

D R A F T
FOR DISCUSSION ONLY

UNIFORM HOME FORECLOSURE PROCEDURES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM HOME FORECLOSURE PROCEDURES ACT

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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June 6, 2015

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PROCEDURES ACT**

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HOME FORECLOSURE PROCEDURES

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1 **UNIFORM HOME FORECLOSURE PROCEDURES ACT**

2 **[ARTICLE] 1**

3 **GENERAL PROVISIONS**

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

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

7 (1) “Abandoned property” means mortgaged property with respect to which the
8 homeowner and all persons claiming through the homeowner, including tenants, have
9 relinquished possession. The term does not include unoccupied mortgaged 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 or seasonal home; or

14 (C) physically secured and the subject of a probate action, action to quiet title, or
15 other litigation in which ownership is contested.

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

22 (3) “Creditor” means a person that is entitled to foreclose a mortgage under Section 104.

23 (4) “Foreclosure resolution” means a process in which a neutral individual assists the

1 parties to exchange information, prepare for and attend an in-person meeting or other
2 communication where a creditor, obligor, and neutral individual simultaneously can
3 communicate with one another with the objective of reaching an agreement between the parties
4 for an alternative to foreclosure.

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

7 (6) “Expenses of foreclosure” means the lesser of:

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

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

12 (7) “Foreclosure” means a process, proceeding, or action to enforce a mortgage by
13 terminating a homeowner’s interest in mortgaged property or obtaining possession of mortgaged
14 property. The term does not include a voluntary transfer by a homeowner or an action to recover
15 possession of property after a completed foreclosure sale. “Foreclose” has a corresponding
16 meaning.

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

19 (9) “Homeowner” means a person that owns an interest in mortgaged property, other than
20 a mortgage, lien, security interest, easement, servitude, or leasehold with an initial term of less
21 than [20] years, including renewal options.

22 (10) “Knowledge” means actual knowledge. “Knows” has a corresponding meaning.

23 (11) “Loss mitigation” means an alternative to foreclosure offered by a creditor to a

homeowner in default or facing imminent default.

(12) “Mortgage” means a consensual interest in real property which secures an obligation. The term does not include a lien that secures an obligation owed to a homeowners’ association in a common-interest community.

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

(14) “Mortgaged property” means real property improved with not more than four dwelling units which is subject to a mortgage. The term includes (i) an attached single-family unit; (ii) a single-family manufactured-housing unit or a time share in a dwelling unit if either is treated as real property under law of this state other than this [act]; (iii) real property on which construction of not more than four dwelling units has commenced; and (iv) a single-family unit in a common-interest community. The term does not include real property that, when the mortgage being foreclosed was created, was used or intended to be used primarily for nonresidential purposes such as farming, commercial, or industrial use.

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

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

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

(18) “Obligor” means a person that:

(A) owes payment or performance of an obligation;

(B) has signed a mortgage agreement with respect to the mortgaged property; or

(C) is otherwise accountable in whole or in part for payment or performance of

1 the obligation.

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

5 (20) “Public sale” means a sale by auction authorized by law of this state other than this
6 [act].

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

9 (22) “Servicer” means a person responsible for servicing an obligation, including a
10 person that holds or owns an obligation or originates a mortgage loan if the person also services
11 the obligation.

12 (23) “Servicing” means:

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

15 (B) making or advancing a payment to the owner of an obligation on account of
16 an amount due from the obligor under a mortgage-servicing loan document or a servicing
17 contract;

18 (C) making a payment to the obligor under a home-equity-conversion mortgage or
19 reverse mortgage; or

20 (D) evaluating the obligor for loss mitigation or communicating with the obligor
21 with respect to loss mitigation.

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

1 the United States.

2 **Legislative Note:** *In states that allow one or more types of nonjudicial foreclosure of residential*
3 *mortgages, a reference to the relevant statute should be added to the definition of “nonjudicial*
4 *foreclosure.” In states that do not allow nonjudicial foreclosure, this definition should be*
5 *deleted, along with references to “nonjudicial foreclosure” elsewhere in this [act].*

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

12 13 **Comment**

14
15 1. The definition of “abandoned property” works in tandem with the factors listed in
16 Section 601(a). Whether mortgaged property is “abandoned property” is determined by the facts
17 of each case. The Section 601(a) factors are not exclusive; they serve an evidentiary purpose.
18 The core question is whether the homeowner is presently in possession of the property. The
19 question must be answered by evaluating the facts related to the homeowner’s use of the
20 property.
21

22 2. The definition of “foreclosure resolution” requires at least one “in-person” meeting or
23 other communication between the parties and a third-party neutral. The alternative requirements
24 of either an “in-person” meeting or other form of electronic communication contemplates the
25 continuation of the practice in many jurisdictions that, as an alternative to a “face-to-face”
26 meeting, the parties may meet by telephone, video conference or other electronic means so long
27 as all the parties and the neutral are able to simultaneously hear or communicate with one
28 another.
29

30 3. The definition of “expenses of foreclosure” limits the expenses that a foreclosing party
31 may impose on a borrower in connection with the foreclosure process to ‘reasonable’ expenses,
32 even if other law of the state would allow expenses which would otherwise not satisfy that
33 standard. The definition contemplates that these allowable expenses would include the
34 reasonable costs of all typical foreclosure expenses, including such costs as sending notices,
35 advertising, title searches, inspections and examinations of the mortgaged property, management
36 and securing of the mortgaged property, insurance, filing and recording fees, attorney’s fees and
37 litigation expenses incurred to the extent provided in the mortgage or authorized by other law,
38 appraisal fees, the fee of the person conducting the sale in the case of a foreclosure by auction,
39 the fee of a court-appointed receiver, and other expenses reasonably necessary to the foreclosure.
40

41 4. The definition of “holder” is taken from revised Article 1: UCC § 1-201(b)(21)(A) and
42 the terms “bearer” and “identified person” have the same meanings in this act as in the UCC. The
43 definition of “holder” in unrevised Article 1 has slightly different language, but is the same in
44 substance.
45

1 5. The terms "homeowner" and "obligor" are separately defined because some provisions
2 of this [act] apply to one rather than to both individuals. For most home mortgage transactions,
3 the same individual (or individuals) will be both a homeowner and an obligor. However,
4 occasionally, an individual will be a homeowner but not an obligor; examples might include a
5 spouse or heir who acquires an ownership interest, but has not assumed the mortgage obligation.
6 Similarly, from time to time an individual will be an obligor but not a homeowner; examples
7 might include a guarantor or a person who conveys an ownership interest to another person after
8 signing a mortgage agreement.

9
10 6. "loss mitigation" includes such actions as a repayment plan, forbearance agreement,
11 loan modification, short sale, partial mortgage insurance claim, negotiated transfer and deed in
12 lieu of foreclosure.

13
14 7. The term "mortgage" refers to the lien held by the creditor, which secures payment of
15 the obligation, whereas the term "mortgage agreement" refers to the writing or other record that
16 memorializes the parties' agreement and creates the mortgage. Depending upon local usage and
17 custom, the mortgage agreement may be denominated as a mortgage, deed of trust, trustee deed,
18 security deed, deed to secure debt, or the like.

19
20 8. The definition of 'Obligor' includes, among other standards, a statement that the
21 person has 'signed' a mortgage agreement. The term 'sign' in this sense has the same meaning
22 as the same term has in UCC Section 1-201(b)(37).

23
24 9. The definition of an obligation includes a non-recourse debt, whether the debt is non-
25 recourse due to the application of anti-deficiency judgment legislation, agreement of the parties
26 or for other reasons.

27
28 10. Real property is "mortgaged property" if its primary use is residential. It includes but
29 is not limited to owner-occupied principal residences and second or vacation homes. The
30 definition excludes parcels of real property that are used primarily for non-residential business
31 purposes but which also contain one-to-four dwelling units, such as a farm with a farmhouse or a
32 manufacturing facility that includes a residence for the company's chief executive officer.
33 Likewise, the term "mortgage" does not include a blanket mortgage that covers multiple parcels
34 containing more than four dwelling units in the aggregate.

35
36 11. The definitions of 'servicer' and 'servicing' are based in part on the Real Estate
37 Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq* ("RESPA"), 24 C.F.R. § 3500.2 (b).

38
39 **SECTION 103. SCOPE.** This [act] applies to foreclosure of mortgaged property in this
40 state.

41 **SECTION 104. PERSON ENTITLED TO FORECLOSE.** The only person who may
42 commence a foreclosure is:

1 (1) if the obligation is evidenced by a negotiable instrument, the “person entitled to
2 enforce” the instrument specified in [U.C.C. Section 3-301]; provided, if that person is not in
3 possession of the instrument due to its loss, theft or destruction, that person must meet the
4 requirements of Section 403;

5 (2) if the obligation is evidenced by a “transferable record” as defined in [UETA] or the
6 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7021(a), the
7 person with control of the transferable record; or

8 (3) if the obligation is not evidenced by a negotiable instrument or transferable record,
9 the person entitled to enforce the obligation as determined by law other than this [act].

10 **Comment**

11 1. The person who is authorized to foreclose a mortgage by this section is a “creditor” as
12 defined in Section 102(3). To foreclose, the creditor must also satisfy the requirements set forth
13 in Section 401 or 402.

14
15 2. This section resolves the problem of who has standing to foreclose by designating the
16 person who is entitled to enforce the obligation, to be determined under other law. When the
17 obligation is evidenced by a negotiable instrument, Article 3 of the Uniform Commercial Code
18 provides the governing rules. When the obligation is evidenced by a “transferable record” as
19 provided for by the Uniform Electronic Transactions Act (UETA) or the federal E-sign Act, the
20 person in control of the transferable record has the right to foreclose; both Acts grant to a person
21 having control of a “transferable record” the right to enforce a promissory note evidenced by an
22 “electronic record,” as those terms are defined in those Acts.

23
24 3. When the obligation is not a transferable record and is not evidenced by a negotiable
25 instrument, law other than this act and other than UCC Article 3 – which does not apply to non-
26 negotiable instruments - will determine who is entitled to enforce the obligation. This includes
27 situations in which the obligation is evidenced by an instrument that is not negotiable and
28 situations in which the obligation is not evidenced by any type of instrument authenticated by the
29 obligor.

30
31 As an example of the former, an obligor may sign a promissory note that has terms that
32 makes the note nonnegotiable. As an example of the latter, under the law of some states an
33 installment land contract creates a mortgage relationship between the parties, in which the
34 vendee’s obligation to pay the price usually is not reflected in an instrument. In such cases, law
35 other than this act determines who has the right to foreclose.

4. At the present time there is substantial interest in the prospect of creation of a mortgage note registry, consisting of an electronic registry of owners, mortgagees, and holders of obligations. Such a registry could be created under either federal or state law or, at least in theory, both. It would maintain the records of mortgages and obligations under standards designed to ensure that each record is unique, identifiable, and unalterable. Such a system may allow the registration of all types of mortgage obligations, including those evidenced by negotiable instruments and transferable records. A mortgage registry of this type, if and when created, would indicate the person who has the right to enforce mortgage obligations and to foreclose on the mortgaged property. For registered obligations, the mortgage registry would supplant the rules provided in parts (1) and (2) of this Section.

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

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

SECTION 105. DUTY OF GOOD FAITH; COMMERCIAL REASONABLENESS.

(a) A person whose conduct is governed by this Act shall comply in good faith with the requirements of this [act] and shall act in good faith throughout the foreclosure process. “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(b) A creditor shall proceed in a commercially reasonable manner in complying with this [act].

Comment

1. For statutory duties that include explicit and precise rules for their performance, such as the time period for sending notices under §§201 and 302, a creditor's failure to implement a different rule cannot violate the "commercially reasonable" standard when the precise rule has been followed. On the other hand, the good faith standard would bar dishonest conduct that is

1 literally in compliance, for example, seeking an abandoned property determination under §602
2 for a home the creditor knows is not abandoned, although it may meet the statutory criteria that
3 give rise to a presumption of abandonment.
4

5 2. The obligation to act in good faith set forth in subsection (a) relates to the performance
6 of specific duties and obligations imposed on persons by this act and to other actions taken
7 throughout the foreclosure process.
8

9 3. The term “creditor” in subsection (b) and elsewhere in the Act includes servicers who
10 have the right to foreclose the mortgage under Section 104.
11

12 4. The duty of good faith governs the conduct of persons who take any actions in
13 connection with the foreclosure process governed by this act, from the sending of the Section
14 201 notice through sale and sale confirmation, if applicable. However, the duty does not extend
15 to other aspects of the mortgage and obligation creation, performance and enforcement
16 processes, which are not covered by this act.
17

18 **SECTION 106. PROHIBITED ACTS.** A creditor may not:

19 (1) make a misleading statement orally or in writing to a homeowner or obligor which
20 would discourage a reasonable person from participating in loss mitigation or foreclosure
21 resolution; or

22 (2) misrepresent any aspect of a foreclosure, including informing the homeowner or
23 obligor that:

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

26 (B) the foreclosure sale has been postponed, canceled, or stayed due to loss
27 mitigation or pre-foreclosure resolution when the sale has not been postponed, canceled or
28 stayed; or

29 (C) the obligor is not eligible for a loss-mitigation option when the option is
30 available and the creditor has not evaluated the option.

31 **SECTION 107. APPLICATION OF LOCAL REGULATIONS.**

32 (a) [Notwithstanding [insert reference to any applicable “home rule” provision under the

1 law of this state]], a municipality, [county], or other political subdivision in this state may not
2 impose a regulation, restriction, or limitation on foreclosure or add to or vary the rights and
3 obligations of a creditor, servicer, homeowner, or obligor under this [act].

4 (b) Except as otherwise provided in subsection (a), this [act] does not invalidate or
5 modify a zoning, subdivision, building, or safety code or other ordinance or regulation generally
6 applicable to the use of real property.

7 **Comment**

8
9 1. This section addresses local laws that regulate residential properties that are in
10 foreclosure or have been sold at foreclosure. During recent years, local governments in a number
11 of states have enacted ordinances that establish mediation or “dispute resolution” programs or
12 that regulate abandoned properties. Lenders have expressed concern that such local programs are
13 often burdensome, especially due to their limited geographical scope. Article 3 of this Act
14 establishes a uniform statewide foreclosure resolution program, and Article 6 regulates
15 abandoned properties in foreclosure on a uniform statewide basis, supplanting the need for local
16 regulation of these matters.

