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Mr. William R. Breetz, Jr., Chairman
Uniform Law Commission Drafting Committee
Residential Real Estate Mortgage Foreclosure Process and Protections
University of Connecticut School of Law
Knight Hall Room 202
35 Elizabeth Street
Hartford, CT 06105

Re: Home Foreclosure Procedures Act

Dear Bill:

In anticipation of the committee meeting later this week of the National Conference of Commissioners on Uniform State Law (the "Commission") on the "Home Foreclosure Procedures Act" (the "Act"), I wanted to provide some specific comments on behalf of the Securities Industry and Financial Markets Association ("SIFMA") to highlight certain of its continuing concerns. Unfortunately, I will not be able to attend the meeting.

EARLY RESOLUTION

Eligibility to Participate

As we have discussed in the past, the new Consumer Financial Protection Bureau ("CFPB") servicing regulations obligate servicers to provide defaulting borrowers with timely notice of loss mitigation options and the protocol for applying for such options, timely notification to the borrower of an incomplete application for loss mitigation, timely consideration of a complete application for loss mitigation, timely notice of the servicer's decision on the borrower's application for loss mitigation and, if rejected, timely notice of the borrower's right to appeal, and timely notice of the servicer's decision on any such appeal. A material industry concern regarding the "early resolution" process is that there is nothing "early" about it, and the process in the ordinary course will not unfold until after the borrower has applied for and been rejected for loss mitigation, appealed that decision and been rejected for the appeal. In other words, the "early resolution" process offers a borrower a third attempt to obtain a loss mitigation option that the servicer already has rejected twice in accordance with rigid federal regulations. And it would not be feasible to accelerate the timing of the early resolution notice to the homeowner to coincide with the CFPB-required loss mitigation time frames, because the competing communications would be inconsistent and materially confusing to the homeowner. We believe, as a result, that the early resolution procedures are unnecessary. If the committee is determined to retain these provisions, we have two specific recommendations below.

First, please consider revising the second sentence of Section 302(a), as follows:

> "A creditor is not required to send or request a notice, *or otherwise participate in an "early resolution" under this Act,* if *either: (i)* a court or governmental agency has determined under Section 505 that the property is abandoned *or (ii) the creditor has rejected an application and any subsequent appeal by a homeowner for loss mitigation in accordance with [cite to CFPB servicing regulations]*"

This would reserve the early resolution option for the homeowner who never applied for loss mitigation, but, as the revised Act presently is worded, the borrower would be required affirmatively to opt in within 30 days of notice in order to have another opportunity.

Deadline for Completion of Early Resolution

Section 303(a) obligates an early resolution agency to schedule a meeting in accordance with its rules and is silent on the time frame within which a court must schedule a meeting. In other words, there is no time frame within which the early resolution meeting must be scheduled and concluded. We note that Section 304(c) authorizes a creditor to proceed to file a default or dispositive motion in a foreclosure action, or schedule or cause to be scheduled a foreclosure sale [90] days after sending the early resolution notice, unless either the parties mutually agree to continue the process or the court or the early resolution agency directs the party to continue early resolution. But the unfettered authority of the resolution agency or the court to impose a unilateral delay for any reason effectively renders creditors subject to the caseload of resolution agencies and courts. This simply is not tenable, particularly, as noted above, since this process only begins after the homeowner already has received significant opportunities to be considered for loss mitigation. We believe that the creditor should have the authority to proceed to foreclosure within an agreed upon number of days after the sending of the notice to the homeowner unless the resolution agency or court orders an extension to cure a creditor's failure to satisfy in all material respects its obligations under Section 303(b) to participate in a scheduled early resolution meeting.

REMEDIES

Loss of Right To Foreclose

Section 701(a) of the Act authorizes a court in a judicial foreclosure to dismiss or stay an action until a material violation of the Act is cured. Any such dismissal must be without prejudice "unless the court determines that a new foreclosure action should be barred because of misconduct by the creditor or servicer or other good cause." The revised draft of the Act deleted the qualifying word "egregious" before the word "misconduct." While the Comments to this Section note that dismissal with prejudice is a "situation of last resort," no such qualifier appears in the text of the Act itself, thereby not legally binding a judge to a limitation on the availability of the forfeiture remedy to extraordinary situations. We do not support a remedy that permits a defaulting borrower to be given a free house, particularly when there is no statutory limitation on a judge's right to impose such a remedy, and actual damages otherwise are available to compensate the borrower for actual damages.

Similarly, Section 701(b) permits a court to stop a foreclosure in respect of a creditor's or servicer's violation of the Act if the court determines that the continuation of the foreclosure action "would unfairly burden the homeowner," but it does not define the phrase. Unlike judicial foreclosure in Section 701(a), the Commentary to the Act also does not seek to define the phrase "unfairly burden." Nor does the Act explain whether the court's authority is limited to a continuation of the delay of the foreclosure or an outright dismissal with prejudice. This phrase is too open ended. One might argue that any remedy resulting in the loss of a principal residence unfairly burdens the consumer. If the violation has been cured, the creditor should be able to complete the foreclosure.

EFFECT OF THE HOLDER IN DUE COURSE RULE

While we appreciate that the committee has attempted to find a middle ground on the extinguishment of the "holder in due course" rule, we believe the selected approach remains fatally flawed. We have identified below a sample of the concerns that we continue to have. In short, it will be virtually impossible for an assignee to defend itself against the types of defenses that this section authorizes. The result will be that holders in many cases will be forced to settle solely because they either will not have the capacity to defend themselves or the costs of defense will be infeasible given the size of the loan. This gives enterprising homeowners an ability to stop any foreclosure.

- The available defenses are based on fraud, material misrepresentation or fundamental breach of promise in connection with the original loan transaction. All that a homeowner would have to do to stop a foreclosure, which already will have been delayed by the federal servicing requirements and the early resolution procedures, is plead the alleged facts of these underlying claims. There is no requirement of any writing to substantiate the claim. It could be based solely on allegations of oral conversations. A review of the loan file would not shed light on the validity of the claim. Presumably a creditor would be unable to obtain an early dismissal because the judge would accept the facts as pled and call for discovery. Moreover, the homeowner may be raising this claim for the first time. For example, there is no requirement for the homeowner to raise and substantiate the defense in the early resolution process as a condition to raising it as a defense in the subsequent enforcement of the loan. There is absolutely no way for an assignee to diligence these types of claims in advance, and it will be virtually impossible to defend the claims if they are based solely on something that someone who is not an employee of the assignee allegedly said sometime in the past.

- The defenses may be asserted solely if they occur in connection with the original loan transaction, but the homeowner is not obligated to plead that the alleged fraud, material misrepresentation or fundamental breach of promise resulted in a loan that the borrower otherwise would not have obtained at all or only on materially different terms and conditions. This issue does come up in the damages phase where the economic losses must be caused by the bad acts, but there is no requirement that the loan itself, or the material terms of the loan, are caused by the alleged bad acts.

- The time period is entirely too long. The average life of a loan is roughly 7 to 10 years based on the type of the loan product. It is hard to fathom how material the alleged bad conduct could be to the consummation of the original transaction if it does not manifest itself for six years. Given that a violation will not be apparent from the contents of the loan file, the ability of the assignee to defend itself against claims of prior oral statements will become even more complicated years after the closing as memories fade and the alleged wrongdoers are no longer employed by the originators of the loans.

Sincerely,

Laurence E. Platt

cc: Chris Killian, SIFMA