

D R A F T
FOR DISCUSSION ONLY

Mortgage Modifications Act

Uniform Law Commission

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Mortgage Modifications Act

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Mortgage Modifications Act

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Mortgage Modifications Act

Section 1. Title

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

Section 2. Definitions

In this [act]:

~~(41)~~ “(Common-interest community)” means real property with respect to which a person, by virtue of ownership of a unit, is obligated to pay real-property taxes or insurance premiums or for maintenance, improvement of other real property, or services described in a declaration or other governing record, however denominated. The term includes properties held by a cooperative-housing corporation. In this paragraph, “ownership” includes a leasehold interest if the lease term is at least [20] years, including renewal options.

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

~~(23)~~ “Modify” means change, amend, or revise. The term includes, correct, supplement-and, or restate. The term does not include a transfer or assignment of the ownership of or right to enforce an obligation secured by a mortgage. The term “modification” has a correlative meaning.

~~(34)~~ “Mortgage” means a security-instrument record that creates a consensual interest in real property to secure payment or performance of an obligation. The term includes a deed of trust [but does not include a security instrument that creates a consensual interest to secure an obligation owed to a homeowners’ association in a common-interest community].

~~(45)~~ “Mortgaged property” means real property or fixtures subject to a mortgage.

~~(6)~~ “Non-residential mortgage-loan” means a loan-secured-by-a mortgage that is

not a residential mortgage~~loan~~.

(~~57~~) “Obligation” means a debt or other duty or liability of an obligor secured by a mortgage.

(~~68~~) “Obligor” means a person that:

(A) owes payment or performance of an obligation;

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

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

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

(~~710~~) “Record”, used as a noun, means information:

(A) inscribed on a tangible medium; or

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

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

(~~812~~) “Residential mortgage~~loan~~” means a ~~loan secured by a~~ mortgage on residential real property.

(~~913~~) “Residential real property” means real property that, when a mortgage is entered into with respect to the property, is used or ~~is~~ intended by its owner to be used primarily for the personal, family, or household purposes of its owner and is improved, or intended by its

owner to be improved, by one to four dwelling units. ~~The term includes:~~

~~(i) an attached single family unit;~~

~~(ii) a single family manufactured housing unit or a time share in a dwelling unit if either is treated as real property under law of this state other than this [act]; and~~

~~(iii) a single family unit in a common interest community.~~

~~(10)~~ “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

Reporter’s Notes

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

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

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

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

4. **Mortgage.** ~~The term definition of “mortgage” is intended to include not only mortgages but also deeds of trust and other consensual real property security interests. It is based upon the definition comes from the definition of “mortgage agreement” in the Model Negotiated Alternative to Home Foreclosure Act; however, in this act, the term refers to the instrument rather than to the interest in property. The Model Act excludes. Depending upon local usage and custom, a mortgage may be denominated as a mortgage, deed of trust, trustee deed, security deed, deed to secure debt, or the like. The definition does not contain an exclusion of homeowners’ association liens, and because they are excluded in the Section 3.~~

Question: Do we need to consider whether our act should also exclude them. If we do exclude

homeowners' association liens, do we need to define common interest community, as does the Model Act, or is the term sufficiently self-explanatory in the context of this act include in the definition of mortgage a consensual interest in fixtures?

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

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

57. Obligation. The definition of the term “obligation” comes from the Model Negotiated Alternative to Foreclosure Act. As in and the Model Uniform Home Foreclosure Procedures Act, the term includes a non-recourse debt. Should that be stated in the definition itself? Also, to consider is whether we need a separate definition, whether the debt is non-recourse due to the application of anti-deficiency judgment legislation, agreement of the parties, or for debt to be used when the act refers to monetary obligations as in section 3(b)(1-3) and 4(b)(1-3) other reasons.

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

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

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

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

8-Question: Would it be better to define “recorded”?

12. Residential mortgage. A “residential mortgage loan” is one that is secured by a mortgage on residential real property as that term is defined in the act. By using that defined term, the definition includes the requirement that the loan be for personal, family, or household purposes.