17
18 2. Subsection (b) makes it clear that municipal ordinances generally applicable to real
19 property in a municipality would not be affected by this act, regardless of who owns the
20 property, and therefore will apply with equal force to property owned by homeowners or lenders.
21 Accordingly, for example, a local ordinance mandating the maintenance of yards and blighted
22 property would apply with equal force to a blighted property whether or not owned by a
23 homeowner or creditor, and an ordinance enabling a municipality to repair blighted property and
24 lien the property for the costs of the work, if it were otherwise lawful under applicable state law,
25 would not be barred by this section.

26 **SECTION 108. SERVICERS.**

27
28 (a) A creditor may delegate a duty under this [act] to a servicer.

29 (b) A servicer to whom a creditor delegates a duty or a person authorized to foreclose
30 under Section 104(c) or Section 402(b):

31 (1) has all the rights conferred on creditors by this [act] with respect to the
32 authorized action, unless limited by contract; and

33 (2) is subject to the duties imposed by this [act] on the creditor.

(c) A creditor's liability for a servicer's noncompliance with this [act] is determined by law of this state other than this [act].

Comment

This section does not prevent a creditor from delegating duties to persons other than servicers.

SECTION 109. NO WAIVER. Except as otherwise provided in this [act], the rights of an obligor or homeowner and duties of a creditor under this [act] may not be waived or varied by agreement.

[ARTICLE] 2

NOTICES; RIGHT TO CURE

SECTION 201. NOTICE OF DEFAULT; RIGHT TO CURE.

(a) A person may not initiate foreclosure under [insert reference to state foreclosure law other than this [act]] until 30 days after the person sends separately to each obligor a written notice of default and right to cure.

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

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

(2) the specific action the obligor must take to cure any curable default, including the exact amount that must be paid, all payment methods permitted by section 204 and any other payment methods acceptable to the creditor;

(3) the date by which the default must be cured, which may not be fewer than 30 days after the date the notice is sent;

(4) that if the obligor does not cure, the creditor may accelerate the obligation and demand payment of the full amount of the obligation, not just past-due payments, and may

1 foreclose the mortgaged property;

2 (5) the effect of curing the default, including the right to have the obligation and
3 mortgage remain in effect;

4 (6) that the obligor may dispute the default and raise any other defense to
5 foreclosure or payment of the obligation and the manner of exercising those rights;

6 (7) the name of

7 (A) the creditor and the facts that establish the creditor's right to foreclose
8 under section 104;

9 (B) the servicer, if different from the creditor; and

10 (C) the legal owner of the obligation, if the creditor is not the legal owner;

11 (8) that the obligor may request a copy of the negotiable instrument or other
12 evidence of the obligation and a copy of any record that demonstrates the right to foreclose; and

13 (9) if the creditor is relying on a lost, destroyed, or stolen negotiable instrument,
14 the information required by Section 403(b).

15 (c) The notice under subsection (a) may state that additional amounts may come due after
16 the date of the notice.

17 (d) The notice under subsection (a) may be combined with other notices required by the
18 mortgage agreement or by other law, but may not be combined with the notice required by
19 Section 302.

20 **Comment**

21
22 1. The itemization of the amount due as of the notice date is a critical piece of
23 information for the homeowner or obligor and should be stated as exactly as possible. The
24 amount included for attorneys' fees should be limited to those accrued prior to the date of the
25 notice, and thus should not include retainers or advances to attorneys that would be refunded in
26 the event of a prompt cure.
27

1 2. The mortgage obligation may be accelerated by filing a complaint, scheduling a sale,
2 or by separate notice of acceleration – the notice of default and right to cure does not by itself
3 accelerate the debt. The notice need not refer to acceleration if the creditor does not intend to
4 accelerate the obligation, for example if it is fully matured. The definition of “foreclosure” in
5 section 102 includes other legal methods that may be used to terminate the homeowner’s interest
6 in the mortgaged property, such as a quiet title or ejectment action in the case of an installment
7 land sale contract.
8

9 3. This Act refers in several sections to the ‘foreclosure process’; see, for example,
10 Sections 105(a) and this section 201. The notice of default under this Section is the beginning of
11 the foreclosure process prescribed by this Act. However, the “first notice or filing” under federal
12 regulations mandating a 120-day waiting period, 24 C.F.R. § 1024.41(f)(1), is the [Complaint or
13 other first court filing in judicial state][Notice of Sale in non-judicial state]. Therefore the notice
14 of default may be sent during the 120-day waiting period under the federal rule.
15

16 4. Items (1) through (6) are adapted from the elements of notice in the standard
17 Fannie/Freddie mortgage negotiable instrument. Item (3) adds a specific deadline to cure the
18 default. Items (7) and (8) are the ownership statement required by the national servicing
19 settlement, and call for the servicer to identify its basis for standing at the outset of foreclosure
20 proceedings, so that any disputes can be resolved promptly. This notice does not displace all
21 state-specific aid programs and counseling notices which necessarily will depend on state
22 funding – for example, Pennsylvania requires a separate 30-day notice of how to apply for its
23 Homeowner’s Emergency Mortgage Assistance Program.
24

25 Subsection (b)(7)(A) requires the creditor to state the facts establishing its right to
26 foreclose. For example, the holder of a negotiable instrument could comply by stating that the
27 original instrument is in its possession, or in the possession of a specified agent, and the
28 instrument is endorsed to the creditor or in blank.
29

30 5. In subsection (b)(2), the actions the homeowner needs to take in order to cure the
31 default are governed by § 203. If the default by its nature cannot be cured, for example if the
32 property has been forfeited or foreclosed by a senior lienholder, the notice may simply state that
33 the default may not be cured.
34

35 6. If a homeowner or obligor has cured a default, any subsequent foreclosure based on a
36 later default must be preceded by a new notice, subject to the limitations on repeated defaults
37 contained in Section 203. This is because a cure restores the homeowner to the same legal
38 position as if no default had occurred, §203(d). If, on the other hand, as a result of foreclosure
39 resolution or otherwise, the homeowner has tendered payments under a forbearance plan or other
40 workout but has not fully cured the default that was the subject of the notice, no new notice is
41 required in the event the workout fails and the creditor chooses to proceed with foreclosure.
42

43 7. The servicer’s duty to respond to an obligor’s request under subsection (b)(8) is
44 defined by other federal and state law governing information requests to servicers.
45
46

SECTION 202. MANNER OF NOTICE DELIVERY. A notice required by Section 201 or 302 must be sent by first-class mail addressed to each obligor at each obligor’s last known address. At least one mailed notice must also be addressed to “homeowner” at the address of the mortgaged property. If the obligor or the obligor’s representative has requested in a record to receive notice by electronic mail and has provided the creditor an electronic-mail address, the notice also must be sent to the electronic-mail address.

Comment

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) A person may cure a monetary default on an obligation by tendering payment in cash or with an electronic funds transfer, cashier's check, certified check, teller's check or equivalent obligation of a bank or money order, the amount specified in subsection (c) at any time after a notice under Section 201 and not later than two days before a scheduled or postponed foreclosure sale.

(b) A person may cure a default other than a monetary default at any time not later than two days before a scheduled or postponed foreclosure sale.

(c) To cure a default under this section, a person shall:

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

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

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

5 (4) tender any late fees, if provided for in the mortgage agreement or obligation
6 and permitted by law other than this [act].

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

9 (e) This section does not impair a greater right to cure a default that the obligor has under
10 the mortgage agreement or the obligation.

11 (f) This section does not limit a right of an obligor to redeem the mortgaged property by
12 paying the full amount of the accelerated obligation at any time before the foreclosure sale is
13 completed.

14 **Comment**

15
16 1. The cure of a default on an obligation secured by a mortgage has the effect of de-
17 accelerating the payments due after acceleration, but before a completed foreclosure sale. The
18 homeowner and obligor receive notice detailing the amounts needed to cure the default pursuant
19 to Section 202, and identifying any nonpayment defaults, such as failure to maintain insurance.

20
21 2. Subsection (a) lists the forms of payment that a creditor must accept; the creditor may
22 choose to accept other forms of payment and, in that case, would also include those other forms
23 in its Section 201 notice. In the unlikely event that one of these forms of payment is not honored,
24 for example if a cashier's check proves to be forged, the default is not cured and subsection (d)
25 would not apply. Tender of the required payment amount results in a cure even if the creditor
26 wrongfully refuses to accept the payment. In that event, the homeowner or obligor must continue
27 to tender the required payment until the creditor accepts it.

28
29 3. The right to cure as used in this Act includes the right to reinstate the mortgage after
30 acceleration. "Cure" is used in a broad sense here, similar to the use of the term in the
31 Bankruptcy Code, §1322(b)(5).

32
33 4. The statutory right to cure provided by this section may not be waived by contract. In

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

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

12 13 **SECTION 204. UNKNOWN HOMEOWNER OR OBLIGOR.**

14 (a) A creditor does not have a duty under Section 201, 302, 404(e) or 405 to notify a
15 homeowner or obligor unless the creditor knows:

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

17 (2) the identity of the person.

18 (b) If the creditor knows the identity of a homeowner or obligor but does not know the
19 homeowner's or obligor's mailing address, notice to the homeowner or obligor under Section
20 201, 302, 404(e) and 405 must be sent to the address of the mortgaged property.

21 **Comment**

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

26 27 **[ARTICLE] 3**

28 **FORECLOSURE RESOLUTION**

29 **SECTION 301. FORECLOSURE RESOLUTION PROGRAM.** [The court or
30 agency serving as the foreclosure resolution agency] is the foreclosure resolution agency. The
31 agency shall adopt rules under [insert reference to state administrative procedures act or, if the
32 agency is the judicial system, to the rules of court] establishing procedures and standards for

1 foreclosure resolution. The agency will appoint a neutral individual to assist parties making a
2 request under Section 303 to achieve alternatives to foreclosure.

3 **Comment**

4 1. Foreclosure resolution is defined in Section 102 as a process in which a third-party
5 neutral assists the parties at a meeting between them with the objective of achieving a
6 commercially reasonable alternative to foreclosure, hopefully resulting in an agreement between
7 the creditor and homeowner.
8

9 Between 2007 and 2012 eighteen states adopted statewide foreclosure diversion or
10 mediation programs, and local jurisdictions in at least eight additional states have established
11 similar programs. The programs vary greatly in their timing and design, and exist in both
12 judicial and nonjudicial foreclosure states. Most programs in judicial foreclosure states call for
13 intervention after a foreclosure complaint is filed. While most stakeholders recognize that
14 starting mediation or foreclosure resolution earlier in the process would increase the chances of
15 success and reduce costs, most existing state laws do not provide a means to initiate foreclosure
16 resolution before the judicial process begins. Foreclosure resolution permits early sorting of
17 foreclosure cases, into those where the homeowner wants to find a solution other than
18 foreclosure, and those cases that are uncontested or where there is no realistic alternative to
19 foreclosure.
20

21 2. The Act does not prescribe standards or procedures for a state's foreclosure resolution
22 program. However, the Appendix to the [act] sets forth model rules and best practices that state
23 agencies may adopt.
24

25 3. Foreclosure resolution is not mediation as defined in the Uniform Mediation Act. The
26 agency or court determination under §304 whether to permit foreclosure to proceed requires
27 reporting of information concerning the foreclosure resolution process. The Uniform Mediation
28 Act generally bars mediators from making reports. Article 3 and the model rules in the
29 Appendix to Article 3 do, however, include some key principles from the Uniform Mediation
30 Act, including the protection of personal financial information exchanged in foreclosure
31 resolution and the avoidance of conflicts of interest on the part of the neutral individual.
32

33 **SECTION 302. NOTICE OF FORECLOSURE RESOLUTION.**

34 (a) In a judicial foreclosure, the creditor shall send to the homeowner and obligor a notice
35 under subsection (c) of the right to participate in foreclosure resolution, or shall request that the
36 foreclosure resolution agency send the notice under subsection (b), not later than service of a
37 foreclosure [complaint] on the homeowner. In a nonjudicial foreclosure, the creditor shall send to
38 the homeowner and obligor a notice under subsection (c) of the right to participate in foreclosure

1 resolution, or shall request that the foreclosure resolution agency send the notice under
2 subsection (b), no later than 30 days after sending a notice of default and right cure required by
3 Section 201.

4 (b) A creditor is not required to send or request a notice if a court or governmental
5 agency has determined under Section 602 or 603 that the property is abandoned. If a court or
6 governmental agency later determines that the property is not abandoned and a foreclosure sale
7 has not been completed, the creditor shall request the notice under subsection (b) or send the
8 notice under subsection (c).

9 (c) If the foreclosure resolution agency establishes a procedure for the agency to send the
10 notice required by subsection (a), a creditor shall request the agency to send the notice to the
11 creditor and to each homeowner and obligor. The notice may be sent before or after
12 commencement of a foreclosure action, as provided by the foreclosure resolution agency's rules,
13 but must be sent before a creditor may request entry of a default or foreclosure judgment or give
14 a notice of a judicial or nonjudicial-foreclosure sale.

15 (d) If the foreclosure resolution agency does not establish a procedure for the agency to
16 send notice required by subsection (a), the creditor shall send notice to each homeowner and
17 obligor, in the same manner as required for the notice under Section 201.

18 (e) A notice of the right to participate in foreclosure resolution must include the
19 following:

20 (1) the name, address, and telephone number of each housing counseling agency,
21 lawyer-referral service, and legal-aid agency serving the geographic area of the mortgaged
22 property designated by the foreclosure resolution agency;

23 (2) the name, address, telephone number, and electronic-mail address of the

appropriate contact person or group assigned by the creditor or servicer to the homeowner or obligor under rules of the federal Consumer Financial Protection Bureau;

(3) that the homeowner or obligor may request a foreclosure resolution meeting, that the request must be made not later than 30 days after notice is sent, the instructions for requesting foreclosure resolution, and all eligibility requirements under the agency's rules;

(4) a description of all documents the homeowner or obligor must bring to the foreclosure resolution meeting under the agency's rules; and

(5) a form prescribed by the agency for the homeowner or obligor to request foreclosure resolution and to affirm that the homeowner or obligor meets the eligibility requirements of Section 303.

