

DRAFT  
FOR DISCUSSION ONLY

# HOME FORECLOSURE PROCEDURES ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAW

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For May 16-17, 2014 Committee Meeting

*Without Prefatory Note and with Reporters' Drafting Notes*

*Final Meeting Draft - Clean*

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May 6, 2014

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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;

12                               (B) physically secured and used or held for use by the homeowner as a vacation  
13 home or seasonal home; or (C) physically secured and the subject of a probate action, action to  
14 quiet title, or other litigation in which ownership is contested.

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

21                   (3) “Creditor” means a person that has the right to foreclose a mortgage under Section  
22 401(b). The term does not include a person that does not own, hold or service more than five  
23 mortgages at the time the notice required by Section 201 is sent.

1 **Drafters' Notes**

2  
3 1. The last sentence of the definition of 'creditor' is an attempt to address  
4 Dale Whitman's and other comments to exclude 'mom & pop' lenders or one-off  
5 seller financing.  
6

7 2. The alternative (i.e., the "or has the right to enforce" clause) is useful for  
8 the time being due to the alternatives for section 401. We could define creditor as  
9 a person who has commenced foreclosure, but that doesn't work because we are  
10 imposing some duties on lenders before commencing foreclosure. We dropped the  
11 language referring to agents, services, and assigns: It is now "buried" in "other  
12 person"; to the extent we need to address issues involving services, agents, and  
13 assigns, we think it belongs elsewhere.  
14

15 3. We should consider the status of mortgage insurers, and other cases;  
16 perhaps we can define guarantors separately and then include them in substantive  
17 provisions only when appropriate.  
18

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

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

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

24 **Drafters' Note**

25 This definition limits the expenses that a foreclosing party may impose on a  
26 borrower in connection with the foreclosure process to 'reasonable' expenses, even  
27 if other law of the state would allow expenses which would otherwise not satisfy  
28 that standard. The definition contemplates that these allowable expenses would  
29 include the reasonable costs of all typical foreclosure expenses, including such  
30 costs as sending notices, advertising, title searches, inspections and examinations  
31 of the mortgaged property, management and securing of the mortgaged property,  
32 insurance, filing and recording fees, attorney's fees and litigation expenses incurred  
33 to the extent provided in the mortgage or authorized by other law, appraisal fees,  
34 the fee of the person conducting the sale in the case of a foreclosure by auction, the  
35 fee of a court-appointed receiver, and other expenses reasonably necessary to the  
36 foreclosure.  
37

38 (5) "Facilitation" means the assistance of a third-party neutral at an in-person meeting or  
39 other communication where the parties and facilitator can simultaneously hear one another with

1 the objective of reaching an agreement between the creditor and the obligor for a commercially  
2 reasonable alternative to foreclosure.

### 3 **Drafters' Note**

4  
5 The definition of 'Facilitation' requires at least one 'in-person' meeting or  
6 other communication between the parties and a third-party neutral. The alternative  
7 requirements of either an 'in-person' meeting or other form of electronic  
8 communication contemplates the continuation of the practice in many jurisdictions  
9 that, as an alternative to a 'face-to-face' meeting, the parties may meet by  
10 telephone, video conference or other electronic means so long as all the parties and  
11 the neutral are able to simultaneously hear or communicate with one another.  
12

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

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

20 (8) "Holder" means the person in possession of a negotiable instrument that is payable  
21 either to bearer or to an identified person in possession of a negotiable instrument.

### 22 **Drafters' Note**

23  
24 The definition of 'holder' is taken from revised Article 1: UCC § 1-201(b)(21)(A)  
25 and the terms 'bearer' and 'identified person' have the same meanings in this act as  
26 in the UCC. The definition of 'holder' in unrevised Article 1 has slightly different  
27 language, but is the same in substance.  
28

29 (9) "Homeowner" means a person owning an interest in mortgaged property, other than a  
30 mortgage, lien, easement, servitude, or leasehold, whether or not the person is an obligor.



1 **Drafters' Notes**

2  
3 At the November meeting, there were suggestions from several persons for more  
4 expansive comments; please let the Reporters know of any desired additional  
5 comments.

6  
7 (10) "Loss mitigation" means an alternative to foreclosure offered by a creditor to a  
8 homeowner in default or facing imminent default.

9 **Drafters' Note**

10  
11 The comments will be expanded to make clear that 'loss mitigation' includes such  
12 actions as a repayment plan, forbearance agreement, loan modification, short sale,  
13 partial mortgage insurance claim, negotiated transfer and deed in lieu of  
14 foreclosure.

15  
16 (11) "Mortgage" means a consensual interest in residential property which secures an  
17 obligation. The term does not include a lien that secures an obligation owed to a homeowner's  
18 association in a common interest community.

19 (12) "Mortgage agreement" means a record that creates a mortgage.

20 **Drafters' Note**

21  
22 In this Act the term "mortgage" refers to the lien held by the creditor, which secures  
23 payment of the obligation, whereas the term "mortgage agreement" refers to the  
24 writing or other record that memorializes the parties' agreement and creates the  
25 mortgage. Depending upon local usage and custom, the mortgage agreement may  
26 be denominated as a mortgage, deed of trust, trustee deed, security deed, deed to  
27 secure debt, or the like.

28  
29 (13) "Mortgage registry" means an electronic registry, created pursuant to federal law, of  
30 holders of the right to enforce mortgages and obligations secured by mortgages which maintains  
31 the records of those mortgages and obligations pursuant to standards designed to ensure that the  
32 record of each mortgage and obligation is unique, identifiable, and unalterable.

33 (14) "Mortgaged property" means residential property that is subject to a mortgage, and  
34 any personal property held or used in connection with the residential property that is subject to

1 the mortgage.

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

4 [(16) “Nonjudicial foreclosure” means a foreclosure that proceeds without judicial  
5 process pursuant to [insert statutory reference.]

6 **Drafters’ Note**  
7

8 In states that allow one or more types of nonjudicial foreclosure of residential  
9 mortgages, the drafter should insert a reference to the relevant statute or statutes  
10 here. In states that do not allow nonjudicial foreclosure, this definition should be  
11 deleted, along with references to “nonjudicial foreclosure” elsewhere in this Act.  
12

13 (17) “Obligation” means a debt or other duty or liability of an obligor secured by a  
14 mortgage.

15 **Drafters’ Note**

16 The definition of an obligation includes a non-recourse debt, whether the debt is  
17 non-recourse due to the application of anti-deficiency judgment legislation,  
18 agreement of the parties or for other reasons.  
19

20 (18) “Obligor” means a person that, with respect to an obligation:

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

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

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

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

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

29 (20) “Record”, used as a noun, means information that is inscribed on a tangible medium

1 or is stored in an electronic or other medium and is retrievable in perceivable form.

2 (21) “Residential property” means real property improved with not more than four dwelling  
3 units. The term includes an attached single-family unit, a single-family manufactured-housing  
4 unit treated as real property under law of this state, a time share in residential property if that time  
5 share is treated as real property under law of this state, real property on which construction of not  
6 more than four dwelling units has commenced, and a single-family unit in a common-interest  
7 community. The term does not include a parcel of real property that was used or is intended to be  
8 used primarily for non-residential purposes such as farming, commercial, or industrial use when a  
9 mortgage was created.

#### 10 **Drafters’ Note**

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

16  
17 2. The term “residential property” does not include property rented or held  
18 for rental by the owner when the mortgage is created, unless an owner personally  
19 occupies at least one dwelling unit. If the property is owner-occupied when a  
20 mortgage is created, the property remains to be “residential property” under this  
21 Act notwithstanding an owner’s subsequent conversion of the property to rental  
22 property.

23  
24 (22) “Servicer” means a person responsible for servicing an obligation, including a person  
25 that makes, holds or owns an obligation if that person also services the obligation.

26 (23) “Servicing” means:

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

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

1 servicing contract, or

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

#### 4 **Comment**

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

8  
9 (24) “State” means a state of the United States, the District of Columbia, Puerto Rico, the  
10 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the  
11 United States.

#### 12 **Drafters’ Notes**

13 1. In some states, a land sale installment contract does not constitute a  
14 ‘mortgage’, with all the attendant consequences for homeowners and creditors,  
15 until a specified percentage of the original principal amount has been paid to the  
16 creditor. In Illinois, for example, that percentage is 50% of the original principal  
17 amount. In those States where the issue arises, statutory drafters should make  
18 appropriate amendments to this act to track existing practice in that state.

19  
20 2. Whether mortgaged property is “abandoned property” is determined by  
21 the facts of each case. The factors listed in Section 505(a) are not exclusive. The  
22 core question is whether the homeowner is presently in possession of the property.  
23 The question must be answered by evaluating the facts related to the homeowner’s  
24 use of the property.

25  
26 3. The definitions of “mortgage” and “obligor” refer to the payment of an  
27 obligation, and do not use the phrasing found in UCC Article 9 definitions that  
28 includes “payment or other performance” of obligations. Almost always the basis  
29 for a residential mortgage foreclosure is the failure to pay a monetary obligation.

30  
31 **SECTION 103. SCOPE.** This [act] applies to the foreclosure of a mortgage on  
32 residential property in this state.

#### 33 **SECTION 104. DUTY OF GOOD FAITH; COMMERCIAL REASONABLENESS.**

34 A creditor, servicer, obligor, or homeowner shall comply in good faith with the requirements of

1 this [act]. “Good faith” means honesty in fact and the observance of reasonable commercial  
2 standards of fair dealing. In addition, a creditor or servicer shall proceed in a commercially  
3 reasonable manner in complying with the requirements of this Act.

#### 4 **Drafters’ Notes**

5  
6 For statutory duties that include explicit and precise rules for their performance,  
7 such as the time period for sending notices under §§201 and 402, a creditor’s failure  
8 to implement a different rule cannot violate the “commercially reasonable”  
9 standard when the precise rule has been followed. On the other hand, the good faith  
10 standard would bar dishonest conduct that is literally in compliance, for example,  
11 seeking an abandoned property determination under §505 for a home the creditor  
12 knows is not abandoned, although it may meet the statutory criteria that give rise to  
13 a presumption of abandonment.  
14

#### 15 **SECTION 105. CERTAIN ACTS PROHIBITED.** A creditor may not:

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

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

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

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

24 (C) the obligor is not eligible for loss-mitigation options when loss-mitigation  
25 options are available and the creditor has not evaluated those options .

