

DRAFT
FOR DISCUSSION ONLY

HOME FORECLOSURE PROCEDURES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

For May 16-17, 2014 Committee Meeting

Without Prefatory Note and with Reporters' Drafting Notes

Final Meeting Draft - Redline

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May 6, 2014

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HOME FORECLOSURE PROCEDURES

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1 **HOME FORECLOSURE PROCEDURES ACT**

2 **[ARTICLE] 1**

3 **GENERAL PROVISIONS**

4 **SECTION 101. SHORT TITLE.** This [act] may be cited as the Home Foreclosure
5 Procedures Act.

6 **SECTION 102. DEFINITIONS.** In this [act]:

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

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

12 (B) physically secured and used or held for use by the homeowner as a vacation
13 home or seasonal home; ~~and or~~

14 (C) physically secured and ~~in substantial compliance with the law of this state and~~
15 ~~all applicable ordinances, codes, and rules~~ the subject of a probate action, action to quiet title, or
16 other litigation in which ownership is contested.

17 (2) “Common interest community” means real property with respect to which a person,
18 by virtue of ownership of a unit, is obligated to pay real property taxes, insurance premiums,
19 maintenance, or improvement of other real property or for services described in a declaration or
20 other governing document, however denominated. A common interest community includes
21 properties held by a cooperative housing corporation. In this paragraph, “ownership” includes a
22 leasehold interest, if the period of the lease is at least [20] years, including renewal options.

23 (3) “Creditor” means a person that has the right to foreclose a mortgage under Section

401(b). The term does not include a person that does not own, hold or service more than five mortgages at the time the notice required by Section 201 is sent.

Drafters' Notes

1. The last sentence of the definition of 'creditor' is an attempt to address Dale Whitman's and other comments to exclude 'mom & pop' lenders or one-off seller financing.

2. The alternative (i.e., the "or has the right to enforce" clause) is useful for the time being due to the alternatives for section 401. We could define creditor as a person who has commenced foreclosure, but that doesn't work because we are imposing some duties on lenders before commencing foreclosure. We dropped the language referring to agents, services, and assigns: It is now "buried" in "other person"; to the extent we need to address issues involving services, agents, and assigns, we think it belongs elsewhere.

3. We should consider the status of mortgage insurers, and other cases; perhaps we can define guarantors separately and then include them in substantive provisions only when appropriate.

(4) "Expenses of foreclosure" means the lesser of:

(A) the reasonable expenses incurred by a foreclosing creditor to the extent provided in the mortgage; or

(B) the maximum amount permitted by law of this state other than this [act] as expenses in connection with a foreclosure.

Drafters' Note

This definition limits the expenses that a foreclosing party may impose on a borrower in connection with the foreclosure process to 'reasonable' expenses, even if other law of the state would allow expenses which would otherwise not satisfy that standard. The definition contemplates that these allowable expenses would include the reasonable costs of all typical foreclosure expenses, including such costs as sending notices, advertising, title searches, inspections and examinations of the mortgaged property, management and securing of the mortgaged property, insurance, filing and recording fees, attorney's fees and litigation expenses incurred to the extent provided in the mortgage or authorized by other law, appraisal fees, the fee of the person conducting the sale in the case of a foreclosure by auction, the fee of a court-appointed receiver, and other expenses reasonably necessary to the foreclosure.

(5) “Facilitation” means the assistance of a third-party neutral at an in-person meeting or other communication where the parties and facilitator can simultaneously hear one another with the objective of reaching an agreement between the creditor and the homeowner-obligor for a commercially reasonable alternative to foreclosure.

Drafters’ Note

The definition of ‘Facilitation’ requires at least one ‘in-person’ meeting or other communication between the parties and a third-party neutral. The alternative requirements of either an ‘in-person’ meeting or other form of electronic communication contemplates the continuation of the practice in many jurisdictions that, as an alternative to a ‘face-to-face’ meeting, the parties may meet by telephone, video conference or other electronic means so long as all the parties and the neutral are able to simultaneously hear or communicate with one another.

(6) “Facilitation agency” means [the administrative or judicial agency designated by the state to supervise foreclosure facilitation].

(7) “Foreclosure” means a process, proceeding, or action by a creditor to terminate a homeowner’s interest in mortgaged property or obtain possession of mortgaged property for the creditor. The term does not include a voluntary transfer by a homeowner or an action to recover possession of property after a completed foreclosure sale. “Foreclose” has a corresponding meaning.

~~(8) **CURRENT AMENDED DRAFT** “Good faith” means: (i) in the case of a creditor or servicer, honesty in fact and the observance of reasonable commercial standards of fair dealing and (ii) in the case of a homeowner or obligor, honesty in fact.~~

~~(8) **RING PROPOSAL** (Pure ‘UCC’) “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing. †~~

~~(8) **MILLER PROPOSAL** “Good faith” means: (i) in the case of a creditor or servicer, honesty in fact and the observance of reasonable commercial standards of fair dealing and (ii) in~~

~~the case of a homeowner or obligor, honesty in fact and the observance of generally accepted standards of fair dealing.~~

(89) “Holder” means the person in possession of a negotiable instrument that is payable either to bearer or to an identified person in possession of a negotiable instrument.

Drafters’ Note

The definition of ‘holder’ is taken from revised Article 1: UCC § 1-201(b)(21)(A) and the terms ‘bearer’ and ‘identified person’ have the same meanings in this act as in the UCC. The definition of ‘holder’ in unrevised Article 1 has slightly different language, but is the same in substance.

~~(949)~~ “Homeowner” means a person owning an interest in mortgaged property, other than a mortgage, lien, easement, servitude, or leasehold, whether or not the person is an obligor.

Drafters’ Notes

At the November meeting, there were suggestions from several persons for more expansive comments; please let the Reporters know of any desired additional comments.

~~(1044)~~ “Loss mitigation” means an alternative to foreclosure offered by a creditor to a homeowner in default or facing imminent default.

Drafters’ Note

The comments will be expanded to make clear that ‘loss mitigation’ includes such actions as a repayment plan, forbearance agreement, loan modification, short sale, partial mortgage insurance claim, negotiated transfer and deed in lieu of foreclosure.

~~(1142)~~ “Mortgage” means a consensual interest in residential property which secures an obligation. The term does not include a lien that secures an obligation owed to a homeowner’s association in a common interest community.

~~(1243)~~ “Mortgage agreement” means a record that creates a mortgage.

1 **Drafters' Note**

2
3 In this Act the term “mortgage” refers to the lien held by the creditor, which
4 secures payment of the obligation, whereas the term “mortgage agreement” refers
5 to the writing or other record that memorializes the parties’ agreement and creates
6 the mortgage. Depending upon local usage and custom, the mortgage agreement
7 may be denominated as a mortgage, deed of trust, trustee deed, security deed,
8 deed to secure debt, or the like.
9

10 (1314) “Mortgage registry” means an electronic registry, created pursuant to federal law,
11 of holders of the right to enforce mortgages and obligations secured by mortgages which
12 maintains the records of those mortgages and obligations pursuant to standards designed to
13 ensure that the record of each mortgage and obligation is unique, identifiable, and unalterable.

14 (1415) “Mortgaged property” means residential property that is subject to a mortgage,
15 and any personal property held or used in connection with the residential property that is subject
16 to the mortgage.

17 (1516) “Negotiable instrument” means a negotiable instrument as defined in [U.C.C.
18 Section 3-104].

19 [(1617) “Nonjudicial foreclosure” means a foreclosure that proceeds without judicial
20 process pursuant to [insert statutory reference.]

21 **Drafters' Note**

22
23 In states that allow one or more types of nonjudicial foreclosure of residential
24 mortgages, the drafter should insert a reference to the relevant statute or statutes
25 here. In states that do not allow nonjudicial foreclosure, this definition should be
26 deleted, along with references to “nonjudicial foreclosure” elsewhere in this Act.
27

28 (1718) “Obligation” means a debt or other duty or liability of ~~a homeowner~~ an obligor
29 secured by a mortgage.

30 **Note**

31 The definition of an obligation includes a non-recourse debt, whether the debt is
32 non-recourse due to the application of anti-deficiency judgment legislation,

1 agreement of the parties or for other reasons.

2
3 (1819) “Obligor” means a person that, with respect to an obligation:

4 (A) owes payment or performance of the obligation; or

5 (B) has provided property other than the mortgaged property to secure payment of
6 the obligation;

7 (C) has signed a mortgage with respect to the mortgaged property; or

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

9 (1920) “Person” means an individual, estate, business or nonprofit entity, public
10 corporation, government or governmental subdivision, agency or instrumentality, or other legal
11 entity.

12 (2024) “Record”, used as a noun, means information that is inscribed on a tangible
13 medium or is stored in an electronic or other medium and is retrievable in perceivable form.

14 (2122) “Residential property” means real property improved with not more than four
15 dwelling units ~~with respect to which, when a mortgage is created, a property owner occupies or~~
16 ~~intends to occupy at least one unit for personal, family, or household purposes.~~ The term
17 includes an attached single-family unit, a single-family manufactured-housing unit treated as real
18 property under law of this state, a time share in residential property if that time share is treated as
19 real property under law of this state, real property on which construction of not more than four
20 dwelling units has commenced, and a single-family unit in a common-interest community. The
21 term does not include a parcel of real property that was used or is intended to be used primarily
22 for non-residential purposes such as farming, commercial, or industrial uses ~~is~~
23 was created.

Drafters' Note

1. This revision to the definition of “residential property” limits the scope of the Act to residential property that is owner-occupied at the time of loan origination. The definition also excludes parcels of real property that are used primarily for non-residential business purposes but which also contain one-to-four dwelling units, such as a farm with a farmhouse.

2. The term “residential property” does not include property rented or held for rental by the owner when the mortgage is created, unless an owner personally occupies at least one dwelling unit. If the property is owner-occupied when a mortgage is created, the property remains to be “residential property” under this Act notwithstanding an owner’s subsequent conversion of the property to rental property.

(~~2223~~) “Servicer” means a person responsible for servicing an obligation, including a person that makes, holds or owns an obligation if that person also services the obligation.

(~~2324~~) “Servicing” means:

(A) receiving a scheduled periodic payment from ~~a homeowner or an~~ obligor under the terms of an obligation, including an amount received for an escrow account; or

(B) making or advancing a payment to the owner of an obligation on account of an amount due from the ~~homeowner or~~ obligor under the terms of the mortgage servicing loan documents or a servicing contract, or

(C) in the case of a home equity conversion mortgage or reverse mortgage, making payments to the ~~homeowner or~~ obligor.

Comment

The definitions of ‘Servicer’ and ‘Servicing’ are adapted from the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq* (“RESPA”), 24 C.F.R. § 3500.2 (b) and have the same meanings as in that Act.

(~~2425~~) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Drafters' Notes

1
2 1. In some states, a land sale installment contract does not constitute a
3 'mortgage', with all the attendant consequences for homeowners and creditors,
4 until a specified percentage of the original principal amount has been paid to the
5 creditor. In Illinois, for example, that percentage is 50% of the original principal
6 amount. In those States where the issue arises, statutory drafters should make
7 appropriate amendments to this act to track existing practice in that state.
8

9 2. Whether mortgaged property is "abandoned property" is determined by
10 the facts of each case. The factors listed in Section 505(a) are not exclusive. The
11 core question is whether the homeowner is presently in possession of the
12 property. The question must be answered by evaluating the facts related to the
13 homeowner's use of the property.
14

15 3. The definitions of "mortgage" and "obligor" refer to the payment of an
16 obligation, and do not use the phrasing found in UCC Article 9 definitions that
17 includes "payment or other performance" of obligations. Almost always the basis
18 for a residential mortgage foreclosure is the failure to pay a monetary obligation.
19

20 **SECTION 103. SCOPE.** This [act] applies to the foreclosure of a mortgage on
21 residential property in this state.

SECTION 104. DUTY OF GOOD FAITH; COMMERCIAL REASONABLENESS.

23 A creditor, servicer, obligor, or homeowner shall comply in good faith with the requirements of
24 this [act]. "Good faith" means honesty in fact and the observance of reasonable commercial
25 standards of fair dealing. In addition, a creditor or servicer shall proceed in a commercially
26 reasonable manner in complying with the requirements of this Act.

Drafters' Notes

29 For statutory duties that include explicit and precise rules for their performance,
30 such as the time period for sending notices under §§201 and 402, a creditor's
31 failure to implement a different rule cannot violate the "commercially reasonable"
32 standard when the precise rule has been followed. On the other hand, the good
33 faith standard would bar dishonest conduct that is literally in compliance, for
34 example, seeking an abandoned property determination under §505 for a home the
35 creditor knows is not abandoned, although it may meet the statutory criteria that
36 give rise to a presumption of abandonment.
37

38 **SECTION 105. CERTAIN ACTS PROHIBITED.** A creditor, ~~servicer, or an agent of~~

1 ~~either~~ may not:

2 (1) Make a misleading oral or written statement to a homeowner or obligor that would
3 discourage a reasonable person from participating in loss mitigation or facilitation; or

4 (2) Misrepresent any aspect of a foreclosure, including informing the homeowner or
5 obligor that:

6 (A) a sale date is set when the procedure for setting a sale date has not been
7 completed;

8 (B) the foreclosure has been postponed, canceled or stayed due to loss mitigation
9 or facilitation and at the same time continuing with the foreclosure; or

10 (C) the ~~homeowner or~~ obligor is not eligible for loss-mitigation options when
11 loss-mitigation options are available and the creditor ~~, servicer, or agent of either~~ has not
12 evaluated those options .

13 **SECTION 106. APPLICATION OF LOCAL REGULATIONS.**

14 (a) [Notwithstanding (insert reference to any applicable 'Home Rule' provisions under
15 the law of this state)] no ordinance or regulation of a municipality, county or other political
16 subdivision in this state may ~~(i) regulate, restrict or limit~~ impose regulations, restrictions or
17 limitations on the process by which mortgages on residential property are foreclosed of
18 foreclosure or the rights and obligations of creditors, servicers, homeowners, or obligors that are
19 inconsistent with conflict with the provisions of this [act] Act. ~~No ordinance or regulation of a~~
20 ~~municipality, county or other political subdivision in this state may (i) regulate, restrict or limit~~
21 ~~the process by which mortgages on residential property are foreclosed, or (ii) impose any~~
22 ~~obligation on a person holding an interest in a mortgage or deed of trust on residential property~~
23 ~~which is not imposed on all owners of real property in that political subdivision, unless expressly~~

1 ~~authorized by legislation of this state.]~~

2 ~~(b) Except as otherwise provided in subsection (a), the provisions of this [act] do not invalidate~~
3 ~~or modify any provision of any zoning, subdivision, building or safety code, or any other~~
4 ~~ordinance or regulation generally applicable to the use of real estate.~~

5 **Comment**

6
7 ~~This section generally tracks the prohibition on local regulation of condominium~~
8 ~~conversions contained in Section 1-106 of the Uniform Common Interest~~
9 ~~Ownership Act and is intended to insure that foreclosure will be governed by a~~
10 ~~single uniform standard throughout the state.~~

11
12 This section provides for limited conflict preemption of local laws. For example,
13 local laws or ordinances imposing responsibilities for abandoned properties
14 inconsistent with Article 45, or providing for facilitation procedures inconsistent
15 with those in Article 3, would be preempted.

16
17 Otherwise, ~~under subsection (b),~~ however, municipal ordinances generally
18 applicable to real estate in a municipality would not be affected by this act,
19 regardless of who owns the property, and therefore will apply with equal force to
20 real estate owned by homeowners or lenders.

21
22 Accordingly, for example, a local ordinance mandating the maintenance of yards
23 and blighted property would apply with equal force to a blighted property whether
24 or not owned by a homeowner or ~~lender~~ creditor, and an ordinance enabling a
25 municipality to repair blighted property and lien the property for the costs of the
26 work, if it were otherwise lawful under applicable state law, would not be barred
27 by ~~subsection (a)~~ this section.

28
29 **SECTION 107. SERVICERS.** Whenever a servicer takes any action authorized or
30 required to be taken by a creditor under this Act, every duty that the Act imposes on the creditor
31 is also a duty of the servicer. Whether a servicer's relationship with a creditor is that of an agent,
32 independent contractor, or otherwise under other law of this state, the creditor for whom the
33 servicer acts is jointly and severally responsible for the acts of the servicer. Noncompliance with
34 the Act by the servicer shall be treated as noncompliance by the creditor.

35 **SECTION 108. NO WAIVER.** Except as otherwise provided in section 501 or

1 elsewhere in this [act], provisions of this [act] that give rights to an obligor or homeowner or
2 impose duties on a creditor may not be waived or varied by agreement.]

3 Drafters' Notes

4 The Committee might discuss whether there are other provisions of the Act that should
5 permit waiver.

6 SECTION 109. KNOWLEDGE AND NOTICES.

7
8 (a) "Knowledge" means actual knowledge. "Knows" has a corresponding meaning.

9 'Organization' means a person other than an individual.

10 (b) Subject to subsection (c), a person "receives" a notice or notification when:

11 (1) It comes to that person's attention; or

12 (2) It is duly delivered in a form reasonable under the circumstances at the place
13 of business through which the contract was made or at another location held out by that person as
14 the place for receipt of such communications.

15 (c) Notice, knowledge, or a notice or notification received by an organization is effective
16 for a particular transaction from the time it is brought to the attention of the individual
17 conducting that transaction and, in any event, from the time it would have been brought to the
18 individual's attention if the organization had exercised due diligence. An organization exercises
19 due diligence if it maintains reasonable routines for communicating significant information to the
20 person conducting the transaction and there is reasonable compliance with the routines. Due
21 diligence does not require an individual acting for the organization to communicate information
22 unless the communication is part of the individual's regular duties or the individual has reason to
23 know of the transaction and that the transaction would be materially affected by the information.

