

D R A F T
FOR DISCUSSION ONLY

Mortgage Modifications Act

Uniform Law Commission

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February 10, 2022

Mortgage Modifications Act

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Mortgage Modifications Act

Section 1. Title

This [act] may be cited as the Mortgage Modifications Act.

Section 2. Definitions

In this [act]:

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

(2) “Loan document” means a promissory note, credit agreement, loan agreement, indenture, or other record creating debt or other obligations secured by a mortgage. The term does not include a mortgage.

(3) “Modify” means change, amend, revise, correct, supplement, or restate. The term does not include a transfer or assignment of the ownership of or right to enforce an obligation secured by a mortgage. The term “modification” has a correlative meaning.

(4) “Mortgage” means a record that creates a consensual interest in real property to secure payment or performance of an obligation.

(5) “Mortgaged property” means real property or fixtures subject to a mortgage.

(6) “Non-residential mortgage” means a mortgage that is not a residential mortgage.

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

1 (8) “Obligor” means a person that:

2 (A) owes payment or performance of an obligation;

3 (B) has signed a mortgage with respect to mortgaged property; or

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

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

9 (10) “Record”, used as a noun, means information:

10 (A) inscribed on a tangible medium; or

11 (B) stored in an electronic or other medium and retrievable in perceivable
12 form.

13 (11) “Record,” used as a verb, means to submit a document complying with
14 applicable legal standards, with required fees and taxes paid, to the appropriate governmental
15 office under [cite to state recording act].

16 (12) “Residential mortgage” means a mortgage on residential real property.

17 (13) “Residential real property” means real property that, when a mortgage is
18 entered into with respect to the property, is used or intended by its owner to be used primarily for
19 the personal, family, or household purposes of its owner and is improved, or intended by its
20 owner to be improved, by one to four dwelling units.

21 (14) “State” means a state of the United States, the District of Columbia, Puerto
22 Rico, the United States Virgin Islands, or any other territory or possession subject to the
23 jurisdiction of the United States. The term includes a federally recognized Indian tribe.

Reporter's Notes

1. **Common-interest community.** The term “common-interest community” comes from the Uniform Home Foreclosure Procedures Act and the Model Negotiated Alternative to Home Foreclosure Act. Note that the definition will be moved to section 3 if that is ultimately the only place that it is used.

Questions: Do we need this definition? Would it be better to reference each state’s definition of a common interest community?

2. **Loan document.** The term “loan document” is intended to encompass any type of record that creates an obligation secured by a mortgage. It is intended to include a promissory note, a credit agreement, a loan agreement, an indenture, a construction loan agreement, a consumer credit agreement, or any other type of agreement secured by a mortgage. However, it does not include the mortgage itself.

3. **Modify.** The term “modify” is intended to be very broad and thus to encompass any type of modification or change that parties might make to a loan document, including a correction, supplement to or a restatement of a loan document. The term does not include an assignment or transfer. “Modification”, as the corresponding noun, has a corresponding meaning.

4. **Mortgage.** The definition of “mortgage” comes from the definition of “mortgage agreement” in the Model Negotiated Alternative to Home Foreclosure Act. Depending upon local usage and custom, a mortgage may be denominated as a mortgage, deed of trust, trustee deed, security deed, deed to secure debt, or the like. The definition does not contain an exclusion of homeowners’ association liens because they are excluded in the Section 3.

Question: Do we need to include in the definition of mortgage a consensual interest in fixtures?

5. **Mortgaged property.** This term now appears in the act in several places.

6. **Non-residential mortgage.** A “non-residential mortgage” is a mortgage that secures a commercial loan or any other mortgage loan that is secured by property that is not residential real property as that term is defined.

7. **Obligation.** The definition of the term “obligation” comes from the Model Negotiated Alternative to Foreclosure Act and the Uniform Home Foreclosure Procedures Act. The term includes a non-recourse debt, whether the debt is non-recourse due to the application of anti-deficiency judgment legislation, agreement of the parties, or for other reasons.

8. **Obligor.** This definition comes from the Uniform Home Foreclosure Procedures Act.

