different
8 times of the day, either before noon, between noon and 6 P.M., or between 6 P.M. and 10 P.M.
9 Posting a written notice on the mortgaged property is not required.

10 (e) When a motion is filed pursuant to subsection (a), the court promptly shall schedule a
11 hearing on the motion to be held not be less than [15] nor more than [30] days after the filing of
12 the motion. The court shall send notice of the hearing and a copy of the motion to all parties.

13 (f) At the hearing, if no appearance is made to oppose the relief sought, and evidence is
14 presented supporting the allegations in the motion, the court shall enter an order finding that the
15 mortgaged property is abandoned property.

16 **Drafters' Note**

17 Subsections (e) and (f) are based in substantial part on Minn. Stat. §
18 582.032, which provides for expedited foreclosure for abandoned homes.
19 Minnesota generally provides a statutory right of redemption (post-foreclosure-
20 sale) of six months or one year, which is reduced to five weeks when the lender
21 uses the statutory procedure for abandoned property; this section does not include
22 a comparable right of redemption.
23

24 **SECTION 507. DETERMINATION OF ABANDONMENT IN NONJUDICIAL** 25 **FORECLOSURE.**

26 (a) In a nonjudicial-foreclosure proceeding, a creditor or servicer or a governmental
27 subdivision in which the mortgaged property is located may submit a request to [government

1 official] for a determination that the mortgaged property is abandoned property. The request
2 must be accompanied by an affidavit attesting to facts indicating abandonment or a governmental
3 agency's determination, finding, or order that the mortgaged property is abandoned.

4 (b) The person seeking a determination that the mortgaged property is abandoned
5 property must send separately to each homeowner and obligor a notice that provides the
6 following:

7 (1) a copy of the request;

8 (2) a copy of an affidavit attesting to abandonment, or a government agency's
9 determination, finding, or order, that that the property is abandoned;

10 (3) a description of the consequences that will follow from a determination of
11 abandonment;

12 (4) a statement that the recipient may contact the [government official] to obtain
13 further information; and

14 (5) a statement that the recipient has the right to object to the proposed
15 determination of abandonment by sending a notification of objection to the [government
16 official], which must be received within 30 days after the notice was sent to the recipient, in
17 which event the [government official] will not issue a determination of abandonment.

18 (c) The notice required by subsection (b) may be combined with the notice required by
19 Section 201.

20 (d) The person seeking a determination that the mortgaged property is abandoned
21 property shall personally serve, or make two attempts to personally serve, the notice described in
22 subsection b) on a homeowner at the mortgaged property, which attempts must be at least 72
23 hours apart, and during different times of the day, either before noon, between noon and 6 P.M.,

1 or between 6 P.M. and 10 P.M. Posting a written notice on the mortgaged property is not
2 required.

3 (e) The [government official] may issue a determination in a record that the property is
4 abandoned property no sooner than 30 days after the sending of notices under subsection (b) if:

5 (1) the [government official] has received evidence that notices under subsection
6 (b) were sent to each homeowner and obligor;

7 (2) the [government official] has not received a notification of objection to the
8 proposed determination from a person entitled to notice under subsection (b) within 30 days after
9 notice was sent to that person;

10 (3) the [government official] has received an affidavit attesting to facts indicating
11 abandonment or a governmental agency's determination, finding, or order that the mortgaged
12 property is abandoned; and

13 (4) the [government official] has personally inspected the property.

14 (f) The [government official] shall send the determination of abandonment to the creditor
15 and to each homeowner and obligor.

16 (g) The determination of abandonment or the refusal of the [government official] to issue
17 a determination is subject to de novo judicial review.

18 **Drafters' Notes**

19
20 1. In a nonjudicial foreclosure proceeding, the creditor may treat the
21 mortgaged property as abandoned only by submitting evidence of abandonment to
22 an independent third party. Subsection (a) provides for the submission of evidence
23 to a person, who as part of the decision making process must personally visit the
24 property. Normally jurisdictions enacting this Act will designate an employee of
25 local government, such as a building inspector, who is responsible for evaluating
26 the physical condition of dwelling units.

27
28 2. Judicial review of the decision is available to any interested person.
29 Subsection (g) does not specify the nature of that action, which in many

1 jurisdictions will be a mandamus action.