1 **Drafter's Note**

2 This Section incorporates without change those parts of Revised UCC § 1-202
3 that are relevant for this act.

4
5 **SECTION 110. SUPPLEMENTAL PRINCIPLES OF LAW.** Unless displaced by
6 the particular provisions of this [act], the principles of law and equity, including the law relative
7 to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion,
8 mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

9 **Drafters' Note**

10 This new section responds to comments made at our past Committee meetings
11 that our act should explicitly indicate that its provisions are to be supplemented by
12 general principles of law and equity, following UCC jurisprudence. Our
13 Committee discussion has focused particularly on making it clear that the law of
14 principal and agent applies as a general matter. The text above is taken verbatim
15 from Revised UCC § 1-103(b) with one modification – this Section omits the § 1-
16 103(b) reference to “the law merchant” on the basis that such principles are not
17 likely to apply to our subject matter.

18
19 **[ARTICLE] 2**

20 **NOTICES; RIGHT TO CURE**

21 **SECTION 201. NOTICE OF ~~INTENT TO FORECLOSE~~DEFAULT AND RIGHT**
22 **TO CURE.**

23 (a) A creditor ~~or servicer~~ may not commence foreclosure until 30 days after the creditor
24 ~~or servicer~~ sends separately to each obligor a notice of ~~intent to foreclose~~default and right to
25 cure.

26 (b) The notice under subsection (a) must state:

27 (1) the nature of the default, including a statement, as of the date of the notice, of
28 all past-due payments, fees, and other charges owed to the creditor, ~~servicer or the creditor's or~~
29 ~~servicer's attorneys;~~

1 (2) the specific action the ~~homeowner or~~ obligor must take to cure the default,
2 including the exact amount that must be paid;

3 (3) the date by which the default must be cured, - which date shall be not less than
4 30 days from the date the notice is sent;

5 (4) that if the ~~homeowner or~~ obligor does not cure, the creditor ~~or servicer~~ may
6 demand payment of the full amount due, not just past-due payments, and may foreclose the
7 mortgaged property;

8 (5) the effect of curing the default, including the right to have the terms of the
9 obligation and mortgage remain in effect;

10 (6) that the ~~homeowner or~~ obligor may dispute the default or ~~raise~~ any other
11 defense to foreclosure or payment of the obligation and how to exercise those rights;

12 (7) the names of (i) the person creditor entitled to foreclose under Section 401
13 and the particular facts that establish the creditor's right to foreclose; the name of (ii) the
14 servicer, if different; and (iii) the owner of the obligation if the creditor ~~or servicer~~ is acting on
15 behalf of the owner ~~of the obligation, the identity of the owner;~~

16 (8) that the ~~homeowner or~~ obligor may request a copy of the ~~homeowner's~~
17 ~~mortgage note~~ negotiable instrument or other evidence of the obligation and a copy of any record
18 required to demonstrate the right to foreclose as provided in Section 401; and

19 (9) if the creditor intends to rely on a lost, destroyed, or stolen negotiable
20 instrument under Section 403, the information required by Section 403(b).

21 (c) The notice may state that additional sums may come due after the date of the notice.

Drafters' Notes

1. The itemization of the amount due as of the notice date is a critical piece of information for the homeowner or obligor and should be stated as exactly as possible. The amount included for attorneys' fees should be limited to those accrued prior to the date of the notice, and thus should not include retainers or advances to attorneys that would be refunded in the event of a prompt cure.

2. The mortgage obligation may be accelerated by filing a complaint, scheduling a sale, or by separate notice of acceleration – the notice of intent to foreclose does not by itself accelerate the debt. The notice need not refer to acceleration if the creditor does not intend to accelerate the obligation, for example if it is fully matured. The definition of “foreclosure” in section 102 includes other legal methods that may be used to terminate the homeowner’s interest in the mortgaged property, such as a quiet title or ejectment action in the case of an installment land sale contract.

3. Items (1) through (6) are adapted from the elements of notice in the standard Fannie/Freddie mortgage negotiable instrument. Item (3) adds a specific deadline to cure the default. Items (7) and (8) are the ownership statement required by the national servicing settlement, and call for the servicer to identify its basis for standing at the outset of foreclosure proceedings, so that any disputes can be resolved promptly. This notice would not displace all state-specific aid programs and counseling notices which necessarily will depend on state funding – for example, Pennsylvania requires a separate 30-day notice of how to apply for its Homeowner’s Emergency Mortgage Assistance Program.

4. In subsection (b)(2), the actions the homeowner needs to take in order to cure the default are governed by § 203.

5. If a homeowner or obligor has cured a default, any subsequent foreclosure based on a later default must be preceded by a new notice, subject to the limitations on repeated defaults contained in Section 203. This is because a cure restores the homeowner to the same legal position as if no default had occurred, [§203\(c\)](#). If, on the other hand, as a result of facilitation or otherwise, the homeowner has tendered payments under a forbearance plan or other workout but has not fully cured the default that was the subject of the notice, no new notice is required in the event the workout fails and the creditor chooses to proceed with foreclosure.

SECTION 202. MANNER OF NOTICE DELIVERY. A notice required by Section 201 or Section 302 must be sent by first-class mail to the last known address of each obligor. At least one mailed notice must also be addressed to ~~the homeowner or to~~ “occupant” at the address

1 of the mortgaged property. If the ~~homeowner or~~ obligor or the ~~homeowner's or~~ obligor's
2 representative has requested to receive notice by electronic mail and has provided an electronic-
3 mail address to the ~~creditor or servicer~~creditor, the notice also must be sent by electronic mail to
4 the electronic-mail address.

5 **Drafters' Notes**

- 6
- 7 1. The complaint in a judicial foreclosure state, or notice of sale in a nonjudicial
8 foreclosure state, must be delivered according to existing law, usually by
9 personal service. The requirement for additional electronic mail notice does
10 not displace the paper notices required by this act or other law.
- 11
- 12 2. Notice must be sent by ordinary first class mail. First class mail has the
13 characteristic that it will be delivered to the last known address whether or not
14 the recipient accepts delivery in person. The ~~creditor or servicer~~creditor may
15 supplement first class mail with certified mail or overnight delivery but may
16 not rely solely on methods that require the recipient to accept delivery in
17 person.
- 18

19 **SECTION 203. RIGHT TO CURE DEFAULT.**

20 (a) ~~A homeowner or An~~ obligor may cure a monetary default by tendering in cash or
21 immediately available funds the amount ~~or performance~~ specified in subsection (c) at any time
22 not later than two business days before a scheduled or postponed foreclosure sale.

23 ~~(b) A homeowner or obligor does not have the right to cure more than three times in a~~
24 ~~calendar year.~~ (b) A homeowner or An obligor may cure a default other than the payment of a
25 sum of money at any time not later than two business days before a scheduled or postponed
26 foreclosure sale.

27 (be) To cure a default under this section, ~~a homeowner or an~~ obligor must:

28 (1) tender all sums that would have been due at the time of tender in the absence
29 of acceleration;

30 (2) perform or tender performance of any other duty under the obligation ~~and or~~

1 mortgage agreement that would have been due in the absence of default or acceleration;
2 (3) tender all expenses of foreclosure that are specified in a record provided by
3 the creditor and that accrued before tender; and
4 (4) tender any late fees, if provided for in the mortgage or obligation and
5 permitted by ~~state~~other law}.

6 ~~(c)~~ Cure of a default under ~~this section~~subsection (b) restores the ~~homeowner and~~
7 obligor to the same position under the mortgage and the obligation it secures as if the default had
8 not occurred.

9 (e) Nothing in the Section impairs any greater rights to cure a default that the obligor may
10 have under the terms of the mortgage agreement or the record that creates the obligation.
11 Nothing in this Section limits the right of an obligor to redeem the mortgaged property by paying
12 the full amount of the accelerated obligation at any time prior to the completion of the
13 foreclosure sale.

14 ~~(e) A homeowner or obligor's right to cure may not be waived unless the waiver is~~
15 ~~contained in a negotiated transfer agreement under Section 501.~~

16 **Drafters' Notes**

17
18 1. The right of a homeowner or obligor to cure a default has the effect of
19 de-accelerating the payments due after acceleration, but before a completed
20 foreclosure sale. Once a sale is completed, the interests of potential purchasers
21 militate against further extending the possibility of cure. The homeowner and
22 obligor receive notice detailing the amounts needed to cure the default pursuant to
23 Section 202, and identifying any nonpayment defaults, such as failure to maintain
24 insurance. The right to cure is independent of any right to redeem.

25
26 2. ~~This section does not alter contractual rights to cure that are stronger,~~
27 ~~but the~~The statutory right to cure provided by this section may not be waived by
28 contract. In the event of a dispute between the creditor and a homeowner or
29 obligor concerning the amounts needed to cure, or any nonmonetary performance
30 that may be claimed as due, either party may seek declaratory relief from an
31 appropriate court, and if appropriate, a temporary stay of any foreclosure sale to

1 resolve the cure dispute.
2

3 3. If a default is cured, restoring the homeowner and obligor to the same
4 position as if no default occurred means that if there is a later default, new notices
5 must be sent prior to foreclosure. Conversely, if as a result of facilitation under
6 Article 3 or otherwise, a settlement is reached but the homeowner or obligor does
7 not fully cure the default, new notices are not required. However, nothing in this
8 [act] requires a lender who properly assessed late fees or default interest following
9 a default to disgorge those fees if the default is subsequently cured.
10

11 **SECTION 204. UNKNOWN HOMEOWNER OR OBLIGOR.**

12 (a) A ~~creditor or servicer~~creditor does not owe a duty under Sections 201 or 302 to notify
13 a person that is a homeowner or obligor unless the ~~creditor or servicer~~creditor knows:

14 (1) that the person is a homeowner or obligor; and

15 (2) the identity of the person.

16 (b) If the creditor ~~or servicer~~ knows the identity of a homeowner or obligor but does not
17 know the homeowner or obligor's current address, notice to the homeowner or obligor must be
18 delivered to the address of the mortgaged property.

19 **Drafters' Notes**

20 1. Section 204~~5~~ is based on UCC § 9-605. Its purpose is to relieve the
21 creditor from duties owed to a homeowner or obligor if the creditor or servicer
22 does not know about that person. This may be the case, for example, when an
23 original homeowner has sold the property to a purchaser, or when the original
24 homeowner has died and his or her interest has passed to an heir or devisee.
25

26
27 **CHAIR'S NOTE** – The following text and Drafter's Notes
28 comprising Article 3, together with the Model Facilitation Program
29 Rules attached as an the Appendix to this Draft, represent the drafting
30 efforts of a Working Group on Article 3. The initial drafting was
31 done by Co-Reporter Alan White in collaboration with Commissioner
32 Kent; the other members of the Working Group who either
33 commented on the draft, participated in a discussion via conference
34 call or both, included Commissioner Walters, Judith Fox (Notre Dame
35 Law School) and Megan Michiels (American Bankers Assn).
36

1 [ARTICLE] 3

2 FACILITATION

3
4 SECTION 301. FACILITATION PROGRAM ESTABLISHED. [Name of court or
5 agency serving as facilitation agency] is designated as the facilitation agency. The facilitation
6 agency shall adopt rules pursuant to [insert reference to state administrative procedures act or, if
7 the facilitation agency is the judicial system, to the rules of court] establishing procedures and
8 standards for the facilitation process.

9 Drafters' Notes

10 1. The Drafting Committee has spent considerable time discussing the
11 subject of mediation – now called facilitation; a number of members on the
12 Committee believe that a successful process that screens potential workout
13 alternatives to foreclosure offers the single best hope for homeowners in the
14 continuing foreclosure crisis.

15
16 2. Facilitation is defined in Section 102 as the assistance of a third-party
17 neutral at an in-person meeting between the parties with the objective of
18 achieving a commercially reasonable alternative to foreclosure, resulting in an
19 agreement between the creditor and homeowner.

20
21 Between 2007 and 2012 eighteen states adopted statewide foreclosure
22 diversion or mediation programs, and local jurisdictions in at least eight additional
23 states have established similar programs. The programs vary greatly in their
24 timing and design, and exist in both judicial and nonjudicial foreclosure states.
25 Most programs in judicial foreclosure states call for intervention after a
26 foreclosure complaint is filed. While most stakeholders recognize that starting
27 mediation or facilitation earlier in the process would increase the chances of
28 success and reduce costs, most existing state laws do not provide a means to
29 initiate facilitation before the judicial process begins. Pre-foreclosure facilitation
30 permits early sorting of foreclosure cases, into those where the homeowner wants
31 to find a solution other than foreclosure, and those cases that are uncontested or
32 where there is no realistic alternative to foreclosure.

33
34 3 The Act does not prescribe standards or procedures for the state
35 facilitation program. The Appendix to Article 3 sets forth model rules and best
36 practices that state facilitation agencies are urged to adopt.

37
38 4. Foreclosure facilitation is not mediation as defined in the Uniform
39 Mediation Act. The agency or court determination under §304 whether to permit

foreclosure to proceed requires reporting of information concerning the facilitation process. The Uniform Mediation Act generally bars mediators from making reports. Article 3 and the model rules in the Appendix to Article 3 do, however, include some key principles from the Uniform Mediation Act, including the protection of confidential information exchanged in facilitation and the avoidance of facilitator conflicts of interest.

SECTION 302. NOTICE OF FACILITATION.

(a) Not later than 30 days ~~after a creditor has sent the notice of intent to foreclose~~ required by Section 201, or 30 days ~~after a creditor has filed a mortgage foreclosure complaint,~~ as provided by agency rules, the creditor must send to the homeowner and obligor a notice of their right to participate in facilitation under subsection (c), or request that the agency send the notice under subsection (b). However, a creditor is not required to send or request a notice if the creditor has requested or obtained a determination that the property is abandoned under Section 505. If a court or agency later determines that the property is not abandoned and a foreclosure sale has not been completed, the ~~notice of facilitation~~ creditor must request the notice under subsection (b) or send the notice under subsection (c). ~~must be sent before foreclosure may proceed.~~

(b) If the facilitation agency establishes a procedure for the agency to send notice of facilitation to homeowners, a creditor shall request the agency to send the notice to the creditor and to each homeowner and obligor. Subject to the agency's rules, the notice may be sent before or after commencement of a foreclosure action, but must be sent before a creditor may request entry of a default or foreclosure judgment or give a notice of a judicial or nonjudicial-foreclosure sale.

(c) If there is no procedure for the agency to send notice, the creditor shall send a notice of facilitation to each homeowner and obligor, in the same manner as required for the notice under Section 201, before a creditor or servicer may request entry of a default or foreclosure

1 judgment or give a notice of a judicial or nonjudicial-foreclosure sale. Subject to the agency's
2 rules, the notice shall be sent before or after commencement of a foreclosure action.

3 (d) The notice of facilitation under subsection (b) or (c) must include the following:

4 (1) The name, address and telephone number of each housing counseling agency,
5 lawyer referral service and legal aid agency serving the homeowner's geographic area that is
6 designated by the facilitation agency.

7 (2) The name, address, telephone number, and e-mail address of the appropriate
8 contact person or group assigned by the creditor or servicer to the homeowner or obligor
9 pursuant to rules of the federal Consumer Finance Protection Bureau.

10 (3) The fact that the homeowner or obligor may request a facilitation meeting, the
11 fact that the request must be made within 30 days of the sending of the notice, and the
12 instructions to request facilitation, and all eligibility requirements under the facilitation agency
13 rules.

14 (4) A description of all documents the homeowner or obligor must bring to the
15 facilitation meeting, in accordance with the facilitation agency rules.

16 **Drafter's Note**

17 The timing of the notice of facilitation will depend on whether the facilitation
18 agency is a court or other agency. Facilitation should begin at the earliest
19 possible time after a notice of default. However, in states whose facilitation
20 programs are operated by the courts, it may not be possible to begin facilitation
21 until a foreclosure lawsuit has begun, in which case the second bracketed
22 alternative language in subsection (a) should be used.

23
24 If the property is not abandoned, but the agency or court determines that
25 the homeowner has rented the dwelling unit to a person other than a family
26 member, the obligor and homeowner are not eligible for facilitation, under §303.
27 However, the creditor or agency must still send the notice of facilitation. If the
28 agency determines, based on the obligor's request for facilitation or other
29 information, that the property is rental property, it must then permit foreclosure to
30 proceed, under §304. The notice of facilitation must be sent to the homeowner and

obligor unless the property has been determined abandoned, or an abandonment determination is pending. The facilitation process is intended only to assist homeowners living in their homes. If the property is not abandoned, but the agency or court determines that it is not owner occupied, the obligor and homeowner are not eligible for facilitation. The agency or court determining that the property is not owner occupied must then permit foreclosure to proceed, under §303(a)(3).

SECTION 303. ELIGIBILITY; PARTICIPATION IN FACILITATION.

(a) If a homeowner or obligor makes a request for facilitation within 30 days of the sending of the notice that complies with the facilitation agency rules, the agency shall schedule a meeting in accordance with its rules. When the agency schedules a meeting, the parties creditor and the homeowner or obligor shall attend and participate in compliance with agency rules and any scheduling or other order established by the facilitator or the facilitation agency.

(b) ~~To be eligible for facilitation, the mortgaged property must not be abandoned property or rented to a person other than a family member of the obligor or homeowner. For purposes of this subsection, a “family member” includes only an individual’s brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants. After requesting facilitation, the homeowner or obligor shall submit to the facilitation agency an affirmation that the mortgaged property is not abandoned or rented to a person other than a family member of the obligor or homeowner. If the mortgaged property contains more than one dwelling unit, facilitation is available if at least one dwelling unit is occupied by the homeowner or obligor. If the facilitation agency determines that the property is abandoned or rented to a person other than a family member of the obligor or homeowner, it will not schedule a meeting, but instead will permit the creditor to proceed with foreclosure under §304.~~ To be eligible for facilitation, the homeowner or obligor must occupy the property as a principal residence. After requesting

~~facilitation, the homeowner or obligor shall submit to the agency an affirmation that the property is being occupied as the requester's principal residence. If the facilitation agency determines that the property is not owner occupied, it will not schedule a meeting, but instead will permit the creditor to proceed with foreclosure under §304.~~

(c) The creditor or servicer shall inform the homeowner and obligor and the facilitation agency of the loss mitigation options that are available to the homeowner and obligor. The creditor or servicer shall notify the homeowner and obligor and the facilitator or facilitation agency of its willingness or refusal to offer any loss mitigation option requested by the homeowner, the reasons for any refusal, and the information on which a refusal is based. The creditor or servicer may not charge the homeowner or obligor a fee for the facilitation process. The agency may charge a fee to either or both parties.

