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MORTGAGE BANKERS ASSOCIATION

March 20, 2015

By Electronic Delivery

Mr. Thomas S. Hemmendinger, Esq.
Chair
Drafting Committee on Model Commercial Real Estate Receiverships Act
Uniform Law Commission
c/o Brennan, Recupero, Cascione, Scungio & McAllister LLP
362 Broadway
Providence, RI 02909

RE: Draft Uniform Commercial Property Receivership Act (the "Act")

Dear Mr. Hemmendinger:

Thank you for sharing a recent draft of the Act and for taking the time to speak with us regarding our thoughts on the proposal. The Mortgage Bankers Association (MBA)[1] appreciates the opportunity to comment on the Drafting Committee's proposed Commercial Real Estate Receiverships Act. Given our limited time to review and analyze the Act, this letter outlines, as discussed, our primary concerns with the Act as proposed.

While MBA believes that enhancing consistency in the statutory framework for receivership laws is an appropriate objective, we have significant concerns with the Act as currently drafted. The proposed Act is unduly restrictive with respect to the role and rights of the secured lender, the party that typically bears the greatest economic risk with respect to the commercial real estate. In addition, we question whether the Act appropriately balances the role and powers of the receiver with the role and rights of the secured lender and other interested parties, including the appointing court.

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

We appreciate the extensive work of the Drafting Committee in developing this proposal. Nonetheless, in reviewing the Act with our members, the Act, in our view, presents fundamental areas of concern. The following are among the issues identified, which further expand upon the general comments that we provided by email last month:

1. Section 16. Sale of collateral over the objection of the secured creditor:

   Many commercial real estate lenders provide financing on a primarily non-recourse basis. The collateral property and the proceeds thereof are often the sole source of repayment of the obligation. To the extent the receiver recommends a sale of the property, the lender should have the right to require that the sale be rejected. Even in circumstances where it appears the sale of the property may pay off the loan in full, there may be other issues, such as a loan that is cross-collateralized, or the existence of other liens or claims against the property which the lender may have an interest in seeing addressed. While the Act provides the right to credit bid, this remedy is inadequate where the purpose of the receivership is to avoid taking title to the property (e.g., issues such as licensure, environmental, regulatory, CMBS REMIC concerns). We do not believe it is appropriate to give a third party (that is neither the court nor a party to the original financing transaction) very broad authority to sell the collateral in which the lender has a security interest and has borne substantial economic risk.

2. Section 16. Allowing the receiver to "substitute" a borrower:

   Lenders ask potential borrowers to undergo substantial due diligence in the underwriting process both at origination and in an assumption by a proposed new borrower. Whether considering the borrower's financial ability to meet its repayment obligations or operate the collateral in a recourse or non-recourse scenario, the borrower's creditworthiness, experience in property operations and other matters can affect the terms and approval of a new loan and assumption. A provision permitting the receiver to transfer the property subject to the existing loan could have the effect of forcing the lender to accept an unknown borrower under terms and conditions which may not be acceptable to the lender, including, in the case of an accelerated loan reinstatement to an unknown borrower.

3. Section 17. Allowing the receiver to reject executory contracts and unexpired leases related to the collateral:

   A receiver should not be given the authority to reject executory contract and leases. Outside a bankruptcy, the rejection is simply a breach of contract which could create substantial claims against the borrower and/or the collateral.

4. Section 12(a)(4). Allowing the receiver to review and object to the secured creditor's claim and/or lien:

A receiver should not have standing to object to a lender's lien. If there is an issue with the lender's claim or lien, the borrower, not the receiver, is the party that should be allowed to pursue a challenge. A receiver who acts on behalf of the court should not possess this right. Giving the receiver standing has the potential of creating an incentivized advocacy for the borrower that may not be in line with its role and responsibilities.

5. Section 12(d). Lack of clarity or limit on the appointing court's discretion in establishing the scope of the order appointing the receiver:

   The Act should be amended to provide that all of the powers listed in the Act are examples of the types of powers a receiver may be given upon request of the party moving for the appointment and should not be viewed as automatic, default powers given to the receiver upon appointment. We do not believe receivers should be granted powers that are broader in scope than those requested by the moving party.

6. Section 22(a). Requiring the appointing court to find cause for removal of the receiver:

   This provision presents several issues, among them, the Act does not define cause, which creates interpretive concerns and potential inconsistency in application. In addition, continuation of receivership in a given case may or may not be in the best interests of the lender, the collateral or other parties to the transaction. The decision to remove a receiver should look to the lender that sought appointment of the receiver unless the court finds misconduct on the part of the moving party.

MBA appreciates the opportunity to comment on the proposal and address the core issues identified at this time. We would welcome the opportunity to engage in further dialogue with the Committee, and please feel free to share our comments with other members of the Drafting Committee. If you have questions or would like to discuss further, please contact Kathy Marquardt, MBA Vice President, at kmarquardt@mba.org. Thank you.

Sincerely,

Thomas T. Kim
Senior Vice President
Commercial/Multifamily Group
Mortgage Bankers Association