Comment

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

2. If the property is not abandoned, but the agency or court determines that the homeowner has rented the dwelling unit to someone other than another homeowner or an obligor, the obligor and homeowner are not eligible for foreclosure resolution, under §303. However, the creditor or agency must still send the notice of foreclosure resolution. If the agency determines, based on the obligor's request for foreclosure resolution or other information, that the property is rental property, it must then permit foreclosure to proceed, under Section 304.

SECTION 303. ELIGIBILITY FOR PARTICIPATION IN FORECLOSURE RESOLUTION.

(a) If a homeowner or obligor makes a request for foreclosure resolution not later than 30 days after the sending of a notice under Section 302(b) or (c), the agency shall schedule a meeting in accordance with its rules and appoint a neutral individual to conduct the meeting. For

1 good cause shown the agency may schedule a meeting and initiate foreclosure resolution later
2 than 30 days after the sending of the notice. The agency may not initiate a second foreclosure
3 resolution or schedule a second meeting in a foreclosure if an earlier resolution was concluded
4 unless both parties consent.

5 (b) If the foreclosure resolution agency schedules a meeting under subsection (a), the
6 creditor and homeowner or obligor shall attend and participate in compliance with agency rules
7 and any scheduling or other order rendered by the neutral individual or the agency. Failure to
8 comply with this subsection includes failure:

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

10 (2) without good cause to provide, before a scheduled meeting, documents and
11 information required by foreclosure resolution agency rules or reasonably requested by the
12 neutral individual;

13 (3) to designate a person with authority to reach a settlement agreement, if the
14 authority exists;

15 (4) without good cause to pay any required foreclosure resolution fee;

16 and

17 (5) to advise the homeowner, obligor, and the neutral individual of any loss-
18 mitigation option that is available to the homeowner or obligor or to consider the homeowner or
19 obligor for the loss-mitigation option before or during foreclosure resolution.

20 (c) A homeowner or obligor is eligible for foreclosure resolution only if the mortgaged
21 property is occupied by the homeowner or obligor. If the mortgaged property contains more than
22 one dwelling unit, foreclosure resolution is available only if at least one dwelling unit is occupied
23 by the homeowner or obligor. With a request for foreclosure resolution, the homeowner or

1 obligor shall submit to the foreclosure resolution agency an affirmation that the mortgaged
2 property is occupied either by an obligor or homeowner. If the agency determines that the
3 property is not occupied by a homeowner or obligor, the agency may not schedule a meeting
4 under subsection (a), but instead shall permit the creditor to proceed with foreclosure under
5 Section 305.

6 **SECTION 304. PARTICIPATION IN FORECLOSURE RESOLUTION.**

7 (a) The creditor shall inform the homeowner, obligor, and the foreclosure resolution
8 agency of (i) the loss-mitigation options available to the homeowner and obligor; and (ii) its
9 willingness or refusal to offer a loss-mitigation option requested by the homeowner or obligor,
10 the reasons for any refusal, and the information on which any refusal is based.

11 (b) A creditor may not charge a homeowner or obligor a fee for foreclosure resolution.
12 The foreclosure resolution agency may charge a fee or costs for the foreclosure resolution
13 process to either or both parties.

14 (c) A homeowner or obligor that participates in foreclosure resolution shall provide
15 reasonably available financial and other information to enable the creditor to evaluate any loss-
16 mitigation options.

17 (d) This [act] does not impose a duty on a creditor to provide any specific loss mitigation
18 option. The foreclosure resolution agency rules may not impose a duty on a creditor to provide
19 any specific loss-mitigation option.

20 (e) A homeowner or obligor may be accompanied at a foreclosure resolution meeting by
21 an attorney, housing counselor, or other individual.

22 (f) Personal financial information exchanged during foreclosure resolution is confidential
23 and not subject to disclosure under [state FOIA or sunshine laws]. Neither the foreclosure

1 resolution agency nor the neutral individual is required to respond to a discovery request in a
2 court proceeding, to the extent that the discovery seeks personal financial information or other
3 privileged information exchanged during foreclosure resolution.

4 (g) The neutral individual shall disclose potential conflicts of interest in the time and
5 manner provided by the agency rules.

6 **Comment**

7
8 1. Abandoned properties are not eligible for foreclosure resolution and no notice of
9 foreclosure resolution to an abandoned property is required. Investors who are renting a property
10 otherwise covered by this Act are also ineligible for foreclosure resolution, but notice must be
11 sent to the property prior to foreclosure. A homeowner must certify under §303(c) that the
12 property is not a rental property (or, if it is, that the homeowner or obligor occupies at least one
13 unit) in order to be eligible for foreclosure resolution. If the homeowner does not make the
14 certification, foreclosure may proceed 30 days after the notice, under §305(a)(1). Existing
15 foreclosure mediation programs generally limit eligibility to owner-occupants. *E.g.* N.Y.
16 C.P.L.R. §3408 (“foreclosure . . . in which the defendant is a resident of the property”); Conn.
17 Public Act No. 11-201 (applies to residential real property defined as “a one-to-four family
18 dwelling occupied as a residence by a mortgagor”); *see also* 12 C.F.R. §1024.30(c)(2) (loss
19 mitigation notice and appeal rules only apply to a mortgage loan that is secured by a property
20 that is a borrower’s principal residence).

21
22 2. As provided in Section 301, the foreclosure agency rules and orders may impose
23 additional requirements on the parties, for example requiring the creditor, servicer or its agent to
24 appear in person or to have a person with authority to approve loss mitigation alternatives
25 available by telephone at the time of the foreclosure resolution session, to perform a net present
26 value analysis, to disclose the assumptions on which the analysis is based, or requiring
27 homeowners to meet with a housing counselor to qualify for foreclosure resolution. The agency
28 will also regulate procedural matters, such as time limits for exchanging documents, scheduling
29 and concluding foreclosure resolution meetings, reports by neutrals, and the like. States should
30 continue to have flexibility in the design and implementation of foreclosure resolution programs,
31 but should establish and publish the standards as required by section 301. The model rules and
32 best practices principles of foreclosure resolution set forth in the Appendix to this Act were
33 developed by the Uniform Laws Commission after extensive collaboration with a number of
34 state agency heads and outside consultants, and should aid new state foreclosure resolution
35 agencies in designing their programs.

36
37 3. In existing state foreclosure mediation programs, a creditor will commonly delegate to
38 its servicer whatever duties the statute imposes on the creditor, and this [act] contemplates that
39 procedure will continue to prevail under the procedures set forth in this Article 3. Section 108
40 provides ample authority for that delegation and articulates both the rights and responsibilities of
41 the servicer in the mediation process. For that reason, in this Article and throughout the [act], the

only reference is to the ‘creditor’, rather than to the ‘creditor and servicer’.

SECTION 305. FORECLOSURE ACTION DURING FORECLOSURE

RESOLUTION.

(a) After a foreclosure resolution agency or a creditor has sent notice required by Section 302 to a homeowner or obligor, the creditor, subject to law of this state other than this [act], may commence a foreclosure. Subject to subsection (c), the creditor may not file a default or dispositive motion in a foreclosure action, or schedule or cause to be scheduled a foreclosure sale, unless:

(1) neither the homeowner nor obligor responds to the foreclosure resolution notice by making a request for foreclosure resolution to the agency not later than 30 days after the notice is sent;

(2) the agency notifies the creditor that

(A) the parties have participated in the meeting required by Section 303(a) and reached an impasse, or

(B) the homeowner or obligor has failed to participate in foreclosure resolution, provide required information after a reasonable opportunity to do so, or materially comply with agency rules or orders; or

(3) the court or agency renders an order permitting the creditor to proceed with foreclosure.

(b) If the court or agency determines that the mortgaged property is not occupied by the homeowner or obligor, the court or agency shall render an order permitting the creditor to proceed with foreclosure.

(c) A creditor may proceed to file a default or dispositive motion in a foreclosure action,

1 or schedule or cause to be scheduled a foreclosure sale, [90] days after sending the notice
2 required by Section 302, unless the parties agree in a record to continue foreclosure resolution or
3 the court or foreclosure resolution agency directs the parties to begin or continue foreclosure
4 resolution.

5 (d) The court or foreclosure resolution agency may render an order imposing appropriate
6 conditions on the parties to foreclosure resolution, including the payment of fees and costs of
7 foreclosure resolution to the agency authorized by Section 304(b) or the tender of periodic
8 payments by the homeowner or obligor to the creditor.

9 **Comment**

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

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

3. Subsection (c) contemplates a variety of situations where the 90 day foreclosure resolution period should be extended. Situations that might warrant such an order include cases where the servicer has failed to evaluate a homeowner's completed request for loss mitigation in a timely manner, has failed to comply with material aspects of federal servicing regulations, *see* 12 C.F.R. §1024.41, or has requested additional documents from the homeowner late in the foreclosure resolution process. In furtherance of the efficiency goals of the Act, extensions should not be routinely granted due to agency or court delays or backlogs.

4. Subsection (d) authorizes the agency to charge the parties fees sufficient to fund the costs of the foreclosure resolution program, a funding mechanism used in several states. States may wish to include more specific provisions about the fees the agency may impose. Subsection (d) also authorizes the agency to direct the homeowner to tender periodic payments during the foreclosure resolution process. A payment tender requirement may filter out borrowers who simply want to buy time, with no realistic expectation of retaining the property or achieving another alternative to foreclosure.

5. The consequence of an obligor failing to comply with the duty to participate under Section 304 or agency orders authorized by Section 305(d) is that the agency will permit the foreclosure to proceed immediately, under Section 305(a)(2)(B). The consequence of a creditor failing to comply with the duty to participate under Section 304 or agency orders authorized by Section 305(d) is that the agency may make an order under Section 305(c) delaying foreclosure until the resolution process is complete, and that a court may award any remedy under Article 7.

SECTION 306. EXEMPTION FOR SMALL CREDITORS. The provisions of this Article do not apply to a foreclosure by a person that is the owner, holder, or servicer of five or fewer mortgages at the time the notice required by Section 201 is sent. An exempt small creditor may elect voluntarily to send the notice under Section 303 and participate in foreclosure resolution under this Article.

[ARTICLE] 4

FORECLOSURE REQUIREMENTS; PUBLIC SALE PROCEDURE

SECTION 401. JUDICIAL FORECLOSURE.

(a) A creditor may commence judicial foreclosure only after default in the obligation and satisfaction of all conditions required by the mortgage agreement and by law.

(b) In a judicial foreclosure, the following rules apply:

(1) The creditor must plead that it has the right under Section 104 to foreclose;

1 and

2 (2) If the obligation is evidenced by a negotiable instrument, the [complaint] must
3 include:

4 (A) a copy of the instrument in its present condition, including any
5 indorsement or allonge and a statement identifying the person in possession of the instrument; or

6 (B) a statement that the instrument has been lost, destroyed, or stolen and
7 a copy of the instrument in its last-known condition, in which case the [complaint] must include
8 an affidavit that complies with Section 402.

9 (3) If the obligation is not evidenced by a negotiable instrument, the [complaint]
10 must include a copy of the record evidencing the obligation and the creditor's right to enforce the
11 obligation.

12 (c) The creditor, in a record, may authorize another person to foreclose. The [complaint]
13 described in subsection (b) must disclose the name of the creditor and the person authorized by
14 the creditor to foreclose.

15 (d) If the obligation is evidenced by a negotiable instrument and the creditor knows that it
16 does not own the obligation, the [complaint] described in subsection (c) must disclose the name
17 of the legal owner of the obligation.

18 **Comment**

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

23
24 2. The conditions referred to in subsection (a) are those indicated in the mortgage
25 agreement or under this act and other law as necessary to accomplish before the commencement
26 of foreclosure.

27
28 3. When the obligation is evidenced by a negotiable instrument, subsection (b) requires

1 that the complaint identify the possessor of the instrument. The creditor may possess the
2 instrument through an agent. If the agent is not an employee of the creditor and has a place of
3 business in a location other than an office of the creditor, the complaint should identify the agent
4 as the possessor.

5
6 4. Under subsection (b) the creditor's production of the original negotiable instrument is
7 not necessary at the time of the filing of a complaint in a judicial foreclosure. Production of the
8 original would later become appropriate if, during the course of the proceedings, the homeowner
9 or obligor seeks further demonstration of the copy's authenticity or the whereabouts of the
10 original.

11
12 5. Subsection (c) authorizes the person who has the right to foreclose to exercise that
13 right through an agent. By requiring a description of the agency it does not permit the principal
14 to remain undisclosed. An agent authorized to foreclose may be a loan servicer who has a pre-
15 existing contractual relationship with the creditor, or any other person appointed at any time. If
16 the secured obligation is evidenced by a negotiable instrument, the agent or the principal (the
17 person entitled to enforce the note) may hold and retain possession of the note. Subsection (c) is
18 not intended to change existing laws that authorize a third person, such as a trustee under a deed
19 of trust, to foreclose in nonjudicial proceedings. In such circumstances, subsection (d) allows the
20 beneficiary to appoint an agent, but does not speak to the procedure for appointing a substitute
21 trustee.

22
23 In allowing an agent or representative to foreclose, this section is consistent with the
24 standing decision in *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269 (2008).
25 There, payphone operators had assigned claims for compensation from long-distance carriers to
26 collection firms. In *Sprint* the Court permitted an assignee of a legal claim for money to pursue
27 that claim in federal court, even when the assignee had promised to remit the proceeds of the
28 litigation to the assignor.

29
30 6. Existing state law conflicts as to (1) whether the foreclosing party must have an
31 express assignment of the mortgage, or a chain of assignments running back to the original
32 mortgagee, and (2) whether that assignment or the chain of assignments must be recorded in the
33 county land records. This section does not resolve the conflict.

34 35 **SECTION 402. NONJUDICIAL FORECLOSURE.**

36 (a) A creditor may commence nonjudicial foreclosure only after default in the obligation
37 and satisfaction of all conditions required by the mortgage agreement and by law.

38 (b) The creditor, in a record, may authorize another person to foreclose.

39
40 (c) The notice of nonjudicial foreclosure required by [insert statutory reference] must
41 disclose the name of the creditor and the person authorized by the creditor to foreclose.

1 **Comment**

2 1. Law other than this act determines whether the obligor is in default. See Section 401,
3 Comment 1.

