MEMORANDUM

January 22, 2014

TO: William Breetz, Esq.

FROM: Alfred Pollard

RE: Model Act Matters for Consideration

Following your request for input on the current draft of the uniform foreclosure Model Act, I and others participating in the meeting have provided feedback from a variety of perspectives about specific attributes of the Model Act regarding provisions which were beneficial to consumers, to investors, states and general legal certainty. Some provisions are perhaps more meritorious than others but the guiding principle has been to move to a workable whole. All parties should benefit from a frictionless, efficient, national real finance market that is fair to consumers and lenders and, after other alternatives are exhausted, provides a foreclosure remedy that is undertaken with due care for homeowners as well for the financial institutions that made a home purchase possible. This likewise will benefit another important consumer group—neighbors. Clearly, efficient foreclosure inures to the benefit of neighborhoods and localities seeking to maintain property values, the tax base and community services. Everyone benefits when a preventable foreclosure is prevented and, when it is not preventable, when the foreclosure process efficiently moves the foreclosed property into the hands of new occupants, who can maintain it, pay taxes on it and otherwise support the community in which they live. The Model Act is an important step in the right direction.

Many provisions of the draft Model Act are clearly on the right track. The Model Act would enhance uniformity and the accelerated abandonment procedures, based in part on certain current state laws, clearly will benefit communities and mortgage investors. The Act would clarify who may foreclose, how to address lost note situations and prepare the law for a national note repository. Other provisions merit consideration for improvement and other provisions should be considered for addition. The Act should avoid unnecessarily delaying the foreclosure process and providing only ephemeral assistance to consumers. Several provisions would raise the cost of lender compliance and expand the challenges involved in originating and servicing mortgages. Sensible reform of the foreclosure process should not include items that either respond to unique events or, in general, create unnecessary burdens on the making and servicing and, if necessary, foreclosure of mortgages.

Timeliness should be a key fixture of the Act. All members of the Committee and participants in the process understand the law, understand the delays currently existing and desire to undertake reforms that include fairness for homeowners. The Model Act should strive to maintain fairness while improving the current system of judicial and non-judicial processes where certain requirements only delay and do not assist or protect homeowners. While the Act grafts various new procedures onto current state law, it does not provide much direction about the time frames for procedures to occur. Having properties languish in the foreclosure process, especially in judicial foreclosure states, hurts consumers, homeowners, lenders and communities at large. Simplifying and expediting the foreclosure process is in everyone's best interest.

Most of these comments have been made before and the purpose of the memorandum is to provide them in one place. The input is provided in seeking to enhance the operation of the Model Act and

is in line with the spirit and goals of a model law. A revised Model Act that incorporates the approaches above would benefit borrowers by having a clear path for them to receive assistance early when it is most beneficial, to understand the time involved and the need to act deliberately to take advantage of protections available to them, to provide a opening for a national repository to eliminate concerns with note documentation, to fit facilitation into a rational time frame where it is of value and to provide effective and clear (not redundant and confusing) notices. Neighborhoods and communities would benefit from restoring the housing stock to a tax-paying status, avoiding blight and deterioration and maintaining community services. Investors would understand their obligations, the clear demands on them to meet clearer legal standards, the process that is predictable and the benefits of a uniform system which should avoid higher costs for all borrowers. Accordingly, below is an outline of items that should be considered to add efficiency to the process, promote legal clarity and certainty and improve the Model Act (November 2013 draft).

Article 1 – General Provisions

a. §101: "Home" is a generic term that is not specific to the scope of the Act— non-agricultural, non-commercial, single family 1-4 unit residential real estate. Replace "Home" with "Residential" in the title to the Act.

b. §102(8): No justification exists for a different standard of "good faith" behavior. Either both parties should be required to act fairly or neither should; the standard should be reciprocal. Both parties should be required to act in good faith.

c. §102(22): The definition of "residential property" should be clarified to include all properties, the primary purpose of which is 1-4 family residence, and exclude properties for which the primary purpose is commercial and agricultural activities.

d. §105(2)(B): Replace the current sentence with the following "the foreclosure has been postponed or cancelled but at the same time continuing with the foreclosure." If the servicer has made a misrepresentation regarding the status of the foreclosure the circumstances for the misrepresentation are immaterial. Moreover, the term "stayed" has become imbued with additional meaning due to its use in bankruptcy, implying that the delay is sacrosanct and subject to immediate penalty if violated, neither of which is the case. Finally, misrepresentation regarding cancellation of the foreclosure is as bad as one regarding postponement.

e. §105(2)(C): Add "if the creditor, servicer or agent or either has established a loss mitigation program for which the homeowner or obligor may be eligible."

f. Legal service by sheriff has proven slow, expensive and sometimes impossible when the sheriff lacks resources or otherwise refuses to follow the law and serve process. An additional definition of "service" should be inserted that includes service by private process server, not just a sheriff or local equivalent. If a global definition is unworkable, then it should be inserted where appropriate throughout the Act.