#### 26 **SECTION 106. APPLICATION OF LOCAL REGULATIONS.**

27 (a) [Notwithstanding (insert reference to any applicable ‘Home Rule’ provisions under  
28 the law of this state)] no ordinance or regulation of a municipality, county or other political  
29 subdivision in this state may impose regulations, restrictions or limitations on the process of

1 foreclosure or the rights and obligations of creditors, servicers, homeowners, or obligors that  
2 conflict with the provisions of this [act].

### 3 **Comment**

4  
5 This section provides for limited conflict preemption of local laws. For example,  
6 local laws or ordinances imposing responsibilities for abandoned properties inconsistent  
7 with Article 5, or providing for facilitation procedures inconsistent with those in Article 3,  
8 would be preempted.  
9

10 Otherwise, however, municipal ordinances generally applicable to real estate in a  
11 municipality would not be affected by this act, regardless of who owns the property, and  
12 therefore will apply with equal force to real estate owned by homeowners or lenders.  
13

14 Accordingly, for example, a local ordinance mandating the maintenance of yards  
15 and blighted property would apply with equal force to a blighted property whether or not  
16 owned by a homeowner or creditor, and an ordinance enabling a municipality to repair  
17 blighted property and lien the property for the costs of the work, if it were otherwise lawful  
18 under applicable state law, would not be barred by this section.  
19

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

26 **[SECTION 108. NO WAIVER.** Except as otherwise provided in section 501 or  
27 elsewhere in this [act], provisions of this [act] that give rights to an obligor or homeowner or  
28 impose duties on a creditor may not be waived or varied by agreement.]

### 29 **Drafters' Notes**

30 The Committee might discuss whether there are other provisions of the Act that should  
31 permit waiver.  
32

1           **SECTION 109. KNOWLEDGE AND NOTICES.**

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

3           ‘Organization’ means a person other than an individual.

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

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

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

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

18                                     **Drafter's Note**

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

21           **SECTION 110. SUPPLEMENTAL PRINCIPLES OF LAW.** Unless displaced by  
22 the particular provisions of this [act], the principles of law and equity, including the law relative  
23 to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion,  
24 mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.  
25

1 **Drafters' Note**

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

10  
11 **[ARTICLE] 2**

12 **NOTICES; RIGHT TO CURE**

13 **SECTION 201. NOTICE OF DEFAULT AND RIGHT TO CURE.**

14 (a) A creditor may not commence foreclosure until 30 days after the creditor sends  
15 separately to each obligor a notice of default and right to cure.

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

17 (1) the nature of the default, including a statement, as of the date of the notice, of  
18 all past-due payments, fees, and other charges owed to the creditor;

19 (2) the specific action the obligor must take to cure the default, including the  
20 exact amount that must be paid;

21 (3) the date by which the default must be cured, which date shall be not less than  
22 30 days from the date the notice is sent;

23 (4) that if the obligor does not cure, the creditor may demand payment of the full  
24 amount due, not just past-due payments, and may foreclose the mortgaged property;

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

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



1 (7) the names of (i) the creditor and the particular facts that establish the  
2 creditor's right to foreclose; (ii) the servicer, if different; and (iii) the owner of the obligation if  
3 the creditor is acting on behalf of the owner;

4 (8) that the obligor may request a copy of the negotiable instrument or other  
5 evidence of the obligation and a copy of any record required to demonstrate the right to foreclose  
6 as provided in Section 401; and

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

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

#### 10 **Drafters' Notes**

11  
12 1. The itemization of the amount due as of the notice date is a critical piece  
13 of information for the homeowner or obligor and should be stated as exactly as  
14 possible. The amount included for attorneys' fees should be limited to those  
15 accrued prior to the date of the notice, and thus should not include retainers or  
16 advances to attorneys that would be refunded in the event of a prompt cure.

17  
18  
19 2. The mortgage obligation may be accelerated by filing a complaint,  
20 scheduling a sale, or by separate notice of acceleration – the notice of intent to  
21 foreclose does not by itself accelerate the debt. The notice need not refer to  
22 acceleration if the creditor does not intend to accelerate the obligation, for example  
23 if it is fully matured. The definition of "foreclosure" in section 102 includes other  
24 legal methods that may be used to terminate the homeowner's interest in the  
25 mortgaged property, such as a quiet title or ejectment action in the case of an  
26 installment land sale contract.

27  
28 3. Items (1) through (6) are adapted from the elements of notice in the  
29 standard Fannie/Freddie mortgage negotiable instrument. Item (3) adds a specific  
30 deadline to cure the default. Items (7) and (8) are the ownership statement required  
31 by the national servicing settlement, and call for the servicer to identify its basis for  
32 standing at the outset of foreclosure proceedings, so that any disputes can be  
33 resolved promptly. This notice would not displace all state-specific aid programs  
34 and counseling notices which necessarily will depend on state funding – for  
35 example, Pennsylvania requires a separate 30-day notice of how to apply for its  
36 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 “occupant” at the address of the mortgaged property. If the obligor or the obligor’s representative has requested to receive notice by electronic mail and has provided an electronic-mail address to the creditor, the notice also must be sent by electronic mail to the electronic-mail address.

## Drafters' Notes

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

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

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

(b) An obligor may cure a default other than the payment of a sum of money at any time

not later than two business days before a scheduled or postponed foreclosure sale. (b) To cure a default under this section, an obligor must:

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

(2) perform or tender performance of any other duty under the obligation or mortgage agreement that would have been due in the absence of default or acceleration;

(3) tender all expenses of foreclosure that are specified in a record provided by the creditor and that accrued before tender; and

(4) tender any late fees, if provided for in the mortgage or obligation and permitted by other law.

(c) Cure of a default under subsection (b) restores the obligor to the same position under the mortgage and the obligation it secures as if the default had not occurred.

(e) Nothing in the Section impairs any greater rights to cure a default that the obligor may have under the terms of the mortgage agreement or the record that creates the obligation.

Nothing in this Section limits the right of an obligor to redeem the mortgaged property by paying the full amount of the accelerated obligation at any time prior to the completion of the foreclosure sale.

#### **Drafters' Notes**

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

2. The statutory right to cure provided by this section may not be waived by contract. In the event of a dispute between the creditor and a homeowner or obligor

1 concerning the amounts needed to cure, or any nonmonetary performance that may  
2 be claimed as due, either party may seek declaratory relief from an appropriate  
3 court, and if appropriate, a temporary stay of any foreclosure sale to resolve the  
4 cure dispute.

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

13  
14 **SECTION 204. UNKNOWN HOMEOWNER OR OBLIGOR.**

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

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

18 (2) the identity of the person.

19 (b) If the creditor knows the identity of a homeowner or obligor but does not know the  
20 homeowner or obligor's current address, notice to the homeowner or obligor must be delivered  
21 to the address of the mortgaged property.

22 **Drafters' Notes**

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

28  
29 **CHAIR'S NOTE** – The following text and Drafter's Notes comprising Article 3,  
30 together with the Model Facilitation Program Rules attached as an the Appendix to  
31 this Draft, represent the drafting efforts of a Working Group on Article 3. The  
32 initial drafting was done by Co-Reporter Alan White in collaboration with  
33 Commissioner Kent; the other members of the Working Group who either  
34 commented on the draft, participated in a discussion via conference call or both,  
35 included Commissioner Walters, Judith Fox (Notre Dame Law School) and Megan  
36 Michiels (American Bankers Assn).  
37

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 achieving  
18 a commercially reasonable alternative to foreclosure, resulting in an agreement  
19 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 timing  
24 and design, and exist in both judicial and nonjudicial foreclosure states. Most  
25 programs in judicial foreclosure states call for intervention after a foreclosure  
26 complaint is filed. While most stakeholders recognize that starting mediation or  
27 facilitation earlier in the process would increase the chances of success and reduce  
28 costs, most existing state laws do not provide a means to initiate facilitation before  
29 the judicial process begins. Pre-foreclosure facilitation permits early sorting of  
30 foreclosure cases, into those where the homeowner wants to find a solution other  
31 than foreclosure, and those cases that are uncontested or where there is no realistic  
32 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

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

7  
8 **SECTION 302. NOTICE OF FACILITATION.**

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

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

24 (c) If there is no procedure for the agency to send notice, the creditor shall send a notice  
25 of facilitation to each homeowner and obligor, in the same manner as required for the notice  
26 under Section 201, before a creditor or servicer may request entry of a default or foreclosure  
27 judgment or give a notice of a judicial or nonjudicial-foreclosure sale. Subject to the agency's

1 rules, the notice shall be sent before or after commencement of a foreclosure action.

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

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

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

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

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

#### 14 **Drafter's Note**

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

21  
22 If the property is not abandoned, but the agency or court determines that the  
23 homeowner has rented the dwelling unit to a person other than a family member,  
24 the obligor and homeowner are not eligible for facilitation, under §303. However,  
25 the creditor or agency must still send the notice of facilitation. If the agency  
26 determines, based on the obligor's request for facilitation or other information, that  
27 the property is rental property, it must then permit foreclosure to proceed, under  
28 §304.  
29

1           **SECTION 303. ELIGIBILITY; PARTICIPATION IN FACILITATION.**

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

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

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



1 The agency may charge a fee to either or both parties.

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

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

6 (1) without good cause to timely attend a meeting;

7 (2) without good cause to provide, before a scheduled meeting, documents and  
8 information required by facilitation agency rules or reasonably requested by a facilitator;

9 (3) to designate a person with authority to reach a settlement agreement, if such  
10 authority exists;

11 (4) without good cause to pay any required facilitation fee;

12 and

13 (5) on the part of a creditor or servicer, to advise the homeowner, obligor and  
14 facilitator of any loss-mitigation option that is available to the homeowner or obligor or to  
15 consider the homeowner or obligor for the loss-mitigation option before or during facilitation.

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

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

20 (h) Personal financial information exchanged during facilitation is confidential and not  
21 subject to disclosure under [state FOIA or sunshine laws]. Neither the agency nor the facilitator  
22 shall be required to respond to any discovery requests in any litigation other than the foreclosure  
23 action, were the discovery seeks personal financial information of a homeowner or obligor

1 exchanged during facilitation.

