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Best Practices for Mortgage Servicing and Foreclosure Compliance

by Anna DeSimone

Every day there is a news article or media story regarding foreclosures and attorney generals from states across the country have issued moratoriums. Lawmakers and consumer groups have found that thousands of homes have been foreclosed upon illegally and often due to inaccurate or fraudulent documentation. Lenders are suddenly faced with transparency and accountability and are forced to take immediate steps to remedy any weaknesses in their servicing practices. Outlined below are recent announcements from Fannie Mae and Freddie Mac regarding foreclosure procedures and servicing best practices:

Freddie Mac - Letter 10/01/2010: Foreclosure Proceedings

Freddie Mac is deeply concerned by recent news articles which report that affidavits used in foreclosure proceedings may have

been executed inappropriately and without proper notarization. The practices described in these reports violate both applicable law and Freddie Mac's contractual Servicing requirements as set forth in the Freddie Mac Single-Family Seller/Servicer Guide ("Guide").

Through this Industry Letter, Freddie Mac seeks to reinforce our commitment to safeguarding the legal rights of Borrowers. We are also reaffirming our focus on protecting the integrity of the foreclosure process. Accordingly, Freddie Mac is requiring Servicers to review their Servicing operations to verify the adequacy of their processes regarding the execution of affidavits and to notify Freddie Mac of any identified deficiencies.

Process review

Each Servicer must conduct a review of its Servicing operations with respect to Freddie Mac foreclosures which are either: a) currently pending or b) within the applicable judgment review period in each State. Specifically, the Servicer must determine

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whether:

The Servicer's policies, procedures and processes were and continue to be adequate to ensure that the affidavits executed in connection with these proceedings are in compliance with applicable law, including that the individuals signing the affidavits ("Affiant") had personal knowledge of the facts and that signatures were properly notarized; and

The Servicer's employees and/or third parties responsible for executing affidavits supplied by the Servicer in these proceedings followed the above-described policies, procedures and processes, including those which required the Affiant to have personal knowledge of the facts and those which required proper notarization. If the Servicer cannot reasonably communicate with any such employee or third party directly, the Servicer should verify this information with the employee's or third party's former supervisor, to the extent possible.

Notification

The Servicer must complete its review by October 18, 2010.

In the event that the Servicer's review creates any question as to whether:

- 1) its policies, procedures or processes regarding the execution of affidavits were adequate to ensure compliance with both applicable law and Freddie Mac's

Servicing requirements, or

- 2) its employees and/or third parties followed the proper policies, procedures and processes, the Servicer must immediately notify Freddie Mac at SRPMconfirmations@FreddieMac.com or (800) FREDDIE (and select "Servicing").

The Servicer must also remedy any deficiencies identified in order to ensure compliance with applicable law and Freddie Mac's Servicing requirements. Freddie Mac reserves all rights and remedies available to it under the Guide and other Purchase Documents.

Fannie Mae - Lender Letter 2010-11: Servicer Review of Procedures Relating to the Execution of Affidavits, Verifications, and Other Legal Documents

Issues have recently arisen with respect to potential defects with affidavits submitted by servicers in support of motions for summary judgment in states with judicial foreclosure processes. The issues pertain to whether the individuals executing the affidavits on behalf of the servicer had the required personal knowledge of the information contained in the affidavits and whether the affidavits were notarized in accordance with applicable requirements.

Fannie Mae is directing all of its servicers to immediately undertake a review of their policies and procedures relating to the

execution of affidavits, verifications, and other legal documents in connection with the default process. If the servicer has any concerns with its policies and procedures or their implementation, the servicer must advise its legal counsel to contact Fannie Mae in writing immediately via e-mail to nonroutine_litigation@fanniemae.com.

Fannie Mae is also taking this opportunity to emphasize the application of existing Mortgage Selling and Servicing Contract (the Contract) and Servicing Guide provisions with regard to the following:

- Servicer's basic duties and responsibilities
- Compliance with applicable laws and mortgage documents
- Servicer's audit and control systems
- Consequences of non-performance of servicer's duties and responsibilities and non-compliance with applicable laws and mortgage documents

Fannie Mae Seller/Service Guide: Part I, 202:

Servicer's Basic Duties and Responsibilities

Lenders service Fannie Mae loans as independent contractors and not as agents, assignees, or representatives of Fannie Mae; thus, most of the policies and standards described in this Guide are intended to set forth the broad parameters under which lenders should exercise their

sound professional judgment as mortgage servicers in the performance of their duties. As a result, in most instances we have not set forth absolute requirements because we believe that servicers need to maintain the discretion to apply appropriate judgment in dealing with borrowers and loans on a case-by-case basis, consistent with our servicing policies. Further, even where we have set forth a "requirement," we have not enumerated specifically how a servicer should implement it. We generally will not object to the practices a servicer regularly applies so long as they are carried out in accordance with established written procedures that are consistent with our servicing policies.

As a general matter, servicers should have sufficient properly trained staff, and adequate controls and quality assurance procedures in place, to carry out all aspects of their servicing duties; to protect against fraud, misrepresentation, or negligence by any parties involved in the mortgage servicing processes; to protect our investment in the security properties; and to provide borrowers with assistance when it is requested. Servicers should have effective processes to promptly address borrower inquiries (relating to both current and delinquent loans) and provide timely payoff quotes and refunds of escrow deposits after payoff. To the extent consistent with the borrower's mortgage documents and applicable laws and regulations, we encourage servicers to adopt servicing practices that allow for an

appropriate level of discretion to take into account the facts of a particular loan and the circumstances of the borrower.

In performing the services and duties incident to the servicing of mortgages, the servicer must take whatever action that is necessary to protect our interest in the security property as long as it is authorized to do so by the terms of the mortgage. Among other things, this generally includes (but is not limited to)

--paying property taxes to avoid possible tax liens;

--maintaining adequate hazard insurance to cover damage from unforeseen casualty losses;

--establishing and maintaining accounts for the deposit of borrowers' funds;

--responding to borrowers' inquiries (relating to both current and delinquent loans) about the terms of their mortgages or the actions the servicer has (or has not) taken in its servicing of the mortgages;

--making periodic property inspections to ensure that the physical condition of the property is satisfactory, that there are no apparent hazardous conditions (such as the presence of hazardous wastes or toxic substances) affecting the property, and that there are no apparent violations of applicable law that might result in a seizure or forfeiture of the property, and to

determine and initiate the needed responsive actions;

--maintaining accurate mortgage servicing and accounting records;

--collecting and promptly remitting any and all amounts due us;

--taking prompt and appropriate action to resolve a delinquency, including any action necessary to liquidate a defaulted mortgage;

--performing certain administrative functions related to an acquired property when we so request;

--advancing reasonable amounts, if necessary, to cover expenses arising in connection with any of the duties described above; and

--providing timely payoff quotes and refunds of escrow deposits after payoff.

To facilitate performance of the servicer's contractual responsibilities to Fannie Mae and the borrower, the servicer ordinarily appears in the land records as the mortgagee. For example, this ensures that the servicer receives legal notices that may impact our lien, such as notices of foreclosure of tax and other liens. However, Fannie Mae may take any and all action with respect to the mortgage it deems necessary to protect its ownership of the mortgage loan, including

recordation of a mortgage assignment, or its legal equivalent, from the servicer to Fannie Mae or our designee. In the event that Fannie Mae determines it necessary to record such an instrument, the servicer must assist Fannie Mae by preparing and recording any required documentation (such as mortgage assignments, powers of attorney, or affidavits) and providing recordation information for the affected mortgages.