9. **Person.** The definition of “person” comes from the ULC Drafting Rules and Style Manual.

10. **Record.** The definition of “record”, used as a noun, comes from the ULC Drafting Rules and Style Manual.

1 11. **Record.** The definition of “record”, used as a verb, comes from the Uniform
2 Nonjudicial Foreclosure Act. The term primarily used in the act is “recorded” which is a passive
3 participle functioning as an adjective.
4

5 Question: Would it be better to define “recorded”?
6

7 12. **Residential mortgage.** A “residential mortgage” is a mortgage on residential real
8 property as that term is defined in the act.
9

10 13. **Residential real property.** The definition of “residential real property” comes from
11 the definition of that term in the Uniform Nonjudicial Foreclosure Act. As described in that Act,
12 there are two elements in the definition, one relating to the use of the property and the other to
13 the improvements on it. “Residential real property” must be used or intended to be used
14 primarily for personal, family, or household purposes of its owner. This definition is similar to
15 that of the Uniform Consumer Credit Code, the Federal Trade Commission’s Holder in Due
16 Course Rule, and various other consumer protection statutes. Some commercial or other
17 nonresidential use is permitted within this definition, so long as the primary use is residential.
18

19 14. **State.** The definition of “state” comes from the ULC Drafting Rules and Style
20 Manual.
21

22 **Section 3. Scope; Exclusions**

23 (a) Except as provided in subsection (b), this [act] applies to mortgages whether
24 denominated as a mortgage, a deed of trust, or another name.

25 (b) This [act] does not apply to a record creating a consensual interest to secure an
26 obligation owed to a condominium association or homeowners’ association in a common-interest
27 community.

28 (c) This [act] does not affect any law of this state that governs:

- 29 (1) the required content of a mortgage; or
30 (2) future advances. “Future advances” are advances of funds made after the
31 initial advance of funds pursuant to the terms of a loan document before its modification.

32 **Reporter’s Notes**

33 1. **Scope.** The act applies to modifications of obligations secured by mortgages, which are
34 defined as consensual interests in real property to secure payment or performance of an
35 obligation.

1 **2. Exclusion for homeowners' association lien.** The act is not intended to apply to the
2 modification of a declaration of covenants, conditions, and restrictions or other record that
3 creates an obligation to a condominium association or homeowners' association.
4

5 **3. Laws Governing Contents of a Mortgage.** The act is not intended to affect any state
6 law that requires a mortgage to include certain terms such as a law that requires that a mortgage
7 state the maximum principal of a loan.
8

9 **4. Laws Governing Future Advances.** The [act] is not intended to affect state law
10 governing future advances. The definition of "future advances" will be moved to the definitions
11 section if the term is ultimately used elsewhere in the act; otherwise, it will be collapsed into the
12 language of the subsection. The definition of future advances needs some thought.
13

14 See also see reporter's note 8 after Section 4 for a discussion of the issue of a
15 modification that provides for new future advances or turns a fixed loan into a revolving credit
16 loan.
17

18 **Section 4. Non-Residential Loan Modification**

19 (a) Except as provided in subsection (b), if a recorded non-residential mortgage provides
20 that the mortgage secures obligations under a loan document as it may be amended, modified,
21 supplemented, or restated, or words of similar effect, the mortgage secures the obligations under
22 the loan document as modified without regard to whether a modification of the mortgage is
23 recorded and without regard to whether the modification may otherwise constitute a novation of
24 the obligations under the loan document and retains its priority.

25 (b) Subsection (a) does not apply to a modification that:

26 (1) increases the principal of the obligation stated in the recorded mortgage,

27 (2) extends or accelerates the maturity date of the obligation if the maturity date is
28 stated in the recorded mortgage,

29 (3) increases the interest rate of the obligation if the interest rate is stated in the
30 recorded mortgage, or

31 (4) occurs contemporaneously with a transfer of the ownership of a loan
32 document.

(c) A modification described in subsection (c) is governed by other law.

