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In March, K&L Gates published a comprehensive client alert on the global foreclosure settlement called: "Global Foreclosure Settlement: The Success of Herding Cats." Since that time, members of our Consumer Financial Services group have analyzed a variety of topics focused on the settlement that we have posted in our Consumer Financial Services Watch blog.

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How the Global Foreclosure Settlement Agreement Impacts Servicing Fees

By: Nanci L. Weissgold, Morey E. Barnes Yost

As scrutiny of default servicing practices provided significant impetus for the recently announced global foreclosure settlement agreement (the "Agreement"), it is no surprise that the Agreement prescribes extensive standards to resolve issues with these practices. Based upon the Servicing Standards announced as part of the Agreement, one major area of focus will be the fees that mortgage loan servicers charge in connection with servicing loans.

Although the Servicing Standards include a broad range of fee prescriptions, with regard to default servicing fees the primary areas of focus include: (1) whether such fees are bona fide, reasonable in amount, and disclosed to the borrower appropriately and in detail; (2) whether any default-related fees collected are for reasonable and appropriate services actually rendered, and meet additional criteria; (3) whether fees charged for third-party default-related services (including those performed by an affiliate of the servicer) are at a reasonable market rate; (5) whether the servicer collects any unearned fees, or gives or accepts any referral fees, in connection with third-party default-related services; and (6) whether the servicer marks up any third-party default-related services.

Similar topics have been the recent focus of state regulators. For example, the New York Department of Financial Services adopted regulations addressing mortgage loan servicers' business conduct, which among other topics include four sets of restrictions on fees that the Servicing Standards incorporated into the Agreement echo. (We use New York as an example because its regulation of mortgage loan servicers has been rumored as the basis for a national model for servicer conduct; parallels between the Servicing Standards and the New York rules support that view. The New York rules apply broadly to any servicer doing business in the state, rather than only to entities registered under New York law.)

First, the Servicing Standards require a servicer to "maintain and keep current a schedule of common non-state specific fees," make that schedule "available on its website and to the borrower or borrower's authorized representative upon request," and to include within the schedule an identification of each fee (including a plain English explanation of the fees and a statement of the amount of the fee, of the maximum amount of the fee or how the fee is calculated or determined). Like the almost identical New York rules, this requirement in the Servicing Standards is not limited to default fees.

Second, the Servicing Standards permit a servicer to collect a default-related fee only if it is for reasonable and appropriate services actually rendered and the fee: (1) is expressly or generally authorized by the loan instruments, and is not prohibited by law or the Agreement; (2) is permitted by law, and is not prohibited by the loan instruments or the Agreement; or (3) is not prohibited by law or the loan instruments, and is a reasonable fee for a specific service required by the borrower that is collected only after clear and conspicuous disclosure of the fee to the borrower. The New York rules incorporate a similar three-prong analysis with regard to fees, which originated in a pair of Federal Trade Commission settlements with mortgage loan servicers – one filed in September 2008 with EMC/Bear Stearns, and one filed in June 2010 with Countrywide. By comparison to the New York rules and those settlements, the Servicing Standards relax some of the more problematic language by

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not requiring the fee to be "expressly" authorized by the loan documents and not requiring the borrower's "express consent" to pay a fee in exchange for a service.

Third, both the Servicing Standards and the New York rules prohibit any attorney fees charged in connection with a foreclosure action from exceeding reasonable and customary fees for such work. Both also limit a borrower's liability to fees for work actually performed in the event that a foreclosure action is terminated prior to a final judgment and sale for specified reasons (such as reinstatement of the loan). The Countrywide settlement included a similar prohibition, limiting any fee charged for a default-related service to the amount of a reasonable fee charged by a third party for work actually performed.

Fourth, with regard to late fees, both the Servicing Standards and the New York rules, in addition to recognizing the late fee restriction in TILA (under which a servicer may not collect a late fee when the only delinquency is attributable to late fees or delinquency charges assessed on an earlier payment, and the payment is otherwise a full payment for the applicable period and is paid on or before its due date or within any applicable grace period) prohibit a servicer from collecting a late fee: (1) based on an amount greater than the past due amount; (2) from the escrow account or any escrow surplus, except with the borrower's approval; or (3) by deducting it from any regular payment. The Servicing Standards also include specific prohibitions related to collecting late fees for periods during which borrowers are in default and under consideration for loss mitigation, when a short sale offer is being evaluated, or when a borrower is in a Chapter 13 bankruptcy. The Servicing Standards do not set limits on the amount of a late fee (which the New York rules and applicable state laws frequently do), nor do they prohibit a servicer from assessing a late fee more than once with respect to a single delinquent installment (again, a frequent feature of state late fee restrictions).

The Servicing Standards go one step further than the New York rules by specifically regulating third-party fees. Property preservation, inspection and BPO fees are subject to a general prohibition against unnecessary or duplicative fees as well as the specific fee limits (which limitation was also a feature of the EMC/Bear Stearns settlement). Property inspection and BPO fees are subject to timing limits. With limited exceptions, BPO fees are limited to once per month and property inspection fees may be charged no more frequently than that allowed under GSE or HUD guidelines. Property preservation fees are generally prohibited when the borrower is under consideration for loss mitigation.

To date, several states have enacted statutes regulating the conduct of mortgage loan servicers, none so comprehensive as the New York rules. Expect the Servicing Standards and efforts such as the New York rules to provide a model for other states looking to regulate mortgage loan servicer conduct with regard to servicing fees.

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How the Global Foreclosure Settlement Agreement Impacts Servicing Fees

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Global Foreclosure Settlement Servicing Standards: Customer Complaint Provisions

By: Melanie Hibbs Brody

In many financial service relationships, dissatisfied customers can solve ongoing customer service deficiencies by simply taking their business to a competing provider. Mortgage borrowers, however, are generally stuck with the company that services their loan, unless they are willing and able to refinance. This inability to "fire" loan servicers for poor performance, combined with the fact that mortgage servicing errors can cause serious harm – up to and including the loss of a home – has motivated government officials to impose loan servicing complaint resolution requirements whenever an opportunity arises.

The March 12, 2012 Global Foreclosure Settlement with the nation's five largest residential mortgage loan servicers is the most recent example. The Global Settlement documents, described in detail here, include 42 pages of Servicing Standards that, among other matters, prescribe the manner in which servicers must handle customer complaints. Although the Servicing Standards apply directly only to the five settling parties and their affiliates, as a practical matter they are likely to become a compliance benchmark for the industry.

The Servicing Standards require the settling servicers to:

- Adopt **enhanced billing dispute procedures**, including: a process that allows customers to readily lodge complaints and pose questions (*e.g.,* by toll-free numbers and email); adequate and competent staff to respond to consumer disputes promptly; a dispute escalation process; complaint resolution tracking; and a toll-free number on monthly billing statements.
- Take "all appropriate action" to **promptly remediate any borrower account information inaccuracies**, including correcting account information and inaccurate credit reporting, and providing refunds or credits.
- Adopt processes for appropriately **addressing customer complaints about third party service providers**, such as foreclosure firms, law firms and subservicers.
- Designate a **management level contact for government officials** regarding complaints and inquiries from individual borrowers who are in default and/or have applied for modifications.
- Respond to all such inquiries with a **written acknowledgment** within 10 business days and a **substantive written response** within 30 days, and provide relevant loan information to the borrower and properly authorized government officials upon written request.
- Provide **Chapter 13 Trustees with a toll-free number** staffed by persons trained in bankruptcy.
- **Communicate with the borrower's authorized representatives and government officials** acting upon a written complaint filed by the borrower.

