List of Major Issues for Discussion at November 2013 Drafting Committee Meeting

1. **Scope, definition of "residential property**," § 102(22): The comment from John Manning, a farm lender, (reproduced verbatim in the Compilation of Comments) suggests that we reconsider this definition. He writes in part:

> "As a farm lender who never makes consumer purpose loans, Rabo Agrifinance, Inc. reminds the committee that this *[i.e., 'anything with a home on it is residential property']* is not true everywhere in the country. Whether speaking of a 100,000 acre ranch with one house on it, a $12,000,000 dairy with a $150,000 home on it or a $15,000,000 winery with a $1,000,000 "estate" home (of which $750,000 is the public tasting facilities) there are properties with overwhelming commercial usage that happen to have a home on them. (After all: the cows need to be milked three times day so, so someone needs to live there. But, it is a working commercial dairy.) Imposing rules intended to protect consumers on these essentially commercial properties would have the effect of chilling the abilities of farmers to have equal access to business credit with other businesses."

2. **Safe-harbor forms:** Should we draft safe-harbor forms for some or all of the notices and affidavits required by the act? Possibilities include the § 201 notice of intent to foreclose and right to cure, the § 302 notice of facilitation, the § 403 lost note affidavit, the § 404 public advertisement of foreclosure sale, the § 405 notice of foreclosure sale, the § 502 notice of proposed negotiated transfer, and the § 505 notice of request to seek a determination that the property is abandoned.

3. **Section 201 – Initial Notice to Homeowner.** Chase Bank has submitted a number of significant comments to the disclosures required in this section. Those comments appear in the Comments Compilation and in the annotated draft distributed to the Committee.

4. **Section 302(d)(2)** requires that the creditor inform the homeowner of 'any person' designated as the creditor's 'single point of contact' – but the language does not appear to require a single point of contact. Do we need more language here?

5. **Section 402 (b):** Who may commence foreclosure when there is a negotiable instrument? Does this section fit properly with UCC Article 3? One possibility would be to eliminate Alternatives A and B and simply provide that when the obligation is evidenced by a negotiable instrument, the person with the right to foreclose is the person entitled to enforce the instrument, determined under other law.

6. **Section 402 (b) (2): Who may commence foreclosure when there is no negotiable instrument?** Subsection (b)(2) authorizes the owner of the obligation to foreclose, with no rules or guidelines for determining ownership. One must consult other law to identify the owner; **see** the discussion in Drafters' Notes 3 & 5. This is the same approach taken by UCC Article 9 when ownership of instruments or payment intangibles is relevant.

7. **Section 401(b)(3): Mortgage Registry:** This subsection calls for the production of a certificate issued by the registry that identifies the person entitled to enforce the obligation and the mortgage. Is this too specific? For example, what if the registry only identifies the person who deposited the note (i.e., the putative holder or owner)?

8. **Section 403(e): Content of lost note affidavit**, This subsection is new to this draft. It requires the affidavit to include specific content, the purpose being to discourage the submission of affidavits containing only general allegations that a note cannot be found when the creditor has made no serious attempt to locate the note. This requires more factual statements in the lost note affidavit than is required by UCC 3-309; **see** Tom Buiteweg's Comment No. 122 in the Comment draft. Chase Bank has also expressed concern about its ability to comply with these requirements.

9. **Sections 501(a) & 504(a) (1): Negotiated transfer, total and partial satisfaction of obligation** The draft allows a negotiated transfer only in total satisfaction of the obligation. This is consistent with the policy adopted in UCC Article 9, which prohibits partial satisfaction "strict foreclosure" in consumer transactions (but allows partial satisfaction for non-consumer transactions). Are we satisfied with this approach?

10. **Sections 502(b) (2) & 504(a),(b): Negotiated transfer, treatment of senior creditors and other senior interests** These sections follow standard principles of foreclosure law, which (i) preserve the rights of all owners of senior interests in the property, without alteration, and (ii) generally terminate the rights of subordinate (junior) interest holders, provided the required procedures are followed. Some commentators have expressed the view that senior creditors should receive notices of proposed negotiated transfers, and perhaps should receive other protections.