(d) A homeowner or obligor that elects to participate in facilitation shall provide reasonably available financial and other information to permit the creditor to evaluate any loss-mitigation options.

(e) Failure to comply with subsection (a) includes failing:

- (1) without good cause to timely attend a meeting;
 - (2) without good cause to provide, before a scheduled meeting, documents and information required by facilitation agency rules or reasonably requested by a facilitator;
 - (3) to designate a person with authority to reach a settlement agreement, if such authority exists;
 - (4) without good cause to pay any required facilitation fee;
- and
- (5) on the part of a creditor or servicer, to advise the homeowner, obligor and

1 facilitator of any loss-mitigation option that is available to the homeowner or obligor or to
2 consider the homeowner or obligor for the loss-mitigation option before or during facilitation.

3 (f) Nothing in [this Act] or agency rules imposes or may impose a duty on a creditor or
4 servicer to provide a borrower with any specific loss mitigation option.

5 (g) The homeowner or obligor may be accompanied by an attorney, housing counselor or
6 other person at the facilitation session.

7 ~~(h) Documents and communications~~ Personal financial information exchanged during
8 facilitation ~~is~~are confidential and not subject to disclosure under [state FOIA or sunshine laws].
9 Neither the agency nor the facilitator shall be required to respond to any discovery requests in
10 any litigation other than the foreclosure action, where the discovery seeks personal financial
11 information of a homeowner or obligor exchanged during facilitation.

12 (i) Facilitators shall disclose potential conflicts of interest, as provided by the agency
13 rules.

14 **Drafters' Notes**

15
16 1. Abandoned properties are not eligible for facilitation and no notice
17 of facilitation to an abandoned property is required. Investors who are renting a
18 property otherwise covered by this Act are also ineligible for facilitation, but
19 notice must be sent to the property prior to foreclosure. A homeowner must
20 certify that the property is not a rental property in order to request facilitation.
21 Existing foreclosure mediation programs generally limit eligibility to owner-
22 occupants. E.g. N.Y. C.P.L.R. §3408 (“foreclosure . . . in which the defendant is
23 a resident of the property”); Conn. Public Act No. 11-201 (applies to residential
24 real property defined as “a one-to-four family dwelling occupied as a residence by
25 a mortgagor”); see also 12 C.F.R. §1024.30(c)(2) (loss mitigation notice and
26 appeal rules only apply to a mortgage loan that is secured by a property that is a
27 borrower’s principal residence).

28
29 4.2. As provided in Section 301, the facilitation agency rules and orders
30 may impose additional requirements on the parties, for example requiring the
31 creditor, servicer or its agent to appear in person or to have a person with
32 authority to approve loss mitigation alternatives available by telephone at the time
33 of the facilitation session, to perform a net present value analysis, to disclose the

assumptions on which the analysis is based, or requiring homeowners to meet with a housing counselor to qualify for facilitation. The agency will also regulate procedural matters, such as time limits for exchanging documents, scheduling and concluding facilitation meetings, reports by facilitators, and the like. States should continue to have flexibility in the design and implementation of facilitation programs, but should establish and publish the standards as required by section 301. The model rules and best practices principles of facilitation set forth following Section 304 should aid state facilitation agencies in designing their programs.

2.3. The Reporter is preparing a definition of 'personal financial information', a term used Section 303(h).

SECTION 304. FORECLOSURE ACTIONS DURING FACILITATION.

(a) After the agency or creditor has sent a notice of facilitation ~~has been sent~~ to a homeowner or obligor, a creditor ~~or servicer~~ may, subject to other law, commence a foreclosure, but may not file a default or dispositive motion in a foreclosure action, or schedule or cause to be scheduled a foreclosure sale unless:

(1) the homeowner or obligor does not respond to the facilitation notice, by ~~either sending-making~~ a ~~written~~ request for loss mitigation to the ~~creditor agency or servicer~~ not later than 30 days after the sending of the facilitation notice ~~or by appearing at the scheduled facilitation session~~;

(2) the facilitation agency provides the creditor with a notice that the parties have participated in the meeting under §303(a) ~~, complied with facilitation rules~~ and reached an impasse, or that the homeowner or obligor has failed to participate in facilitation, ~~or~~ provide required information after a reasonable opportunity to do so, or to materially comply with agency rules; or

(3) the court or facilitation agency enters an order on good cause shown permitting the creditor to proceed with foreclosure. If the court or facilitation agency determines that the property is abandoned or used as rental property, the court or agency shall

1 enter an order permitting the creditor to proceed with foreclosure.

2 (b) Notwithstanding subsection (a), a creditor may proceed to enforce the mortgage [90]
3 days after sending the notice under Section 302, unless the parties agree to continue the
4 facilitation process or the facilitation agency or court directs the parties to continue the
5 facilitation process.

6 (c) The facilitation agency or court may ~~if it extends the facilitation period,~~ impose
7 appropriate conditions, including the payment of reasonable fees and costs of facilitation or
8 tender of periodic payments by the homeowner to either the lender or the agency-

9 **Drafters' Notes**

10
11 1. Numerous states have recently enacted mandatory facilitation or loss
12 mitigation laws whose object is to delay or prevent foreclosure until the
13 homeowner has had the opportunity to request loss mitigation or facilitation:
14 Arkansas Act 885 (2011) Sec 3, Ark Code 18-50-104 (beneficiary must certify to
15 selling attorney or trustee that it has notified homeowner of ineligibility for loss
16 mitigation options before nonjudicial sale); California Assembly Bill 278 (enacted
17 July 11, 2012, prohibits foreclosure when loan modification request is pending);
18 Idaho Code 45-1506, HB 331 Idaho now requires notice of right to apply for loan
19 modification and bars nonjudicial sale until creditor responds to homeowner's
20 request); Indiana Act 170 of 2011 (same; also prohibits servicer or attorney fees
21 for facilitation or loss mitigation); Massachusetts Chapter 194 of Acts of 2012 (
22 creditor must offer mortgage modification prior to foreclosing, if modification
23 would maximize value for mortgagee); Michigan Compiled Laws §3205a
24 (amended Act 302 of 2011); Nevada Rev. Stat. §107.086; Washington Chapter 58
25 Laws of 2011, amending RCW 61.24 (delays foreclosure 90 days if homeowner
26 requests meeting with creditor to request loss mitigation, and for cases referred by
27 housing counselor to facilitation, until the parties comply with duty to mediate in
28 good faith). Requiring a complete facilitation process prior to initiation of
29 foreclosure allows necessary foreclosures to go forward promptly and efficiently
30 after cases suitable for other resolutions are identified and resolved.

31
32 2. Subsection (a)(3) contemplates a variety of situations where, notwithstanding
33 the 90-day waiting period before foreclosure may be commenced under
34 subsection (b), either the court or facilitation agency may enter an order
35 permitting foreclosure to proceed in less than 90 days. Examples of particular
36 situations that might warrant such an order may include a case where the
37 homeowner has already agreed to vacate the property, or has unequivocally
38 declined to participate in facilitation, or if emergency conditions short of

1 abandonment would justify an accelerated foreclosure.

2
3 ~~3.4.3.~~ Subsection (b) contemplates a variety of situations where the 90 day
4 waiting period before foreclosure may be finalized should be extended.
5 Examples of particular situations that might warrant such an order include
6 cases where the servicer has failed to evaluate a homeowner's completed
7 request for loss mitigation in a timely manner, has failed to comply with
8 material aspects of federal servicing regulations, 12 CFR §1024.41, or has
9 requested additional documents from the homeowner late in the facilitation
10 process.

11
12 4.5. Revised subsection (c) responds to a suggestion made by Barry Hawkins at
13 the January 2014 Drafting Committee meeting that we consider a requirement
14 that the borrower who elects facilitation make monthly payments to the
15 facilitation agency for the duration of the facilitation. This draft makes the
16 requirement optional for the agency. A possible amount, or upward limit, of
17 50% of principal and interest was mentioned. Such facilitation payments by
18 borrowers may ameliorate the fiscal impact on the state of the facilitation
19 program. Borrowers presently have a disincentive to resume making payments
20 to lenders after a default leads to pending foreclosure. Thus, this fee would
21 not deprive lenders of funds that they presently collect. Lenders should
22 benefit because the fee may filter out borrowers who simply want to buy time,
23 with no realistic expectation that retaining the property is possible. Lenders
24 will often benefit from the cases that result in loss mitigation agreements that
25 avoid the costs of foreclosure.

26 [ARTICLE] 4

27 RIGHT TO FORECLOSE; SALE PROCEDURES

28 SECTION 401. RIGHT TO FORECLOSE.

29 (a) A person described in subsection (b) may commence a foreclosure only after default
30 in the obligation and satisfaction of all conditions required by the mortgage agreement and by
31 ~~law of this state.~~

32 Drafters' Notes

33 1. This act does not define events of default under the mortgage. Instead,
34 like UCC Article 9, this act leaves the definition of default to contract law. The
35 obligation may be state in a promissory note (i.e., an obligation to make monthly
36 installment payments) or in another instrument such as the mortgage agreement.

37 2. In subsection (a), the phrase 'law of this state' other law' includes this act

as well as ~~all~~ other law of this state and any other applicable laws.

3. The conditions referred to in this subsection are those indicated in the mortgage agreement or under other law as necessary to accomplish before the commencement of foreclosure.

~~Alternative A~~

(b) (1) Except as otherwise provided in paragraph (2) and in section (e), the only person who may commence a foreclosure is ~~a person entitled to enforce~~ the obligation secured by the mortgage, determined by law ~~of this state~~ other than this [act].

Drafters' Notes

1. ~~Alternative A for subsection~~ Subsection (b)(1) resolves the problem of who has standing to foreclose by designating the person who is entitled to enforce the obligation, to be determined under other law. When the obligation is evidenced by a negotiable instrument, Article 3 of the Uniform Commercial Code provides the governing rules. When the obligation is not evidenced by a negotiable instrument, law other than ~~the~~ Uniform Commercial Code Article 3 will determine who is entitled to enforce the obligation. One example of other law is the Uniform Electronic Transactions Act (UETA), which grants to a person having control of a "transferable record" the rights to enforce a promissory note evidenced by an "electronic record," as those terms are defined in that act.

~~Alternative B~~

~~(b)(1) In this paragraph, "mortgagee of record" means a person whose name is provided in a mortgage agreement or other instrument recorded in the [county land records office] as:~~

~~(A) with respect to a judicial foreclosure proceeding, the owner, grantee, holder, or beneficiary of the mortgage, grantee, or beneficiary; but if the mortgage has been assigned of record, the mortgagee of record is the last person to whom the mortgage has been assigned of record; or~~

~~(B) with respect to a nonjudicial foreclosure proceeding, a person authorized to exercise a power of sale; but if authorization to exercise the power of sale has been assigned of record, the mortgagee of record is the last person to whom the power of sale has been assigned of~~

1 ~~record. The term includes a trustee or substitute trustee under a deed of trust or a mortgagee who~~
2 ~~holds a power of sale.~~

3 ~~Except as otherwise provided in paragraph (2), the only person who may commence a~~
4 ~~foreclosure is the mortgagee of record, whether or not the mortgagee of record is the person~~
5 ~~entitled to enforce the obligation. The obligation secured by the mortgage is discharged to the~~
6 ~~extent of the net proceeds realized from the foreclosure proceedings, even if the mortgagee of~~
7 ~~record is not entitled to enforce the obligation.~~

8 (2) If the obligation is registered in a mortgage registry, the only person who may
9 commence a foreclosure is the person ~~identified as~~designated as entitled to ~~enforce the~~
10 ~~obligation~~foreclose on a record issued by a ~~the~~ mortgage registry as of the time the foreclosure
11 is commenced.

12 (c) In a judicial-foreclosure proceeding, the ~~plaintiff creditor~~ must ~~prove~~plead that it has
13 the right to foreclose under subsection (b). If the obligation is evidenced by a negotiable
14 instrument, the [complaint] must include a copy of the negotiable instrument in its present
15 condition including any ~~endorsement~~indorsement or allonge and either

16 (1) a statement indicating who is in possession of the negotiable instrument; or

17 (2) a statement that the negotiable instrument has been lost, destroyed, or stolen,
18 in which case the [complaint] must include a lost-negotiable-instrument affidavit that complies
19 with Section 403. If the obligation is not evidenced by a negotiable instrument ~~under subsection,~~
20 the [complaint] must include a copy of the records evidencing the obligation and the
21 ~~plaintiff creditor's~~ right to enforce the obligation.

22 (d) ~~In a nonjudicial-foreclosure proceeding, the creditor or servicer must attest by~~
23 ~~affidavit to facts demonstrating that the creditor or servicer has the right to foreclose under~~

1 subsection (b). The affidavit must be included with the notice of foreclosure required by Section
2 201.

3 (ed) In any foreclosure proceeding, ~~a person that has the right to foreclose the creditor~~
4 may, in a record, authorize another person to foreclose. The [complaint] described in subsection

5 (c) ~~or the affidavit described in subsection (d)~~ must disclose the name of both each such the
6 person that has the right to foreclose creditor and the name of the person authorized by the
7 creditor to foreclose.

8 (fe) If an obligation is evidenced by a negotiable instrument and a ~~person with the right to~~
9 ~~foreclose under subsection (b) creditor~~ does not own the obligation, the [complaint] described in
10 subsection (c) ~~or the affidavit described in subsection (d)~~ must disclose the name of the owner of
11 the obligation.

12 **Drafters' Notes**

13 1. The General Counsel's office of the Federal Reserve Bank of New York
14 has recommended in its letter dated March 6, 2013 that the Act contemplate the
15 possibility of an electronic recording system where all notes are electronically
16 generated and where, as a consequence, there is no paper note which might be
17 'possessed' in order to satisfy the holder in due course requirements of UCC
18 Article 3. This approach has been endorsed by the Federal Housing Finance
19 Agency, by Prof. Dale Whitman and by others.

20 To accommodate this possibility, the draft added new subsection (b)(3); it
21 serves as a starting point for Committee discussion of the feasibility of including
22 in the Act such a provision for the registration of documents for residential
23 mortgage loans. Under this draft, a certificate or record issued by the sponsoring
24 organization is conclusive evidence that the person named in the certificate as
25 owning the obligation, holding the negotiable instrument (if the obligation is
26 evidenced by an negotiable instrument), or acting on behalf of the owner or
27 holder, has the right to foreclose under Section 401.

28 The draft also makes conforming changes in subsections 401(a), 401 (b),
29 401(c) and 401(d) by making, in each case, appropriate references to subsection
30 (g).
31

32 2. This section designates the "person entitled to enforce" a negotiable

1 instrument under revised UCC Article 3 as the person with the right to foreclose
2 the mortgage. Section 401(b)(1) follows the language of UCC § 3-301, which
3 defines who is “person entitled to enforce” a negotiable instrument. When the
4 payee of the negotiable instrument has retained possession of the instrument, that
5 person has the right to foreclose. When the payee has transferred possession of
6 the negotiable instrument to another person, the facts must be examined to
7 determine who has the right to enforce the note. The subsequent possessor may
8 become a holder under UCC Article 3 by obtaining a special ~~endorsement~~
9 indorsement or blank ~~endorsement~~indorsement, but this section does not require
10 that a subsequent possessor become a holder in order to acquire the right to
11 foreclose. Such a subsequent possessor may be entitled to enforce the note, but
12 will have to allege and prove facts that are sufficient to establish the right to
13 enforce.
14

15 3. Subsection (b)(2) includes situations in which the secured obligation is
16 evidenced by an instrument that is not negotiable and situations in which the
17 obligation is not evidenced by any type of instrument authenticated by the debtor.
18 As an example of the former, an owner may sign a promissory note that has terms
19 that makes the note nonnegotiable. As an example of the latter, under the law of
20 some states an installment land contract creates a mortgage relationship between
21 the parties, in which the vendee’s obligation to pay the price usually is not
22 reflected in a negotiable instrument. In all such cases, the owner of the obligation
23 who has the right to foreclose will be either the original obligee or an assignee.
24

25 4. In judicial foreclosure, under existing law the creditor generally must
26 confirm possession or account for possession of the original note at the time of
27 filing or prior to the foreclosure sale. In some nonjudicial foreclosure states, the
28 law appears not to require confirmation of possession of the original note prior to
29 commencement of foreclosure proceedings or the sale. This section requires that
30 the foreclosing person have possession of the negotiable instrument prior to the
31 commencement of foreclosure, whether the proceeding is judicial or nonjudicial,
32 unless that person prepares a lost note affidavit meeting the requirements of
33 Section 4-103.
34

35 5. The decision in subsection (b)(1) to require foreclosure by the holder of
36 a negotiable instrument, paired with the decision in subsection (b)(2) to require
37 foreclosure by the owner of other obligations, seeks to reach an appropriate
38 balance between the interests and expectations of borrowers, lenders, and their
39 assignees. It recognizes the traditional importance of qualifying as a holder of a
40 negotiable instrument under Article 3, and seeks to protect borrowers by ensuring
41 that proceeds of foreclosure sales will discharge the obligation. With respect to
42 obligations evidenced by non-negotiable instruments and other writings,
43 possession of those writings, although sometimes important, generally has less
44 significance. Thus, section (b)(2), by authorizing foreclosure by the owner of
45 such an obligation, makes irrelevant the possession of a non-negotiable
46 promissory note or another writing such as the mortgage agreement or an

1 installment land contract.