Reporter's Notes

1. Another Option. In our December meeting there was support for language suggested by Dale Whitman which is shown as subsection (b) below. In addition, Pat Fry suggested separating the concepts of priority and continued security for the modified obligation. Below is possible language that incorporates those comments:

(a) If a non-residential mortgage provides that it secures obligations under a loan document as the obligations may be amended, modified, supplemented, or restated, or words of similar effect, the mortgage secures the obligations under the loan document as modified without regard to whether a modification of the mortgage is executed and recorded and without regard to whether the modification may otherwise constitute a novation of the obligations under the loan document.

(b) Except as provided in subsection (c), modification of an obligation secured by a non-residential mortgage does not affect the priority of the mortgage as against junior interests in the mortgaged property.

Note that subsection (a) does not need exceptions. As between the parties, the mortgage is still enforceable to secure the modified obligation. With modification language in the mortgage, the mortgage itself need not be modified. Subsection (b) is based on the language of Restatement §7.3(b). The safe harbor applies even without modification language in the mortgage, and the exceptions to the safe harbor would be those modifications that are materially prejudicial. The provisions are not limited to recorded mortgages.

2. Applicability. Section 4 applies to non-residential mortgage loans. The section applies to modifications of obligations secured by a mortgage. It does not apply to releases of or additions to the mortgaged property.

3. Continued security for modified obligation. The first part of subsection (a) makes clear that a provision in a mortgage to the effect that the mortgage secures obligations in loan documents as modified is effective. The mortgage will secure the loan document obligations as modified without regard to whether the parties execute and record a modification of the mortgage itself and without regard to whether the modification may otherwise constitute a novation of the obligations under the loan document.

Execution and recordation of a mortgage modification may be desirable for other reasons. If a loan document term that is stated in the mortgage is modified, a recorded modification agreement will give notice of that modification pursuant to a state's recording act.

Some states require that a mortgage must state the maximum principal amount that the mortgage may secure. In those states, an increase in the stated principal amount would appear to require a modification of the mortgage. Section 3(c)(1) makes clear that this act does not supersede any such requirements.

1 If a modification is so substantial as to constitute a novation of the loan, some cases hold
2 that the mortgage may no longer secure the modified loan. See, e.g. In re Fair Finance Co., 834
3 F.3d 651 (2016). Subsection (a) is intended to clarify that language in the mortgage stating that it
4 continues to secure the loan is effective even if the modification is so substantial as to be a
5 novation.
6

7 **4. Priority.** Under common law and the Restatement, if an obligation secured by a
8 mortgage is modified, the mortgage “retains priority as against junior interests in the real estate,
9 except to the extent that the modifications is materially prejudicial to the holders of such
10 interests.” Restatement §7.3(b). The purpose of second part of subsection (a) of the act is to
11 create a safe harbor for certain modifications that will not be treated as materially prejudicial
12 with exceptions to the safe harbor listed in subsection (b).
13

14 **5. Increase in principal.** Cases hold that an advance of new funds does materially
15 prejudice a junior lienholder. This provision would change that rule if the new advance does not
16 increase the principal beyond the principal stated in the mortgage.
17

18 Question: Does this implicate some state’s statutes regarding future advances or revolving credit
19 loans? See note 8 below.
20

21 **6. Change in maturity date.** Most of the cases find that a junior lienholder is not
22 materially prejudiced by the extension of the maturity date of a loan because it makes a
23 foreclosure less likely. In a few circumstances, a junior lienholder could be prejudiced if the
24 value of the property falls during the extended term of the loan or because principal is not
25 reduced as quickly with a modified amortization schedule. The Restatement position is that an
26 extension of the maturity of a senior mortgage loan is beneficial to junior lienholders and should
27 not cause a loss of priority.
28

29 Question: Do we want to keep this exception?
30

31 Question: What if the maturity date is shortened? Why would that ever happen except perhaps in
32 conjunction with a reduction in interest rate and payments?
33

34 **6. Increase in interest rate.** Cases hold that an increase in interest rate does materially
35 prejudice a junior interest holder and results in loss of priority to the extent of the increase.
36 Taking this exception out would change that rule.
37

