MEMORANDUM

TO: Drafting Committee Members, Advisors and Observers,
Proposed Home Foreclosure Procedures Act

FROM: Bill Breetz, Chair of the Drafting Committee

DATE: FEBRUARY 16, 2015

RE: FEBRUARY 26-28, 2015 Drafting Committee meeting

The DuPont Circle Hotel
1500 New Hampshire Ave, NW
Washington, DC 20036
(202) 483-6000

I. INTRODUCTION Greetings once again. . As you know, the Drafting Committee on the proposed Home Foreclosure Procedures Act will meet – likely for the final time before the annual meeting - on Thursday, Friday, and Saturday, February 26 through 28, 2015, at the DuPont Circle Hotel in Washington, DC. Meeting hours on Thursday will be from 1 pm until 5 pm, and on Friday and Saturday, from 9:00 a.m. to 5:00 p.m. Our meeting rooms will be posted at the hotel. **The Thursday and Friday meetings will not be held in the same rooms.** We will not have a Sunday meeting.

An agenda for the meeting is attached as **Exhibit A** to this memorandum (*see* Page 13). There is a list of all the Exhibits at page 12. This memorandum also includes a summary of the significant changes in this Draft, beginning at page 7.

If you have any questions concerning the meeting, please call Rachel Hewitt in the Chicago office; she is available at (312) 450-6600.

Before you received this memorandum, you should have received from the Chicago office both a redlined and clean draft of the most recent version of the Home Foreclosure Procedures Act for consideration at our meeting. You should also have received – as a separate document –a memorandum from Commissioners Miller and Ring, describing their proposal to add a new article to the Home Foreclosure Procedures Act to create an electronic registry of notes and mortgages at the State level. Their memo and proposed text is incorporated into the draft of the Act as a possible new Article 8.

I understand that not all members of the Drafting Committee, and not all our observers, will be able to attend the Thursday meeting to discuss the Miller/Ring proposal. The Drafting Committee will benefit greatly if Committee members and observers unable to attend on Thursday would forward to me by email any comments they may have regarding this subject.

II. DEVELOPMENTS SINCE THE LAST MEETING

A. On December 14, 2014, shortly after our Drafting Committee meeting in Chicago, the Deputy General Counsel of the American Bankers Association and his Senior Counsel wrote a letter to me, indicating that their organization did not support this Act.

The American Bankers Association has engaged in depth with its members concerning the Act, and has offered Barry Nekritz and me several opportunities to meet directly and by telephone with many of its members. Accordingly, we assumed that the December letter represented a consensus position of the ABA's members. Nevertheless, in a subsequent conversation with them both, Barry Nekritz and I sought to determine whether there were any particular amendments to the current draft that might, if incorporated into the Act, be sufficient to enable that organization to reverse its position.

While the conversation was entirely cordial and professional, it is clear that the American Bankers Association will not support the Act under any conceivable circumstances. Both the ABA letter and my written response are posted on the website of the Uniform Law Commission and were distributed to the Drafting Committee and observers.

B. From the very beginning of this project, and at various times thereafter, I and others have reached out to the National Consumer Law Center ('NCLC'), and to other organizations who profess to represent the interests of homeowners, to seek both their engagement in our drafting process and their support for the Act as it has evolved during this process. We continued to make such efforts after our November meeting. Unlike the consistent participation of the lending industry, NCLC has consistently rejected every invitation to engage in our drafting efforts, and has failed to respond to all overtures seeking support for our work. Anecdotal evidence suggests that NCLC has also urged every other consumer advocacy group to boycott our work, an effort which has been successful.

C. The General Counsel's office of the New York Federal Reserve Board continues to develop proposed federal legislation that, if adopted, would create a single, national, electronic registry of both residential mortgages and notes. An early draft of the proposal dated in October, 2014 was distributed to the Drafting Committee and observers. The General Counsel's office has been very open to suggestions from various interested parties, including the Uniform Law Commission, which has submitted extensive comments. I anticipate that a subsequent draft of the proposal will be forthcoming.

D. Partly in response to the Federal proposal, Commissioners Miller and Ring have proposed that the Home Foreclosure Procedures Act be amended to include a new Article 8, creating an electronic registry at the State level. That proposal has been distributed to the Drafting Committee and observers, and will be discussed at our upcoming meeting.

At this writing, I have only one written comment regarding the proposal, from Attorney David K. Greene of Fannie Mae regarding the proposed State-administered electronic registry. Attorney Greene's comment is attached to this memo as **Exhibit B.**

E. Last week, the Connecticut Foreclosure Mediation Program published a study of its program, conducted this past year by the State Justice Institute. According to their website:

> "The State Justice Institute (SJI) was established by Federal law in 1984 to award grants to improve the quality of justice in State courts, facilitate better coordination between State and Federal courts, and foster innovative, efficient solutions to common issues faced by all courts.
>
> SJI is unique both in its mission and how it seeks to fulfill it. Only SJI has the authority to assist all State courts - criminal, civil, juvenile, family, and appellate - and the mandate to share the success of one State's innovations with every State court system as well as the Federal courts.
>
> SJI is a non-profit corporation governed by an 11-member Board of Directors appointed by the President and confirmed by the Senate. By law, the President must appoint six State court judges, one State court administrator, and four members of the public (no more than two of whom may be of the same political party).

Note that the Report does not detail the costs of the program and therefore does not make any direct cost/benefit analysis. I do know that the CT program now costs $5 million per year, a cost borne entirely by CT taxpayers. By the time of our meeting, I hope to have some sense of the cost per case.

In **Exhibit D,** I have attached excerpts from the SJI study addressing what I consider to be its key findings:

First, defaulting borrowers who participated in Connecticut's mediation program were significantly more likely to avoid foreclosure than borrowers who do not participate.

Second, while the mediation program does delay foreclosure, that delay is only 30 days when all parties cooperate. The longest delays in the foreclosure process resulting from mediation – by far – are attributable to the behavior of lenders or their lawyers, and not borrowers.

The entire Report is 45 pages long; interested parties can read the full Report at this web site: http://www.jud.ct.gov/statistics/fmp/sji_eval.pdf

III. MUSINGS OF THE CHAIR

In my November, 2014 Memorandum, in a section entitled "DEVELOPMENTS IN THE FIELD SINCE OUR LAST MEETING"**,** I described what I characterized as a range of fundamental changes in the rules of the mortgage game, and wrote the following:

> "I attach several articles and opinion pieces on this subject that have been published over the last several weeks. The general thrust of the articles appears to be that the (new) rules are extremely favorable to lenders and servicers and – in the eyes of investor advocates and others – have the potential effect of setting the stage for the next housing crisis."

Several lender representatives accused me of simply not understanding the overall impact of these changes, a charge to which I plead "almost certainly guilty." To avoid a repeat of these manifold sins and wickedness, I will not, in this memorandum, characterize the landscape of the finance industry. Instead, I am simply forwarding, with almost no comment, three recent articles that recently appeared in print.

