HOME FORECLOSURE PROCEDURES ACT
ISSUES MEMORANDUM

January 24, 2014

[ARTICLE] 1
GENERAL PROVISIONS

SECTION 102 [DEFINITIONS]

SECTION 102(8) 'GOOD FAITH'

INTRODUCTION The Drafting Committee must finally determine how it would define the term 'good faith' in the act. The issue is significant since Section 104 requires that "A creditor, servicer, obligor, or homeowner shall comply in good faith with the requirements of this [act]."

DISCUSSION The Redlined meeting draft at pp. 2-3 contains three drafts of this definition:

(i) the current draft of the definition, amended only in the case of creditors and servicers to track the exact language of the UCC definition of the term, thus substituting 'commercial' as the adjective describing the requisite standard of fair dealing, rather than what the Reporters and Chair felt was the appropriate industry – that is, the mortgage industry.

(ii) The proposed 'Ring' definition, which would track the UCC for both the creditor/servicer, and for the consumer. In the latter sense, Ring departs from the current draft which requires only 'honesty in fact' as the applicable standard for homeowners and obligors.

(iii) The proposed 'Miller' draft, that agrees with the Ring approach for creditors and servicers, but would not follow either the Ring standard of the standard of the current draft. Instead, Miller proposes that homeowners and obligors be held to a standard of 'honesty in fact and the observance of generally accepted standards of fair dealing.

The issue of whether the current draft properly defines the term 'good faith' was first

raised [at least with regard to this draft] by Commissioner Ring, who wrote:

> As you know, I have been concerned with the wording of Good Faith in the draft. It departs from the wording of UCC and a number of other Uniform Acts in which the term is used. Is the change in wording because the reporters want to change the application of good faith from that of the UCC? Or is the change in wording simply because the reporters believe it better expresses and applies the term?
>
> If the intent is to have "good faith" apply in the same manner as in the UCC and other Uniform Acts, I believe you should use the exact wording of the UCC.
>
> If the intent is to change the application of "good faith", I would like a full explanation of why the changes that are felt to be needed. ***If the intent is to follow the UCC, I will move for the wording of the UCC and that of other Uniform Acts to be used. If the intent is to change the application of "good faith", I will consider the explanation but I am likely to move that we stay with the thoughtfully worked out application in the UCC.

Shortly thereafter, Commissioner Miller wrote:

> I mostly agree with Connie. I see no reason to deviate from the UCC language in UCC sec. 1-304. As to the definition I never have agreed that an individual ought to be held to reasonable commercial standards (how are they to know?). Our definition in the case of a creditor, servicer, or agent of either I see as the same as the UCC definition so why change? In the case of a homeowner or obligor however I think honesty in fact is too narrow and it ought to be something like honesty in fact and the observance of generally accepted standards of fair dealing.

(emphasis added). I replied to both:

> On the subject of good faith, I have taken a look at [the UCC] definition….
> ***
> Trying to parse your collective reactions: as applied to creditors and servicers, the current draft simply targeted the appropriate industry standards - the mortgage industry - rather than using the more vague adjective 'commercial'; that appears to be the sole difference.
>
> As Chair, I would not go to the mat with either of you if you felt we should return to 'commercial'….
>
> As to the homeowner, Connie and Fred seem to be in disagreement with one another, though you both seem to disagree with the current draft of this section of the Act.

> Connie seems to prefer that the borrower be held to commercial standards, while Fred, in turn, feels that 'honesty in fact' is 'too narrow' a standard, and would add word such as 'and the observance of generally accepted standards of fair dealing.' I don't pretend to know what those are, or how they differ from 'commercial standards' - if a borrower breaks into tears, or swears at the lender, or doesn't show up at a scheduled meeting - are any of those violations of the standard? Who decides what is a generally accepted standard of fair dealing? I can understand those terms in the commercial context, but I must say, I don't understand them in the usual world of average men and women who have defaulted on their mortgages, and don't understand what the words add to 'honesty in fact'.

Commissioner Miller replied again:

> To respond, there may be standards beyond the mortgage industry that should be applicable--what they may be I have no clue nor do I have a clue as to what I propose means. That is why I fought to retain mere honesty in fact--we know what that means--but I lost, except in Article 5. I could live with the current draft but I doubt others will.

SECTION 102(10), 'HOMEOWNER' [and the term 'OBLIGOR']

INTRODUCTION – Two issues continue to be discussed regarding this definition:

(i) Whether the defined terms are appropriate or whether we should use 'borrower' or 'mortgagor' in place of either defined term;

(ii) Whether we should further consider to whom (and when) the Act requires 'notice' to be provided – that to a 'homeowner' or an 'obligor'; and

(iii) How the creditor is able to identify each; ***see*** the proposed amendments to Sec. 401.

DISCUSSION The Act currently defines "**Homeowner**" as 'a person owning an interest in mortgaged property, other than a mortgage, lien, easement, servitude, or leasehold, **whether or not the person is an obligor**.'

The Act currently defines "**Obligor'** as 'a person that, with respect to an obligation:

(A) Owes payment or performance of the obligation; or

(B) Has provided property other than the mortgaged property to secure payment of the obligation;

[new] (C) Has signed a mortgage with respect to the mortgaged property; or

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

There are several issues in need of resolution here.

1. The most typical example of a person who may be a 'homeowner' without also being an 'obligor' [or 'borrower'] might be a spouse or other person who owns an undivided interest in a house but never signed the mortgage, either in error, or because of divorce settlement, a post-mortgage marriage, a quit-claimed interest from the original homeowner/obligor, or other circumstance. The **Drafters' Notes** to the definition of 'homeowner' note that "At the November meeting, there were suggestions from several persons for more expansive comments; please let the Reporters know of any desired additional comments." It may be these examples of differences are what the note was intended to address.

2. In discussing the definition of 'obligor' in preparing this draft, the drafters decided to amend the definition to provide that someone who has signed a mortgage, but not the note for which it serves as collateral, is still an 'obligor', on the theory that the mortgage imposes a variety of obligations.

3. Are we satisfied with the term 'obligor or would we prefer 'borrower' or 'mortgagor'?

4. In multiple locations, the act currently provide rights to both homeowners and to obligors. Several examples are:

A. **Section 201(a)** currently requires the creditor or servicer to "send separately to each [homeowner and] obligor a notice of intent to foreclose and right to cure." [The brackets in the draft reflect the following comments from Atty Lewis and others.] In November, Attorney Rita Lewis of Chase Bank commented:

> 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.

Alan White has pointed out that Section 204 does not require notice to be sent to 'unknown' homeowners, and that the word 'know' derives from UCC §9-605, which requires actual rather than constructive knowledge. Others have observed that (i) one individual loan officer may have actual knowledge of a quit-claimed interest to a new spouse, but that knowledge is not possessed by the department that sends out the notices; and (ii) roughly 70% of these first notices result in a payment, so that the imposition of additional search costs on a lender at the time of first notice may be unwarranted.

B. **Section 203** gives both the homeowner and the obligor the right to cure a default, and describes the consequences of a cure. The section as drafted may not fully contemplate those circumstances where the homeowner and obligor are different people who may have different interests.

C. **Section 302** gives both the homeowner and obligor the right to participate in mediation. Suppose they are different persons and disagree? My personal sense is that the person who owes the obligation ought to be the only person with the right to agree to a settlement in mediation, but that is not something we have discussed as a Drafting Committee, nor with the Reporters.

In any case, the Drafting Committee ought to review those sections as we proceed through the act and determine whether we have it right in each instance.

5. If we choose to reduce the notice and other rights of homeowners who are not obligors, what protections should the act provide to those persons? And in any case, do we need to focus on the interests of other stakeholders in the property, such as tenants?

SECTION 102(22),'RESIDENTIAL PROPERTY'

INTRODUCTION In November, at the recommendation of Attorney John Manning of Rabo Agri-Finance, the Drafting Committee decided to exempt from the definition of 'residential property' any property whose primary use was for farming, commercial or industrial purposes; that exemption now appears in the definition of 'residential property.'

Separately, the Drafting Committee reversed its earlier decision favoring a 'bright line' test of applicability (i.e., *all 1 to 4 dwelling units*) when it voted to require that at the outset of the mortgage, the new owner either occupied, or intended to occupy. at least one of the units in the property for the owner's personal, family or household purpose. This second qualification also now appears in the definition.

DISCUSSION In the course of preparing this draft, the Reporters and Chair discussed some of the implications of that decision:

(i) If the Drafting Committee wishes to limit the scope of the act to "owner – occupants", what public policy is being served if the property is owner-occupied at the time of default – the only time when the protections of the Act are relevant – even if it is

not owner-occupied at the outset of the mortgage? It may be that the policy arguments favor consideration of owner-occupancy only at the time of default rather than at the time of initial ownership.

(ii) Regardless of when to measure applicability of the act, if the lender chooses not to comply with the notice and mediation requirements of the Act, on whom would the burden of proof lie in a foreclosure action where the owner claimed either that she in fact did occupy the home, or at least intended to do so at the relevant time (that is, either at the mortgage was created or at the time of default)?

(iii) If the Drafting Committee decides to retain the measure of applicability as the time the mortgage is created, is the issue of intent to be decided by whether the borrower signed a customary 'owner-occupancy' affidavit at closing? If so, is the presence of such an affidavit conclusive of the owner's intentions? [It is common in some circles that a real estate broker –never a lawyer, of course - will often advise an investment buyer to sign such an affidavit in order to qualify for more favorable loan terms.]

(iv) If the prudent lender, concerned about the risk described in (iii) above, were to decide in all but the most obvious instances to follow the requirements of this act in any foreclosure of a one to four-unit dwelling, what marginal benefit would the prudent lender have gained? On the other hand, is this gesture – presumably favored by lenders – one that will encourage enactability of the act as a whole?

These issues suggest that the Drafting Committee should at least discuss this subject further before the annual meeting and articulate the policy considerations affecting our decision in the comments.