38 Question: Do we want to keep this exception?
39

40 **7. Modification contemporaneously with transfer.** The Restatement and cases on
41 subrogation give a lender who pays off another lender and takes a new note and mortgage the
42 same priority as the mortgage that is repaid to the extent that junior lienholders are not materially
43 prejudiced. Examples of material prejudice are the same as those relating to a modification. It
44 does not matter that the lender has changed. The same is true where a loan is assigned and
45 modified rather than paid off with a new loan.
46

1 Concerns about modification at the time of transfer may relate to whether a mortgage tax
2 is due. Whether a tax is due is governed by other law. This act is not intended to create a method
3 for avoiding payment of such a tax.
4

5 Question: Do we want to keep this exception?
6

7 **8. Future advances.** Michael O’Neal has raised a concern about a modification that
8 provides for new future advances or turns a fixed loan into a revolving credit loan. We have
9 added language in Section 3 as a possible way to address the issue. Michael describes the issue
10 as follows:
11

12 I believe we need an exception for future advances. Without one, this act could be used to
13 avoid (1) existing statutes that govern the required *contents* and *effect* of future advance
14 mortgages and (2) existing laws that govern *priority of mechanics’ liens* and other similar liens.

15 The recommendation of the Study Committee expressly stated that the Drafting
16 Committee should not consider the question of future advances. It is true that that
17 recommendation defined “future advances” as “advances of funds made . . . *without* modification
18 of the loan documents.” Study Committee Report, at 5 n. 12. But the question is sufficiently
19 complicated and the political interests at stake are so strongly vested that we should consider
20 whether future advances made *pursuant to a modification* of the loan documents should be
21 expressly excluded.

22 The following example demonstrates the potential conflicts with state mechanic’s lien
23 priority laws.

24 **Example 1:** On January 1, B acquires Blackacre, located in State X, in the amount of
25 \$150,000 and obtains a loan in the amount of \$100,000 from L for that purpose. B
26 executes and L records a mortgage encumbering Blackacre and securing the loan
27 obligation. The entire \$100,000 is advanced by L to B and used by B to pay the purchase
28 price.

29 On February 1, B contracts with GC to furnish materials and labor for improvements to
30 Blackacre and GC commences work at the property. Because the loan by L was fully
31 disbursed prior to commencement of work, under the laws of State X any lien rights in
32 favor of GC for work performed or material furnished but unpaid by B are completely
33 subordinate to the recorded mortgage securing the \$100,000 for the benefit of L.

34 On March 1, B pays down the loan from L to a balance of \$10,000. B and L agree to
35 supplement the original loan with a revolving line of credit in the amount of \$90,000,
36 which B may use in part to pay for the ongoing construction. They agree that the original
37 mortgage will also secure the supplemental revolving credit loan facility. Under the
38 existing “broken priority” laws of State X, the lien of the mortgage will continue to have
39 priority over the lien rights of GC to the extent of \$10,000. However, because GC has
40 already commenced work at Blackacre, GC’s lien rights will now have priority over the
41 mortgage in favor of L to the extent of any future advance of the \$90,000 revolving credit
42 line secured by the mortgage.

1 As drafted, the proposed act will overturn this result. Because there is no increase to the
2 original principal amount of \$100,000 secured by the mortgage, the supplemental line of
3 credit transaction is a “modification” that does not fall into any of the exceptions to the
4 safe harbor. Therefore, the mortgage will secure the \$90,000 line of credit with the “same
5 priority” as the original mortgage.

6 The following example demonstrates the potential conflicts with existing state laws
7 governing revolving credit lines. For example, Virginia has a statute that governs the priority of
8 credit line deeds of trust. *See* VA. CODE § 55.1-318. This provision establishes certain formalities
9 for the *contents* of credit line deeds of trust (*e.g.*, a required legend declaring “THIS IS A
10 CREDIT LINE DEED OF TRUST”, beneficiary’s address, stated maximum aggregate principal
11 amount secured). It then establishes *priority rules* that provide for future advances to have
12 priority that “relates back” to the recording of the deed of trust. There are exceptions to this
13 priority rule; for example, a subsequent judgment creditor may obtain partial priority over a
14 future advance by giving notice to the beneficiary. These priority rules conflict with Virginia’s
15 recent loan modification statute. VA. CODE § 55.1-318.1.