The first article – attached as ***Exhibit C-I*** - appeared early this month in the Wall Street Journal; it is entitled "**As Regulators Focus on Culture, Wall Street Struggles to Define It".** The author writes in part**:**

> As they emerge from years of bruising fines, layoffs and losses, big banks are trying more than ever to monitor employee attitudes and values to avoid future problems.
>
> But they also have little choice: Senior officials with the Federal Reserve and other agencies in recent weeks have made it clear that they believe bad behavior at banks goes deeper than a few bad apples and are advising firms to track warning signs of excessive risk taking and other cultural breakdowns. Still, even regulators acknowledge culture is a difficult thing to measure.
>
> "I confess that proof is hard to come by," said **Thomas Baxter**, general counsel of the Federal Reserve Bank of New York, in a speech last month. "Yet I am not alone in the fundamental belief that a strong ethical culture will lead to better behavior."
>
> In October, New York Fed President William Dudley warned bank executives that regulators would consider breaking apart the big banks if executives didn't do enough to root out wrongdoing. Mr. Dudley mentioned the word "culture" 44 times in the speech.

Susan Ochs, who heads the Better Banking Project for the New America Foundation, is quoted in the article as saying:

“The industry is sort of having a culture moment.”

Curious about what Tom Baxter had written, I found the speech he delivered last month to a conference at the Bank of England; the entire speech with footnotes is attached as **Exhibit C-2.** Baxter’s remarks speak for themselves, as these excerpts show:

> At the New York Fed, we have made ethical culture a priority for financial services....
>
> Bad behavior in the financial services industry prompted the New York Fed’s call for a stronger ethical culture in banking. My list of the most serious transgressions…includes the evasion of taxes and economic sanctions; conspiracy and market manipulation with respect to LIBOR and foreign exchange rates; and misselling financial products, including residential mortgages and insurance, to people who should not have acquired them. This list is only illustrative. It is not by any means exhaustive.

Baxter goes on to describe the qualities he perceives as important in building an ethical culture, and the qualities he would not include in that culture. The three factors he finds inappropriate are these:

> <u>First,</u> <u>I would leave out any depiction of the persons an organization does business with as ‘counterparties</u>.’…. A‘counterparty’ is not someone needing your help; ‘it’ represents a profit opportunity – something to be exploited. Their loss is your gain. A customer, by contrast, is someone to be served….
>
> <u>The second item I would leave out is a conception of a bank as a money-making machine.</u> This is not to say that I would ignore profitability; that would be foolish….But a bank’s goal should be to provide services to its customers through financial intermediation….It is possible to do good and do well at the same time…
>
> <u>The last item I will leave out is ‘short termism.</u>’….With increasing frequency, people working in a financial servicing firm have no loyalty to their firm because they do not intend to work there long. Instead, the idea is to get some experience and a decent bonus and then move to the next employer….Some of this is simply generational; there is more employment mobility than thirty years ago. <u>But compensation plans bear some degree of responsibility as well. Annual bonuses that reward immediate book value without reflecting tail risk to the organization reinforce short termism</u>.

I cite these remarks in conjunction with the ‘extraordinary’ findings of two judges about lender behavior, as reported in another recent article in the *New York Times.* I also pass along a tidbit from a recent conversation, which seems to bear on this subject.

Taken together, the article and tidbit might be interpreted as substantiating Baxter's suggested need for a change of culture in the financial services industry. Perhaps they also suggest a continuing need to provide meaningful tools by which borrowers who may be subject to abusive lender behavior – on those occasions when it arises - may protect themselves.

First, the tidbit: in a recent chat, an acquaintance referred jokingly to the use in the financial services world of the acronym **"IBG-YBG**". He laughed when I acknowledged not having heard this before, and suggested I look it up on the Internet.

When I did, I realized once again how naïve I am in matters of the financial services world. A website known as NetLingo.com describes the acronym as follows:

> IBG-YBG: <u>I'll Be Gone, You'll Be Gone</u>
>
> A phrase invented on Wall Street, it refers to getting the deal done and letting someone else pay for it. For example, consumers are paying for the fact that they were suckered into no-income second mortgages, and those who did the deals are long gone.

Finally, I enclose an article by Gretchen Morganstern, who writes on financial matters for the *New York Times*. Her article, dated January 31, 2015 is entitled **Two Judges Who Get It about Banks** and is attached as **Exhibit C-3.** She writes, in part:

> Big banks hold great sway in Washington these days, far more than troubled homeowners do. But outside the Beltway, many people remain caught in the maw of the financial giants, which is why it is heartening when some judges step into the fray.
>
> Consider two opinions involving Wells Fargo, a bank that enjoys a somewhat better reputation than many of its peers. On Monday, a judge in a state court in Missouri ordered Wells to pay over $3 million in punitive damages and other costs for abusing a borrower. Then, on Thursday, a judge in Federal Bankruptcy Court in suburban New York ruled on behalf of another borrower, concluding that there was substantial evidence Wells Fargo forged documents when it foreclosed on a property.

In the Missouri case, according to Morganstern, the homeowners

> …fell behind on their mortgage in spring 2008 after a storm damaged the property. They quickly put together the roughly $10,000 needed to bring the loan current, and Wells agreed to reinstate the mortgage one day before a scheduled foreclosure sale.

> The couple …scrambled to do what Wells required: fax a copy of a certified check to one office and send it by overnight mail to another. The next day, the bank foreclosed anyway.
>
> Lawyers …contended that Wells had moved to foreclose …even though the bank had no proof that it possessed the note underlying the mortgage.
>
> ****
>
> In his ruling, (the judge) quoted from the testimony of a bank representative at trial, bridling at her lack of remorse.
>
> **"I'm not here as a human being," she testified. "I'm here as a representative of Wells Fargo."**

And in the New York case, according to Morganstern, a bankruptcy court found

> "substantial evidence that Wells Fargo's administrative group responsible for the documentary aspects of enforcing defaulted loan documents **created new mortgage assignments and forged indorsements when it was determined by outside counsel that they were required to enforce loans**."

The judge also found "a general willingness and practice on Wells Fargo's part to create documentary evidence, after the fact, when enforcing its claims, WHICH IS EXTRAORDINARY" (emphasis in the opinion).

IV. COMMENTS ON THIS DRAFT

Again, this draft represents the work of our co-Reporters - James Charles Smith of the University of Georgia Law School and Alan White of CUNY Law School in New York City - and several conference calls between the co-Reporters, American Bar Association Advisor Barry Nekritz and me. I continue to be extremely grateful for Jim, Alan and Barry's scholarship, drafting efforts and pragmatic approach to the drafting challenges we face in what remains a highly important subject.

This draft is based on the Draft considered at our November meeting in Chicago, the discussion and votes at that meeting, and the discussions between the Reporters, the ABA advisor and me. In addition, proposed Article 8 of this draft is the work of Drafting Committee members Connie Ring and Fred Miller.

There are some significant changes from the last draft. While each of you may draw your own conclusions by reviewing the redlined draft, these are my observations, listed in the order in which the y appear in the Act:

<u>ARTICLE 1</u> – GENERAL PROVISIONS

Section 102 (3) - definition of 'Creditor': This draft proposes further amendments to this definition. However, it retains its focus on the PETE (Sec. 401) which the Committee concludes is entirely appropriate. Additionally, this draft deletes the bracketed language regarding a potential exemption for small lenders – which is now included as a more limited exemption in Article 3. A new comment to Section 104 makes clear that the term includes servicers who have the right to foreclose under Section 401.

