DRAFTING COMMITTEE ON HOME FORECLOSURE PROCEDURES ACT
NOVEMBER 15-16, 2013

Washington Court Hotel
525 New Jersey Avenue, Washington, Dc

COMPILATION OF RELEVANT MATERIALS

1. MEMORANDUM FROM ELIZABETH KENT RE: FACILITATION

TO: **Bill Breetz**

FROM: **Elizabeth Kent**

DATE: **July 10, 2013**

RE: **Dispute Resolution Article of Home Foreclosure Procedures Act**

Thank you for meeting with me on Monday and asking me to put my thoughts into writing. I've tried to capture them in the points below and offer suggestions for change.

ARTICLE 1

Facilitation. The draft uses "facilitation" to describe the dispute resolution process for homeowners and lenders. However, "facilitation" already has a meaning for ADR practitioners that is different from the process described in the act. It would be confusing to use the term in a different way.

Please consider using "dispute resolution" instead. "Dispute resolution" is a general term that does not have a precise meaning as facilitation. Hawaii used "dispute resolution" for its non-judicial foreclosure program statute, recognizing that the neutrals may have duties not customarily performed by mediators, such as make determinations of noncompliance with program rules.

Suggested changes:

SECTION 102. DEFINITIONS.

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

(5)"Dispute resolution" means a process in which a neutral facilitates communication and negotiation between a creditor and a homeowner to assist them in reaching a voluntary agreement regarding resolution of their foreclosure action. (based on the definition in the Uniform Mediation Act)

(6) "~~Facilitation~~ Dispute resolution" means [the administrative or judicial agency designated by the state to supervise foreclosure ~~facilitation~~ dispute resolution.

Missing Definitions. Some important terms were used in the draft were not defined in Section 102. Suggested additions:

"Neutral" means an individual who conducts a dispute resolution process. (based on the UMA definition)

"Housing counselor" means a housing counseling agency that has received approval from the United States Department of Housing and Urban Development to provide housing counseling

services pursuant to section 106(a) (2) of the Housing and Urban Development Act of 1968, title 12 United States Code section 1701x, as the agency appears on the United States Department of Housing and Urban Development website.

ARTICLE 3

It appears that the Committee wants to create an "enabling statute" that would create minimum requirements rather than specifying all the elements of the program. This makes sense because the states differ and a cookie cutter approach won't work. However, it presents numerous challenges, some of which are listed below along with other concerns.

Best practices. Listing the best practices in the drafters' notes is probably not the most effective way to make sure they will be included in the final rules and procedures adopted by the programs. One of the most difficult challenges for a new program will be creating rules and the list right now is very general. It might be more helpful to create a list of rules and procedures that states could choose from as opposed to a list of principles and that way you can be sure that the principles are incorporated into the rules. Additionally, getting administrative rules enacted may be time consuming, so it would provide significant assistance to dispute resolution agency staff there were rules to choose from.

Policy determinations. There are suggestions that the Committee wanted to make some policy determinations such as requiring at least one in person meeting (noted in the definition but not in the text of Article 3) and requiring the neutral to make a determination of good faith, but those are not clearly stated in the text. Also unclear is who the responsibility falls on to provide a notice of the opportunity to participate in a dispute resolution process, the timing for sending the notice and responding to it, and whether this is an opt in or opt out process.

One option would be to require the notice of dispute resolution with the service of a complaint or notice of default and to give the homeowner 30 days within which to respond (Section 304(a)(1) appears to have the first occurrence as appearance at a facilitation session, and I would suggest that the homeowner actually has to file some sort of documentation before a session to show that they want to participate rather than having lenders and neutrals show up at the session only to find the homeowner did not intend to participate). If the homeowner does not respond within that time they the homeowner is deemed to have lost the opportunity to participate in the process. The lenders need to have a designated time to know whether they will be required to participate.

Good faith. The current draft has a duty to participate in good faith with definitions of failure to participate in good faith. Please consider instead using noncompliance with program rules as the standard. In my experience, the best practice is to use noncompliance with program rules as the standard in non-binding forms of ADR (good faith can be used when the neutral is the decision maker). If program rules are clearly spelled out, as they are here in Section 303(d) then it will be fairly easy to make a determination on noncompliance.

Related to that, as noted above, it appears that the determination about noncompliance is made by the neutral, but it is not clear what the consequence of that determination is or where the determination is made. In my experience, it is made in a closing report that is recorded at the Bureau of Conveyances (for non-judicial foreclosures) or filed with the court (for judicial foreclosures), and the filing of that

report triggers the recommencement of the foreclosure action. How does the determination get made and what happens after a determination is made?

Settlement agreement. Please consider removing the failure to implement or comply with the settlement agreement as something that is noncompliant or not in good faith (the current draft). Most likely, non-compliance would occur after the dispute resolution process was completed and so it could make it challenging to know when the process ended. Also, couldn't this be addressed by the aggrieved party filing a motion to enforce settlement agreement or a breach of contract action in the case of a non-judicial foreclosure? My guess is that homeowners in a significant number of cases that are resolved in foreclosure dispute resolution later default, but is that really bad faith?

Suggested changes to Article 3 for your consideration (note: the suggested changes do not address all the issues raised in this memo, but they start to address some):

SECTION 301. ~~FACILITATION~~ DISPUTE RESOLUTION PROGRAM ESTABLISHED.
There is established in the agency a mortgage foreclosure dispute resolution program. ~~Name of court or agency serving as facilitation agency] is designated as the facilitation agency.~~ The ~~facilitation~~ agency shall adopt rules pursuant to [insert reference to state administrative procedures act or, if the ~~facilitation~~ agency is the judicial system, to the rules of court] establishing procedures and standards for the ~~facilitation~~ dispute resolution process.

SECTION 302. NOTICE OF ~~FACILITATION~~ DISPUTE RESOLUTION.
(a) Before a creditor or servicer may request entry of a default or foreclosure judgment or issue a notice of a judicial or nonjudicial-foreclosure sale, the creditor or servicer, at the election of the homeowner, shall participate in dispute resolution ~~must send each homeowner and obligor a notice of facilitation.~~
(b) If the ~~facilitation~~ agency establishes a procedure for the agency to send notice of ~~facilitation~~ dispute resolution to homeowners, a creditor or servicer shall request the agency to send the notice to the creditor or servicer and to each homeowner and obligor. If there is no procedure for the agency to send notice, the creditor or servicer shall send a notice of ~~facilitation~~ dispute resolution to each homeowner and obligor, in the same manner as required for the notice under Section 201.
(c) A notice of ~~facilitation~~ dispute resolution must be requested or sent not later than 30 days after the sending of the notice of intent to foreclose under Section 201.
(d) The notice of ~~facilitation~~ dispute resolution under subsection (a) must include the following:
(1) The name, address and telephone number of each housing counseling agency, lawyer referral service and legal aid agency serving the homeowner's geographic area that is designated by the ~~facilitation~~ agency.
(2) The name, address, telephone number, and e-mail address of any person designated by the creditor or servicer as the homeowner or obligor's single point of contact.
(3) The fact that the homeowner or obligor may request a ~~facilitation meeting~~ dispute resolution session and the name and contact information for the person to contact to request a facilitation a dispute resolution session.
(4) A description of all documents the homeowner or obligor must bring to the ~~facilitation meeting~~ dispute resolution session, in accordance with rules promulgated by the ~~facilitation~~ agency.

SECTION 303. ~~DUTY TO~~ PARTICIPATION IN ~~FACILITATION IN GOOD FAITH~~ DISPUTE RESOLUTION.