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

#### 4 **Drafters' Notes**

5  
6 1. Abandoned properties are not eligible for facilitation and no notice  
7 of facilitation to an abandoned property is required. Investors who are renting a  
8 property otherwise covered by this Act are also ineligible for facilitation, but notice  
9 must be sent to the property prior to foreclosure. A homeowner must certify that  
10 the property is not a rental property in order to request facilitation. Existing  
11 foreclosure mediation programs generally limit eligibility to owner-occupants. *E.g.*  
12 N.Y. C.P.L.R. §3408 (“foreclosure . . . in which the defendant is a resident of the  
13 property”); Conn. Public Act No. 11-201 (applies to residential real property  
14 defined as “a one-to-four family dwelling occupied as a residence by a mortgagor”);  
15 see also 12 C.F.R. §1024.30(c)(2) (loss mitigation notice and appeal rules only  
16 apply to a mortgage loan that is secured by a property that is a borrower’s principal  
17 residence).

18  
19 2. As provided in Section 301, the facilitation agency rules and orders  
20 may impose additional requirements on the parties, for example requiring the  
21 creditor, servicer or its agent to appear in person or to have a person with authority  
22 to approve loss mitigation alternatives available by telephone at the time of the  
23 facilitation session, to perform a net present value analysis, to disclose the  
24 assumptions on which the analysis is based, or requiring homeowners to meet with  
25 a housing counselor to qualify for facilitation. The agency will also regulate  
26 procedural matters, such as time limits for exchanging documents, scheduling and  
27 concluding facilitation meetings, reports by facilitators, and the like. States should  
28 continue to have flexibility in the design and implementation of facilitation  
29 programs, but should establish and publish the standards as required by section 301.  
30 The model rules and best practices principles of facilitation set forth following  
31 Section 304 should aid state facilitation agencies in designing their programs.

32  
33 3. The Reporter is preparing a definition of ‘personal financial information’, a  
34 term used Section 303(h).

#### 35 **SECTION 304. FORECLOSURE ACTIONS DURING FACILITATION.**

36  
37 (a) After the agency or creditor has sent notice of facilitation to a homeowner or obligor,  
38 a creditor may, subject to other law, commence a foreclosure, but may not file a default or  
39 dispositive motion in a foreclosure action, or schedule or cause to be scheduled a foreclosure sale

1 unless:

2 (1) the homeowner or obligor does not respond to the facilitation notice by  
3 making a request for loss mitigation to the agency not later than 30 days after the sending of the  
4 facilitation notice;

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

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

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

17 (c) The facilitation agency or court may impose appropriate conditions, including the  
18 payment of reasonable fees and costs of facilitation or tender of periodic payments by the  
19 homeowner to either the lender or the agency

#### 20 **Drafters' Notes**

21  
22 1. Numerous states have recently enacted mandatory facilitation or loss  
23 mitigation laws whose object is to delay or prevent foreclosure until the homeowner  
24 has had the opportunity to request loss mitigation or facilitation: Arkansas Act 885  
25 (2011) Sec 3, Ark Code 18-50-104 (beneficiary must certify to selling attorney or  
26 trustee that it has notified homeowner of ineligibility for loss mitigation options  
27 before nonjudicial sale); California Assembly Bill 278 (enacted July 11, 2012,

1 prohibits foreclosure when loan modification request is pending); Idaho Code 45-  
2 1506, HB 331 Idaho now requires notice of right to apply for loan modification and  
3 bars nonjudicial sale until creditor responds to homeowner's request); Indiana Act  
4 170 of 2011 (same; also prohibits servicer or attorney fees for facilitation or loss  
5 mitigation); Massachusetts Chapter 194 of Acts of 2012 ( creditor must offer  
6 mortgage modification prior to foreclosing, if modification would maximize value  
7 for mortgagee); Michigan Compiled Laws §3205a (amended Act 302 of 2011);  
8 Nevada Rev. Stat. §107.086; Washington Chapter 58 Laws of 2011, amending  
9 RCW 61.24 (delays foreclosure 90 days if homeowner requests meeting with  
10 creditor to request loss mitigation, and for cases referred by housing counselor to  
11 facilitation, until the parties comply with duty to mediate in good faith). Requiring  
12 a complete facilitation process prior to initiation of foreclosure allows necessary  
13 foreclosures to go forward promptly and efficiently after cases suitable for other  
14 resolutions are identified and resolved.

15  
16 2. Subsection (a)(3) contemplates a variety of situations where, notwithstanding  
17 the 90-day waiting period before foreclosure may be commenced under subsection  
18 (b), either the court or facilitation agency may enter an order permitting foreclosure  
19 to proceed in less than 90 days. Examples of particular situations that might warrant  
20 such an order may include a case where the homeowner has already agreed to vacate  
21 the property, or has unequivocally declined to participate in facilitation, or if  
22 emergency conditions short of abandonment would justify an accelerated  
23 foreclosure.

24  
25 4. Subsection (b) contemplates a variety of situations where the 90 day waiting  
26 period before foreclosure may be finalized should be extended. Examples of  
27 particular situations that might warrant such an order include cases where the  
28 servicer has failed to evaluate a homeowner's completed request for loss  
29 mitigation in a timely manner, has failed to comply with material aspects of  
30 federal servicing regulations, 12 CFR §1024.41, or has requested additional  
31 documents from the homeowner late in the facilitation process.

32  
33 5. Revised subsection (c) responds to a suggestion made by Barry Hawkins at the  
34 January 2014 Drafting Committee meeting that we consider a requirement that  
35 the borrower who elects facilitation make monthly payments to the facilitation  
36 agency for the duration of the facilitation. This draft makes the requirement  
37 optional for the agency. A possible amount, or upward limit, of 50% of principal  
38 and interest was mentioned. Such facilitation payments by borrowers may  
39 ameliorate the fiscal impact on the state of the facilitation program. Borrowers  
40 presently have a disincentive to resume making payments to lenders after a  
41 default leads to pending foreclosure. Thus, this fee would not deprive lenders  
42 of funds that they presently collect. Lenders should benefit because the fee may  
43 filter out borrowers who simply want to buy time, with no realistic expectation  
44 that retaining the property is possible. Lenders will often benefit from the cases  
45 that result in loss mitigation agreements that avoid the costs of foreclosure.

1 [ARTICLE] 4

2 RIGHT TO FORECLOSE; SALE PROCEDURES

3 SECTION 401. RIGHT TO FORECLOSE.

4 (a) A person described in subsection (b) may commence a foreclosure only after default  
5 in the obligation and satisfaction of all conditions required by the mortgage agreement and by  
6 law.

7 **Drafters' Notes**

8 1. This act does not define events of default. Instead, like UCC Article 9,  
9 this act leaves the definition of default to contract law. The obligation may be  
10 state in a promissory note (i.e., an obligation to make monthly installment  
11 payments) or in another instrument such as the mortgage agreement.  
12

13 2. In subsection (a), the phrase 'other law' includes this act as well as  
14 other law of this state and any other applicable laws.  
15

16 3. The conditions referred to in this subsection are those indicated in the  
17 mortgage agreement or under other law as necessary to accomplish before the  
18 commencement of foreclosure.  
19

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

23 **Drafters' Notes**

24 1. Subsection (b)(1) resolves the problem of who has standing to foreclose  
25 by designating the person who is entitled to enforce the obligation, to be determined  
26 under other law. When the obligation is evidenced by a negotiable instrument,  
27 Article 3 of the Uniform Commercial Code provides the governing rules. When  
28 the obligation is not evidenced by a negotiable instrument, law other than Uniform  
29 Commercial Code Article 3 will determine who is entitled to enforce the obligation.  
30 One example of other law is the Uniform Electronic Transactions Act (UETA),  
31 which grants to a person having control of a "transferable record" the rights to  
32 enforce a promissory note evidenced by an "electronic record," as those terms are  
33 defined in that act.  
34

1 (2) If the obligation is registered in a mortgage registry, the only person who may  
2 commence a foreclosure is the person designated as entitled to foreclose by the mortgage registry  
3 as of the time the foreclosure is commenced.

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

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

9 (2) a statement that the negotiable instrument has been lost, destroyed, or stolen,  
10 in which case the [complaint] must include a lost-negotiable-instrument affidavit that complies  
11 with Section 403.

12 If the obligation is not evidenced by a negotiable instrument, the [complaint] must include a copy  
13 of the records evidencing the obligation and the creditor's right to enforce the obligation.

14 (d) In any foreclosure proceeding, the creditor may, in a record, authorize another person  
15 to foreclose. The [complaint] described in subsection (c) must disclose the name of both the  
16 creditor and the name of the person authorized by the creditor to foreclose.

17 (e) If an obligation is evidenced by a negotiable instrument and a creditor does not own  
18 the obligation, the [complaint] described in subsection (c) must disclose the name of the owner  
19 of the obligation.

## 20 **Drafters' Notes**

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

1 Prof. Dale Whitman and by others.

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

10 The draft also makes conforming changes in subsections 401(a), 401 (b),  
11 401(c) and 401(d) by making, in each case, appropriate references to subsection  
12 (g).

13  
14 2. This section designates the “person entitled to enforce” a negotiable  
15 instrument under revised UCC Article 3 as the person with the right to foreclose  
16 the mortgage. Section 401(b)(1) follows the language of UCC § 3-301, which  
17 defines who is “person entitled to enforce” a negotiable instrument. When the  
18 payee of the negotiable instrument has retained possession of the instrument, that  
19 person has the right to foreclose. When the payee has transferred possession of the  
20 negotiable instrument to another person, the facts must be examined to determine  
21 who has the right to enforce the note. The subsequent possessor may become a  
22 holder under UCC Article 3 by obtaining a special indorsement or blank  
23 indorsement, but this section does not require that a subsequent possessor become  
24 a holder in order to acquire the right to foreclose. Such a subsequent possessor may  
25 be entitled to enforce the note, but will have to allege and prove facts that are  
26 sufficient to establish the right to enforce.

27  
28 3. Subsection (b)(2) includes situations in which the secured obligation is  
29 evidenced by an instrument that is not negotiable and situations in which the  
30 obligation is not evidenced by any type of instrument authenticated by the debtor.  
31 As an example of the former, an owner may sign a promissory note that has terms  
32 that makes the note nonnegotiable. As an example of the latter, under the law of  
33 some states an installment land contract creates a mortgage relationship between  
34 the parties, in which the vendee’s obligation to pay the price usually is not reflected  
35 in a negotiable instrument. In all such cases, the owner of the obligation who has  
36 the right to foreclose will be either the original obligee or an assignee.