2
3 **SECTION 508. WITHDRAWAL OF ABANDONED PROPERTY PROCEEDING.**

4 In a judicial-foreclosure proceeding, after a party has filed a motion for a determination
5 that the property is abandoned property, the motion may be withdrawn only by leave of the court.
6 In a nonjudicial-foreclosure proceeding, after a person has filed a request for a determination that
7 the property is abandoned property, the request may be withdrawn only by the consent of the
8 person submitting the request and each homeowner and obligor.

9 **SECTION 509. FORECLOSURE OF ABANDONED PROPERTY.**

10 (a) In a judicial-foreclosure proceeding, if a court determines under Section 506 that
11 mortgaged property is abandoned property and the court has previously rendered or at the same
12 time renders a judgment of foreclosure, the court shall:

13 (1) order a public sale of the abandoned property not earlier than [30] days but not
14 later than [45] days after entry of the order; or

15 (2) upon a motion of the creditor, if the court, based on an appraisal or other
16 evidence, determines that there is no equity in the mortgaged property available to satisfy the
17 interests of junior creditors, the court shall order a transfer of the abandoned property directly to
18 the foreclosing creditor without public sale and, upon the transfer, the rights of all interests
19 subordinate to the interest of the foreclosing creditor are extinguished.

20 (b) In a nonjudicial-foreclosure proceeding, on the issuance of a determination under
21 Section 507 that the mortgaged property is abandoned property, a creditor may conduct an
22 expedited public sale of the property. The sale may take place not earlier than [30] days but not
23 later than [60] days after issuance of the determination, unless an action for judicial review of the
24 determination is pending. The creditor or servicer shall comply with the notice requirements of

1 Section 405, except that [15]-days advance notice of the sale is sufficient.

2 (c) After a judicial order or a determination in a record finding that the mortgaged
3 property is abandoned property under Section 506 or 507, the creditor shall take necessary and
4 appropriate action to cause the foreclosure sale or transfer of the mortgaged property to the
5 creditor to be completed within 120 days unless the creditor releases its mortgage and files the
6 release in the [land records]. Unless the creditor releases its mortgage, the creditor may not seek
7 to end its obligation to maintain the property under Section 510 by dismissing, terminating, or
8 suspending the foreclosure proceeding.

9 (d) Upon a foreclosure sale or transfer of the mortgaged property to the creditor pursuant
10 to subsection (a) or (b), any personal property remaining on the abandoned property shall be
11 deemed to have been abandoned by the owner of such personal property and may be disposed of
12 by the purchaser or transferee of the property [60] days after the sale or transfer. Neither the
13 creditor nor or purchaser is liable to the homeowner or obligor for disposal of personal property
14 pursuant to this subsection.

15 (e) The completion of a foreclosure sale or transfer of the mortgaged property to the
16 creditor pursuant to subsection (a) or (b) terminates the rights of the homeowner and any other
17 person to redeem the property under law of this state other than this [act].

18 **Drafters' Notes**

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

27
28 2. This Section does not authorize a disposition of abandoned property
29 other than public sale, but other dispositions are available under other sections of

1 this Act. For example, the homeowner and creditor may agree to a negotiated
2 transfer to the creditor in lieu of foreclosure pursuant to Sections 501 to 504 [cash
3 for keys agreement].
4

5 3. Once a creditor decides to take advantage of the expedited foreclosure
6 procedure allowed by this Section, there is a public interest in ensuring that the
7 property becomes occupied as soon as reasonably possible. For this reason
8 subsection (c) does not allow the creditor to suspend indefinitely its efforts to
9 consummate the foreclosure. There may be exceptional circumstances in which it
10 is not feasible to hold the foreclosure sale within 60 days of the judicial order or
11 written determination finding the property to be abandoned, as required by
12 subsection (a) and (b).
13

14 Subsection (c) poses the substantial question of what consequences should
15 flow from the failure of the creditor to comply with its requirements. On the one
16 hand, it would clearly be inappropriate to impose an obligation on a creditor to
17 repair the property subject to the mortgage before the creditor has taken
18 possession or an official determination is made that the property is abandoned.
19 Certainly, the lending community would object to a statutory duty to maintain
20 property on which it holds a mortgage in those instances where the lender would
21 prefer to release its mortgage and forego any interest in that property.
22