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

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

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

(d) The neutral's closing report shall indicate if the creditor or the homeowner failed to comply with the rules, scheduling orders and information requests from the agency and the neutral. Noncompliance ~~Failure to participate in good faith~~ includes failure:

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

(2) without good cause to provide, before a scheduled ~~meeting~~ session, documents and information required by ~~facilitation~~ agency rules or reasonably requested by a neutral ~~facilitator~~;

(3) to designate a person with authority to reach a settlement agreement;

(4) without good cause to pay any required ~~facilitation~~ dispute resolution fee; and

(5) ~~to implement or comply with a settlement agreement in connection with foreclosure or facilitation; and~~

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

SECTION 304. NO FORECLOSURE DURING ~~FACILITATION~~ DISPUTE RESOLUTION.

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

(1) the homeowner or obligor does not respond to the ~~facilitation~~ dispute resolution notice within [30] days , ~~by either appearing at the scheduled facilitation~~ dispute resolution session or by sending a written request for loss mitigation to the creditor or servicer not later than 60 days after sending the ~~facilitation~~ dispute resolution notice; or

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

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

Other Issues

The best practices listed after Section 301 show a desire to provide confidentiality for discussions in dispute resolution sessions, and most likely a privilege was intended. It is my understanding that the majority rule is that privileges can only be granted by legislatures and there is no such grant in the draft.

Does the Committee intend to require that the homeowner meet with a housing counselor before the dispute resolution session? The research shows that the likelihood of success is directly related to exchange of documents and preparation prior to the session such as meeting with a housing counselor. This may be something the Committee wants to put in the draft rather than the best practices.

Some of the sections of the draft did not seem party neutral.

There is definitely a fiscal impact in setting up a program. This might have in an impact on enactability and will probably be brought up on the floor. It is not clear from the draft whether the parties need to pay to participate in the proposed program and that may cover some of the costs, but there will also be costs to enact the program.

In conclusion, it is clear that the Committee has spent a lot of time on ADR issues and I thank you for listening to my concerns. After almost 20 years running a state office of dispute resolution and three years spent on foreclosure dispute resolution, I have a lot of opinions in this area and know that we both wish we had started talking earlier about this subject.

My intent is not to provide any obstacles for the Committee but hopefully to provide some assistance and different viewpoints. Please let me know if you have questions about any of the issues raised in this memo and please let me know if I may be of assistance in any way.

Section 102 __ ”Dispute resolution” means a process in which a neutral facilitates communication and negotiation between a creditor and a homeowner to assist them in reaching a voluntary agreement regarding resolution of their foreclosure action.

Section 102 _ “Neutral” means an individual who conducts a dispute resolution process.

Section 102_ “Housing counselor” means a housing counseling agency that has received approval from the United States Department of Housing and Urban Development to provide housing counseling services pursuant to section 106(a) (2) of the Housing and Urban Development Act of 1968, title 12 United States Code section 1701x, as the agency appears on the United States Department of Housing and Urban Development website. (Note – does it need to be local?)

Section 102 __ “Department” means the _____ [or court].

Need a definition for sign?

Section 301. Dispute Resolution Program Established. There is established in the Department a mortgage foreclosure dispute resolution program to provide homeowners of residential property an opportunity to meet with the creditor to attempt to reach a voluntary agreement regarding resolution of their foreclosure action. The Department shall adopt rules pursuant to {insert reference to state administrative procedures act or rules of court] establishing procedures and standards for the dispute resolution process. **Note – requiring establishment of admin rules may significantly delay this process of setting up the program.**

Section 302. Dispute Resolution Required Before Foreclosure. (a) Before an entry of default or foreclosure judgment or issue of a notice of a judicial or non-judicial foreclosure sale, the foreclosing creditor, at the election of the homeowner, shall participate in dispute resolution.

(b) (c) and (d) current

Section 303. Participation in Dispute Resolution

The parties shall comply with all scheduling orders and information requests from the Department and the neutral.

(d) The neutral's closing report shall indicate if the creditor or the homeowner failed to comply with rules (or procedures) of the dispute resolution program. Noncompliance includes failure: (insert from p. 17)

"(a) An homeowner elects to participate in the mortgage foreclosure dispute resolution program by returning to the department the completed program election form provided by the homeowner.

"(c) The written notification of a case opening under this section shall operate as a stay of the foreclosure proceeding in accordance with section ____ and may be recorded at _____.

"(a) the parties to a dispute resolution process conducted under this part shall consist of the homeowner or the homeowner's representative, and the creditor or the creditor's representative; provided that:

(1) A representative of the creditor who participates in the dispute resolution shall be authorized to negotiate a loan modification on behalf of the creditor or shall have, at all stages of the dispute resolution process, direct access by telephone, videoconference, or other immediately available contemporaneous telecommunications medium to a person who is so authorized;

(2) The creditor and homeowner may be represented by an attorney; and

(3) The homeowner may be assisted by a housing counselor."

(1) The creditor shall provide to the department and the homeowner:

(A) A copy of the promissory note, signed by the homeowner, including any endorsements, allonges, amendments, or riders to the note evidencing the mortgage debt;

(B) A copy of the mortgage document and any amendments, riders, or other documentation evidencing the creditor's right of nonjudicial foreclosure and interest in the property including any interest as a successor or assignee; and

(C) Financial records and correspondence that confirm the mortgage loan is in default.

(2) The homeowner shall provide to the department and the creditor:

(A) Documentation showing income qualification for a loan modification, including any copies of pay stubs, W-2 forms, social security or disability income, retirement income, child support income, or any other income that the homeowner deems relevant to the homeowner's financial ability to repay the mortgage;

(B) Any records or correspondence available which may dispute that the mortgage loan is in default;

(C) Any records or correspondence available evidencing a loan modification or amendment;

(D) Any records or correspondence available that indicate the parties are currently engaged in bona fide negotiations to modify the loan or negotiate a settlement of the delinquency;

(E) Names and contact information for housing counselors, approved budget and credit counselors, or representatives of the creditor, with whom the homeowner may have or is currently working with to address the delinquency; and

(F) Verification of counseling by a housing counselor."

"(b) If, despite the parties' participation in the dispute resolution process and compliance with the requirements of this part, the parties are not able to come to an agreement, the neutral shall file a closing report with the department that the parties met the program requirements. The creditor may record the report. Upon recording of the report pursuant to this subsection, the foreclosure process shall resume along the timeline as it existed on the date before the homeowner elected dispute resolution, and may proceed as otherwise provided by law. The creditor shall notify the homeowner of the recording date and document number of this report and the deadline date to cure default in an amended foreclosure notice. Nothing in this subsection shall be construed to require the neutral to wait the full sixty days allotted for dispute resolution to determine that the parties were unable to reach an agreement and file a report.

(c) If the parties have complied with the requirements of this part and have reached an agreement, the agreement shall be memorialized in a document signed by the parties or their authorized representatives. The parties shall be responsible for drafting any agreement reached and enforcing the agreement. The agreement shall be a contract between the parties and shall be enforceable in a private contract action in a court of appropriate jurisdiction in the event of breach by either party. If the agreement allows for foreclosure or other transfer of the subject property, the stay of the foreclosure under section _____ shall be released upon the recordation of the neutral's closing report.

(d) If the parties to a dispute resolution process reach an agreement which resolves the matters at issue in the dispute resolution before the first day of the scheduled dispute resolution session scheduled pursuant to this section, the parties shall notify the neutral by that date. The neutral shall thereafter issue a closing report that the parties have reached an agreement prior to the commencement of a dispute resolution session. If the agreement provides for foreclosure, the parties shall memorialize the agreement in a document signed by both parties the parties may record the report.

"(c) The parties shall comply with all information requests from the department or neutral. No less than fifteen days prior to the first day of the scheduled dispute resolution session:

2. COMMENTS OF HEATHER SCHEIWE KULP

(Commenting on the Elizabeth Kulp Memo)

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SECTION 102. DEFINITIONS.

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

(5)"Dispute resolution" means a process in which a neutral facilitates communication and negotiation between a creditor and a homeowner to assist them in reaching a voluntary agreement regarding resolution of their foreclosure action. (based on the definition in the Uniform Mediation Act)

(6) "~~Facilitation~~ Dispute resolution agency" means the administrative or judicial agency designated by the state to supervise foreclosure ~~facilitation~~ dispute resolution.