2. **Article 2 – Notices**

a. § 201(b): The notice in the Act provides voluminous information that is not material to the borrower and may provide no benefit. Courts, consumer groups and the media have criticized the

volume of documentation and information sent to borrowers, often resulting in confusion with no commensurate benefit. The notices currently required by the Uniform Note have worked well over the many years it has been employed and it should continue to serve as the standard. The Uniform Note notice should be considered as a substitute for the list in the Act— "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."

b. § 202: If the homeowner or obligor has requested email communications, the notice should be able to be sent via email or mail, but not both. The servicer may send them via both methods anyway, but a requirement of both is burdensome, especially for small servicers. Alternatively, keep the service requirement as it is today is most states: via U.S. mail only.

c. § 203: This section allows the borrower to come current at *any* time before foreclosure sale. This means that for sales held on Monday the law firm conducting the sale or servicer would have to have an office open on Sunday, which isn't reasonable, especially if the foreclosure has been pending for months or years. It also means that the borrower could show up one minute before sale with the funds, causing unnecessary disruption and confusion. The Act should require that the tender be made at least 2 business days prior to the foreclosure sale, avoiding problems not only for lenders but as well government officials. The servicer should have the option, but not the requirement, to accept reinstatement funds presented less than 2 business days prior to sale.

d. §§ 201-203: The notice provisions in Article 2 need to be harmonized with the notice requirements imposed by the CFPB effective January 10, 2014. Notices which are inconsistent or unnecessary in light of the CFPB requirements should be eliminated. It is possible the notice provisions may be eliminated altogether.

3. Article 3 – Facilitation

a. General: 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. Focusing on pre-foreclosure is important for homeowners as history has shown that early intervention is the best time to resolve borrower's payment distress and the most likely time to avoid foreclosure. Having borrowers make a contribution is of value and fitting the pre-foreclosure facilitation into a fixed time period is important as well.

b. § 301 Drafter's Notes 1 and 2(a): The goal of facilitation, first and foremost, should be the resolution of the borrower's default and reinstatement of the mortgage as current. Loss mitigation options such as loan modification make sense only when reinstatement of the mortgage is not possible due to unemployment, death, sickness, divorce or other long term hardship that affects the borrower's ability to pay. The Drafter's Notes imply that both loss mitigation and facilitation are

borrowers' rights, which is not the state of the law. Moreover, there are many cases where borrowers, for personal or financial reasons, are simply not resolvable short of foreclosure. All of these fundamental concepts must be explicitly recognized in the drafters' comments. A clear expression of when facilitation is or is not appropriate should exist.

c. § 301 Drafter's Note 1(h): The following changes regarding document exchange should be made— i. servicer must identify the documents it needs unless it has already done so prior to the start of facilitation; ii. borrower has 14 days to provide these documents; iii. servicer must provide a payment history only if requested by the borrower; and iv. the reasons for the creditor's decision, including and especially the variables or coefficients to any model used to make that decision, should not be required unless otherwise required under applicable federal law, such as ECOA or RESPA. Models and coefficients are not a problem where plainly set modification terms exist and are unnecessary for finding a non-foreclosure alternative for a borrower.

d. Drafter's Note 1(i): First facilitation meeting should occur within 30 days of initiation of process.

e. Drafter's Note 1(j): The creditor should be permitted to attend the facilitation either in person or telephonically. There should be no requirement for an attorney or representative to appear in person; only that a qualified party, with appropriate authority participate. The more people that need to attend the more difficult it will be to schedule these sessions.

f. Drafter's Note 1(o): The terms of a loss mitigation solution should be memorialized in writing. No "report" from the facilitator is necessary.

g. § 301 and 302: Sending a notice and conducting facilitation should be contingent upon the existence of a loss mitigation program to which the borrower may apply. If a servicer wishes to rely upon the strict terms of the note and mortgage and does not construct loss mitigation programs, then there is no purpose for facilitation. While facilitation may exist and be available, it would not be mandated or required under these circumstances. The CFPB has recognized this concept and declined to require loss mitigation as a part of its servicing regulations.

h. § 302: The notice of facilitation should inform the borrower of the name and contact information for the facilitation agency, the name and contact information for a representative of the creditor (not necessarily a single point of contact) and a description of the information the borrower needs to bring to the meeting. Any other information should be provided by the facilitator, a counseling agency or the borrower's attorney. The Act should provide that the notice is not a "referral to foreclosure" under 10 CFR § 1024 so that the notice can be sent before the loan is 120 days past due. Alternatively, the Act should specifically provide that the notice may be sent at an earlier date, such as when the loan is at least 60 days past due. Again, early borrower assistance should be a theme of the Model Act.