16 Virginia is not alone. Florida law also requires a mortgage to expressly state that it
17 secures future advances and state the maximum principal amount secured; and it provides a
18 special statute of limitations (20 years) as to effectiveness. FLA. STAT. § 697.04. Many other
19 examples could be found. Without an exclusion for future advances, the act could be used to
20 evade these formal contents requirements and override these priority rules.

21 **Example 2:** On January 1, B acquires Blackacre, located in State X, in the amount of
22 \$150,000 and obtains a loan in the amount of \$100,000 from L for that purpose. B
23 executes and L records a mortgage encumbering Blackacre and securing the loan
24 obligation. The entire \$100,000 is advanced by L to B and used by B to pay the purchase
25 price.

26 On February 1, B pays down the loan from L to a balance of \$10,000. B and L agree to
27 supplement the original loan with a revolving line of credit in the amount of \$90,000.
28 They agree that the original mortgage will also secure the supplemental revolving credit
29 loan facility. State X has rules similar to Virginia or Florida (*supra*) that govern the
30 contents the priority of credit line mortgages. However, B and L do not amend the
31 recorded mortgage to comply with those rules. Because the recorded mortgage does not
32 comply with the content requirements of the credit line statute, the mortgage may not be
33 entitled to the benefit of the priority rules of that statute.

34 As drafted, the proposed act will overturn this result. Because there is no increase to the
35 original principal amount of \$100,000 secured by the mortgage, the supplemental line of
36 credit transaction is a “modification” that does not fall into any of the exceptions to the
37 safe harbor. Therefore, the mortgage will secure the \$90,000 line of credit with the “same
38 priority” as the original mortgage. That the mortgage fails to comply with the credit line
39 statute appears to be immaterial.

40 The simplest way to prevent these kinds of conflicts with existing state priority rules as to
41 future advances is to include an exception to the safe harbor for a modification that “provides for

1 a future advance.” By expressly excluding future advances, this act would appropriately deal
2 with the narrow issue raised by the Virginia statute—providing clarity of what does and does not
3 constitute “material prejudice” to a potential junior creditor.

4 You will note that I have also included as part of the exception the phrase that the
5 modification “provides that the collateral secures future advances.” Normally, of course, such a
6 provision would be found in the mortgage itself. However, according to the Restatement, the
7 agreement for a future advance “need not be in the mortgage” and is binding on third parties
8 provided “the mortgage states a monetary amount to be secured.” RESTATEMENT § 2.1(b), (c).
9 Although I have not examined the supporting case law in detail, the Reporter’s Note indicates
10 that “[t]his principle is widely accepted.”

11 12 **Section 5. Residential Loan Modification**

13 (a) Except as provided in subsection (b), if a recorded residential mortgage provides that
14 the mortgage secures obligations under a loan document as it may be amended, modified,
15 supplemented, or restated, or words of similar effect, the mortgage secures the obligations under
16 the loan document as modified without regard to whether a modification of the mortgage is
17 recorded and without regard to whether the modification may otherwise constitute a novation of
18 the obligations under the loan document and retains its priority.

19 (b) Subsection (a) does not apply to a modification that:

- 20 (1) increases the amount of the principal of the obligation [except if the increase is
21 a capitalization of unpaid interest or other unpaid obligations];;
22 (2) extends the maturity date of the obligation; or
23 (3) increases the interest rate of the obligation.

24 (c) A modification described in subsection (b) is governed by the law that would apply
25 without regard to this [act].

26 **Reporter’s Notes**

27 1. **Another option.** John Valdivielso and Lisa Caffrey provided comments with respect
28 to what they believe would be useful for residential mortgages. Based on their comments,
29 another option for the language of the residential section is as follows:

30
31 (a) Except as provided in subsection (b):

1 (1) modification of an obligation secured by a residential mortgage does not affect
2 the priority of the mortgage; and

3 (2) recordation of a modification agreement is not necessary to retain mortgage
4 priority.

5
6 (b) Subsection (a) does not apply to a modification that:

7 (1) provides for the advance of new funds not contemplated under the loan
8 documents and mortgage; or

9 (2) increases the interest rate in excess of that provided in the loan documents.