SECTION 106, 'APPLICATION OF LOCAL REGULATIONS'

INTRODUCTION As originally drafted, this section provided that a local government may not **'**regulate, restrict or limit the process by which mortgages on residential property are foreclosed" unless specifically authorized by state law.

DISCUSSION The Chair unilaterally inserted this section in the November draft and the Drafting Committee appeared to approve of it. The intention of the section is essentially one of state pre-emption: that is, assuming a state were to adopt this (or any) act regulating the foreclosure process, it would be inappropriate for local governments to then impose a different

set of rules, at least in the absence of an express state policy authorizing local regulation.

Since November, there have been proposals both to expand and to restrict its scope, and at least one suggestion that the original language was insufficient to address a number of local initiatives that might not be considered part of 'the foreclosure process.'

Further, Megan Michiels of the American Bankers Association forwarded the statutes of the two states – Wisconsin and Missouri - that currently pre-empt local regulation of the foreclosure process; her email appears below.

Limiting the Section's Effect Alan White has expressed concerns about the section and proposes to limit its impact. He writes:

> This section will be controversial with consumer groups and others. The two battlegrounds have been 1) local enforcement of nuisance-type laws against lenders, and 2) local mediation programs in states that don't have a statewide program. The section as previously drafted would preempt Judge Rizzo's very successful program in Philadelphia, for example.

White's suggested redraft of the section, in relevant part, reads as follows:

> (a) [Notwithstanding (insert reference to any applicable 'Home Rule' provisions under the law of this state)] No ordinance or regulation of a municipality, county or other political subdivision in this state may (i) ~~regulate, restrict or limit~~ <u>impose regulations, restrictions or limitations on</u> the process by which mortgages on residential property are foreclosed <u>that are inconsistent with this Act</u>,….

In a proposed Reporter's Note, White writes:

> This provision is intended to preempt local legislation that imposes requirements on creditors and servicers in the foreclosure process that conflict with this Act. It is not intended to displace generally applicable local legislation, for example, concerning building maintenance, payments of local tax and utility charges, or to displace local court rules. Local mediation or foreclosure diversion programs are displaced only in the event Article 3 of this Act has been adopted.

Expanding the Section's Effect – Thomas Fitzpatrick of the Cleveland Federal Reserve Bank took a different position. He initially wrote:

> Is Sec 106 intended to preempt all local ordinances that require lenders to register their foreclosures with a municipality and make it a misdemeanor not to? Or would that not fall under "regulating" foreclosure? I take it this is aimed at

> ordinances like the $10,000 foreclosure bond requirements in Youngstown, OH, Springfield, MA, and others, but I wanted to get a better idea of what the thinking was.

Subsequently he wrote:

> Candidly, I think there are plenty of local ordinances like the foreclosure bond requirements that are problematic. I don't have data on their impacts, but I'd feel comfortable betting that they don't achieve nearly as much as community development practitioners claim they do, and they will exacerbate the problem in some ways. There are some ordinances that can be valuable for local governments that are trying to keep up with where the majority of foreclosures or vacancies are occurring in their jurisdictions, but even some of those get excessive with the fees and fines they attach. I have done some research on those, and they don't seem to do much else in markets than provide that information. In any case, I hope we can talk a bit more about this in San Diego.

The Chair, again acting unilaterally and in an effort (perhaps unsuccessful) to respond to Mr. Fitzpatrick's inquiry, added this second clause to Section 106(a) as it appears in the January 2014 draft

> (a) …No ordinance or regulation of a municipality, county or other political subdivision in this state may … (ii) <u>impose any obligation on a person holding an interest in a mortgage or deed of trust on residential property which is not imposed on all owners of real property in that political subdivision,</u> unless expressly authorized by legislation of this state.

There may well be adjustments to this section that address concerns of both the lending and the consumer communities. For example, we might exempt court rules or court-administered programs from the prohibition, or exempt local mediation/facilitation programs in a state which has not adopted Article 3, as suggested in Alan White's proposed note. We also should discuss the suggested draft language, which may or may not adequately address the concerns raised by Mr. Fitzpatrick.

> **Information regarding existing statutes:** Megan Michiels recently wrote: "below please find brief information on the short list of states that had state law preemptors…. "

States with statutes that preempt local law in the area of foreclosure specifically: Missouri and Wisconsin.

Missouri 2013 HBs 446 and 211:

Be it enacted by the General Assembly of the state of Missouri, as follows:
Section A. Chapter 443, RSMo, is amended by adding thereto one new section, to be known as section 443.454, to read as follows:

443.454. The enforcement and servicing of real estate loans secured by mortgage or deed of trust or other security instrument shall be pursuant only to state and federal law and no local law or ordinance may add to, change, delay enforcement, or interfere with, any loan agreement, security instrument, mortgage or deed of trust. No local law or ordinance may add, change, or delay any rights or obligations or impose fees or taxes of any kind or require payment of fees to any government contractor related to any real estate loan agreement, mortgage or deed of trust, other security instrument, or affect the enforcement and servicing thereof.

Wisconsin's action was buried in its budget bill passed last year: Sec. 1896s of the2013 budget bill, creating new code Sec. 138.052(13)
https://docs.legis.wisconsin.gov/2013/related/acts/20.pdf (See pages 484-485 below)

SECTION 1896s. 138.052 (13) of the statutes is created to read:

138.052 **(13)** (a) In this subsection:

1. "Financial institution" means a bank, credit union, savings bank, savings and loan association, mortgage banker, or any other lender that receives an application for, services, or enforces the terms of a loan.

2. "Local governmental unit" means a city, village, town, or county, or any other local governmental unit, as defined in s. 66.0131 (1) (a), but does not include a 1st class city.

(b) A local governmental unit may not enact an ordinance or adopt a resolution that does any of the following:

1. Imposes any fee or tax on any financial institution in connection with servicing, or enforcing the terms of, a loan.
2. Delays any financial institution in enforcing the terms of a loan.
3. Affects any financial institution's servicing, or enforcement of the terms of, a loan.
4. Regulates any financial institution with respect to the lending practices or financial services of the financial institution as it relates to loans.

(c) If a local governmental unit has in effect on the effective date of this paragraph .... [LRB inserts date], an ordinance or resolution that is inconsistent with par. (b), the ordinance or resolution does not apply and may not be enforced.

(d) Except in a 1st class city, the servicing of loans and enforcement of loan terms are matters of statewide concern for which uniformity in regulation is necessary and are subject only to applicable state and federal laws and not to local regulation.

MILLER PROPOSAL RE: ADDITIONAL GENERAL PROVISIONS

INTRODUCTION Currently, the Act does not contain a number of provisions that appear in the General Provisions of the UCC and a number of other uniform acts. In an email, Commissioner Miller made that observation and then wrote the following:

DISCUSSION In commenting on the language of Section 105 (Certain Acts Prohibited), where the language applies to "The creditor, servicer or an agent of either" he wrote:

> The creditor, servicer or an agent of either seems too narrow in one sense and repetitive; why not add a UCC sec. 1-103(b) which incorporates agency as well as several other useful supplementary laws?
>
> It also would be useful to help fit our act's provisions into overall law by forcing a decision as to what state laws are supplementary and what are displaced. In that vein, how about a UCC sec. 1-104 against implied repeal by subsequent legislation to help secure uniformity.
>
> We also need a much more careful and detailed repealer….
>
> Other useful additions from the UCC to be considered might be UCC sec. 1-105 on severability; UCC sec. 1-202 on notice; UCC sec.1-301 on choice of law; UCC 1-302 on variation by agreement and limitations; UCC sec. 1-303 on course of performance etc.; UCC sec. 1-306 on waiver; UCC sec.1-309 on acceleration at will; and perhaps more controversial UCC sec. 2-302 on unconscionability.

I replied:

> Your shopping list is long….My own view is that most of these subjects [other than the repealer issue, which is critical and which I was going to suggest be drafted in the first instance by Fannie/Freddie lawyers for further review in each state by legislative counsel] are tangential at best to our main mission; I also believe that expansion of the act to deal with tangential subjects - and making the act longer - is the enemy of enactability.

Commissioner Miller replied again:

> As for the shopping list, I hate to see agency repeated and it might be too narrow. Also other laws may supplement. Thus 1-103(b) covers this. It also may be useful so our act can displace some laws that should be but were not listed in the specific repealer-trust me I speak from experience here. I did not list 1-104 but should have since in revised form it could help against later enactments superseding our

act. 1-102 on notice again serves a general function to answer questions beyond more specific notices. I would think choice of law is governed by the location of the property but perhaps that should be expressed and 1-302 on what can be varied by agreement may be important for clarity given consumer protection, surely we do not want sections like 201 to be varied or waived. 1-303 on course of performance, usage of trade could also be useful.

None are controversial and could be worth the space without detraction from enactment--may even help enactment. The rest are less important.

[ARTICLE] 2
NOTICES; RIGHT TO CURE

SECTION 201 (a) and (b) 9, 'NOTICE TO HOMEOWNER AND OBLIGOR'

INTRODUCTION At the November meeting, the Reporters were asked to prepare a timeline of the notices that the Act requires to be sent to homeowners and obligors**,** with a comparison of that timeline and the timelines imposed by the Consumer Financial Protection Bureau and by the Fannie Mae/ Freddie Mac servicing guidelines. In addition, a range of questions regarding the various required notices were discussed in November; many of those issues are addressed above in the analysis of Section 102 (10) on 'homeowners.

Subsequently, Larry Platt of K&L Gates, on behalf of the securitization industry, prepared an outline of the CFPB rules which has been distributed to the Drafting Committee and observers.