2
3 Although this distinction seems beneficial, the two-tier system does have
4 some costs, including but not limited to complexity. By authorizing the holder of
5 a negotiable instrument to foreclose, sometimes the power is conferred upon a
6 person who has no economic stake in the obligation or the collateral. The holder,
7 however, will usually have an obligation, created by contract or other law, to the
8 owner who does have an economic stake, giving it some incentive to behave
9 properly.

10
11 The two-tiered system makes it necessary to determine whether a
12 promissory note is negotiable for some cases. Uncertainty as to whether the note
13 is negotiable creates cost. If a single person both possesses the note and owns the
14 obligation, the problem is not major. If it is unclear whether the secured
15 obligation is evidenced by a negotiable instrument or by an instrument that is not
16 negotiable, the creditor may choose to proceed by complying with both
17 subsections (b)(1) and (b)(2). If, however, different persons possess the note and
18 own the obligation, the problem is harder. For example, consider a promissory
19 note secured by a mortgage and payable to the order of Creditor. Creditor enters
20 into a signed contract with Assignee pursuant to which Creditor sells the
21 promissory note to Assignee. Assignee pays Creditor, but Creditor retains
22 possession of the promissory note (and is not possessing the note as agent for
23 Assignee). If the promissory note is a negotiable instrument under UCC Article 3,
24 Creditor can commence a foreclosure under this Section, but Assignee cannot
25 (because Creditor is the holder of the note). If the promissory note is not a
26 negotiable instrument, however, Assignee is its owner and can commence a
27 foreclosure, but Creditor cannot. If Creditor and Assignee cannot reliably
28 determine, before foreclosure, whether the promissory note meets the standards
29 for negotiability, neither one will hold a clear right to foreclose. The uncertainty
30 can be cleared up only by litigation or their agreement to make a further transfer
31 (Creditor delivers the note to Assignee, or Assignee resells the note to Creditor).

32
33 6. This section does not state a separate rule for determining when a
34 creditor who holds a security interest in a note to secure an obligation owed to the
35 creditor has the right to foreclose. UCC Article 9 covers both sales of instruments
36 and assignments of instruments that secure an obligation of the assignor. A
37 creditor who takes possession of a negotiable instrument will acquire the right to
38 foreclose. Other law determines when a creditor who takes possession of an
39 instrument that is not negotiable to secure an obligation owed to the creditor
40 acquires the right to foreclose. For example, UCC § 9-607(a) and (b) provide
41 rules indicating when a secured party has the right to collect on collateral and to
42 enforce the debtor's rights with respect to property that secures obligation owed to
43 the debtor (i.e., the obligation to pay the mortgage loan to the debtor).

44
45 7. Multiple persons may hold the right to foreclose a mortgage. Other law,
46 including UCC Article 3 and the law of agency, determines whether the right to

1 foreclose may be exercised by fewer than all such persons.

2
3 8. When the obligation is owned by a trust, the owner of the obligation for
4 purposes of this Section is the trustee, not the beneficial owner or owners of the
5 trust property.

6
7 9. Under subsection (c) the creditor's production of the original negotiable
8 instrument is not necessary at the time of the filing of a complaint in a judicial
9 foreclosure. Production of the original would later become appropriate if, during
10 the course of the proceedings, the homeowner or obligor seeks further
11 demonstration of the copy's authenticity or the whereabouts of the original.
12 Similarly, in a nonjudicial foreclosure, if there are subsequent judicial
13 proceedings, a court may decide to order production of the original instrument if
14 necessary to resolve a particular issue.

15 10. Subsection (e) authorizes the person who has the right to foreclose to
16 exercise that right through an agent. By requiring a description of the agency it
17 does not permit the principal to remain undisclosed. An agent authorized to
18 foreclose may be a loan servicer who has a pre-existing contractual relationship
19 with the creditor, or any other person appointed at any time. If the secured
20 obligation is evidenced by a negotiable instrument, the agent or the principal (the
21 person entitled to enforce the note) may hold and retain possession of the note.
22 Subsection (e) is not intended to change existing laws that authorize a third
23 person, such as a trustee under a deed of trust, to foreclose in nonjudicial
24 proceedings. In such circumstances, subsection (e) allows the beneficiary to
25 appoint an agent, but does not speak to the procedure for appointing a substitute
26 trustee.

27
28 11. Section 401 as drafted, allowing an agent or representative to
29 foreclose, is consistent with the standing decision in *Sprint Communications Co.*
30 *v. APCC Services, Inc.*, 554 U.S. 269 (2008). There, payphone operators had
31 assigned claims for compensation from long-distance carriers to collection firms.
32 In *Sprint* the Court permitted an assignee of a legal claim for money to pursue that
33 claim in federal court, even when the assignee had promised to remit the proceeds
34 of the litigation to the assignor.

35
36 **SECTION 402. TRANSFER OF RIGHT TO ENFORCE MORTGAGE.**

37 (a) A transfer of an interest in an obligation secured by a mortgage also operates to
38 transfer a corresponding interest in the mortgage.

39 (b) If a transfer of the right to enforce an obligation is accompanied by a separate
40 assignment of the mortgage, the assignment may be recorded in the [office in which mortgages

are recorded], but recordation is not required for the assignee to foreclose the mortgage pursuant to Section 401.

Drafters' Notes

1. Subsection (a) restates the principle stated in UCC § 9-203(g), which provides that an Article 9 transfer of a negotiable instrument also transfers the mortgage (more formally, § 9-203(g) provides that attachment of a security interest in a right to payment or performance secured by personal or real property automatically transfers the security interest to the secured party). Section 9-203(g) covers sales of negotiable instruments, other instruments, and payment intangibles, as well as lending transactions in which those rights serve as collateral to secure an obligation of the transferor.

Subsection (a) is broader than § 9-203(g); it applies regardless of whether the transferee obtains an attached Article 9 security interest. It also encompasses involuntary transfers such as inheritance and judicial sales. Restatement (Third) of Property (Mortgages) § 5.4(a) (1997) proposes a similar rule: “A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.” Under the Restatement rule, parties to the transfer may agree otherwise, but this section does not permit severance of the obligation from the mortgage, following UCC § 9-203(g) and common-law authorities in a number of states.

2. When the foreclosing party is not the originating creditor there is conflicting state law, both in judicial foreclosure and nonjudicial foreclosure states, as to (1) whether the foreclosing party must have an express assignment of the mortgage, or a chain of assignments running back to the original mortgagee, and (2) whether that assignment or the chain of assignments must be recorded in the county land records.

In some states, a statute explicitly requires a recorded assignment. E.g., Ga. Code § 44-14-162: “The security instrument or assignment thereof vesting the secured creditor with title to the security instrument shall be filed prior to the time of sale in the [county land records].” In many states, judicial decisions going in both directions interpret statutes that do not on their face provide immediately obvious answers to these questions. E.g., *In re Vasquez*, 266 P.3d 1053 (Ariz. 2011) (recording assignments of deeds of trust is not required, although trustee must record notice of trustee’s sale); *U.S. Bank Nat. Ass’n v. Ibanez*, 941 N.E.2d 40 (Mass. 2011) (requiring written chain of assignments).

Subsection (b) adopts the position that an express assignment is unnecessary; note that subsection (a) implies an assignment upon a transfer of the obligation. In addition, subsection (b) adopts the position that recordation of an assignment (or notice of an implied assignment) is not a prerequisite for

1 foreclosure.

2 3. By allowing foreclosure by an assignee or transferee who qualifies as
3 the person to foreclose under Section 401, without a requirement of recording any
4 documents in the real property records, this Act makes it unnecessary to follow
5 the procedure authorized by UCC § 9-607(b), which grants a secured party the
6 right to record a copy of the security agreement and an affidavit in the real
7 property records. Compliance with the requirements of Section 401 is sufficient.
8

9 **SECTION 403. LOST, DESTROYED, OR STOLEN NEGOTIABLE**

10 **INSTRUMENT; AFFIDAVIT.**

11 (a) If a negotiable instrument secured by a mortgage has been lost, destroyed, or stolen
12 and the obligation is not registered in a mortgage registry, the creditor or servicer may foreclose
13 the mortgage only if:

14 (1) either (A) the creditor was entitled to enforce the instrument when loss of
15 possession occurred, or (B) the creditor has directly or indirectly acquired ownership of the
16 instrument from a person who was entitled to enforce the instrument when loss of possession
17 occurred;

18 (2) the loss of possession was not the result of a transfer by the creditor or servicer
19 or a lawful seizure; and

20 (3) the creditor or servicer cannot reasonably obtain possession of the instrument
21 because the instrument was destroyed, its whereabouts cannot be determined, or it is in the
22 wrongful possession of an unknown person or a person that cannot be found or is not amenable
23 to service of process.

24 ***Revised Legislative Note:*** This subsection incorporates the language of Section 3-309 of Revised
25 UCC Article 3 (2002). This language is recommended both for States that have adopted Revised
26 Article 3 and those that have adopted a prior version of UCC Article 3.
27

28 (b) If a creditor relies upon a lost, destroyed, or stolen negotiable instrument as the basis
29 for its right to foreclose, the notice of intent to foreclose sent under Section 201 must state that

1 the instrument is unavailable and set forth information establishing the creditor's right to
2 foreclose under subsection (a). In a nonjudicial-foreclosure proceeding, the notice must further
3 (1) advise the homeowner or obligor that there may be a risk that a person other
4 than the creditor will seek to enforce the instrument and that the homeowner or obligor has the
5 right to petition the [name of appropriate court] where the mortgaged property is located for an
6 order requiring the creditor to provide adequate protection against a claim by another person and
7 (2) include the indemnity described in subsection (c).

8 **Drafters' Notes**

9 1. This lost-note disclosure is compatible with the Settlement Term Sheet of
10 the National Servicer Settlement, which requires for all states that the Servicer
11 send, "no later than 14 days prior to referral to foreclosure attorney or foreclosure
12 trustee," "a statement setting forth facts supporting Servicer's or holder's right to
13 foreclose." A single notice may satisfy both this subsection and the National
14 Settlement. The Settlement Term Sheet requires the following for lost notes
15 (Section II C 4):
16

17 If the original note is lost or otherwise unavailable, Servicer shall comply
18 with applicable law in an attempt to establish ownership of the note and
19 the right to enforcement. Servicer shall ensure good faith efforts to
20 obtain or locate a note lost while in the possession of Servicer or
21 Servicer's agent and shall ensure that Servicer and Servicer's agents who
22 are expected to have possession of notes or assignments of mortgage on
23 behalf of Servicer adopt procedures that are designed to provide
24 assurance that the Servicer or Servicer's agent would locate a note or
25 assignment of mortgage if it is in the possession or control of the
26 Servicer or Servicer's agent, as the case may be. In the event that
27 Servicer prepares or causes to be prepared a lost note or lost assignment
28 affidavit with respect to an original note or assignment lost while in
29 Servicer's control, Servicer shall use good faith efforts to obtain or locate
30 the note or assignment in accordance with its procedures. In the affidavit,
31 sworn statement or other filing documenting the lost note or assignment,
32 Servicer shall recite that Servicer has made a good faith effort in
33 accordance with its procedures for locating the lost note or assignment.
34

35 2. In a non-judicial foreclosure proceeding, the additional content for the
36 notice is required because the homeowner or obligor is unlikely to appreciate the
37 risk associated with lost instruments, and it is unlikely that a court will consider
38 the issue unless the homeowner or obligor initiates consideration.

(c) If a creditor relies upon a lost, destroyed, or stolen negotiable instrument as the basis for its right to foreclose, the homeowner or obligor is entitled to adequate protection against loss that might occur by reason of a claim by another person to enforce the negotiable instrument. The creditor must provide in a record an indemnity against loss by the homeowner or obligor. Whether adequate protection requires more than the indemnity is determined by the facts of each case. In a judicial-foreclosure proceeding, the court may require additional protection on motion by the homeowner or obligor or on its own motion. In a nonjudicial-foreclosure proceeding, the homeowner or obligor has the right to petition the [name of appropriate court] where the mortgaged property is located for an order requiring the creditor to provide adequate protection against a claim by another person.

Drafters' Note

The act does not detail what form of any additional protection might be adequate in a particular case, since the court will determine the adequacy of needed additional protection in any given case. ~~This subsection creates no presumption that~~If the creditor has sufficient financial solvency, normally the indemnity ~~is~~would be adequate. ~~For example~~On the other hand, if the foreclosing party were a single purpose entity with no assets other than the mortgage being foreclosed, the court might require a bond, letter of credit, or a parent guarantee.

(d) In a judicial-foreclosure proceeding, the creditor ~~or servicer~~ shall file an affidavit attesting to facts that establish the creditor's right to foreclose under subsection (a) with the [complaint]. The creditor shall provide the indemnity described in subsection (c) no later than ~~[confirmation of the foreclosure sale.]~~A particular phrasing of the affidavit is not required. The following form of affidavit, when completed, provides sufficient information:

INSERT SAFE HARBOR LOST NOTE AFFIDAVIT HERE

(e) The destruction of a negotiable instrument in connection with its registration in a mortgage registry is not a discharge of the obligation.

1 **Drafter's Note**

2
3 This section requires a lost-note affidavit in a judicial foreclosure proceeding, thus
4 following the procedure adopted by most states in their judicial foreclosure laws.
5 The act does not require the preparation of a lost-note affidavit in a non-judicial
6 foreclosure proceeding. If an action is filed to contest or to confirm a non-judicial
7 foreclosure, the court should have the discretion to decide what proof of a lost,
8 destroyed, or stolen negotiable instrument is sufficient.
9

10 **Drafters' Notes**

11
12 1. Subsection (a) deals with the problem of lost or destroyed promissory
13 notes by requiring the preparation of an affidavit. The substance of this
14 requirement follows the 2002 amendments to Article 3. In specifying when a
15 creditor is entitled to enforce a negotiable instrument secured by a mortgage
16 notwithstanding its inability to confirm possession of the instrument, subsection
17 (a) tracks the requirements of UCC § 3-309 (2002). In states that have adopted
18 the 2002 amendments to Article 3, Section 3-309 makes it clear that the person
19 who lost possession may be a predecessor of the creditor who seeks to enforce the
20 instrument.
21

22 Most states have not yet adopted the 2002 amendments. Most of these
23 states follow the 1990 Official Text of Article 3. In these states there are a few
24 cases holding that the affidavit must be signed by the person who lost the note.
25 Other cases, however, interpret that version of Article 3 to allow enforcement by a
26 successor. See, e.g., *Atlantic Nat. Trust, LLC v. McNamee*, 984 So. 2d 375 (Ala.
27 2007) (examining prior cases; holding that assignee of promissory note that was
28 not in possession when lost may enforce the note). This subsection rejects the
29 cases holding that the affidavit must be signed by the person who lost the note,
30 adopting the position expressly taken in Revised Article 3, but does require that
31 the affiant state certain facts on which the affidavit is made; *see* subsection (e).

32 2. In some states, the circumstances in which a creditor is allowed to
33 enforce an unavailable negotiable instrument are broader than under either the
34 2002 version or the earlier version of UCC § 3-309. E.g., Va. Code § 55-59.1(B)
35 (“[i]f a note or other evidence of indebtedness secured by a deed of trust is lost or
36 for any reason cannot be produced”). In some states, the circumstances are more
37 restricted because the creditor’s affidavit must attest to additional facts. E.g., Md.
38 Code, Real Prop. § 7-105.1(f) (affidavit not sufficient unless it “(1) Identifies the
39 owner of the debt instrument and states from whom and the date on which the
40 owner acquired ownership; (2) States why a copy of the debt instrument cannot be
41 produced; and (3) Describes the good faith efforts made to produce a copy of the
42 debt instrument.”).
43

44 3. When the loan documents executed by the parties did not include a
45 negotiable instrument, the creditor seeking to foreclose may or may not possess

1 an original writing or record (including a counterpart) that evidences the
2 obligation. This section does not require an affidavit for a creditor who lacks
3 possession of such an original record. Some states require “lost note affidavits”
4 under these circumstances. E.g., Va. Code § 8.01-32 (“any past-due lost bond,
5 note, contract, open account agreement, or other written evidence of debt”); Va.
6 Code § 55-59.1(B) (“note or other evidence of indebtedness”).
7

8 4. This section does not discuss the evidentiary effect of the affidavit in
9 judicial proceedings. Some states have statutory law on point. For example, an
10 Alabama statute provides that a lost note affidavit “must be received as
11 presumptive evidence both of the contents and loss or destruction of such
12 negotiable instrument, unless the defendant by answer, verified by affidavit,
13 denies the execution of such bond, note or bill or the endorsement, acceptance, or
14 the contents thereof, in which case proof of such execution, endorsement,
15 acceptance, or contents must be made by the plaintiff.” Ala. Code § 6-5-284.
16

17 5. Some statutes dealing with lost note affidavits appear to require an
18 affidavit only if the creditor is unable to produce the original *or a copy* of the
19 instrument.
20

21 6. Subsection (b) follows UCC § 3-309(b), which requires adequate
22 protection for the obligor from the risk that at some point in the future the
23 instrument will surface and its possessor will assert the right to be paid. (UCC §
24 3-309(b) was not affected by the 2002 amendments to Article 3.) Subsection (b)
25 requires that the affidavit include a written indemnity, binding the creditor, to
26 protect all obligors against the risk that a person other than the creditor will seek
27 to enforce the instrument. This indemnity serves to reinforce the rights that the
28 obligor already has under principles of restitution and unjust enrichment. See,
29 e.g., Restatement (Third) of Restitution and Unjust Enrichment § 6 (2011):
30 “*Payment of Money Not Due*. Payment by mistake gives the payor a claim in
31 restitution against the recipient to the extent payment was not due.” In appropriate
32 cases, a court may require a bond in addition to a written indemnity.
33

34 **SECTION 404. PUBLIC ADVERTISEMENT OF FORECLOSURE SALE.**

35 (a) Mortgaged property may be sold at a public sale only after the creditor has published
36 a commercially reasonable public advertisement of the sale. Whether the method or timing of
37 publication of the advertisement is commercially reasonable is a question of fact. The public
38 advertisement is commercially reasonable if ~~if both~~:

39 (i) published in a newspaper having general circulation in the [county] where the
40 mortgaged property is located once per week for three consecutive weeks before the sale, with

1 the first publication not more than 30 days before the sale ~~and or~~

2 (ii) posted on an Internet website that is reasonably expected to be viewed by
3 persons having an interest in purchasing the mortgaged property at least 21 days before the sale
4 and the Internet posting remains regularly available between the time of posting and the time of
5 sale.