Missing Definitions. Some important terms were used in the draft were not defined in Section 102. Suggested additions:

"Neutral" means an individual who conducts a dispute resolution process. (based on the UMA definition)

"Housing counselor" means a housing counseling agency that has received approval from the United States Department of Housing and Urban Development to provide housing counseling services pursuant to section 106(a) (2) of the Housing and Urban Development Act of 1968, title 12 United States Code section 1701x, as the agency appears on the United States Department of Housing and Urban Development website.

ARTICLE 3

****

Best practices. Listing the best practices in the drafters' notes is probably not the most effective way to make sure they will be included in the final rules and procedures adopted by the programs. One of the most difficult challenges for a new program will be creating rules and the list right now is very general. It might be more helpful to create a list of rules and procedures that states could choose from as opposed to a list of principles and that way you can be sure that the principles are incorporated into the rules. Additionally, getting administrative rules enacted may be time consuming, so it would provide significant assistance to dispute resolution agency staff there were rules to choose from.

Policy determinations. There are suggestions that the Committee wanted to make some policy determinations such as requiring at least one in person meeting (noted in the definition but not in the text of Article 3) and requiring the neutral to make a determination of good faith, but those are not clearly stated in the text. Also

Comment [H1]: I like your changes, especially removing the "objective of reaching an agreement," as we know that that's not always in the interest of both parties. I am wondering about the use of "negotiation" here, though, because I think "communication" captures what we mean without muddying the waters by adding the term, "negotiation." Banks and borrowers rarely negotiate in foreclosure context, unfortunately.

Comment [H2]: I know this is the language from the current draft, but I wonder if there's room to make the distinction between supervising and managing. I see a supervising agency as one that may contract with a mediation firm or center to conduct the mediations, then receive statistics from the mediation firm or center. I see a managing agency as one that actually does the work of managing the dispute resolution process, including but not limited to providing the mediation services. This language makes it sound like the agency is supervising the dispute resolution sessions themselves, which I'm not sure represents either term well.

Comment [H3]: Is it okay to invoke the UMA here?

Comment [H4]: Excellent addition. This will narrow the pool of counselors, but we don't want to work with people giving unapproved advice!

Comment [H5]: I think a list of procedures or decision points would be helpful. For instance: for program outreach, does your state think a hotline, a paper notice, an in-person contact, a phone call, or another form of outreach is best? I'm not as sure if sample rules would be. The problem is that many states will simply adopt the rules of another state, if they are available, without thinking much about whether the rules were effective in the other state or how they may need to be adopted for the adopting states' context.

unclear is who the responsibility falls on to provide a notice of the opportunity to participate in a dispute resolution process, the timing for sending the notice and responding to it, and whether this is an opt in or opt out process.

Comment [H6]: These are all great decision points that could be included in the procedural list you mention above.

One option would be to require the notice of dispute resolution with the service of a complaint or notice of default and to give the homeowner 30 days within which to respond. (Section 304(a)(1) appears to have the first occurrence as appearance at a facilitation session, and I would suggest that the homeowner actually has to file some sort of documentation before a session to show that they want to participate rather than having lenders and neutrals show up at the session only to find the homeowner did not intend to participate). If the homeowner does not respond within that time they the homeowner is deemed to have lost the opportunity to participate in the process. The lenders need to have a designated time to know whether they will be required to participate.

Comment [H7]: This is one option. Unfortunately, this option result s in a low rate of participation, as most borrowers are not opening their mail or are not seeing a positive (opportunity to participate in dispute resolution) mixed in with a negative (the complaint)

Good faith. The current draft has a duty to participate in good faith with definitions of failure to participate in good faith. Please consider instead using noncompliance with program rules as the standard. In my experience, the best practice is to use noncompliance with program rules as the standard in non-binding forms of ADR (good faith can be used when the neutral is the decision maker). If program rules are clearly spelled out, as they are here in Section 303(d) then it will be fairly easy to make a determination on noncompliance.

Comment [H8]: Great phrasing and criteria that back up your recommendation.

Related to that, as noted above, it appears that the determination about noncompliance is made by the neutral, but it is not clear what entity receives that determination, how the neutral or entity initiates further proceedings to issue consequences, and what the consequences may be. In my experience, it is made in a closing report that is recorded at the Bureau of Conveyances (for non-judicial foreclosures) or filed with the court (for judicial foreclosures), and the filing of that report triggers the recommencement of the foreclosure action (for borrower noncompliance) or a fine (for servicer noncompliance). However, the Act should answer these questions for itself: how does the determination get made and what happens after a determination is made?

Comment [H9]: Just modified this sentence a bit for clarify.

Settlement agreement. Please consider removing the failure to implement or comply with the settlement agreement as something that is noncompliant or not in good faith (the current draft). Most likely, non-compliance would occur after the dispute resolution process was completed and so it could make it challenging to know when the process ended. Also, couldn't this be addressed by the aggrieved party filing a motion to enforce settlement agreement or a breach of contract action in the case of a non-judicial foreclosure? My guess is that homeowners in a significant number of cases that are resolved in foreclosure dispute resolution later default, but is that really bad faith?

Comment [H10]: I might put something in here about how this interpretation of good faith is contra to basic contracts law, where either party is free to breech, and may have good reasons for doing so.

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SECTION 302. NOTICE OF ~~FACILITATION~~ DISPUTE RESOLUTION.

(a) Before a creditor or servicer may request entry of a default or foreclosure judgment or issue a notice of a judicial or nonjudicial-foreclosure sale, the creditor or servicer, at the election of the homeowner, shall participate in dispute resolution ~~must send each homeowner and obligor a notice of facilitation.~~

Comment [H11]: This language creates an opt-in program. Is that what you intended, instead of giving adopters the option of an opt-in or opt-out?

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

Comment [H12]: This implies the notice will be via mail.

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

Comment [H13]: What happens if they do not bring the documents, or it is unclear what those documents are? I think part of the point of a session is to understand what documents are needed.

SECTION 303. ~~DUTY TO~~ PARTICIPATION IN ~~FACILITATION IN GOOD FAITH~~ DISPUTE RESOLUTION.

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

Comment [H14]: This is very controversial, and not necessarily best practice. I would leave this as an optional policy and not as part of the body.

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(d) The neutral's closing report shall indicate if the creditor or the homeowner failed to comply with the rules, scheduling orders and information requests from the agency and the neutral. Noncompliance ~~Failure to participate in good faith~~ includes failure:

Comment [H15]: Excellent modifications to this section!

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SECTION 304. NO FORECLOSURE DURING ~~FACILITATION~~ DISPUTE RESOLUTION.

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

Comment [H16]: They may have already commenced this. Maybe, "no further judicial action can be taken"?

(1) the homeowner or obligor does not respond to the ~~facilitation~~ dispute resolution notice within [30] days , ~~by either appearing at the scheduled facilitation~~ dispute resolution session or by sending a written request for loss mitigation to the creditor or servicer not later than 60 days after sending the ~~facilitation~~ dispute resolution notice; or

Comment [H17]: This is a bit confusing. I think it's just a wording issue.

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Other Issues

- The best practices listed after Section 301 show a desire to provide confidentiality for discussions in dispute resolution sessions, and most likely a privilege was intended. It is my understanding that the majority rule is that privileges can only be granted by legislatures and there is no such grant in the draft.

Comment [H18]: That is my understanding, too, which is why it's best to call it dispute resolution!