23 On the other hand, the consequences of a creditor's failure to either
24 commence and complete a foreclosure action or to release its mortgage, on other
25 stakeholders in the abandoned property – including the fee owner, the
26 municipality and neighbors in which the abandoned property is located, and
27 where appropriate, a homeowners association - are very real. The act as drafted
28 resolves these conflicting policies by offering the lender a choice of how it wishes
29 to proceed.
30

31 4. In states that afford the homeowner and other persons a statutory right
32 of redemption after completion of a foreclosure sale, subsection (d) serves to
33 terminate those redemption rights.
34

35 **SECTION 510. MAINTENANCE OF ABANDONED PROPERTY.**

36 (a) In this section, “maintain” means to:

- 37 (1) care for the yard and exterior of any building on abandoned property,
38 including removing excessive foliage growth that diminishes the value of surrounding properties;
39 (2) prevent trespassers from remaining on the property;
40 (3) prevent mosquito larvae from growing in standing water on the property; and

1 (4) take any other actions needed to prevent conditions on the property that create
2 a public or private nuisance.

3 (b) If a creditor is a party in a judicial-foreclosure proceeding, the creditor shall maintain
4 the property beginning when the court renders an order determining that the mortgaged property
5 is abandoned property pursuant to Section 506.

6 (c) If a creditor commences a nonjudicial-foreclosure proceeding, the creditor shall
7 maintain abandoned property beginning when a determination in a record that the mortgaged
8 property is abandoned property is issued pursuant to Section 507.

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

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

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

22 (g) A person that enters abandoned property for a purpose described in subsection (f) is
23 not liable to the homeowner for trespass or for damage to the property resulting from a cause

1 other than the person's negligence or willful misconduct.

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

4 (1) a governmental subdivision that has jurisdiction of the mortgaged property;
5 [or]

6 (2) a homeowners association, condominium association, or cooperative
7 association, if the property is subject to the rules of the association.[]; or

8 (3) a community development corporation serving the area where the mortgage
9 property is located.]

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

15 **Drafters' Notes**

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

29
30 2. Subsection (e) defines the scope of the creditor's obligation to maintain
31 abandoned property. The focus is on the outward appearance of the property,
32 including yards and other exterior spaces, and other conditions that are likely to

1 have significant impacts on the neighborhood, such as interior spaces frequented
2 by squatters or persons engaged in criminal activities. This subsection is modeled
3 closely on Cal. Civ. § 2929.3(b), enacted in 2008.
4

5 3. Subsection (f) grants a license to the creditor and to its agents or
6 contractors to enter abandoned property for the purpose of inspection, repair, and
7 maintenance, regardless of whether that right is reserved in the mortgage.
8 Similarly, this subsection authorizes the addition of the creditor's reasonable
9 maintenance expenses under this section to the debt secured by the mortgage,
10 regardless of whether the mortgage contains a provision to that effect.
11

12 4. Subsection (h) provides for enforcement by the local government that
13 has jurisdiction over the abandoned property. When the property is located in a
14 common-interest community, it also provides standing for the association as a
15 means to protect neighboring property owners whose interests are likely to be
16 harmed by the creditor's failure to maintain the property. In conferring standing
17 both to the local government and to owners' associations, this subsection follows
18 the approach taken by N.Y. Real Prop. Acts. § 1307(3), enacted in 2009. This
19 subsection does not grant a direct enforcement right to neighbors. If negatively
20 impacted, such persons may have a remedy under other laws, such as public or
21 private nuisance.
22

23 5. At common law a creditor who takes possession of mortgaged property
24 prior to the completion of foreclosure becomes a "mortgagee in possession," who
25 by virtue thereof undertakes a number of obligations to the homeowner with
26 respect to maintenance and care of the property. Subsection (i) expressly
27 provides that a creditor who enters the property for the purpose of complying with
28 its obligations under this Section does not assume the liabilities of a mortgagee in
29 possession.
30

31 **[ARTICLE] 6**

32 **REMEDIES**

33 **SECTION 601. EFFECT OF VIOLATION.**

34
35 (a) In a judicial foreclosure proceeding, if a creditor or servicer is shown to have
36 committed a material violation of this [act], the court may dismiss the action, stay the action on
37 appropriate terms and conditions or impose other appropriate sanctions until the violation is
38 cured. Dismissal must be without prejudice unless the court determines that a new foreclosure
39 action should be barred because of egregious misconduct by the creditor or servicer or other

1 good cause.

