American Bankers Association

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VIA EMAIL TO: william.breetz@law.uconn.edu
Mr. William Breetz, Chairman
Uniform Law Commission Drafting Committee on a Home Foreclosure Procedures Act
Connecticut Urban Legal Initiative, Inc.
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RE: Draft Home Foreclosure Procedures Act

Chairman Breetz:

The American Bankers Association (ABA) appreciates the opportunity to comment again on the draft Uniform Home Foreclosure Procedures Act (HFPA) and is grateful to you and the Drafting Committee for your unwavering commitment to working with all stakeholders fairly throughout this process.

The ABA appreciates the work of the HFPA Drafting Committee in undertaking the remarkably difficult task of drafting model state legislation that would bring uniformity to aspects of the residential mortgage loan foreclosure process. Nonetheless, for the reasons stated below, the ABA is concerned that HFPA has the potential to be incompatible with or unnecessary given recent state and federal statutory and regulatory changes to servicing and foreclosure practices. Provisions of HFPA could further delay an already prolonged foreclosure process in many states. It is unclear that HFPA would successfully add to or amend state foreclosure laws in a way that is good for borrowers and lenders together in the current national housing market.

American Bankers Association

The American Bankers Association is the voice of the nation's $15 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $11 trillion in deposits and extend more than $8 trillion in loans.

Assorted and Expanding Foreclosure Rules and Regimes

The legal context within which this drafting project has been undertaken demonstrates conclusively the rich variety of American foreclosure law. Laws, rules, and regulations affecting foreclosure have been enacted, promulgated and issued by states and by federal agencies for many years and vary greatly as to scope, definitions, process and remedies. On the state side, there may be no more idiosyncratic segment of banking-related law than foreclosure law.

State banking regulators and several federal regulatory agencies have authority and available resources to oversee loan origination, mortgage servicing and foreclosure processes. Viewed

from the highest macro level, a number of multi-state ABA member banks favor the concept of uniform legislation if it would standardize foreclosure processes across the country and thereby contribute to operational cost savings. Problems arise, however, once the conceptual level gives way to draft texts and the prospect of enacting and implementing them. To appreciate those problems, a brief review of the range of applicable governing structures is in order.

State Law

The HFPA Drafting Committee's intent was to draft an act that is an overlay to, rather than a replacement for, existing state legislation. As currently drafted, the HFPA goes beyond an overlay in that its enactment would displace enacted texts in many cases. Each state in the U.S. prescribes real estate foreclosure procedures in its own way. These distinctions begin with the choice of judicial versus nonjudicial foreclosure as the dominant process in a state, but that is also a macro difference.

Over the past several years, and especially since the 2008 recession, many states have amended existing statutes or enacted new laws related to mortgage foreclosure. According to the National Conference of State Legislatures (NCSL), in 2014 alone, foreclosure-related legislation was introduced in 31 states, the District of Columbia and Puerto Rico, resulting in 34 bills and resolutions enacted or adopted in 21 states. While the tide of state foreclosure legislation has subsided somewhat, prefiling for the 2015 session is underway, and foreclosure-related bills are expected to be among legislative priorities in some states.

National Mortgage Settlement

In early 2012, the federal government and 49 states entered into a settlement agreement with the nation's five largest mortgage servicers to address mortgage servicing, foreclosure and bankruptcy issues (the "National Mortgage Settlement" or the "Settlement"). The National Mortgage Settlement is the largest consumer financial protection settlement in United States history. Under its terms, signatory banks were required to implement extensive new mortgage servicing standards. Among the new servicing standards, servicers agreed to:

- Standards for executing documents in foreclosure cases;
- Strict oversight of foreclosure processing, including processing by third-party vendors;
- New standards to ensure the accuracy of information provided in federal bankruptcy court, including pre-filing reviews of some documents;
- Mandatory evaluation of homeowners for loan mitigation options prior to resorting to foreclosure;
- Restrictions from foreclosing while a homeowner is being considered for a loan modification (bar to dual-tracking);
- New procedures and timelines for reviewing loan modification applications;
- A right for homeowners to appeal denials; and
- A single point of contact for borrowers seeking information about their loans and adequate staff to handle calls.