913. Residential real property. The definition of “residential real property” comes from the definition of that term in the Uniform Nonjudicial Foreclosure Act and includes examples from the. As described in that Act, there are two elements in the definition of mortgaged property in the Model Negotiated Alternative, one relating to Foreclosure Act. In the Model Act, use of the character of property as residential is determined at and the time of foreclosure, which is not applicable in this act other to the improvements on it. “Residential real property” must be used or intended to be used primarily for personal, family, or household purposes of its owner. This definition (and the one in is similar to that of the Uniform Act) determines Consumer Credit Code, the residential character of Federal Trade Commission’s Holder in Due Course Rule, and various other consumer protection statutes. Some commercial or other nonresidential

1 use is permitted within this definition, so long as the property at the time the loan primary use is
2 made residential.

3
4 **1014. State.** The definition of “state” comes from the ULC Drafting Rules and Style
5 Manual.

6 7 **Section 3. Scope; Exclusions**

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

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

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

14 (1) the required content of a mortgage; or

15 (2) future advances. “Future advances” are advances of funds made after the
16 initial advance of funds pursuant to the terms of a loan document before its modification.

17 **Reporter’s Notes**

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

21
22 2. **Exclusion for homeowners’ association lien.** The act is not intended to apply to the
23 modification of a declaration of covenants, conditions, and restrictions or other record that
24 creates an obligation to a condominium association or homeowners’ association.

25
26 3. **Laws Governing Contents of a Mortgage.** The act is not intended to affect any state
27 law that requires a mortgage to include certain terms such as a law that requires that a mortgage
28 state the maximum principal of a loan.

29
30 4. **Laws Governing Future Advances.** The [act] is not intended to affect state law
31 governing future advances. The definition of “future advances” will be moved to the definitions
32 section if the term is ultimately used elsewhere in the act; otherwise, it will be collapsed into the
33 language of the subsection. The definition of future advances needs some thought.

34
35 See also see reporter’s note 8 after Section 4 for a discussion of the issue of a

1 modification that provides for new future advances or turns a fixed loan into a revolving credit
2 loan.

3 4 **Section 4. Non-Residential Loan Modification**

5 (a) Except as provided in subsection (b), if a recorded ~~mortgage securing a non-~~
6 residential mortgage ~~loan~~ provides that the mortgage secures obligations under a loan document
7 as it may be amended, modified, supplemented, or restated, or words of similar effect, the
8 mortgage secures the obligations under the loan document as modified without regard to whether
9 a modification of the mortgage is recorded and without regard to whether the modification may
10 otherwise constitute a novation of the obligations under the loan document and retains its
11 priority.

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

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

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

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

18 (4) occurs contemporaneously with a transfer of the ownership of a loan
19 document.

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

21 **Reporter's Notes**

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

26
27 (a) If a non-residential mortgage provides that it secures obligations under a loan
28 document as the obligations may be amended, modified, supplemented, or restated, or

1 words of similar effect, the mortgage secures the obligations under the loan document as
2 modified without ~~the necessity regard to whether a modification of recording an~~
3 ~~amendment to the mortgage is executed and recorded~~ and without regard to whether the
4 modification may otherwise constitute a novation of the obligations under the loan
5 document ~~and has the same priority as the priority of the original recorded mortgage.~~
6

7 (b) Except as provided in subsection (c), modification of an obligation secured by
8 a non-residential mortgage does not affect the priority of the mortgage as against junior
9 interests in the mortgaged property.
10

11 Note that subsection (a) does not need exceptions. As between the parties, the mortgage
12 is still enforceable to secure the modified obligation. With modification language in the
13 mortgage, the mortgage itself need not be modified. Subsection (b) is based on the language of
14 Restatement §7.3(b). The safe harbor applies even without modification language in the
15 mortgage, and the exceptions to the safe harbor would be those modifications that are materially
16 prejudicial. The provisions are not limited to recorded mortgages.
17

18 **2. Applicability.** Section 4 applies to non-residential mortgage loans. The section applies
19 to modifications of obligations secured by a mortgage. It does not apply to releases of or
20 additions to the mortgaged property.
21

22 **3. Continued security for modified obligation.** The first part of subsection (a) makes
23 clear that a provision in a mortgage to the effect that the mortgage secures obligations in loan
24 documents as modified is effective. The mortgage will secure the loan document obligations as
25 modified without regard to whether the parties execute and record a modification of the
26 mortgage itself and without regard to whether the modification may otherwise constitute a
27 novation of the obligations under the loan document.
28