4
5 2. This act does not generally replace the procedural requirements for nonjudicial
6 foreclosure set forth in the enacting state's statutes governing nonjudicial foreclosure. The
7 conditions referred to in subsection (a) include requirements set forth in the nonjudicial
8 foreclosure statute, except as provided in Section 805.

9
10 3. This section states fewer requirements for the information to be provided to the
11 homeowner in nonjudicial foreclosure than those contained in Section 401 for judicial
12 foreclosure. This is consistent with the practice in most states that authorize nonjudicial
13 foreclosure.

14
15 4. The information required in a judicial foreclosure complaint by Section 401 must also
16 be provided, at an earlier point in time, when the notice of default and right to cure is sent to the
17 obligor. See Section 201(b). Section 201 requires the same content for both judicial and
18 nonjudicial foreclosures. This section does not require that this information be repeated in the
19 notice given to the homeowner that initiates nonjudicial foreclosure.

20
21 5. Subsection (b) authorizes the creditor to foreclose through an agent, subject to the
22 requirement that the notice initiating the nonjudicial foreclosure disclose the agency. See Section
23 401, Comment 5.

24
25 **SECTION 403. LOST, DESTROYED, OR STOLEN NEGOTIABLE**

26 **INSTRUMENT; AFFIDAVIT.**

27 (a) If the obligation is or was evidenced by a negotiable instrument and the creditor is not
28 in possession of the instrument, the creditor may foreclose the mortgage only if:

29 (1) the creditor:

30 (A) was entitled to enforce the instrument when loss of possession
31 occurred; or

32 (B) the creditor has directly or indirectly acquired ownership of the
33 instrument from a person who was entitled to enforce the instrument when loss of possession
34 occurred;

35 (2) the loss of possession was not the result of a transfer by the creditor or a

1 lawful seizure; and

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

6 (b) If a creditor seeks to foreclose under subsection (a), the notice of default and right to
7 cure sent under Section 201 must state that the instrument is unavailable and provide information
8 establishing that the creditor may foreclose under subsection (a). In a nonjudicial foreclosure,
9 the notice also must:

10 (1) state that there may be a risk that a person other than the creditor will seek to
11 enforce the instrument, that the homeowner or obligor has the right to adequate protection
12 against a claim by another person, and that the homeowner or obligor has the right to petition the
13 [name of appropriate court] where the mortgaged property is located for an order requiring the
14 creditor to provide adequate protection; and

15 (2) include the indemnity required by subsection (c).

16 (c) If a creditor seeks to foreclose subsection (a) the homeowner or obligor is entitled to
17 adequate protection against loss that might occur by reason of a claim by another person to
18 enforce the negotiable instrument. The creditor must provide in a record an indemnity against
19 loss by the homeowner or obligor. In a judicial foreclosure, the court may require additional
20 protection against a claim by another person. In a nonjudicial foreclosure, the homeowner or
21 obligor may petition the [name of appropriate court] where the mortgaged property is located for
22 an order requiring the creditor to provide additional protection against a claim by another person.

23 (d) In a judicial foreclosure, a creditor shall file a [verified complaint] [complaint with

affidavit] attesting to facts under subsection (a). The creditor shall provide the indemnity required by subsection (c) no later than the date established by the court.

Legislative Note: Subsection (a) incorporates the language of Section 3-309 of Revised UCC Article 3 (2002). This language is recommended for States that have adopted Revised Article 3. For States that have adopted a prior version of UCC Article 3, there is a split of authority as to whether an assignee of a lost, destroyed, or stolen negotiable instrument may enforce the instrument when the assignee never obtained possession of the instrument. States with a prior version of Article 3 should consider whether subsection (a) will change the law in their State.

Comment

1. This section requires a lost-note affidavit in a judicial foreclosure, thus following the procedure adopted by most states in their judicial foreclosure laws. The substance of this requirement follows the 2002 amendments to Article 3. In specifying when a creditor is entitled to enforce a negotiable instrument secured by a mortgage notwithstanding its inability to confirm possession of the instrument, subsection (a) tracks the requirements of UCC § 3-309 (2002). In states that have adopted the 2002 amendments to Article 3, Section 3-309 makes it clear that the person who lost possession may be a predecessor of the creditor who seeks to enforce the instrument. UCC § 9-109, Comment 5 provides a result similar to the 2002 Article 3 amendment (“Also, the right under Section 3-309 to enforce a lost, destroyed, or stolen negotiable promissory note may be sold to a purchaser who could enforce that right by causing the seller to provide the proof required under that section.”).

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

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

4. This section does not discuss the evidentiary effect of the affidavit in judicial proceedings. Some states have statutory law on point. For example, an Alabama statute provides that a lost note affidavit “must be received as presumptive evidence both of the contents

1 and loss or destruction of such negotiable instrument, unless the defendant by answer, verified by
2 affidavit, denies the execution of such bond, note or bill or the endorsement, acceptance, or the
3 contents thereof, in which case proof of such execution, endorsement, acceptance, or contents
4 must be made by the plaintiff.” Ala. Code § 6-5-284.

5
6 5. This section does not require the preparation of a lost-note affidavit in a non-judicial
7 foreclosure. If an action is filed to contest or to confirm a non-judicial foreclosure, the court
8 should have the discretion to decide what proof of a lost, destroyed, or stolen negotiable
9 instrument is sufficient.

10
11 6. Subsection (b) requires the creditor to disclose that the negotiable instrument is lost,
12 destroyed, or stolen when it sends notice of default and right to cure under Section 201. In a non-
13 judicial foreclosure, the additional content for the notice is required because the homeowner or
14 obligor is unlikely to appreciate the risk associated with lost instruments, and it is unlikely that a
15 court will consider the issue unless the homeowner or obligor initiates consideration.

16
17 7. Subsection (c) follows UCC § 3-309(b), which requires adequate protection for the
18 obligor from the risk that at some point in the future the instrument will surface and its possessor
19 will assert the right to be paid. (UCC § 3-309(b) was not affected by the 2002 amendments to
20 Article 3.) Subsection (b) requires that the affidavit include a written indemnity, binding the
21 creditor, to protect all obligors against the risk that a person other than the creditor will seek to
22 enforce the instrument. This indemnity serves to reinforce the rights that the obligor already has
23 under principles of restitution and unjust enrichment. See, e.g., Restatement (Third) of
24 Restitution and Unjust Enrichment § 6 (2011): “*Payment of Money Not Due*. Payment by
25 mistake gives the payor a claim in restitution against the recipient to the extent payment was not
26 due.” In appropriate cases, a court may require a bond in addition to a written indemnity.

27
28 8. Subsection (d) requires a verified complaint or a complaint with affidavit in a judicial-
29 foreclosure when the negotiable instrument is lost, destroyed, or stolen. The affidavit must be
30 based upon the affiant’s personal knowledge and must describe the efforts made to locate the
31 negotiable instrument. A bare assertion that the instrument is lost or cannot be found is not
32 sufficient. The court should apply its normal standards for determining the sufficiency of the
33 affidavit. At trial the normal rules of evidence govern use of the affidavit. Below is a form for an
34 affidavit that ordinarily would provide sufficient information:

35
36 **LOST-NOTE AFFIDAVIT**

37
38 _____ [Name of affiant] (Affiant) being sworn deposes and says:

39
40 1. Affiant is _____ [Title or position] of _____
41 _____ [Name of creditor] (Lender) and is authorized to make this
42 affidavit on Lender's behalf.

43
44 2. Lender is the legal owner of a promissory note (Note) executed by _____
45 _____ [Name(s) of obligor(s)] in the original principal amount of
46 \$ _____ [dollar amount], dated _____ [insert date]

1 and secured by _____ [*Name of instrument*] recorded in _____
2 _____ [*recording reference*]. Lender has not sold, assigned,
3 pledged, or otherwise transferred the Note to any person. The Note is free and clear of all claims
4 and encumbrances.

5
6 3. The Note is lost, destroyed, or stolen and for this reason cannot be produced.

7
8 4. On _____ [*insert date*] Affiant made a diligent search for the Note by
9 personal examination of the books and records of Lender, as follows: _____

10
11 _____
12 [*describe search efforts including the books and records examined by Affiant*]
13

14 _____ [*Name of affiant*]
15

16 **ACKNOWLEDGEMENT**

17
18 On _____ [*insert date*], before me, personally appeared [*insert name of affiant*], [*insert*
19 *affiant's title and name of creditor*] who acknowledged the same to be affiant's free act and deed
20 and the free act and deed of [*insert name of creditor*].
21

22 _____
23 NOTARY PUBLIC or other title [*Name of Notary or other person authorized to administer*
24 *oaths under the law of this state*]
25

26 **SECTION 404. ADVERTISEMENT OF PUBLIC SALE.**

27 (a) Mortgaged property may be sold at a public sale no sooner than 30 days after the
28 creditor has published an advertisement of the sale that satisfies this section. An advertisement
29 satisfies this section if:

30 (1) published in a newspaper having general circulation in the [county] where the
31 mortgaged property is located once per week for three consecutive weeks before the sale; or

32 (2) published on an Internet website that is reasonably expected to be viewed by
33 persons having an interest in purchasing the mortgaged property and the Internet publication
34 remains regularly available between the time of posting and the time of sale.

35 (b) An advertisement under subsection (a) must indicate:

36 (1) the name of the homeowner and, if not the same, the name of the person that

1 signed the mortgage agreement;

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

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

4 (4) the street address or, if there is no street address, other information identifying
5 the location of the mortgaged property;

6 (5) any improvements and personal property included in the sale, if that
7 information is readily available to the creditor;

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

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

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

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

15 (c) An advertisement under subsection (a) need not contain a legal description of the
16 mortgaged property or recording information for the mortgage or other instrument of record.

17 (d) The creditor may post an advertisement under subsection (a) or other information
18 pertaining to the sale at the location of the mortgaged property.

19 (e) A creditor shall send a copy of the advertisement under subsection (a) to the
20 homeowner and to each obligor no later than the date of newspaper publication or Internet
21 posting. The creditor may send the copy with the notice of public sale required by Section 404
22 or send it separately.

23 ***Legislative Note:*** States that have already adopted a statute authorizing Internet advertising of
24 public sales in lieu of newspaper advertising should consider whether the requirements of this

1 *section are compatible with that statute, and make changes if appropriate.*

2
3 **Comment**

4 1. This section allows a public sale of the mortgaged property only if the creditor first
5 publishes an advertisement that satisfies the requirements of this section. The purpose is to
6 ensure that the public has a meaningful opportunity to learn of the proposed sale in order to
7 appear and engage in competitive bidding. This section supersedes existing state laws covering
8 advertisements for public sales for all foreclosures that are within the scope of this act.
9

10 2. In many states, a person other than the creditor, such as a trustee or sheriff, performs
11 some or all of the steps related to advertisement of the public sale. This act does not mandate a
12 change in who is responsible for advertising the sale.
13

14 3. This act does not require the accomplishment of foreclosure by a public auction sale. If
15 other state law allows alternative methods of foreclosure, such methods remain permissible. For
16 example, Connecticut law allows strict foreclosure without a sale of the property.
17

18 4. Subsection (b) states minimum requirements for the public advertisement. An
19 advertisement that lacks any of the information set forth in subsection (b) is insufficient as a
20 matter of law. An advertisement may contain additional information about the mortgaged
21 property or the sale.
22

23 5. Subsection (a) states the basic requirement of an advertisement of a public sale.
24 Traditionally the law required the advertisement of foreclosure sales in local newspapers.
25 Subsection (a) allows the creditor to continue that practice, but no longer specifies newspaper
26 advertisement as required. In many communities, newspaper advertisements are no longer an
27 effective means of informing the public about upcoming foreclosure sales. Under these
28 circumstances, a creditor's decision not to publish in a newspaper benefits both the creditor and
29 the homeowner and any obligors by saving the expense.

30 Subsection (a) also allows the creditor to publish the advertisement either in a local
31 newspaper or on an appropriate Internet website. The Internet site may be one operated by the
32 newspaper or by any other person, whether or not located in the jurisdiction where the mortgaged
33 property is located. The Internet site, however, must be one that has characteristics suggesting
34 that interested members of the public are likely to find and to read the posting.
35

36 6. Subsection (c) adopts a bright-line rule with respect to legal descriptions of the real
37 property and recording information. The failure to include such information does not make the
38 public advertisement insufficient. This information is seldom of importance to a person who
39 reads a foreclosure advertisement for the purpose of deciding whether the person has potential
40 interest. Anyone who develops a potential interest is highly likely to investigate further before
41 appearing at the sale to bid. That investigation may include title information, which will disclose
42 the legal description and recording references for the mortgage and other recorded instruments in
43 the chain of title, and typically will include other information as well bearing on the property.
44

7. Subsection (d) authorizes the creditor to post the public advertisement or a sign on the mortgaged property, regardless of whether that right is reserved in the mortgage. Posting at the property is not required. This changes the law in some states, in which posting foreclosure sale signs at the property is mandatory.

SECTION 405. NOTICE OF PUBLIC SALE. A creditor shall send each homeowner and obligor notice of the date, time, and place of a scheduled public sale. The creditor must send the notice of sale by first-class mail to the last-known address of each homeowner and obligor and send a separate copy by first-class mail, addressed to the occupant at the property address. Notice of sale must be mailed or delivered at least 30 days before the sale date.

Comment

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

2. This section does not displace any requirement under other law of this state for sending notices to persons other than homeowners and obligors, such as holders of junior interests in the mortgaged property.

SECTION 406. POSTPONEMENT OR CANCELLATION OF PUBLIC SALE.

(a) A creditor may postpone or cancel an advertised public sale for any reason. If the sale is postponed, the announcement of postponement must include the date, time, and place of the rescheduled sale. If announcement of the postponement is made at the date, time, and place advertised for the sale, a new public advertisement is not required under Section 404, unless the sale is postponed for longer than [180] days after the date originally advertised. If the announcement is not made at the date, time, and place advertised for the sale, a new public advertisement under Section 404 is required.

(b) If a public sale is postponed, the creditor promptly shall give each homeowner and

obligor commercially reasonable notice of the postponement. The notice must include the date, time, and place of the rescheduled sale.