The Servicing Standards' requirements in many ways raise the bar for complaint resolution best practices, particularly with regard to communications with borrower representatives, government

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officials and bankruptcy trustees. Although implementing these requirements may present administrative hurdles for the settling servicers and others who opt to voluntarily comply, the bigger challenge may be trying to merge the Servicing Standards with other government-mandated complaint resolution requirements.

For example, the Consumer Financial Protection Act requires timely responses to consumer complaints and directed the Consumer Financial Protection Bureau (CFPB) establish a process to facilitate the complaint resolution process. In response to this mandate, the CFPB last fall issued a Company portal manual that spells out a detailed complaint collection, monitoring and response procedure. The CFPB's complaint response timing requirements are generally more permissive than those in the Servicing Standards, but the response logistics – including the required use of the CFPB's consumer complaint portal – are more specific and complicated.

Further complicating the issue of complaint response time requirements are the Dodd-Frank Act (DFA) changes to RESPA's qualified written request (QWR) requirements. Whereas RESPA currently requires a servicer to acknowledge receipt of a QWR in 20 days and respond in 60 days, the DFA shortened the acknowledgment and response time to 5 and 30 days (with a possible 15 day extension), respectively.

Servicers participating in Treasury and Fannie Mae/Freddie Mac HAMP programs also need to contend with the special consumer complaint resolution requirements arising under the Treasury and Fannie Mae/Freddie Mac escalation case requirements (*i.e.,* certain borrower inquiries and disputes related to HAMP denials and program violations). Finally, a number of states have enacted statutes imposing specific consumer complaint response requirements, some of which apply only to state licensees, and others that apply more generally. New York, for example, requires servicers to have procedures and systems to address borrower complaints promptly and appropriately, including a customer service department staffed by trained personnel and a toll-free telephone number or collect-calling service through which any borrower may direct telephone inquiries during regular business hours.

Enhancing customer complaint resolution practices to align with the Global Foreclosure Settlement Servicing Standards may present significant administrative, logistical and technological hurdles. The first part of the job – reconciling the hodgepodge of overlapping complaint resolution requirements applicable to various different entities and aspects of the servicing process – may be one of the toughest challenges.

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Global Servicing Settlement Requires Single Points of Contact ("SPOCs")

By: Kristie D. Kully

The servicing standards imposed on the five largest mortgage loan servicers by the recent global settlement agreement with state and federal regulators, described here, continue to pile on the "SPOC" requirements. "**SPOC" stands for a single point of contact** – a knowledgeable and accessible person a troubled borrower may contact to receive information and assistance in the loss mitigation, loan modification, and foreclosure process. SPOCs may do little to resolve the foreclosure documentation irregularities that sparked state and federal regulators to initiate their investigation. However, they have been touted as key to the efforts for national servicing standards, and are an inevitable adjunct to the global settlement agreement.

SPOCs seek to address complaints that certain servicers, in handling the crush of borrower inquiries since the subprime mortgage meltdown, failed to inform borrowers about their loss mitigation options, lost documents, and created confusion and delays. While the global settlement agreement requires each of the five largest servicers to **designate a SPOC for each potentially-eligible first-lien mortgage borrower**, the SPOC model is already required for 14 large banks as a result of a Consent Order signed last year with federal banking agencies. Similarly, Fannie Mae and Freddie Mac (the GSEs) began last year, in their new default servicing guidelines, to encourage (but they do not yet affirmatively require) their servicers to use SPOCs. The U.S. Department of Treasury, announced last year that SPOCs were required for the 20 largest servicers that participate in the Home Affordable Modification Program ("HAMP"). States may even be joining the SPOC trend – Michigan enacted a requirement that a mortgage holder or servicer must designate an individual (or a department or unit) to serve as a contact for borrowers in foreclosure proceedings, which contact is authorized to facilitate negotiations and attend meetings with the borrower. Thus, the SPOC specter has been circling for some months now, although it has been rolled out with differing degrees of specification and clarity, and with different timing requirements.

According to the global settlement agreement with the five largest servicers, those servicers will be required initially to designate a SPOC for a particular borrower "promptly" after the borrower requests loss mitigation assistance (if the borrower is potentially-eligible for that assistance). (Similarly, the HAMP SPOC requirement is triggered when the servicer successfully contacts a borrower and determines that it will consider the borrower for HAMP.) Once assigned, the global settlement agreement provides that the SPOC must become knowledgeable about the borrower's situation and current status in the delinquency/imminent default resolution process, and will then have **primary responsibility for communicating available loss mitigation options**, the actions the borrower must take, and the status of the servicer's evaluation. The SPOC also will be accountable for the coordination of all documents associated with loss mitigation activities. The SPOC's duties are not merely reactive; the agreement appears to require the SPOC affirmatively to reach out to the borrower with introductions, information, and assistance. (Similarly, a servicer under HAMP must identify the SPOC in a written notice to the borrower within five business days of the assignment.)

The servicer must ensure that relevant records are promptly available to the SPOC, and that a SPOC can escalate the borrower's account to an appropriate supervisor upon the borrower's request.

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The SPOC generally remains assigned to a particular borrower's account until either the servicer determines in good faith that all loss mitigation options have been exhausted, or the borrower's account becomes current (i.e., the SPOC assignment does not extend through the foreclosure process, unlike the Michigan provision mentioned above). Treasury's HAMP guidance does not expressly address when the SPOC relationship ends, but requires the SPOCs to be available at least until all loss mitigation options have been exhausted. It also differs from the settlement by requiring the SPOC to affirm, prior to a scheduled foreclosure sale, that to the best of his/her knowledge, all available loss mitigation alternatives have been exhausted and a non-foreclosure outcome could not be reached. Both the settlement and HAMP guidance require the servicer to provide the borrower with updated contact information if the designated SPOC is reassigned, no longer employed by the servicer, or otherwise not able to act as the primary point of contact.

The global settlement agreement also applies the SPOC model to **communications with government regulators and enforcers**, requiring servicers to designate one or more management level employees to be the primary contact for Attorneys General, state financial regulators, the Executive Office of U.S. Trustee, each regional office of the U.S. Trustee, and federal regulators, who may supply or require information regarding defaulted borrower complaints or inquiries. The servicers must acknowledge those inquiries within 10 business days and provide a substantive written response within 30 days.

While SPOCs have been brandished about in various forms, **it is still not clear what a SPOC system entails**. The recent global settlement agreement does not address, e.g., how a servicer could feasibly assign a single individual to each applicable borrower and expect that individual to be available at any time for direct communications, regardless of fluctuating call volumes or other staffing/scheduling hurdles. Treasury expressly requires the assignment of a single individual to each borrower, while the GSEs' model at least allows SPOCs to consist of a dedicated team of individuals for each borrower, as an alternative to a single individual. The global settlement agreement's SPOC requirement presumably will be interpreted through a similar "rule of reason" lens.

As the servicers (some of which may be subject to multiple sets of SPOC requirements, as described above) work through these specifics, it is clear the SPOC requirements represent **a big change in the way servicers staff and manage their shops**. It may not be feasible to have teams that are experts in a particular area of default servicing (i.e., a loan modifications group, a group for short sales or other workout options, a bankruptcy group, a foreclosure group). The servicers apparently will need to have a team of SPOCs who are trained and expert in the entire array of default servicing activities (with perhaps the ability to use a "lifeline" as necessary).

Additionally, the SPOC requirements remind us that certain states (and the Department of Housing and Urban Development ("HUD")) determined that individuals who are employed by state-regulated mortgage servicers and who assist borrowers in the loan modification process may need to be licensed as loan originators. The federal banking agencies have, for their part, held that employees of banks and savings associations (and certain of their subsidiaries that are regulated by a federal banking agency, among certain other entities) who are engaged in loan modification activities, or "bona fide cost-free loss mitigation efforts that result in reduced and sustainable payments for the borrower," **typically would not need to be registered as loan originators** (unless they also conduct more than a de minimis number of refinancings). Since the Consumer Finance Protection Bureau ("CFPB") took over the banking agencies' authority to determine the scope of loan originator registration (and HUD's authority with regard to the scope of licensing at the state level), the CFPB intends (for now, at least) to "substantially duplicate" their prior interpretations. Nonetheless, the CFPB will have the final say as to whether the new crop of SPOCs will flood the loan originator registration system.