6 (b) A public advertisement under subsection (a) must indicate:

7 (1) the name of the homeowner and, if not the same, the name of the person that
8 signed the mortgage agreement;

9 (2) the name of the person that will conduct the sale;

10 (3) the date, time, and place of the sale;

11 (4) the street address or, if there is no street address, other information identifying
12 where the mortgaged property is located;

13 (5) any improvements and personal property that are included in the sale, if that
14 information is readily discernable by the creditor;

15 (6) whether the mortgaged property is to be sold subject to senior indebtedness;

16 (7) the material terms of the sale, including payment terms required of the
17 successful bidder at the completion of the auction;

18 (8) whether access to the mortgaged property for the purpose of inspection is
19 available to prospective bidders before the sale; and

20 (9) a telephone number and electronic mail address from which a person may
21 obtain additional information concerning the mortgaged property and the sale.

22 (c) The public advertisement under subsection (a) need not contain a legal description of
23 the mortgaged property or recording information for the mortgage or other instruments of record.

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

~~Drafters' Note~~

~~The bracketed alternatives represent a drafting suggestion from the Style Committee that is appropriate for the entire Committee to address.~~

(e) A creditor ~~or servicer~~ must send a copy of the public advertisement under subsection (a) to the homeowner and to each obligor. The notice of public advertisement may be sent with the notice of commencement of foreclosure or may be sent separately.

Drafters' Notes

1. This section allows a public sale of the mortgaged property only if the creditor first gives a commercially reasonable public advertisement. The purpose is to ensure that the public has a meaningful opportunity to learn of the proposed sale in order to appear and engage in competitive bidding. This section supersedes existing state laws covering advertisements for public sales for all foreclosures that are within the scope of this act.

2. This section does not specify the person who is obligated to give the advertisement of sale. In many states, that person will be the creditor, but in other states, another person such as a trustee or sheriff performs that function. This act does not mandate a change in who is responsible for advertising the sale.

3. This act does not require the accomplishment of foreclosure by a public auction sale. If other state law allows alternative methods of foreclosure, such methods remain permissible. For example, Connecticut law allows strict foreclosure without a sale of the property.

4. Subsection (b) states minimum requirements for the public advertisement. An advertisement that lacks any of the information set forth in subsection (b) is insufficient as a matter of law. An advertisement may contain additional information about the mortgaged property or the sale.

5. Traditionally the law required the advertisement of foreclosure sales in local newspapers. Subsection (a) allows the creditor to continue that practice, but no longer specifies newspaper advertisement as required or sufficient in all cases. Whether a newspaper advertisement alone is sufficient depends upon whether it is commercially reasonable under the facts, which must be determined based upon the nature of the property, the newspaper, and other local circumstances. Similarly, whether it is commercially reasonable for a creditor *not* to publish a

1 newspaper advertisement, relying instead on other outlets, depends upon the facts.
2 In many communities, newspaper advertisements are no longer an effective
3 means of informing the public about upcoming foreclosure sales. Under these
4 circumstances, a creditor's decision not to publish in a newspaper benefits both
5 the creditor and the homeowner and any obligors by saving the expense.

6 Subsection (a) also creates a safe harbor regarding circumstances when an
7 advertisement would be commercially reasonable. Specifically, the method of
8 publication is commercially reasonable if the creditor publishes the public
9 advertisement both in a local newspaper and with an appropriate Internet website.
10 The Internet site may be one operated by the newspaper or by any other person,
11 whether or not located in the jurisdiction where the mortgaged property is located.
12 The Internet site, however, must be one that has characteristics suggesting that
13 interested members of the public are likely to find and to read the posting. The
14 safe harbor exists, however, only if period of time for newspaper and Internet
15 advertisements, satisfies the standards in the act, which seek to ensure public
16 access to the advertisement for approximately one month preceding the date of
17 sale.
18

19 6. Subsection (c) adopts a bright-line rule with respect to legal descriptions
20 of the real property and recording information. The failure to include such
21 information does not make the public advertisement insufficient. This
22 information is seldom of importance to a person who reads a foreclosure
23 advertisement for the purpose of deciding whether the person has potential
24 interest. Anyone who develops a potential interest is highly likely to investigate
25 further before appearing at the sale to bid. That investigation may include title
26 information, which will disclose the legal description and recording references for
27 the mortgage and other recorded instruments in the chain of title, and typically
28 will include other information as well bearing on the property.
29

30 7. Subsection (d) authorizes the creditor to post the public advertisement
31 or a sign on the property, regardless of whether that right is reserved in the
32 mortgage. This changes the law in some states, in which posting foreclosure sale
33 signs at the property is mandatory.
34

35 **SECTION 405. NOTICE OF FORECLOSURE SALE.** A creditor ~~or servicer~~

36 shall give each homeowner and obligor written notice of the date, time, and place of a
37 scheduled foreclosure sale. Notice of sale must be sent by first-class mail to the last-
38 known address of each homeowner and obligor and be hand delivered to the property
39 address. Notice of sale must be mailed or delivered at least 30 days before the sale date.

1 **Drafters' Note**

2 This section requires that the creditor notify the homeowner and any
3 obligors of the date, time, and place of the foreclosure sale. The section
4 requires a 30-day notice of the originally scheduled sale. One notice must
5 be mailed, and a second copy of the notice must be personally delivered to
6 the residence.

7
8 **SECTION 406. POSTPONEMENT OR CANCELLATION OF SALE.**

9 (a) A person conducting a foreclosure sale may postpone or cancel the sale for
10 any reason. Announcement of a postponement must include the date, time, and place of
11 the rescheduled sale. If oral announcement of the postponement is made at the date, time,
12 and place advertised for the sale, a new public advertisement is not required under
13 Section 404 unless the sale is postponed for longer than 30 days from the date originally
14 advertised.

15 (b) If a foreclosure sale is postponed the creditor promptly shall give each
16 homeowner and obligor commercially reasonable notice of the postponement. The notice
17 must include the date, time, and place of the rescheduled sale.

18 (c) If a foreclosure sale is cancelled, the creditor promptly shall notify each
19 homeowner and obligor in the manner provided in Section 405. The notice must include a
20 telephone number and electronic mail address from which a person may obtain additional
21 information concerning the creditor's plan with respect to the mortgaged property,
22 including any new sale date.

23 **Drafters' Note**

24 Once a foreclosure sale is scheduled, the creditor may elect to postpone or cancel
25 the sale for any reason the person considers appropriate. A postponement might
26 also take place for other reasons, such as a judicial order or an automatic stay in
27 bankruptcy. Homeowners and obligors should receive prompt notice of any
28 postponement or cancellation. The rules of Section 405 do not apply to notices of
29 postponement or cancellation. Subsection (b) covers notices of postponement and

1 cancellation, requiring that the notice be commercially reasonable under the facts
2 and circumstances. A postponement may be as short as one day. An oral
3 announcement of the postponement, made at the time and place of the originally
4 scheduled sale, would suffice if the homeowner and any obligor were present, in
5 which event no written or additional notice would be necessary.
6

7 **[SECTION 407. (OPTIONAL) CONFIRMATION OF FORECLOSURE SALE**

8 (a) In a judicial-foreclosure proceeding, the creditor may file a motion for confirmation of
9 a foreclosure sale within one year after the sale of the mortgaged property. The motion shall be
10 served on all parties and the person who conducted the sale, who shall file a report of the sale
11 with the court. The report must name the purchaser and describe the property, the amount bid,
12 the amount paid to date, and any other material terms.

13 (b) The court shall grant an order confirming the sale unless it finds:

14 (1) there was a material procedural irregularity such as the failure to give required
15 notices to parties;

16 (2) the terms of sale were unconscionable; or

17 (3) the sale was conducted fraudulently.

18 (c) If the court fails to confirm the sale and a party makes a motion to set aside the sale,
19 the court may order a resale of the property.

20 (d) A final and non-appealable court order confirming the sale pursuant to subsection (b)
21 conclusively establishes compliance with this Act in favor of purchasers of the mortgaged
22 property in good faith for value. For purposes of this subsection, the foreclosing creditor is not a
23 good faith purchaser for value.

24 (e) Confirmation of the sale is not required. Unless the creditor files a motion for
25 confirmation of the sale, entry of the judgment of foreclosure concludes the judicial-foreclosure
26 proceeding, subject to the normal rules governing finality and appeal.]

1 **Legislative Note**

2 In some but not all states, the law of judicial foreclosure requires that the court
3 confirm the foreclosure sale. Although confirmation is mandatory, in the vast
4 majority of the cases, no objection to confirming the sale is made. This section
5 provides for an optional confirmation procedure, which allows the creditor the
6 choice to seek confirmation or to treat the sale as ending the proceeding, assuming
7 that no other party makes a post-sale challenge to the judgment or the sale. The
8 creditor generally will seek confirmation only if it desires the conclusive effect
9 that a confirmed sale has for title passing to a bona fide purchaser or if it
10 anticipates that another party is likely to challenge the sale based upon alleged
11 defects in post-judgment procedures. This section is recommended only for
12 states that presently require confirmation of foreclosure sale in judicial-
13 foreclosure proceedings.

14
15 **[ARTICLE] 5**

16 **ACCELERATED DISPOSITIONS**

17 **SECTION 501. NEGOTIATED TRANSFER OF MORTGAGED PROPERTY IN**
18 **SATISFACTION OF OBLIGATION.**

19 (a) A homeowner and creditor may negotiate a transfer of mortgaged property to the
20 creditor in full satisfaction of the obligation to the creditor secured by the mortgaged property if:

21 (1) The homeowner and creditor agree to the transfer in a record after the
22 homeowner's default;

23 (2) notice of the proposed negotiated transfer is sent to the persons entitled to
24 notice under Section 502; and

25 (3) the person who sent the notice under Section 502 does not receive an
26 objection to the proposed transfer in a record from any person entitled to notice under Section
27 502 within 20 days after notice was sent to the person.

28 (b) If the homeowner or a person claiming under the homeowner is in possession of the
29 mortgaged property, the agreement must specify the date and time when the homeowner is to
30 surrender possession to the creditor. If there is any person entitled to notice under section 502,

1 then, regardless of the terms of the proposed transfer, the homeowner is not obligated to
2 surrender possession before the 20-day period described in subsection (a)(3) has elapsed.

3 (c) This section does not authorize a transfer of the mortgaged property to the creditor in
4 partial satisfaction of the obligation it secures.

5 **Drafters' Notes**

6
7 1. This section authorizes a transfer from the homeowner to the creditor in
8 satisfaction of the debt or other obligation. In so doing, it provides a framework
9 for existing workout arrangements such as cash-for-keys agreements and deed-in-
10 lieu of foreclosure transactions. This section and the following two sections
11 provide for a safe harbor by specifying the effect of a transfer that meets the
12 requirements of this section. This section is based in part on UCC § 9-620, which
13 provides for the acceptance of personal property mortgaged property by a secured
14 party in full or partial satisfaction of a secured obligation. The important
15 innovations here are, first, to provide an expedited procedure to discharge junior
16 liens on the property without the need for a foreclosure sale; and second, to
17 resolve a number of collateral issues that flow from the expedited procedure, as
18 detailed in Section 504.

19
20 2. This section does not specify a minimum consideration to be received
21 by the homeowner in exchange for the homeowner's agreement to transfer the
22 mortgaged property in satisfaction of the obligation. The sole exception is that if
23 the homeowner is in possession and there are third parties entitled to notification
24 of the proposed transfer, the agreement may not require the homeowner to vacate
25 possession prior to the expiration of the period for notified persons to submit an
26 objection.

27
28 As a consequence, this section as now drafted confers a substantial benefit
29 on mortgage creditors in the form of a new mechanism for converting every 'deed
30 in lieu' transaction into an accelerated means of clearing title of junior
31 encumbrancers without the need for a more traditional judicial foreclosure. In
32 doing so, the section does not require any minimum benefit on homeowners, other
33 than the general statement of effects of such an agreement contained in Section
34 504 and the rights of possession noted in paragraph 2 above,

35 **Drafters' Note**

36
37
38 The second sentence of Section 501(b) contemplates a circumstance where, for
39 example, the lender and homeowner had agreed, in a common 'cash for keys'
40 agreement, that the homeowner would move within a short period in return for a
41 sum of money. If there are junior lienholders, however, the possibility exists that
42 there may be an objection to the proposed transfer, that the agreement would not

1 be approved, and that the benefits contemplated by a homeowner under Section
2 504 from an early move-out would not be realized. This sentence makes certain
3 that the homeowner need not be displaced, even voluntarily, until the parties knew
4 whether there would be objection from a junior lienholder.

5
6 In those cases where there are no junior lienholders or other holders of
7 subordinate interests, it is likely that the parties would often choose to use a
8 traditional deed in lieu of foreclosure to accomplish their agreement, instead of
9 following this statutory negotiated transfer procedure; *see* section 504(f).

10 11 **Drafters' Notes**

12
13 The comments will make clear that in the case of multiple owners of residential
14 property, all the owners need to consent to a negotiated transfer; the act does not
15 authorize a forced transfer outside of foreclosure for a non-consenting co-owner.

16 17 **SECTION 502. NOTICE OF NEGOTIATED TRANSFER.**

18 (a) If a negotiated transfer pursuant to Section 501 is proposed when a judicial-
19 foreclosure proceeding is pending with respect to the mortgaged property, the homeowner and
20 creditor must request that the court send notice of the proposed negotiated transfer to all parties
21 except for the homeowner and the creditor that is foreclosing and the court promptly shall do so.

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

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

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

1 **Drafters' Notes**

2
3 1. This section is based in part on UCC § 9-621, which provides for a
4 notification procedure for an acceptance of personal property by a secured party
5 in satisfaction of a secured obligation.
6

7 2. Subsection (a) provides for the court to notify parties to the foreclosure
8 proceeding of an agreement proposed by the homeowner and creditor for a
9 transfer in full satisfaction of the debt or other obligation. If there are no parties
10 to the action, other than the homeowner and the creditor, then there is no one to
11 notify. Holders of subordinate interests in the mortgaged property should have
12 been joined as necessary parties to the foreclosure action.
13

14 3. Subsection (b) provides for the creditor to notify persons who have
15 subordinate interests in the mortgaged property of an agreement proposed by the
16 homeowner and creditor for a transfer in full satisfaction of the obligation. Such
17 subordinate interest holders may have their rights terminated by the negotiated
18 transfer, and therefore they have the right to request protection pursuant to
19 Section 503.
20

21 **SECTION 503. HEARING ON OBJECTION TO NEGOTIATED TRANSFER.**

22
23 (a) If a judicial-foreclosure proceeding is pending with respect to mortgaged property
24 and the court receives an objection from a person holding an interest in the mortgaged property
25 which would be affected by a negotiated transfer under Section 504, the court promptly shall
26 schedule a hearing on the objection to be held within [20] days after the objection is received..

27 (b) [relocated without change from former subsection (d)] If a creditor that sent a notice
28 under Section 502(b) receives an objection from a person holding an interest in the mortgaged
29 property that would be affected by the negotiated transfer, the negotiated transfer may not
30 proceed unless the creditor initiates a judicial proceeding seeking a hearing on the objection.
31 The hearing shall be conducted as provided by subsections (c) and (d).

32 (c) If a hearing is held under subsection (a) and if the court finds, based on an appraisal or
33 other evidence, that that there is no equity in the mortgaged property available to satisfy the
34 interest of the objecting interest holder, the court shall overrule the objection. In that event, the

1 rights of the objecting party and all other interests junior to the interest of the creditor that is a
2 party to the proposed transfer under this section are extinguished effective on the date of the
3 court's determination.

4 (d) If a hearing is held under subsection (a) and if the court finds, based on an appraisal
5 or other evidence, that there is equity in the mortgaged property available to satisfy the interest
6 of the objecting interest holder, the court shall set a date not later than [30] days after the date of
7 the hearing by which the objecting party may tender to the creditor that is a party to the proposed
8 transfer a sum equal to the obligation owed to the creditor. If the objecting party tenders that
9 sum to the creditor within the time set by the court, the objecting party is entitled to the benefit of
10 the proposed negotiated transfer, and all interests junior to the interest of the objecting creditor
11 are extinguished effective on the date of tender. Otherwise, the rights of the objecting party and
12 all other interests junior to the interest of the creditor that is a party to the proposed transfer
13 under this section are extinguished, effective on the date set by the court by which the tender
14 could have been made.

15 **SECTION 504. EFFECT OF NEGOTIATED TRANSFER.**

16 (a) A homeowner's transfer of mortgaged property pursuant to Section 501 to a creditor
17 in satisfaction of an obligation to the creditor:

18 (1) discharges the obligation in full;

19 (2) transfers to the creditor all of the homeowner's rights in the mortgaged
20 property, except for a right of the homeowner to continue to occupy the mortgaged property
21 pursuant to an agreement between the homeowner and the creditor which is incorporated into the
22 negotiated transfer agreement;

23 (3) discharges the mortgage held by the creditor and any mortgage or other lien

1 that is junior in priority to the mortgage held by the creditor; and

2 (4) terminates any subordinate interest that is not insulated from termination
3 under other law.

4 **Drafter's Notes**

5 The comments will make clear that this act, in stating that a negotiated transfer
6 terminates all subordinate interest, does not terminate a subordinate interest that is
7 insulated under other law from termination as a result of foreclosure. The clearest
8 examples are be the common provisions in state statutes providing that various
9 kinds of residential leasehold interests are not automatically terminated by a
10 foreclosure, but may only be terminated by the creditor when they would be
11 terminable under the terms of the lease itself in the absence of foreclosure. This
12 act does not overturn the results under those statutes.