DISCUSSION

A. A Comparison of Timelines Alan White prepared the requested analysis of the timelines; it appears on the following page:

Foreclosure Notice Timeline: Home Foreclosure Procedures Act[i]

1st notice after default (any time after a default)	§201 notice; comparable to FNMA uniform instrument notice of breach
2d notice after default, no later than 30 days after §201 notice [could be at same time but separate]	§302 (a) notice of facilitation – starts a '60 day' clock for borrower to ask for mediation *Note*- creditor can file foreclosure action at this time but cannot complete for 90 days: §302 (b).
90 days after §302 notice	Facilitation completed (*see* §304(b) unless extended by mediator.
1st day after facilitation ends (minimum)	§404 advertisement once/week for 3 weeks
1st day after facilitation ends (minimum)	§405 notice of sale
30 days after sale notice	Foreclosure sale

Foreclosure Notice Timeline: HFPA overlay with CFPB rules in Judicial and Non-Judicial States

	Judicial foreclosure state	Nonjudicial foreclosure state
Not later than ('NLT') 36 days after default	CFBP mandates 'live contact'- 12 C.F.R. §1024.39(a)	CFBP mandates 'live con- tact'-12 C.F.R. §1024.39(a)
NLT 45 days after default	CFPB loss mitigation notice 12 C.F.R. §1024.39(b)	CFPB loss mitigation notice 12 C.F.R. §1024.39(b)
60 days[ii]	§201 notice / FNMA uniform instrument notice of breach[iii]	§201 notice /FNMA uniform instrument notice of breach
60-90 days	§302 notice of facilitation	§302 notice of facilitation
120 days (no facilitation)/ 150 days with facilitation[iv]	Complaint (CFPB rule 12 CFR §1024.41(f) prohibits filing before day 120)	§404 advertisement and §405 notice of sale (some nonjudicial states require an extra step, such as recording notice of default, e.g. CA)
150/180 days	Motion for Judgment (earliest date to file depends on state civil procedure rules)	Foreclosure sale
>180/210 days	Entry of judgment, writ of execution, §404 advertisement and §405 notice of sale	
Possible Foreclosure Delay	CFPB rule 12 CFR §1024.41(f) requires postponement if borrower seeks loan mod NLT 37 days before scheduled sale	CFPB rule 12 CFR §1024.41(f) requires postponement if borrower seeks loan mod NLT 37 days before scheduled sale
>210/240 days	Foreclosure sale	Foreclosure sale

[1] Prepared by Alan White, co-reporter, based on November 2013 draft of the Act.
[2] The Act has no minimum period before a notice of default or of facilitation may be sent. In theory the notice could be sent 1 day after the CFPB loss mitigation notice In practice these notices are more likely to be sent after 60 days after default.
[3] The reporters' intent is that the §201 notice of the Act will fulfill the requirements of the uniform Fannie Mae mortgage or deed of trust for a notice of default, i.e. that a single notice will suffice to comply with §201 and the mortgage contract. The provisions of the California version of the uniform instrument are as follows:

> 22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale.

[4] As presently drafted, Article 3 allows foreclosure to proceed 60 days after the §302 notice if the homeowner does not request facilitation, and limits facilitation to 90 days in the event the homeowner does request it.

****

Alan's analysis is complicated by the fact that the three differing sets of notice requirements do not apply uniformly to all creditors. For example:

(i) **This Act** would apply broadly to **all "creditors**" – that is, "a person that has the right to foreclose a mortgage under Section 401(b)" **and all "servicers"** – that is, a "person responsible for servicing an obligation, including a person that makes, holds or owns an obligation if that person also services the obligation." The only narrow exception in this Act is the definition of creditor excludes "a person that does not own, hold or service more than five mortgages at the time the notice required by Section 201 is sent."

(ii) **The Fannie Mae/Freddie Mac Servicing Guidelines** presumably apply only to **mortgages owned by those two organizations**, unless by contract other parties have agreed to be bound by them.

(iii) **With regard to the CFPB rules**, Alan White writes:

The CFPB rule, with its 45-day notice of loss mitigation options and 120-day

> waiting period for the first filing, applies **only to "property that is a borrower's principal residence",** and also **excludes from coverage "small servicers",** defined as servicers handling **5,000 or fewer mortgage loans** that they own or originated. 12 CFR §§1024.30(b), 1024.30(c) (2). I could not find guidance as to the timing of the determination that property is a principal residence.
>
> We could limit the scope of our Article 3 facilitation provisions to mortgages on principal residences; I'm less certain whether the small servicer exemption should be included in our Act as well.

Alan White's timeline nicely integrates with the most essential of the CFPB rules as they overlap with Article 2. What the timeline does not do is to detail all of the CFPB rules in the same manner as Larry Platt's materials depict them – the entire range of CFPB's rules regarding mortgage servicing standards in three areas related to what the Act currently addresses in Article 2:

(i) early intervention by the servicer with the borrower following a default;

(ii) mandatory procedures by which the servicer can maintain 'continuity of contact' with the borrower after the default; and

(iii) a requirement that the servicer consider loss mitigation options that may be available to the borrower.

Thus, the two sets of materials nicely complement one another and provide the Drafting Committee both a clear sense of what the CFPB rules do and how the current draft of the Act integrates with the most relevant of those rules.

The question for the Drafting Committee is how best to draft the Act in light of their overlapping subject matters, and the fact that to some degree, the different sets of rules apply to different sets of actors. In answering that question, at least one consideration should be the benefit to be conferred on borrowers by providing notices in Article 2 that differ from the requirements of CFPB and the GSEs, compared to whatever costs those alternative notices might impose on the lending and servicing industries.

The discussion may have 'real world' consequences as we think about enactability. A representative of the lending industry, in commenting broadly on the question of lending industry support for the act as a whole, wrote the following immediately after the November meeting:

> ….no one on my side of the table - - banks, state bankers associations, anyone related to our community - - has told me they support the Act. There are bits they

> like (insert Expedited Foreclosure here) and concepts the multi-state banks like (uniformity in procedural aspects of foreclosure), but that is about it.
>
> One thing I noted…is a growing awareness of the coming impacts of the CFPB rules. I believe that many banks will adjust their procedures to accommodate requirements of those rules for the best reason of all - - they have to. To the extent the Act trues up to those rules, its chances for success increase. (Emphasis added).

In summary, Alan White's timeline and the details of the Platt analysis of CFPB rules seem susceptible to several interpretations: one is that the differences between the act's requirements before mediation and those of CFPB or Fannie Freddie are not great, and therefore ought not to be of concern to lenders.

Another is that, because there are relatively minor differences before mediation, we ought to, as the lending representative suggested, seek to 'true up the rules' of the Act to the CFPB rules; without putting words in his mouth, Alan White's remarks suggest that we might be able to move in that direction.

Alternatively, the notice requirements in our act might – stress might- apply only in the case of lenders and servicers who are not otherwise subject to either the CFPB rules or the Fannie/Freddie guidelines. That is, perhaps they could be drafted to fill a gap, rather than to add cumulative notice requirements to lenders already subject to the CFPB and GSE rules.

B. Substantive Requirements of the Notice Provisions In our final review of the notice requirements for this draft, the Reporters, Barry Nekritz and I noted at least one requirement that we felt the Drafting Committee might address.

Specifically, Section 201(b)(9) 9) provides that if the creditor is sending the Section 201 (a) to an obligor other than the homeowner, the notice itself must "state 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."

We solicit the Drafting Committee's sense of how essential this requirement is.

[ARTICLE] 3
FACILITATION

ARTICLE 3- FACILITATION-INTRODUCTION

INTRODUCTION AND CHAIRMAN'S NOTE

At the November Drafting Committee meeting, Commissioner Elizabeth Kent [until her recent retirement, the head of Hawaii's Center for Dispute Resolution] led a discussion which in some ways advocated an alternative approach to this important subject when compared to the existing draft's 'best practices.'

Following that meeting and at my request, Commissioner Kent undertook to review several of the 'best practices' contained in the prior draft. Our goal was that she would convert certain of those practices into proposed draft rules that the facilitation agency in an enacting state might adopt; her work, in turn, would be further reviewed by the Reporters in preparation for consideration by the Drafting Committee

The Drafting Committee will recall that those 'best practices' were the initial work product of a sub-committee that met at Commissioner Ring's office in Washington, DC in December, 2012; that sub-committee included Co-Reporters Smith and White, Alfred Pollard of FHFA, Vicky Vidal (then of the Mortgage Bankers Assn), Heather Kulp of the Harvard Negotiating Project, Professor Judith Fox, a foreclosure mediator and clinical law professor at Notre Dame Law School, Attorney Jacqueline Hagerott, head of the foreclosure mediation program in Ohio, and me.

In the course of her efforts, Commissioner Kent sought and received assistance from former Dean (and former ULC Commissioner) Nancy Rogers; Professor Rogers was, among other things, the Reporter for the Uniform Mediation Act (already adopted in 12 states) and Commissioner Kent was a member of that Drafting Committee, as were Commissioners Martha Walters and Fred Miller. At various points in the interim, Commissioner Kent and Professor Rogers have spoken with both our Reporters and with me to develop this subject further.

Commissioner Kent has prepared initial drafts both of suggested rules and revised 'best practices;' they appear in Appendix I to this memorandum. Because of time constraints, our Reporters have not had time to review and comment on those rules.

In the course of discussions about this drafting effort, however, it became clear that, aside from the details of the 'best practices' or the proposed rules, there are important differences of opinion on how best to approach this subject in the statute itself.

I believe the Drafting Committee's time in San Diego will not be best spent in reviewing Commissioner Kent's further work on draft rules and a revised set of best practices, important though her work is.

Rather, I propose to use our time to consider the broader issues that exist in the field of foreclosure dispute resolution. If the Drafting Committee is able to focus its discussion primarily

on resolving those policy questions, we will be able to provide direction to the Reporters and those tasked with drafting the best practices and proposed rules.

To that end, Reporter Smith, Commissioner Kent, Professor Rogers and I developed several questions for consideration during our discussion of Article 3 in San Diego. While they are an amalgam of different drafting styles prepared in a relatively short period, I think they touch the most significant issues confronting this Committee.

In addition, the Drafting Committee should benefit from these two additional resources:

> First, Reporter White and Commissioner Kent are preparing a memorandum detailing the policy alternatives that the Drafting Committee should consider; that memorandum will be distributed as soon as it is completed and in any case before our scheduled discussion of this subject in San Diego.
>
> Second, Professor Rogers has agreed to join us via telephone on Saturday morning from 9 am to noon, Pacific Time.