37  
38 4. In judicial foreclosure, under existing law the creditor generally must  
39 confirm possession or account for possession of the original note at the time of  
40 filing or prior to the foreclosure sale. In some nonjudicial foreclosure states, the  
41 law appears not to require confirmation of possession of the original note prior to  
42 commencement of foreclosure proceedings or the sale. This section requires that  
43 the foreclosing person have possession of the negotiable instrument prior to the  
44 commencement of foreclosure, whether the proceeding is judicial or nonjudicial,

1 unless that person prepares a lost note affidavit meeting the requirements of Section  
2 4-103.

3  
4 5. The decision in subsection (b)(1) to require foreclosure by the holder of  
5 a negotiable instrument, paired with the decision in subsection (b)(2) to require  
6 foreclosure by the owner of other obligations, seeks to reach an appropriate balance  
7 between the interests and expectations of borrowers, lenders, and their assignees. It  
8 recognizes the traditional importance of qualifying as a holder of a negotiable  
9 instrument under Article 3, and seeks to protect borrowers by ensuring that  
10 proceeds of foreclosure sales will discharge the obligation. With respect to  
11 obligations evidenced by non-negotiable instruments and other writings, possession  
12 of those writings, although sometimes important, generally has less significance.  
13 Thus, section (b)(2), by authorizing foreclosure by the owner of such an obligation,  
14 makes irrelevant the possession of a non-negotiable promissory note or another  
15 writing such as the mortgage agreement or an installment land contract.

16  
17 Although this distinction seems beneficial, the two-tier system does have  
18 some costs, including but not limited to complexity. By authorizing the holder of a  
19 negotiable instrument to foreclose, sometimes the power is conferred upon a person  
20 who has no economic stake in the obligation or the collateral. The holder, however,  
21 will usually have an obligation, created by contract or other law, to the owner who  
22 does have an economic stake, giving it some incentive to behave properly.

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

45  
46 6. This section does not state a separate rule for determining when a creditor



1 who holds a security interest in a note to secure an obligation owed to the creditor  
2 has the right to foreclose. UCC Article 9 covers both sales of instruments and  
3 assignments of instruments that secure an obligation of the assignor. A creditor  
4 who takes possession of a negotiable instrument will acquire the right to foreclose.  
5 Other law determines when a creditor who takes possession of an instrument that  
6 is not negotiable to secure an obligation owed to the creditor acquires the right to  
7 foreclose. For example, UCC § 9-607(a) and (b) provide rules indicating when a  
8 secured party has the right to collect on collateral and to enforce the debtor's rights  
9 with respect to property that secures obligation owed to the debtor (i.e., the  
10 obligation to pay the mortgage loan to the debtor).  
11

12 7. Multiple persons may hold the right to foreclose a mortgage. Other law,  
13 including UCC Article 3 and the law of agency, determines whether the right to  
14 foreclose may be exercised by fewer than all such persons.  
15

16 8. When the obligation is owned by a trust, the owner of the obligation for  
17 purposes of this Section is the trustee, not the beneficial owner or owners of the  
18 trust property.  
19

20 9. Under subsection (c) the creditor's production of the original negotiable  
21 instrument is not necessary at the time of the filing of a complaint in a judicial  
22 foreclosure. Production of the original would later become appropriate if, during  
23 the course of the proceedings, the homeowner or obligor seeks further  
24 demonstration of the copy's authenticity or the whereabouts of the original.  
25 Similarly, in a nonjudicial foreclosure, if there are subsequent judicial proceedings,  
26 a court may decide to order production of the original instrument if necessary to  
27 resolve a particular issue.

28 10. Subsection (e) authorizes the person who has the right to foreclose to  
29 exercise that right through an agent. By requiring a description of the agency it  
30 does not permit the principal to remain undisclosed. An agent authorized to  
31 foreclose may be a loan servicer who has a pre-existing contractual relationship  
32 with the creditor, or any other person appointed at any time. If the secured  
33 obligation is evidenced by a negotiable instrument, the agent or the principal (the  
34 person entitled to enforce the note) may hold and retain possession of the note.  
35 Subsection (e) is not intended to change existing laws that authorize a third person,  
36 such as a trustee under a deed of trust, to foreclose in nonjudicial proceedings. In  
37 such circumstances, subsection (e) allows the beneficiary to appoint an agent, but  
38 does not speak to the procedure for appointing a substitute trustee.  
39

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

1 to the assignor.

2  
3 **SECTION 402. TRANSFER OF RIGHT TO ENFORCE MORTGAGE.**

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

6 (b) If a transfer of the right to enforce an obligation is accompanied by a separate  
7 assignment of the mortgage, the assignment may be recorded in the [office in which mortgages  
8 are recorded], but recordation is not required for the assignee to foreclose the mortgage pursuant  
9 to Section 401.

10 **Drafters' Notes**

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

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

28  
29 2. When the foreclosing party is not the originating creditor there is  
30 conflicting state law, both in judicial foreclosure and nonjudicial foreclosure states,  
31 as to (1) whether the foreclosing party must have an express assignment of the  
32 mortgage, or a chain of assignments running back to the original mortgagee, and  
33 (2) whether that assignment or the chain of assignments must be recorded in the  
34 county land records.

35  
36 In some states, a statute explicitly requires a recorded assignment. E.g., Ga.  
37 Code § 44-14-162: "The security instrument or assignment thereof vesting the

1 secured creditor with title to the security instrument shall be filed prior to the time  
2 of sale in the [county land records].” In many states, judicial decisions going in  
3 both directions interpret statutes that do not on their face provide immediately  
4 obvious answers to these questions. E.g, In re Vasquez, 266 P.3d 1053 (Ariz. 2011)  
5 (recording assignments of deeds of trust is not required, although trustee must  
6 record notice of trustee’s sale); U.S. Bank Nat. Ass’n v. Ibanez, 941 N.E.2d 40  
7 (Mass. 2011) (requiring written chain of assignments).

8  
9 Subsection (b) adopts the position that an express assignment is  
10 unnecessary; note that subsection (a) implies an assignment upon a transfer of the  
11 obligation. In addition, subsection (b) adopts the position that recordation of an  
12 assignment (or notice of an implied assignment) is not a prerequisite for  
13 foreclosure.

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

## 20 21 **SECTION 403. LOST, DESTROYED, OR STOLEN NEGOTIABLE**

### 22 **INSTRUMENT; AFFIDAVIT.**

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

26 (1) either (A) the creditor was entitled to enforce the instrument when loss of  
27 possession occurred, or (B) the creditor has directly or indirectly acquired ownership of the  
28 instrument from a person who was entitled to enforce the instrument when loss of possession  
29 occurred;

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

32 (3) the creditor or servicer cannot reasonably obtain possession of the instrument  
33 because the instrument was destroyed, its whereabouts cannot be determined, or it is in the

wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

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

(b) If a creditor relies upon a lost, destroyed, or stolen negotiable instrument as the basis for its right to foreclose, the notice of intent to foreclose sent under Section 201 must state that the instrument is unavailable and set forth information establishing the creditor's right to foreclose under subsection (a). In a nonjudicial-foreclosure proceeding, the notice must further

(1) advise the homeowner or obligor that there may be a risk that a person other than the creditor will seek to enforce the instrument and that 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 and

(2) include the indemnity described in subsection (c).

#### **Drafters' Notes**

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

If the original note is lost or otherwise unavailable, Servicer shall comply with applicable law in an attempt to establish ownership of the note and the right to enforcement. Servicer shall ensure good faith efforts to obtain or locate a note lost while in the possession of Servicer or Servicer's agent and shall ensure that Servicer and Servicer's agents who are expected to have possession of notes or assignments of mortgage on behalf of Servicer adopt procedures that are designed to provide assurance that the Servicer or Servicer's agent would locate a note or assignment of mortgage if it is in the possession or control of the Servicer or Servicer's agent, as the case may be. In the event that Servicer prepares or causes to be prepared a lost

1 note or lost assignment affidavit with respect to an original note or  
2 assignment lost while in Servicer's control, Servicer shall use good faith  
3 efforts to obtain or locate the note or assignment in accordance with its  
4 procedures. In the affidavit, sworn statement or other filing documenting  
5 the lost note or assignment, Servicer shall recite that Servicer has made a  
6 good faith effort in accordance with its procedures for locating the lost  
7 note or assignment.  
8

9 2. In a non-judicial foreclosure proceeding, the additional content for the  
10 notice is required because the homeowner or obligor is unlikely to appreciate the  
11 risk associated with lost instruments, and it is unlikely that a court will consider the  
12 issue unless the homeowner or obligor initiates consideration.  
13

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

#### 24 **Drafters' Note**

25 The act does not detail what form of any additional protection might be adequate  
26 in a particular case, since the court will determine the adequacy of needed  
27 additional protection in any given case. If the creditor has sufficient financial  
28 solvency, normally the indemnity would be adequate. On the other hand, if the  
29 foreclosing party were a single purpose entity with no assets other than the  
30 mortgage being foreclosed, the court might require a bond, letter of credit, or a  
31 parent guarantee.

32 (d) In a judicial-foreclosure proceeding, the creditor shall file an affidavit attesting to  
33 facts that establish the creditor's right to foreclose under subsection (a) with the [complaint].