13
14 . (b) A subordinate interest is discharged or terminated under subsection (a), even in the
15 event of noncompliance with the requirements of this [act]. A creditor that fails to comply with
16 the requirements of this [act] is liable for damages in the amount of any loss caused by its failure
17 to comply.

18 (c) If a homeowner and creditor have agreed that the homeowner has the right to continue
19 to occupy the mortgaged property for a fixed time after a transfer, the agreement creates a
20 license, unless the parties have agreed in a record to enter into a landlord-tenant relationship.

21 (d) A transfer of the mortgaged property pursuant to Section 501 terminates all rights of
22 the creditor to obtain a personal judgment for the obligation, including attorneys' fees, costs, and
23 other expenses, against the homeowner and any other person liable for the obligation secured by
24 the property..

25 (e) A transfer of the mortgaged property pursuant to Section 501 terminates all rights of
26 the homeowner ~~or~~ and other persons s to redeem the property.

27 (f) Nothing in Sections 501 through 504 prevents a homeowner and creditor from
28 entering into any other agreement, but the effects of a negotiated transfer described in this

1 section do not apply to an agreement that fails to state that the agreement is made pursuant to
2 Section 501.

3 (g) Nothing in this [article] affects the rights of a creditor holding an interest in the
4 mortgaged property which has priority over the interests of a creditor that takes title to the
5 mortgaged property under this section.

6 **Drafters' Notes**

7
8 1. This section is based in part on UCC § 9-622, which specifies the effect
9 of acceptance of personal property by a secured party in full or partial satisfaction
10 of a secured obligation.
11

12 Subsection (a) specifies that the effect of a transfer of the mortgaged
13 property is full satisfaction of the secured obligation. The transfer to which it
14 refers is one that results from performance of the agreement made by the
15 homeowner and the creditor. If a timely objection is received by the court or by
16 the creditor from a person entitled to notification, then neither this subsection nor
17 subsection (b) applies. Paragraph (1) expresses the fundamental consequence of
18 accepting the mortgaged property in full satisfaction of the secured obligation—
19 the obligation is discharged.
20

21 2. Paragraphs (2) through (4) indicate the effects of a transfer on various
22 property rights and interests. Under paragraph (2), the creditor acquires “all of the
23 homeowner’s rights in the mortgaged property.” Under paragraph (3), all junior
24 encumbrances are discharged. Paragraph (4) provides for the termination of other
25 subordinate interests. Under existing law, a deed-in-lieu of foreclosure accepted
26 by a creditor does not terminate subordinate mortgages, subordinate liens, or other
27 subordinate property rights. This Act changes that result by authorizing a transfer
28 in full satisfaction of the obligation, which terminates junior interests.
29

30 3. Subsection (c) specifies that the status of the homeowner who continues
31 to occupy the property after entering into an agreement to transfer the property to
32 the creditor in full satisfaction of the obligation is that of a licensee. The parties’
33 agreement and other state law determine the rights and obligations of the parties
34 as licensor and licensee.
35

36 4. As drafted, the sentence authorizes homeowners and creditors to enter
37 into any other type of agreement that they might desire, but no such agreement –
38 presumably including a traditional ‘deed in lieu’ arrangement – would confer the
39 benefits of Section 504 unless the agreement expressly provided that it was made
40 pursuant to Section 501.
41

1 The converse of the policy is reflected in this observation from Reporter
2 Smith:

3 “I believe the better policy is to displace existing state laws on “deed in
4 lieu” transactions within the scope of this act. Among other problems, if
5 we keep both, there will be transactions in which the lender has not clearly
6 documented whether the intent to proceed under this act or under other
7 law.”
8

9 5. The act as drafted does not require notice of the proposed negotiated
10 transfer to a senior creditor because the interest of the senior creditor will not be
11 affected by that transfer. It may well be that a negotiated transfer would result in
12 a violation of a ‘due on sale’ clause in the senior mortgage, but whether or not
13 such a violation results would not be affected by notice to a senior creditor, and
14 the act should not suggest a contrary result.
15

16 Moreover, a practical concern for the junior creditor and borrower may be
17 that after receiving notice, the senior creditor may intervene in the hearing and
18 seek to impose a charging order on any consideration offered by the junior
19 creditor in connection with the negotiated transfer, a tactic that might jeopardize
20 the entire transfer. A junior creditor may well be willing to satisfy the senior debt
21 but more eager to quickly clear subordinate liens; no valid purpose would be
22 served by requiring more notice to senior lien holders than would be required in a
23 conventional foreclosure.
24

25 **SECTION 505. ABANDONED PROPERTY.**

26 (a) A governmental agency’s determination, finding, or order that mortgaged property is
27 abandoned, or the presence of not fewer than {three} of the following conditions, establishes a
28 presumption that the property is abandoned property:

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

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

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

1 (4) A governmental entity has issued an order or finding declaring that the
2 property is unfit for occupancy or ~~The property is deteriorating so as to~~ constitutes a serious
3 threat to public health or safety.

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

7 (6) One or more written statements signed by the homeowner indicate a clear
8 intent to abandon the property.

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

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

13 (b) In a judicial-foreclosure proceeding, ~~the plaintiffa party~~ or a governmental
14 subdivision in which the mortgaged property is located may make a motion for a determination
15 that the property is abandoned property. If the property is located in a common-interest
16 community, the association that governs that community may intervene in the proceeding.

17 (c) ~~In addition to serving a copy of the motion on the property owner and other parties~~
18 ~~holding an interest in the property as required by other law,~~ In a judicial-foreclosure proceeding,
19 the party filing the motion must send separately to each homeowner and obligor a notice, which
20 must provide the following information:

21 (1) copy of the motion;

22 (2) copy of any affidavit attesting to abandonment or a government agency's
23 determination, finding, or order that that the property is abandoned that the party will submit as

1 evidence;

2 (3) description of the consequences that will follow from a determination of
3 abandonment; and

4 (4) inform the recipient that the recipient may contact the [applicable government
5 official] to obtain further information or object to the proposed determination of abandonment.

6 This notice may be combined with the notice required by Section 201.

7 **Alternative A**

8 (d) In a judicial-foreclosure proceeding, the party filing the motion shall post a written
9 notice on the mortgaged property [insert any posting standards such as type size, location of
10 notice, number of postings, mandatory language etc.]

11 **Alternative B**

12 (d) In a judicial-foreclosure proceeding, the party filing the motion shall personally serve,
13 or make two attempts to personally serve, the notice described in subsection (c) on a homeowner
14 at the mortgaged property, which attempts must be at least 72 hours apart, and during different
15 times of the day, either before noon, between noon and 6 P.M., or between 6 P.M. and 10 P.M.
16 Posting a written notice on the mortgaged property is [prohibited] [not required].

17 **Drafters' Note**

18 Alternative A continues the language from the January 2014 draft.
19 Alternative B is new. It responds to observations made at our last Committee
20 meeting that the posting of “abandoned property” notices may encourage
21 vandalism, theft, and other illegal behavior.

22 **End of Alternatives**

23 (de) When a motion is filed pursuant to subsection (b), the court immediately shall issue
24 an order to show cause commanding the parties it considers appropriate to appear at a hearing
25

1 before the court on a day and at a place stated in the order. The appearance date may not be less
2 than [15] nor more than [25] days after the date of the order to show cause. A copy of the
3 motion must be attached to the order to show cause.

4 Drafters' Note

5
6 This subsection requires a hearing within a definite time period after the
7 motion is filed. Unless there are unusual circumstances, the court should issue the
8 order on the date the motion is filed. The 15-to-25-day window is taken from
9 Minn. Stat. § 582.032(4). The numbers of days are bracketed to invite Committee
10 consideration as to whether that timeframe is appropriate.

11
12 (ef) At the hearing on the order to show cause, if service of process is established, no
13 appearance is made to oppose the relief sought, and evidence is presented supporting the
14 allegations in the motion ~~and no appearance is made to oppose the relief sought~~, the court shall
15 enter an order finding that the mortgaged property is abandoned property.

16 (fg) A ~~defendant's~~ homeowner's failure to appear at the hearing after service of process
17 is conclusive evidence of abandonment by the homeowner ~~defendant~~.

18 (gh) In the absence of an affidavits or written statements, or if rebuttal evidence is offered
19 by the defendant or a party lawfully claiming through the defendant, the court may consider any
20 competent evidence, including oral testimony, concerning any allegation in the complaint or
21 motion.

22 **Drafters' Notes**

23 Subsections (de) through (gh) are based in substantial part on Minn. Stat. §
24 582.032, which provides for expedited foreclosure for abandoned homes.
25 Minnesota generally provides a statutory right of redemption (post-foreclosure-
26 sale) of six months or one year, which is reduced to five weeks when the lender
27 uses the statutory procedure for abandoned property; this section does not include
28 a comparable right of redemption.

29
30 (hi) In a non-judicial-foreclosure proceeding, a creditor or servicer or a governmental
31 subdivision in which the mortgaged property is located may ~~seek a determination that the~~

1 ~~property is abandoned property by submitting a request accompanied by an affidavit attesting to~~
2 ~~facts indicating abandonment to [government official] to seek a determination that the mortgaged~~
3 ~~property is abandoned property. The request must be accompanied by an affidavit attesting to~~
4 ~~facts indicating abandonment or a governmental agency's determination, finding, or order that~~
5 ~~the mortgaged property is abandoned. In addition:~~

6 (j) In a nonjudicial-foreclosure proceeding, the person seeking a determination that the
7 mortgaged property is abandoned property must send separately to each homeowner and obligor
8 a notice, which must provide the following information:

9 (1) copy of the request;

10 (2) copy of an affidavit attesting to abandonment or a government agency's
11 determination, finding, or order that that the property is abandoned;

12 (3) description of the consequences that will follow from a determination of
13 abandonment;

14 (4) inform the recipient that the recipient may contact the [government official] to
15 obtain further information; and

16 (5) inform the recipient that the recipient has the right to object to the proposed
17 determination of abandonment by sending a notification of objection to the [government
18 official], which must be received within 30 days after the notice was sent to the recipient, in
19 which event the [government official] will not issue a determination of abandonment.

20 This notice may be combined with the notice required by Section 201.

21 Alternative A

22 (k) In a nonjudicial-foreclosure proceeding, the person seeking a determination that the
23 mortgaged property is abandoned property shall post a written notice on the property [insert any

posting standards such as type size, location of notice, number of postings, mandatory language etc.]

Alternative B

(k) In a nonjudicial-foreclosure proceeding, the person seeking a determination that the mortgaged property is abandoned property shall personally serve, or make two attempts to personally serve, the notice described in subsection (j) on a homeowner at the mortgaged property, which attempts must be at least 72 hours apart, and during different times of the day, either before noon, between noon and 6 P.M., or between 6 P.M. and 10 P.M. Posting a written notice on the mortgaged property is [prohibit]ed [not required].

End of Alternatives

~~(1) The person seeking the determination must send a notice to each homeowner and other person entitled to notice under Section 201 and post the notice on the mortgaged property in the manner described in subsection (c) of this section. The notice must include a copy of the request and the affidavit, describe the consequences that will follow from a determination of abandonment, and inform the recipient that the recipient may contact the [government official] to obtain further information or to object to the proposed determination of abandonment.~~

(l) In a nonjudicial-foreclosure proceeding—(2) After personal inspection of the property, the [government official] may issue a determination in a record that the property is abandoned property no sooner than 30 days after the sending of notices under subsection (j) if:

(1) the [government official] has received evidence that notices under subsection (j) were sent to each homeowner and obligor;

(2) the [government official] has not received a notification of objection to the

1 proposed determination from a person entitled to notice under subsection (j) within 30 days after
2 notice was sent to that person;

3 (3) the [government official] has received an affidavit attesting to facts indicating
4 abandonment or a governmental agency's determination, finding, or order that the mortgaged
5 property is abandoned; and

6 (4) the [government official] has personally inspected the property.

7 The [government official] shall send the determination of abandonment to the creditor and to
8 each, the homeowner, and obligor~~any other person entitled to notice under Section 201.~~

9 ~~(3m)~~ In a nonjudicial-foreclosure proceeding, the ~~The~~ determination of abandonment or
10 the refusal of the [government official] to issue a determination is subject to de novo judicial
11 review.

12 (n) If a person executes an affidavit attesting to the presence of conditions set forth in
13 Section 505(a) or to other facts bearing on abandonment, the affidavit shall be signed by and
14 based on personal knowledge of the affiant. Photographic or other documentary evidence that
15 demonstrates the supporting facts set forth in the affidavit shall be attached to the affidavit. A
16 party or person may submit multiple affidavits as evidence of abandonment. An affidavit may be
17 given by any person having personal knowledge, including contractors, government employees,
18 and neighbors of the mortgaged property.

19 (o) In a judicial-foreclosure proceeding, after a party has filed a motion for a
20 determination that the property is abandoned property, the motion may be withdrawn only by
21 leave of the court. In a nonjudicial-foreclosure proceeding, after a person has filed a request for a
22 determination that the property is abandoned property, the request may be withdrawn only by the
23 consent of the person submitting the request and each homeowner and obligor.

Drafters' Notes

1. This Act authorizes an expedited foreclosure procedure for abandoned properties for both judicial foreclosure and for nonjudicial foreclosures. An expedited procedure is appropriate for two reasons. First, the homeowner is no longer making a valuable economic use of the property to provide shelter for the homeowner or the homeowner's family or someone claiming under the homeowner, such as a tenant. A foreclosure sale will not result in a possessor being forced to relocate to other housing. Second, properties that are facing foreclosure and that are vacant have significant negative impacts on neighborhoods and the surrounding communities. Vacancies reduce the market values of neighboring properties. Neighborhood crime increases. The vacant properties tend to suffer from lack of repair and maintenance, creating public health risks, including infestations by vermin, mosquitoes, and other insects. There are fiscal impacts on local governments, who find property taxes on vacant properties often become delinquent; yet the governments are faced with added expenses to provide essential services to blighted neighborhoods, such as police and fire protection. By providing for an expedited foreclosure procedure, this Act seeks to return abandoned properties to the stock of occupied, well-maintained housing as soon as reasonably possible.

2. The conditions giving rise to prima facie evidence of abandonment set forth in Subsection (a) through (a) closely track the criteria set forth in Ind. Code § 32-30-10.6-5(a) (effective March 16, 2012). A government agency's issuance of a determination that the mortgaged property is abandoned by itself constitutes prima facie evidence of abandonment. In some localities, after such a determination the government will mark the property as abandoned. The government's determination, finding, or order might not use the word "abandoned"; it might, for example, refer to the property as vacant. Of course, the homeowner or another person has the right to challenge the correctness of the governmental determination.

With respect to the statutory conditions listed in Subsection (a)(1) through (a)(8), the presence of [three] or more of such conditions constitutes prima facie evidence, giving rise to a presumption of abandonment. Such conditions are not conclusive on the issue of abandonment. Many residential properties will exhibit at least one such condition, when the homeowner is still in possession of the property. If the homeowner or another person holding under the homeowner is in actual possession of the mortgage property, the property is not abandoned notwithstanding the existence of such conditions. Likewise, mortgaged property may be abandoned under this Section notwithstanding the absence of any of the statutory conditions.

3. Mortgaged property often becomes vacant, both under standard mortgage and reverse mortgage transactions, when the homeowner dies. Under Subsection (a)(8) proof of death of the homeowner is one of the conditions that

1 may give rise to a presumption that the mortgaged property is abandoned,
2 provided that there is no evidence that an heir or other beneficiary of the
3 homeowner's estate is in actual possession. Of course if there are multiple
4 homeowners, this condition is met only if all the homeowners have died.

5
6 4. In a nonjudicial foreclosure proceeding, the creditor may treat the
7 mortgaged property as abandoned only by submitting evidence of abandonment to
8 an independent third party. Subsection (c) provides for the submission of evidence
9 to a person, who as part of the decision making process must personally visit the
10 property. Normally jurisdictions enacting this Act will designate an employee of
11 local government, such as a building inspector, who is responsible for evaluating
12 the physical condition of dwelling units.

13
14 Judicial review of the decision is available to any interested person.
15 Subsection (c) does not specify the nature of that action, which in many
16 jurisdictions will be a mandamus action.

17
18 **SECTION 506. FORECLOSURE OF ABANDONED PROPERTY.**

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

22 ~~(1) either (i)~~ order a public sale of the abandoned property not earlier than [30]
23 days but not later than [6045] days after entry of the order; or

24 ~~(2), (ii)~~ upon a motion of the creditor, if the court, based on an appraisal or other
25 evidence, finds that there is no equity in the mortgaged property available to satisfy the interests
26 of junior creditors, the court shall order a transfer of the abandoned property directly to the
27 foreclosing creditor without public sale and, upon the transfer, the rights of all interests junior to
28 the interest of the ~~plaintiff~~ foreclosing creditor are extinguished.

29 **Drafters' Notes**

30
31 The alternative of a direct transfer to the creditor is one of the components
32 set forth in an Ohio bill that would provide expedited foreclosure procedures for
33 abandoned property. Obviously if the Committee decides that this alternative has
34 merit, further provisions are necessary dealing with matters such as the
35 termination of junior interests and the payment of expenses by the creditor. The

1 Ohio bill requires that a creditor who chooses a direct transfer pay any unpaid
2 taxes and assessments on the property.

3
4 (b) In a non-judicial-foreclosure proceeding, on the issuance of a determination under
5 Section 505(d) that the mortgaged property is abandoned property, a creditor, servicer or trustee
6 may conduct an expedited public sale of the property. The sale may take place not earlier than
7 [30] days but not later than [60] days after the issuance of the determination, unless judicial
8 review of the determination is commenced. The creditor or servicer shall comply with the notice
9 requirements of Section 405, except that [15]-days advance notice of the sale is sufficient.