Banks subject to the Settlement are required periodically to report compliance with the settlement to an independent, outside monitor that reports to state Attorneys General. Non-compliance carries heavy penalties for servicers. Although the National Mortgage Settlement is in place through late 2015, the major reforms in how banks service mortgage loans will be in place going forward. Some states also enacted legislation modeled after the National Mortgage Settlement to codify the servicing standards (for example, California Assembly Bill 278 Homeowner's Bill of Rights).

CFPB Regulations

While the Home Foreclosure Procedures Act would be a model state law, it is essential to consider the project along with applicable rules and requirements promulgated by the Consumer Financial Protection Bureau (CFPB) pursuant to the 2010 Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111–203, H.R. 4173).

On January 17, 2013, CFPB issued two regulations (the "Servicing Rules") that amend the mortgage servicing provisions of Regulation Z and Regulation X, which implement the Truth in Lending Act ("TILA") and the Real Estate Settlement Procedures Act ("RESPA"), respectively. The Servicing Rules cover the following nine major topics:

Regulation X

- Force-placed insurance
- Error resolution and information requests
- Servicing policies and procedures
- Early intervention with delinquent borrowers
- Continuity of contact with delinquent borrowers
- Loss mitigation

Regulation Z

- Periodic billing statements
- Interest rate adjustment notices for ARMS
- Prompt crediting and payoff statements

The Servicing Rules, which took effect January 10, 2014, fundamentally changed how banks manage their servicing operations. Historically, servicing was an operational issue largely limited to allowing servicers the time to update systems and policies within reasonable timeframes; now, with the Servicing Rules, servicing operations are also a compliance issue and can be the subject of regulatory enforcement. In addition, some provisions in the Servicing Rules create new borrower rights that are enforceable through private rights of action, meaning that failure to comply can be enforced by borrowers in addition to the regulators.

State laws that are inconsistent with the requirements of RESPA or Regulation X may be preempted by RESPA or Regulation X. State laws that give greater protection to consumers and that are not inconsistent with RESPA or Regulation X, however, are not preempted. CFPB has stated that RESPA and Regulation X do not preempt the entire field of regulation of the practices covered by RESPA or Regulation X, including the regulations in Subpart C with respect to mortgage servicers or mortgage servicing. Thus, in addition to complying with the Servicing Rules, it is critical for servicers to review and comply with any state law requirements that offer greater protections for consumers.

The Servicing Rules and interpretations of the rules are evolving and continue to be subject to amendment. On November 20, 2014, the CFPB proposed several changes to its Servicing Rules, including a new requirement for servicers to do more to prevent foreclosures by satisfying loss mitigation requirements "more than once in the life of a loan" for borrowers who become current after a delinquency and taking "affirmative steps" to delay a foreclosure sale. The proposed amendments would also clarify servicers' obligations in handling loss mitigation applications. The extensive round of proposed updates to the Servicing Rules would also clarify the definition of delinquency, explain how servicers must handle successors in interest, narrow the exemption from early intervention requirements for bankrupt borrowers, amend disclosures for lender-placed insurance, clarify early intervention obligations and address the treatment of periodic payments for customers in loan modifications.

ABA believes that the issuance by CFPB of comprehensive, national mortgage servicing rules address the major consumer issues that arose over the past few years. The rules are still being refined, and banks need time to adjust practices in order to comply fully. Enactment and implementation of the state-based standards in HFPA could impose divergent and conflicting standards that would add costs to future homebuyers and create confusion for current homeowners.

Basel III

In July 2013, the Federal Reserve Board finalized a rule implementing Basel III capital rules in the United States, a package of regulatory reforms developed by the Basel Committee on Banking Supervision, on which the United States serves as a participating member. The Basel III capital rules called for a large increase in bank capital. In many cases, U.S. regulators applied these rules to all banks regardless of size or their actual level of international activity.