1 The creditor shall provide the indemnity described in subsection (c) no later than the foreclosure  
2 sale. A particular phrasing of the affidavit is not required. The following form of affidavit, when  
3 completed, provides sufficient information:

4 INSERT SAFE HARBOR LOST NOTE AFFIDAVIT HERE  
5

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

8 **Drafter's Note**  
9

10 This section requires a lost-note affidavit in a judicial foreclosure proceeding, thus  
11 following the procedure adopted by most states in their judicial foreclosure laws.  
12 The act does not require the preparation of a lost-note affidavit in a non-judicial  
13 foreclosure proceeding. If an action is filed to contest or to confirm a non-judicial  
14 foreclosure, the court should have the discretion to decide what proof of a lost,  
15 destroyed, or stolen negotiable instrument is sufficient.  
16

17 **Drafters' Notes**  
18

19 1. Subsection (a) deals with the problem of lost or destroyed promissory  
20 notes by requiring the preparation of an affidavit. The substance of this requirement  
21 follows the 2002 amendments to Article 3. In specifying when a creditor is entitled  
22 to enforce a negotiable instrument secured by a mortgage notwithstanding its  
23 inability to confirm possession of the instrument, subsection (a) tracks the  
24 requirements of UCC § 3-309 (2002). In states that have adopted the 2002  
25 amendments to Article 3, Section 3-309 makes it clear that the person who lost  
26 possession may be a predecessor of the creditor who seeks to enforce the  
27 instrument.  
28

29 Most states have not yet adopted the 2002 amendments. Most of these states  
30 follow the 1990 Official Text of Article 3. In these states there are a few cases  
31 holding that the affidavit must be signed by the person who lost the note. Other  
32 cases, however, interpret that version of Article 3 to allow enforcement by a  
33 successor. See, e.g., *Atlantic Nat. Trust, LLC v. McNamee*, 984 So. 2d 375 (Ala.  
34 2007) (examining prior cases; holding that assignee of promissory note that was  
35 not in possession when lost may enforce the note). This subsection rejects the cases  
36 holding that the affidavit must be signed by the person who lost the note, adopting  
37 the position expressly taken in Revised Article 3, but does require that the affiant  
38 state certain facts on which the affidavit is made; *see* subsection (e).

39 2. In some states, the circumstances in which a creditor is allowed to enforce  
40 an unavailable negotiable instrument are broader than under either the 2002 version

1 or the earlier version of UCC § 3-309. E.g., Va. Code § 55-59.1(B) (“[i]f a note or  
2 other evidence of indebtedness secured by a deed of trust is lost or for any reason  
3 cannot be produced”). In some states, the circumstances are more restricted because  
4 the creditor’s affidavit must attest to additional facts. E.g., Md. Code, Real Prop. §  
5 7-105.1(f) (affidavit not sufficient unless it “(1) Identifies the owner of the debt  
6 instrument and states from whom and the date on which the owner acquired  
7 ownership; (2) States why a copy of the debt instrument cannot be produced; and  
8 (3) Describes the good faith efforts made to produce a copy of the debt  
9 instrument.”).

10  
11 3. When the loan documents executed by the parties did not include a  
12 negotiable instrument, the creditor seeking to foreclose may or may not possess an  
13 original writing or record (including a counterpart) that evidences the obligation.  
14 This section does not require an affidavit for a creditor who lacks possession of  
15 such an original record. Some states require “lost note affidavits” under these  
16 circumstances. E.g., Va. Code § 8.01-32 (“any past-due lost bond, note, contract,  
17 open account agreement, or other written evidence of debt”); Va. Code § 55-  
18 59.1(B) (“note or other evidence of indebtedness”).

19  
20 4. This section does not discuss the evidentiary effect of the affidavit in  
21 judicial proceedings. Some states have statutory law on point. For example, an  
22 Alabama statute provides that a lost note affidavit “must be received as presumptive  
23 evidence both of the contents and loss or destruction of such negotiable instrument,  
24 unless the defendant by answer, verified by affidavit, denies the execution of such  
25 bond, note or bill or the endorsement, acceptance, or the contents thereof, in which  
26 case proof of such execution, endorsement, acceptance, or contents must be made  
27 by the plaintiff.” Ala. Code § 6-5-284.

28  
29 5. Some statutes dealing with lost note affidavits appear to require an  
30 affidavit only if the creditor is unable to produce the original *or a copy* of the  
31 instrument.

32  
33 6. Subsection (b) follows UCC § 3-309(b), which requires adequate  
34 protection for the obligor from the risk that at some point in the future the  
35 instrument will surface and its possessor will assert the right to be paid. (UCC § 3-  
36 309(b) was not affected by the 2002 amendments to Article 3.) Subsection (b)  
37 requires that the affidavit include a written indemnity, binding the creditor, to  
38 protect all obligors against the risk that a person other than the creditor will seek to  
39 enforce the instrument. This indemnity serves to reinforce the rights that the obligor  
40 already has under principles of restitution and unjust enrichment. See, e.g.,  
41 Restatement (Third) of Restitution and Unjust Enrichment § 6 (2011): “*Payment of*  
42 *Money Not Due*. Payment by mistake gives the payor a claim in restitution against  
43 the recipient to the extent payment was not due.” In appropriate cases, a court may  
44 require a bond in addition to a written indemnity.  
45

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

2           (a) Mortgaged property may be sold at a public sale only after the creditor has published  
3 a commercially reasonable public advertisement of the sale. Whether the method or timing of  
4 publication of the advertisement is commercially reasonable is a question of fact. The public  
5 advertisement is commercially reasonable if:

6                   (i) published in a newspaper having general circulation in the [county] where the  
7 mortgaged property is located once per week for three consecutive weeks before the sale, with  
8 the first publication not more than 30 days before the sale or

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

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

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

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

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

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

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

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

23                   (7) the material terms of the sale, including payment terms required of the



1 successful bidder at the completion of the auction;

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

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

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

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

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

### 13 **Drafters' Notes**

14 1. This section allows a public sale of the mortgaged property only if the  
15 creditor first gives a commercially reasonable public advertisement. The purpose  
16 is to ensure that the public has a meaningful opportunity to learn of the proposed  
17 sale in order to appear and engage in competitive bidding. This section supersedes  
18 existing state laws covering advertisements for public sales for all foreclosures that  
19 are within the scope of this act.  
20

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

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

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

1           5. Traditionally the law required the advertisement of foreclosure sales in  
2 local newspapers. Subsection (a) allows the creditor to continue that practice, but  
3 no longer specifies newspaper advertisement as required or sufficient in all cases.  
4 Whether a newspaper advertisement alone is sufficient depends upon whether it is  
5 commercially reasonable under the facts, which must be determined based upon the  
6 nature of the property, the newspaper, and other local circumstances. Similarly,  
7 whether it is commercially reasonable for a creditor *not* to publish a newspaper  
8 advertisement, relying instead on other outlets, depends upon the facts. In many  
9 communities, newspaper advertisements are no longer an effective means of  
10 informing the public about upcoming foreclosure sales. Under these circumstances,  
11 a creditor's decision not to publish in a newspaper benefits both the creditor and  
12 the homeowner and any obligors by saving the expense.

13           Subsection (a) also creates a safe harbor regarding circumstances when an  
14 advertisement would be commercially reasonable. Specifically, the method of  
15 publication is commercially reasonable if the creditor publishes the public  
16 advertisement both in a local newspaper and with an appropriate Internet website.  
17 The Internet site may be one operated by the newspaper or by any other person,  
18 whether or not located in the jurisdiction where the mortgaged property is located.  
19 The Internet site, however, must be one that has characteristics suggesting that  
20 interested members of the public are likely to find and to read the posting. The safe  
21 harbor exists, however, only if period of time for newspaper and Internet  
22 advertisements, satisfies the standards in the act, which seek to ensure public access  
23 to the advertisement for approximately one month preceding the date of sale.  
24

25           6. Subsection (c) adopts a bright-line rule with respect to legal descriptions  
26 of the real property and recording information. The failure to include such  
27 information does not make the public advertisement insufficient. This information  
28 is seldom of importance to a person who reads a foreclosure advertisement for the  
29 purpose of deciding whether the person has potential interest. Anyone who  
30 develops a potential interest is highly likely to investigate further before appearing  
31 at the sale to bid. That investigation may include title information, which will  
32 disclose the legal description and recording references for the mortgage and other  
33 recorded instruments in the chain of title, and typically will include other  
34 information as well bearing on the property.  
35

36           7. Subsection (d) authorizes the creditor to post the public advertisement or  
37 a sign on the property, regardless of whether that right is reserved in the mortgage.  
38 This changes the law in some states, in which posting foreclosure sale signs at the  
39 property is mandatory.  
40

41           **SECTION 405. NOTICE OF FORECLOSURE SALE.** A creditor shall give

42 each homeowner and obligor written notice of the date, time, and place of a scheduled  
43 foreclosure sale. Notice of sale must be sent by first-class mail to the last-known address

1 of each homeowner and obligor and be hand delivered to the property address. Notice of  
2 sale must be mailed or delivered at least 30 days before the sale date.

3 **Drafters' Note**

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

9  
10 **SECTION 406. POSTPONEMENT OR CANCELLATION OF SALE.**

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

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

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

25 **Drafters' Note**

26 Once a foreclosure sale is scheduled, the creditor may elect to postpone or cancel  
27 the sale for any reason the person considers appropriate. A postponement might

1 also take place for other reasons, such as a judicial order or an automatic stay in  
2 bankruptcy. Homeowners and obligors should receive prompt notice of any  
3 postponement or cancellation. The rules of Section 405 do not apply to notices of  
4 postponement or cancellation. Subsection (b) covers notices of postponement and  
5 cancellation, requiring that the notice be commercially reasonable under the facts  
6 and circumstances. A postponement may be as short as one day. An oral  
7 announcement of the postponement, made at the time and place of the originally  
8 scheduled sale, would suffice if the homeowner and any obligor were present, in  
9 which event no written or additional notice would be necessary.

10  
11 **[SECTION 407. (OPTIONAL) CONFIRMATION OF FORECLOSURE SALE.]**

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

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

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

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

21 (3) the sale was conducted fraudulently.

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

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

28 (e) Confirmation of the sale is not required. Unless the creditor files a motion for

confirmation of the sale, entry of the judgment of foreclosure concludes the judicial-foreclosure proceeding, subject to the normal rules governing finality and appeal.]

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

## [ARTICLE] 5

### ACCELERATED DISPOSITIONS

#### SECTION 501. NEGOTIATED TRANSFER OF MORTGAGED PROPERTY IN SATISFACTION OF OBLIGATION.

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

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

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

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

(b) If the homeowner or a person claiming under the homeowner is in possession of the mortgaged property, the agreement must specify the date and time when the homeowner is to 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 resolve  
17 a number of collateral issues that flow from the expedited procedure, as detailed in  
18 Section 504.