10
11 Note that Lisa and John do not have the same concerns with residential mortgages about
12 continued security of the modified obligation or about novation. Also, we can add a definition of
13 modification agreement if this subsection (a) is selected.

14
15 **2. Applicability.** Section 5 applies to residential mortgage loans. The section applies to
16 modifications of obligations secured by a mortgage. It does not apply to releases of or additions
17 to the mortgaged property.

18
19 **3. Priority.** Under common law and the Restatement, if an obligation secured by a
20 mortgage is modified, the mortgage “retains priority as against junior interests in the real estate,
21 except to the extent that the modifications is materially prejudicial to the holders of such
22 interests.” Restatement §7.3(b). The purpose of subsection (a) of the [act] is to create a safe
23 harbor for certain modifications that will not be treated as materially prejudicial with exceptions
24 to the safe harbor listed in subsection (b).

25
26 Recordation of modification agreement is not necessary to retain the priority of the
27 mortgage if the modification is not materially prejudicial to junior interest holders. However,
28 recordation of a modification agreement may be desirable for other reasons.

29
30 **4. Increase in amount owed.** Cases hold that an advance of new funds does materially
31 prejudice a junior lienholder and results in loss of priority at least to the extent of the increase.

32
33 Question: What should this exception cover and how should it be worded?

34
35 **5. Change in maturity date.** Most of the cases find that a junior lienholder is not
36 materially prejudiced by the extension of the maturity date of a loan because it makes a
37 foreclosure less likely. In a few circumstances, a junior lienholder could be prejudiced if the
38 value of the property falls during the extended term of the loan or because principal is not
39 reduced as quickly with a modified amortization schedule. The Restatement position is that an
40 extension of the maturity of a senior mortgage loan is beneficial to junior lienholders and should
41 not cause a loss of priority.

42
43 Question: Do we want this as an exception?

44
45 Question: What if the maturity date is shortened? Why would that ever happen except perhaps in
46 conjunction with a reduction in interest rate and payments?

1 **6. Increase in interest rate.** Cases hold that an increase in interest rate does materially
2 prejudice a junior interest holder and results in loss of priority to the extent of the increase.
3 Consistent with case law, this exception removes increases in the amount owed from the safe
4 harbor.
5

6 **Section 6. Uniformity of Application and Construction**

7 In applying and construing this uniform act, a court shall consider the promotion of
8 uniformity of the law among jurisdictions that enact it.

9 **Section 7. Relation to Electronic Signatures in Global and National Commerce Act**

10 **{Insert if necessary.}**

11 This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National
12 Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or
13 supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices
14 described in 15 U.S.C. Section 7003(b).

15 ***Legislative Note:** It is the intent of this act to incorporate future amendments to the cited federal*
16 *law. A state in which the constitution or other law does not permit incorporation of future*
17 *amendments when a federal statute is incorporated into state law should omit the phrase “, as*
18 *amended”. A state in which, in the absence of a legislative declaration, future amendments are*
19 *incorporated into state law also should omit the phrase.*
20

21 **Section 8. Transitional Provision**

22 (a) This [act] applies to a mortgage modification made on or after [the effective date of
23 this [act]].

24 (b) This [act] applies to a mortgage created on, after, or before [the effective date of this
25 [act]].

26 **Reporter’s Note**

27 Should subsection (a) refer to modification of an obligation rather than to a mortgage
28 modification?
29

30 **Section 9. Severability**

1 If a provision of this [act] or its application to a person or circumstance is held invalid,
2 the invalidity does not affect another provision or application that can be given effect without the
3 invalid provision.

4 ***Legislative Note:** Include this section only if the state lacks a general severability statute or a*
5 *decision by the highest court of the state stating a general rule of severability.*

6 **Section 10. Repeals; Conforming Amendments**

8 (a) . . .

9 (b) . . .

10 ***Legislative Note:** A state should examine its statutes to determine whether conforming revisions*
11 *are required by provisions of this act relating to { }. See Section { }.*

12 **Section 11. Effective Date**

14 This [act] takes effect . . .