While the final U.S. capital rule made some adjustments for smaller banks, the rule's capital treatment of mortgage servicing assets ("MSAs") applies to all banks. Banks, therefore, are retaining less mortgage servicing due to Basel III's unfavorable capital treatment of MSAs. The increased regulatory burden and legal liabilities associated with the CFPB's new servicing rules, combined with Basel III's negative capital treatment of MSAs, appears to be resulting in consolidation in the servicing industry and a shift of assets to non-bank servicers, such as mortgage companies, REITs, hedge funds, and private equity firms that are not subject to the new capital restrictions or to safety and soundness regulation by state or federal bank regulators. The ABA continues to advocate to the regulatory agencies for changes to Basel III's punitive treatment of MSAs because of the disruptive and damaging effect on real estate financing.

GAO Study; CSBS Task Force

Focusing on the growth of the non-bank servicing industry over the past three years, the U.S. House Committee on Oversight and Government Reform sent a letter in October 2014, asking that the Government Accountability Office (GAO) look into growth of the non-bank mortgage servicing industry. Also in October, the Conference of State Bank Supervisors (CSBS) launched a Mortgage Servicing Rights Task Force charged to develop standards and guidelines for non-bank mortgage servicers. The bottom line is that yet more regulation and oversight of the servicing industry is likely in the future, and HFPA's compatibility with existing regulations and additional rules expected in the future is unclear.

ABA Participation in HFPA Project

It is also worth briefly reviewing the engagement of the banking industry and ABA with the HFPA drafting process. ABA has participated consistently, from the first stakeholder meeting in January 2012, until the present, in good faith and with a significant resource commitment. ABA has made unprecedented efforts to bring to the table the views of not only the most directly engaged advocacy segments of ABA but also specialized industry segments represented within other parts of the ABA structure. ABA has also made extraordinary efforts to provide the Chairman and American Bar Association Advisor Barry Nekritz with opportunities for direct contact with ABA task force members, ABA staff, state bankers association (SBA) executives, SBA government relations professionals and counsels, and stateside legislative professionals from multi-state banks.

- ABA representatives have attended nearly all of the in-person Drafting Committee meetings and both HFPA readings at two ULC Annual Meetings.
- ABA staff was grateful to be asked to participate in HFPA sub-working groups on the Holder-in-Due Course (HDC) topic and the Pre-Foreclosure Resolution process (formerly referred to in HFPA as Facilitation).
- ABA representatives speak with and correspond frequently with the Chairman and with Mr. Nekritz on particular issues and Drafting Committee events.
- ABA hosts a task force on the HFPA project comprised of bank attorneys and state bankers association attorneys and government relations professionals. The task force has convened eleven conference calls to date. The Chairman and Mr. Nekritz were good enough to participate in conference calls with the full task force in June 2013, and with a smaller group in January 2014. Members of the ABA HFPA Task Force regularly attend HFPA Drafting Committee meetings as well.
- On October 10, 2013, as part of an annual state legislative program, ABA hosted a 90-minute panel session featuring the Chairman, Mr. Nekritz and FHFA's General Counsel Alfred Pollard. The panel directly addressed more than 125 government relations and lobbying professionals from ABA member banks and state bankers associations.
- In May 2014, the ABA and six state bankers associations submitted a comment letter specifically with regard to Section 106 of the draft act, Application of Local Regulations.
- Several ABA bank members, including ABA HFPA Task Force participants, have provided informal comments on specific topics, including the definition of residential mortgaged property, HFPA Sections 2 and 4, and alternative approaches to modifying the holder in due course doctrine.
- ABA's Mathew Street and Meg Michiels have provided informal comments regarding states' experience with expedited foreclosure and mediation statutes.

In effort to assure HFPA received broad exposure to ABA's members, the General Counsel's Office has briefed additional departments within the ABA as the HFPA project evolved. ABA's Mortgage Markets, Financial Management and Public Policy Group hosts the ABA Mortgage Servicing Working Group to review, comment on and keep bankers abreast of developments pertaining to new servicing regulations issued by the CFPB and servicing issues that arise in the secondary mortgage market. The Center for Securities, Trust and Investments in the Financial

Institutions Policy and Regulatory Affairs Group hosts the ABA Corporate Legal Trust Counsel Working Group, whose purpose is to address legal and policy issues for corporate trustees. Each of these staff groups has updated their constituents on relevant HFPA developments.