i. § 302(d)(2): "Single point of contact" is becoming a term of art to describe a single set of contact information through which the borrower can communicate with the servicer. The Act should define the term in this manner, so it will not be interpreted to mean that only one person working for the servicer may speak to the borrower. Making a single point of contact a single person would create a bottleneck for borrower communication with one person rather than a contact number where all their information is available and current.

j. § 303: Other than imposing a duty of good faith, the remainder of this section should be deleted. This facilitator is a neutral third party, not a judge, not a trier of fact and not a prosecutor. The procedural and due process protections that are part of a judicial proceeding are not present in a facilitation session. The remainder of this section creates problems for an unwary creditor and provides a de facto method by which borrowers can stall foreclosure by claiming bad faith; for willing borrowers and willing creditors this is unnecessary.

k. § 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.

4. **Article 4 – Sales Procedures**

a. §401(b): While the clarity on who can foreclose is beneficial, the use of the word "only" could imply that the owner of a negotiable instrument cannot foreclose unless it is also the holder.

b. § 401(c): By stating that the plaintiff in judicial foreclosure proceeding must "prove" the right to foreclose, the Act implies the plaintiff has to present evidence of standing even if the borrower fails to answer the complaint. This seems to turn standing from an affirmative defense into a pleading-and-proof obligation. The word "prove" should be replaced with "plead."

c. §401(d): The Act should not require a party foreclosing non-judicially to attest "by affidavit" to facts demonstrating that it has the right to foreclose. This should be the burden of the borrower to challenge via suit for injunction or other relief.

d. §403(a): This provision appears to put the burden on the foreclosing party to prove certain facts via affidavit when there is a lost Note. This should be a pleading requirement, which the borrower can challenge via the discovery of competent evidence.

e. § 403(b): This section authorizes the court to require the creditor to provide "adequate protection" to the borrower when enforcing a lost Note. Because the risk of double liability on the Note has proven remote, the Act should clarify that the "indemnity against loss" will satisfy the adequate protection requirement absent a showing by the borrower in a particular case.

f. § 404(a): Newspaper advertisement is an ineffective and archaic method of advertising the sale of real estate. In reality, advertisements are often made in obscure periodicals that were created solely for the purpose of advertising legal notices. Newspaper advertisement also increases delays and is an expense to no one's benefit. It would be better to allow newspaper or Internet publication and let the servicer determine which is the most effective means of advertisement in the particular community. Where counties offer Internet sites, this, too, could be employed. In addition, the Act could allow posting pending sales on the local multiple listing service (MLS).

g. § 404: The Act should state that a sale may be conducted by a private, licensed real estate sales company, such as an auction company. The Act should authorize sales to be conducted at any public place, not just the courthouse, such as the hotel ballroom auctions that are increasingly common and in many cases more convenient for bidders. Experience has shown that large auctions,

well-advertised and attended by qualified buyers, can generate higher sales prices which benefit borrowers, neighbors, local governments and lenders.

h. § 406(b): The point of this communication is to inform the borrower of the postponement in a manner that is fast, efficient and most likely to be received by the borrower. Therefore, if the foreclosure sale is postponed, the servicer should follow a waterfall approach to enhance the chances the borrower receives notice. If the servicer has the borrower's email address, it should be sufficient to send the notice of postponement via email. If not, then the servicer should call the borrower. Then, if the servicer does not have a working phone number for the borrower or the call is not answered, the servicer must mail a notice of postponement via regular first class mail. Leaving the determination of "commercially reasonable notice" undefined will lead to uncertainty, delay and non-uniformity.

i. The Committee should add a provision that sets forth the permissible grounds for challenging a foreclosure sale. The only acceptable grounds should be failure to provide notice from §404 and §405 or some other irregularity in the process. The Act should clearly eliminate the ability of the obligor or homeowner to challenge the foreclosure on the basis of an inadequate sales price. If the process functions as intended, then the sales price is outside of the parties' control and should be close to fair market value, which is all the parties should expect. There would be no purpose to cancelling and re-selling the property.