Global Servicing Settlement Requires Single Points of Contact (“SPOCs”)

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Vendor Management Standards in the Global Foreclosure Settlement

By: David A. Tallman

The alleged failure of servicers to adequately supervise the activities of their foreclosure and loss mitigation vendors and other service providers is one of the central criticisms levelled by federal and state regulators against residential mortgage servicers. The regulators assert that skyrocketing foreclosure volumes caused key vendors – including foreclosure firms, bankruptcy attorneys, and document custodians – to take shortcuts. Moreover, with respect to the management and execution of legal documents, regulators assert that servicers failed to adequately supervise the activities of their foreclosure and loss mitigation vendors and other service providers. According to the regulators, servicers were not sufficiently equipped to track the movement of original documents, verify that affidavits and declarations filed in foreclosure and bankruptcy proceedings were factually accurate and correctly executed, or ensure that the vendors otherwise performed their services in compliance with applicable law.

Thus, it is no surprise that vendor management is a significant focus of the March 2012 Global Foreclosure Settlement. The settlement's vendor management-related Servicing Standards are consistent with the overarching risk management principles articulated by the federal banking agencies for depository institutions subject to their jurisdiction (e.g., OCC Bulletin 2001-47 and the FFIEC Information Technology Handbook), and also incorporate a number of vendor management requirements previously articulated in the 2011 residential mortgage servicing consent orders. For example, the general vendor management obligation set forth in both the 2011 consent orders and the Servicing Standards is that a servicer must adopt policies and processes to oversee and manage vendors performing foreclosure, bankruptcy, loss mitigation, or mortgage servicing activities. Such policies and procedures must cover a range of matters, including, but not limited to: (i) due diligence on vendor qualifications and key business practices; (ii) contractual controls, including measures to enforce vendor obligations; (iii) vendor certification and recertification processes; (iv) verifying that documents used in legal proceedings are accurate and appropriately executed; (v) documenting chain of title and loan ownership; and (vi) ensuring that incentive compensation does not encourage undue haste or lack of due diligence over quality.

But in addition to requiring servicers to enhance their general due diligence, contracting, audit, and quality control functions, the Settlement Agreement includes much more granular vendor management obligations. In this regard, the Agreement goes well beyond the standards set forth in existing guidance, including the banking agency guidelines, the 2011 consent orders and the Fannie Mae and Freddie Mac servicing guides (which, among other vendor management matters, require servicers to verify that vendors have business continuity plans, limit permissible third party fees, and restrict a servicer's ability to influence the selection of vendors by attorneys and trustees).

For example, the 2011 consent orders required servicers to implement "processes to ensure periodic reviews of [vendor] work for timeliness, competence, completeness, and compliance with all applicable Legal Requirements and supervisory guidance, and to ensure that foreclosures are conducted in a safe and sound manner." The Settlement Agreement elaborates on this obligation by describing several specific issues that such periodic reviews must cover, including:

Vendor Management Standards in the Global Foreclosure Settlement

- A review of a sample of the foreclosure and bankruptcy documents prepared by the vendor, to provide for compliance with applicable state and federal law and the Settlement Agreement in connection with the preparation of the documents, and the accuracy of the facts contained therein;
- A review of the fees and costs assessed by the vendor to provide that only fees and costs that are lawful, reasonable and actually incurred are charged to borrowers and that no portion of any fees or charges incurred by any vendor for technology usage, connectivity, or electronic invoice submission is charged as a cost to the borrower;
- A review of the vendor processes to provide for compliance with the servicer's policies and procedures concerning servicing activities;
- A review of the security of original loan documents maintained by the vendor;
- A requirement that the vendor disclose to the servicer any imposition of sanctions or professional disciplinary action taken against it for misconduct related to performance of servicing activities; and
- An assessment of whether bankruptcy attorneys comply with the best practice of determining whether a borrower has made a payment curing any motion of relief from stay ("MRS") delinquency within two business days of the scheduled hearing date of the related MRS.

The Settlement Agreement also departs from previous guidance with respect to vendor contracting. Although the consent orders and banking agency guidance each require general processes to ensure that contracts provide for adequate oversight of vendors, the Settlement Agreement expressly requires servicers to amend existing agreements to require vendors to comply not only with applicable law, but also with policies and procedures that incorporate the specific obligations in the Settlement Agreement. Because of the level of detail in the Servicing Standards (and in light of the vendor incentive compensation limitations), it thus often may prove necessary for servicers to renegotiate existing contracts. Vendors are unlikely to resist changes required by the Settlement Agreement if they intend to stay competitive.

Other granular vendor management obligations listed in the Settlement Agreement include:

- Ensuring that foreclosure and bankruptcy counsel and foreclosure trustees have appropriate access to information from the servicer's books and records;
- Ensuring that all information provided by or on behalf of the servicer to a vendor in connection with servicing activities is accurate and complete;
- Reviewing and approving standardized forms of affidavits, sworn statements, and declarations;
- Making good faith efforts to obtain or locate lost notes and requiring vendors to do the same;
- Ensuring not only that attorneys are licensed to practice in the relevant jurisdiction, but also that they have the experience and competence necessary to perform the services requested, and that their services comply with applicable law and other requirements;
- Ensuring that foreclosure and bankruptcy counsel and foreclosure trustees have an appropriate servicer contact to assist in legal proceedings and to facilitate borrower loss mitigation questions;
- Requiring vendors to maintain records that identify all notarizations of servicer documents executed by each notary employed by the vendor; and

Vendor Management Standards in the Global Foreclosure Settlement

- Ensuring timely and accurate communication of or access to relevant loss mitigation status and changes in status to foreclosure attorneys, bankruptcy attorneys and foreclosure trustees and, where applicable, to court-mandated mediators.

The Servicing Standards apply directly only to the five settling parties and their affiliates, but as a practical matter they are likely to become a compliance benchmark for the industry. Although the Servicing Standards' vendor management provisions may seem at first blush to be more onerous than the 2011 consent orders and other industry guidance, the added specificity likely is consistent with the work plans adopted in response to the 2011 consent orders and provides a useful guide towards the creation of a residential mortgage servicing vendor management program that meets regulatory expectations.

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Protecting the Protectors – the Global Settlement Agreements' SCRA Provisions

By: Jonathan D. Jaffe

Given the reported violations of the provisions of the Servicemembers Civil Relief Act ("SCRA") by some servicers, and the attendant enforcement and civil actions against those servicers, state and federal regulators clearly felt compelled to impose significant SCRA-related requirements on the nation's five largest residential mortgage loan servicers (the "Servicers") in the recent global settlement agreements (the "Agreements") entered into between those regulators and Servicers, described here.

The Agreements start simply enough by requiring the Servicers to comply with all applicable provisions of the SCRA and any applicable state law offering protections to servicemembers. Of course, the devil is in the details – which has historically made SCRA compliance problematic because the SCRA is devoid of details. The Agreements address some of the details via clarifications, and also impose requirements that extend beyond those found in the SCRA.

The SCRA's primary provisions with which loan servicers must comply involve (a) reductions in servicemembers' interest rate to six percent in certain circumstances (including certain fees and charges that might take the interest rate above six percent, (b) limitations on initiating and completing foreclosures, (c) requirements in connection with obtaining waivers of rights under the SCRA, (d) limitations on obtaining default judgments, (e) limitations on evictions and lease terminations, and (f) prohibitions against reporting to credit reporting agencies based on a servicemember's exercise of rights under the SCRA.