19  
20 2. This section does not specify a minimum consideration to be received by  
21 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 of  
24 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 doing  
32 so, the section does not require any minimum benefit on homeowners, other than  
33 the general statement of effects of such an agreement contained in Section 504 and  
34 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 be

1 approved, and that the benefits contemplated by a homeowner under Section 504  
2 from an early move-out would not be realized. This sentence makes certain that  
3 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 subordinate  
7 interests, it is likely that the parties would often choose to use a traditional deed in  
8 lieu of foreclosure to accomplish their agreement, instead of following this statutory  
9 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 in  
5 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 transfer  
9 in full satisfaction of the debt or other obligation. If there are no parties to the  
10 action, other than the homeowner and the creditor, then there is no one to notify.  
11 Holders of subordinate interests in the mortgaged property should have been joined  
12 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 Section  
19 503.  
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

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

33 (c) If a hearing is held under subsection (a) and if the court finds, based on an appraisal or  
34 other evidence, that that there is no equity in the mortgaged property available to satisfy the  
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 act  
12 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 and other persons 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 refers  
14 is one that results from performance of the agreement made by the homeowner and  
15 the creditor. If a timely objection is received by the court or by the creditor from a  
16 person entitled to notification, then neither this subsection nor subsection (b)  
17 applies. Paragraph (1) expresses the fundamental consequence of accepting the  
18 mortgaged property in full satisfaction of the secured obligation—the obligation is  
19 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 by  
26 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 as  
34 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.

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 lieu”  
4 transactions within the scope of this act. Among other problems, if we keep  
5 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 law.”  
7

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

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

## 24 **SECTION 505. ABANDONED PROPERTY.**

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

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

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

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

34 (4) A governmental entity has issued an order or finding declaring that the

1 property is unfit for occupancy or constitutes a serious threat to public health or safety.

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

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

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

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

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

15 (c) In a judicial-foreclosure proceeding, the party filing the motion must send separately  
16 to each homeowner and obligor a notice, which must provide the following information:

17 (1) copy of the motion;

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

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

23 (4) inform the recipient that the recipient may contact the [applicable government

1 official] to obtain further information or object to the proposed determination of abandonment.

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

3 **Alternative A**

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

7 **Alternative B**

8 (d) In a judicial-foreclosure proceeding, the party filing the motion shall personally serve,  
9 or make two attempts to personally serve, the notice described in subsection (c) on a homeowner  
10 at the mortgaged property, which attempts must be at least 72 hours apart, and during different  
11 times of the day, either before noon, between noon and 6 P.M., or between 6 P.M. and 10 P.M.

12 Posting a written notice on the mortgaged property is [prohibited] [not required].

13 **Drafters' Note**

14  
15 Alternative A continues the language from the January 2014 draft.  
16 Alternative B is new. It responds to observations made at our last Committee  
17 meeting that the posting of "abandoned property" notices may encourage  
18 vandalism, theft, and other illegal behavior.

19  
20 **End of Alternatives**

21 (e) When a motion is filed pursuant to subsection (b), the court immediately shall issue an  
22 order to show cause commanding the parties it considers appropriate to appear at a hearing  
23 before the court on a day and at a place stated in the order. The appearance date may not be less  
24 than [15] nor more than [25] days after the date of the order to show cause. A copy of the  
25 motion must be attached to the order to show cause.

26 **Drafters' Note**

27  
28 This subsection requires a hearing within a definite time period after the

1 motion is filed. Unless there are unusual circumstances, the court should issue the  
2 order on the date the motion is filed. The 15-to-25-day window is taken from Minn.  
3 Stat. § 582.032(4). The numbers of days are bracketed to invite Committee  
4 consideration as to whether that timeframe is appropriate.  
5

6 (f) At the hearing on the order to show cause, if service of process is established, no  
7 appearance is made to oppose the relief sought, and evidence is presented supporting the  
8 allegations in the motion, the court shall enter an order finding that the mortgaged property is  
9 abandoned property.

10 (g) A homeowner's failure to appear at the hearing after service of process is conclusive  
11 evidence of abandonment by the homeowner.

12 (h) In the absence of an affidavit or written statement, or if rebuttal evidence is offered by  
13 the defendant or a party lawfully claiming through the defendant, the court may consider any  
14 competent evidence, including oral testimony, concerning any allegation in the complaint or  
15 motion.

#### 16 **Drafters' Notes**

17 Subsections (e) through (h) are based in substantial part on Minn. Stat. §  
18 582.032, which provides for expedited foreclosure for abandoned homes.  
19 Minnesota generally provides a statutory right of redemption (post-foreclosure-  
20 sale) of six months or one year, which is reduced to five weeks when the lender  
21 uses the statutory procedure for abandoned property; this section does not include  
22 a comparable right of redemption.  
23

24 (i) In a nonjudicial-foreclosure proceeding, a creditor or servicer or a governmental  
25 subdivision in which the mortgaged property is located may submit a request to [government  
26 official] to seek a determination that the mortgaged property is abandoned property. The request  
27 must be accompanied by an affidavit attesting to facts indicating abandonment or a governmental  
28 agency's determination, finding, or order that the mortgaged property is abandoned.

29 (j) In a nonjudicial-foreclosure proceeding, the person seeking a determination that the

1 mortgaged property is abandoned property must send separately to each homeowner and obligor  
2 a notice, which must provide the following information:

- 3 (1) copy of the request;
  - 4 (2) copy of an affidavit attesting to abandonment or a government agency's  
5 determination, finding, or order that that the property is abandoned;
  - 6 (3) description of the consequences that will follow from a determination of  
7 abandonment;
  - 8 (4) inform the recipient that the recipient may contact the [government official] to  
9 obtain further information; and
  - 10 (5) inform the recipient that the recipient has the right to object to the proposed  
11 determination of abandonment by sending a notification of objection to the [government  
12 official], which must be received within 30 days after the notice was sent to the recipient, in  
13 which event the [government official] will not issue a determination of abandonment.
- 14 This notice may be combined with the notice required by Section 201.

15 **Alternative A**

16 (k) In a nonjudicial-foreclosure proceeding, the person seeking a determination that the  
17 mortgaged property is abandoned property shall post a written notice on the property [insert any  
18 posting standards such as type size, location of notice, number of postings, mandatory language  
19 etc.]

20 **Alternative B**

21 (k) In a nonjudicial-foreclosure proceeding, the person seeking a determination that the  
22 mortgaged property is abandoned property shall personally serve, or make two attempts to  
23 personally serve, the notice described in subsection (j) on a homeowner at the mortgaged



1 property, which attempts must be at least 72 hours apart, and during different times of the day,  
2 either before noon, between noon and 6 P.M., or between 6 P.M. and 10 P.M. Posting a written  
3 notice on the mortgaged property is [prohibitjd] [not required].

#### 4 **End of Alternatives**

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

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

10 (2) the [government official] has not received a notification of objection to the  
11 proposed determination from a person entitled to notice under subsection (j) within 30 days after  
12 notice was sent to that person;

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

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

17 The [government official] shall send the determination of abandonment to the creditor and to  
18 each homeowner and obligor.

19 (m) In a nonjudicial-foreclosure proceeding, the determination of abandonment or the  
20 refusal of the [government official] to issue a determination is subject to de novo judicial review.

21 (n) If a person executes an affidavit attesting to the presence of conditions set forth in  
22 Section 505(a) or to other facts bearing on abandonment, the affidavit shall be signed by and  
23 based on personal knowledge of the affiant. Photographic or other documentary evidence that

1 demonstrates the supporting facts set forth in the affidavit shall be attached to the affidavit. A  
2 party or person may submit multiple affidavits as evidence of abandonment. An affidavit may be  
3 given by any person having personal knowledge, including contractors, government employees,  
4 and neighbors of the mortgaged property.(o) In a judicial-foreclosure proceeding, after a party  
5 has filed a motion for a determination that the property is abandoned property, the motion may  
6 be withdrawn only by leave of the court. In a nonjudicial-foreclosure proceeding, after a person  
7 has filed a request for a determination that the property is abandoned property, the request may  
8 be withdrawn only by the consent of the person submitting the request and each homeowner and  
9 obligor.

#### 10 **Drafters' Notes**

11  
12 1. This Act authorizes an expedited foreclosure procedure for abandoned  
13 properties for both judicial foreclosure and for nonjudicial foreclosures. An  
14 expedited procedure is appropriate for two reasons. First, the homeowner is no  
15 longer making a valuable economic use of the property to provide shelter for the  
16 homeowner or the homeowner's family or someone claiming under the  
17 homeowner, such as a tenant. A foreclosure sale will not result in a possessor being  
18 forced to relocate to other housing. Second, properties that are facing foreclosure  
19 and that are vacant have significant negative impacts on neighborhoods and the  
20 surrounding communities. Vacancies reduce the market values of neighboring  
21 properties. Neighborhood crime increases. The vacant properties tend to suffer  
22 from lack of repair and maintenance, creating public health risks, including  
23 infestations by vermin, mosquitoes, and other insects. There are fiscal impacts on  
24 local governments, who find property taxes on vacant properties often become  
25 delinquent; yet the governments are faced with added expenses to provide essential  
26 services to blighted neighborhoods, such as police and fire protection. By providing  
27 for an expedited foreclosure procedure, this Act seeks to return abandoned  
28 properties to the stock of occupied, well-maintained housing as soon as reasonably  
29 possible.