2 (b) In a non judicial-foreclosure proceeding, a homeowner or obligor may initiate an
3 action to enjoin or restrain the foreclosure on the grounds that a creditor or servicer committed a
4 material violation of this Act. If the court finds that a material violation of this [act] occurred, the
5 court shall nevertheless allow foreclosure to continue after the violation is cured, unless the court
6 determines that continuation of the foreclosure action would unfairly burden the homeowner.

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

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

13 (e) In addition to the damages recoverable under subsections (d), a homeowner or obligor
14 may recover, as the court may allow, statutory damages not exceeding \$[15,000] in the case of a
15 pattern or practice of noncompliance. In determining whether to award statutory damages and the
16 amount of statutory damages under this subsection, the court shall consider, among other
17 relevant factors:

18 (1) the frequency and persistence of noncompliance [in dealing with the
19 homeowner][in its business practices] by the creditor or servicer;

20 (2) the nature of the noncompliance, and

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

22 (f) An action for damages brought under this section must be commenced not later than
23 one year after the violation on which it is based.

1 (g) In opposing the imposition or amount of statutory damages for violations of the act
2 established by the obligor or homeowner, the creditor or servicer may show that:

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

5 (2) before the action was brought, the creditor or servicer discovered and cured
6 the violation.

7 **Comment**

8
9 1. The statutory damages for individuals under subsection (e) require a
10 pattern or practice of noncompliance, similar to the federal RESPA statute's
11 provision for statutory damages, 12 U.S.C. §2605(f)
12

13 2. Dismissal with prejudice is a sanction of last resort, and should be
14 reserved for cases of very serious noncompliance by the creditor or servicer.
15 Dismissal with prejudice may be warranted, for example, when there have been
16 repeated and serious violations by the creditor. E.g. Bank of New York v.
17 Richardson, 2011 Me 38, 15 A.3d 756 (2011) (creditor failed to appear at three
18 successive mediation conferences in a case where the homeowner asserted
19 significant consumer law counterclaims); U.S. Bank N.A. v. Solorin 934
20 N.Y.S.2d 655 (2012)(dismissal after 16-month delay in filing required
21 certification of accuracy of supporting documents).
22

23 3. Actual damages incurred by a homeowner or obligor under this section
24 may include damages for emotional distress. Whether or not the homeowner may
25 claim that damages caused by a servicer are chargeable to the creditor who
26 retained the servicer under theories of agency or employer/employee law is not
27 determined by this act but by other law.
28

29 4. Under subsection (a), before confirmation of the foreclosure sale, the
30 homeowner may raise a material violation of the statute - for example, a
31 materially inaccurate notice of the amounts needed to cure a default - as a basis
32 for asking the court to prevent the foreclosure sale (or confirmation), until the
33 violation has been corrected and remedied. If the creditor can cure the violation
34 in a timely way so that full compliance is achieved, it would then be appropriate
35 under this section for the foreclosure may proceed.
36

37 However, after a foreclosure sale, under established principles of real
38 estate law, unless the homeowner under state law has an independent right of
39 redemption, a bona fide sale purchaser is entitled to rely on the conclusive effect
40 of the sale, and the homeowner's only remedy for violations of the statute would

1 be to seek damages from the foreclosing creditor or any other remedy allowed
2 under state or federal law; *see* Section 602.

3
4 **SECTION 602. DEFENSE OR REMEDY UNDER OTHER LAW.** Nothing in this

5 [act] displaces any defense or remedy a homeowner or obligor may have under federal law or
6 law of this state other than this [act].

7 **Drafter's Note**

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

22
23 **SECTION 603. PROCEDURE FOR ASSERTING DEFENSE IN NONJUDICIAL**
24 **FORECLOSURE.**

25 (a) A homeowner or obligor may bring an action against a creditor or servicer asserting a
26 defense to a nonjudicial foreclosure. [An action to enjoin a foreclosure sale must be brought
27 before the sale.]

28 (b) In an action under this section, if the court determines that a defense to the nonjudicial
29 foreclosure exists, the court may render an order that is just and equitable under the
30 circumstances, including an award of any remedy provided in Section 601.

31 **Drafter's Note**

32 The bracketed language in subsection (a) complements the 1-year limitations
33 period in section 601(f) for damage actions.

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

SECTION 606. EFFECT OF THE HOLDER IN DUE COURSE RULE.

