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Mr. William R. Breetz, Jr.
Connecticut Urban Legal Initiative, Inc.
University of Connecticut School of Law
35 Elizabeth Street
Hartford, CT 06105

Re: Proposed Residential Real Estate Mortgage Foreclosure Process and Protections Act (the "Proposed Act")

Dear Mr. Breetz:

This letter is submitted on behalf of the Securitization and Structured Finance Committee (the "Securitization Committee") of the Business Law Section of the American Bar Association (the "ABA"). We are writing to you in your capacity as the Chair of the Uniform Law Commission's drafting committee (the "ULC Committee") for the Proposed Act. The comments expressed in this letter represent the views of the Securitization Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law.

The importance of securitization, and the secondary mortgage market more generally, to the health of the economy should not be underestimated. The importance of the securitization market was highlighted in a White Paper prepared by the Securitization Committee and other ABA Business Law Section committees and sent to members of Congress and their staff in January 2010. Attached to this letter, for your interest and that of members of your Committee, is an excerpted version of that White Paper, containing the portions that relate to the residential mortgage market. The full White Paper is available upon request (or on the Securitization Committee's web page at http://apps.americanbar.org/dch/committee.cfm?com=CL112000) should you wish to review it.

Since the financial crisis of 2008, the federal government has supported the single-family residential mortgage market through the temporary expansion of Fannie Mae and Freddie Mac, rule changes and funding for the FHA, and mortgage-backed securities purchases by the Federal Reserve, among other measures. However, those governmental support mechanisms are not intended to be permanent alternatives to private sector funding in the U.S. housing finance system. In the future, as in the past, private sector securitizations are the key tool for bringing private capital to the mortgage market.

We appreciate the work of the ULC Committee in attempting to bring a measure of uniformity to the residential mortgage loan foreclosure process and we recognize the challenges the ULC Committee faces in balancing the competing interests of consumers, on the one hand, and lenders, on the other hand, and crafting a uniform act that is fair and balanced. We favor, and think that the securitization bar as a whole would favor, legislation that would standardize the foreclosure process. We have a number of concerns, however, about the Proposed Act based upon the drafts that have been circulated to date. At the most basic level, we are concerned that, rather than streamlining the foreclosure process and making it more consistent among the various states (to the extent possible given the differences between judicial and non-judicial foreclosure regimes), the Proposed Act may have the effect of unnecessarily delaying or seriously impeding the foreclosure process and have a chilling effect on private-label securitizations of residential mortgage loans. For example, the restrictions on who may foreclose, required remediation efforts and expanded causes of action and defenses may result in prolonged delays in the foreclosure process, even in a situation in which the borrower has no real defense to foreclosure and foreclosure would be in the best interest of the borrower and the lender. Foreclosure suits and delays have a real economic impact on investors in securitization transactions, inasmuch as the costs of defending such suits (and the lack of payments on the defaulted mortgage loans) have a negative impact on the cash flow available to make payments on the securities held by investors.

The more serious effect might be the Proposed Act's possible chilling impact on private-label residential mortgage loan securitizations. The creation of a private-label residential mortgage loan securitization includes modeling cash flows, a process that enables rating agencies to project the adequacy of collateralization and reserves to pay investors. The models used in this analysis incorporate, among many parameters, the anticipated timing for accomplishing foreclosures of property securing defaulted mortgage loans under the various state laws. Therefore, changes in the timeline for foreclosure would ripple through the analytical process and affect the economics, and ultimately the pricing, of these transactions. At the margin, such changes could affect which deals can get done, and which are uneconomic.

The residential securitization industry is already struggling to fashion new processes and procedures designed to comply with a myriad of new rules and regulations implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, including the Act's "ability to repay" requirements and the Consumer Financial Protection Bureau's related implementing rules, while awaiting even more regulations (including the final risk retention, conflict of interest and Volcker rules). The CFPB's "ability-to-repay" rules, in particular, create new assignee liability and remedies for residential mortgage loans that violate the rules (or do not fit within the prescribed "qualified mortgage" safe harbors). What we are hearing is that lenders likely will only make new mortgage loans that have the benefit of the full safe harbor (and, thus, have no assignee liability) or, if loans that do not enjoy the full safe harbor are made by lenders, such loans will not be included in private-label securitizations. New assignee liability provisions in the Proposed Act could exacerbate the situation.