Section 102 (4) - definition of 'Pre-foreclosure Resolution": The Chair is pleased that we developed a consensus term for what, in Connecticut, is called a 'Foreclosure Mediation Program'; ***see*** § 49 CGS 31m. This draft proposes minor amendments to the language.

Section 104 - Duty of Good Faith – The Drafting Committee voted in Chicago to retain this section and to remove the brackets around the language confirming that the section does not create an independent cause of action. It may be helpful to give the Reporters guidance regarding an appropriate expansion of the comments to this section.

Section 108 - No Waiver: The Drafting Committee should consider whether the Act should permit waiver after default under some or any circumstances.

Section 109 - Notice and Knowledge: At the direction of the Drafting Committee in Chicago, this section has been deleted**.**

Supplemental Principles of Law: Rejecting the recommendations of the Style Committee, the Drafting Committee voted to include this section, and it now appears as Section 902.

<u>ARTICLE 2</u> – NOTICES; RIGHT TO CURE

While the redlined draft shows several changes to the sections in Article 2, none of them pose fundamental policy issues.

Section 201(d) allows various notices to be combined, but not the Section 302 notice.

Section 202 – the Committee must determine the outcome of the bracketed language concerning mandated notices to 'occupants'.

<u>ARTICLE 3</u> – PRE-FORECLOSURE RESOLUTION

We spent considerable time at the Chicago meeting addressing a variety of policy issues, and the decisions are all reflected in the current draft.

Section 305 – The Drafting Committee discussed at length whether a court can continue a matter in PFR for more than 90 days if the sole reason for the continuance is the backlog of the court. The subject is addressed in the comment, and the Committee should review that language to be certain it reflects the Committee's decision.

Further, the current draft makes no effort to address the issue of 'hopeless cases'. This is due in part because the Reporters, ABA Advisor and Chair could not readily define such cases, and also because we could not determine whether – even if we could – why it would be better to let such cases go to judgment when a negotiated transfer might, with the assistance of a third party neutral, yield a better result for all parties. Because of the lending community interest, however, the Drafting Committee should at least re-visit this subject.

New Section 306 – which is not noted in the Table of Contents – is the exemption from mandatory mediation for small lenders - that is lenders holding or servicing less than 6 loans.

<u>ARTICLE 4</u> – RIGHT TO FORECLOSE; PUBLIC SALE PROCEDURE

Section 401 [A] and [B] – Right to Foreclose – Judicial and Non-Judicial

The Drafting Committee will want to consider the proposed amendments in subsections 401 (b) and (e), both of which are new in this draft.

[Former] Section 402 – Assignment of Mortgage Unnecessary:

The draft deletes the section making it unnecessary to record a mortgage assignment. As the Chair's Note in the redlined draft indicates, several of you have asked to reconsider that decision.

Section 402 [formerly 403] – LOST, DESTROYED OR STOLEN NEGOTIABLE INSTRUMENT

The form of lost note affidavit has been relocated to a location following the text of this section, and contains minor style amendments.

Section 403 [formerly 404] – PUBLIC ADVERTISEMENT OF PUBLIC SALE

This section and the comments have been rewritten to reflect the decision to delete the requirement that the advertisement be 'commercially reasonable.'

Section 404 [formerly 405] – Notice of Public Sale

The only changes to this section were to change the 'passive' notice to an 'active' obligation of the Creditor to send the notice. Not a substantive change.

<u>ARTICLE 5</u> – NEGOTIATED TRANSFER

A substantial revision of this Article appears in Section 503, where we have attempted to address the problems that arise in two situations:

First- where there are multiple junior creditors who object to the proposed transfer, and the court is obliged to deal with conflicting lien priorities;
Second, where the only objecting creditor is subordinate to the creditor that has reached a proposed 'negotiated transfer' with a homeowner but is junior to an intervening creditor that did not object.

In both cases, we seek review and comment from the Drafting Committee.

<u>ARTICLE 6</u> – ABANDONED PROPERTY

The only change here is that the drafters added additional language to comment 1 to Section 606, making clear that the only circumstance in which the lender is required to maintain the property under the provisions of this Act is when the lender itself has initiated a foreclosure action and even then only when the creditor seeks to use the accelerated foreclosure process of Article 6.

We added this comment in light of the concern expressed in the December 14 letter from the American Bankers Association that this Article somehow imposes involuntary obligations on lenders; hopefully, this comment will correct that mis-impression.

<u>ARTICLE 7</u> – REMEDIES

Please note that because this draft combined Sections 701 and 703, we were able to delete Section 703. As a consequence, the controversial Section 706 – dealing with Holder In Due Course – has become the controversial Section 705.

Section 701- Effect of Violation:

Various changes were made to subsection (a) pursuant to the discussion in Chicago. The changes to subsection (b) reflect the drafters' effort to combine this language with the substance of Section 703.

Section 705- Effect of the Holder In Due Course Rule The only changes to this section are:

First, in subsection (b), the draft deletes the reference to other statutes of limitations or prohibition in favor of a simple six year statute of limitations as stated in subsection (d).

Second, also in (b), we added the Restatement's definition of what constitutes a 'material breach of promise'; the Committee may wish to consider how much light the new definition actually sheds on the problem.

In subsection (d), per the Chicago discussion, we eliminated the 'springing' one year statute for interest rate adjustments.

Finally, following this section is a Note from Reporter White asking whether subsection (e) should be made parallel to UCC Section 3-305.

ARTICLE 8 – A PROPOSED STATE-LEVEL ELECTRONIC NOTE REGISTRY

This proposal will be the exclusive subject of our Thursday discussion.

ARTICLE 9- MISCELLANEOUS PROVISIONS

Section 902- General Principles of Law Applicable

At the direction of the Drafting Committee, the draft adds this shortened version of a common provision is many uniform acts, together with a comment on its derivation.

APPENDIX – MODEL RULES FOR PRE-FORECLOSURE RESOLUTION

These rules have been relocated to follow the end of the entire Act, rather than at the end of Article 3. No changes to the language of the rules have been made, and the Drafting Committee may wish to use of the time allocated to this subject on Saturday morning to review them.