Supplementing those provisions, or in some cases, clarifying those provisions, the Agreements also require the Servicers to take the actions described below regarding eligible documentation, required review processes, timing and content of notices, and assessment of financial hardship in terms of eligibility for loss mitigation without being in default or imminent default. Although these requirements apply directly only to the five settling Servicers and their affiliates, as a practical matter they might become a de facto standard for the industry.

Determination of SCRA Protections and Use of Trained Employees

While the SCRA contains no explicit requirement that a servicer affirmatively determine that a borrower is entitled to SCRA protections, the Agreements appear to impose such a requirement on the Servicers.

One provision of the Agreements requires the Servicer to notify customers who are forty-five (45) days delinquent that, if they are a servicemember, (a) they may be entitled to certain protections under the SCRA regarding the servicemember's interest rate and the risk of foreclosure, and (b) counseling for covered servicemembers is available at agencies such as Military OneSource, Armed Forces Legal Assistance, and U.S. Department of Housing and Urban Development- ("HUD") certified housing counselors. That notice must include a toll-free number that servicemembers may call to be connected to a person who has been specially trained on the protections of the SCRA to respond to the

borrower's questions. The toll-free number must either connect directly to that person or afford a caller the ability to identify him- or herself as an eligible servicemember and be routed to that person.

This notice requirement appears to impose the same – and no greater – requirements that banking regulators take the position is imposed under existing law. This existing requirement evolved from the Housing and Urban Development Act of 1968, which established a requirement that loan servicers notify delinquent borrowers of the availability of homeownership counseling. The National Defense Authorization Act for Fiscal Year 2006 (the "NDAA") amended the required content of the notification form and directed HUD to issue a disclosure form to be used by mortgagees in fulfilling the notice requirement. Following HUD's issuance of the NDAA-mandated notice (HUD Form 92070), residential mortgage loan servicers have been required to deliver the notice to homeowners who are forty-five (45) days delinquent to inform the borrowers of certain rights available to them under the SCRA if they are servicemembers or dependents of servicemembers. This form has been modified twice since its issuance (see the current form of notice.)

The Agreements do, however, impose new obligations concerning determination of a servicemember's entitlement to SCRA protections. When a borrower states that he or she is in active military service or is subject to military orders requiring the borrower to commence active military service, the Servicer must determine whether the borrower might be eligible for SCRA's general protections or for the Agreement's foreclosure protections. It appears the Servicers are to make this determination by reviewing the Defense Manpower Data Center ("DMDC"), as discussed under the Pre-foreclosure Review heading below. If the Servicer determines the borrower is in fact eligible to receive SCRA benefits, the Servicer must route the borrower to Servicer employees who have been specially trained in SCRA's protections. Of course, if the Servicer has appointed a single point of contact ("SPOC") for the servicemember, that SPOC must also be well versed in the SCRA's protections. The Servicer must continue to route the servicemember to those employees until the Servicer determines that the borrower is no longer protected by the SCRA.

Pre-foreclosure Review

The SCRA prohibits servicers from initiating a foreclosure or attempting to foreclose on a servicemember if the servicemember owns the security property, is the borrower on the loan, and the loan was made before the borrower was called to military service unless:

1. the servicer first obtains a court order authorizing the foreclosure, or
2. the servicer obtains a waiver as authorized under the SCRA.

The SCRA left open when and how to determine whether the borrower is a servicemember in military service. The Agreement resolves this issue for Servicers, and presumably for other servicers who are not subject to the Agreements.

The Agreements require the Servicers to determine whether the security property is owned by a servicemember covered under the SCRA by searching the DMDC for evidence of SCRA eligibility. The Servicers are to search the DMDC by either (a) last name and social security number, or (b) last name and date of birth. The Servicers must perform this search (i) before they refer a loan for foreclosure, (ii) within seven days before a foreclosure sale, and (iii) the later of (a) promptly after a foreclosure sale and (b) within three days before the regularly scheduled end of any redemption period.

Evidence to Support Interest Rate Reductions

Under the SCRA, a servicer is required to reduce a servicemember's interest rate to six percent if the loan was made to the servicemember, or the servicemember and the servicemember's spouse jointly, before the servicemember entered military service. But this obligation arises only if the servicemember provides the servicer (a) written notice and (b) a copy of the military orders calling the servicemember to military service.

The Agreements require the Servicers to also accept from a servicemember who provides written notice but does not provide the Servicer military orders, a letter on official letterhead from the servicemember's commanding officer including a contact telephone number for confirmation. The letter must:

1. be addressed in such a way as to signify that the commanding officer recognizes that the letter will be relied on by creditors of the servicemember;
2. set forth the full name (including middle initial, if any), Social Security number and date of birth of the servicemember;
3. set forth the home address of the servicemember; and
4. set forth the date of the military orders marking the beginning of the period of military service of the servicemember and, as may be applicable, that the military service of the servicemember is continuing or the date on which the military service of the servicemember ended.

Additional Mortgage Foreclosure Protections

As noted above, for the SCRA's foreclosure protections to trigger, the servicemember must have entered into the loan prior to entering into military service. The Agreements afford servicemembers protections under certain circumstances even if the loan was originated after the borrower entered military service.

Even if the mortgage loan was originated during the period of a servicemember's military service, subject to certain limitations, the Servicers may not foreclose on a mortgage secured by property owned by a servicemember during the SCRA protection period if the servicemember is (a) eligible for Hostile Fire/Imminent Danger Pay (the Agreements do not define what constitutes but presumably that term refers to 37 U.S. Code § 351) and (b) serving at a location (i) more than 750 miles from the location of the secured property or (ii) outside of the United States. This limitation does not apply if the Servicer has obtained either (a) a court order granted before the foreclosure, or (b) a waiver signed by the borrower that complies with the SCRA's waiver provisions. Also, unless a servicemember's eligibility for this protection can be fully determined by a proper search of the DMDC website, the Servicers are only obligated if they are able to determine, based on a servicemember's military orders (or any letter from a commanding officer as described earlier in this blog), together with any other documentation provided by or on behalf of the servicemember that is satisfactory to the Servicer, that the servicemember is (a) eligible for Hostile Fire/Imminent Danger Pay and (b) serving at a location (i) more than 750 miles from the location of the secured property or (ii) outside of the United States.

Loss Mitigation

The SCRA does not address loss mitigation, but the Agreements do.

The Servicers may not require a servicemember to be delinquent to qualify for a short sale, loan modification, or other loss mitigation relief if the servicemember is suffering financial hardship and is

otherwise eligible for such loss mitigation. Subject to certain limitations, for purposes of assessing financial hardship in relation to:

1. **a short sale or deed in lieu transaction**, the Servicers must take into account whether the servicemember is, as a result of a permanent change of station order, required to relocate even if the servicemember's income has not been decreased, so long as the servicemember does not have sufficient liquid assets to make his or her monthly mortgage payments, or
2. **a loan modification**, the Servicer must take into account whether the servicemember is, as a result of his or her under military orders required to relocate to a new duty station at least 750 miles from his or her residence/secured property or to reside at a location other than the residence/secured property, and accordingly is unable personally to occupy the residence and (a) the residence will continue to be occupied by his or her dependents, or (b) the residence is the only residential property owned by the servicemember.

Separate Agreement

Some, but not all, of the Servicers entered into related agreements with the U.S. Department of Justice ("DOJ") relating to the SCRA. Those agreements require the applicable Servicers to engage independent consultants to review the Servicers' compliance with the foreclosure and interest rate reduction provisions of the SCRA and provide formulas for remediation when the consultants and DOJ determine there were violations. But more pertinent for purposes of this blog, those Servicers also agreed to additional obligations beyond those discussed above.