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

17 (d) Upon a foreclosure sale or transfer of the mortgaged property to the creditor pursuant
18 to subsection (a) or (b), any personal property remaining in or upon the abandoned property shall
19 be deemed to have been abandoned by the owner of such personal property and may be disposed
20 of by the purchaser or transferee of the property after [60] days of storage at another location.
21 No mortgagee or its successors or assigns or purchaser shall be liable for any such storage or
22 disposal of personal property.

23 ~~(de)~~ The completion of a foreclosure sale pursuant to subsection (a) or (b) terminates the
24 rights of the homeowner or any other person to redeem the property under other law of this state.

Drafters' Notes

1. This Section provides for an expedited public sale of the mortgaged property after a determination that the mortgaged property is abandoned. In a judicial foreclosure, the court must order the sale to take place no longer than ___ days after the court enters its order finding the property to be abandoned, unless the creditor agrees to a later sale date. In a nonjudicial foreclosure, the creditor may select the date, provided it is no sooner than [___] days after the written determination of abandonment.

2. This Section does not authorize a disposition of abandoned property other than public sale, but other dispositions are available under other sections of this Act. For example, the homeowner and creditor may agree to a negotiated transfer to the creditor in lieu of foreclosure pursuant to Sections 501 to 504 [cash for keys agreement].

3. Once a creditor decides to take advantage of the expedited foreclosure procedure allowed by this Section, there is a public interest in ensuring that the property becomes occupied as soon as reasonably possible. For this reason subsection (c) does not allow the creditor to suspend indefinitely its efforts to consummate the foreclosure. There may be exceptional circumstances in which it is not feasible to hold the foreclosure sale within 60 days of the judicial order or written determination finding the property to be abandoned, as required by subsection (a) and (b).

Subsection (c) poses the substantial question of what consequences should flow from the failure of the creditor to comply with its requirements. On the one hand, it would clearly be inappropriate to impose an obligation on a creditor to repair the property subject to the mortgage before the creditor has taken possession or an official determination is made that the property is abandoned. Certainly, the lending community would object to a statutory duty to maintain property on which it holds a mortgage in those instances where the lender would prefer to release its mortgage and forego any interest in that property.

On the other hand, the consequences of a creditor's failure to either commence and complete a foreclosure action or to release its mortgage, on other stakeholders in the abandoned property – including the fee owner, the municipality and neighbors in which the abandoned property is located, and where appropriate, a homeowners association - are very real. The act as drafted resolves these conflicting policies by offering the lender a choice of how it wishes to proceed.

4. In states that afford the homeowner and other persons a statutory right of redemption after completion of a foreclosure sale, subsection (d) serves to terminate those redemption rights.

1 **SECTION 507. MAINTENANCE OF ABANDONED PROPERTY.**

2 (a) In this section, “maintain” means to:

3 (1) care for the yard and exterior of any building on the property, including
4 removing excessive foliage growth that diminishes the value of surrounding properties;

5 (2) prevent trespassers or squatters from remaining on the property;

6 (3) prevent mosquito larvae from growing in standing water; and

7 (4) take any other actions needed to prevent conditions on the property that create
8 a public or private nuisance.

9 (b) If a creditor is the plaintiff in a judicial-foreclosure proceeding, that creditor is
10 obligated to maintain the property beginning when the court renders an order finding that the
11 mortgaged property is abandoned property pursuant to Section 505(c).

12 (c) If a creditor institutes a nonjudicial-foreclosure proceeding, that creditor is obligated
13 to maintain abandoned property beginning when a determination in a record that the mortgaged
14 property is abandoned property pursuant to Section 505(d) is issued.

15 (d) In the absence of a judicial order under subsection (b) or a determination under
16 subsection (c), a creditor that has commenced foreclosure proceedings is obligated to maintain
17 the mortgaged property beginning when it receives notice that a governmental entity has issued a
18 determination, finding, or order stating that the mortgaged property is abandoned property and is
19 in a condition that poses a threat to public safety or health.

20 (e) The creditor’s obligation to maintain abandoned property continues until the property
21 is conveyed through foreclosure to a purchaser other than the creditor or the creditor records a
22 release of its mortgage.

23 (f) A creditor that is obligated to maintain abandoned property may enter the property

1 peacefully and cause others to enter the property peacefully for the limited purpose of inspection,
2 repair, and maintenance as required by this section. All reasonable expenses incurred by a
3 creditor pursuant to this section are an obligation of the homeowner and are secured by the
4 mortgage.

5 (g) A person that enters abandoned property for a purpose described in subsection (f) is
6 not liable to the homeowner for trespass or for damage to the property resulting from causes
7 other than the person's negligence or willful misconduct.

8 (h) The following persons have the right to enforce the obligations created by this section
9 in an action:

10 (1) a governmental subdivision that has jurisdiction of the mortgaged property;

11 [or]

12 (2) a homeowners association, condominium association, or cooperative
13 association, if the property is subject to the rules of the association. [: or

14 (3) a community development corporation serving the area where the mortgage
15 property is located.]

16 (i) The obligation of a creditor to maintain abandoned property is limited to that stated in
17 this section. If a creditor becomes the owner of the property, the creditor's obligations with
18 respect to the property are determined by law of this state other than this [act]. A creditor does
19 not become a mortgagee in possession of the property by virtue of the creditor's performance of
20 the obligations stated in this section.

21 **Drafters' Notes**

22
23 1. This Section requires creditors to maintain abandoned properties under
24 certain circumstances. The obligation may arise based upon action of the creditor
25 or action of the municipality or other governmental entity where the property is
26 located. The creditor does not become obligated to maintain merely by

1 commencing foreclosure proceedings at a time when the dwelling unit is vacant.
2 Rather, the obligation arises when the creditor seeks to use the expedited
3 foreclosure procedure authorized by Section 505 and obtains either a judicial
4 order or official determination that the property is abandoned. Under subsection
5 (c) the obligation may also arise any time after the creditor has commenced
6 foreclosure proceedings if the municipality or other local governmental entity
7 cites the property as both abandoned and presenting a threat to public safety or
8 health.
9

10 2. Subsection (e) defines the scope of the creditor's obligation to maintain
11 abandoned property. The focus is on the outward appearance of the property,
12 including yards and other exterior spaces, and other conditions that are likely to
13 have significant impacts on the neighborhood, such as interior spaces frequented
14 by squatters or persons engaged in criminal activities. This subsection is modeled
15 closely on Cal. Civ. § 2929.3(b), enacted in 2008.
16

17 3. Subsection (f) grants a license to the creditor and to its agents or
18 contractors to enter abandoned property for the purpose of inspection, repair, and
19 maintenance, regardless of whether that right is reserved in the mortgage.
20 Similarly, this subsection authorizes the addition of the creditor's reasonable
21 maintenance expenses under this section to the debt secured by the mortgage,
22 regardless of whether the mortgage contains a provision to that effect.
23

24 4. Subsection (h) provides for enforcement by the local government that
25 has jurisdiction over the abandoned property. When the property is located in a
26 common-interest community, it also provides standing for the association as a
27 means to protect neighboring property owners whose interests are likely to be
28 harmed by the creditor's failure to maintain the property. In conferring standing
29 both to the local government and to owners' associations, this subsection follows
30 the approach taken by N.Y. Real Prop. Acts. § 1307(3), enacted in 2009. This
31 subsection does not grant a direct enforcement right to neighbors. If negatively
32 impacted, such persons may have a remedy under other laws, such as public or
33 private nuisance.
34

35 5. At common law a creditor who takes possession of mortgaged property
36 prior to the completion of foreclosure becomes a "mortgagee in possession," who
37 by virtue thereof undertakes a number of obligations to the homeowner with
38 respect to maintenance and care of the property. Subsection (i) expressly
39 provides that a creditor who enters the property for the purpose of complying with
40 its obligations under this Section does not assume the liabilities of a mortgagee in
41 possession.

1 [ARTICLE] 6

2 REMEDIES

3 SECTION 601. EFFECT OF VIOLATION.

4 (a) In a judicial foreclosure proceeding, if a creditor or servicer is shown to have
5 committed a material violation of this [act], the court may dismiss the action, stay the action on
6 appropriate terms and conditions or impose other appropriate sanctions until the violation is
7 cured. Dismissal must be without prejudice unless the court determines that a new foreclosure
8 action would unfairly burden the homeowner.

9 (b) In a non judicial-foreclosure proceeding, a homeowner or obligor may initiate an
10 action to enjoin or restrain the foreclosure on the grounds that a creditor or servicer committed a
11 material violation of this Act. If the court finds that a material violation of this [act] occurred, the
12 court shall nevertheless allow foreclosure to continue after the violation is cured, unless the court
13 determines that continuation of the foreclosure action would unfairly burden the homeowner.

14 (c) If a material violation of this [act] is established pursuant to subsection (a) or (b), the
15 creditor may not add to the amount of the obligation any attorney's fees or costs incurred as a
16 result of the violation, before it cures the violation.

17 (d) A homeowner or obligor injured by a violation of this [act] may bring an action in
18 [court] for actual damages sustained by the homeowner or obligor against a person that caused
19 the violation.

20
21 (e) In addition to the damages recoverable under subsections (d), a homeowner or obligor
22 may recover, as the court may allow, statutory damages not exceeding \$[15,000] in the case of a
23 pattern or practice of noncompliance. In determining whether to award statutory damages and the
24 amount of statutory damages under this subsection, the court shall consider, among other

relevant factors:

(1) the frequency and persistence of noncompliance [in dealing with the homeowner][in its business practices] by the creditor or servicer;

(2) the nature of the noncompliance, and

(3) the extent to which the noncompliance was intentional.

(f) An action for damages brought under this section must be commenced not later than one year after the violation on which it is based.

(g) In opposing the imposition or amount of statutory damages for violations of the act established by the obligor or homeowner, the creditor, servicer or its agent may show that:

(1) the violation was due to a mistake, other than a mistake of law, that occurred notwithstanding reasonable procedures established to preclude such mistakes, or

(2) before the action was brought, the creditor or servicer discovered and cured the violation.

~~[(h) **Alternative A**: No class action shall be permitted pursuant to sub-sections (e) and (f) of this section]~~

~~— **Alternative B**: In the case of a class action alleging a claim arising under subsections (e) or (f), an award may not exceed an amount equal to the sum of—~~

~~(A) any actual damages to each of the borrowers in the class as a result of the failure; and~~

~~(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not greater than \$1,000 for each member of the class, except that~~

~~(C) the total amount of damages under this subparagraph in any class action may not exceed the lesser of—~~

1 ~~(i) \$500,000; or~~
2 ~~(ii) 1 percent of the net worth of the creditor or servicer.]~~
3 ~~[Alternative C]: Delete subsection (h) in its entirety so that this act remains silent on~~
4 ~~the issue of class actions and the viability of any potential class action would then depend on~~
5 ~~other state law.~~

Drafters' Notes

1. At the November 13 meeting the Committee voted to delete former subsection 601(e) providing for minimum damages for all violations. Further, a motion to delete subsection 601(f) failed but consensus seemed to favor removing references to “punitive” damages.

2. The statutory damages for individuals under subsection (e) (former subsection (f)) have been amended to require a pattern or practice of noncompliance, similar to the RESPA provision for statutory damages.

3. The comments should be expanded to discuss the circumstances under which a permanent bar to foreclosure under either subsections (a) or (b) would be appropriate and cite cases where that extraordinary relief has been granted. Examples would include cases where the creditor or servicer has repeatedly violated this act or other law, or other aggravating circumstances.

4. Actual damages incurred by a homeowner or obligor under this section may include damages for emotional distress. Whether or not the homeowner may claim that damages caused by a servicer are chargeable to the creditor who retained the servicer under theories of agency or employer/employee law is not determined by this act but by other law.

5. Under subsection (a), before confirmation of the foreclosure sale, the homeowner may raise a material violation of the statute - for example, a materially inaccurate notice of the amounts needed to cure a default – as a basis for asking the court to prevent the foreclosure sale (or confirmation), until the violation has been corrected and remedied. If the creditor can cure the violation in a timely way so that full compliance is achieved, it would then be appropriate under this section for the foreclosure may proceed.

However, after a foreclosure sale, under established principles of real estate law, unless the homeowner under state law has an independent right of redemption, a bona fide sale purchaser is entitled to rely on the conclusive effect of the sale, and the homeowner’s only remedy for violations of the statute would be to seek damages from the foreclosing creditor or any other remedy allowed

1 under state or federal law; *see* Section 602.

2
3 **SECTION 602. DEFENSE OR REMEDY UNDER OTHER LAW.** Nothing in this

4 [act] displaces any defense or remedy a homeowner or obligor may have under federal law or
5 law of this state other than this [act].

6 **Drafter's Note**

7 This act preserves rights and defenses available to homeowners and obligors
8 under other state statutes, regulations, common law, and federal law. In many
9 states, such rights and defenses include payment or tender of payment; discharge;
10 contract law defenses, including forgery, lack of capacity, duress, absence or
11 failure of consideration, fraud, misrepresentation, unconscionability, failure of a
12 condition precedent; equitable defenses such as estoppel, laches, or unclean
13 hands; release by cancellation of debt; a violation by a creditor, servicer, their
14 predecessors in interest, or their agents of unfair and deceptive trade practices
15 statutes and other consumer protection statutes; a defect in a mortgage resulting
16 from a failure to comply with statutory requirements for the execution of
17 mortgages; a determination that the creditor or its predecessor in interest was not
18 licensed under state mortgagee licensing statutes or was not legally authorized to
19 make the loan under federal law; and breach of the duty of good faith and fair
20 dealing.

21
22 **SECTION 603. PROCEDURE FOR ASSERTING DEFENSE IN NONJUDICIAL**
23 **FORECLOSURE.**

24 (a) A homeowner or obligor may bring an action against a creditor or servicer asserting a
25 defense to a nonjudicial foreclosure. [An action to enjoin a foreclosure sale must be brought
26 before the sale.]

27 **Drafter's Note**

28 The bracketed language in subsection (a) complements the 1-year limitations
29 period in section 601(f) for damage actions.

30
31 (b) In an action under this section, if the court determines that a defense to the nonjudicial
32 foreclosure exists, the court may render an order that is just and equitable under the
33 circumstances, including an award of any remedy provided in Section 601.

1 **SECTION 604. ATTORNEY’S FEES AND COSTS.** In an action in which a party
2 seeks a remedy under Section 601 based on a violation of this [act], or asserts a defense or
3 remedy under Section 602 or a defense under Section 603, the court shall award the costs of the
4 action and reasonable attorney’s fees to the prevailing party.

5 **SECTION 605. ENFORCEMENT BY [ATTORNEY GENERAL].** In addition to
6 enforcing any remedies available under other law, the [attorney general or other state official or
7 agency] may bring an action to enjoin a pattern of violating this [act]. In such an action the court
8 may issue an injunction or order against a creditor, servicer, their agents, or any other person
9 violating this [act], which may include requiring steps to be taken to remedy violations or the
10 payment of damages to aggrieved homeowners. In such an action, the court may assess a civil
11 penalty of not less than \$[____] nor more than \$[____].

12 **SECTION 606. EFFECT OF THE HOLDER IN DUE COURSE RULE IN**
13 **FORECLOSURES.**

14 **INTRODUCTION AND CHAIRMAN’S NOTES OF 3-24-2014**

15 Following the San Diego meeting, a Working Group was appointed to address the
16 Holder In Due Course issue. The group consisted of the following persons:

17 **Drafting Committee**

18 Bill Breetz
19 Tom Buiteweg
20 Barry Hawkins
21 James Smith, Co-Reporter
22 Barry Nekritz, American Bar Assn advisor

23 **American Law Institute**

24 Teresa Harmon
25 Neil Cohen
26
27
28
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The group met twice, once at the offices of FHFA in Washington on March 12 and a second time at the offices of the New York Federal Reserve Bank on March 20. All members of the Group participated either in person or by telephone in at least one meeting, and most members participated in both meetings. The group benefitted from the involvement of two observers who had not previously participated in our deliberations: Laura Johnson from the CFPB, and John Snook from the Mortgage Bankers Association.

The Group made limited progress in resolving the several sub-issues embedded in the HDC debate.

1. Whatever changes may be ultimately be made to the HDC rule would apply only to the foreclosure of mortgages signed after the effective date of the act.

3. As a general matter, there was consensus that this Act should not attempt a wholesale abrogation of the Holder In Due Course doctrine as applied to foreclosure of residential real estate mortgages.

1. What should the statute of limitations or time limit be with respect to the ability of a borrower to assert defenses to a foreclosure? The lender representatives proposed one year, while borrower advocates sought six or seven years. Neither group supported Mr. Nekritz's suggestion of four or five years.

1 Indeed, at one point, Mr. Nekritz asked why there should be any time limit
2 imposed on a borrower's ability to raise defenses to an action?
3

4 2. Current CFPB regulations provide a 'safe harbor' from most borrowers'
5 claims if the mortgage satisfies the standards of a 'qualified mortgage' ("QM").
6 [The final text of the May draft will include those QM standards]. Lenders
7 proposed to exempt all QMs from any change in the HDC rule; others present
8 resisted that position. Mark Greenlee suggested that other 'prime mortgage'
9 standards might prove a useful 'redline' and Tom Cox was prepared to consider
10 some excluded mortgages – though not all QMs - where the HDC rule might be
11 preserved.
12

13 3. Regardless of excluded mortgages, and regardless of the statute of
14 limitations issues, the most fundamental lack of consensus centered on two issues:
15

16 a. **First**, whether the original mortgage broker or loan originator's alleged
17 'bad act' [for example, misrepresenting the interest rate, whether the rate was
18 fixed or adjustable, whether the borrower would be able to re-finance] was either:
19 (i) 'material' to the borrower's default; or (ii) had a 'nexus' with the borrower's
20 default. Some stated it as (iii) a 'but for' standard – that is, would the borrower
21 not have defaulted 'but for' the bad act. Each of these presents a different
22 approach to the problem.
23

24 b. **Second**, could the lender have discovered the 'bad act' by the exercise of
25 due diligence' – a standard likely to exclude most forms of verbal mis-
26 representations or fraud – a considerable challenge.
27

28 **C. Other efforts to find possible agreement** 29

30 1. Between the two meetings, an effort was made to draft a procedure under
31 which borrower claims that possibly could be raised to delay a foreclosure ("the
32 broker lied about my interest rate") but would not commonly justify a dismissal of
33 the action [such as full payment] might be treated under a procedure such as the
34 following:
35

36 (i) first, the economic benefit to the borrower could be tentatively valued
37 (e.g., if true, the monthly payment would be reduced by \$100 /month) and
38

39 (ii) if the borrower could afford the reduced monthly mortgage payment
40 based on the alleged bad act, the foreclosure would be deferred while waiting for
41 a prompt resolution of the alleged facts; but
42

43 (iii) if the borrower could not afford even the reduced payment, the
44 foreclosure would proceed under some expedited process (unless there were other
45 issues raised) and the value of the alleged claim, even if proved, would only affect
46 the amount of the debt, rather than the validity of the foreclosure.