With that background, here are the questions that we four prepared:

1. What process does the Drafting Committee want to use for the conduct of the 'facilitation'?

There are significantly different views on this subject. Two ends of the spectrum include

(a) **a special master-type proceeding** (perhaps under the state equivalent of FRCP 53), where the facilitator can hold a kind of pretrial settlement conference, on the record; or

(b) **a privileged mediation before a 3d party neutral** with no record.

Both approaches have implications in terms of sanctions and. confidentiality

The current draft of Article 3 may be seen as incorporating portions of both approaches. Commissioner Kent and Professor Rogers are concerned that the current 'hybrid' approach may produce the unintended consequence of litigation about who said what during the session; they believe that due process considerations could cause the court or agency to hold an evidentiary hearing rather than accepting the report of the facilitator/mediator as the final word on that subject.

Reporter White, who has not had the opportunity to review this draft, may have different thoughts.

If we choose the special master approach and either of the parties object to the special master's report, there would be a record of who said what. It is also likely the special master could be called as a witness if there is litigation following the dispute resolution process.

If we choose the mediation approach then there is no report possible from the mediator about what was said during the mediation session and the neutral would not be called as a witness.

The decision the Drafting Committee makes will likely determine the extent of confidentiality that the parties can expect from the process, and may have some implications for settlement success. On this subject, Professor Rogers writes:

> "as between the special master and mediation neutral approaches, it's a guess as to which of the two approaches would provide the most settlements (and that guess would better be made by someone who has sat through many of these in the foreclosure context, which I have not). In mediation, the servicer might be more willing to settle, as it is less likely that others will learn about what settlement positions the services was willing to take in a particular case. On the other hand, the servicer might prepare more thoroughly for a settlement conference that will be on the record. I wonder if a best practice in which the agency or court employee calls each party ahead of the mediation to check about who is coming, what documents each is bringing, whether it is worth it to hold the session, etc. might take care of some of the Drafting Committee's apparent concerns about a standard mediation approach.

2. As the Drafting Committee considers the appropriate model for the process, do we anticipate that any aspect of that process in 'confidential' or 'privileged'? Does the answer to this question lead to an obvious answer to the process question, or vice versa?

3. Regardless of the form of facilitation/mediation process, what does the Drafting Committee intend with respect to the imposition of sanctions?

The imposition of sanctions for noncompliance with program rules (an objective standard which the Drafting Committee adopted in November, rather than the subjective approach implied in the term 'good faith') is closely related to the form of process. Most importantly, what sanctions does the Drafting Committee intend may be imposed? Will it include attorneys' fees? Who may impose those sanctions? What existing models do we have?

The current draft does not provide that the mediator may impose sanctions for failure to comply with the rules, although it is possible that the rules could so provide. However, § 601 currently provides that in a judicial foreclosure proceeding, the court may dismiss or delay a foreclosure if the lender or servicer commits a material violation of the Act; a parallel provision would allow a borrower to enjoin a nonjudicial foreclosure on the same basis. From prior committee conversations, we appeared to have consensus that a violation of a facilitation order would be 'material violation' of the Act.

Further, the Act currently contemplates that the owner of a note could lawfully adopt and apply a policy that prohibits any modification of the terms of a note or mortgage. Have we made sufficiently clear that in those circumstances, an owner who complies with document production

etc, but who makes clear from the outset that it will refuse to modify the mortgage, has followed the rules and therefore may proceed with foreclosure without a sanction?

4. Regardless of what the Drafting Committee decides with regard to the fundamental question of whether or not to adopt a mediation/special master/'hybrid' approach to the process, how shall we address existing state statutes that do use mediation and, in 12 states, have adopted the Uniform Mediation Act?

At prior committee meetings, the Drafting Committee decided to call our process "facilitation" and to avoid the term "mediation;" one reason for the decision was to avoid the implication that all of the normal rules governing mediation should apply, including those related to confidentiality and privilege.

If we continue to follow this approach, should the Act provide some guidance on the relationship between foreclosure facilitation and existing state laws on mediation?

There are several options available to the Drafting Committee.

One is to simply ignore those differences, an outcome we would defend on the grounds that mortgage foreclosure facilitation is a unique process. Inevitably, the Drafting Committee will have to address in some fashion a decision to ignore an existing uniform act which, at least superficially (and perhaps more than superficially) is relevant to the issues raised in Article 3.

As an alternative to departing entirely from the UMA, the Committee could choose to consider the Uniform Mediation Act in more detail, incorporate much or all of UMA into Article 3 and then make exceptions to it to accommodate our unique situation. Clearly, there are differences of opinion in this regard which the Chair will seek to have articulated in San Diego.

5. Is there anything of value that the Act might provide for the 18 states that already have some form of procedures in place for foreclosure mediation/facilitation?

Some of us believe it's highly unlikely that the 18 states with existing programs – like Hawaii or Connecticut, which are familiar to Commissioners Kent and Breetz - will prefer 'uniformity' over their existing procedures. Perhaps, however, there are pieces of what we're doing that could be attractive supplements for those states.

OTHER ISSUES WITH FACILITATION

1. ***SECTION 301-*** **What do we call this procedure in the next draft?**

At various points, we have used 'mediation', 'facilitation', and 'dispute resolution'. Recently, in an email, Alan White used the term 'foreclosure diversion program.' If nothing else, of the phrases I have heard used, 'foreclosure diversion' seems to most accurately describe the intended function of this procedure. In any case, we ought to vote on it after any further

comments, and move on.

2. SECTION 301- FACILITATION LIMITATIONS In an earlier draft, I had suggested that we consider various 'triggers' that might terminate mandatory 'facilitation' in the state. Alan White commented on those various triggers in a comment to the proposed draft:

> I have not drafted additional limitations….. The suggestions were as follows.
>
> 1) That CFPB change its requirement for sending two offers to modify mortgages for defaulting borrower. I have not found any such requirement in 12 CFR §1024.40 or §1024.41.
>
> 2) That facilitation not be required if two offers to modify have been sent. In my view this will foster litigation and create more problems than it could solve.
>
> 3) That a borrower be required to make monthly payments as a condition of proceeding with facilitation. I added a sentence to §304 to permit a court or agency to impose this.
>
> 4) & 5) Sunset Article 5 or make it optional – this is a policy decision for the committee as a whole. I would oppose.
>
> 6) Shorten the 90 day time frame. Given that the 90 days after notice is sent is barely enough time for a single facilitation session, this does not appear workable.

The Chair is not wedded to any one or more of these devices for limiting the facilitation process – and one can imagine others, such as tying facilitation to an index of outstanding foreclosures as a percentage of all mortgages in the state, or to an objective number of pending foreclosures. My concern is that inevitably, at some point, the mediation process in the states will be perceived as an unnecessary [and potentially expensive] proceeding. While I am especially concerned about the continuing need for this is non-judicial foreclosure states, I do think we need to be sensitive to the realities of the situation.

Separately, I think it especially unrealistic for our current mediation process to provide the defaulting homeowner an automatic 90 day 'no pay' option when – in most cases – the borrower is able to pay something: that is usually the reason the borrower is seeking a mortgage modification. And it seems to me that a procedure requiring some form of payment would make this process more palatable to the lending community. For the genuinely destitute borrower, one might compromise by allowing an initial facilitation session where, as a practical matter, a cash

for keys negotiated transfer might be suggested as a far better solution for all concerned. In any event, this subject is separately addressed under Section 304 below.

SECTION 304, 'FORECLOSURE ACTIONS DURING FACILITATION'

INTRODUCTION This section addresses the interplay between the 'notice of facilitation' required by Section 302, the commencement of the foreclosure process under other state law, and the timing of the facilitation process.

DISCUSSION The two principal issues in this section are, first, what foreclosure steps may be taken after the foreclosure notice has been sent, and second, whether it is appropriate for the borrower to be required to make any payments to the creditor during the facilitation process.

The January draft differs from the November draft in that Section (a) expressly permits the creditor to commence the foreclosure process at any time after sending the notice of foreclosure. This was not clear in the November draft and prompted Alfred Pollard to write:

> § 304. There is no reason why the foreclosure process cannot continue while facilitation takes place. This prevents undue delay if the facilitation is unsuccessful and provides an incentive for the borrower to act with due speed to secure a better outcome. A foreclosure *sale* should not occur until facilitation has ended.

The January draft does exactly what Mr. Pollard suggests.

The second issue arises as a result of the proposed new language at the end of subsection (b):

> [The facilitation agency or court may, if it extends the facilitation period, impose appropriate conditions, including the tender of periodic payments by the homeowner.]

The policy questions for the Drafting Committee are, first, whether it feels that the borrower should be susceptible to a requirement that it make periodic payments to the creditor at any time during the facilitation and, if so, whether the mediator or the court should be permitted

to impose them at any time during the facilitation or only during an extension of the facilitation beyond the initial 90 days.

HIGER PROPOSAL TO SEPARATE FACILITATION ARTICLE AS OPTIONAL

> Following the November meeting, Commissioner Higer wrote the following:
>
> I have been thinking about your favorite drafting project. The issue that bothers me the most is the act tries to do too much. It not only does facilitation, but it tries to be a complete foreclosure act. My observation after the last meeting is that Tom Cox is getting pretty happy with the facilitation portion of the act…. Alfred Pollard on the other hand is all steamed up about how long it takes to complete a foreclosure in certain states.
>
> I suspect most of those states don't have a nonjudicial foreclosure statute. As you know these statutes have a short time limit to complete the foreclosure.
>
> My idea would be to have an act that would have two parts, one for facilitation and the other for nonjudicial foreclosures. This second part would be bracketed so that states with a nonjudicial foreclosure statute would not have to adopt that portion of the act. I just think this approach would enhance enactability of the act.