- Before the Servicer refers a loan to foreclosure, the Servicer must review any orders it has received from borrowers and check borrowers' names and Social Security numbers against the DMDC website (as noted above).
- If the Servicer pursues a judicial foreclosure and the borrower fails to answer the action, the Servicer (or its agent), before seeking entry of default, the Servicer (or its agent) must query the DMDC and review information in its possession or control for orders to determine if the borrower is on active duty. If the Servicer learns that the borrower is on active duty or was on active duty at the time of the borrower's failure to answer, the Servicer must file an affidavit stating that "the defendant is in military service" or "was in military service at the time of his or her failure to answer" prior to seeking default judgment and attaching the most recent certificate of service from the DMDC or a copy of the military orders.
- If the Servicer initiates and pursues a written waiver as provided in Section 517 of the SCRA, the Servicer must initiate the waiver process with the servicemember at least thirty (30) days in advance of any anticipated foreclosure sale date by sending a notice and a copy of the proposed waiver to the servicemember. The Servicer must use a specified form of notice and proposed waiver.
- The Servicer must accept servicemembers' requests for reduced mortgage interest rates via electronic mail, facsimile, U.S. Mail, Federal Express or other overnight/express delivery to facsimile numbers and addresses designated by the Servicer. If the Servicer maintains full-service branch locations, under certain circumstances the Servicer must also accept servicemembers' requests for reduced mortgage interest rates via in-person delivery at those branches.
- When a servicemember requests interest rate relief, the Servicer must accept, in addition to orders, any document the U.S. Department of Defense deems sufficient as a substitute for official orders. The Servicer may seek only orders identifying the beginning date of the applicable period of

military service and may not condition providing SCRA benefits on the servicemember submitting orders that include an end date.

- Before concluding that the SCRA permits raising the interest rate on a servicemember's loan higher than six percent, the Servicer must access the DMDC website to determine the dates, where available, of active duty military service of those servicemembers who requested reduced interest rates. If the DMDC indicates that the individual is still on active duty, the Servicer must continue to limit the charges pursuant to Section 527 of the SCRA.
- If the Servicer determines that a servicemember is not eligible for a reduced rate, the Servicer must notify the servicemember in writing of the reasons for the denial and that they may provide additional documentation or information to establish eligibility for the reduced interest rate.
- The Servicers must establish SCRA training programs for employees (including management officials): (1) providing customer service to servicemembers, (2) involved in mortgage servicing, including adjusting interest rates for mortgage loans, or (3) with significant involvement in the foreclosure process, within thirty days of the employee's hiring, promotion, or transfer. The Servicers must also obtain confirmation from third-party vendors, law firms, and/or trustee companies involved in conducting foreclosures that their employees who are involved in the foreclosure process have been trained on their obligations to comply with this settlement and the SCRA.

There is no regulatory agency to flesh out the details of the SCRA. Rightly or wrongly, the DOJ has now stepped in to fill that void.

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National Mortgage Foreclosure Settlement Tackles "Dual Tracking" of Foreclosure and Loan Modification

By: Stephanie C. Robinson, Kerri M. Smith

At what point is it appropriate after a borrower defaults to initiate foreclosure proceedings? As soon as the borrower defaults? Few, if any, servicers follow this rule. During a review of loss mitigation options? During a trial modification? Servicers long have felt that the extraordinary delays in completing foreclosures based on some state laws weigh in favor of starting the foreclosure process as soon as possible. Of course, the servicer always can call off the foreclosure if the loss mitigation option succeeds, but a decision to delay the initiation of foreclosures can result in investor claims. On the other hand, borrowers who think they are in the running for a loan modification often are angry and dismayed when the foreclosure notice arrives. The national foreclosure settlement between the country's five largest residential mortgage loan servicers and the federal government and 49 state attorneys general places a number of restrictions on the controversial but common practice of "dual tracking" foreclosures and loan modifications.

In many ways, the standards imposed on mortgage loan servicers through the national foreclosure settlement are similar to those that Fannie Mae and Freddie Mac (the "GSEs") already impose for the servicing of delinquent loans they own or guarantee. But while both the GSE guidelines and the settlement standards generally operate in favor of delaying foreclosure, the GSEs impose strict foreclosure timelines that limit the number of days a servicer can wait before completing a foreclosure sale. Further, unlike the settlement standards, the GSE guidelines require prior GSE approval for postponing a foreclosure sale on certain severely delinquent loans (notwithstanding rules to the contrary).

Additionally, the GSE guidelines provide clearer expectations of the specific action a servicer may take while evaluating a borrower for a loan modification. For example, GSE guidelines outline when the "next legal action" (*i.e.*, the next step required by law to proceed with the foreclosure action, such as publication or service of process) must be taken or halted. By comparison, the national foreclosure settlement prohibits a servicer under certain circumstances from "proceeding with a foreclosure sale" (which could be read to encompass the legal actions leading up to the sale or just the sale itself).

The settlement agreement's description of when a servicer may refer a borrower to foreclosure or conduct a foreclosure sale is extraordinarily rules-based and laborious. With respect to dual tracking of foreclosure and loan modification efforts, the settlement agreement provides two classes of rules—one for before a servicer refers a borrower to foreclosure, and the other for after the servicer has referred a borrower to foreclosure.

Pre-foreclosure referral

If the loan has not yet been referred to foreclosure and a servicer receives a complete loan modification application from the borrower by day 120 of delinquency, under the terms of the settlement agreement, the servicer must review and make a determination on the application before

referring the loan to foreclosure. If the package is substantially complete but is missing only any required documentation of hardship, the borrower has an extra 10 days to provide the hardship documentation to the servicer. If a borrower qualifies for a trial modification offer and accepts it, the servicer is prohibited from referring the borrower to foreclosure while the borrower is performing on the trial.

The settlement agreement's pre-foreclosure referral procedures mirror those found in GSE guidelines, except with respect to borrowers who are denied a loan modification. First, the settlement agreement requires an independent "automatic review" of most denials before a denial notice is sent to the borrower. Second, the settlement agreement provides the borrower a 30-day window to appeal the denial (unless inconsistent with federal or state law or investor directives). If the borrower appeals the denial, the servicer is prohibited from "proceeding to a foreclosure sale" during the appeal process (again, unless inconsistent with otherwise applicable requirements). By contrast, under the GSE guidelines, a servicer is expressly prohibited from postponing referral to foreclosure upon receiving a borrower's appeal of a loan denial. Such a conflict is sure to raise issues about whether it is appropriate to impose compensatory fees for delays in foreclosure based on considering a borrower's appeal.

Post-foreclosure referral

Within five business days after referral to foreclosure, the servicer must send the borrower a letter soliciting the borrower's loan modification application ("Post Referral to Foreclosure Solicitation Letter"). The letter must indicate that the borrower can still be evaluated for alternatives to foreclosure, even if he or she had previously shown no interest.

Where the servicer has already referred a borrower to foreclosure, the settlement agreement adopts a sliding scale of rules based on when the servicer receives the borrower's complete loan modification application package. If the borrower submits a complete application package to the servicer within 30 days after the Post Referral to Foreclosure Solicitation Letter, then the servicer must delay foreclosure (*i.e.*, must not move for foreclosure judgment or order of sale, or seek a foreclosure sale) and review the borrower's application. In general, the servicer must review and make a determination on a borrower's completed application within 30 days of receipt.

