

November 20, 2013

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

Re: Home Foreclosure Procedures Act

Dear Bill:

You asked me to summarize in writing the discussion points that I made on Friday, November 15, 2013 at the working group meeting of the National Conference of Commissioners on Uniform State Law (the "Commission") pertaining to the Commission's discussion draft on the "Home Foreclosure Procedures Act" (the "Draft"). As you know, I spoke on behalf of the Securities Industry and Financial Markets Association ("SIFMA").

I began by saying that SIFMA and its members have not yet taken a formal position on the Draft, but that I am impressed by the thoughtfulness of the Draft to date. We understand that, if there is to be a uniform state law, it will need to balance the legitimate interests of various stakeholders and that will require compromises among all concerned. Without providing comprehensive comments on all of the Draft's provisions, I offered some general observations.

First, I noted our concern that the Draft, if enacted, could be merely a starting point for the states and serve as a "floor" and not as a "ceiling." It is very difficult to support the Draft without knowing whether states will repeal existing laws that address the same topics in different way or will revise the Draft in a way that undermines the compromises that perhaps are required to capture the support of various stakeholders. I understand that consumer groups expressed a similar concern.

Second, I expressed the need that the provisions of the Draft be synchronized with federal requirements addressing similar issues, such as the newly issued servicing regulations of the Consumer Financial Protection Bureau (the "CFPB") or the requirements of the Federal Housing Administration ("FHA") or the Department of Veterans Affairs ("VA") for FHA-insured or VA-guaranteed residential mortgage loans. While foreclosure is necessarily a state law issue, I reminded the attendees that the CFPB has issued very detailed, uniform federal requirements for loss mitigation, which are effective in January 2014. I used as an example the various notices that must be sent under the new federal regulations before a servicer can initiate foreclosure and which would be duplicative of and perhaps inconsistent with those required under the Draft. I suggested considering the addition of a provision to the effect that satisfaction of the federal requirements would

be deemed to satisfy the Draft's requirements given the comprehensiveness of the federal requirements.

Third, I requested an affirmative statement that nothing in the Draft shall obligate a loan holder or servicer to amend or waive the terms of the mortgage loan documents. I provided background on the CFPB's policy decision to focus on procedural safeguards regarding loss mitigation, rather than to require any particular outcome, such as a permanent principal reduction in favor of the borrower in certain circumstances. The CFPB rejected such an outcome-based, loss mitigation requirement in its final regulations. It feared the impact such a requirement would have on the availability and price of credit if it were to force reluctant loan holders to accept unwanted loan modifications. While the existing Draft does not explicitly require that holders and loan servicers provide defaulting borrowers with loan modifications, the Draft's obligations to act in good faith with respect to preventing foreclosure and providing loss mitigation options might be construed to impose an implicit obligation on loan holders and servicers to accept permanent principal write downs or other types of loan modifications. It should be made clear in the Draft that defaulting borrowers do not have a statutory right to better economic terms than what the executed loan documents provide.

Fourth, I acknowledged the considerable support within the Commission for "facilitation" or some form of non-binding mediation, as reflected in the Draft, but I commented that it could run counter to the exhaustive loss mitigation requirements detailed in the new federal servicing regulations. Under the CFPB regulations, a servicer is prohibited from initiating foreclosure until after it has considered borrowers for all available loss mitigation options. The Draft would prohibit a servicer from initiating foreclosure until after the completion of the "facilitation" process (subject to certain timing limits). Read together, a servicer first would have to satisfy available loss mitigation options under federal law and then offer "facilitation" under state law before initiating foreclosure. I suggested that any state "facilitation" requirement run simultaneously with, rather than sequentially after, any federal loss mitigation activities--a form of "dual track facilitation." For example, I questioned what it means in the Draft to require a servicer to approach a facilitation process in good faith when the servicer already properly and in good faith had determined that the borrower did not qualify for eligible loss mitigation options pursuant to applicable requirements.

While the Draft applies to loans secured by residential properties, I advocated that the availability of any facilitation requirements be limited to consumer purpose borrowers. I opined that there is no reason to give special protections to investor borrowers. I also suggested that a borrower have only one opportunity to a facilitation option and that the Draft clarify that the servicer is not required to absorb all of the charges of any such process.

Fifth, I highlighted that the considerable remedies available under the Draft are conditioned on "material" violations, but that the term "material" is not defined. I understand that courts are well suited to define materiality but in this case it is important to clarify in the Draft that materiality for purposes of preventing a foreclosure should be limited to those violations that resulted in a wrongful foreclosure.

Sixth, I expressed the opposition of SIFMA to assignee liability through an abrogation of the Holder in Due Course doctrine under Article 3 of the Uniform Commercial Code. There are now forms of assignee liability under federal law pursuant to the new "ability to repay" requirements and limits on loan originator compensation under the federal Dodd Frank Act. These federal provisions give borrowers a right to assert claims and defenses in connection with a holder's enforcement of the security instrument against a defaulting borrower based on violations of these new requirements.

There is widespread concern about the impact of these provisions on the availability and cost of credit.

The Draft provides three alternative approaches to the Holder in Due Course doctrine. While two of them would impose time or dollar limits on assignee liability, none of them would limit the types of claims or defenses that could be asserted against a holder in its enforcement of the loan documents. I said that this approach is akin to the type of assignee liability that is found under federal law with respect to "high cost" residential mortgage loans, which generally are not made, sold, or securitized because of this overly broad assignee liability.

One reason is that purchasers can not diligence in advance open-ended assignee liability, such as amorphous claims based on allegations of unfair or deceptive acts and practices. In response to a question of whether a purchaser is in a better position than a borrower to police the allegedly illegal activities of the loan originators, I said that, even if that were true, investors simply are not willing to subject their capital to the risk of evaporation or extinguishment arising out of claims and defenses based on alleged legal violations that are impossible to diligence prior to purchase. While SIFMA remains adamantly opposed to assignee liability of any type, any potential compromise for consideration must be limited to claims and defenses arising out of violations that a loan purchaser can diligence and that bear a direct, one-to-one relationship to the foreclosure--in other words, but for the violation, a foreclosure would not have occurred. I also noted that more research must be performed to determine that any limit on the Holder in Due Course doctrine under the Draft will not impair the negotiable status of the loan under Article 3 of the Uniform Commercial Code.

In conclusion, I emphasized that excessive protections of defaulting borrowers could come at a cost of less available and more expensive credit. The natural consequence is that more borrowers could be harmed than helped.

Thank you for the opportunity to participate.

Sincerely,

A handwritten signature in dark ink, appearing to read "L. Platt", with a stylized flourish extending from the end.

Laurence E. Platt

cc: Chris Killian, SIFMA