29 Execution and recordation of a mortgage modification may be desirable for other reasons.
30 If a loan document term that is stated in the mortgage is modified, a recorded modification
31 agreement will give notice of that modification pursuant to a state's recording act.
32

33 Some states require that a mortgage must state the maximum principal amount that the
34 mortgage may secure. In those states, an increase in the stated principal amount would appear to
35 require a modification of the mortgage. Section 3(c)(1) makes clear that this act does not
36 supersede any such requirements.
37

38 If a modification is so substantial as to constitute a novation of the loan, some cases hold
39 that the mortgage may no longer secure the modified loan. See, e.g. In re Fair Finance Co., 834
40 F.3d 651 (2016). Subsection (a) is intended to clarify that language in the mortgage stating that it
41 continues to secure the loan is effective even if the modification is so substantial as to be a
42 novation.
43

44 **4. Priority.** Under common law and the Restatement, if an obligation secured by a
45 mortgage is modified, the mortgage “retains priority as against junior interests in the real estate,
46 except to the extent that the modifications is materially prejudicial to the holders of such

1 interests.” Restatement §7.3(b). The purpose of second part of subsection (a) of the act is to
2 create a safe harbor for certain modifications that will not be treated as materially prejudicial
3 with exceptions to the safe harbor listed in subsection (b).

4
5 **5. Increase in principal.** Cases hold that an advance of new funds does materially
6 prejudice a junior lienholder. This provision would change that rule if the new advance does not
7 increase the principal beyond the principal stated in the mortgage.

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

11
12 **6. Change in maturity date.** Most of the cases find that a junior lienholder is not
13 materially prejudiced by the extension of the maturity date of a loan because it makes a
14 foreclosure less likely. In a few circumstances, a junior lienholder could be prejudiced if the
15 value of the property falls during the extended term of the loan or because principal is not
16 reduced as quickly with a modified amortization schedule. The Restatement position is that an
17 extension of the maturity of a senior mortgage loan is beneficial to junior lienholders and should
18 not cause a loss of priority.

19
20 Question: Do we want to keep this exception?

21
22 Question: What if the maturity date is shortened? Why would that ever happen except perhaps in
23 conjunction with a reduction in interest rate and payments?

24
25 **6. Increase in interest rate.** Cases hold that an increase in interest rate does materially
26 prejudice a junior interest holder and results in loss of priority to the extent of the increase.
27 Taking this exception out would change that rule.

28
29 Question: Do we want to keep this exception?

30
31 **7. Modification contemporaneously with transfer.** The Restatement and cases on
32 subrogation give a lender who pays off another lender and takes a new note and mortgage the
33 same priority as the mortgage that is repaid to the extent that junior lienholders are not materially
34 prejudiced. Examples of material prejudice are the same as those relating to a modification. It
35 does not matter that the lender has changed. The same is true where a loan is assigned and
36 modified rather than paid off with a new loan.

37
38 Concerns about modification at the time of transfer may relate to whether a mortgage tax
39 is due. Whether a tax is due is governed by other law. This act is not intended to create a method
40 for avoiding payment of such a tax.

41 Question: Do we want to keep this exception?

42
43 **8. Future advances.** Michael O’Neal has raised a concern about a modification that
44 provides for new future advances or turns a fixed loan into a revolving credit loan. We have
45 added language in Section 3 as a possible way to address the issue. Michael describes the issue
46 as follows:

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

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

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

13 **Example 1:** On January 1, B acquires Blackacre, located in State X, in the amount of
14 \$150,000 and obtains a loan in the amount of \$100,000 from L for that purpose. B
15 executes and L records a mortgage encumbering Blackacre and securing the loan
16 obligation. The entire \$100,000 is advanced by L to B and used by B to pay the purchase
17 price.