If the borrower submits a complete modification application more than 30 days after the Post Referral to Foreclosure Solicitation Letter, then the required response depends on the timing of any scheduled foreclosure sale:

- If the complete package is received more than 37 days before the date of a scheduled sale, then the servicer must not "proceed with the foreclosure sale" and must review the borrower's application.
- If the complete package is received more than 15 days but less than 37 days before the date of a scheduled sale, then the servicer must perform an expedited review of the borrower's application (but the servicer has no affirmative obligation to delay foreclosure proceedings during the expedited review).
- If the complete package is received less than 15 days before the date of a scheduled sale, then the servicer must notify the borrower of its determination (if it completes its review) or inability to complete its review of the application (but the servicer has no affirmative obligation to delay foreclosure proceedings during the evaluation).

National Mortgage Foreclosure Settlement Tackles "Dual Tracking" of Foreclosure and Loan Modification

In all cases, if the servicer makes an offer of a loan modification, it must allow the borrower 14 days to decide whether to accept the offer. If the borrower accepts the servicer's offer, the servicer must suspend the foreclosure sale until the borrower fails to perform under the trial loan modification.

While the borrower is performing under the trial loan modification, the servicer is prohibited from moving to judgment or order of sale or "proceeding with a foreclosure sale." The settlement standards are not as clear on this point as the GSE guidelines, which clarify that a servicer must delay the next legal action while a borrower is performing on a trial.

If the borrower is denied a trial modification after the loan has been referred to foreclosure, the servicer has differing responsibilities regarding the automatic "independent review" and appeals process, depending on when the servicer receives the complete application package. For example, when the servicer receives a complete application more than 30 days after the Post Referral to Foreclosure Solicitation Letter and it is within 37 days of a scheduled foreclosure sale, an automatic review is not required, and the servicer may continue with foreclosure proceedings during the appeal process.

Comparison to HAMP

The dual tracking provisions of the settlement agreement differ somewhat from HAMP rules. For example, the HAMP guidance generally does not provide a sliding scale of rules based on when the borrower application is received (with an exception for those requests that occur within seven business days of a scheduled sale, known as the "deadline"). Similar to the settlement standards, HAMP guidance provides the borrower a 30-day appeal window after a denial in which the servicer cannot proceed with a foreclosure sale. The difference, however, is that servicers under HAMP must delay a foreclosure sale if an appeal is received before the deadline, whereas servicers under the settlement agreement must delay the foreclosure sale only in connection with a borrower application received 37 days before the scheduled date. HAMP can also be distinguished from the settlement standards as it does not require a servicer during the evaluation to halt certain events in the foreclosure process (such as moving for foreclosure judgment) but does prohibit the actual sale.

In sum, the settlement standards' restrictions on dual tracking of foreclosure and loan modification are extremely rules-based, and although similar to existing rules of the GSEs, servicers should review the timelines carefully to determine how best to implement their foreclosure procedures.

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Tenants' Rights under the Global Foreclosure Settlement Agreement

By: Nanci L. Weissgold, Morey E. Barnes Yost

Buried deep in the 40-plus pages of "Servicing Standards" that are part of the recently announced global foreclosure settlement agreement (the "Agreement") are two bullets on a topic that could impact thousands: tenants' rights.

Specifically, the Agreement requires subject servicers to: (1) comply with all applicable state and federal laws governing the rights of tenants living in foreclosed residential properties; and (2) develop and implement written policies and procedures to ensure compliance with such laws.

Just what does compliance with the applicable state and federal laws entail? First and foremost, notice. Under the federal Protecting Tenants at Foreclosure Act (12 U.S.C. §§ 5201 et seq.), a tenant of foreclosed residential property is entitled to receive notice at least 90 days before being required to vacate the property. Similar state laws generally require the same notice period, prescribe the exact form that the notice must take and the method of its delivery, and also provide penalties for failure to give the required notice. Both the Protecting Tenants at Foreclosure Act and similar state laws condition the rights of a successor in interest to foreclosed property, requiring such a party to let a bona fide tenant finish out the term of his or her lease, unless the party intends to occupy the property as his or her principal residence. Separate notice requirements may apply to property for which a foreclosure action has been filed and for property which has been sold at a foreclosure sale.

Thus, at a minimum, for servicers to develop policies and procedures to ensure compliance with federal and state tenant protection laws will require identifying the specific requirements of each law (which, in the case of notice laws, include timing, scope, method of delivery, and format). Keeping in mind that each state law varies with regard to the penalties for noncompliance with notice requirements, a one-size-fits-all approach will not suffice.

Second, servicers need to be mindful that compliance with state and federal laws is not limited to the notice requirements described above. For instance, under the New Jersey Foreclosure Fairness Act, a person who has filed a complaint in a foreclosure action on residential property or who takes title to such property following the filing of a foreclosure complaint may not make any communication to induce the tenant to vacate the property, except for a bona fide monetary offer (i.e., "cash for keys"), or to pressure a tenant to accept such an offer during the pendency of a foreclosure proceeding (or for one year after transfer of title following such a proceeding).

Many states and municipalities also have enacted laws and ordinances requiring lenders to maintain vacant or tenant-occupied properties. To fulfill their obligations under such laws, lenders and servicers may be required to maintain the exterior and grounds of such properties (removing debris, maintaining landscaping and pools), ensure that vacant properties do not become nuisances (because of criminal activity or the accumulation of trash), and otherwise comply with local property maintenance standards.

Third, for REO properties, servicers will need to understand landlord-tenant laws both at the state and local level. Rental limitations arising under local zoning laws or homeowner and condominium association rules could either prohibit a lease or limit the number of occupants. If the servicer is

Tenants' Rights under the Global Foreclosure Settlement Agreement

implementing a rent-to-own program (as leaseback offers in connection with deeds in lieu of foreclosure are gaining popularity), a host of additional issues would come into play. According to recent guidance from the Federal Reserve Board, the rental of REO properties could also implicate landlord licensing and registration requirements, protections under the Servicemembers Civil Relief Act and anti-discrimination laws (such as the Fair Housing Act and the Americans with Disabilities Act), and the property oversight of third-party vendors used to manage properties. Although this guidance is addressed to banking organizations subject to the Federal Reserve's oversight (such as state member banks, bank holding companies, non-bank subsidiaries of bank holding companies, savings and loan holding companies, non-thrift subsidiaries of savings and loan holding companies, and U.S. branches and agencies of foreign banking organizations), the enumerated laws are not so limited in their application.

Although the Agreement's standards apply only to five servicers (and their affiliates), the application of these provisions will be much broader if the expectation is true that the standards are the baseline for consideration of national standards. Furthermore, given their inclusion in the Agreement, tenants' rights may be an area to which state regulators pay increased attention, making compliance by all parties subject to these provisions more important. The issues raised above are only examples, and by no means an exhaustive list, which indicates the amount of effort that may be required to ensure compliance with applicable laws.

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Force-Placed Insurance Standards in the Global Foreclosure Settlement

By: Steven M. Kaplan, Rebecca Lobenherz

Force-placing insurance could be a hazardous practice if not done appropriately. The Consumer Financial Protection Bureau ("CFPB") has made force-placed insurance a main focus of its desired mortgage servicing reforms and new rules on the issue are expected to be released by the CFPB as soon as this week. This is in addition to high-profile investigations into force-placed insurance by New York and California. Therefore, it should be no surprise that a significant section of the March 2012 Global Foreclosure Settlement lays out new force-placed insurance standards for parties to the settlement agreement.