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

Comment

1. In this section the terms "postponement" and "cancellation" are mutually exclusive. A postponement means a decision not to hold a scheduled public sale coupled with the designation of a specific later date for the sale. A decision not to hold a scheduled sale, with no new date then designated, is a cancellation, even if the creditor intends to go forward with foreclosure and select or obtain a new date.

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

[SECTION 407. CONFIRMATION OF PUBLIC SALE.]

(a) Not later than 30 days after a public sale of mortgaged property pursuant to an order or judgment of a court, the person conducting the sale shall file a report of sale with the court. The report must name the purchaser and describe the property, the amount bid, the amount paid to date, the expenses of the sale, and any other material terms.

(b) The creditor may file a motion for confirmation of a public sale not later than one year after the sale of the mortgaged property. The motion must be served on all parties and the person that conducted the sale.

(c) The court that holds a hearing on a motion filed under subsection (b) shall confirm the sale unless the court concludes:

(1) there was a material procedural irregularity;

(2) the terms of sale were unconscionable; or

(3) the sale was conducted fraudulently.

(d) If the court does not confirm a public sale under subsection (c) and a party makes a motion to set aside the sale, the court may order a resale of the property.

(e) For purposes of this subsection, a foreclosing creditor is not a good faith purchaser for value. A final order for which time for appeal has expired, confirming a public sale pursuant to subsection (c) conclusively establishes compliance with this [act] in favor of a purchaser of the mortgaged property in good faith for value

(f) Confirmation of a public 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, subject to law of this state other than this [act].]

Legislative Note: *In some 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.*

Comment

Subsection (e) provides that confirmation of the sale has conclusive effect on the transfer of title to the mortgaged property to a bona fide purchaser. The foreclosing creditor is not entitled to benefit from the conclusive effect of the sale. If a defect results in avoidance of the sale, the creditor is protected by reinstatement of the obligation and the mortgage. A creditor may not obtain conclusive effect by purchasing the mortgaged property through an agent,

1 nominee, or affiliate, such as a subsidiary corporation.

2
3 **[ARTICLE] 5**

4 **NEGOTIATED TRANSFER**

5 **SECTION 501. NEGOTIATED TRANSFER OF MORTGAGED PROPERTY IN**
6 **SATISFACTION OF OBLIGATION.**

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

9 (1) all the homeowners and the creditor agree to the transfer in a record after
10 default by the homeowner or obligor;

11 (2) the agreement states it is made pursuant to this section;

12
13 (3) the creditor sends notice of the proposed negotiated transfer to the persons
14 entitled to notice under Section 502; and

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

18 (b) If a homeowner or person claiming under the homeowner is in possession of the
19 mortgaged property, an agreement under subsection (a) must specify the date and time when the
20 homeowner must surrender possession to the creditor. If a person is entitled to notice under
21 Section 502, the homeowner is not obligated to surrender possession before the 20-day period
22 provided in subsection (a)(4) has expired, regardless of the terms of the proposed transfer.

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

25 (d) A negotiated transfer does not affect the rights of a person holding an interest in

1 mortgaged property which has priority over the interest of a creditor that takes title to the
2 property under this section.

3 **Comment**

4
5 1. This section authorizes a transfer from the homeowner to the creditor in satisfaction of
6 the debt or other obligation. In so doing, it provides a framework for existing workout
7 arrangements such as cash-for-keys agreements and deed-in-lieu of foreclosure transactions.
8 This section and the following two sections provide for a safe harbor by specifying the effect of a
9 transfer that meets the requirements of this section. This section is based in part on UCC § 9-620,
10 which provides for the acceptance of personal property mortgaged property by a secured party in
11 full or partial satisfaction of a secured obligation. The important innovations here are, first, to
12 provide an expedited procedure to discharge junior liens on the property without the need for a
13 foreclosure sale; and second, to resolve a number of collateral issues that flow from the
14 expedited procedure, as detailed in Section 504.

15
16 2. This section does not specify a minimum consideration to be received by the
17 homeowner in exchange for the homeowner's agreement to transfer the mortgaged property in
18 satisfaction of the obligation. The sole exception is that if the homeowner is in possession and
19 there are third parties entitled to notification of the proposed transfer, the agreement may not
20 require the homeowner to vacate possession prior to the expiration of the period for notified
21 persons to submit an objection.

22
23 As a consequence, this section as now drafted confers a substantial benefit on mortgage
24 creditors in the form of a new mechanism for converting every 'deed in lieu' transaction into an
25 accelerated means of clearing title of junior encumbrancers without the need for a more
26 traditional judicial foreclosure. In doing so, the section does not require any minimum benefit on
27 homeowners, other than the general statement of effects of such an agreement contained in
28 Section 504 and the rights of possession noted in the preceding paragraph.

29
30 3. The second sentence of Section 501(b) contemplates a circumstance where, for
31 example, in a typical 'cash for keys' agreement, the lender and homeowner had agreed that the
32 homeowner would move within a short period in return for a sum of money. If there are junior
33 lienholders, however, the possibility exists that there may be an objection to the proposed
34 transfer, that the agreement would not be approved, and that the benefits contemplated by a
35 homeowner under Section 504 from an early move-out would not be realized. This sentence
36 makes certain that the homeowner need not be displaced, even voluntarily, until the parties knew
37 whether there would be objection from a junior lienholder.

38
39 In those cases where there are no junior lienholders or other holders of subordinate
40 interests, it is likely that the parties would often choose to use a traditional deed in lieu of
41 foreclosure to accomplish their agreement, instead of following this statutory negotiated transfer
42 procedure; *see* section 504(f).

43
44 4. When there are multiple owners of the mortgaged property, all the owners need to

1 consent to a negotiated transfer. The act does not authorize a forced transfer outside of
2 foreclosure for a non-consenting co-owner.

3
4 5. Subsection (c) prohibits the creditor from accepting the mortgaged property in partial
5 satisfaction of the obligation it secures in a negotiated transfer under this [act]. Because the effect
6 of a negotiated transfer under section 504(a)(1) is to completely discharge the obligation, this
7 section does not require any consent from an obligor who is not also a homeowner. Whether the
8 parties may enter into another type of agreement for the transfer of the mortgaged property in
9 partial satisfaction of the obligation is determined by other law of this state.

10 11 **SECTION 502. NOTICE OF NEGOTIATED TRANSFER.**

12 (a) If a negotiated transfer under Section 501 is proposed when a judicial-foreclosure is
13 pending, the homeowner and creditor shall request the court to send notice of the proposed
14 negotiated transfer to all parties to the action other than the homeowner and creditor. The court
15 promptly shall send the notice.

16 (b) If a negotiated transfer under Section 501 is proposed when a judicial-foreclosure is
17 not pending, the creditor shall send notice of the proposed transfer to:

18 (1) a person from which the creditor received, before the homeowner and the
19 creditor agreed to the proposed transfer, notice of a claimed interest in the mortgaged property;
20 and

21 (2) a person that, [10] days before the homeowner and creditor agreed to the
22 proposed transfer, held a recorded interest in the property subordinate to the mortgage that is the
23 subject of the proposed transfer.

24 **Comment**

25
26 1. This section is based in part on UCC § 9-621, which provides for a notification
27 procedure for an acceptance of personal property by a secured party in satisfaction of a secured
28 obligation.

29
30 2. Subsection (a) provides for the court to notify parties to the foreclosure of an
31 agreement proposed by the homeowner and creditor for a transfer in full satisfaction of the debt
32 or other obligation. If there are no parties to the action, other than the homeowner and the
33 creditor, then there is no one to notify. Holders of subordinate interests in the mortgaged

1 property should have been joined as necessary parties to the foreclosure action.

2
3 3. Subsection (b) provides for the creditor to notify persons who have subordinate
4 interests in the mortgaged property of an agreement proposed by the homeowner and creditor for
5 a transfer in full satisfaction of the obligation. Such subordinate interest holders may have their
6 rights terminated by the negotiated transfer, and therefore they have the right to request
7 protection pursuant to Section 503.

8
9 4. The notification procedure under subsection (b) is allowed in both judicial foreclosure
10 and nonjudicial foreclosure states, provided the creditor has not filed a foreclosure complaint
11 when it sends notice. Under Section 501(a)(1), there must be a default before the creditor and the
12 homeowner agree to a negotiated transfer. Other steps that the creditor must take before
13 foreclosing under this act, including the sending of notices under Section 201 and 302, do not
14 have to precede a negotiated transfer.

15
16 **SECTION 503. OBJECTIONS TO NEGOTIATED TRANSFER.**

17 (a) Except as provided in subsection (b), (c) and (d), if a judicial foreclosure is pending
18 and the court receives an objection from a person holding an interest in the mortgaged property
19 which would be affected by a negotiated transfer under Section 501, the court shall set a date not
20 later than [30] days after the date of the objection by which the person objecting may tender to
21 the creditor that is a party to the proposed negotiated transfer an amount equal to the sum due to
22 the creditor from the homeowner under the negotiated transfer. If the person objecting tenders
23 the amount to the creditor within the time set by the court, the person objecting is entitled to the
24 benefit of the proposed negotiated transfer, and all interests subordinate to the interest of the
25 creditor that is a party to the proposed negotiated transfer are extinguished effective on the date
26 of tender. If the person objecting does not tender the amount to the creditor within the time set by
27 the court, the rights of the person objecting and all other interests subordinate to the interest of
28 the creditor that is a party to the proposed negotiated transfer are extinguished, effective on the
29 date set by the court by which the tender could have been made.

30 (b) If a judicial foreclosure is pending and the court receives objections from more than
31 one person holding an interest in the mortgaged property which would be affected by a

1 negotiated transfer under Section 501, the court shall promptly determine the relative priorities of
2 the interests held by each of the persons who filed objections. The court shall then set
3 consecutive days by which each of the objecting persons holding interests in the mortgaged
4 property may tender (i) the sums described in subsection (a) to the creditor proposing the
5 negotiated transfer; and (ii) all sums due to all other persons holding interests in the mortgaged
6 property which are subordinate to the interest of the creditor proposing the negotiated transfer.
7 The court shall assign those dates to the objecting parties in the reverse order of their priorities,
8 with the most junior objecting party receiving the first tender date.

9 (c) If a judicial proceeding is not pending and a creditor that sends a notice under Section
10 502(b) receives an objection from a person holding an interest in the mortgaged property which
11 would be affected by the negotiated transfer under Section 501, the negotiated transfer may not
12 proceed unless the creditor initiates a judicial proceeding to allow the objecting person to tender the
13 amount due to the creditor. The judicial proceeding must be conducted as provided by subsections
14 (a), (b), (d), and (e).

15 (d) If the objecting person holding the most junior interest in the mortgaged property
16 tenders the amounts described in (b) within the time set by the court, that person is entitled to the
17 benefit of the proposed negotiated transfer, and all interests subordinate to the interest of the
18 creditor that first proposed the negotiated transfer are extinguished effective on the date of
19 tender.

20 (e) If the objecting person holding the most junior interest in the mortgaged property does
21 not tender the amounts described in (b) to the creditors within the time set by the court: (i) the
22 rights of the person who failed to tender are forever extinguished; and (ii) the objecting party
23 with the next tender date shall be entitled to tender to all creditors who are senior to the objecting
24 party in the same manner as described in (b). This process shall continue until each objecting

1 person shall either have been paid in full, or shall have its interest extinguished.

2 **Comment**

3 Section 503 provides a process to addresses those situations that may arise when there are
4 either: (i) multiple objections to a negotiated transfer by junior lien holders; or (ii) non-objecting
5 lien holders whose interests are subordinate to the creditor who proposed the negotiated transfer,
6 but senior to the interests of an objecting lien holder.

7
8 **SECTION 504. EFFECT OF NEGOTIATED TRANSFER.**

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

11 (1) discharges the obligation in full;

12 (2) transfers to the creditor all of the homeowner's rights in the property, except
13 for a right of the homeowner to continue to occupy the property pursuant to an agreement
14 between the homeowner and the creditor which is incorporated into the negotiated-transfer
15 agreement;

16 (3) discharges the mortgage held by the creditor and any mortgage or other lien
17 subordinate to the mortgage held by the creditor; and

18 (4) terminates any other subordinate interest except an interest protected from
19 termination by law other than this [act].

20 (b) A subordinate interest is discharged or terminated under subsection (a) even in
21 the event of noncompliance with this [article]. A creditor that fails to comply with this
22 [article] is liable for damages in the amount of any loss caused by its failure to comply.

23 (c) If a homeowner and creditor agree that the homeowner may continue to occupy the
24 mortgaged property for a fixed time after a transfer, the agreement creates a license unless the
25 parties agree in a record to enter into a landlord-and-tenant relationship.

26 (d) Transfer of mortgaged property under Section 501 terminates all rights of the creditor

1 to obtain a personal judgment for the obligation, including attorney’s fees, costs, and other
2 expenses, against the homeowner and any other person liable for the obligation secured by the
3 property.

4 (e) Transfer of mortgaged property under Section 501 terminates any right of the
5 homeowner and other persons to redeem the property.

6 (f) This [article] does not prevent a homeowner and creditor from entering into an
7 agreement other than a negotiated transfer, but a negotiated transfer described in this section
8 does not apply to an agreement that does not state it is made pursuant to Section 501.

9 **Comment**

10
11 1. This section is based in part on UCC § 9-622, which specifies the effect of acceptance
12 of personal property by a secured party in full or partial satisfaction of a secured obligation.
13

14 Subsection (a) specifies that the effect of a transfer of the mortgaged property is full
15 satisfaction of the secured obligation. The transfer to which it refers is one that results from
16 performance of the agreement made by the homeowner and the creditor. If a timely objection is
17 received by the court or by the creditor from a person entitled to notification, then neither this
18 subsection nor subsection (b) applies. Paragraph (1) expresses the fundamental consequence of
19 accepting the mortgaged property in full satisfaction of the secured obligation—the obligation is
20 discharged.
21

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

30 3. Subsection (a)(4) terminates subordinate interests, but with a savings clause for a
31 subordinate “protected from termination by other law.” The clearest examples are the common
32 provisions in state statutes providing that various kinds of residential leasehold interests are not
33 automatically terminated by a foreclosure, but may only be terminated by the creditor when they
34 would be terminable under the terms of the lease itself in the absence of foreclosure. This act
35 does not overturn the results under those statutes.
36

37 4. Subsection (b) affords a remedy to any person aggrieved by a creditor’s failure to
38 comply with the requirements of this [article], including the holder of a subordinate interest to

1 whom a notice required by Section 502 was not sent. Damages for noncompliance are those
2 reasonably calculated to put the aggrieved person in the position it would have occupied but for
3 the noncompliance. They include attorneys' fees and costs.