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3. LETTER FROM CLEVELAND FEDERAL RESERVE BANK RE ABANDONED PROPERTY

FEDERAL RESERVE BANK *of* CLEVELAND

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October 28, 2013

VIA E-MAIL

Mr. William R. Breetz, Jr.
Chairman, Uniform Law Commission Drafting Committee
on Home Foreclosure Procedure Act
University of Connecticut School of Law
Knight Hall Room 202
35 Elizabeth Street
Hartford, CT 06105

Re: Comments on the June 4, 2013 draft of the Home Foreclosure Procedures Act ("Act") related to abandoned residential property

Dear Mr. Breetz:

This letter comments on the provisions of the Act related to expediting the foreclosure process for abandoned residential property. We support inclusion of provisions to expedite the foreclosure process for abandoned residential property if they improve the efficiency of the residential housing market. The letter to you from Gus Frangos, dated October 25, 2013, summarizes an approach to fast-tracking the foreclosure process for abandoned property that we support. We ask that you forward Mr. Frangos' letter, along with this letter to the Reporters and add the letters to the committee's website so that they are available for consideration at the November 15th and 16th meeting of the drafting committee. As with our previous comments, this letter presents our personal views, and not those of the Federal Reserve Bank of Cleveland or the Board of Governors of the Federal Reserve System.

When residential property is truly abandoned an ordinary foreclosure process imposes costs to communities, lenders, and homeowners, without corresponding benefits. Extended periods of vacancy harm property values, attract crime, and can lead to rapid depreciation of the value of the collateral. Homeowners that walk away from property do not benefit from a long and protracted foreclosure process. In states that allow deficiency judgments, protracted foreclosure on vacant property may actually hurt the homeowner's interest further by lowering the eventual sale price of the home. At the same time, the ability of creditors to take possession and sell the property is unnecessarily impeded. Speeding up the transfer of abandoned residential property to a new owner can improve the efficiency of the market and benefit the creditor and community without incremental cost to the homeowner.

The following comments on the provisions of the Act related to abandoned residential property are offered for consideration by the committee.

First, based on feedback we have received from several practitioners, we have some concern that the draft does not do enough to pragmatically fast-track private mortgage foreclosure. Section SOS(c) as written requires a court finding of abandonment after notice and hearing, which we are told will reduce use of the fast-track and slow the process down when it is used. It is our understanding that the Indiana law,[1] which the Act tracks, is rarely used by bank council for this very reason. Ohio has fast-tracked property-tax foreclosures for vacant and abandoned property by using a rebuttable presumption framework that substantially expedites the tax-foreclosure process.[2] When a tax-foreclosure complaint is filed, the foreclosing party states that the property is vacant and abandoned and elects to use the fast-track in the complaint itself. This creates a rebuttable presumption that the property is vacant, and if the owner does not respond to the foreclosure notice within the prescribed period to rebut it, the fast-track takes place. Currently, a similar law is being drafted in Ohio for private mortgage foreclosure, which is summarized in the above-mentioned letter from Gus Frangoes.

The June 4th draft of the Act seems to move in the direction proposed by Mr. Frangoes because the phrase "constitutes prima facie evidence" as has replaced by the phrase "establishes a presumption" in the introduction to Section SOS(a). However, Section SOS(c) requires an evidentiary hearing before the court may issue an order finding that property is abandoned. Mr. Frangoes' proposal does not require a hearing. The court may find that property is abandoned based upon an affidavit, unless the homeowner appears to contest such a finding. In such event, a hearing would be held.

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[1] Indiana Code Annotated § 32-30-10.6-4.
[2] *Ohio* Revised Code § 323.65(G)(2).

We believe a similar approach could make the Act's expedited processing provisions more effective and efficient, and is worth consideration. We propose that the expedited process apply when a foreclosure complaint or other pleading is filed electing to use the fast track process accompanied by an affidavit swearing that the property is vacant and abandoned,

attesting to specific facts to establish the affiant's knowledge and belief that [three] or more of the conditions listed in Section 505(a) exist, and the borrower does not respond to contest the claim of vacancy and abandonment.

Second, we are concerned that the phrase "which must include entry into any dwelling unit on the property" in section 505(d)(2) may cause a "government official" to violate the Fourth Amendment to the U.S. Constitution unless they obtain a search warrant. Drafters' Note 4 to this section repeats the entry requirement. Such entry by a government official is government action under the Fourth Amendment. Housing officials in many jurisdictions believe that a search warrant is necessary to avoid violation of the Fourth Amendment. While it might argued that entry would not constitute a search because a homeowner no longer has a reasonable expectation of privacy in abandoned property, it would create a litigation risk local governments are unwilling to bear. In any event, the factors listed in 505(a) can be determined without entry into a dwelling unit or involve the creditor action (i.e., action by a private person not subject to the Fourth Amendment).

Third, it seems that Drafting Note 3 to Section 505 misstates the consequence of the death of a homeowner. The second sentence of the note states: "Under Subsection (a) proof of death of the homeowner constitutes prima facie evidence that the mortgaged property is abandoned. . ." However, Section 505(a) states: "A government agency's determination, finding, or order that mortgaged property is abandoned or the presence of not less than [three] of the following conditions constitutes a presumption that the mortgaged property is abandoned property." Under this section, the death of the homeowner is only one condition that combined with [two] other conditions may establish a presumption of abandonment. As written, Drafting Note 3 states that the death of the homeowner alone constitutes prima facie evidence. Therefore, we suggest the following revision: "Under Subsection (a) proof of death of the homeowner constitutes <u>is one of [three] conditions that can establish</u> a rebuttable that the mortgaged property is abandoned. . . ." For consistency, "rebuttable presumption" should be substituted for "prima facie evidence" in Drafters' Notes 2 and 3 to Section 505.

Fourth, there is an inconsistency between Section 506(c) and Reporter's Drafting Note 3 thereto. The section states that "the creditor shall take necessary and appropriate action to cause the foreclosure sale to be completed within a reasonable time…." This allows for flexibility but also introduces uncertainty. The note states: "In that event,

subsection (c) provides an outside limit of [four months] to complete the sale." What measure of time is intended?

Fifth, we wonder whether the words "determination, finding, or order" should be substituted for "citation" in Section 507(d) to make it consistent with the first sentence of Section SOS(a). Alternatively, the words "determination, finding, order or citation" could be used in both places.

Finally, many community development corporations focus on the maintenance and construction of housing in a delineated geographic area. The presence of these corporations varies dramatically from state to state and municipality to municipality. Where they are present, they would have an interest in the impact of abandoned property on the surrounding neighborhoods and communities. Therefore, it would be appropriate to add "[a community development corporation serving the area in which the mortgaged property is located]" to the list of persons entitled to enforce the obligations created by section 507(h), as an option for jurisdictions with community development corporations.

We appreciate the opportunity to comment on the Act and look forward to further discussion at the upcoming meeting.

Sincerely,

Mark B. Greenlee
Counsel

Thomas J. Fitzpatrick IV
Economist

4. LETTER FROM GUS FRANGOS, CLEVELAND LAND BANK, RE: ABANDONED PROPERTY

October 25, 2013

William R. Breetz, Jr.
Chairman, Uniform Law Commission Drafting Committee for
Home Foreclosure Procedures Act
University of Connecticut School of Law
Knight Hall Room 202
35 Elizabeth Street
Hartford, CT 06105

RE: Summary of Proposed Ohio Bill Creating Fast Track Private Foreclosure Proceeding for Abandoned Properties

Dear Mr. Breetz,

I am writing you to briefly summarize the key principals behind the Ohio fast-track foreclosure legislation I have recently drafted at the request of Thriving Communities Institute.[1] Thomas Fitzpatrick from the Federal Reserve Bank in Cleveland suggested to me that the Commission may be interested in learning more about some of the ideas found in this proposed legislation. What distinguishes this fast track proceeding from others of its type is that it addresses two key aspects of a foreclosure proceeding that cause the largest delays; namely, the Rules of Civil Procedure and the need for evidentiary hearings and findings as a prerequisite to an expedited foreclosure. This legislation overcomes these delays by incorporating two critical provisions. First, it defines the fast track foreclosure proceeding as a "special statutory proceeding" to which the Civil Rules do not apply.[2] Second, the legislation conditionally eliminates the need for hearings to support judicial findings over issues such as abandonment and fair market value by creating rebuttable presumptions set up by an affidavit introduced as evidence with the complaint.