The Global Foreclosure Settlement outlines requirements on when force-placed insurance may be placed, what the coverage amount should be, and what disclosures must be provided to the borrower prior to force-placement. While the standards listed in the Global Foreclosure Settlement may seem strict, most of these restrictions first appeared in Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled the Mortgage Reform and Anti-Predatory Lending Act ("Mortgage Reform Act"). Prior to the Mortgage Reform Act, the restrictions on placing hazard insurance (other than flood insurance) came mainly from investor guidelines and agreements. However, recent changes to the Fannie Mae servicing guide conform with the requirements in the Mortgage Reform Act and the Global Foreclosure Settlement. Additionally, some state regulators are pushing for stricter force-placed insurance standards similar to those in the Global Foreclosure Settlement, notably New York's Department of Financial Services ("DFS"), which has proposed a servicing standards agreement that several New York regulated servicers have already signed onto. Thus, the Global Foreclosure Settlement's force-placed insurance standards, far from shaking up the servicing industry, serve mainly to memorialize the changes to the force-placed insurance standards industry-wide since the passage of the Mortgage Reform Act.

General Requirements

The Mortgage Reform Act, Global Foreclosure Settlement, New York DFS agreement, and new Fannie Mae guidelines all attempt to decrease the cost of force-placed insurance for the consumer and increase the burden on the servicer prior to force-placing insurance.

Under the Global Foreclosure Settlement, a servicer must have a "reasonable basis" to believe that the borrower has not maintained the required insurance. This "reasonable basis" standard is also a feature of the Mortgage Reform Act, and both the Global Foreclosure Settlement and the Mortgage Reform Act require a servicer to meet all other force-placed insurance requirements in order to demonstrate that a reasonable basis exists.

For borrowers paying into escrow accounts, the Global Foreclosure Settlement also requires the servicer to continue to advance payments to the insurer regardless of homeowner payments, unless the borrower or the insurance company cancels the existing policy. The servicer must make reasonable efforts to work with the borrower to continue or reestablish the existing homeowner's policy if there is a lapse in payment and the borrower's payments are escrowed. The New York DFS agreement

requires a servicer to take "all commercially reasonable steps" to continue or reestablish the existing homeowner's policy.

Disclosure Standards

Disclosure standards under the Global Foreclosure Settlement track requirements under the Mortgage Reform Act and require servicers to provide *two* separate notices to the homeowner of a lapse in coverage prior to allowing force-placement. Specifically, the first written notice must provide the following information to the borrower:

- A reminder of the borrower's obligation to maintain hazard insurance on the property securing the federally related mortgage;
- A statement that the servicer does not have evidence of insurance coverage of such property;
- A clear and conspicuous statement of the procedures by which the borrower may demonstrate that the borrower already has insurance coverage; and
- A statement that the servicer may obtain such coverage at the borrower's expense if the borrower does not provide such demonstration of the borrower's existing coverage in a timely manner.

The Global Foreclosure Settlement, unlike the Mortgage Reform Act, also requires the first notice to include:

- A statement that the cost of such coverage may be significantly higher than the cost of the homeowner's current coverage; and
- A statement, in the case of single interest coverage, that the coverage may only protect the mortgage holder's interest and not the homeowner's interest.

For first lien loans on the servicer's primary servicing system, under the Global Foreclosure Settlement, the notice must also include a statement that the servicer will set up an escrow account and advance the insurance premiums if the borrower wishes. It is unclear whether the CFPB's rules will include any additional notice requirements like those contained in the Global Foreclosure Settlement. However, the CFPB's proposal on force-placed insurance rules does go further than the Global Foreclosure Settlement in one key respect, by requiring the servicer to include a good faith estimate of the cost of the insurance in the notice, not just a statement that cost of the insurance may be higher.

Under both the Global Foreclosure Settlement and the Mortgage Reform Act, the second notice must be sent 30 days following the mailing of the first notice and include the same information. Then the servicer has to wait 15 days following the mailing of the second notice, with no written confirmation of the borrower's hazard insurance coverage, before force-placement is allowed. Prior to the Mortgage Reform Act, the Fannie Mae servicing guide mandated only one written notice to the borrower prior to obtaining force-placed insurance coverage. However, Fannie Mae recently made corresponding changes to its servicing guide – now requiring the servicer to contact the borrower at least twice in writing prior to force-placement. The additional notice requirements will increase the costs to servicers and could increase the amount of time the borrower's property may remain uninsured unless coverage is otherwise maintained.

Termination of Force-Placed Insurance

Under the Global Foreclosure Settlement, a servicer must accept any reasonable form of written confirmation from a borrower or the borrower's insurance agent of existing insurance coverage. This

confirmation must include the borrower's existing insurance policy number and the identity and contact information for the insurance company or agent, but no other information is required. Within 15 days of receiving this evidence, the servicer must terminate the force-placed insurance and refund to the consumer all force-placed insurance premiums and related fees paid by the borrower when the property was already covered by insurance. Again, these requirements match restrictions in the Mortgage Reform Act, although the time frame for refunding premiums is a slightly longer 20 days under the Mortgage Reform Act. And, while requirements that insurance be terminated and premiums be refunded are not new, requiring that borrowers only provide a reasonable form of written confirmation (instead of actual proof of an insurance policy) and the shorter time frame for servicers to make such refunds are new requirements that originated with the Mortgage Reform Act. Previous guidance from Fannie Mae only required servicers to refund the premiums in a "reasonable time frame." And the New York DFS proposed standards do not lay out a time frame within which termination and refunds need to occur. However, under the new Fannie Mae servicing requirements, insurance premium refunds must occur within 15 days of the receipt of evidence of acceptable insurance coverage from the borrower. Again, it appears that industry standards are changing to conform with the Mortgage Reform Act, and the Global Foreclosure Settlement merely captures the CFPB's standards.

Cost of Insurance

The Global Foreclosure Settlement requires that any force-placed insurance policy must be purchased for a commercially reasonable price. This differs slightly from the Mortgage Reform Act's requirement that the charges be "bona fide and reasonable." The New York DFS proposed servicing standards agreement also requires that a force-placed insurance policy be reasonably priced in relation to the claims that may be incurred. However, all of the restrictions are based on a reasonableness standard, and there is no indication in the law or the agreements on what constitutes a reasonable price for such insurance.

Amount of Coverage

Finally, the Mortgage Reform Act is silent on required coverage amounts for force-placed insurance and, unsurprisingly, there is a real divergence between the Global Foreclosure Settlement, Fannie Mae servicing guides, and the New York DFS agreement on the appropriate standard for coverage in the absence of the Mortgage Reform Act's guidance. Under the Global Foreclosure Settlement, the servicer must set the coverage amount at an amount in excess of the *greater* of replacement value, last known amount of coverage or the outstanding loan balance. Fannie Mae requires the insurance coverage amount to be the last known coverage amount when the borrower is 119 days delinquent, and the *lesser* of the unpaid principal balance or the replacement cost of property improvements for loans that are 120 or more days delinquent. The New York DFS agreement goes even further, requiring the coverage amount to be the lesser of unpaid principal balance, last known coverage, and replacement cost. Competing standards for force-placed insurance coverage could be difficult for servicers to reconcile, especially since many state laws also separately regulate force-placed insurance coverage.

While the force-placed insurance standards in the Global Foreclosure Settlement are not applicable to all servicers, the requirements in the Mortgage Reform Act, along with changing investor requirements and pressure from state regulators, appear to be rapidly moving the industry toward these more stringent standards.

Force-Placed Insurance Standards in the Global Foreclosure Settlement

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Conflicted Out: When Must a Servicer Follow FHA Guidelines over the Global Foreclosure Settlement Servicing Standards?

By: Krista Cooley, Rebecca Lobenherz

The National Servicing Standards, outlined in the March 2012 Global Foreclosure Settlement, are difficult to reconcile with the already stringent servicing requirements in place for the Federal Housing Administration's ("FHA") single family loan insurance program. The National Servicing Standards are expressly subject to and must be interpreted in accordance with applicable federal, state and local laws, rules and regulations, and the terms and provisions of the requirements, binding directives and investor guidelines of the mortgage insurer, including FHA. In the event of a conflict between such requirements and the National Servicing Standards such that a servicer cannot comply with the National Servicing Standards without violating these requirements or being subject to adverse action, then the servicer must document such conflicts and notify the monitoring committee that the servicer intends to comply with the FHA requirements to the extent necessary to eliminate the conflict.