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

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

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

37 The following example demonstrates the potential conflicts with existing state laws
38 governing revolving credit lines. For example, Virginia has a statute that governs the priority of
39 credit line deeds of trust. See VA. CODE § 55.1-318. This provision establishes certain formalities
40 for the *contents* of credit line deeds of trust (e.g., a required legend declaring “THIS IS A

1 CREDIT LINE DEED OF TRUST”, beneficiary’s address, stated maximum aggregate principal
2 amount secured). It then establishes *priority rules* that provide for future advances to have
3 priority that “relates back” to the recording of the deed of trust. There are exceptions to this
4 priority rule; for example, a subsequent judgment creditor may obtain partial priority over a
5 future advance by giving notice to the beneficiary. These priority rules conflict with Virginia’s
6 recent loan modification statute. VA. CODE § 55.1-318.1.

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

12 **Example 2:** On January 1, B acquires Blackacre, located in State X, in the amount of
13 \$150,000 and obtains a loan in the amount of \$100,000 from L for that purpose. B
14 executes and L records a mortgage encumbering Blackacre and securing the loan
15 obligation. The entire \$100,000 is advanced by L to B and used by B to pay the purchase
16 price.

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

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

31 The simplest way to prevent these kinds of conflicts with existing state priority rules as to
32 future advances is to include an exception to the safe harbor for a modification that “provides for
33 a future advance.” By expressly excluding future advances, this act would appropriately deal
34 with the narrow issue raised by the Virginia statute—providing clarity of what does and does not
35 constitute “material prejudice” to a potential junior creditor.

36 You will note that I have also included as part of the exception the phrase that the
37 modification “provides that the collateral secures future advances.” Normally, of course, such a
38 provision would be found in the mortgage itself. However, according to the Restatement, the
39 agreement for a future advance “need not be in the mortgage” and is binding on third parties
40 provided “the mortgage states a monetary amount to be secured.” RESTATEMENT § 2.1(b), (c).
41 Although I have not examined the supporting case law in detail, the Reporter’s Note indicates

1 that “[t]his principle is widely accepted.”

2
3 **Section 5. Residential Loan Modification**

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

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

11 (1) increases the amount of the principal of the obligation [except if the increase is
12 a capitalization of unpaid interest or other unpaid obligations];

13 [(2) extends the maturity date of the obligation ~~if the maturity date is stated in the~~
14 ~~original mortgage,]; or~~

15 [(3) increases the interest rate of the obligation ~~if the interest rate is stated in the~~
16 ~~original mortgage,] or.~~

17 [(4) occurs at the time of a transfer of [the ownership or right to enforce] a loan
18 document.]

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

21 **Reporter's Notes**

22 ~~1. Section 3 applies to non-residential loans.~~

23
24 ~~2. Subject to exceptions in subsection (b), subsection (a) is intended to create a safe~~
25 ~~harbor for modifications of a loan document if a mortgage provides that it secures loan~~
26 ~~documents as modified. Most mortgages do in fact have a provision to this effect. If~~
27 ~~modifications are within the safe harbor, no need exists for the recordation of a modification~~

1 ~~agreement, and the mortgage retains its original priority.~~

2
3 ~~3. Subsection (b) lists exceptions to the safe harbor—those types of modifications that the~~
4 ~~act does not alleviate the necessity for recording or protect the priority of the mortgage, in which~~
5 ~~case those issues are determined by other law as provided in subsection (c). If the committee~~
6 ~~determines that the exceptions as related to the recordation issue and the priority issue are~~
7 ~~different, section 3 may need to be divided into two sections—one for each issue—or the~~
8 ~~exceptions may need to be listed in separate subsections for the two issues.~~

9
10 ~~4. The exceptions and possible exceptions to the safe harbor are discussed in an issues~~
11 ~~memo.~~

12 13 **Section 4. Residential Loan Modification**

14 ~~(a) Except as provided in subsection (b), if a recorded mortgage securing a residential~~
15 ~~mortgage loan provides that the mortgage secures obligations under a loan document as it may~~
16 ~~be amended, modified, supplemented, or restated, or words of similar effect, the mortgage~~
17 ~~secures the obligations under the loan document as modified without the necessity of recording~~
18 ~~an amendment to the mortgage and without regard to whether the modification may otherwise~~
19 ~~constitute a novation of the obligations under the loan document and has the same priority as the~~
20 ~~priority of the original recorded mortgage.~~

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

22 ~~(1) increases the amount of the principal of the obligation [except if the increase is~~
23 ~~a capitalization of unpaid interest or other unpaid obligations];~~