By defining this new fast tract foreclosure proceeding as a "special statutory proceeding," the proceeding is not controlled by the timing provisions found in the Civil Rules. I am sure you are aware that under the Civil Rules, a judicial foreclosure proceeding can take months if not years to commence and complete. Arguably, this may be a desirable outcome in cases where the property is occupied by an owner or tenant. But in most cases where the property is vacant and abandoned, the Civil Rules only delay the inevitable. It is not necessary to use the same Civil Rules that govern a personal injury, contract, or divorce disputes in cases concerning the foreclosure of vacant and abandoned

[1] This legislation should not be confused with recently introduced SB 223 also purporting to provide for expedited foreclosures of vacant and abandoned properties. In my opinion as a practitioner, that bill, as with similar fast track legislation introduced in other *states*, seems to work on paper, but in practice has flaws that will short circuit their intent and utility.

[2] Some State Constitutions limit the ability of a legislature to modify the Civil Rules themselves, without the participation of the Highest Court of the State or its representative committee or other agency. However, this fast track bill does not propose to change any Civil Rules. In fact, Civil Rule 1 forms part of the basis for this "special proceeding" to which the Civil Rules do not apply.

properties. This delay in a foreclosure decree and ultimate disposition of the property, often contributes to any remaining equity in the property literally being stripped away while the property sits idle awaiting the outcome of a judicial proceeding operating under the Civil Rules. Despite this non-applicability of the Civil Rules as a whole to this fast track foreclosure proceeding, certain aspects of the Civil Rules concerning notice and an opportunity to be heard have been incorporated into the statutorily prescribed proceeding to preserve and protect the owner/borrower's and any other party with a recorded interest in the property's substantive and procedural due process or the state and Federal Constitutional rights. Further, the legislation provides Courts the discretion to look to the Civil Rules for guidance, so long as the Court's application if the Civil Rules is not inconsistent with the intent and purpose of the fast track foreclosure proceeding.

By creating rebuttable presumptions concerning vacancy, abandonment and fair market value of the property, the time needed for evidentiary hearings on these issues is eliminated. For example, other fast track laws typically state things such as "if a property is 'vacant,' or "if a property is 'unsecured', or "if the fair market value of a property is...,"or "if the lien holders do this or that," or "if the owner did or didn't do thus and so," then the foreclosure can go real fast. The problem therein is that these conditions (vacancy, abandonment, etc.) beg the question. In other words, there is always an evidentiary predicate, requiring a hearing and finding, to do an expedited foreclosure. So with this fast track procedure, rather than requiring evidentiary hearings, which inquire into factual questions of abandonment, vacancy, tee, we have set up rebuttable presumptions by way of affidavit and public records that are submitted along with the fast track foreclosure complaint. To comply with Constitutional prescriptions requiring notice and opportunity to be heard, these presumptions, which may be rebutted, establish party, vacancy, and abandonment status, as well as the fair market value vs. mortgage balance, default status, etc. as related to the property. More often than not, foreclosure cases concerning vacant and abandoned properties end up being default cases because no interested party has answered, pled or appeared in the case. Here, if an interested party defaults, the case continues because the defaulting party had notice and a chance to be heard, but the presumptions have not been rebutted. Even if an interested party is not in default, unless they can affirmatively rebut the presumptions the case continues to move forward. And, the concept and use of rebuttable presumptions are common and familiar to Courts charged with managing the evidence in the case.

Here is a brief summary of how the rebuttable presumptions are incorporated into the proceeding. A property is eligible for this fast track proceeding if it is a vacant and abandoned residential structure with four or fewer dwelling units that provides security for a first mortgage. There are two ways in which a property can be determined to be vacant and abandoned and thereby eligible. First, the financial institution and the owner/borrower can file an affidavit along with the complaint that stipulates that the property is a vacant and abandoned and is therefore eligible for an expedited foreclosure. Alternatively, a financial institution can file an affidavit with the complaint that avers that based on the financial institution's knowledge and belief the property is vacant and abandoned. This creates an evidentiary presumption of vacancy and abandonment. The evidentiary presumptions contained in this affidavit can be rebutted to the court by the owner/borrower. If the presumptions are rebutted by the owner/borrower, the action will proceed as a normal mortgage foreclosure under Chapter 2329 of the Revised Code. If not rebutted, or in cases of default, the property is presumed vacant and abandoned without any need for further evidentiary hearings.

Upon the court's finding that the property is vacant and abandoned and that the owner/borrower is in default of the mortgage, the court will issue a decree of foreclosure.

Within this decree or as a separate order, the property will be ordered disposed of in one of several ways. In all cases, a financial institution can choose to have the parcel sold at public auction without appraisal with a minimum bid starting at $500. If the parcel does not sell at auction after the first sale, the financial institution will be deemed to be the purchaser and must take title to the property and pay all taxes and costs due on the property.

As an alternative to sale, a financial institution may petition the court to order the transfer of the property by directly to the financial institution or to a consenting land bank. This option is available to financial institutions in all cases where the balance due on its mortgage is equal to or greater than the rebuttably presumed market value of the property or all other parties with an interest in the property are in default of the proceeding. To prevent subordinate lien holders from holding the case up by making the fair market value of the property an issue, the presumed property value is the Auditor's value. Again, this presumption may be rebutted if a subordinate lien holder can show affirmatively that the value of the 1st mortgage and the subordinate lien combined are less than the fair market value (so as to suggest equity for the subordinate lien holders). Otherwise, all subordinate lien holders are out if the fair market value of the property is less than the value of the 1st mortgage. With vacant and abandoned properties, the properties are almost always upside-down. Hence no subordinate lien holder will pursue this valuation rebuttal exercise. But the important thing is that the subordinate lien holders have a right to do so, to be heard, and the opportunity to preserve any perceived equity by rebutting the presumption. As a practical matter, if there was truly equity in these properties, the market would take care of it either by resale, short sale or some mortgage modification.

A financial institution can request that a direct transfer be to the financial institution itself or to a land bank that has agreed in advance of the final hearing to receive the property. When the financial institution receives the property as a direct transfer, it must pay all taxes owed on the property and all costs of the foreclosure proceeding. If the property is transferred to a land bank, the financial institution must only pay for the costs of the proceeding. Any delinquent taxes owed on the property are abated as though the property was forfeited via a deed in lieu of foreclosure under the land bank statutes (Chapter 5722 of the Ohio Revised Code). This extinguishment of delinquent taxes combined with a direct transfer to a consenting land bank is meant to be an incentive for financial institutions to utilize land banks as a repository for these low value assets that may otherwise remain in a legal limbo (commonly referred to as "zombie properties") after a mortgage default. To my knowledge, this is the first fast track foreclosure legislation that directly and efficiently ties land banks into the proceeding, addresses subordinate liens, addresses evidentiary predicates and truly "fast-tracks" by providing an alternative procedural process to the Civil Rules.

In summary, if enacted in Ohio, this legislation will provide financial institutions with an alternative expedited foreclosure proceeding for use on vacant and abandoned properties that secure a mortgage. In addition to an expedited finding of foreclosure, the financial institution will be able to quickly dispose of the property either by public sale without appraisal or by a direct transfer to the financial institution or to a consenting land bank.

I hope that this brief explanation will be helpful to you and your committee. If you have any questions, or would like to discuss this matter more fully, I would be happy to do so at a mutually convenient time.

Yours truly,
GUS FRANGOS, Esq.

5. COMMENTS OF TERESA HARMON

Note – these comments appear verbatim in the 'Comments' draft of the Act

6. COMMENTS OF THOMAS BUITEWEG

Note – these comments appear verbatim in the 'Comments' draft of the Act

7. COMMENTS OF NEIL COHEN

Note – these comments appear verbatim in the 'Comments' draft of the Act

8. COMMENTS OF STEVEN WEISE (PEB/UCC)

***I've set out below a bunch (not a defined term in the UCC) of suggested edits. They are not intended to be substantive. I'm skipping over comments made at the meeting, such as whether it's better to repeat UCC defined terms or to paraphrase/duplicate them.