(Emphasis added). I have three reactions to Commissioner Higer's proposal:

> First, consumer advocates would likely oppose such a position on at least two grounds:
>
> - They believe that a procedure that diverts a case away from foreclosure would be especially important for borrowers in those states where there is no judicial supervision of the foreclosure process;
>
> - They believe, as the National Consumer Law Center observed more than two years ago, that lenders would 'cherry-pick' the act and not support an integrated act that benefits both borrowers and lenders; indeed, in the opinion of consumer advocates, the act as currently structured is already too susceptible to 'cherry-picking'; to make Article 3 optional would simply facilitate the cherry-picking process.

Second, although FHFA recommends significant changes to our current facilitation provisions, the concept of an 'optional' provision on facilitation appears at least superficially to be at variance with the position of FHFA favoring a single, uniform approach to this process. In his remarks dated January 22, 2014, Alfred Pollard writes:

> The major issue with the Facilitation provisions is that they do not provide sufficient certainty on a model that would lead to uniform facilitation practices.

One of the major goals of this project is to create a uniform foreclosure process across the country. To "grandfather" disparate facilitation programs fails to achieve this goal as opposed to setting the model for all states. The adoption of Model Act language detailing facilitation processes should lead to uniform and valuable facilitation or mediation programs.

Third, on the other hand, the political reality is that the National Consumer Law Center has repeatedly refused to participate in this drafting process and has supported a boycott of this process by every 'institutional' consumer advocacy group in the country. If we assume that consumer groups will continue to oppose the act regardless of its merits, then Commissioner Higer may in fact be correct in his assessment that making the facilitation process optional would enhance enactability of the act.

[ARTICLE] 4
RIGHT TO FORECLOSE; SALE PROCEDURES.

SECTION 401, ' RIGHT TO FORECLOSE'

INTRODUCTION Our discussion at the November meeting led to a decision to revise Section 401 to track the outcome under the UCC as to who was entitled to enforce a note. The Committee also responded to the suggestion of Commissioner Yaekel and approved an Alternative B to accommodate existing practices in Texas and Georgia.

DISCUSSION

1. Alternatives A and B. The Drafting Committee should review the language of Alternatives A and B to confirm that they accomplish the desired outcomes. In addition, please consider this observation by Reporter Smith regarding Alternative B:

Drafters' Notes

1. Alternative B responds to a suggestion made at the November 2013 Drafting Committee meeting that we might consider an alternative standing rule that preserves the existing law in some states (e.g, Texas and Georgia), which allows foreclosure by a creditor or trustee shown on the land records as holding the mortgage or power of sale, without evidence that the person also is the holder of the promissory note or acts as agent for that person. In contrast to Alternative A, this Alternative allows separation of the right to foreclose from the right to enforce the underlying obligation. If adopted, this Alternative will require an alternative or other modification to Section 402 - instead of the mortgage following a transfer of an obligation, the mortgage (right to foreclose) will have to stand independently of ownership of the obligation.

2. The last sentence of this subsection provides for discharge of the debt to

the extent of foreclosure proceeds, regardless of whether the holder of the obligation receives the proceeds, has authorized the foreclosure, or even knows of the foreclosure. This protects the obligor from the risk of double liability that is inherent in a rule that allows separation of the right to foreclose from the right to enforce the obligation.

3. Instead of using this provision as an alternative statutory text, the Committee may want to consider putting this language in the notes or comments to the Act as a suggestion for states like Texas or Georgia if they decide to keep their existing law.

2. Posting Advertisements Subsection 404 (d) reads:

(d) The public advertisement under subsection (a) or other information pertaining to the sale [may] [must] be posted at the location of the mortgaged property.

The Drafters' Note states that "The bracketed alternatives represent a drafting suggestion from the Style Committee that is appropriate for the entire Committee to address." Specifically, the original draft language was 'may', while Style recommends 'must.'

3. **Other Issues** Alfred Pollard poses a range of questions regarding Section 401 and the remaining sections of Article 4.

[ARTICLE] 5
ACCELERATED DISPOSITIONS

ISSUES MEMO ON 502(B) (2). NOTICE TO INTEREST HOLDERS

INTRODUCTION Section 502 creates a procedure which a creditor may use to terminate interests in the mortgaged property which are 'junior' or subordinate to the interest of the creditor after that creditor has reached an agreement with the borrower.

DISCUSSION The question is whether the notice which the section requires the creditor and debtor to send should be sent only to the creditors whose interests will be affected, or to all creditors. The Reporters and Chair recommend that the notice be required only to junior lien holders. The relevant language reads:

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

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

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

SECTIONS 505-507, 'ABANDONED PROPERTY'

INTRODUCTION The Drafting Committee has made clear its intent to provide a means calculated to expedite foreclosure of abandoned property, consistent with due process requirements and the needs of the community in which that abandoned property is located. Representatives of the Federal Reserve Bank of Cleveland have been especially interested in this subject, as described below.

DISCUSSION At the November meeting, Mark Greenlee and Thomas Fitzpatrick urged the Drafting Committee to consider ways in which foreclosure of abandoned property could be further expedited; their letter and a letter from Attorney Frangos of the Cleveland Land Bank were included in the compilation of materials distributed to the Committee in advance of that meeting.

In response, the Reporters added language in sections 505 (c) through (g) which they and the Chair intended to accomplish the desired goals. More recently, Mark and Tom have provided the Drafting Committee extensive research and further commentary on the subject, and have proposed specific additions to this section. They write:

FEDERAL RESERVE BANK *of* CLEVELAND

Mark B. Greenlee
Counsel
Legal Department

Thomas J. Fitzpatrick IV
Economist
Community Development Department

January 16, 2014

Mr. 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: November 15, 2013 draft of the Home Foreclosure Procedures Act ("Act")

Dear Mr. Breetz:

This letter provides comments on sections 102, 505, and 506 of the Act related to abandoned property.[1] As expressed at the last meeting, we want to make sure that the abandoned property provisions the Committee drafts are both effective and efficient. As discussed at the last meeting, the Act's provisions to expedite private mortgage foreclosures for abandoned property are modeled on provisions from Indiana. Anecdotal reports from bank council suggest that the Indiana law is not being regularly used because it is too cumbersome. Attachment A illustrates that after the foreclosure fast track laws became effective in Illinois and Indiana, the durations loans spend in foreclosure did not drop. They have remained level or increased. This is occurring even though roughly 20% of the Illinois homes in foreclosure are vacant and over 30% of the Indiana homes in foreclosure are vacant.[2] These ratios have been stable or increased since the effective date of each fast track law. This data supports the anecdotal reports of the underutilization of foreclosure fast track legislation and illustrates the importance of the Committee's efforts to draft a law that is as effective and efficient as possible.

We place our comments in the context of the laws of eleven states that expedite aspects of the residential foreclosure process for abandoned and vacant real property. Our analysis of these laws and the Act is presented in a series of attachments to this letter, which culminate in a redlined version of the abandoned property sections of the Act:

[1] The views expressed herein are our personal views, and not those of the Federal Reserve Bank of Cleveland or the Board of Governors of the Federal Reserve System.
[2] Based on quarterly data provided by RealtyTrac.

- Attachment A graphs the duration that loans finishing the foreclosure process have spent in foreclosure in Indiana and Illinois.
- Attachment B offers our observations about the similarities and differences between these laws.
- Attachment C provides a comparison of many features of the eleven state laws.
- Attachment D presents the factual circumstances that support a determination of abandonment under the law of seven of these states.
- Attachment E diagrams the steps leading to a determination that property is abandoned property under the Act in the judicial and non-judicial tracks with our indications of possible changes.
- Attachment F provides the text of the expedited foreclosure laws in all eleven states.
- Attachment G suggests revisions to the Act for consideration by the Committee.

Our analysis, comments, and proposed changes to the Act reflect our views of a balanced approach to an expedited procedure for vacant and abandoned property that improves market efficiency while protecting homeowners

We look forward to discussing these matters at the Committee's meeting at the end of January.

Sincerely,

Thomas J. Fitzpatrick IV
Economist

Mark B. Greenlee
Counsel

****

Because of their length, I have not included most of the attachments here, but they were distributed to the entire Drafting Committee. However, for ease of reference, all of the Greenlee/Fitzpatrick proposed amendments to the abandoned property sections appear in Appendix II to this memorandum.

At the Drafting Committee meeting, at their request, Mssrs. Greenlee and Fitzpatrick will make introductory remarks regarding their proposal, and Reporter Smith will then respond to the proposals and compare them to the changes already made in the January draft.

[ARTICLE] 6
REMEDIES

SECTION 601 (h), 'CLASS ACTIONS'

INTRODUCTION This subject has been debated several times during our meetings, and remains a topic of interest.

DISCUSSION Following the November meeting, alternative B has been added to the existing provisions; this alternative caps statutory damages similar to those provided for by RESPA and TILA, as suggested by Commissioner Miller.

Other alternatives would be to bar class actions altogether, or limit them to actual damages, as in the prior draft and Alternative A.

Finally, the draft includes a new Alternative C, which suggests that the act "delete subsection (h) in its entirety so that this act remains silent on the issue of class actions and the viability of any potential class action would then depend on other state law."

The Chair proposes that the Drafting Committee either settle on one of the various alternatives or decide to retain some or all of the alternatives in the next draft of the Act.

SECTION 606, HOLDER IN DUE COURSE

Updated Chairman's Note

The Drafting Committee has discussed but has not previously taken a position regarding proposed amendments to the Holder In Due Course doctrine as articulated in Article 3 of the Uniform Commercial Code, with respect to residential real estate loans.

The Drafting Committee has received three internal documents regarding this matter. The first document was prepared by a subcommittee of the Drafting Committee composed of Commissioners Walters, Miller and Lisman; That Report appears in the second document, a separate policy paper which the Reporters, Committee Chair and the Advisor from the American Bar Association prepared and which was subsequently distributed to the Committee.

In addition, Reporter Smith prepared a memorandum summarizing several aspects of the doctrine; this third internal document was also attached to the Policy paper.

Separately, the Drafting Committee has received substantial comments from many stakeholders regarding this subject, all of which have been distributed in one fashion or another to the Drafting Committee. Those seeking additional information concerning this subject and the policy positions surrounding it will find all of those thoughtful comments provided by various stakeholders – consumer representatives, regulators, academic writers and the securitization industry – on the ULC website for the Drafting Committee.