30  
31 2. The conditions giving rise to prima facie evidence of abandonment set  
32 forth in Subsection (a) through (a) closely track the criteria set forth in Ind. Code §  
33 32-30-10.6-5(a) (effective March 16, 2012). A government agency's issuance of a  
34 determination that the mortgaged property is abandoned by itself constitutes prima  
35 facie evidence of abandonment. In some localities, after such a determination the  
36 government will mark the property as abandoned. The government's determination,  
37 finding, or order might not use the word "abandoned"; it might, for example, refer

1 to the property as vacant. Of course, the homeowner or another person has the right  
2 to challenge the correctness of the governmental determination.  
3

4 With respect to the statutory conditions listed in Subsection (a)(1) through  
5 (a)(8), the presence of [three] or more of such conditions constitutes prima facie  
6 evidence, giving rise to a presumption of abandonment. Such conditions are not  
7 conclusive on the issue of abandonment. Many residential properties will exhibit  
8 at least one such condition, when the homeowner is still in possession of the  
9 property. If the homeowner or another person holding under the homeowner is in  
10 actual possession of the mortgage property, the property is not abandoned  
11 notwithstanding the existence of such conditions. Likewise, mortgaged property  
12 may be abandoned under this Section notwithstanding the absence of any of the  
13 statutory conditions.  
14

15 3. Mortgaged property often becomes vacant, both under standard mortgage  
16 and reverse mortgage transactions, when the homeowner dies. Under Subsection  
17 (a)(8) proof of death of the homeowner is one of the conditions that may give rise  
18 to a presumption that the mortgaged property is abandoned, provided that there is  
19 no evidence that an heir or other beneficiary of the homeowner's estate is in actual  
20 possession. Of course if there are multiple homeowners, this condition is met only  
21 if all the homeowners have died.  
22

23 4. In a nonjudicial foreclosure proceeding, the creditor may treat the  
24 mortgaged property as abandoned only by submitting evidence of abandonment to  
25 an independent third party. Subsection (c) provides for the submission of evidence  
26 to a person, who as part of the decision making process must personally visit the  
27 property. Normally jurisdictions enacting this Act will designate an employee of  
28 local government, such as a building inspector, who is responsible for evaluating  
29 the physical condition of dwelling units.  
30

31 Judicial review of the decision is available to any interested person.  
32 Subsection (c) does not specify the nature of that action, which in many  
33 jurisdictions will be a mandamus action.  
34

### 35 **SECTION 506. FORECLOSURE OF ABANDONED PROPERTY.**

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

39 (1) order a public sale of the abandoned property not earlier than [30] days but not  
40 later than [45] days after entry of the order; or

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

6 **Drafters' Notes**  
7

8 The alternative of a direct transfer to the creditor is one of the components  
9 set forth in an Ohio bill that would provide expedited foreclosure procedures for  
10 abandoned property. Obviously if the Committee decides that this alternative has  
11 merit, further provisions are necessary dealing with matters such as the termination  
12 of junior interests and the payment of expenses by the creditor. The Ohio bill  
13 requires that a creditor who chooses a direct transfer pay any unpaid taxes and  
14 assessments on the property.  
15

16 (b) In a nonjudicial-foreclosure proceeding, on the issuance of a determination under  
17 Section 505(d) that the mortgaged property is abandoned property, a creditor, servicer or trustee  
18 may conduct an expedited public sale of the property. The sale may take place not earlier than  
19 [30] days but not later than [60] days after the issuance of the determination, unless judicial  
20 review of the determination is commenced. The creditor or servicer shall comply with the notice  
21 requirements of Section 405, except that [15]-days advance notice of the sale is sufficient.

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

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

7 (e) The completion of a foreclosure sale pursuant to subsection (a) or (b) terminates the  
8 rights of the homeowner or any other person to redeem the property under other law of this state.

### 9 **Drafters' Notes**

10  
11 1. This Section provides for an expedited public sale of the mortgaged  
12 property after a determination that the mortgaged property is abandoned. In a  
13 judicial foreclosure, the court must order the sale to take place no longer than \_\_  
14 days after the court enters its order finding the property to be abandoned, unless the  
15 creditor agrees to a later sale date. In a nonjudicial foreclosure, the creditor may  
16 select the date, provided it is no sooner than [\_\_] days after the written  
17 determination of abandonment.  
18

19 2. This Section does not authorize a disposition of abandoned property other  
20 than public sale, but other dispositions are available under other sections of this  
21 Act. For example, the homeowner and creditor may agree to a negotiated transfer  
22 to the creditor in lieu of foreclosure pursuant to Sections 501 to 504 [cash for keys  
23 agreement].  
24

25 3. Once a creditor decides to take advantage of the expedited foreclosure  
26 procedure allowed by this Section, there is a public interest in ensuring that the  
27 property becomes occupied as soon as reasonably possible. For this reason  
28 subsection (c) does not allow the creditor to suspend indefinitely its efforts to  
29 consummate the foreclosure. There may be exceptional circumstances in which it  
30 is not feasible to hold the foreclosure sale within 60 days of the judicial order or  
31 written determination finding the property to be abandoned, as required by  
32 subsection (a) and (b).  
33

34 Subsection (c) poses the substantial question of what consequences should  
35 flow from the failure of the creditor to comply with its requirements. On the one  
36 hand, it would clearly be inappropriate to impose an obligation on a creditor to  
37 repair the property subject to the mortgage before the creditor has taken possession  
38 or an official determination is made that the property is abandoned. Certainly, the

1 lending community would object to a statutory duty to maintain property on which  
2 it holds a mortgage in those instances where the lender would prefer to release its  
3 mortgage and forego any interest in that property.  
4

5 On the other hand, the consequences of a creditor's failure to either  
6 commence and complete a foreclosure action or to release its mortgage, on other  
7 stakeholders in the abandoned property – including the fee owner, the municipality  
8 and neighbors in which the abandoned property is located, and where appropriate,  
9 a homeowners association - are very real. The act as drafted resolves these  
10 conflicting policies by offering the lender a choice of how it wishes to proceed.  
11

12 4. In states that afford the homeowner and other persons a statutory right of  
13 redemption after completion of a foreclosure sale, subsection (d) serves to terminate  
14 those redemption rights.  
15

## 16 **SECTION 507. MAINTENANCE OF ABANDONED PROPERTY.**

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

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

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

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

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

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

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

30 (d) In the absence of a judicial order under subsection (b) or a determination under  
31 subsection (c), a creditor that has commenced foreclosure proceedings is obligated to maintain

1 the mortgaged property beginning when it receives notice that a governmental entity has issued a  
2 determination, finding, or order stating that the mortgaged property is abandoned property and is  
3 in a condition that poses a threat to public safety or health.

4 (e) The creditor's obligation to maintain abandoned property continues until the property  
5 is conveyed through foreclosure to a purchaser other than the creditor or the creditor records a  
6 release of its mortgage.

7 (f) A creditor that is obligated to maintain abandoned property may enter the property  
8 peacefully and cause others to enter the property peacefully for the limited purpose of inspection,  
9 repair, and maintenance as required by this section. All reasonable expenses incurred by a  
10 creditor pursuant to this section are an obligation of the homeowner and are secured by the  
11 mortgage.

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

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

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

18 [or]

19 (2) a homeowners association, condominium association, or cooperative  
20 association, if the property is subject to the rules of the association.[]; or

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

23 (i) The obligation of a creditor to maintain abandoned property is limited to that stated in

1 this section. If a creditor becomes the owner of the property, the creditor's obligations with  
2 respect to the property are determined by law of this state other than this [act]. A creditor does  
3 not become a mortgagee in possession of the property by virtue of the creditor's performance of  
4 the obligations stated in this section.

#### 5 **Drafters' Notes**

6  
7 1. This Section requires creditors to maintain abandoned properties under  
8 certain circumstances. The obligation may arise based upon action of the creditor  
9 or action of the municipality or other governmental entity where the property is  
10 located. The creditor does not become obligated to maintain merely by  
11 commencing foreclosure proceedings at a time when the dwelling unit is vacant.  
12 Rather, the obligation arises when the creditor seeks to use the expedited  
13 foreclosure procedure authorized by Section 505 and obtains either a judicial order  
14 or official determination that the property is abandoned. Under subsection (c) the  
15 obligation may also arise any time after the creditor has commenced foreclosure  
16 proceedings if the municipality or other local governmental entity cites the property  
17 as both abandoned and presenting a threat to public safety or health.  
18

19 2. Subsection (e) defines the scope of the creditor's obligation to maintain  
20 abandoned property. The focus is on the outward appearance of the property,  
21 including yards and other exterior spaces, and other conditions that are likely to  
22 have significant impacts on the neighborhood, such as interior spaces frequented  
23 by squatters or persons engaged in criminal activities. This subsection is modeled  
24 closely on Cal. Civ. § 2929.3(b), enacted in 2008.  
25

26 3. Subsection (f) grants a license to the creditor and to its agents or  
27 contractors to enter abandoned property for the purpose of inspection, repair, and  
28 maintenance, regardless of whether that right is reserved in the mortgage. Similarly,  
29 this subsection authorizes the addition of the creditor's reasonable maintenance  
30 expenses under this section to the debt secured by the mortgage, regardless of  
31 whether the mortgage contains a provision to that effect.  
32

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



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

## [ARTICLE] 6

## REMEDIES

**SECTION 601. EFFECT OF VIOLATION.**

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

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

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

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

(e) In addition to the damages recoverable under subsections (d), a homeowner or obligor

1 may recover, as the court may allow, statutory damages not exceeding \$[15,000] in the case of a  
2 pattern or practice of noncompliance. In determining whether to award statutory damages and the  
3 amount of statutory damages under this subsection, the court shall consider, among other  
4 relevant factors:

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

7 (2) the nature of the noncompliance, and

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

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

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

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

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

### 17 **Drafters' Notes**

18  
19 1. At the November 13 meeting the Committee voted to delete former  
20 subsection 601(e) providing for minimum damages for all violations. Further, a  
21 motion to delete subsection 601(f) failed but consensus seemed to favor removing  
22 references to "punitive" damages.

23  
24 2. The statutory damages for individuals under subsection (e) (former  
25 subsection (f)) have been amended to require a pattern or practice of  
26 noncompliance, similar to the RESPA provision for statutory damages.

27  
28 3. The comments should be expanded to discuss the circumstances under  
29 which a permanent bar to foreclosure under either subsections (a) or (b) would be  
30 appropriate and cite cases where that extraordinary relief has been granted.