General Provisions

§ 102

- "Creditor": the reference to "owns or has a right to enforce" is not quite right – "owns" applies only to non-negotiable instruments and "right to enforce" is meant to apply to negotiable instruments (although that person may well also be the owner); the second sentence refers only to "own" and should pick up a "right to enforce" person
- "Facilitation": is "in-person" really necessary? What if the obligor lives remotely from the "creditor"; why not allow telephone or video conferences as long as "live"?
- "Homeowner": should this exclude license interests (as it already excludes leasehold interests)? That would avoid disputes about whether an "interest" is one or the other
- "Obligor": this term is used dozens of times in the blackletter; every time except one (§ 201(b)(10)) it is used wth "homeowner" – why not fold the concept of "homeowner" into "obligor" so that "obligor" includes "homeowners"?; note that as now written "obligor" would not include "homeowner" because a homeowner that buys "subject to" the mortgage would not "owe" the obligation nor have "provided" the mortgaged property; the separate definition of "homeowner" would still be necessary because that term is often used without "obligor"
- "Servicer": should it include a person entitled to enforce who is collecting (as it already includes for example the owner)?

Notices; Right to Cure

- § 201(b)(1): a safe harbor form for itemization would be useful; in California there's lot of litigation on a similar requirement for car loan foreclosures
- § 203: it would be useful to define "tender"; does "immediately availale funds" include a cashier's check? personal check? delivered to creditor? unconditional?

Facilitation

- § 302(a): The word "issue" seems incorrect in connection with a notice of foreclosure; § 405 uses the word "give", which seems much better
- § 302(d)(2): this refers to a "person" who is the single point of contact; the Act defines "person" to include entities – is that intended here?
- § 303(b): How much detail does the creditor have to give when declining to offer loss mitigation? This seems to be an area that would produce a lot of litigation; guidance would be useful
- § 303(b): this says that the creditor can't charge the homeowner, can the facilitation agency charge the obligor a fee (I don't see anything on that in § 301)?
- § 303(d)(6): this requires the creditor to advise the obligor of loss-mitigation options that are "available" – does this refer to theoretically "available" or actually "available" from the creditor based on the relevant facts?
- § 304: should this also prohibit sending a notice of intent to foreclose?

Right to Foreclose; Sale Procedures

- § 401(a): should this provide that the right to foreclose applies only if the default has not been cured?
- § 401(c): here and elsewhere where the word "plaintiff" is used, the word "creditor" would be better; the creditor won't always be the plaintiff
- § 401(c): the creditor would not "rely" on a negotiable instrument, it would be "foreclosing" a mortgage that secures a negotiable instrument
- § 401(c)(2): instead of "complies" consider "satisfied"; UCC § 3-309 states a condition, not a requirement
- § 401(e): at the end of the first sentence, consider adding "on behalf of the person"
- § 402(a): this should refer to a transfer of ownership; UCC § 9-203(g) is not about transfer of the right to enforce
- § 403(d): the requirement that the creditor search prior holders should acknowledge that prior holders may not cooperate or may no longer exist or may be impossible to determine prior holders of a bearer instrument
- § 404(b)(9): should the address be of the creditor or someone acting for the creditor?
- § 404(e): if the copy of the advertisement is not sent with the notice of commencement of foreclosure, when does it have to be sent? to what address?
- § 406(a): this seems to presume that the announcement of postponement or cancellation would be at the originally scheduled sale, but does not say that

Accelerated Dispositions

- § 501(a): this refers to the homeowner's obligation to the creditor; if the homeowner bought the property subject to the mortgage and never assumed it, the homeowner does not have an obligation to the creditor; it should refer to the obligation secured by the mortgage
- § 501(a)(2): the content of the required notice does not seem to be stated

- § 502(a): this requires the court to give notice of the negotiated transfer, but there's no provision for how the court gets notice
- § 502(b)(2): instead of "perfected" interest, shouldn't this refer to an interest of record?
- 503(b) and (c): the reference to "no equity" seems inapposite; "equity" usually refers to value in excess of all liens, here it refers to value in excess of the mortgage being foreclosed
- § 503(d) and (e): instead of couching these as "waivers" and possibly raising issues of knowledge and the like, why not state them as affirmative rules ("following a transfer under § 501, the creditor has no right …")
- § 505(a)(5): to whom does the homeowner make the "request"? how would the homeowner know that it was the creditor that changed the locks?
- § 505(d): to whom does the "request" go? what does the affidavit have to say?
- § 507(d): how does the creditor know that a governmental entity has obtained an abandonment order?

Remedies

- § 601(b): if the creditor has misbehaved, is the ban on foreclosure forever, even if the obligor never makes a payment?

Thanks,

Steve

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Partner

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9. COMMENTS OF RITA J. LEWIS, CHASE BANK

COMMENTS FROM CHASE BANK, NOVEMBER 1, 2013

Article 2, Section 201 – Notice of Intent to Foreclose and Right to Cure

(a) Foreclosure may not commence until 30 days after the creditor or servicer sends separately to each homeowner and obligor a notice of intent to foreclose and right to cure. – Page 1

Comments: We would prefer to be required to send the notice to the obligors and "mortgagors", not the "homeowners". Lenders do not generally have updated title information in their systems until closer to the referral date. If lenders are required to send the notice to the homeowner, then it places a burden on lenders to have to complete a title search prior to sending the letter. This particular letter is largely automated so the event of pulling title, putting the new information in the system, and then re-programming the letter to pick up that information would cause a large amount of delays. Lenders would have to obtain an updated title search every time the letter was generated. This type of letter could be generated multiple times prior to referral to foreclosure. It would give borrowers one additional item to challenge which would delay foreclosures and increase costs to defend claims of an invalid foreclosure.

The notice under subsection (a) must state:

(1) the nature of the default, including an itemization, as of the date of the notice, of all past-due payments, fees, and other charges owed to the creditor, servicer or the creditor's or servicer's attorneys and an estimate of other amounts accrued but unknown in amount; - Page 1

Comments: We would prefer to model this language after what is required by the standard Fannie/Freddie security instrument. It does not require a specific itemization and a breakdown of all amounts. We don't object to providing general categories of the amounts that are due but prefer not list of a full running total of all past due amounts. This would require lenders to have to re-program current letters and would cause the letter to be several pages long. The other required disclosures in the letter may get overshadowed by the pages of itemized past due amounts and fees. If the borrower wants an itemization, they should be able to receive it on request. We also do not want to include estimated amounts on the notice of intent letter. The purpose of this letter is to put the borrower on notice of the past due amounts that are owed and have not been paid. If you include estimates and they are paid by the borrower, lenders would have the burden of tracking the excess funds and returning amounts that have not been actually incurred.

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

Comments: We are already required to state the nature of the default. We should not have to state the specific basis of the creditor's right to foreclose. This information is already detailed in other required notices. By requiring it in the notice of intent, the borrower would have an additional ground to dispute

the foreclosure. We would also prefer not to identify the owner of the loan because it could be interpreted to require that lenders complete the chain of title prior to the letter being sent. This letter is sent relatively early in the default and would be delayed if lenders have to complete the chain of title prior to sending the letter. This would give borrowers additional grounds to challenge the foreclosure which would delay the process and cost money to defend.

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

Comments: We would prefer not to require this information in the notice of intent letter. By putting the requirement in this type of notice, it could be viewed as a pre-condition to foreclosure. In the event that a lender failed to provide the documents in a timely manner as perceived by the borrower, then it would cause delays in the foreclosure process and additional money to defend. In order to minimize risk, lenders would incur increased costs to send the notice in a manner that guaranteed mailing confirmation.

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

Comments: Lenders should be separately required to send certain loss mitigation notices prior to referral but it should not be a requirement in the notice of intent letter for the same reasons addressed above.