LIST OF EXHIBITS

EXHIBIT A:	**AGENDA FOR THE MEETING**
EXHIBIT B:	**COMMENT OF DAVID K. GREENE, FANNIE MAE RE: THE MILLER/RING PROPOSAL FOR A STATE-ADMINISTERED ELECTRONIC NOTE REGISTRY**
EXHIBIT C-1:	**GLAZER, E. "AS REGULATORS FOCUS ON CULTURE, WALL STREET STRUGGLES TO DEFINE IT", Wall St. Journal, 2-1-15**
EXHIBIT C-2:	**BAXTER, T. "THE REWARDS OF AN ETHICAL CULTURE", Delivered at the Bank of England, January 20, 2015**
EXHIBIT C-3:	**MORGANSTERN, G. "TWO JUDGES WHO GET IT ABOUT BANKS", New York Times, 1-31-15**
EXHIBIT D:	**EXCERPTS FROM THE SJI STUDY OF THE CONNECTICUT MEDIATION PROGRAM**

EXHIBIT A: AGENDA

HOME FORECLOSURE PROCEDURES ACT DRAFTING COMMITTEE MEETING
THURSDAY, FRIDAY and SATURDAY, FEBRUARY 26-28, 2015

Note – the Chair welcomes suggested amendments, comments regarding obvious omissions and special scheduling requests

Thursday, February 26, 2015

1 pm -1:15 pm	Welcome and Introductions of attendees
1:15 pm – 5 pm	Discussion of Proposed Article 8 [Registry]

Friday, February 27, 2015

9am - 9:10	Welcome and Introductions of old and new attendees
9:10 -9:30	Report on Thursday's discussions concerning Article 8
9:30-10:00	Discussion of 'Federal Reserve and other activities regarding the electronic Note and Mortgage registry
10:00 – 12:00	Consideration of UCC-related matters: ○ Article 1 – Definitions (creditor, servicer, etc.) ○ Article 4 – Who can enforce; Lost Notes ○ Section 705 – Holder in Due Course
12 noon – 1:15 pm	Lunch break [on own]
1:15- 3:00 pm	Further Consideration of UCC-related matters
3:30-5::00 pm	Line-by-Line Consideration of the Act

Saturday, February 28, 2015

9 am -10 am	Consideration of Article 3 (Early Resolution), rules
10 am to 12 noon	Line-by-Line Consideration of the Act
12 noon – 1:15 pm	Lunch break [on own]
1:15 – 5 pm	Further Consideration of the Act

If needed and Time Permits – Further discussion of Article 8

EXHIBIT B

COMMENT FROM DAVID K. GREENE, ASSOCIATE GENERAL COUNSEL, FANNIE MAE, REGARDING THE PROPOSED STATE ELECTRONIC REGISTRY. (Feb.4, 2015)

Mr. Chairman: Unfortunately, I will not be able to attend the special half-day meeting on the topic of including provisions concerning the Note Registry as Article 8 of the Home Foreclosure Procedures Act (HFPA), scheduled for Thursday, February 26. However, I am writing to express my opposition to this suggestion.

First, I think there simply isn't enough time to have a properly drafted Article included in the HFPA in time for consideration by the National Committee of the ULC in July 2015. It's taken several years of discussion and debate to get the HFPA to the position it's presently in, and to simply graft a new Article to the Act at the last minute like this is ill-advised. Stephanie Heller has been working on proposed legislation for the Note Registry for over a year now, and while her first circulated draft was a good start, I'm sure she received many substantive comments. Fannie Mae alone sent an e-mail with 19 separate comments. The Committee simply doesn't have time to craft a proper Note Registry statute.

Second and more substantively, I think adding the Note Registry concept to the Act would be improper. The Note Registry is more appropriately a single *national* registry that should be implemented through pre-emptive federal legislation. A national registry would be more uniform, less expensive to build and maintain, and less vulnerable to external attack or hacking than 50+ separate registries. A single registry would be easier for both lenders and consumers to navigate and manage.

And finally, and pragmatically, grafting the Registry concept onto the HFPA will make it less likely that the Registry will ever be adopted. With the expressed opposition to the HFPA by consumer groups, and by the American Bankers Association, adding the Registry to the Act might doom it. A stand-alone National Note Registry bill, however, might be able to garner bipartisan support. And frankly, getting a Note Registry bill adopted by one legislature (Congress) will be easier than 50 state legislatures.

For these reasons, I urge the Drafting Committee to let the Note Registry bill continue on the course it is on, led by the fine efforts of the New York Fed, and keep it out of the HFPA. Thank you for your consideration.

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EXHIBIT C-1

As Regulators Focus on Culture, Wall Street Struggles to Define It

Big Banks Try to Monitor Employee Attitudes to Avoid Future Problems

By Emily Glazer in the Wall Street Journal, Feb. 1, 2015

"Culture" is the buzzword of the moment at banks—and a puzzle that regulators and Wall Street firms are wrestling to solve.

As they emerge from years of bruising fines, layoffs and losses, big banks are trying more than ever to monitor employee attitudes and values to avoid future problems.

But they also have little choice: Senior officials with the Federal Reserve and other agencies in recent weeks have made it clear that they believe bad behavior at banks goes deeper than a few bad apples and are advising firms to track warning signs of excessive risk taking and other cultural breakdowns. Still, even regulators acknowledge culture is a difficult thing to measure.

"I confess that proof is hard to come by," said Thomas Baxter, general counsel of the Federal Reserve Bank of New York, in a speech last month. "Yet I am not alone in the fundamental belief that a strong ethical culture will lead to better behavior."

In October, New York Fed President William Dudley warned bank executives that regulators would consider breaking apart the big banks if executives didn't do enough to root out wrongdoing. Mr. Dudley mentioned the word "culture" 44 times in the speech.

"Risk takers are drawn to finance like they are drawn to Formula One racing," Mr. Dudley said then.

The issue is taking on added urgency as U.S. banks await feedback expected around March from the Fed's annual "stress tests" to ensure large banks can handle a deep slump like the 2008 financial crisis and continue lending without needing a government rescue.

Industry experts say qualitative components, such as how banks monitor and measure risks, appear to be a greater focus this year in addition to the number-crunching aspects of the tests.

The result is a rush at firms including J.P. Morgan Chase & Co. and Wells Fargo & Co. to crunch the numbers on things like how often employees go to happy hour to how they score on a happy-to-grumpy ratio. One consulting firm hired by a major bank determined it was a red flag when employees used the word "workaround" in internal communications, indicating a willingness to bypass set rules or policies.

Privately, bankers and their advisers worry that regulators will use "culture" as a blunt instrument to find fault with banks on a range of matters, since the subject is by nature qualitative. BB&T Corp. Chief Executive Kelly King recently called culture "the new rabbit" Washington is chasing.

Bank culture, especially at large institutions, can range from how a teller interacts with customers to how highly paid traders make decisions and weigh obligations to their clients against the bank's. That can make it different than other industries.

Wall Street more than other industries provides a mechanism that feeds the risk taking. Traders in particular are often incentivized to be confident and aggressive, and it is often those employees who rise to the top at the banks.

As a result, all the largest U.S. banks are grappling with how they might measure culture.

"The industry is sort of having a culture moment," said Susan Ochs, founder of the Better Banking Project at the nonpartisan think tank New America Foundation. Ms. Ochs said she is discussing with bankers, consultants and regulators assessment tools that could be used across the industry based on her research.

Her group is part of a cottage industry of consultants and other experts that has developed around this issue. According to people familiar with the matter, banks are collectively spending tens of millions of dollars on such consultants.

Among other things, the Better Banking Project is developing an analytical survey for banks to give to employees to tease out ways of thinking that could turn into potential problems. For example, it is looking to identify cultural trends in a bank where employees believe selling complex products makes them seem smarter, or that pay is the best measure of success.