1 Examples would include cases where the creditor or servicer has repeatedly  
2 violated this act or other law, or other aggravating circumstances.  
3

4 4. Actual damages incurred by a homeowner or obligor under this section  
5 may include damages for emotional distress. Whether or not the homeowner may  
6 claim that damages caused by a servicer are chargeable to the creditor who retained  
7 the servicer under theories of agency or employer/employee law is not determined  
8 by this act but by other law.  
9

10 5. Under subsection (a), before confirmation of the foreclosure sale, the  
11 homeowner may raise a material violation of the statute - for example, a materially  
12 inaccurate notice of the amounts needed to cure a default – as a basis for asking the  
13 court to prevent the foreclosure sale (or confirmation), until the violation has been  
14 corrected and remedied. If the creditor can cure the violation in a timely way so  
15 that full compliance is achieved, it would then be appropriate under this section for  
16 the foreclosure may proceed.  
17

18 However, after a foreclosure sale, under established principles of real estate  
19 law, unless the homeowner under state law has an independent right of redemption,  
20 a bona fide sale purchaser is entitled to rely on the conclusive effect of the sale, and  
21 the homeowner's only remedy for violations of the statute would be to seek  
22 damages from the foreclosing creditor or any other remedy allowed under state or  
23 federal law; *see* Section 602.  
24

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

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

#### 28 **Drafter's Note**

29 This act preserves rights and defenses available to homeowners and obligors under  
30 other state statutes, regulations, common law, and federal law. In many states, such  
31 rights and defenses include payment or tender of payment; discharge; contract law  
32 defenses, including forgery, lack of capacity, duress, absence or failure of  
33 consideration, fraud, misrepresentation, unconscionability, failure of a condition  
34 precedent; equitable defenses such as estoppel, laches, or unclean hands; release by  
35 cancellation of debt; a violation by a creditor, servicer, their predecessors in  
36 interest, or their agents of unfair and deceptive trade practices statutes and other  
37 consumer protection statutes; a defect in a mortgage resulting from a failure to  
38 comply with statutory requirements for the execution of mortgages; a determination  
39 that the creditor or its predecessor in interest was not licensed under state mortgagee  
40 licensing statutes or was not legally authorized to make the loan under federal law;  
41 and breach of the duty of good faith and fair dealing.  
42

**SECTION 603. PROCEDURE FOR ASSERTING DEFENSE IN NONJUDICIAL FORECLOSURE.**

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

## Drafter's Note

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

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

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

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

1           **SECTION 606. EFFECT OF THE HOLDER IN DUE COURSE RULE IN**  
2 **FORECLOSURES.**

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

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

6  
7                   **Drafting Committee**

8  
9                   Bill Breetz  
10                  Tom Buiteweg  
11                  Barry Hawkins  
12                  James Smith, Co-Reporter  
13                  Barry Nekritz, American Bar Assn advisor  
14

15                  **American Law Institute**

16  
17                  Teresa Harmon  
18                  Neil Cohen  
19

20                  **Observers**

21  
22                  Tom Cox, Maine consumer advocate  
23                  Mark Greenlee, Cleveland Federal Reserve Bank  
24                  Laura Johnson, Consumer Financial Protection Bureau  
25                  Larry Platt, SIFMA  
26                  Alfred Pollard, FHFA  
27                  John Snook, Mortgage Bankers Assn  
28                  Matthew Street, American Bankers Assn  
29

30           The group met twice, once at the offices of FHFA in Washington on March 12 and  
31           a second time at the offices of the New York Federal Reserve Bank on March 20.  
32           All members of the Group participated either in person or by telephone in at least  
33           one meeting, and most members participated in both meetings. The group  
34           benefitted from the involvement of two observers who had not previously  
35           participated in our deliberations: Laura Johnson from the CFPB, and John Snook  
36           from the Mortgage Bankers Association.  
37

38           Both meetings involved a frank and candid exchange of views and all perspectives  
39           previously voiced in the full Drafting Committee meetings were heard.  
40

41           The Group made limited progress in resolving the several sub-issues embedded in  
42           the HDC debate.  
43

1       **A. Areas of Agreement.**               Specifically, as noted below, the group  
2       seemed to agree that:

3  
4       1.       Whatever changes may be ultimately be made to the HDC rule would apply  
5       only to the foreclosure of mortgages signed after the effective date of the act.

6  
7       2.       The amount of damages to which a Holder In Due Course could be subject  
8       would be limited to the outstanding balance due on the note.

9  
10      3.       As a general matter, there was consensus that this Act should not attempt a  
11      wholesale abrogation of the Holder In Due Course doctrine as applied to  
12      foreclosure of residential real estate mortgages.

13  
14      **B. Areas of Disagreement**       Beyond those agreements, the Group did not  
15      achieve consensus on these sub-issues:

16  
17      1.       What should the statute of limitations or time limit be with respect to the  
18      ability of a borrower to assert defenses to a foreclosure? The lender representatives  
19      proposed one year, while borrower advocates sought six or seven years. Neither  
20      group supported Mr. Nekritz's suggestion of four or five years. Indeed, at one point,  
21      Mr. Nekritz asked why there should be any time limit imposed on a borrower's  
22      ability to raise defenses to an action?

23  
24      2.       Current CFPB regulations provide a 'safe harbor' from most borrowers'  
25      claims if the mortgage satisfies the standards of a 'qualified mortgage' ("QM").  
26      [The final text of the May draft will include those QM standards]. Lenders proposed  
27      to exempt all QMs from any change in the HDC rule; others present resisted that  
28      position. Mark Greenlee suggested that other 'prime mortgage' standards might  
29      prove a useful 'redline' and Tom Cox was prepared to consider some excluded  
30      mortgages – though not all QMs - where the HDC rule might be preserved.

31  
32      3.       Regardless of excluded mortgages, and regardless of the statute of  
33      limitations issues, the most fundamental lack of consensus centered on two issues:

34  
35      a.       **First**, whether the original mortgage broker or loan originator's alleged  
36      'bad act' [for example, misrepresenting the interest rate, whether the rate was fixed  
37      or adjustable, whether the borrower would be able to re-finance] was either:  
38      (i) 'material' to the borrower's default; or (ii) had a 'nexus' with the borrower's  
39      default. Some stated it as (iii) a 'but for' standard – that is, would the borrower not  
40      have defaulted 'but for' the bad act. Each of these presents a different approach to  
41      the problem.

42  
43      b.       **Second**, could the lender have discovered the 'bad act' by the exercise of  
44      due diligence' – a standard likely to exclude most forms of verbal mis-  
45      representations or fraud – a considerable challenge.

1           **C.       Other efforts to find possible agreement**

2  
3           1. Between the two meetings, an effort was made to draft a procedure under which  
4           borrower claims that possibly could be raised to delay a foreclosure (“the broker  
5           lied about my interest rate”) but would not commonly justify a dismissal of the  
6           action [such as full payment] might be treated under a procedure such as the  
7           following:

8  
9                   (i) first, the economic benefit to the borrower could be tentatively valued  
10           (e.g., if true, the monthly payment would be reduced by \$100 /month) and

11  
12                   (ii) if the borrower could afford the reduced monthly mortgage payment  
13           based on the alleged bad act, the foreclosure would be deferred while waiting for a  
14           prompt resolution of the alleged facts; but

15  
16                   (iii) if the borrower could not afford even the reduced payment, the  
17           foreclosure would proceed under some expedited process (unless there were other  
18           issues raised) and the value of the alleged claim, even if proved, would only affect  
19           the amount of the debt, rather than the validity of the foreclosure.

20  
21           This approach was perceived as too complex and the resources to fund the ‘prompt’  
22           resolution of the claim viewed as non-existent.

23  
24           2.       Some efforts were made to determine whether any form of insurance or  
25           reserve fund might exist or be created to which all claims now excluded by the  
26           HDC rule might be referred. However, no insurance or reserve fund options arose  
27           during the course of the deliberations.

28  
29           3.       We discussed whether it would be possible to implead the original ‘bad  
30           actor’ into the foreclosure proceeding; this suggestion did not meet with  
31           enthusiasm.

32  
33           4.       Concern was expressed that any state might be reluctant to be the first to  
34           enact any new limitation on the HDC rule, since lenders might refuse to make loans  
35           in that state, either for competitive reasons or as a means of intimidating other  
36           states. To avoid this outcome, a suggestion was made that we draft a ‘springing’  
37           HDC limitation statute which would only become effective if a certain number of  
38           states adopted the statute.

39  
40           5.       After the San Diego meeting and in anticipation of the Working Group’s  
41           efforts, Reporter Smith prepared the yellow-highlighted language that appears  
42           below. Sub-section (b) would allow three specific types of claims that would  
43           become exceptions to the HDC rule: that is, claims that either:

- 44  
45                   1.   Were material to the original loan transaction;  
46                   2.   Would allow rescission of the original transaction; or

1 3. Could have been discovered through due diligence.

2  
3 This 'middle ground' solution – supported by the Reporters, the American Bar  
4 Association advisor and the Chair - was not acceptable to the lender representatives.

5  
6 **END OF INTRODUCTORY REMARKS**

7 **SECTION 606. EFFECT OF THE HOLDER IN DUE COURSE RULE IN**  
8 **FORECLOSURES.**

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

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

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

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

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

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

25 (d) If the foreclosing creditor is a holder in due course under [insert reference to State  
26 UCC 3-305], any recovery by the obligor or homeowner shall not exceed the total outstanding



1 balance due on the obligation.

2 (e) This section applies to obligations incurred after the effective date of this [act].

### 3 **Reporters' Notes**

4  
5 1. This alternative represents a middle-ground position between preservation of the  
6 status quo and complete abrogation of the HDC doctrine, along the lines of the  
7 Federal Trade Commission Regulation (16 CFR Part 433) that protects consumers  
8 who finance the purchase of goods or services.  
9

10 2. This alternative (1) caps the liability of the transferee to the outstanding loan  
11 balance, (2) imposes a clear statute of limitation, (3) applies only prospectively, and  
12 (4) preserves only certain claims and defenses: those material to the loan  
13 transaction, those that justify equitable rescission, and those discoverable by due  
14 diligence.  
15

16 3. If the act limits the HDC doctrine, a choice must be made as to whether the  
17 defense only restricts foreclosure, or whether the defense also applies to  
18 enforcement of the instrument (assuming the obligor is personally liable to pay the  
19 obligation). This language takes the broader approach, the same as the FTC  
20 regulation - by making the creditor "subject to" claims and defenses, those claims  
21 and defenses, when proven, offset the amount due on the obligation.  
22

## 23 **[ARTICLE] 7**

### 24 **MISCELLANEOUS PROVISIONS**

#### 25 **SECTION 701. PRE-EFFECTIVE DATE TRANSACTIONS.**

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

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

### 29 **Drafters' Note**

30  
31 This Act applies to the foreclosure of mortgages created before the effective date of this  
32 Act, unless the creditor has taken action to foreclose before the effective date.  
33

#### 34 **SECTION 702. REPEALER.**

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

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

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

### **Drafters' Notes**

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

2. At the same time, this Act was drafted with the expectation that existing state foreclosure procedures would remain in place. This Act is not intended to displace all existing foreclosure laws in each state, but rather to be an overlay on existing law. For example, and most fundamentally, the Act does not anticipate or provide that a state employ a judicial foreclosure process when the customary practice is to foreclose under a power of sale procedure, nor does the Act contemplate that a state should enact a non-judicial foreclosure process in the absence of existing state laws. It is for that reason that the legislative drafters in each state should carefully consider how best to integrate the provisions of the Act with existing state laws governing the foreclosure process.

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

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

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

**SECTION 704. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but

1 does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or  
2 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15  
3 U.S.C. Section 7003(b).

4 **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.]