The Co-Reporters, Committee Chair and ABA Advisor, after consideration of all the materials submitted to the Drafting Committee and the wide ranging discussion of this subject in November, now propose to the Drafting Committee that the provisions regarding this matter as they appear in the draft, which they unanimously recommend to the Drafting Committee, be fully discussed at the San Diego meeting.

DISCUSSION The Drafting Committee will recall the voluminous materials it has previously received on this subject, all of which are posted on the Committee's ULC website. In addition to those materials, I provide two additional emails from Larry Platt on this subject.

In the first, Larry comments on the likely effect on the securitization industry of the original alternatives contained in the November draft – which are largely retained in the text that the Reporters, Barry Nekritz and I include in this draft. He writes:

> Bill, I looked at the three alternatives for effective repeal of holder in due course doctrine, and I believe they all have the same fundamental flaw-namely, that the claim and defense may be asserted without limitation as to type of claim or defense. That is impossible for an assignee to diligence. It also undermines the intellectual honesty of the primary argument why an assignee should bear some risk relative to origination defects by the originator, that a borrower should not lose their home on a loan that never should have been made or a foreclosure that never should have happened simply because the holder is not the wrongdoer. In other words the availability of the remedy should be limited to claims and defenses that go to the heart of the foreclosure. All three of the alternatives provide open ended "definition" of claims and defenses and look at the "compromise" as predicated on limits on damages and time, but needs to add type of claim and defense to have any chance of support.

I propose that the Drafting Committee consider the extent to which Larry Platt's recommendations are susceptible of being incorporated into our Act.

Second, Larry had previously suggested that another approach might be to consider the extent to which the Act might incorporate already existing federal law that addresses this issue. He writes:

> Bill, you also asked me to send you the language from Section 130 of the Truth in Lending Act (15 USC 1640), which displaces the holder in due course act with respect to the ability to repay and loan originator compensation provisions from the Dodd Frank Act.

The heart of the statute is this:

> **15 USC 160 (k) Defense to foreclosure**
> **(1) In general**
> Notwithstanding any other provision of law, when a creditor, assignee, or other holder of a residential mortgage loan or anyone acting on behalf of such creditor, assignee, or holder, initiates a judicial or nonjudicial foreclosure of the residential mortgage loan, or any other action to collect the debt in connection with such loan, a consumer may assert a violation by a creditor of paragraph (1) or (2) of section 1639b(c) of this title, or of section 1639c(a) [ABILITY TO REPAY] of this title, as a matter of defense by recoupment or set off without regard for the time limit on a private action for damages under subsection (e).
>
> **(2) Amount of recoupment or setoff**
> **(A) In general**
> The amount of recoupment or set-off under paragraph (1) shall equal the amount to which the consumer would be entitled under subsection (a) [SEE BELOW] for damages for a valid claim brought in an original action against the creditor, plus the costs to the consumer of the action, including a reasonable attorney's fee.

The entire text of 15 USC 1640 appears in Appendix III of this memorandum.

APPENDICES

APPENDIX I - ARTICLE 3

FACILITATION PROGRAM RULES AND BEST PRACTICES

Reporters' Drafting Comment

At the November 2013 meeting many participants recommended that the Act include model facilitation program rules, particularly for the benefit of states who have not already established a program. It was also recommended that the rules not be part of the uniform Act itself, to permit flexibility for states that have already adopted comprehensive rules for their facilitation or mediation programs. Commissioner Kent has prepared revised 'best practices' and an initial set of model rules; the Reporters will continue to consult with Commissioner Elizabeth Kent and others to review and refine these model rules and best practices, which they were not able to do in anticipation of the January 2014 meeting.

****

What follows are, in this order:

A. The original 'best practices' previously incorporated into the Act;

B. Revised 'best practices' prepared by Commissioner Kent and reviewed by both Professor Nancy Rogers and Heather Schiewe Kulp; and

C. An initial set of model rules, also prepared by Commissioner Kent and reviewed by both Professor Nancy Rogers and Heather Schiewe Kulp.

A. Original 'Best Practices'

a. The goal of facilitation is to create commercially reasonable alternatives to foreclosure which achieve sustainable outcomes, including "graceful exits."

b. The homeowner should have access to a housing counselor (or a lawyer) to assist in the facilitation process.

c. The process of bringing the parties together to achieve an alternative to foreclosure is better understood as facilitation, not mediation, because some of the standards typically followed by mediators are not appropriate.

d. Facilitation is not merely a requirement that parties "meet and confer," i.e. a mandate merely for two-party settlement negotiations. The involvement of a neutral third party is critical to success.

e. The neutral facilitator should disclose any conflicts of interest. A

lawyer serving as a facilitator must inform unrepresented homeowners that the lawyer is not representing them.

f. Facilitation should not unnecessarily delay the foreclosure process, but should provide adequate time for full consideration of alternatives to foreclosure.

g. If the homeowner makes a timely request for facilitation, or in an opt-out system, when the lender initiates foreclosure, the relevant agency must initiate the facilitation process within 14 days.

h. Documentation information exchange.

i. The creditor or servicer must specify whatever documents it requires from the homeowner within [5] days after initiation of the facilitation process.

ii. The homeowner must provide the income and other documents required by the servicer listed in (a) above to the servicer and the facilitator not less than [30] days before the scheduled first facilitation session. If the homeowner fails to substantially provide the documents specified by the creditor or servicer within the time frame required by this paragraph, the facilitation process terminates.

iii. The creditor or servicer must provide to the homeowner and the facilitation agency: (i) the homeowner's payment history from the date of default; (ii) itemized amounts due on the loan, including all fees.

iv. The creditor or servicer should provide the facilitator its decision, including the inputs and results of any net present value calculations it relies on in deciding not to offer any particular loss mitigation alternative.

i. The first facilitation session must take place within [XX] days after initiation of the facilitation process.

j. Participation – the creditor or servicer must have a lawyer and creditor or servicer representative present in person or by telephone or teleconference; the creditor or servicer must evaluate loss mitigation and make a decision as required by [the RESPA regulations of the Consumer Financial Protection Bureau.]

k. The facilitation agency should clearly identify any eligibility restrictions for its program, such as property occupancy.

l. Standards of practice for facilitators: There is consensus that facilitator conflicts of interest should be avoided or disclosed. Traditional mediator standards are problematic in some cases. For example, mediators traditionally do not disclose anything that takes place during facilitation or report to a court on the

parties' conduct, whereas a facilitator may need to report on either party's conduct so that a court can decide whether to permit foreclosure to proceed, or to impose sanctions.

m. Proceedings should be confidential, with appropriate exceptions to permit reporting outcomes and/or noncompliance with rules to the court or supervising agency.

n. States should establish programs to provide appropriate training and continuing education of facilitators.

o. All agreements for foreclosure alternatives should be memorialized in writing and signed by both parties to minimize later disputes. p. Facilitation agencies should collect enough data to determine the outcomes of facilitation and whether it is achieving its objectives.

q. States should provide adequate funding to train and provide facilitators and for the associated agency or court supervision.

r. Original copies of documents (as opposed to true copies) should not be needed during facilitation. Issues about authenticity and possession should be resolved separately in litigation if need be.

Here are other deletions from the former draft regarding borrower fees and potential limitations on the mediation process.

1. The Chair, ABA Advisor and Reporters contemplate that the facilitation agency would be authorized to charge a fee to the borrower for the facilitation.

2. The Chair, ABA Advisor and Reporters have also discussed - but have not agreed on any - proposed additional limitations on the facilitation process in an effort to make the process workable while at the same time (i) encouraging more lender support for the process, and (ii) not losing the support of our borrower advocates. Among the ideas we have discussed are these:

a. 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.

b. 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.

c. 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.

d. 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.

e. Make Article 3 an optional provision for each state.

f. Impose a shorter 'hard stop' time frame for the facilitation process [absent a finding of lender's failure to abide by the facilitation process] measured from the date the lender triggers the process by sending a notice to the defaulting borrower – note: we already have a 90 day 'hard stop' in Section 304(b).

B. Revised 'Best Practices' for Foreclosure Facilitation Programs

- **Clarity about the purpose of the program.** Participants in foreclosure facilitation programs benefit when the purpose of the program is clear. When programs design their communications to reflect the outcomes, such as assisting parties to find voluntary agreements to avoid foreclosure or mitigate damages or finding commercially reasonable alternatives to foreclosure, the parties are clearer about what is expected from the process.

- **Clarity about expectations of parties.** Providing information about the program and expectations will help ensure success. Parties benefit from access to a comprehensive, publicly-available user guide that is easily understood, including a video to view before the sessions start. When program staff call the parties __ days before the first session to check whether they have questions about the process, ensure that someone with authority will attend the session, and that required documents will be submitted on time the likelihood of a successful outcome increases.

- **Pre-session communication between the parties and preparation.** When facilitators guide the parties to discuss what documents are needed for a loss mitigation review and check back to ensure the review has occurred, there is a substantially greater likelihood of settlement at the first session. This may include holding joint phone conferences with the parties prior to the facilitation session to determine what documents are needed from the borrower for the servicer to consider the borrower for any loss mitigation options, there is a greater likelihood of settlement at the first session. Likewise, when the parties review documents provided by the other party prior to the facilitation session to determine eligibility for loss options and follow up with requests for other needed information, there is a greater likelihood of settlement at the first formal session.

- **Housing Counselors.** Housing counselors provide borrowers with information that helps them make informed choices and effectively participate in dispute resolution programs. If borrowers are encouraged to meet with housing counselors early in the process, they will be able to more effectively participate in facilitation sessions.

- **Case management.** Effective case management is critical to success of the program. If program staff monitor the exchange of loss mitigation documents between parties and contact the parties if an incomplete document is submitted or a deadline is missed, the process is more likely to be successful.