1 This approach was perceived as too complex and the resources to fund the
2 'prompt' resolution of the claim viewed as non-existent.

3
4 2. Some efforts were made to determine whether any form of insurance or
5 reserve fund might exist or be created to which all claims now excluded by the
6 HDC rule might be referred. However, no insurance or reserve fund options arose
7 during the course of the deliberations.

8
9 3. We discussed whether it would be possible to implead the original 'bad
10 actor' into the foreclosure proceeding; this suggestion did not meet with
11 enthusiasm.

12
13 4. Concern was expressed that any state might be reluctant to be the first to
14 enact any new limitation on the HDC rule, since lenders might refuse to make
15 loans in that state, either for competitive reasons or as a means of intimidating
16 other states. To avoid this outcome, a suggestion was made that we draft a
17 'springing' HDC limitation statute which would only become effective if a certain
18 number of states adopted the statute.

19
20 5. After the San Diego meeting and in anticipation of the Working Group's
21 efforts, Reporter Smith prepared the yellow-highlighted language that appears
22 below. Sub-section (b) would allow three specific types of claims that would
23 become exceptions to the HDC rule: that is, claims that either:

- 24
25 1. Were material to the original loan transaction;
26 2. Would allow rescission of the original transaction; or
27 3. Could have been discovered through due diligence.

28
29 This 'middle ground' solution – supported by the Reporters, the American Bar
30 Association advisor and the Chair - was not acceptable to the lender
31 representatives.

32
33 **END OF INTRODUCTORY REMARKS**

34
35 **SECTION 606. EFFECT OF THE HOLDER IN DUE COURSE RULE IN**
36 **FORECLOSURES.**

37 (a) Notwithstanding [insert reference to State UCC 3-305] and any agreement by the
38 homeowner or obligor, [REPORTER/CHAIR/ABA ADVISOR PROPOSAL] a creditor who
39 forecloses under this [act] is subject to all claims and defenses described in subsection (b) that
40 the obligor or homeowner could assert against the initial holder of the obligation.

1 (b) In foreclosure, an obligor or homeowner may assert any claim or defense that:

2 (i) is material to the original loan transaction,

3 (ii) would allow rescission of the original loan transaction [the comment would
4 note that this would be based on fraud, misrepresentation or breach of promise]; or

5 (iii) could reasonably have been discovered in the exercise of due diligence by the
6 holder at the time it acquired the obligation.

7 (c) If the foreclosing creditor is a holder in due course under [insert reference to State
8 UCC 3-305], an obligor or home owner may not assert a claim or defense more than ['x'] years
9 after the execution of the obligation; provided, if the claim or defense relates to an adjustment of
10 the interest rate on the obligation or a prepayment fee, the time for asserting the claim or defense
11 shall expire [x] years after the creditor sends notice of an interest rate adjustment or the
12 imposition of a prepayment fee.

13 ~~(d) If the party initiating the foreclosure is not the original creditor of the obligation or its~~
14 ~~agent, foreclosing creditor is a holder in due course under [insert reference to State UCC 3-305],~~
15 any recovery by the obligor or homeowner shall not exceed ~~a recoupment or set-off against the~~
16 total outstanding balance due on the ~~mortgage~~ obligation.

17 (e) This section ~~only~~ applies to obligations ~~secured by mortgages on residential property~~
18 ~~in this state which are entered into~~ incurred after the ~~date this [act] becomes effective date of~~
19 this [act]. ~~effective in this state.~~

20 Reporters' Notes

21 -
22
23 1. This alternative represents a middle-ground position between preservation of
24 the status quo and complete abrogation of the HDC doctrine, along the lines of the
25 Federal Trade Commission Regulation (16 CFR Part 433) that protects consumers
26 who finance the purchase of goods or services.
27

1 2. This alternative (1) caps the liability of the transferee to the outstanding loan
2 balance, (2) imposes a clear statute of limitation, (3) applies only prospectively,
3 and (4) preserves only certain claims and defenses: those material to the loan
4 transaction, those that justify equitable rescission, and those discoverable by due
5 diligence.

6
7 3. If the act limits the HDC doctrine, a choice must be made as to whether the
8 defense only restricts foreclosure, or whether the defense also applies to
9 enforcement of the instrument (assuming the obligor is personally liable to pay
10 the obligation). This language takes the broader approach, the same as the FTC
11 regulation - by making the creditor "subject to" claims and defenses, those claims
12 and defenses, when proven, offset the amount due on the obligation.
13

14 ~~-(a) Notwithstanding [insert reference to State UCC §3-305], and any agreement by~~
15 ~~the homeowner or obligor, when a party with the right to foreclose under Section 401 initiates~~
16 ~~foreclosure, the homeowner or obligor may assert any claim or defense that the debtor could~~
17 ~~assert against the original creditor of the obligation secured by the mortgage. If the party~~
18 ~~initiating the foreclosure is not the original creditor of the obligation or its agent, any recovery by~~
19 ~~the homeowner or obligor shall not exceed a recoupment or set-off against the total outstanding~~
20 ~~balance due on the mortgage obligation.~~

21 ~~-(b) Whether the party who initiates foreclosure is the original creditor of the obligation~~
22 ~~secured by the mortgage or a subsequent holder of that obligation, the homeowner or obligor~~
23 ~~may not assert a claim or defense in the foreclosure if the claim or defense would be barred by a~~
24 ~~statute of limitations if asserted in a foreclosure action by the original creditor of the obligation.~~

25 ~~-(c) This section only applies to obligations secured by mortgages on residential property~~
26 ~~in this state which are incurred after the date this [act] becomes effective in this state.~~

1 [ARTICLE] 7

2 MISCELLANEOUS PROVISIONS

3 SECTION 701. PRE-EFFECTIVE DATE TRANSACTIONS.

4 (a) Except as otherwise provided in this Section, this [act] applies to the foreclosure of a
5 mortgage within its scope, even if the mortgage was created before this [act] takes effect.

6 (b) This [act] does not affect a foreclosure commenced before this [act] takes effect.

7 **Drafters' Note**

8
9 This Act applies to the foreclosure of mortgages created before the effective date
10 of this Act, unless the creditor has taken action to foreclose before the effective
11 date.

12
13 SECTION 702. REPEALER.

14 (a) The following acts and parts of acts are hereby repealed:

15 [List statutes and parts of statutes to be repealed.]

16 (b) In addition to the statutes specifically repealed under subsection (a), all other acts and
17 parts of acts inconsistent with this Act are hereby repealed.

18 **Drafters' Notes**

19
20 1. Subsection (a) of this section should be separately prepared for each
21 state. In each state it is necessary to pay careful attention to how this Act is to be
22 blended with existing state law. The statutes to be specifically repealed will
23 include statutes relating to notices of default, intent to accelerate, and the right to
24 cure to be sent to homeowners; notices and standards for mediation and other
25 types of facilitation; determination of who has the right to commence foreclosure;
26 and advertisement and notices of foreclosure sales; confirmation of sales. Given
27 the scope of this Act, which is limited to residential foreclosures, care should be
28 taken not to repeal statutes to the extent they should continue to apply to non-
29 residential foreclosures. In some instances, instead of repeal it may be useful to
30 amend other state statutes to limit their scope to foreclosures that are not within
31 the scope of this Act.

32 2. At the same time, this Act was drafted with the expectation that existing
33 state foreclosure procedures would remain in place. This Act is not intended to
34 displace all existing foreclosure laws in each state, but rather to be an overlay on
35 existing law. For example, and most fundamentally, the Act does not anticipate

1 or provide that a state employ a judicial foreclosure process when the customary
2 practice is to foreclose under a power of sale procedure, nor does the Act
3 contemplate that a state should enact a non-judicial foreclosure process in the
4 absence of existing state laws. It is for that reason that the legislative drafters in
5 each state should carefully consider how best to integrate the provisions of the
6 Act with existing state laws governing the foreclosure process.
7

8 3. In addition to the listed specific sections repealed by this Act,
9 subsection (b) provides for the repeal of all other legislation in this state which
10 is inconsistent with this Act. This provision is necessary to resolve those matters
11 that may ultimately be presented to a court in construing the Act in cases where
12 the specific repealer in subsection (a) fails to note an existing state statute which
13 the court concludes is inconsistent with a provision of this Act.
14

15 **SECTION 703. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

16 applying and construing this uniform act, consideration must be given to the need to promote
17 uniformity of the law with respect to its subject matter among states that enact it.

18 **SECTION 704. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**
19 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the
20 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but
21 does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
22 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
23 U.S.C. Section 7003(b).

24 **SECTION 705. EFFECTIVE DATE.** This Act takes effect on [insert date].

Appendix to Article 3

Home Foreclosure Procedures Act Model Facilitation Program Rules

1. These rules apply to the foreclosure facilitation program under [Article 3 of the Home Foreclosure Procedures Act.] “Agency” means the facilitation agency. The agency is [name of court or agency]. All provisions referring to “creditor” include “servicer” as defined in [the HFPA].
2. The purpose of the foreclosure facilitation program is to assist a creditor and a homeowner to reach a voluntary agreement that avoids foreclosure and achieves a sustainable default resolution or mitigates damages in cases where foreclosure is unavoidable.
3. The facilitation notice required by §302 of the HFPA may be sent [at any time no later than 30 days after the creditor sends the notice required by §201][no later than 30 days after the creditor files a complaint in foreclosure.] The notice shall instruct the homeowner to contact the agency to request facilitation at the telephone number [or e-mail address] designated from time to time on the [agency web site][official journal].
4. If a homeowner requests facilitation, the agency shall open a foreclosure facilitation case. Within five days of the request the agency shall send notice to the homeowner and creditor [by mail, by electronic mail] to provide the agency with required documents and information for the facilitation process. The document exchange notice to the homeowner shall also include a list of available housing counseling agencies that can assist the homeowner.
5. The agency shall schedule a facilitation meeting within 60 days after the homeowner’s request for facilitation.
6. The document exchange notice to the homeowner shall instruct the homeowner to submit to the agency and the creditor necessary and relevant documents including
 - a) Documents showing income qualification for a loan modification, including copies of pay stubs, W-2 forms, social security or disability income, retirement income, child support income, or other income that the homeowner believes is relevant to the homeowner’s ability to repay the mortgage,
 - b) Documents supporting any dispute regarding the existence or amount of any mortgage loan default,
 - c) Documents relating to any prior loan modification or other prior agreement regarding the mortgage loan and
 - d) Documents relating to any pending request to modify the loan or negotiate a settlement of the delinquency.
7. Homeowners who are renting the property (other than to family members) are not eligible for facilitation. The document exchange notice to the homeowner shall state that the homeowner who is renting the property or holding it for rental is not eligible for facilitation, and that the

homeowner must return a signed non-investor certification form provided by the agency, together with the required facilitation fee, in order to participate in facilitation.

8. The document exchange notice to the creditor shall instruct the creditor to submit to the agency and the homeowner necessary and relevant documents including

- a) Any 45-day notice and 5-day notices required by CFPB rule 12 CFR §1024.39(b) and §1024.41(b)(2)(i)(B) previously sent to the homeowner in connection with the current default,
- b) Any prior offers of loss mitigation, forbearance, modification or other agreements made with the homeowner in connection with the current default,
- c) a list of documents required by the creditor to evaluate the homeowner's request for loss mitigation,
- d) The homeowner's payment history from the date of default,
- e) Itemization of all amounts due on the loan, including all fees,
- f) copies of the promissory note, signed by the mortgagor, including any endorsements, allonges, amendments, or riders that show the mortgage debt,
- g) any lost note affidavit the creditor will rely on to foreclose the mortgage.

9. The agency or facilitator may request additional documents from either party as appropriate. Either originals or copies of documents may be exchanged for the facilitation. The facilitator and the agency will not resolve disputes regarding authenticity of documents.

10. The homeowner and creditor shall provide the documents requested by the agency no later than 10 days after the sending of the document exchange notice.

11. The creditor shall communicate to the agency and the homeowner the identity of the individual who will represent the creditor at the facilitation session at the time it provides the required documents.

12. Within fourteen days after receiving the homeowner's request, the agency shall send [mail, electronic] notice to the creditor and homeowner that shall include:

- (1) The name and contact information of the assigned facilitator,
- (2) The date, time, and location of the facilitation session,
- (3) Information about the conduct of the facilitation session, and
- (4) Consequences and penalties for noncompliance with program rules.

13. Before accepting appointment as facilitator, the facilitator shall (a) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the facilitator, including a financial or personal interest in the outcome of the facilitation and an existing or past relationship with a party to the facilitation or foreseeable participant in the facilitation, and (b) disclose such known fact to the parties as soon as is practical before the facilitation meeting. If, after accepting a facilitation, a facilitator learns any fact that a reasonable individual would consider likely to affect the impartiality of the facilitator, including a financial or personal interest in the outcome of the facilitation and an existing or past relationship with a party to the

facilitation or foreseeable participant in the facilitation, the facilitator shall disclose it as soon as is practical.

14. The facilitator's role is to assist the parties with information exchange, communication and negotiation to insure that every reasonable effort has been made to reach a voluntary agreement to resolve the alleged mortgage default in some manner other than a foreclosure sale.

[15. The facilitator may charge each party a fee of [\$200]].

16. At least [10] days prior to the facilitation session, the creditor must notify the facilitator and homeowner of any decision to offer or not offer any loss mitigation options to the homeowner. The creditor shall provide the facilitator with documentation supporting its decision not to offer a loss mitigation alternative to the homeowner. The creditor shall also provide the facilitator with inputs and the results of the net present value calculations relied upon in reaching its decision. The facilitator may request the creditor to provide additional documentation to support its decision.

17. The homeowner is entitled to have an attorney, housing counselor or other person of the homeowner's choosing accompany the homeowner to and participate in the facilitation meeting.

Note – The term 'housing counselor' is included only as an example and without a definition because the term 'other person' would include any representative the homeowner chooses

18. If the homeowner fails without good cause to substantially and timely provide the documents specified by the facilitator or the agency, or to attend the facilitation meeting, or if the agency determines that the homeowner requesting facilitation is not occupying the property as his or her primary residence, the agency shall [enter an order][request the court to enter an order] terminating the facilitation process and permitting foreclosure to proceed pursuant to the HFPA §304.

19. If the creditor fails without good cause to substantially and timely provide the documents specified by the facilitator or the agency, or to appear at the facilitation meeting with authority to act on any available loss mitigation alternatives, the agency shall [enter an order][request the court to enter an order] extending the facilitation period and the stay of foreclosure pursuant to the HFPA §304.

20. The parties are required to appear in person at the facilitation session and shall have the authority to enter into a settlement to resolve the dispute. The creditor's representative must have the ability to evaluate loss mitigation and to have the authority to make a decision as required by the RESPA regulations of the Consumer Financial Protection Bureau. However, upon written request provided to the facilitator at least 30 days prior to the facilitation session, the facilitator may waive the requirement of having the parties physically present at the facilitation session and allow them to appear by telephone or teleconference.

21. The parties shall create a signed record of any agreements reached during facilitation. The

facilitator shall ensure that any agreement reached by the parties at the facilitation session or during facilitation is promptly confirmed in a record and signed by all parties.

22. Within ten days from the conclusion of the facilitation session, the facilitator shall file a record with the agency, reporting whether the parties were present at the session, complied with Section 303 of the Act and all program rules, and whether the parties reached any agreement. The facilitator shall also send the record to the parties.

23. Upon receipt of the facilitator's report, the agency shall close the case.

24. Sanctions for violations of these rules, pursuant to Article 6 of the HFPA, may be imposed only by a court of competent jurisdiction upon motion of either party and after notice and an opportunity to be heard.

25. All personal financial information as defined by [section of Act] disclosed by the parties in the course of the facilitation is confidential and not subject to public disclosure under [state freedom of information or sunshine laws] or any other state law.

26. The agency shall provide ongoing training for facilitators. This includes participation by all facilitators in a mandatory training session on an annual basis.

27. The agency shall prepare and submit to the legislature annually, twenty days prior to the convening of each regular session, a report containing an evaluation of the operation and effects of the program. The report shall include a summary of the cases handled by the program, including the type and frequency of different outcomes, recommendations for changes, modifications, or repeal of the program or parts thereof with accompanying reasons and data.

28. The agency or facilitator may recommend or require in appropriate cases that the homeowner tender monthly payments equal to at least 50% of the contractual mortgage payment to the lender or to the agency as a condition of the facilitation.

29. The lender or creditor may at any time request, pursuant to HFPA §302(a)(2), an order permitting the foreclosure to proceed on the basis that the homeowner has materially failed to comply with rules and requirements of facilitation. The agency shall act on the request no later than 30 days after receiving the request.

[Court facilitation programs in judicial foreclosures][30. The appearance of the homeowner or obligor at a facilitation session will constitute an entry of appearance in the foreclosure action.]