We understand that you are in the process of revising the latest draft of the Proposed Act, based on your Committee's deliberations in early April. Because that revision is currently in process, we thought it best to defer our detailed comments until we review that draft. Accordingly, at this point, we would like to call your attention to several broad areas of concern.

<u>Scope</u> – We favor, and think that the securitization bar as a whole would favor, legislation that would standardize the foreclosure process. If, however, the proposal goes beyond that, we have concerns that its scope – specifically, the proposals about Facilitation, Common Interest Communities, Additional Defenses and Abrogation of Holder in Due Course Rules – may be outside the scope of the ULC Committee's mandate. It seems to us that the impetus for the Proposed Act was not to create new consumer protection laws (with

fundamental changes in the legal and economic rights of the consumer and the lender) but, rather, was to regularize the foreclosure process among the various states.

Relationship to Existing Foreclosure Law – It is not clear whether the Proposed Act is intended to supplant or be layered on top of existing state law. There is a statement that it is an overlay, but the exact meaning of that is unclear.

Defenses to Foreclosure and Rights of Action – For the reasons described above, we are concerned about creating additional defenses to foreclosure or rights of action, beyond those that exist in current law. As we noted above, the expansion of defenses or rights of action is significantly different from crafting rules that are intended to make the foreclosure process uniform across the states.

Relationship to Recent Changes in Servicing Practices and Federal Law – Recent changes to industry servicing practices, including those required by recent CFPB rules that will become effective in early 2014, as well as the Dodd-Frank Act's "ability to repay" requirements and the CFPB's related implementing rules (which also will become effective in early 2014), have largely rectified or will rectify perceived problems that occurred in the early days after the economic crisis, many of which were a result of inadequate preparation for the volume of delinquencies. Many states, as well, have implemented statutory changes. The addition of yet another set of changes that are geared toward consumer protection seems to us to be not only beyond the scope of a uniform law relating to foreclosure procedures but also unnecessary. The benefits of uniformity are already achieved with greater efficiency by having federal laws (in particular, the Dodd-Frank Act and implementing CFPB regulations). Moreover, federal laws and regulations would presumably preempt any inconsistent provisions of state law.

Relationship to Articles 3 and 9 of the Uniform Commercial Code – Provisions of the Proposed Act that would have the effect of altering or undercutting the existing protections afforded to residential mortgage notes under the UCC should also, at a minimum, be considered by the committees of the ABA and the Uniform Law Commission that deal with the UCC. As a general matter, securitization transactions utilize UCC Article 9 methods of selling, transferring and creating security interests in mortgage loans, and those processes have worked well and successfully. We struggle with the question of why legislation that is aimed at addressing problems in the foreclosure process should include changes to Articles 3 and 9. Such changes may make adoption of uniform laws relating to foreclosure processes much more uncertain. Changing the ways in which Articles 3 and 9 apply to residential mortgage notes is fundamentally (and substantively) different from what otherwise could be a relatively straightforward statute relating to procedures that must be followed in order to foreclose on the related mortgages.

Also, we appreciate the fact that the Federal Reserve Bank of New York and the Federal Housing Finance Administration are working toward an electronic registration system for residential mortgage notes and mortgages and agree that the Proposed Act should acknowledge the possibility of such a system. We assume that such a system would not be developed in isolation, but instead would also include consideration of the impact on UCC Articles 3 and 9, with some attempt to accommodate the new system under those Articles.

Retroactive Effect – To the extent that the Proposed Act would change the economic relationship of the parties (which, as noted, we think may well result if the Proposed Act were to be adopted in its current form), it would be less problematic to have those changes apply to new loans originated subsequent to the time of enactment than to have the changes apply to existing loans. With prospective application, the parties will have at least some ability, through contract terms and pricing, to adjust to the new legal environment. Any retroactive change to deal terms, by contrast, would burden parties disproportionately and could raise constitutional issues.

We also have a number of terminology and drafting matters with respect to the Proposed Act, but they are in the nature of clean-up suggestions. In view of the expectation that a new draft will be circulated soon, however, we will defer sharing those until the next draft of the Proposed Act.

Our group will be happy to meet with you, by phone or in person, to discuss our concerns.

Very truly yours,

Martin Fingerhut
Chair of Securitization and Structured Finance Committee

<u>Drafting Committee</u>:
Ellen R. Marshall, Chair of the Drafting Committee

Melissa Beck	Thomas Panoff	Vicki O. Tucker
Kathleen G. Cully	Thomas E. Plank	Craig A. Wolson
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Attachment: Excerpts from 2009 White Paper