Promontory Financial Group, which is separately working with several global financial institutions, is measuring the response time by management to audit challenges, which could represent tension among departments. The firm is also helping clients craft action plans to put into place if a regulator reports weakness in the institution—even informally—and then tracking them internally to ensure they reach senior officials, said Elizabeth McCaul, a former New York superintendent of banks who now leads Promontory's New York office.

Academics have examined and tried to measure corporate cultures for decades, but "nobody has cracked the code in the way the banks are trying to do now," said Sydney Finkelstein, a management professor at Dartmouth College's Tuck School of Business. He added that getting valid data on this issue is "really, really very difficult."

U.S. Comptroller of the Currency Thomas Curry said in an interview that culture is a "critical component of a sound management team" and could significantly affect his agency's rating of a bank's strength, known by the acronym Camels, for capital adequacy, asset quality, management, earnings, liquidity and sensitivity to market risk. "There is teeth to this" new emphasis, he said.

Ideas floated by regulators and industry experts include putting banks on a driver's-license-like "point system" where their licenses to do business could be pulled for bad performance. Other ideas such as fining bank chief executives, banning bad traders from the business or factoring compliance breaches into compensation aim to build a more personal sense of responsibility.

The Clutch Group, which is consulting for two banks it wouldn't name, found that informal happy hours led more often to harassment issues than those planned as corporate events, said Brandon Daniels, Clutch president. It also found that there was a 75% greater chance of employees going around internal controls when the word "workaround" was used in their communications.

J.P. Morgan in late December issued a report in response to a shareholder request that emphasized culture across the bank and detailed a focus on benchmarking employee survey results to spot weaknesses.

The report said the bank is tracking issues raised by employees or reported through its code of conduct hot line and measuring culture progress by a reduction in "adverse regulatory events."

In the last two years, Wells Fargo has added questions to its annual employee survey to understand whether employees refer the bank's products to friends and family, trying to decipher their confidence in the firm, said Pat Callahan, the bank's chief administrative officer.

The bank also measures employee satisfaction through what CEO John Stumpf calls a "happy to grumpy ratio." The idea, executives say, is that happy employees, defined as ones who say they are satisfied, are more likely to act ethically. Wells Fargo says the ratio clocked in at 8:1 in 2014, versus 7:1 in 2013 and 3.8:1 in 2010.

Exhibit C-2

Thomas C Baxter: The rewards of an ethical culture

Remarks by Mr Thomas C Baxter, Executive Vice President and General Counsel of the Federal Reserve Bank of New York, at the Bank of England, London, 20 January 2015.

These remarks are personal and do not necessarily represent the official position of the Federal Reserve Bank of New York, or any other component of the Federal Reserve System.

Introduction

Let me begin by thanking Sir William Blair and the Bank of England for inviting me to participate in this Project and at this Conference. At the New York Fed, we have made ethical culture a priority for financial services. We have done this not as a formal part of a supervisory program, but more as a call for reform. In the short time that I have this afternoon, I will speak about the reasons why I believe reform is necessary, highlight some of the important practical features of a strong ethical culture, and conclude by setting out a few of the rewards that might result from it.

Bad behavior in the financial services industry prompted the New York Fed's call for a stronger ethical culture in banking. My list of the most serious transgressions is probably not much different from anyone else's. It includes the evasion of taxes and economic sanctions; conspiracy and market manipulation with respect to LIBOR and foreign exchange rates; and misselling financial products, including residential mortgages and insurance, to people who should not have acquired them. This list is only illustrative. It is not by any means exhaustive.

The traditional means to address bad behavior are enforcement actions against the bad actors and the organizations where they worked. [1] This traditional response, in my view, is appropriate and I strongly support the actions that have been taken and that will continue to be taken. All enforcement actions, though, are essentially retrospective. Of course, we like to think that enforcement actions will not only punish but also deter. But

I wonder if this hope is really a prospective strategy. We would better serve the public good if we could do something - anything - more forward looking, and complementary to what our enforcement colleagues are doing to deter future bad behavior.

Ethical culture

The new emphasis on an ethical culture within financial services firms arises from the policy interest in preventing some of the bad behavior that has been observed. Now I use the phrase "some of the bad behavior" deliberately. I fully embrace the goal of eliminating all bad behavior. But we cannot let the goal of perfection become the enemy of progress. We need to start making progress, so let us agree that perfection is probably not realistic. Even an organization with the strongest ethical culture will have episodic bad behavior. Although culture is no panacea, I believe that the ethical culture of an organization can improve the behavior of the people who work there. Strengthening the ethical culture of financial services should therefore reduce the volume of bad behavior we have been seeing.

Some of the skeptics say, "Prove it." I confess that proof is hard to come by. Yet, I am not alone in the fundamental belief that a strong ethical culture will lead to better behavior. A 2010 Corporate Executive Board survey of more than 500,000 respondents shows a widespread view that corporations with strong ethical cultures experience less misconduct. [2] This makes intuitive sense even in the absence of empirical proof. [3] Further, the natural tendency to go with the intuitive is bolstered by the potential benefit of a reduction in enforcement actions against financial services firms, and by a healthy change in the public perception of the financial services industry. And, of course, there is ready evidence for the contrapositive view. Few would disagree with the following: The bad behavior that contributed to the Financial Crisis was evidence of a culture that was not strongly ethical.

Let me also pose a challenge to those who are skeptical about the benefits of a strong ethical culture: If this is not a suitable method to prevent bad behavior by bankers, what alternative proposal do you advocate? The status quo is not acceptable. As a wise man once said, "Plan beats no plan."

The components of a strong ethical culture

So what are the key components of a strong ethical culture? It is said that lawyers love a metaphor, and this lawyer is no exception. I like to think about ethical culture as if it were a package. The culture that we will have is derivative of what we put into the package, and there are clear choices to be made. The contents depend upon the type of organization, the kinds of people, and the nature of the skills needed to conduct the organization's activities. Time will not permit me to cover this thoroughly, so let me cover a few items with a very broad brush.

What goes in

For starters, the conduct of the people in any organization will be strongly influenced by incentives. Let me mention the "big three." Bankers, like lawyers, want to do [1] quality work, [2] with people they like and respect, and [3] receive fair recognition in return. I will touch on all three but will focus on two species of recognition: compensation and promotion. Each should be tied to ethical considerations. If the only consideration with respect to compensation and promotion is how much money the individual made for the firm, then that communicates a message that is inhospitable to a strong ethical culture.

A second key component is what I call "character at the top." The usual expression is "tone at the top," and it refers to the message from the people who occupy the upper most positions in any organization (the board of directors and the "C" Suite). My worry with the typical expression is that it tends to focus on words, rather than conduct. The implication is that if you sing the right notes in the right key then all will be fine. I do not believe this. Employees will be influenced by the actions of key management, and not merely by the songs they sing. If those actions are in harmony with stated mores, then the combination should foster a strong ethical culture. But if the observed actions are not congruent with the words (or, worse, conflict with the words), then employees will follow suit: They may say the right things, but they will not behave the right way. Worse still, they will sense that they work for a firm lacking in integrity. This has long-term, deleterious consequences. Recall that one of the key attractions in working for a particular organization is association with people who are liked and respected. Do people like and respect leaders who lack integrity? Good luck attracting top talent in that kind of organization.