5. Article 5 – Accelerated Dispositions

a. §502(a): It should be considered that notice of a negotiated transfer should be given to all parties with a recorded interest in the property, even if they are not named parties in the judicial foreclosure action. Senior lienholders may not be named parties in a junior lienholder foreclosure action, but will still want to know when their collateral has been transferred to a new owner. The senior lienholder's risks increase when an unknown buyer takes property. Further, the senior lienholder will want to know who to contact if the mortgage subsequently becomes delinquent.

b. §503: Only persons with an interest in the property that may be eliminated should have the opportunity to object at the hearing. While superior lienholders certainly should know of the transfer, they would have no present grounds for objecting to it as their lien is preserved.

c. §504(a): The language currently used ("transfer . . . to a creditor in satisfaction of an obligation to the creditor") does not address the situation in which the homeowner transfers property to an objecting junior creditor under § 503(c).

d. § 505(b) and (c): The judicially foreclosing creditor should have the option to obtain a determination of abandonment from the "government official" identified in 505(d). A fast track abandonment process that still relies on court hearings is less helpful as specialized housing courts do not exist in many jurisdictions or are often faced with long dockets. Cities and counties are more capable of assessing abandonment of property because they can send employees out to actually inspect the property and then can provide a safe harbor to creditors. These inspections are also going to be the primary, and perhaps only, source of the evidence presented to the court in any event.

e. § 507: Creditors have an independent economic interest in maintaining the condition of their collateral during the foreclosure process. Creditors will make a cost benefit analysis of what maintenance, if any, is feasible. Fannie Mae and Freddie Mac conduct extensive property maintenance activities for these reasons and are doing so under federal government supervision. However, if localities want to achieve a public benefit through the maintenance of abandoned dwellings, it should be at their discretion so deleting this section would be appropriate. Also, consider a direction to exempt from coverage any program subject to federal government oversight or regulation.

6. **Article 6 – Remedies**

a. §601(a) & (b) permits a court to dismiss the foreclosure *with prejudice* or enjoin a foreclosure if the new foreclosure action would "unfairly burden" the homeowner because of "other aggravating circumstances." This unusually vague standard seems to create a trap for unwary – or even wary – lenders.

b. §601(d) & (e) appears to impose personal liability upon each person who violated the Act. It will be difficult to hire or retain attorneys, loss mitigation employees, *etc.,* if they can be sued personally. Unfamiliar with any State doing this; further, where there have been provisions of law that impose extraordinary liability, foreclosures have been halted, which harms borrowers, communities, lenders and everyone else who has an interest in the efficient passing of foreclosed properties into the hands of new owner-occupants.

c. § 601 (e) and (f): The whole concept of authorizing a defaulting borrower to sue for actual and statutory damages and attorneys' fees and punitive damages, in addition to stopping the foreclosure, seems excessive. The Act should provide that a foreclosure may not occur until the process has been followed and for recovery of actual damages incurred by the prevailing party. No punitive or statutory damages should be permitted and the "no class action" option in §601(h) should be mandatory.

d. § 601(g): This section should be a defense to liability, not just a mitigation of damages. If the creditor cured a violation, why should the violation be actionable?

e. §606: In light of the new, but unknown, liability created by the CFPB's QM and QRM rules, eliminating HDC may be premature.

7. Article 7 – Miscellaneous Provisions

a. §702 needs to be clear that the Act and the existing state foreclosure laws occupy the entire field of foreclosure procedure and that all local laws or ordinances which purport to regulate the foreclosure process are expressly preempted.

8. **Addition— Redemption and Confirmation**

a. Redemption periods were created in order to enable farmers to harvest their crop at the end of the season and bring their mortgages current, even if a foreclosure had occurred. It is archaic and harmful to lenders, borrowers and communities to apply redemption principles to residential properties, however. Where a borrower had ample opportunity to cure their default by paying

arrears before foreclosure, maintaining a redemption period on the chance they will have funds to pay it off completely after foreclosure does not make sense. The use of redemption is extremely rare, but the delays are disruptive to potential purchasers. The costs of holding properties without being able to sell them, often as they are damaged due to vandalism or deterioration, is significant. Any type of process that allows a borrower to remain in possession of the property or allows the property to remain unoccupied after foreclosure should be expressly eliminated (absent a program created by a lender, such as an REO rental program, which both Fannie Mae, Freddie Mac and other industry participants use extensively).

b. The Committee should add a provision (perhaps in Article 4) that abolishes post-sale confirmation as an affirmative duty of the creditor. If the homeowner or obligor wants to challenge the process by which the property was sold, he or she can do so by bringing a motion (in a judicial proceeding) or filing a lawsuit (in a non-judicial foreclosure).

9. Addition— Timelines

a. The Act should set forth expectations – either in the text or in a Drafter's Note – that all facilitations will be completed within 100 days of the date the borrower opts in to the facilitation.

b. The Act should set forth an expectation that a foreclosure sale will be completed within 240 days from the date the foreclosure is initiated. "Initiated" should be defined as the first legal notice given under §201 of the Act or similar foreclosure notice.