11. **Section 506: Abandoned Property.** Attorney Mark Greenlee of the Cleveland Federal Reserve Bank and Attorney Gus Frangos, President and General Counsel of a Cleveland land bank, urge us to consider incorporating procedures for a more expedited process to transfer title to abandoned property.

12. **Section 601: Penalties on creditors and servicers as a result of claimed violations of the Act**. Various comments raise questions about certain of the Section's provisions. The Committee should consider the section in detail.

13. **Section 606: Alternatives to the existing Holder In Due Course Rule.** Because of the significance of this issue, we reproduce all the comments submitted on this issue.

> **Neil Cohen** – A better title for this section than "EFFECT OF THE HOLDER IN DUE COURSE RULE IN FORECLOSURES" is needed inasmuch as this section also protects homeowners even when there is not a holder in due course.
>
> **Teresa Harmon** - [this comment appears next to Sec. 603] "PEB

members did not reach a conclusion on what should be done in connection with HDC. Members expressed a desire for additional information, including

-- which specific defenses would now be available that are not available today;
-- what is the likelihood those defenses would be raised;
-- what is the litigation burden of those defenses and would a heightened pleading/evidentiary standard or TILA-style due diligence defense alleviate concerns; and
-- how does abrogation for home mortgages compare to the FTC Rule for other consumer obligations and commercial mortgage backed securitization."

Tom Buieweg - We should discuss other approaches to the "middle ground." For example, we could construct an elevated pleading and proof standard for defenses that could not normally be asserted against an HDC to try to preserve the creditors ability to get a summary judgment on the issue in the absence of clear proof of a meritorious defense. In summary, a little brain-storming as a group on this issue might be worthwhile.

Teresa Harmon - Whether to abrogate HDC, and if so how to draft, should be open for continuing discussion. Note that, as drafted, all three of these provisions overrides/impacts a significant concept of settled UCC law and warrants cooperation of the UCC and ALI-PEB.

Neil Cohen – If any change to the HDC rule is contemplated, the Act should specifically override any agreement by the homeowner to waive the defenses; otherwise the rule will be avoided by the use of waiver of defense clauses (which waive defenses as against assignees of the original obligor), which are common in some contexts.

Tom Buieweg - In considering a rule which would totally abrogate the HDC rule, note that UCC § 3-305, itself defers to other law that establishes a different rule for consumers.

Teresa Harmon - All-out abrogation is inconsistent with the motion on ULC floor this summer. Here, even if all-out abrogation is desired, note that only actions by first creditor, not intermediate transferees, are provided for.

Neil Cohen – Defenses are asserted against the payee or its successors rather than the owners of the obligation. By way of contrast, in alternative #2, you refer to "the original creditor of the mortgage." Is that intended to refer to the same person as this language [i.e., the '*original obligee of the obligation*?']

Neil Cohen – In Alternative # 2, the text refers to 'the original creditor of the mortgage'. Do you mean to refer to the 'original creditor of the obligation secured by the mortgage?'

Alan White – He points out that the limitation in Alternative # 2 that "Any recovery *** shall not exceed a recoupment or set-off against the total outstanding balance due on the mortgage obligation plus amounts paid by the homeowner or obligor to the creditor or servicer bringing the foreclosure action" "would be roughly parallel to the limitation in the FTC Preservation of Claims Rule."

Teresa Harmon – "This draft does not include several concepts suggested in the subcommittee's write-up to ameliorate the potential negative market impact of expanding transferee liability, including limiting the featuring to newly created notes to avoid takings/contracts clause problems, a much shorter statute of limitations, and more restrictive liability caps. Future discussion should not be limited to these three options, as they are not reflective of the scope or sense of committee discussions so far."

Chair's Note- Alternative # 4 of this draft makes this section applicable prospectively only. The draft also includes a 10 year statute of limitations and a limitation on liability, both of which are of course subject to further review by the Drafting Committee.

14. **Sec. 702: Repealer** How should the Act deal with the existing repealer language? Neil Cohen writes:

"Awfully broad, isn't it? Since no other act will be inconsistent with this act in its entirety, how does one know when this act entirely repeals another act and when it repeals only a part of another act? (Is the determination similar to preemption?)"