A third key component in a strong ethical culture is values. Most firms elaborate rules of proper behavior, often in well-crafted codes of conduct. In some large, complex organizations, the rules can be difficult and tedious, like the rules for conflicting interests and for avoiding trading on insider information. In better run firms, the rules are built on a foundation of the shared and well-understood values of the institution. These values reflect a bank's public function as a financial intermediary and recognize the privileges that come with a banking charter. [4] In other firms, however, compliance rules can be undermined by the values of the organization, resulting in an unhealthy dissonance. For example, if there are elaborate rules for complying with the tax laws of a particular jurisdiction, but the organizational value is to facilitate flight capital, a mixed message may be sent that tax compliance rules are just technicalities. Similarly, in the area of economic sanctions, if the sanction is perceived as something technical and implicating only a single currency, the bank might be sending an unintended message - that we comply with the sanction only because it represents a mandatory but silly rule of a single sovereign issuing a specific currency, and not because the sanction seeks to address a problem that all should find abhorrent, like financing a jurisdiction engaged in genocide. [5]

What to leave out

Thinking about culture like a package, there are some things that I would leave out. Again, without being exhaustive, here are three examples.

First, I would leave out any depiction of the persons that an organization does business with as "counterparties." If you went to your doctor and overheard her refer to you in conversation with office personnel as a "counterparty," rather than as a "patient," would you worry? I would. Similarly, if you went to your personal lawyer and overheard him refer to you in conversation with his associate as a "counterparty," rather than as a "client," would you worry? You should. My point here is not that banking is a profession like medicine or law. My point is about how you see your customer and the service provided to that customer. A counterparty is not someone needing your help; "it" represents a profit opportunity - something to be exploited. Their loss is your gain. A customer, by contrast, is someone to be served. It is right to charge a fee to a customer, client, or patient, but the transaction is driven by the other person's needs. Many financial services firms, however, refer to the people they do business with as counterparties. This is no accident. It characterizes the way in which the organization views the person it is facing in its businesses. Viewing customers as profit opportunities is inconsistent with a strong ethical culture. In my experience, firms that consider their operational model as service provider tend to have a better culture than those firms that consider their operational model as money maker.

The second item that I would leave out is a conception of a bank as a money making machine. This is not to say that I would ignore profitability; that would be foolish and would destine a firm to a short life. But a bank's goal should be to provide service to its customers through financial intermediation, as Mark Carney has explained so eloquently. [6] Christine Lagarde sees this as a question of animating purpose - of "telos" - and I agree. [7] Similarly, the Archbishop of Canterbury, Justin Welby, has called for financial institutions to reset to the first principle of service, playing a role in the world that contributes to "human flourishing." [8] If you don't believe me, listen to the Archbishop: It is possible to do good and do well at the same time. And remember one of attributes that attracts the best and the brightest to an organization is the prospect of quality work. Having a work force that feels they are contributing to the greater good should benefit the organization in its effort to recruit the best minds, but also in the effort to recruit those with the best hearts (who presumably will be less likely to become malefactors).

The last item that I will leave out is "short termism." Permit me to describe the concept. With increasing frequency, people working in a financial services firm have no loyalty to their employer because they do not intend to work there long. Instead, the idea is to get some experience and a decent bonus and then move to the next employer - or, if the bonus is large enough, to work for oneself. [9] 10 Given the specialization that tends to accompany various financial services, people with near-term career horizons tend to develop loyalty to the special group of individuals with whom they transact business and who might provide the next job opportunity. These specialized bankers or traders increasingly resemble independent contractors or freelancers - careerists with no institutional loyalty. In foreign exchange, for example, we saw people orchestrating a manipulative scheme across a network of individuals at many institutions. This is all rational and understandable - specialists need the long-term allegiance of their network to continue to ply their trade, and this allegiance is far more consequential than loyalty to the organization currently employing them. So, when in conflict, career trumps institution. Some of this is simply generational; there is more employment mobility now than thirty years ago. But compensation plans bear some degree of responsibility as well. Annual bonuses that reward immediate book value without reflecting tail risk to the organization reinforce short termism. Changing the time horizon for compensation will be a significant feature of meaningful cultural reform. [10]

Conclusion

The principal benefit to a financial services firm in having a strong ethical culture is the avoidance of bad banker behavior. Bad banker behavior often leads to enforcement actions that can carry significant monetary fines, that can inflict destructive damage to the organization's reputation, and in the worst case, that can cause the death of a franchise (recalling that all financial services firms depend upon public confidence to survive). A strong ethical culture also attracts the best and the brightest personnel, who will seek out the bank as the place to build a career doing high quality work, for fair compensation, with people they like and respect. As for those with whom the bank does business, they may come to see the organization as customer focused, looking to serve them well, and not turning them into the next "profit opportunity." Finally, from the perspective of the supervisory community, an industry comprising personnel who have a strong ethical culture will be a safer and sounder industry, certainly safer and sounder than an industry full of miscreants. This could be a powerful factor toward financial stability. Thank you for your kind attention.

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[1] To call enforcement traditional is not to say that it is static. Eric Holder, the Attorney General of the United States, recently recommended that Congress create new criminal liability for bank officers who were in a position to detect and deter illegal conduct, but failed to do so. That is, individual executives could be criminally liable for failings within their organization without specific bad intent. See Eric Holder, Remarks on Financial Fraud Prosecutions at NYU School of Law, September 17, 2014.

[2] See Corporate Executive Board, Research Reveals That Integrity Drives Corporate Performance: Companies With Weak Ethical Cultures Experience 10x More Misconduct Than Those With Strong Ones, Press Release, September 15, 2010. See also Anthony Salz, Salz Review: An Independent Review of Barclays' Business Practices, 18991 (App'x C)

(discussing the impact of culture on two archetypes of employee behaviors, and collecting sources).

[3] Somewhat tautologically, the proof of a good culture might be the absence of bad behavior. As Bill Dudley, the President of the Federal Reserve Bank of New York, has observed: "How will a firm know if it is making real progress [on culture]? Not having to plead guilty to felony charges or being assessed large fines is a good start." William C. Dudley, Enhancing Financial Stability by Improving Culture in the Financial Services Industry, Remarks at the Workshop on Reforming Culture and Behavior in the Financial Services Industry, October 20, 2014.

[4] Cf. E. Gerald Corrigan, Are Banks Special? Federal Reserve Bank of Minneapolis Annual Report, January 1983, ("[T]he presence of the public safety net uniquely available to a particular class of institutions also implies that those institutions have unique public responsibilities and may therefore be subject to implicit codes of conduct or explicit regulations that do not fall on other institutions.").

[5] See Thomas C. Baxter, Jr., Reflections on the New Compliance Landscape, Remarks at "The New Compliance Landscape: Increasing Roles - Increasing Risks" Conference, July 24, 2014.

[6] See Mark Carney, "Inclusive Capitalism: Creating a Sense of the Systemic," Address to the Conference on Inclusive Capitalism, May 24, 2014.

[7] Christine Lagarde, "Economic Inclusion and Financial Integrity," Address to the Conference on Inclusive Capitalism," May 27, 2014.