24 ~~[(2) extends the maturity date of the obligation if the maturity date is stated in the~~
25 ~~original mortgage,]~~

26 ~~[(3) increases the interest rate of the obligation if the interest rate is stated in the~~
27 ~~original mortgage,] or~~

28 ~~[(4) occurs at the time of a transfer of [the ownership or right to enforce] a loan~~
29 ~~document.]~~

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

3 **Reporter's Notes**

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

7
8 (a) Except as provided in subsection (b):
9 (1) modification of an obligation secured by a residential mortgage does not affect
10 the priority of the mortgage; and
11 (2) recordation of a modification agreement is not necessary to retain mortgage
12 priority.

13
14 (b) Subsection (a) does not apply to a modification that:
15 (1) provides for the advance of new funds not contemplated under the loan
16 documents and mortgage; or
17 (2) increases the interest rate in excess of that provided in the loan documents.

18
19 Note that Lisa and John do not have the same concerns with residential mortgages about
20 continued security of the modified obligation or about novation. Also, we can add a definition of
21 modification agreement if this subsection (a) is selected.

22
23 **2. Applicability.** Section-5 applies to residential mortgage loans. The section applies to
24 modifications of obligations secured by a mortgage. It does not apply to releases of or additions
25 to the mortgaged property.

26
27 **3. Priority.** Under common law and the Restatement, if an obligation secured by a
28 mortgage is modified, the mortgage “retains priority as against junior interests in the real estate,
29 except to the extent that the modifications is materially prejudicial to the holders of such
30 interests.” Restatement §7.3(b). The purpose of subsection (a) of the [act] is to create a safe
31 harbor for certain modifications that will not be treated as materially prejudicial with exceptions
32 to the safe harbor listed in subsection (b).

33
34 Recordation of modification agreement is not necessary to retain the priority of the
35 mortgage if the modification is not materially prejudicial to junior interest holders. However,
36 recordation of a modification agreement may be desirable for other reasons.

37
38 **4. Increase in amount owed.** Cases hold that an advance of new funds does materially
39 prejudice a junior lienholder and results in loss of priority at least to the extent of the increase.

40
41 Question: What should this exception cover and how should it be worded?

42
43 **5. Change in maturity date.** Most of the cases find that a junior lienholder is not

1 materially prejudiced by the extension of the maturity date of a loan because it makes a
2 foreclosure less likely. In a few circumstances, a junior lienholder could be prejudiced if the
3 value of the property falls during the extended term of the loan or because principal is not
4 reduced as quickly with a modified amortization schedule. The Restatement position is that an
5 extension of the maturity of a senior mortgage loan is beneficial to junior lienholders and should
6 not cause a loss of priority.

7
8 Question: Do we want this as an exception?
9

10 Question: What if the maturity date is shortened? Why would that ever happen except perhaps in
11 conjunction with a reduction in interest rate and payments?
12

13 6. Increase in interest rate. Cases hold that an increase in interest rate does materially
14 prejudice a junior interest holder and results in loss of priority to the extent of the increase.
15 Consistent with case law, this exception removes increases in the amount owed from the safe
16 harbor.
17

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

19 In applying and construing this uniform act, a court shall consider the promotion of
20 uniformity of the law among jurisdictions that enact it-~~}.~~

21 **~~{~~Section 7. Relation to Electronic Signatures in Global and National Commerce Act**

22 **~~{Insert if necessary.}~~**

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

27 ***Legislative Note:*** *It is the intent of this act to incorporate future amendments to the cited federal*
28 *law. A state in which the constitution or other law does not permit incorporation of future*
29 *amendments when a federal statute is incorporated into state law should omit the phrase “, as*
30 *amended”. A state in which, in the absence of a legislative declaration, future amendments are*
31 *incorporated into state law also should omit the phrase-~~}.~~*

32 **~~{~~Section Saving Provision**

33 ~~If a saving provision is necessary, include appropriate language. See Rule 403.}}~~

34 **~~Section-8.~~ Transitional Provision**

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

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

Reporter's Note

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

Section 9. Severability

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

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

Section 10. Repeals; Conforming Amendments

(a) . . .

(b) . . .

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

Section 11. Effective Date

This [act] takes effect . . .