(a) Notwithstanding [insert reference to State UCC 3-305] and any agreement waiving claims or defenses by an obligor or homeowner, a creditor who is a holder in due course or who seeks to enforce a waiver of claims or defenses is subject to the claims and defenses described in subsection (b) that the obligor or homeowner could assert against the initial holder of the obligation.

(b) An obligor or homeowner may assert against a holder in due course a claim or defense not otherwise subject to a statute of limitations or other preclusion that is based on fraud, material misrepresentation, or fundamental breach of promise in connection with the original loan transaction.

Alternative A

In this alternative, the obligor or homeowner may assert as either a defense to a foreclosure or in a declaratory judgment, any claim or defense she may

1 **have under subsection (b), in addition to whatever rights she may have under**
2 **UCC3-305. However, this right is limited to a period of 3 years from the date**
3 **of the original transaction or, if longer in the case of an interest rate**
4 **adjustment or prepayment fee, an additional one year after the date of the**
5 **adjustment. Further, the maximum amount of borrower's recovery in that**
6 **case would be the balance owing on the note.**

7
8 (c) If the creditor is a holder in due course under [insert reference to State UCC 3-305] or
9 seeks to enforce a waiver of claims and defenses, an obligor or homeowner may:

10 (1) assert, in addition to the defenses otherwise available under [insert reference
11 to State UCC 3-305], any defense against the holder in due course described in subsection (b); or

12 (2) bring a declaratory judgment action to establish any claim against the holder
13 in due course described in subsection (b); provided, that no such claim or defense may be made
14 or asserted after the later of three years after the execution of the obligation being enforced or, if
15 the claim or defense relates to an adjustment of the interest rate on the obligation or a
16 prepayment fee, one year after the creditor sends notice of an adjustment or fee.

17 (d) If an obligor or homeowner establishes a claim or defense under this section, relief
18 shall be limited to reformation of the obligation and recoupment. Any recoupment shall be in the
19 amount of the economic loss caused by the fraud, misrepresentation, or fundamental breach of
20 promise and may not exceed the amount owed on the obligation at the time of judgment. The
21 court may determine whether the effect of recoupment is to cure the default or reinstate the
22 obligation pursuant to Section 201. Any recoupment shall reduce both what the creditor is
23 entitled to collect in foreclosure and what the creditor is entitled to collect by other processes,
24 including a separate action to collect the obligation.

25 **Alternative B**

26 **Under this alternative, there is no time limit on when an obligor or**
27 **homeowner may raise a defense in a foreclosure action. However, no**
28 **declaratory judgment is authorized under this alternative, and therefore no**

relief is available to the borrower unless the creditor initiates foreclosure after the borrower's default. This alternative imposes the same limits on the economic recovery attributable to the defense as in Alternative A.

(c) If the creditor is a holder in due course under [insert reference to State UCC 3-305] or seeks to enforce a waiver of claims and defenses, an obligor or homeowner may assert as a defense to the foreclosure, in addition to the defenses otherwise available under [insert reference to State UCC 3-305], any defense against the holder in due course described in subsection (b).

(d) If an obligor or homeowner establishes a defense under this section, relief shall be limited to reformation of the obligation and recoupment. Any recoupment shall be in the amount of the economic loss caused by the fraud, misrepresentation, or fundamental breach of promise and may not exceed the amount owed on the obligation at the time of judgment. The court may determine whether the effect of recoupment is to cure the default or reinstate the obligation pursuant to Section 201. Any recoupment shall reduce both what the creditor is entitled to collect in foreclosure and what the creditor is entitled to collect by other processes, including a separate action to collect the obligation.

Alternative C

Under this alternative, as in Alternative B, there is no time limit on when an obligor or homeowner may raise a defense in a foreclosure action, and the same prohibition on affirmative claims applies. However, unlike Alternative B, any relief is limited to protection from a deficiency judgment.

(c) If the creditor is a holder in due course under [insert reference to State UCC 3-305] or seeks to enforce a waiver of claims and defenses, an obligor or homeowner may assert as a defense to the foreclosure, in addition to the defenses otherwise available under [insert reference to State UCC 3-305], any defense against the holder in due course described in subsection (b).

(d) If an obligor or homeowner establishes a defense under this section, the creditor shall be entitled to foreclose as if the defense had not been established, but the creditor may not obtain

1 a deficiency judgment in connection with or after the foreclosure.