[8] The Archbishop offered these comments at an October 12, 2014 panel discussion that was part of the International Monetary Fund 2014 Annual Meetings. A video of that discussion is available at http://www.archbishopofcanterbury.org/articles.php/5426/archbishop-to-take-part-in-imfworld-bank-panel-onethics-and-finance. Notably, the Archbishop described his role at the conference as a "lion in a den of Daniels."

[9] Even the skeptics of cultural reform concede that there is "almost universal accord that remuneration structures contributed to excessive risk-taking in financial institutions and that excessive bonuses paid on

anticipated accounting profit at the time of deal origination distorted decision-making and resulted in asymmetric riskholding." Paradigm Risk Consulting, To boldly supervise . . . , February 2014.

[10] See Dudley, Enhancing Financial Stability by Improving Culture in the Financial Services Industry, supra n.4.

EXHIBIT C-3

Two Judges Who Get It About Banks

Gretchen Morganstern
New York Times, January 31, 2015

Big banks hold great sway in Washington these days, far more than troubled homeowners do. But outside the Beltway, many people remain caught in the maw of the financial giants, which is why it is heartening when some judges step into the fray.

Consider two opinions involving Wells Fargo, a bank that enjoys a somewhat better reputation than many of its peers. On Monday, a judge in a state court in Missouri ordered Wells to pay over $3 million in punitive damages and other costs for abusing a borrower. Then, on Thursday, a judge in Federal Bankruptcy Court in suburban New York ruled on behalf of another borrower, concluding that there was substantial evidence Wells Fargo forged documents when it foreclosed on a property.

It was not a good week on the litigation front for Wells Fargo.

The award in Missouri went to David and Crystal Holm of Holt, Mo., a town northeast of Kansas City with a population of 450. For the last six and a half years, the Holms have battled Wells Fargo over a foreclosure sale of their $142,000 property. As they fought against what they considered a wrongful taking of their property, they remained in the home, which they built themselves in 1997 and where they were married.

According to court filings, the Holms fell behind on their mortgage in spring 2008 after a storm damaged the property. They quickly put together the roughly $10,000 needed to bring the loan current, and Wells agreed to reinstate the mortgage one day before a scheduled foreclosure sale.

The couple, who have a 12-year-old daughter, scrambled to do what Wells required: fax a copy of a certified check to one office and send it by overnight mail to another. The next day, the bank foreclosed anyway. Freddie Mac bought the Holms' 5.5-acre property.

Lawyers in the Missouri case and the New York matter contended that Wells had moved to foreclose on both properties even though the bank had no proof that it possessed the notes underlying the mortgages. This is a common and often persuasive argument, given the documentation failures that were rife in the mortgage industry.

Another common element in such cases — conflicts of interest in mortgage loan servicing — also seemed to disturb the judge overseeing the Holm matter. An employee of Freddie Mac testified that it would have welcomed a reinstatement of the Holms' mortgage. But Wells stood to make more money foreclosing on the couple's home, an expert witness in the case testified.

"Defendant Wells Fargo's deceptive and intentional conduct displayed a complete and total disregard for the rights of David and Crystal Holm," wrote R. Brent Elliott, a circuit judge in Missouri's 43rd Judicial District, in a Jan. 26 opinion. "Wells Fargo took its money and moved on, with complete disregard to the human damage left in its wake."

In addition to $2.9 million in punitive damages awarded to the Holms, Judge Elliot gave them clear title to their home and almost $96,000 to be paid by Wells Fargo, representing the difference between the amount it paid for the property in 2008 and its current value.

The Holms were also awarded $200,000 for emotional distress. Mr. Holm, who is 40, had heart problems that were worsened by anxiety over the case, the judge concluded. Finally, $33,000 of the couple's legal fees must be paid by Freddie Mac and Wells.

The judge ordered these sanctions because lawyers for Wells and Freddie Mac "have demonstrated a pattern of contempt for the Missouri Supreme Court rules as well as this court's rules and orders."

Mr. and Ms. Holm, in a telephone interview, said they were relieved that the threat of eviction was no longer hanging over them. "Our lives have been so much on hold," Ms. Holm, 37, said. "It will be nice to breathe and be able to live our lives now."

A spokesman for Freddie Mac declined to comment on the case.

Tom Goyda, a Wells Fargo spokesman, provided the following statement. “There’s a lot more to this case than the decision reflects, and we have strong arguments to appeal the judgment and the unwarranted damages that were awarded.”

Wells Fargo, he added, is committed to helping borrowers stay in their homes and has modified more than one million mortgage loans and forgiven $8.4 billion in principal since the beginning of 2009.

Foreclosure defense lawyers say a $2.9 million punitive damages award is highly unusual. While judges hearing foreclosure cases are not as uniformly pro-bank as they used to be, said April Charney, a foreclosure defense lawyer formerly with Jacksonville Area Legal Aid in Florida, many still don’t recognize how banks can run roughshod over borrowers.

Judge Elliott certainly seems to have understood. In his ruling, he quoted from the testimony of a bank representative at trial, bridling at her lack of remorse. “I’m not here as a human being,” she testified. “I’m here as a representative of Wells Fargo.”

Gregory Leyh, a lawyer in Gladstone, Mo., who represented the Holms, said: “This is a family that was trying to do everything right to keep their house. When you pit a family in financial distress against a powerful company that wants to make a few more dollars in a foreclosure, I think that’s pretty egregious.”

In the other case, presided over by Judge Robert D. Drain at a Bankruptcy Court in White Plains, Wells lost a five-year-old foreclosure dispute involving a $170,000 property owned by Cynthia Carrsow-Franklin.

Her lawyers contended that the bank, after initiating foreclosure proceedings, had simply created a missing document that it needed in order to foreclose. That document, known as an indorsement, transferred the underlying note to Wells Fargo.

On Thursday, Judge Drain sided with the borrower. He wrote that testimony from a Wells Fargo manager in charge of the bank’s default documents and part of its assignment team “constitutes substantial evidence that Wells Fargo’s administrative group responsible for the documentary aspects of enforcing defaulted loan documents created new mortgage assignments and forged indorsements when it was determined by outside counsel that they were required to enforce loans."

The testimony, Judge Drain went on, shows "a general willingness and practice on Wells Fargo's part to create documentary evidence, after the fact, when enforcing its claims, WHICH IS EXTRAORDINARY" (emphasis his).

Mr. Goyda, the Wells Fargo spokesman, strongly disputed the judge's conclusions in the case. "Wells Fargo's processes ensure that all note indorsements are done legally and appropriately," he said in a statement. "More importantly, we are extremely troubled by the additional comments about our general practices that are unsupported by the evidence and unrelated to the case."

Linda Tirelli, a lawyer at Garvey, Tirelli & Cushner in White Plains, represented the borrower in this case. She applauded Judge Drain. "This is a judge who gets it," she said in an interview on Friday.