4
5 5. Subsection (c) specifies that the status of the homeowner who continues to occupy the
6 property after entering into an agreement to transfer the property to the creditor in full
7 satisfaction of the obligation is that of a licensee. The parties' agreement and other state law
8 determine the rights and obligations of the parties as licensor and licensee.

9
10 6. Subsection (f) authorizes homeowners and creditors to enter into any other type of
11 agreement that they might desire, but no such agreement – presumably including a traditional
12 'deed in lieu' arrangement – would confer the benefits of Section 504 unless the agreement
13 expressly provided that it was made pursuant to Section 501.

14
15 7. The act does not require notice of the proposed negotiated transfer to a senior creditor
16 because the interest of the senior creditor will not be affected by that transfer. It may well be that
17 a negotiated transfer would result in a violation of a 'due on sale' clause in the senior mortgage,
18 but whether or not such a violation results would not be affected by notice to a senior creditor,
19 and the act should not suggest a contrary result.

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

28 29 **[ARTICLE] 6**

30 **ABANDONED PROPERTY**

31 **SECTION 601. DETERMINATION OF ABANDONMENT IN JUDICIAL** 32 **FORECLOSURE.**

33 (a) In a judicial foreclosure, a creditor or governmental subdivision in which the
34 mortgaged property is located may move for a determination that the property is abandoned
35 property. If the property is located in a common-interest community, the community association
36 may intervene in the foreclosure.

37 (b) A moving party under subsection (a) shall send separately to each homeowner and

obligor a notice that contains the following:

(1) a copy of the motion;

(2) a copy of any affidavit attesting to abandonment or a governmental agency's determination that the property is abandoned that the party will submit as evidence;

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

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

(c) The notice required by subsection (b) may be combined with the notice required by Section 201.

(d) The party filing a motion under subsection (a) shall serve personally, or make two attempts to serve personally, the notice described in subsection (b) on a homeowner at the mortgaged property. The attempts must be at least 72 hours apart. One attempt must be before noon, and the other attempt must be between 6 P.M. and 10 P.M. Posting the notice on the property is not required.

(e) When a motion is filed under subsection (a), the court shall schedule a hearing on the motion to be held not less than [15] nor more than [30] days after the filing of the motion.

(f) At a hearing under subsection (e), if no appearance is made to oppose the relief sought and credible evidence is presented supporting the allegations in the motion, the court shall render an order that the mortgaged property is abandoned property.

Comment

1. This Act authorizes an expedited foreclosure procedure for abandoned properties for both judicial foreclosure and for nonjudicial foreclosures. An expedited procedure is appropriate for two reasons. First, the homeowner is no longer making a valuable economic use of the property to provide shelter for the homeowner or the homeowner's family or someone claiming

1 under the homeowner, such as a tenant. A foreclosure sale will not result in a possessor being
2 forced to relocate to other housing. Second, properties that are facing foreclosure and that are
3 vacant have significant negative impacts on neighborhoods and the surrounding communities.
4 Vacancies reduce the market values of neighboring properties. Neighborhood crime increases.
5 The vacant properties tend to suffer from lack of repair and maintenance, creating public health
6 risks, including infestations by vermin, mosquitoes, and other insects. There are fiscal impacts on
7 local governments, who find property taxes on vacant properties often become delinquent; yet
8 the governments are faced with added expenses to provide essential services to blighted
9 neighborhoods, such as police and fire protection. By providing for an expedited foreclosure
10 procedure, this Act seeks to return abandoned properties to the stock of occupied, well-
11 maintained housing as soon as reasonably possible.

12
13 2. Subsections (e) and (f) are based in substantial part on Minn. Stat. § 582.032, which
14 provides for expedited foreclosure for abandoned homes. Minnesota generally provides a
15 statutory right of redemption (post-foreclosure-sale) of six months or one year, which is reduced
16 to five weeks when the lender uses the statutory procedure for abandoned property; this section
17 does not include a comparable right of redemption.

18
19 3. If no appearance is made at the hearing to oppose the motion to determine that the
20 mortgaged property is abandoned, under subsection (f) the court may rely on affidavits to render
21 an order that the property is abandoned without taking testimony.

22
23 **SECTION 602. DETERMINATION OF ABANDONMENT IN NONJUDICIAL**
24 **FORECLOSURE.**

25 (a) In a nonjudicial foreclosure, the creditor, the governmental subdivision in which the
26 mortgaged property is located, or if the property is located in a common-interest community the
27 community association may submit a request to the [building code appeals board] for a
28 determination that the property is abandoned property. The request must be accompanied by an
29 affidavit attesting to facts indicating abandonment.

30 (b) A person that submits a request under subsection (a) shall send separately to each
31 homeowner and obligor a notice that contains the following:

32 (1) a copy of the request;

33 (2) a copy of the affidavit attesting to abandonment;

34 (3) a description of the consequences that will follow from a determination of

1 abandonment;

2 (4) a statement that the recipient may contact the [building code appeals board] to
3 obtain further information;

4 (5) a statement that the recipient has the right to object to the proposed
5 determination of abandonment by sending a notification of objection to the [building code
6 appeals board]; and

7 (6) a statement that the notification of objection must be received within 30 days
8 after the notice was sent to the recipient, in which event the [building code appeals board] will
9 not issue a determination of abandonment.

10 (c) The notice required by subsection (b) may be combined with the notice required by
11 Section 201.

12 (d) A person that submits a request under subsection (a) shall serve personally, or make
13 two attempts to serve personally, the notice described in subsection (b) on a homeowner at the
14 mortgaged property. The attempts must be at least 72 hours apart. One attempt must be before
15 noon, and the other attempt must be between 6 P.M. and 10 P.M. Posting the notice on the
16 mortgaged property is not required.

17 (e) The [building code appeals board], no sooner than 30 days after sending notice under
18 subsection (b), may issue a determination in a record that the property is abandoned property if:

19 (1) the [building code appeals board] has received evidence that notice under
20 subsection (b) was sent to each homeowner and obligor;

21 (2) the [building code appeals board] has not received a notification of objection
22 to the proposed determination from a person entitled to notice under subsection (b) not later than
23 30 days after notice was sent to the person;

1 (3) the [building code appeals board] has received an affidavit attesting to facts
2 indicating abandonment; and

3 (4) a representative of the [building code appeals board] has personally inspected
4 the property.

5 (f) In a proceeding under subsection (e), if no objection is made to the proposed
6 determination and credible evidence is presented supporting the allegations of abandonment, the
7 [building code appeals board] shall issue a determination that the mortgaged property is
8 abandoned property.

9 (g) The [building code appeals board] shall send a determination of abandonment under
10 subsection (e) to the creditor and to each homeowner and obligor.

11 (h) A determination of abandonment under subsection (e) or the refusal of the [building
12 code appeals board] to issue a determination is subject to de novo judicial review.

13 **Comment**

14 1. In a nonjudicial foreclosure, the creditor may treat the mortgaged property as
15 abandoned only by submitting evidence of abandonment to a governmental board, department, or
16 other entity for its review and consideration.

17
18 2. Subsection (e) (4) requires that a person acting on behalf on the governmental board
19 personally visit the property as part of the decision making process. That person may be an
20 employee of local government, such as a building inspector, who is responsible for evaluating
21 the physical condition of dwelling units.

22
23 3. Judicial review of the decision is available to any interested person. Subsection (g)
24 does not specify the nature of that action, which in many jurisdictions will be a mandamus
25 action. De novo judicial review is appropriate to protect the homeowner from the significant
26 limitations on the homeowner's rights under this act that follow from a determination of
27 abandonment.

28 29 **SECTION 603. PRESUMPTION OF ABANDONMENT.**

30 (a) In a proceeding under sections 601 or 602, mortgaged property is presumed to be
31 abandoned property if (1) a [building code department] determines that the property is

1 abandoned; or (2) three or more of the following subparagraphs apply to the property:

2 (A) (i) One or more doors to the property are boarded up, broken off, or
3 continuously unlocked; (ii) multiple windows are boarded up or closed off; or (iii) multiple
4 window panes are broken.

5 (B) Gas, electric, or water service to the property has been terminated or utility
6 consumption is so low that it indicates that the property is not regularly occupied.

7 (C) Rubbish, trash, or debris has accumulated on the property.

8 (D) A governmental agency has determined that the property is unfit for
9 occupancy or constitutes a serious threat to public health or safety.

10 (E) A creditor has changed the locks or otherwise secured the property and, for at
11 least 30 days thereafter, the homeowner has not contacted the creditor to request entrance to the
12 property.

13 (F) One or more written statements signed by the homeowner indicate a clear
14 intent to abandon the property.

15 (G) A law-enforcement agency has received at least two separate reports of
16 trespass, vandalism, or other illegal acts being committed on the property in the 180 days before
17 determination of abandonment is made.

18 (H) The homeowner is dead and there is no evidence that a survivor or an heir of
19 the homeowner is in actual possession of the property.

20 (b) An affidavit attesting to the presence of conditions described in subsection (a) and any
21 other facts evidencing abandonment must be signed by and based on personal knowledge of the
22 affiant and must state the basis for that personal knowledge. A person may submit multiple
23 affidavits as evidence of abandonment.

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Comment

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

With respect to the statutory conditions listed in the subparagraphs to subsection (a)(2), the presence of three or more of such conditions constitutes prima facie evidence, giving rise to a presumption of abandonment. Such conditions are not conclusive on the issue of abandonment. Many residential properties will exhibit at least one such condition, when the homeowner is still in possession of the property. If the homeowner or another person holding under the homeowner is in actual possession of the mortgage property, the property is not abandoned notwithstanding the existence of such conditions. Likewise, mortgaged property may be abandoned under this Section notwithstanding the absence of any of the statutory conditions.

2. A governmental agency's determination of abandonment under subsection (a)(1) is distinct from the procedure established by Section 602 for a creditor or another person to request a determination of abandonment in nonjudicial foreclosure. In many states other law authorizes a government agency or employee to issue an order, citation, or determination that residential property is abandoned, often without a prior hearing. Such an order or determination creates a presumption of abandonment under this Section. Likewise, a governmental determination that the property is unfit for occupancy or constitutes a serious threat to public health or safety under subsection (a)(2)(D) is not subject to the procedures established by Section 602.

3. Mortgaged property often becomes vacant, both under standard mortgage and reverse mortgage transactions, when the homeowner dies. Under subparagraph (a)(2)(H) proof of death of the homeowner is one of the conditions that may give rise to a presumption that the mortgaged property is abandoned, provided that there is no evidence that an heir or other beneficiary of the homeowner's estate is in actual possession. Of course if there are multiple homeowners, this condition is met only if all the homeowners have died.

4. An affidavit under subsection (b) may be given by any individual having personal knowledge, including a contractor, government employee, or neighbor of the mortgaged property.

SECTION 604. WITHDRAWAL OF ABANDONED PROPERTY PROCEEDING.

(a) In a judicial foreclosure, after a party has moved for a determination that the property is abandoned property, the motion may be withdrawn only by leave of court.

1 (b) In a nonjudicial foreclosure, after a person has requested a determination that the
2 property is abandoned property, the request may be withdrawn only with consent of the person
3 submitting the request and each homeowner and obligor.

4 **Comment**
5

6 Once a party has filed a motion in a judicial foreclosure for a determination that the
7 mortgaged property is abandoned, withdrawal of the motion is allowed only by leave of court.
8 This allows for judicial control over the imposition of maintenance responsibilities under Section
9 606.
10

11 **SECTION 605. FORECLOSURE OF ABANDONED PROPERTY.**

12 (a) In a judicial foreclosure, if a court determines that mortgaged property is abandoned
13 property and the court previously rendered or at the same time renders a judgment of foreclosure,
14 the court shall:

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

17 (2) on a motion of the foreclosing creditor, if the court determines that there is no
18 equity in the mortgaged property available to satisfy the interests of subordinate creditors, the
19 court shall order a transfer of the abandoned property directly to the foreclosing creditor without
20 public sale. The transfer of the property extinguishes the rights of all interests subordinate to the
21 interest of the foreclosing creditor.

22 (b) In a nonjudicial foreclosure, if a governmental agency has determined that the
23 mortgaged property is abandoned property, a creditor may conduct an expedited public sale of
24 the property. Unless an action for judicial review of the determination is pending, the sale may
25 take place not earlier than [30] days but not later than [60] days after issuance of the
26 determination. The creditor shall comply with the notice requirements of Section 404, except
27 that [15]-days' notice of the sale is sufficient.

(c) After a judicial order or a determination by a governmental agency that the mortgaged property is abandoned property, the creditor shall cause the public sale or transfer of the mortgaged property to the creditor to be completed not later than 120 days after the order is rendered or the determination is made unless the creditor releases its mortgage and the release is filed in the [real-property records]. Unless the creditor releases its mortgage, the creditor may not seek to end its obligation to maintain the property under Section 606 by dismissing, terminating, or suspending the foreclosure.

(d) On a public sale or transfer of the mortgaged property to the creditor under subsection (a) or (b), any personal property remaining on the abandoned property is deemed to have been abandoned by the owner of the personal property and may be disposed of by the purchaser or transferee of the property [60] days after the sale or transfer. Neither the creditor nor purchaser is liable to the homeowner or obligor for disposal of personal property pursuant to this subsection.

(e) Completion of a public sale or a transfer of mortgaged property to the creditor under subsection (a) or (b) terminates the right of the homeowner and any other person to redeem the property under law of this state other than this [act].

Legislative Note: *In some states, homeowners have a statutory right of redemption for a period of time after the completion of a public sale. Some of those states also extend redemption rights to third parties, such as subordinate lien holders. In states with statutory redemption, subsection (e) eliminates those rights after a public sale or transfer to the creditor of the mortgaged property. After a homeowner abandons the property, it serves no useful purpose to allow the homeowner an option to reacquire the property after the completion of foreclosure.*

Comment

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

1 written determination of abandonment.