- **Trained facilitators.** Successful programs maximize the quality and competence of their services by providing competent and specially trained facilitators to assist the parties. Facilitators who have received at least 40 hours of training in mediation and have a background and training in foreclosure law provide an effective base for the program. Additionally, if the program provides for an annual meeting of facilitators and training, the facilitators may improve their skills and better assist the parties. Facilitators who engage in ongoing improvement through review and feedback and who attend continuing education sessions add continued value to the program.

- **Neutrality.** The facilitator's commitment is to the participants, their self-determination, and the facilitation process through which a voluntary and uncoerced resolution may be reached. Facilitators who are trained to guard against bias for or against clients due to their backgrounds, personalities, or conduct will be aware of their neutrality, which is fundamental to the success of the program.

- **Input from stakeholders.** Meetings between program staff and stakeholders before the program is set up will help establish collaborative relationships, and regular meetings once the program is implemented will allow for candid input.

- **Community diversity.** Programs that are designed with knowledge and sensitivity to the diversity of the communities that they serve are more likely to foster greater participation. Providing needed services such as translation and interpretation increases meaningful participation by participants.

- **Written agreements.** Recording the parties' agreements (including procedural and substantive agreements, and partial agreements) reduces the likelihood of misunderstandings and miscommunication.

- **Resolution of complaints.** The program should establish and provide information about its complaint and grievance procedure. Additionally, the program should provide the parties with information about the consequences of violating program rules and who makes that determination.

- **Monitoring and evaluation.** Monitoring and evaluation of the program are most successful when a determination is made before the program starts about what information to track in addition to the number of cases opened and closed and the number of agreements (full or partial) that are reached. Housing counselors, attorneys who participate in program, parties, facilitators, program staff, and the courts in the case of a judicial program may want to collect different types of information. Programs may want to monitor timing information (the time that elapses between opening and closing a case), the number of parties who appear without a representative, non-English speaking parties, and the parties' satisfaction with the process and their facilitator. In addition, programs may want to solicit input through exit surveys from participants about whether facilitators addressed:

  (a) The borrower's current and future economic circumstances, including the borrower's current and future income, debts, and obligations for the previous sixty days or greater time period as determined by the facilitator;

  (b) The net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recovery following foreclosure;

  (c) Any affordable loan modification calculation and net present value calculation when required under any federal mortgage relief program, including the home affordable modification program (HAMP) as applicable to government-sponsored enterprise and

nongovernment-sponsored enterprise loans and any HAMP-related modification program applicable to loans insured by the federal housing administration, the veterans administration, and the rural housing service.

(d) Any other loss mitigation guidelines to loans insured by the federal housing administration, the veterans administration, and the rural housing service, if applicable.

Taken from ***Best Practices in Foreclosure Mediation*** *by Heather Scheiwe Kulp (RSI),* ***Best Practices for Custody Mediation Programs*** *by the North Carolina Administrative Office of the Courts,* ***Massachusetts Supreme Judicial Court Uniform Rules on Dispute Resolution (Rule 7)*** *as noted in* ***Ethics and Best Practices for Mediation Provider Organizations: 7 Years After Georgetown*** *by Diane J. Levin,* ***Top Ten Pieces of Information Courts Should Collect on ADR*** *by the American Bar Association Section of Dispute Resolution Task Force on Research and Statistics,* ***ABA Section of Dispute Resolution Task Force on Improving Mediation Quality Final Report****,* ***CPR-Georgetown Commission on Ethics and Standards of Practice in ADR*** *(May 1, 2002).*

C. DRAFT RULES (BASED ON WASHINGTON STATE)

(1) The foreclosure facilitation program established in this section applies to_____ .

(2) If a homeowner elects to participate in the foreclosure facilitation program, the agency shall open a foreclosure facilitation case. Within fourteen days of receipt of the homeowner's election form and fee, the agency shall mail written notification of the case opening to the parties by registered mail, return receipt requested, which shall include:

(a) Notification of the date, time, and location of the facilitation session;
(b) Information about the facilitation session;
(c) Information about the foreclosure facilitation program requirements, including documents that the parties must provide to each other and the facilitator; and
(d) Consequences and penalties for noncompliance with program rules.

(3) Within [twenty-five calendar days] of the department's notice that the parties have been referred to facilitation, the borrower shall transmit the documents required for facilitation to the facilitator and the lender. The required documents include an initial Making Home Affordable Application (HAMP) package or an equivalent homeowner financial information worksheet as required by the agency. At a minimum, the borrower should include the following information:

(a) The borrower's current income;
(b) Debts and obligations;
(c) Assets;
(d) Expenses;

(e) Signed tax returns for the previous two years;
(f) Hardship information;
(g) Proof of residency in the home.

(4) Within [twenty calendar days] of the lender's receipt of the borrower's documents, the lender shall transmit the documents required for facilitation to the facilitator and the borrower. The required documents include:

(a) An accurate statement containing the balance of the loan within thirty days of the date on which the lender's documents are due to the parties;
(b) Copies of the mortgage and note; (CORRECT TERMINOLOGY???)
(c) Proof that the entity claiming to be the lender is the owner of any promissory note or obligation secured by the deed of trust;
(d) The amount of any arrearage and an itemized statement of the arrearages;
(e) The payment history and schedule for the preceding twelve months, or since default, whichever is longer, including a breakdown of all fees and charges claimed;
(f) All borrower-related and mortgage-related input data used in any net present values analysis. If no net present values analysis is required by the applicable federal mortgage relief program, then the input data required under the federal deposit insurance corporation and published in the federal deposit insurance corporation loan modification program guide, or if that calculation becomes unavailable, substantially similar input data as determined by the department;
(h) An explanation regarding any denial for a loan modification, forbearance, or other alternative to foreclosure in sufficient detail for a reasonable person to understand why the decision was made; and
(i) Appraisal or other broker price opinion most recently relied upon by the lender not more than ninety days old at the time of the scheduled facilitation.

(5) The facilitator may schedule phone conferences, consultations with the parties, and other communications to ensure that the parties have all the necessary information and documents to engage in a productive facilitation.

(6)
(a) Each party shall designate representatives with adequate authority to fully settle, compromise, or otherwise reach a resolution in facilitation.
(b) The borrower, the lender or authorized agent, and the facilitator must meet [in person for the facilitation session. However, a person with authority to agree to a resolution on behalf of the lender may be present over the telephone or videoconference during the facilitation session.]
(c) After the facilitation session commences, the facilitator may continue the facilitation session once, and any further continuances must be with the consent of the parties.

(7) Within [seventy calendar days] of receiving the referral from the agency, the facilitator shall convene a facilitation session in the county where the borrower resides, unless the parties agree on another location. The parties may agree to extend the time in which to schedule the facilitation session.

(8) The parties may be represented in the facilitation session by an attorney or other advocate.

(9) At the session, the parties must have a person present with authority to agree to a resolution, including a proposed settlement, loan modification, dismissal, or continuation of the foreclosure proceeding.

(10) Noncompliance with program rules means:

(a) Failure to timely participate in facilitation without good cause;
(b) Failure of the borrower or the lender to provide the documentation required in the time lines set by the program or that the parties establish without good cause; and
(c) Failure of a party to have the party's authorized agent present at the facilitation.

(11) Within [seven calendar days] after the conclusion of the facilitation session, the facilitator must send a written report to the agency stating:

(a) The date, time, and location of the facilitation session;
(b) The names of all persons attending in person and by telephone or videoconference, at the facilitation session;
(c) Whether a resolution was reached by the parties, including the type of the resolution; and
(d) Whether the parties complied with program rules, and if they did not, the names of the parties who did not comply and the rule that was not complied with.

(12) If the parties are unable to reach an agreement, the lender may proceed with the foreclosure after receipt of the facilitator's written report.

(13) The agency shall prepare and submit to the legislature annually, twenty days prior to the convening of each regular session, a report containing an evaluation of the operation and effects of the program. The report shall include a summary of the claims included in the program, a description and summary of the work conducted by the program, an appraisal of the effectiveness of the program, and recommendations for changes, modifications, or repeal of the program or parts thereof with accompanying reasons and data.

APPENDIX II – ABANDONED PROPERTY

PROPOSED AMENDMENTS -FEDERAL RESERVE BANK OF CLEVELAND

HOME FORCLOSURE PROCEDURES ACT

SECTION 102. DEFINITIONS. In this [act]:

(1) "Abandoned property" means mortgaged property with respect to which the homeowner and persons claiming through the homeowner, including tenants, have relinquished possession. The term does not include unoccupied residential property that is:

(A) undergoing construction, renovation, or rehabilitation that is proceeding with reasonable diligence to completion; ~~[or]~~

(B) used or held for use by the homeowner as a vacation home or seasonal home, physically secured and in substantial compliance with the law of this state and all applicable ordinances, codes, and rules~~.~~; [or]

[(C) subject of a probate action, action to quiet title, or other ownership dispute.]

(22) "Residential property" means real property [in this state?] improved with not more than four dwelling units, including structures ancillary to a unit. The term includes an attached single-family unit, a single-family manufactured-housing unit treated as real property under law of this state, a time share in residential property if that time share is treated as real property under law of this state, real property on which construction of not more than four dwelling units has commenced, and a single-family unit in a common-interest community. The term does not include property used primarily for agricultural or grazing purposes.

SECTION 505. ABANDONED PROPERTY.

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

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

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

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

(4) The property is deteriorating so as to constitute a serious threat to public health or safety.

(5) A creditor, servicer, or contractor of a servicer has changed the locks or otherwise secured ~~on~~ the property and, for at least 30 days after the changing of the locks or securing the property, the homeowner has not contacted the creditor, servicer, contractor to request entrance to the property.

(6) One or more written statements signed by the homeowner, homeowner's personal representative, or assigns indicate a clear intent to abandon the property

(7) A law enforcement agency has received at least two separate reports of trespass, vandalism or other illegal acts being committed on the property in the previous 180 days.

(8) The homeowner has died and there is no evidence that a survivor or an heir of the homeowner is in actual possession of the property.

(b) In a judicial-foreclosure proceeding, the plaintiff or a governmental subdivision in which the mortgaged property is located may petition the court for a determination that the property is abandoned property. If the property is located in a common-interest community, the association that governs that community may intervene in the proceeding.