2 **End of Alternatives**

3 (f) This section applies to obligations incurred after the effective date of this [act].

4 **Reporters' Notes**

5
6 1. This section represents a middle-ground position between preservation
7 of the status quo and complete abrogation of the HDC doctrine, along the lines of
8 the Federal Trade Commission Regulation (16 CFR Part 433) that protects
9 consumers who finance the purchase of goods or services. It presents three
10 alternative 'compromise' positions for discussion.

11
12 2. First, in all instances, this section: (1) caps the liability of the holder in
13 due course to the outstanding loan balance, (2) applies only prospectively, and (3)
14 preserves only claims and defenses based on fraud, material misrepresentation, or
15 fundamental breach of promise in connection with the original loan transaction.

16
17 3. Further, under Alternative A, the borrower may bring a declaratory
18 judgment to affirmatively assert one of these permitted claims, without the need
19 to raise them only in a foreclosure action. However, in Alternative A, the
20 borrower's right to assert either a claim or a defense is limited to a three year
21 statute of limitation, with another year allowed in the case of an interest rate
22 adjustment.

23
24 Under both Alternatives B and C, the borrower is limited to raising the claims
25 granted by subsection (b) only as defenses in a foreclosure action rather than
26 providing the borrower the right to bring an affirmative action against the holder.
27 In return, those defenses may be raised whenever a foreclosure action is brought,
28 and is not subject to the three year statute of limitations in Alternative A.
29 Finally, under Alternative C, the only relief available to a successful borrower is
30 relief from a deficiency judgment.

31
32 Under both Alternatives A and B, the relief granted to the borrower is framed in
33 terms of recoupment or reduction in the balance of the outstanding loan, rather
34 than requiring the holder to pay funds to the borrower. For example, if the obligor
35 is personally liable to pay the obligation, recoupment under this section reduces
36 what the creditor may collect outside of foreclosure, including by way of a
37 deficiency judgment if foreclosure proceeds to a sale. In this respect, this section
38 follows the broad approach taken by the FTC regulation. By making the creditor
39 "subject to" claims and defenses, those claims and defenses, when proven, offset
40 the amount due on the obligation.
41

1 [ARTICLE] 7

2
3 MISCELLANEOUS PROVISIONS

4 SECTION 701. PRE-EFFECTIVE DATE TRANSACTIONS.

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

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

8 **Drafters' Note**

9
10 This Act applies to the foreclosure of mortgages created before the effective date
11 of this Act, unless the creditor has taken action to foreclose before the effective
12 date.

13
14 SECTION 702. REPEALER.

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

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

17 (b) In addition to the statutes specifically repealed under subsection (a), in the event of a
18 conflict between the provisions of this [act] and other law of this state, this [act] prevails."

19 **Drafters' Notes**

20
21 1. Subsection (a) of this section should be separately prepared for each
22 state. In each state it is necessary to pay careful attention to how this Act is to be
23 blended with existing state law. The statutes to be specifically repealed will
24 include statutes relating to notices of default, intent to accelerate, and the right to
25 cure to be sent to homeowners; notices and standards for mediation and other
26 types of facilitation; determination of who has the right to commence foreclosure;
27 and advertisement and notices of foreclosure sales; confirmation of sales. Given
28 the scope of this Act, which is limited to residential foreclosures, care should be
29 taken not to repeal statutes to the extent they should continue to apply to non-
30 residential foreclosures. In some instances, instead of repeal it may be useful to
31 amend other state statutes to limit their scope to foreclosures that are not within
32 the scope of this Act.

33
34 2. At the same time, this Act was drafted with the expectation that existing
35 state foreclosure procedures would remain in place. This Act is not intended to
36 displace all existing foreclosure laws in each state, but rather to be an overlay on

1 existing law. For example, and most fundamentally, the Act does not anticipate
2 or provide that a state employ a judicial foreclosure process when the customary
3 practice is to foreclose under a power of sale procedure, nor does the Act
4 contemplate that a state should enact a non-judicial foreclosure process in the
5 absence of existing state laws. It is for that reason that the legislative drafters in
6 each state should carefully consider how best to integrate the provisions of the
7 Act with existing state laws governing the foreclosure process.
8

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

16 **SECTION 703. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

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

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

25 **SECTION 705. EFFECTIVE DATE.** This [act] takes effect