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

7
8 3. Once a creditor decides to take advantage of the expedited foreclosure procedure
9 allowed by this Section, there is a public interest in ensuring that the property becomes occupied
10 as soon as reasonably possible. For this reason subsection (c) does not allow the creditor to
11 suspend indefinitely its efforts to consummate the foreclosure. There may be exceptional
12 circumstances in which it is not feasible to hold the foreclosure sale within 60 days of the
13 judicial order or written determination finding the property to be abandoned, as required by
14 subsection (a) and (b).

15
16 Subsection (c) poses the substantial question of what consequences should flow from the
17 failure of the creditor to comply with its requirements. On the one hand, it would clearly be
18 inappropriate to impose an obligation on a creditor to repair the property subject to the mortgage
19 before the creditor has taken possession or an official determination is made that the property is
20 abandoned. Certainly, the lending community would object to a statutory duty to maintain
21 property on which it holds a mortgage in those instances where the lender would prefer to release
22 its mortgage and forego any interest in that property.

23
24 On the other hand, the consequences of a creditor's failure either to commence and
25 complete a foreclosure action or to release its mortgage on other stakeholders in the abandoned
26 property – including the fee owner, the municipality and neighbors in which the abandoned
27 property is located, and where appropriate, a homeowners association - are very real. The act as
28 drafted resolves these conflicting policies by offering the lender a choice of how it wishes to
29 proceed.

30
31 4. In states that afford the homeowner and other persons a statutory right of redemption
32 after completion of a foreclosure sale, subsection (e) serves to terminate those redemption rights.

33
34 **SECTION 606. MAINTENANCE OF ABANDONED PROPERTY.**

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

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

38 (2) prevent trespassers from remaining on the property;

39 (3) prevent mosquito larvae from growing in standing water on the property; and

40 (4) take any other actions needed to prevent conditions on the property which

1 create a public or private nuisance.

2 (b) If a creditor commences a judicial foreclosure, the creditor shall maintain the
3 mortgaged property beginning when the court renders an order determining that the property is
4 abandoned property under Section 601.

5 (c) If a creditor commences a nonjudicial foreclosure, the creditor shall maintain the
6 mortgaged property beginning when a [building code appeals board] determines that the property
7 is abandoned property is issued under Section 602.

8 (d) Absent a judicial order under subsection (b) or a determination under subsection (c), a
9 creditor that has commenced a foreclosure shall maintain the mortgaged property beginning
10 when the creditor receives notice that a building code appeals board has issued a determination
11 that the property is abandoned property and is in a condition that poses a threat to public safety
12 or health.

13 (e) A creditor's obligation to maintain abandoned property under this section continues
14 until the property is conveyed to a purchaser or until the creditor records a release of its
15 mortgage.

16 (f) A creditor that is obligated to maintain abandoned property may enter the property
17 peacefully and cause others to enter the property peacefully for the limited purpose of
18 maintenance required by this section and inspection and repair. All reasonable expenses incurred
19 by a creditor in complying with this section are an obligation of the homeowner and are secured
20 by the mortgage.

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

1 (h) The following have the right to enforce the obligations created by this section:

2 (1) a governmental subdivision in which the mortgaged property is located; or

3 (2) if the property is located in a common-interest association, the community
4 association.

5 (i) The obligation of a creditor to maintain abandoned property is limited to the
6 obligations created by this section. If the creditor becomes the owner of the property, the
7 creditor's obligations with respect to the property are determined by law of this state other than
8 this [act]. The creditor does not become a mortgagee in possession of the property solely by
9 virtue of the creditor's performance of the obligations created by this section.

10 **Comment**

11
12 1. This Section requires creditors to maintain abandoned properties under certain
13 circumstances. The obligation may arise based upon action of the creditor or action of the
14 municipality or other governmental entity where the property is located.

15
16 However, it is clear under this [act] that the creditor has no obligation to maintain the
17 property before the creditor commences a foreclosure. Moreover, the creditor does not become
18 obligated to maintain merely by commencing foreclosure at a time when the dwelling unit is
19 vacant. Rather, the obligation arises when the creditor seeks to use the expedited foreclosure
20 procedure authorized by Section 605 and obtains either a judicial order or official determination
21 that the property is abandoned. Under subsection (c) the obligation may also arise any time after
22 the creditor has commenced foreclosure if the municipality or other local governmental entity
23 cites the property as both abandoned and presenting a threat to public safety or health.

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

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

36
37 4. Subsection (h) provides for enforcement by the local government that has jurisdiction

1 over the abandoned property. When the property is located in a common-interest community, it
2 also provides standing for the association as a means to protect neighboring property owners
3 whose interests are likely to be harmed by the creditor's failure to maintain the property. In
4 conferring standing both to the local government and to owners' associations, this subsection
5 follows the approach taken by N.Y. Real Prop. Acts. § 1307(3), enacted in 2009. This subsection
6 does not grant a direct enforcement right to neighbors. If negatively impacted, such persons may
7 have a remedy under other laws, such as public or private nuisance.
8

9 5. At common law a creditor who takes possession of mortgaged property prior to the
10 completion of foreclosure becomes a "mortgagee in possession," who by virtue thereof
11 undertakes a number of obligations to the homeowner with respect to maintenance and care of
12 the property. Subsection (i) expressly provides that a creditor who enters the property solely for
13 the purpose of complying with its obligations under this Section does not assume the liabilities of
14 a mortgagee in possession.
15

16 **[ARTICLE] 7**

17 **REMEDIES**

18 **SECTION 701. EFFECT OF VIOLATION; DEFENSES.**

19 (a) In a judicial foreclosure, if the court finds that the creditor or servicer or a person that
20 has commenced foreclosure has committed a material violation of this [act], the court may
21 dismiss the action, stay the action on appropriate terms and conditions, or impose any sanction
22 the court finds appropriate. Dismissal must be without prejudice unless the court determines that
23 a new foreclosure action should be barred because of substantial misconduct by the creditor or
24 servicer or other good cause.

25 (b) In a nonjudicial foreclosure, the homeowner or obligor may initiate an action against
26 the creditor or servicer or a person that has commenced foreclosure asserting a defense to
27 foreclosure or that a creditor or servicer or a person that has commenced foreclosure committed a
28 material violation of this [act]. If the court finds that a defense exists or a material violation of
29 this [act] occurred, the court may enjoin the foreclosure, stay the foreclosure on appropriate
30 terms and conditions, or impose any sanction the court finds appropriate. An injunction must
31 not be permanent unless the court determines that foreclosure should be barred because of

1 substantial misconduct by the creditor or servicer or other good cause.

2 (c) If a court determines there is a material violation of this [act] under subsection (a) or
3 (b), the creditor or servicer or other person that has commenced foreclosure may not add to the
4 amount of the obligation any attorney's fees or costs incurred as a result of the violation, or any
5 other attorney's fees and costs incurred before the creditor cures the violation.

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

9 (e) In addition to the damages recoverable under subsection (d), the court may award a
10 homeowner or obligor statutory damages not exceeding \$[15,000] for a pattern or practice of
11 violating this [act]. In determining whether to award statutory damages and the amount of
12 statutory damages, the court shall consider, all relevant factors, including:

13 (1) the frequency and persistence of violations by the creditor or servicer in its
14 business practices;

15 (2) the nature of the violations, and

16 (3) the extent to which the violations were intentional.

17 (f) In opposing the imposition or amount of statutory damages for violations of this [act]
18 established by the obligor or homeowner, the creditor or servicer may show that:

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

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

23 (g) An action for damages brought under this section must be commenced not later than

1 [one] year after the violation on which it is based.

2 **Comment**

3
4 1. The statutory damages for individuals under subsection (e) require a pattern or practice
5 of noncompliance, similar to the federal RESPA statute's provision for statutory damages, 12
6 U.S.C. §2605(f)
7

8 2. Dismissal with prejudice under (a) or a permanent injunction under (b) would be a
9 sanction of last resort, and should be reserved for cases of very serious noncompliance by the
10 creditor or servicer. Dismissal with prejudice may be warranted, for example, when there have
11 been repeated and serious violations by the creditor. e.g., *Bank of New York v. Richardson*, 2011
12 Me. 38, 15 A.3d 756 (2011) (creditor failed to appear at three successive mediation conferences
13 in a case where the homeowner asserted significant consumer law counterclaims); *U.S. Bank*
14 *N.A. v. Solorin* 934 N.Y.S.2d 655 (2012) (dismissal after 16-month delay in filing required
15 certification of accuracy of supporting documents).
16

17 3. Actual damages incurred by a homeowner or obligor under this section may include
18 damages for emotional distress. Whether or not the homeowner may claim that damages caused
19 by a servicer are chargeable to the creditor who retained the servicer under theories of agency or
20 employer/employee law is not determined by this act but by other law.
21

22 4. Under subsection (a), before confirmation of the foreclosure sale, the homeowner may
23 raise a material violation of the statute, for example, a materially inaccurate notice of the
24 amounts needed to cure a default, as a basis for asking the court to prevent the foreclosure sale
25 (or confirmation), until the violation has been corrected and remedied. If the creditor can cure
26 the violation in a timely way so that full compliance is achieved, it would then be appropriate
27 under this section for the foreclosure to proceed.
28

29 However, after a foreclosure sale, under established principles of real estate law, unless
30 the homeowner under state law has an independent right of redemption, a bona fide sale
31 purchaser is entitled to rely on the conclusive effect of the sale, and the homeowner's only
32 remedy for violations of the statute would be to seek damages from the foreclosing creditor or
33 any other remedy allowed under state or federal law.
34

35 **SECTION 702. DEFENSE OR REMEDY OF HOMEOWNER OR OBLIGOR**

36 **UNDER OTHER LAW.** This [act] does not displace any defense or remedy a homeowner or
37 obligor has under federal law or law of this state other than this [act].

38 **Comment**

39 This act preserves rights and defenses available to homeowners and obligors under other
40 state statutes, regulations, common law, and federal law. In many states, such rights and
41 defenses include payment or tender of payment; discharge; contract law defenses, including

1 forgery, lack of capacity, duress, absence or failure of consideration, fraud, misrepresentation,
2 unconscionability, failure of a condition precedent; equitable defenses such as estoppel, laches,
3 or unclean hands; release by cancellation of debt; a violation by a creditor, servicer, their
4 predecessors in interest, or their agents of unfair and deceptive trade practices statutes and other
5 consumer protection statutes; a defect in a mortgage resulting from a failure to comply with
6 statutory requirements for the execution of mortgages; a determination that the creditor or its
7 predecessor in interest was not licensed under state mortgagee licensing statutes or was not
8 legally authorized to make the loan under federal law; and breach of the duty of good faith and
9 fair dealing.

10
11 **SECTION 703. ATTORNEY'S FEES AND COSTS.** In an action in which a party
12 seeks a remedy under Section 701 based on a violation of this [act], or asserts a defense or
13 remedy under Section 702, the court may award the costs of the action and reasonable attorney's
14 fees to the prevailing party.

15 **SECTION 704. ENFORCEMENT BY [ATTORNEY GENERAL].** In addition to
16 enforcing any remedies available under law of this state other than this [act], the [attorney
17 general or other state official or agency] may bring an action to enjoin a pattern or practice of
18 violating this [act]. In such an action the court may (1) issue an injunction or order against a
19 creditor, servicer, their agents, or any other person violating this [act], which may include
20 requiring steps to be taken to remedy a violation or the payment of damages to aggrieved
21 obligors or homeowners; and (2) assess a civil penalty of not less than \$[_____] nor more than
22 \$[_____].

23 **SECTION 705. EFFECT OF THE HOLDER IN DUE COURSE RULE.**

24 (a) Notwithstanding [insert reference to UCC Section 3-305] and any agreement waiving
25 claims or defenses by an obligor or homeowner, a creditor that is a holder in due course or who
26 seeks to enforce a waiver of claims or defenses is subject to the following claims and defenses
27 that the obligor or homeowner could assert against the initial holder of the obligation:

28 (1) a claim or defense based on specific allegations of fraud in connection with

1 the original loan transaction;

2 (2) a claim or defense based on specific allegations of material misrepresentation
3 in connection with the original loan transaction; or

4 (3) a claim or defense based on a breach of promise in connection with the
5 original loan transaction that substantially deprives the obligor of the benefit of the expected
6 bargain.

7 (b) If the creditor is a holder in due course under [insert reference to UCC Section 3-305]
8 or seeks to enforce a waiver of claims and defenses, an obligor or homeowner may:

9 (1) assert, in addition to the defenses otherwise available under [insert reference
10 to UCC Section 3-305], any defense against the holder in due course described in subsection (b);
11 or

12 (2) bring a declaratory judgment action to establish any claim against the holder
13 in due course described in subsection (a).

14 (c) A claim or defense under subsection (a) may not be made or asserted more than six
15 years after signing of the record creating the obligation being enforced.

16 (d) If an obligor or homeowner establishes a claim or defense under this section, relief is
17 limited to modification of the remaining obligation and recoupment. Recoupment must be in the
18 amount of the economic loss caused by the fraud, misrepresentation, or material breach of
19 promise and may not exceed the amount owed on the obligation at the time of judgment. The
20 court may determine whether the effect of recoupment is to cure the default or reinstate the
21 obligation pursuant to Section 201. Recoupment reduces both what the creditor is entitled to
22 collect in foreclosure and what the creditor is entitled to collect by other processes, including a
23 separate action to collect the obligation.

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

Comment

1. This section represents a middle-ground position between preservation of the status quo and complete abrogation of the HDC doctrine.

In doing so, the draft limits the insulation that UCC Section 3-305 otherwise provides to holders of notes – typically viewed by the marketplace as negotiable instruments under UCC Section 3-104 – when secured by mortgages on “mortgaged property” as that term is defined in Section 102 (15) of this [act].

The section contains these major limitations compared to simply abrogating the holder in due course doctrine:

(a) it caps the liability of the holder to the outstanding loan balance,

(b) it applies only prospectively, and

(c) it preserves only claims and defenses based on fraud, material misrepresentation, or material breach of promise in connection with the original loan transaction.