It is not clear, however, that merely following FHA's requirements will be sufficient to comply with the National Servicing Standards, and attempting to follow both the National Servicing Standards and the FHA requirements can be a difficult, and sometimes impossible, balancing act for a loan servicer absent specific guidance from the Department of Housing and Urban Development ("HUD") and the committee responsible for monitoring compliance with the National Servicing Standards. HUD was an active participant in the negotiations surrounding the National Servicing Standards and clarification from the agency on how the National Servicing Standards will fit into the FHA servicing framework will be necessary going forward.

Below, we summarize some of the more difficult to reconcile requirements in the National Servicing Standards and how they may conflict with current FHA guidelines.

Loss Mitigation Requirements

Both the National Servicing Standards and FHA guidelines outline specific steps to take in evaluating a borrower for loss mitigation options. However, the two sets of requirements envision very different loss mitigation frameworks. Most importantly, while the National Servicing Standards contemplate only a few categories of loss mitigation options (the U.S. Department of the Treasury's Home Affordable Modification Program, or "HAMP", loan modifications and short sales) and view the servicer's evaluation of the borrower for each option to be a separate occurrence, FHA guidelines outline a complete loss mitigation waterfall. FHA-approved servicers are required to evaluate a borrower's eligibility for a number of well-defined loss mitigation options (repayment plans, special forbearance, loan modifications, partial claims, FHA-HAMP, pre-foreclosure sales and deeds-in-lieu of foreclosure) in a set priority order and select the most appropriate option based on HUD's requirements and the borrower's circumstances. This holistic approach to loss mitigation under the

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FHA guidelines makes many of the National Servicing Standards, while not expressly in conflict with FHA requirements, difficult to implement within the FHA loss mitigation program.

Moreover, the application and evaluation process differs significantly between the two sets of guidelines. Under the National Servicing Standards, borrowers initiate the loss mitigation process by submitting applications for assistance and servicers are required to analyze the borrower's eligibility for loss mitigation by using a "net present value" calculation, which considers the borrower's ability to repay as well as the risk of re-default and the cost of a loan modification as opposed to foreclosure. By contrast, under FHA guidelines, servicers initiate contact with delinquent borrowers and are required to obtain financial information from the borrowers sufficient to evaluate the borrower, which may be obtained verbally provided it is independently verified. Once the financial information is obtained, under FHA guidelines, the servicer must use that information to calculate the borrower's "surplus income percentage," and as discussed above, use good business judgment to select a loss mitigation option that is most appropriate for the borrower based on the borrower's ability to repay. "Net present value" requirements discussed under the National Servicing Standards have no applicability in the FHA context.

Thus, the general loss mitigation evaluation process differs for servicers following the National Servicing Standards and servicers of FHA loans to a large degree even before considering the separate criteria for specific loss mitigation options available under both standards.

HAMP and FHA-HAMP

While the National Servicing Standards contain a number of restrictions on a servicer's application of the Treasury's HAMP program, it is worth noting that HAMP is not available for FHA borrowers. Rather, FHA servicers may use FHA-HAMP, which is a HAMP-like modification but which contains completely separate program features and requirements related to borrower eligibility. The National Servicing Standards appears to cover HAMP-like programs, such as FHA-HAMP, by extending many of the standards to HAMP or proprietary loan modification programs. Under the National Servicing Standards, when a borrower makes all of the required trial period payments under a HAMP or proprietary loan modification program, but then is denied a permanent modification, the borrower has the option of reapplying for the program. Under FHA's version of the HAMP program, if the borrower does not successfully execute the permanent loan modification, the borrower is no longer eligible for FHA-HAMP and may not be reconsidered for the option. While these guidelines are clearly inconsistent, clarification from HUD of the inapplicability of the HAMP provisions in the National Servicing Standards would be helpful for servicers evaluating the application of the National Servicing Standards to their FHA portfolios.

Appeal Process

Under FHA requirements, if a servicer determines based on verbal financial information that a borrower is not eligible for any loss mitigation option available under FHA requirements, the servicer must send the borrower a letter explaining the reason for denial and provide the borrower seven calendar days to submit additional information that may impact the loss mitigation evaluation. The National Servicing Standards, in contrast, set up a lengthy and multi-step appeal process upon the denial of a loan modification. If the servicer denies a loan modification, an independent review of the decision must be performed and the borrower notified of the decision within 10 business days of the initial determination if the denial stands. At this point, the borrower generally has 30 days to request an appeal and provide the servicer with additional information that will impact this decision. However, if the denial was because the mortgage or property was ineligible, the offer was not

accepted by the borrower, or the loan was previously modified, then the borrower does not have the right to appeal the decision. If the loan was denied because of the net present value test and the borrower disagrees with the property value, the borrower can request a new appraisal. Denials for FHA loan modifications, however, may occur because of loan or borrower eligibility, the servicer's business judgment that the borrower has an inability to pay the modified mortgage amount, or simply because another loss mitigation option is better suited for the borrower's needs. In short, the appeals process, while not in direct conflict with FHA requirements relating to the denial of borrowers for loss mitigation options, incorporates concepts and considerations that are not currently included in FHA's loss mitigation framework. Thus, guidance from HUD will be necessary to determine whether, if at all, the appeals process outlined in the National Servicing Standards should be implemented within the FHA program.

Dual Tracking and Foreclosure Timelines

Both the National Servicing Standards and the FHA guidelines set out timelines servicers must follow when referring borrowers to foreclosure and proceeding to a foreclosure sale. FHA guidelines have strict standards regarding when foreclosure must begin and a relatively short timeline during which the servicer must either complete a loss mitigation option or refer the borrower for foreclosure. Meanwhile, the National Servicing Standards do not provide an overarching timeframe for completing loss mitigation evaluations and referring borrowers to foreclosure, but do require servicers to halt foreclosure if borrowers request loan modifications following foreclosure referral and to provide the borrower with a 30-day appeal period if the application is denied. While servicers under the FHA guidelines must stay foreclosure proceedings during loss mitigation evaluations and trial payment plans, once foreclosure is initiated, the servicer must exercise reasonable diligence in prosecuting the foreclosure proceedings to completion. And, while dual tracking after foreclosure referral is prohibited under the National Servicing Standards, under the FHA guidelines, the servicer is required to continue to work with a borrower to find an appropriate loss mitigation option up until the foreclosure sale date, which may result in loss mitigation during the foreclosure process.

Again, HUD will need to clarify whether its foreclosure timeframe requirements will prevail over the appeals process and any dual tracking requirement that could prohibit loss mitigation evaluation of borrowers in the pre-sale foreclosure process, or whether HUD will grant extensions of its foreclosure timelines so that servicers can adhere to the lengthy appeals and dual tracking restrictions contained in the National Servicing Standards.

In conclusion, while many of the National Servicing Standards can be implemented within the FHA program without conflicting with existing FHA requirements, conflicts do exist between the guidelines that cannot be resolved. Even where compliance with both FHA requirements and the National Servicing Standards is technically possible, the National Servicing Standards, tailored for conventional servicing programs, do not easily fit in with a government guaranty program. Servicers should seek guidance from HUD, as a key player in the negotiations, when implementing the National Servicing Standards into their FHA portfolios to ensure adherence to the FHA requirements.

Conflicted Out: When Must a Servicer Follow FHA Guidelines over the Global Foreclosure Settlement Servicing Standards?

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