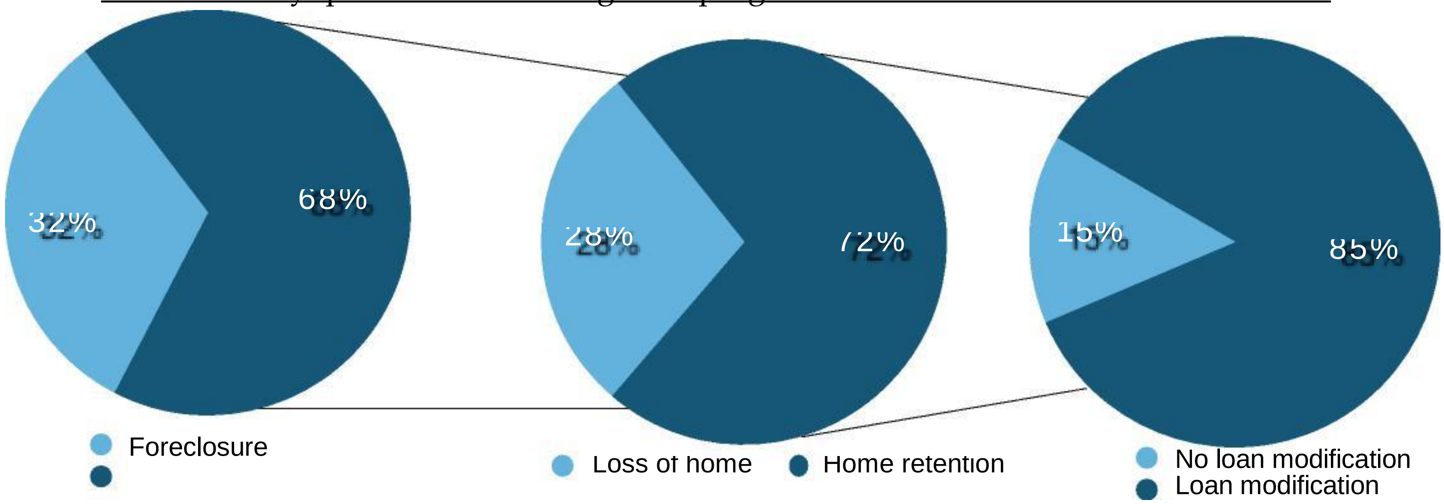
What's depressing is that it has taken so long for these cases to be resolved. Many people — especially officials at the banks themselves — want us to move on from the foreclosure mess. And no doubt those stuck — out of the limelight — in its unrelenting and crippling machinery would like to do so. But they can't.

"I very respectfully disagree that this is extraordinary behavior," Ms. Tirelli said. "This is business as usual, not just at Wells Fargo."

EXHIBIT D

EXCERPTS FROM THE SJI STUDY OF THE CONNECTICUT MEDIATION PROGRAM

A. PARTICIPANTS IN THE PROGRAM HAD FEWER FORECLOSURES



One of the key questions motivating FMP program evaluation is whether outcomes for FMP participants are better than they would have been without FMP participation. As explained in the methodology section, we cannot ascribe causality with the data at our disposal, but controlling for various factors and using the best available comparison group, we can illustrate strong correlations and trends.

In this section we discuss the results of our multivariate regression models. Tables 3 through 7 in Appendix B present the full results of both the full and partial models discussed below.

32% of the FMP cases that have been completed have ended in foreclosure. Of the 68% that avoided foreclosure, 72% of the homeowners retained their homes. Of those who retained their homes, 85% received a loan modification.

Of all pre-eligible cases, 58% ended in foreclosure. Looking at only cases where the defendant had submitted a certificate and been determined to be eligible but not initiated the mediation, the percentage of foreclosures drops below 50% to 44%. Among

FMP participants, the percentage is lower still, with only 32% receiving a judgment of foreclosure.

While these figures do not control for any other case characteristics, they do mirror the results from the multivariate models discussed below.

In Table 3 (Appendix B) we compare FMP cases and a comparison group of non-FMP cases where homeowners returned the certificate of foreclosure mediation and were eligible but did not initiate mediation. FMP participation correlates with a 13% higher likelihood of avoiding a judgment of foreclosure, a strongly statistically significant result. FMP participation also correlates with an additional case length of 255 days.

Cases that began mediation but terminated without reaching a settlement fared much worse. These cases were 25% more likely to be foreclosed on and took even longer— 320 days more— than non-FMP, comparison group cases.

Looking across other outcomes of interest in the full model presented in Appendix B, cases where mediation was terminated without a settlement were 48.4% less likely to result in home retention, 45.5% less likely to result in loan modification, 85.2% more likely to result in foreclosure, and took 104 more days to resolve than FMP cases that reached settlement.

B. THE MEDIATION PROGRAM RESULTS IN LONGER PROCESSING TIMES – BUT THE KEY VARIABLE IS LENDER BEHAVIOR – WHICH CAUSES MUCH LONGER PROCESSING TIMES

[C]ases in which the plaintiff demonstrated behavior consistent with the objectives of mediation last on average only 30 days longer than non-FMP cases. The effect of plaintiff behavior on the length of FMP cases is discussed in more detail below. Attempts to decrease case length should consider the finding that one major factor in FMP case length is plaintiff behavior.

Defendant and plaintiff behavior

One of the most salient factors affecting program outcomes is the behavior of the parties in mediation. Over time, more indicators surrounding party behavior have been added into the data collection regimen to better capture behaviors that are in keeping with the objectives of the mediation. The newest indicators have shown the strongest correlations across different FMP outcomes. Cases where defendants and/or plaintiffs behaved consistently with the objectives of the mediation were significantly more likely to result in foreclosure avoidance, home retention, and loan modification. Particular to plaintiff behavior, when plaintiff's conduct was consistent with the objectives of mediation, the case was nearly 70 days shorter.

Five indicators of party behavior tracked by the Judicial Branch correlate closely with case length. These five indicators include whether plaintiff/defendant appeared at mediation, whether they were prepared, whether they motioned to extend the mediation process, and whether they had the ability to mediate. ****

On all five indicators, homeowners outperformed servicers, although not always by statistically significant margins. That is to say, plaintiffs (or their attorneys) were more likely to be unprepared, to file a continuance, to engage in conduct inconsistent with the objectives of the mediation program, not to possess the ability to mediate, or not to make an appearance. These differences in behavior are correlated with the length of the case, both in and out of mediation. On average, mediations in cases in which servicers were acting consistently with the objectives of the mediation lasted only 30 days longer than non-FMP cases, while cases in which servicers were acting inconsistently with mediation objectives lasted 120 days longer. The same effect is not seen in how consistent the homeowner's behavior was with the objectives of the mediation, with the two groups having the same case length, statistically speaking. Cases in which homeowners' behavior was or was not consistent with the objectives last almost exactly the same amount of time in mediation (168 and 165 days, respectively).

Our analysis identified two specific servicers that were less likely to appear, be prepared, have conduct in keeping with the objectives of mediation, or have the ability to mediate. The case length for these servicers differs in a statistically significant way from other servicers. Not only are the two servicers identified less likely to perform well on the indicators of behavior consistent with mediation, but cases brought by these servicers last for an unusually long amount of time. An average FMP case takes 484 days from filing. A case with a plaintiff whose behavior was consistent with the mediation objectives lasts, on average, 388 days. The average case length for the two servicers least likely to have conduct in keeping with the mediation objectives is more than 537 days.