2. The primary limitations on the claims or defenses which a borrower may assert are the following:

First, under subsection (a) the borrower’s claims or defenses may be asserted despite any waiver the borrower or other owner of the mortgaged property may have signed;

Second, under subsection (b), any claim or defense must not be barred by a statute of limitation or other preclusion;

Third, also under subsection (b), any claim or defense must be ‘based on fraud, material misrepresentation, or material breach of promise in connection with the original loan transaction;

Fourth, under subsection (c), the subsection (b) claims or defenses are in addition to the defenses already available under U.C.C. 3-305.

Fifth, under subsection (d), no such claim or defense may be made or asserted more than six years after the note was signed. However, nothing in this section would alter the existing common law doctrine of recoupment that, in some states, may permit assertion of a time-barred claim as a recoupment defense only.

Sixth, under subsection (e), if a borrower establishes a claim, the recovery is limited to the amount of borrower’s economic loss, and in no event more than the outstanding balance on the note.

Seventh, under subsection (f), the new remedies provided to borrowers under this section would apply only to notes signed after the effective date of the [act] in the state where the

1 mortgaged property is located.

2 3. The section also authorizes the borrower to bring a declaratory judgment to
3 affirmatively assert one of these permitted claims, without the need to raise them only in a
4 foreclosure action. This balances the limitation of the borrower's right to assert either a claim or
5 a defense to a six year statute of limitation, with another year allowed in the case of an interest
6 rate adjustment. There is no policy reason to force the borrower to default on her loan as a
7 condition of asserting claims she may have arising out of fraud, misrepresentation or breach of
8 promise.
9

10 4. Under subsection (e), the relief granted to the borrower is framed in terms of
11 recoupment or reduction in the balance of the outstanding loan, rather than requiring the holder
12 to pay funds to the borrower. For example, if the obligor is personally liable to pay the
13 obligation, recoupment under this section reduces what the creditor may collect outside of
14 foreclosure, including by way of a deficiency judgment if foreclosure proceeds to a sale. In this
15 respect, this section follows the broad approach taken by the FTC regulation. By making the
16 creditor "subject to" claims and defenses, those claims and defenses, when proven, offset the
17 amount due on the obligation.
18

19 5. Finally, while the section refers only to 'creditors', a servicer would be subject to the
20 same liabilities imposed on the creditor whose contract with a servicer authorized or required the
21 creditor to undertake a duty that the [act] imposes on the creditor; see Section 107 of the [act].
22

23 [ARTICLE] 8

24 MISCELLANEOUS PROVISIONS

25 **SECTION 801. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
26 applying and construing this uniform act, consideration must be given to the need to promote
27 uniformity of the law with respect to its subject matter among states that enact it.

28 **SECTION 802. GENERAL PRINCIPLES OF LAW APPLICABLE.** The principles
29 of law and equity, including the law of principal and agent, supplement this [act] unless
30 displaced by its particular provisions.

31 Comment

32
33 The provisions of this act are to be supplemented by general principles of law and equity.
34 In mortgage loan transactions, a creditor often acts through agents, and sometimes the creditor is
35 an agent for a principal. The law of agency often will determine when a person has rights or
36 duties under this act. The text is a shortened version of Revised UCC § 1-103(b), which
37 provides:
38

1 Unless displaced by the particular provisions of the Uniform Commercial Code, the
2 principles of law and equity, including the law merchant and the law relative to capacity to
3 contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake,
4 bankruptcy, or other validating or invalidating cause supplement its provisions.

5
6 **SECTION 803. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**
7 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the
8 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but
9 does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
10 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
11 U.S.C. Section 7003(b).

12 **SECTION 804. PRE-EFFECTIVE DATE TRANSACTIONS.** This [act] applies to
13 foreclosure of a mortgage created before, on or after the effective date of this [act], unless the
14 creditor has commenced a foreclosure before the effective date of this [act].

15 **SECTION 805. REPEALER; CONFORMING AMENDMENTS.** The following
16 acts and parts of acts are repealed:

17 (a)

18 (b)

19 (c)

20 If there is a conflict between this [act] and other law of this state, this [act] prevails.

21 **Legislative Notes**

22
23 At a later time, and with further guidance from Style, the Reporters will add legislative
24 notes on FOIA, various kinds of records, and Redemption.

25 **Comment**

26
27
28 1. Subsection (a) of this section should be separately prepared for each state. In each state
29 it is necessary to pay careful attention to how this Act is to be blended with existing state law.
30 The statutes to be specifically repealed will include statutes relating to notices of default, intent
31 to accelerate, and the right to cure to be sent to homeowners; notices and standards for mediation

1 and other types of facilitation; determination of who has the right to commence foreclosure; and
2 advertisement and notices of foreclosure sales; confirmation of sales. Given the scope of this
3 Act, which is limited to residential foreclosures, care should be taken not to repeal statutes to the
4 extent they should continue to apply to non-residential foreclosures. In some instances, instead of
5 repeal it may be useful to amend other state statutes to limit their scope to foreclosures that are
6 not within the scope of this Act.
7

8 2. At the same time, this Act was drafted with the expectation that existing state
9 foreclosure procedures would remain in place. This Act is not intended to displace all existing
10 foreclosure laws in each state, but rather to be an overlay on existing law. For example, and
11 most fundamentally, the Act does not anticipate or provide that a state employ a judicial
12 foreclosure process when the customary practice is to foreclose under a power of sale procedure,
13 nor does the Act contemplate that a state should enact a non-judicial foreclosure process in the
14 absence of existing state laws. It is for that reason that the legislative drafters in each state
15 should carefully consider how best to integrate the provisions of the Act with existing state laws
16 governing the foreclosure process.
17

18 3. In addition to the listed specific sections repealed by this Act, subsection (b) provides
19 for the repeal of all other legislation in this state which is inconsistent with this Act. This
20 provision is necessary to resolve those matters that may ultimately be presented to a court in
21 construing the Act in cases where the specific repealer in subsection (a) fails to note an existing
22 state statute which the court concludes is inconsistent with a provision of this Act.
23

24 **SECTION 806. EFFECTIVE DATE.** This [act] takes effect

1 [APPENDIX]

2 *Legislative Note: These Model rules are not part of the Act; they are only suggested rules –*
3 *which should be amended as appropriate - for use of the agency designated under Article 3].*
4

5 **MODEL FORECLOSURE RESOLUTION PROGRAM RULES**

6 1. These rules apply to the foreclosure resolution program under Article 3 of the Uniform Home
7 Foreclosure Procedures Act (“HFPA”). “Agency” means the foreclosure resolution agency. The
8 agency is [name of court or agency]. All provisions referring to “creditor” include “servicer” as
9 defined in the HFPA.

10
11 2. The purpose of the foreclosure resolution program is to assist a creditor and a homeowner to
12 reach a voluntary agreement that avoids foreclosure and achieves a sustainable foreclosure
13 resolution or mitigates damages in cases where foreclosure is unavoidable.
14

15 3. The foreclosure resolution notice required by §302 of the HFPA may be sent [at any time no
16 later than 30 days after the creditor sends the notice required by §201][no later than 30 days after
17 the creditor files a complaint in foreclosure.] The notice shall instruct the homeowner to contact
18 the agency to request foreclosure resolution at the telephone number [or electronic mail address]
19 designated from time to time on the [agency web site][official journal].
20

21 4. If a homeowner requests foreclosure resolution, the agency shall open a foreclosure resolution
22 case. Within five days of the request the agency shall send notice to the homeowner and creditor
23 [by mail, by electronic mail] to provide the agency with required documents and information for
24 the foreclosure resolution process. The document exchange notice to the homeowner shall also
25 include a list of available housing counseling agencies that can assist the homeowner.
26

27 5. The agency shall schedule a meeting within 60 days after the homeowner’s request for
28 foreclosure resolution.
29

30 6. The document exchange notice to the homeowner shall instruct the homeowner to submit to
31 the agency and the creditor necessary and relevant documents including
32

- 33 a) Documents showing income qualification for a loan modification, including copies of pay
34 stubs, W-2 forms, social security or disability income, retirement income, child support
35 income, or other income that the homeowner believes is relevant to the homeowner’s
36 ability to repay the mortgage,
37 b) Documents supporting any dispute regarding the existence or amount of any mortgage
38 loan default,
39 c) Documents relating to any prior loan modification or other prior agreement regarding the
40 mortgage loan and
41 d) Documents relating to any pending request to modify the loan or negotiate a settlement of
42 the delinquency.
43

44 7. Homeowners who do not occupy the property being foreclosed are not eligible for foreclosure

1 resolution. The notice to the homeowner shall state that if the homeowner or obligor is not
2 occupying the property, the homeowner is not eligible for foreclosure resolution, and that the
3 homeowner must return a signed non-investor certification form provided by the agency,
4 together with any required fee, in order to participate in foreclosure resolution.

5
6 8. The document exchange notice to the creditor shall instruct the creditor to submit to the
7 agency and the homeowner necessary and relevant documents including
8

- 9 a) Any 45-day notice and 5-day notices required by CFPB rule 12 CFR §1024.39(b) and
10 §1024.41(b)(2)(i)(B) previously sent to the homeowner in connection with the current
11 default,
12 b) Any prior offers of loss mitigation, forbearance, modification or other agreements made
13 with the homeowner in connection with the current default,
14 c) a list of documents required by the creditor to evaluate the homeowner's request for loss
15 mitigation,
16 d) The homeowner's payment history from the date of default,
17 e) Itemization of all amounts due on the loan, including all fees,
18 f) copies of the promissory note, signed by the mortgagor, including any endorsements,
19 allonges, amendments, or riders that show the mortgage debt,
20 g) any lost note affidavit the creditor will rely on to foreclose the mortgage.
21

22 9. The agency or neutral may request additional documents from either party as appropriate.
23 Either originals or copies of documents may be exchanged for the foreclosure resolution. The
24 neutral and the agency will not resolve disputes regarding authenticity of documents.

25 10. The homeowner and creditor shall provide the documents requested by the agency no later
26 than 10 days after the sending of the document exchange notice.
27

28 11. The creditor shall communicate to the agency and the homeowner the identity of the
29 individual who will represent the creditor at the foreclosure resolution session at the time it
30 provides the required documents.
31

32 12. Within fourteen days after receiving the homeowner's request, the agency shall send [mail,
33 electronic] notice to the creditor and homeowner that shall include:
34

- 35 (1) The name and contact information of the assigned neutral,
36 (2) The date, time, and location of the foreclosure resolution session,
37 (3) Information about the conduct of the foreclosure resolution session, and
38 (4) Consequences and penalties for noncompliance with program rules.
39

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

1 neutral learns any fact that a reasonable individual would consider likely to affect the impartiality
2 of the neutral, including a financial or personal interest in the outcome of the foreclosure
3 resolution and an existing or past relationship with a party to the foreclosure resolution or
4 foreseeable participant in the foreclosure resolution, the neutral shall disclose it as soon as is
5 practical.

6
7 14. The neutral's role is to assist the parties with information exchange, communication and
8 negotiation to insure that every reasonable effort has been made to reach a voluntary agreement
9 to resolve the alleged mortgage default in some manner other than a foreclosure sale.

10
11 [15. The neutral may charge each party a fee of [\$200]].

12
13 16. At least [10] days prior to the foreclosure resolution session, the creditor must notify the
14 neutral and homeowner of any decision to offer or not offer any loss mitigation options to the
15 homeowner. The creditor shall provide the neutral with documentation supporting its decision
16 not to offer a loss mitigation alternative to the homeowner. The creditor shall also provide the
17 neutral with inputs and the results of the net present value calculations relied upon in reaching its
18 decision. The neutral may request the creditor to provide additional documentation to support its
19 decision.

20
21 17. The homeowner is entitled to have an attorney, housing counselor or other person of the
22 homeowner's choosing accompany the homeowner to and participate in the foreclosure
23 resolution meeting.

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

27
28 18. If the homeowner fails without good cause to substantially and timely provide the
29 documents specified by the neutral or the agency, or to attend the pre-foreclosure resolution
30 meeting, or if the agency determines that the homeowner requesting pre-foreclosure resolution is
31 not occupying the property, the agency shall [enter an order][request the court to enter an order]
32 terminating the pre-foreclosure resolution process and permitting foreclosure to proceed pursuant
33 to the HFPA §304.

34
35 19. If the creditor fails without good cause to substantially and timely provide the documents
36 specified by the neutral or the agency, or to appear at the foreclosure resolution meeting with
37 authority to act on any available loss mitigation alternatives, the agency shall [enter an
38 order][request the court to enter an order] extending the foreclosure resolution period and the
39 stay of foreclosure pursuant to the HFPA §304.

40
41 20. The parties are required to appear in person at the foreclosure resolution session and shall
42 have the authority to enter into a settlement to resolve the dispute. The creditor's representative
43 must have the ability to evaluate loss mitigation and to have the authority to make a decision as
44 required by the RESPA regulations of the Consumer Financial Protection Bureau. However,
45 upon written request provided to the neutral at least 30 days prior to the foreclosure resolution
46 session, the neutral may waive the requirement of having the parties physically present at the

1 session and allow them to appear by telephone or teleconference.

2
3 21. The parties shall create a signed record of any agreements reached during foreclosure
4 resolution. The neutral shall ensure that any agreement reached by the parties at the foreclosure
5 resolution session or during foreclosure resolution is promptly confirmed in a record and signed
6 by all parties.

7 22. Within ten days from the conclusion of the foreclosure resolution session, the neutral shall
8 file a record with the agency, reporting whether the parties were present at the session, complied
9 with Section 303 of the HFPA and all program rules, and whether the parties reached any
10 agreement. The neutral shall also send the record to the parties.

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

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

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

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

20
21 27. The agency shall prepare and submit to the legislature annually, twenty days prior to the
22 convening of each regular session, a report containing an evaluation of the operation and effects
23 of the program. The report shall include a summary of the cases handled by the program,
24 including the type and frequency of different outcomes, recommendations for changes,
25 modifications, or repeal of the program or parts thereof with accompanying reasons and data.

26
27 28. The agency or neutral may recommend or require in appropriate cases that the homeowner
28 tender monthly payments equal to at least 50% of the contractual mortgage payment to the lender
29 or to the agency as a condition of the pre-foreclosure resolution.

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

35
36 [30. Court foreclosure resolution programs in judicial foreclosures. The appearance of the
37 homeowner or obligor at a foreclosure resolution session will constitute an entry of appearance
38 in the foreclosure action.]