The petitioner must send each homeowner and person entitled to notice under Section 201 with notice of the filing of the petition in the manner proscribed in Section 202.

The notice must include the following:

(1) Copy of the petition;

(2) Either a copy of the affidavit or affidavits attesting to the presence of conditions set forth in Section 505(a) or a government agency's determination, finding, or order that that the property is abandoned;

(3) Description of the consequences that will follow from a determination of abandonment;

(4) Inform the recipient that the recipient may contact the [applicable government official] to obtain further information or object to the proposed determination of abandonment. This notice may be [combined / sent?] with the notice required by Section 201.

[In addition, the petitioner must personally serve, or make two attempts to personally serve, the notice on a homeowner at the property, which attempts must be at least 72 hours apart, and during different times of the day, either before noon, between noon and 6 P.M., or between 6 P.M. and 10 P.M.]

The court shall fix a date and time for hearing the petition no less than [30] days or more than [45] days after the filing of the petition, which shall include notice to the homeowner and any other person entitled to notice under Section 201.

If the plaintiff, a servicer, a contractor of a servicer, or the government subdivision in which the mortgaged property is located executes an affidavit attesting to the presence of conditions set forth in Section 505(a), the affidavit shall be signed by and based on personal knowledge of the affiant. Photographic or other documentary evidence that demonstrates the supporting facts set forth in the affidavit shall be attached to the affidavit.

(c) In a judicial-foreclosure proceeding, after notice and hearing, the court may issue an order finding that the mortgaged property is abandoned property based evidence of service of process required by subsection (b) and:

(i) a government agency determination, finding, or order that the property is abandoned,

(ii) an affidavit or affidavits attesting to the presence of at least [three] conditions set forth in Section 505(a), or

(iii) other written evidence or oral testimony,

unless the homeowner or a person claiming through the homeowner:

(i) file an answer to the petition,

(ii) appear at the hearing to object to a determination of abandonment, or

(iii) file an affidavit stating that the property is not abandoned,

which is not withdrawn.

(d) In a non judicial-foreclosure proceeding, a creditor, [trustee,?] ~~or~~ servicer or a governmental subdivision in which the mortgaged property is located may seek a determination

that the property is abandoned property by submitting a request accompanied by an affidavit or affidavits of the creditor, [trustee,?] servicer, contractor of a servicer, or representative of a governmental subdivision attesting to ~~facts indicating abandonment~~at least [three] conditions set forth in section 505(a) or a government agency's determination, finding, or order that that the property is abandoned to [insert name of appropriate government official].

(1) The person seeking the determination must send a notice to each homeowner and other person entitled to notice under Section 201 in the manner proscribed in Section 202. The notice must include: (i) a copy of the request and the affidavit or (ii) copy of the request and government agency's determination, finding, or order that that the property is abandoned, describe the consequences that will follow from a determination of abandonment, and inform the recipient that the recipient may contact the [government official] to obtain further information or to object to the proposed determination of abandonment. This notice may be [combined / sent] with the notice required by Section 201.

[In addition, the person seeking the determination must personally serve or make two attempts to personally serve, the notice on a homeowner at the property, which attempts must be at least 72 hours apart, and during different times of the day, either before noon, between noon and 6 P.M., or between 6 P.M. and 10 P.M.]

~~(2) After personal inspection of the property, the [insert name of appropriate government official] may issue a determination in a record that the property is abandoned property.~~

(2) The [appropriate government official] may issue a determination in a record that the property is abandoned property 30 days after submission of the request for a

determination that the property is abandoned property, if the [appropriate government official] has:

(i) received evidence of service of process required by subsection (d)(1);

(ii) received a government agency determination, finding, or order that the property is abandoned or an affidavit or affidavits attesting to at least [three] of the conditions set forth in Section 505(a); and

(iii) personally inspected the property,

unless the [appropriate government official] has previously received from the homeowner or a person claiming through the homeowner a copy of an affidavit stating that the homeowner or a person claiming through the homeowner is occupying or intends to occupy the property.

The [insert name of appropriate government official] shall send the determination to the creditor, the homeowner, and any other person entitled to notice under Section 201.

(3) The determination or the refusal of the [insert name of appropriate government official] to issue a determination is subject to de novo judicial review.

Drafters' Notes

. . .

5. Other laws may limit the ability of a creditor to foreclose on abandoned property, such as the Servicemembers Civil Relief Act and Protecting Tenants at Foreclosure Act. See 50 App. U.S.C.A. § 501 et seq. and 12 U.S.C.A. § 5220 note.

SECTION 506. FORECLOSURE OF ABANDONED PROPERTY.

(a) In a judicial-foreclosure proceeding, if a court renders an order under Section 505(c) finding that mortgaged property is abandoned property and the court ~~has previously rendered or~~ shall at the same time

(1) render~~s~~ a judgment of foreclosure~~, the court shall~~ and

(2) order a public sale of the abandoned property not earlier than [30] days but not later than [~~60~~45] days after entry of the order.

(b) In a non judicial foreclosure proceeding, on the issuance of a determination under Section 505(d) that the mortgaged property is abandoned property, a creditor, servicer, contractor of a servicer, or trustee may conduct an expedited public sale of the property. The sale may take place not earlier than [30] days but not later than [~~60~~45] days after the issuance of the determination, unless judicial review of the determination is commenced. The creditor or servicer shall comply with the notice requirements of Section 405, except that [15]-days advance notice of the sale is sufficient.

(c) After a judicial order or a determination in a record finding that the mortgaged property is abandoned property under Section 505(c) or (d), the creditor or servicer shall take necessary and appropriate action to cause the foreclosure sale to be completed within ~~a reasonable time~~ [120] days unless the creditor releases its mortgage and files the release in the [land records]. Unless the creditor releases its mortgage, the creditor may not seek to end its obligation to maintain the property under Section 507 by dismissing, terminating, or suspending the foreclosure proceeding.

(d) Upon [a foreclosure sale / confirmation of a sale] held pursuant to subsection (a) or (b), any personal property remaining in or upon the abandoned property shall be deemed to have been abandoned by the owner of such personal property and may be disposed of by the purchaser of the property. No mortgagee or its successors or assigns or purchaser shall be liable for any such disposal of personal property.

(~~d~~e) The completion of a [foreclosure sale / confirmation of sale] pursuant to subsection (a) or (b) terminates the rights of the homeowner or any other person to redeem the property under other law of this state.

APPENDIX III

ARTICLE 6 – SECTION 606 – HOLDER IN DUE COURSE

TEXT OF 15 USC 1640 (k)

15 USC 1640

****

(k) Defense to foreclosure

(1) In general Notwithstanding any other provision of law, when a creditor, assignee, or other holder of a residential mortgage loan or anyone acting on behalf of such creditor, assignee, or holder, initiates a judicial or nonjudicial foreclosure of the residential mortgage loan, or any other action to collect the debt in connection with such loan, a consumer may assert a violation by a creditor of paragraph (1) or (2) of section 1639b(c) of this title, or of section 1639c(a) [ABILITY TO REPAY] of this title, as a matter of defense by recoupment or set off without regard for the time limit on a private action for damages under subsection (e).

(2) Amount of recoupment or setoff

(A) In general The amount of recoupment or set-off under paragraph (1) shall equal the amount to which the consumer would be entitled under subsection (a) [SEE BELOW] for damages for a valid claim brought in an original action against the creditor, plus the costs to the consumer of the action, including a reasonable attorney's fee.

(B) Special rule Where such judgment is rendered after the expiration of the applicable time limit on a private action for damages under subsection (e), the amount of recoupment or set-off under paragraph (1) derived from damages under subsection (a)(4) shall not exceed the amount to which the consumer would have been entitled under subsection (a)(4) for damages computed up to the day preceding the expiration of the applicable time limit.

(a) Individual or class action for damages; amount of award; factors determining amount of award. Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, subsection (f) or (g) ofsection 1641 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any ***actual damage*** sustained by such person as a result of the failure;

(2)

(A)

(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction,

(ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $200 nor greater than $2,000,

(iii) in the case of an individual action relating to an open end consumer credit plan that is not secured by real property or a dwelling, twice the amount of any finance charge in connection with the transaction, with a minimum of $500 and a maximum of $5,000, or such higher amount as may be appropriate in the case of an established pattern or practice of such failures; [1] or

(iv) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, *not less than $400 or greater than $4,000*; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $1,000,000 or 1 per centum of the net worth of the creditor;

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 or 1638(e)(7) of this title, the costs of the action, together with a *reasonable attorney's fee* as determined by the court; and

(4) in the case of a failure to comply with any requirement under section 1639 of this title, paragraph (1) or (2) of section 1639b(c) of this title, or section 1639c(a) of this title, *an amount equal to the sum of all finance charges and fees paid by the consumer*, unless the creditor demonstrates that the failure to comply is not material.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional. In connection with the disclosures referred to in subsections (a) and (b) ofsection 1637 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title, 1637(a) [2] of this title, or any of paragraphs (4) through (13) of section 1637(b) of this title, or for failing to comply with disclosure requirements under State law for any term or item that the Bureau has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms or items referred to in section 1637(a) of this title, or any of paragraphs (4) through (13) of section 1637(b) of this title. In connection

with the disclosures referred to in subsection (c) or (d) ofsection 1637 of this title, a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 1637(c)(1)(A)(ii)(I) orsection 1637(c)(4)(A)(i) of this title or who uses the credit card or charge card. In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title, of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title, or section 1638(b)(2)(C)(ii) of this title, of subparagraphs (A), (B), (D), (F), or (J) of section 1638(e)(2) of this title (for purposes of paragraph (2) or (4) of section 1638(e) of this title), or paragraph (4)(C), (6), (7), or (8) of section 1638(e) of this title, or for failing to comply with disclosure requirements under State law for any term which the Bureau has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title or section 1638(b)(2)(C)(ii) of this title. With respect to any failure to make disclosures required under this part or part D or E of this subchapter, liability shall be imposed only upon the creditor required to make disclosure, except as provided in section 1641 of this title.