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

Comments: We should be required to send the notice to "mortgagors", not "homeowners" as discussed in the initial comments.

Section 403 – Lost or Destroyed Negotiable Instrument; Affidavit on page 21.

Comment is to Section 403(e). Section 403(e) provides that in addition to the facts stated in subsection (a), the affidavit must, among other things, identify *the owner of the negotiable instrument* and state from whom and the date on which the owner acquired ownership. This section works when the creditor or servicer acquired possession of the note and subsequently lost it (in that situation I think the creditor or servicer can reasonably say that the creditor owned the note) but it does not work in situations where the creditor or servicer never obtained possession of the note. If the creditor or servicer never obtained possession of the note, how can the creditor or servicer state that it is the owner of the note or from whom and on what date it acquired ownership of the note? In other words, I think it's problematic for party to certify ownership of a Note if that party never possessed the Note.

(e) In addition to damages recoverable under subsection (d), a homeowner or obligor may recover $[200] in each case from the person violating this [act]. – Page 17

Comment: The borrower should be able to recover actual damages, attorney's fees, and other amounts as the court may aware subject to certain restrictions. We do not need to include an additional $200 per violation.

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, 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 $[____]. The injunction or order may bind a creditor, servicer, their agents, or any other person violating this [act]. – Page 18**

Comment: We should remove this section. The AG already has enforcement power under existing governing authority. We do not need to reiterate or separately highlight that authority in this document.

10. COMMENTS OF JOHN P. MANNING, RABO AGRI-FINANCE, RE RESIDENTIAL PROPERTY DEFINITION

Dear Mr. Breetz,

As commentators and legislatures focus on the serious issues relating to home mortgages in this country, there is a tendency (at least in the written language) to assume anything with a home on it is truly residential property. This is perfectly understandable. In large parts of the country this is a valid assumption.

As a farm lender who never makes consumer purpose loans, Rabo Agrifinance, Inc. reminds the committee that this is not true everywhere in the country. Whether speaking of a 100,000 acre ranch with one house on it, a $12,000,000 dairy with a $150,000 home on it or a $15,000,000 winery with a $1,000,000 "estate" home (of which $750,000 is the public tasting facilities) there are properties with overwhelming commercial usage that happen to have a home on them. (After all: the cows need to be milked three times day so, so someone needs to live there. But, it is a working commercial dairy.) Imposing rules intended to protect consumers on these essentially commercial properties would have the effect of chilling the abilities of farmers to have equal access to business credit with other businesses. Remember, it is usually not an option to "carve out" the house from the rest of the property because of large minimum lot sizes in rural areas.

The Home Foreclosure Procedures Act committee is not the first legislative body to face this issue. The Federal SAFE Mortgage Act provides an excellent definition of a residential mortgage loan that correctly identifies true residential properties without burdening the access to business credit for farmers. It does so by focusing on whether the loan is made for a consumer or business purpose rather than simply counting the number of homes on the real estate. I strong encourage the committee consider if the current definition provided by the current draft of the Home Foreclosure Procedures Act is well designed to cover the intended consumer protection goals without burdening persons in the business of farming.

Rabo Agrifinance suggests that aligning the SAFE Mortgage Act definition of a "residential mortgage loan" would also provide additional benefits since most states that implemented the SAFE Mortgage Act also use the Federal definition and using the same definition in both acts would provide significant convenience for courts and regulators. Definition is below. Thank you for your consideration.

Title V of PL 110-289
The SAFE Mortgage Licensing Act
TITLE 12 - BANKS AND BANKING
CHAPTER 51 - SECURE AND FAIR ENFORCEMENT FOR MORTGAGE LICENSING
CHAPTER 51 - SECURE AND FAIR ENFORCEMENT FOR MORTGAGE LICENSING
…
5102. Definitions.
…
(9) Residential mortgage loan
The term "residential mortgage loan" means any loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling (as defined in section 1602(v) (!1) of title 15) or residential real estate upon which is constructed or intended to be constructed a dwelling (as so defined).

John P. Manning V, General Counsel & Secretary

11. ALAN WHITE MEMO ON CFPB SERVICING REGULATIONS AND FACILITATION UNDER ARTICLE 3

The New CFPB Servicing Regulations and Facilitation under Article 3 of the Act
Alan M. White, Co-reporter
DRAFT 10-8-2013

Introduction

The Consumer Financial Protection Bureau (CFPB) has published regulations taking effect on January 10, 2014 that set timelines for mortgage servicers to notify borrowers about loss mitigation options, to respond to applications and to provide appeal rights.[1] The CFPB also prohibits proceeding with foreclosure while a request for loss mitigation is being evaluated. The current draft of the uniform Home Foreclosure Procedures Act (the Act) provides for a facilitation process, optional for the homeowner, that would put off foreclosure while the parties explore loss mitigation alternatives. This memo will describe the interaction of the new federal rules with the draft Act and consider how homeowners and servicers would comply with both.

In summary, if a state adopted the Act after the CFPB rules were in effect, a homeowner and servicer could submit and evaluate a loss mitigation application before, simultaneously with, or even after the Act's Article 3 facilitation process. The time periods under the Act and the CFPB rule are not mutually exclusive; they could overlap or take place in any sequence.

It should also be noted that coverage of the federal rules and the Act is not co-extensive. The CFPB's loss mitigation procedures apply only to mortgages on a borrower's principal residence. The Act applies to all foreclosures of single-family homes.

I. Timing of Initial Notices under the CFPB Rule and the Act

The CFPB rule requires a notice of loss mitigation options no later than the 45th day of delinquency.[2] The Act requires, as a prerequisite to foreclosure, a notice of intent to foreclose and right to cure, §201, and a notice of facilitation, §302. There is no minimum delinquency period before the Act notices may be sent, but the facilitation notice under §302 must be sent no later than 30 days after the notice of intent to foreclose under §201. A servicer seeking to minimize the foreclosure timeline might send the CFPB notice shortly after 45 days of delinquency, and then send the pre-foreclosure notices under the Act simultaneously, shortly after 60 days of delinquency.

The CFPB rule prohibits sending the "first notice or filing" required by state law for foreclosure until after 120 days of delinquency.[3] The bar on sending the "first notice or filing"

[1] 78 Fed. Reg. 10696 (Feb. 14, 2013)
[2] 12 C.F.R. §1024.39(b) (effective Jan. 10 2014).
[3] §1024.41(f).

continues after the 120th day if a loss mitigation request is still being evaluated.[4] However, the agency recently published a clarification that "first notice or filing" would not include notices like the Act's notice of intent or the notice of facilitation, so that the Act's preliminary notices could be sent within the initial 120-day period or while a loss mitigation request is pending.[5] In a judicial foreclosure state, the CFPB rule would define the "first notice or filing" as the complaint or similar initial document filed with the court. In a nonjudicial state, the "first notice or filing" would be any notice of sale that must be recorded or published, or if neither is required, then the notice of the actual sale date to the homeowner.[6] Thus, the pre-foreclosure notices under federal and state law could be sent more or less simultaneously rather than sequentially.

II. Time Limits for Homeowner's Request for Loss Mitigation or Facilitation

The Act gives homeowners a much more limited time window to request facilitation than the CFPB rule for loss mitigation requests. The CFPB rule does contemplate a period between day 45 and day 120 of the delinquency when loss mitigation alternatives should be evaluated and decided, and bars foreclosure from proceeding during that period. On the other hand, the CFPB rule also permits the homeowner to request loss mitigation for the first time well after day 120, and even as late as 37 days before a foreclosure sale. In that event, the rule still requires the servicer to evaluate the request, and if it is complete, to decide on the request before the foreclosure sale.[7]

The Act does not prescribe exactly what time limits the state facilitation process should impose. However, §304 limits the stay of foreclosure to a total of 90 days from the date of the facilitation notice, unless a court extends the time period. If a servicer sends the §201 and §302 notices on day 60 of the delinquency, for example, foreclosure could proceed after day 150, absent a contrary court order. The stay is further shortened if the homeowner fails to request facilitation within 60 days of the notice, or fails to attend the first scheduled session.