Content of HFPA

ABA recognizes that the work of the Drafting Committee is not complete and that one meeting remains prior to presenting a final draft for approval at the 2015 ULC Annual Meeting. All of ABA's work to date and all the discussions with and among its constituencies have led to the following, top-level observations:

- ***Section 108. No Waiver.*** The blanket prohibition against waiver or variance by agreement is severe and runs counter to much of the tone of uniform law, especially the UCC. It is unclear why an informed obligor and creditor should be prevented from consenting to otherwise reasonable terms.
- ***Article 3. Pre-Foreclosure Resolution.*** The mediation-like process referred to as Pre-Foreclosure Resolution seems to remain at the heart of the HFPA and presents a material industry concern. About half of the states have foreclosure mediation programs of some kind in place; some are statewide and others operate only in certain cities, counties or particular judicial circuits. It is also unmistakable that other states' legislatures have unequivocally rejected legislative attempts to enact mediation or a similar process, some more than once. In some states where foreclosure mediation is practiced, it is believed to contribute further delay to the foreclosure process. It is certainly not an unequivocal success wherever it is in place. Even though data show that the number of foreclosures nationwide is decreasing, the time to complete a foreclosure in many states remains excessively long. Adding a process that can prolong foreclosure is undesirable.
- ***Article 6. Abandoned Property.*** Approximately sixteen states provide for expedited foreclosure of abandoned property. The use and reliance on those statutes vary greatly among the states. The provisions of Article 6 in the current draft have become expansive and would be onerous to creditors. The maintenance provisions would require a creditor not only to care for the yard and exterior of the property, but would also require a creditor to prevent trespassers and conditions that create a public or private nuisance. These requirements would apply before a creditor takes title to the property. Other provisions would allow community associations to intervene in a foreclosure to seek a determination of abandonment and provide a right to enforce creditor maintenance obligations. Onerous expedited foreclosure provisions discourage our members from availing themselves of the process due to the increased costs associated with maintenance and the uncertainty around liability in instances where property owners challenge the abandonment filing after the foreclosure.
- ***Article 7. Remedies.*** HFPA Article 7 contains extensive, negative liability and remedy provisions. Section 701 would provide expansive remedies – including dismissal with prejudice – for a material violation of the act, but would not require a showing of harm to the homeowner or obligor. HFPA would authorize a court to look beyond the foreclosure case before it and assess penalties if it sees a pattern or practice of noncompliance.
- ***Section 706. Effect of the Holder in Due Course Rule.*** Our members continue to oppose the expanded assignee liability created by modifying the holder-in-due-course doctrine.

Conclusion

At this point, in the third year of an expected two-year process, it seems fair and appropriate to sum up the views of ABA and its members as those views have developed and been shared with multiple ABA constituencies since the first stakeholders meeting.

The Chairman and the Committee have stated from the beginning of the process that it was intended, among other goals, to produce a text that would gain the support of the banking industry by offering benefits that would outweigh additional burdens. After many discussions, many papers, many task force calls and many meetings, no banker and no state bankers association has told ABA that they want this bill (in any of the texts that has been produced to date). It is seen as not offering the banking industry any particular benefit that cannot be gained by continued advocacy in the states, and it is also seen as potentially imposing burdens on the mortgage lending process by restricting credit supply by varying the holder in due course doctrine and by encouraging a mediation-like process whose benefits where practiced are unclear. Given the breadth of existing and proposed foreclosure-related laws, rules and regulations, ABA bank members and state bankers associations have expressed reservations to the ABA about HFPA as constituting yet another layer of burdensome foreclosure requirements without substantial benefit to all affected parties.

Thank you for this opportunity to outline our concerns with the HFPA drafting project on behalf of ABA's members. The ABA will continue to encourage member banks and state bankers associations to participate in monitoring the HFPA drafting project, attend meetings and comment on forthcoming HFPA discussion drafts.

If you have any questions or would like any clarification concerning the matters addressed in this letter, do not hesitate to contact us.

Sincerely,

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