A homeowner who applied for loss mitigation promptly (within 15 days) after receiving the CFPB's 45-day notice should receive a decision by day 90. The homeowner could then request facilitation under Article 3, instead of, or combined with, requesting an appeal under the CFPB rule, §1024.41(h). In contrast, if the homeowner did not apply for loss mitigation promptly, she might face expiration of the Act's deadline to request facilitation before she has even applied for loss mitigation.

For example, a homeowner might fail to request facilitation within 60 days of the §302 notice, be served with a foreclosure complaint, and then submit a loss mitigation request to the servicer. If the request is a complete application, the CFPB rule would require the servicer to

[4] §1024.41(g).
[5] 78 Fed. Reg. 60382, 60440 (Oct 1, 2013), Comment 41(f)-1 to §1024.41 (comment clarifying that "first notice or filing" is the complaint in a judicial foreclosure, and the publication, recording, or first sale date notice in a nonjudicial foreclosure.)
[6] Id.
[7] §1024.41(c).

make a decision, and, if the sale date is still more than 90 days away, to allow the homeowner to appeal any adverse decision.[8] The CFPB rule assumes, however, that this would not delay foreclosure, because the servicer must make a decision on a complete loss mitigation application within 30 days.

III. Duration of Loss Mitigation Review under the CFPB Rule and Facilitation under the Act

The CFPB rule does not specify deadlines for each step of the process. Implicitly, the rule contemplates that loss mitigation requests should be deal with between day 45 and day 120 of a delinquency, but the homeowner controls the timing because the deadlines are triggered by the homeowner's application, not by the servicer's notice. If the homeowner's application is incomplete, the servicer must notify the homeowner what is missing and allow a reasonable time for the application to be completed. Once the application is complete the servicer must provide a written decision within 30 days.[9] The beginning of the review period is triggered by the homeowner's submission of a complete application.

The uniform Act prescribes a 90-day period from the sending of the facilitation notice to the end of the stay of foreclosure. The servicer therefore controls the timing of the facilitation period in the Act's foreclosure process. This period can be extended by court order, and facilitation could presumably continue past the 90-day period in any event. The facilitation period must begin no later than 30 days after the notice of intent to foreclose is sent, leaving the servicer the option to proceed with the initial steps of foreclosure or to wait for the facilitation process to conclude.

IV. Multiple Homeowner Applications for Loss Mitigation

The CFPB rule limits homeowners to a single bite of the apple: servicers are only required to comply with the procedures of the servicing rule for a single complete loss mitigation application for any given mortgage account.[10] This means that if a servicer has received a complete application, denied it and provided applicable appeal rights, while fully complying with the CFPB rule, the servicer is not obliged to meet timelines to respond to later requests for loss mitigation or to delay foreclosure if a renewed request is made. Of course, a homeowner might in a particular case dispute whether the previous request was handled in compliance with the CFPB rules.

The Act's facilitation process is available to any homeowner, whether or not they have previously made a loss mitigation arrangement on their mortgage in connection with a prior default or the current default. The facilitation process is available only once during a given period of default and foreclosure. However, after a complete cure under §203, new notices,

[8] §1024.41(c), (h).
[9] §1024.41(c).
[10] 12 C.F.R. §1024.41(i).

including the facilitation notice, would be required before a servicer could commence a new foreclosure based on a new default.

Conclusion

Loss mitigation requests governed by the CFPB rule and facilitation under Article 3 could be simultaneous or not. The Article 3 facilitation process could in some instances serve as a simple status check on the servicer's compliance with the CFPB loss mitigation process, and in other cases could come after the servicer's initial decision, and serve as an opportunity for reconsideration of any errors in the initial process, new facts, or basis for an appeal. Because the CFPB process is required only once in the life of a mortgage, Article 3 facilitation can also permit the homeowner to pursue foreclosure alternatives not covered by the CFPB rules after a prior failed loss mitigation effort, if changed circumstances warrant. Because the servicer controls the timing of the facilitation process, Article 3's procedures should not delay the overall foreclosure timeline. Indeed, the required 120-day waiting period under the CFPB rule should provide sufficient time to complete routine loss mitigation requests and facilitation sessions. In exceptional cases where further delay is warranted, the Act contemplates court intervention, based on good cause shown, to permit facilitation to run its course.

12. MEMO TO AMERICAN BANKERS ASSOCIATION SEEKING INPUT ON THE ACT

The Drafting Committee on the Home Foreclosure Procedures Act ("HFPA") encourages the banking industry to candidly critique its current draft making these four assumptions –

Assumption One - We can identify a device to insure that the Act as adopted will not be undermined by amendments that either (i) increase the consumer protections in the final act, (ii) reduce the effectiveness of the lender-oriented provisions in the final act; or (iii) reduce the benefits conferred on borrowers by HFPA.

Assumption Two – The Act in its final form will be widely adopted in the 50 states;

Assumption Three– Each adopting state will also adopt an appropriately drafted repealer Section, as required by HFPA § 702, tailored to that laws of that state;

Assumption Four - HFPA will shorten the time for completion of judicial foreclosures and will provide more certainty in non-judicial foreclosures.

FIRST: If those four assumptions proved accurate, would you view HFPA as a net improvement in the law as it applied to your institution?

SECOND: What other provisions might make the Article 3 mediation /facilitation sections sufficiently workable that lenders would support them? Without suggesting they are good, bad or otherwise, here are some ideas:

1. Encourage the Consumer Financial Protection Bureau to amend its regulations to provide that if those states that adopt HFPA, a lender may commence foreclosure without first sending two offers to modify mortgages for defaulting borrowers.
2. If a lender complies with the CFPB rules by sending two offers to modify mortgages for defaulting borrowers, it need not participate in the Article 3 facilitation process.
3. In order for a borrower to invoke Article 3, the borrower would have to initially pay 'X' percent [10% /25% /50%] of her monthly mortgage payment either to the lender or into a fund maintained by the facilitation agency, and thereafter pay a similar sum each month during the mediation process.
4. Impose a sunset provision for facilitation in each state, tied either to a calendar date or to some index reflecting the severity of foreclosures in that state.

THIRD: HFPA includes several provisions sought by lenders:

(i) two 'Accelerated Disposition' provisions on Abandoned Property and Negotiated Transfers, both designed to shorten the foreclosure process;

(ii) clarification of oft-litigated issues such as

(a) who can foreclose;

(b) adoption of the 'modern' UCC rule on lost note affidavits;

(c) eliminating the need to produce the original note in every foreclosure;
(d) making mortgage assignments optional

(iii) uniform pre-foreclosure, pre-sale notice rules simplify national compliance

(iv) a safe harbor for commercially reasonable publication of notice of sale similar to Article 9, and simplified advertisement requirements

How might HFPA be further amended to enhance these provisions from a lender's perspective?

FOURTH: Generally, HFPA includes proposed consumer remedies in Article 6; they include a right of action for violation of the Act, an attorneys' fees award to the prevailing party, and clear authority for the State Attorney General. While borrower advocates wish to strengthen the remedies as drafted and lenders seek to reduce borrower remedies as drafted, we seek a reaction from lender advocates as to whether the draft represents a balanced approach to this issue.

More significantly, the draft proposes several alternative amendments of the traditional Holder In Due Course Doctrine. As drafted, ***Alt. 1*** would entirely abolish the doctrine, ***Alt 2*** would be similar to the current HDC rule as it applies to the transferee creditor in the case of personal property loans, and **Alt 3** would impose a bracketed 10 year statute of limitations of claims against a transferee creditor. Missing in this draft by inadvertence is an applicability limitation to the holders of loans originated after the date the act becomes effective in that state.

How important is the Holder in Due Course doctrine to your institution? Are your litigators able to identify cases in which you have invoked it?