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What does the State Attorneys General Settlement and the OCC Consent Orders mean for Law Firms, Mortgage Bankers and Mortgage Servicers?

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ORDERS BASED ON LOAN-LEVEL REVIEWS.....	3
III.	MAJOR FINDINGS IDENTIFIED IN THE INTERAGENCY REVIEW.....	4
	A. SERVICERS.....	4
	B. LAW FIRMS.....	5
	C. OUTSOURCERS.....	6
	D. MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.	6
	E. EXAMINATION POSITIVES.....	7
IV.	ENFORCEMENT MANDATES.....	7
V.	SUMMER 2012 – PROGRESS.....	8
	A. IN-HOUSE SERVICING.....	8
	B. THIRD-PARTY MANAGEMENT.....	9
	C. MERS.....	9
	D. MANAGEMENT INFORMATION SYSTEMS.....	10
	E. RISK ASSESSMENT AND MANAGEMENT.....	10
	F. COMPLIANCE COMMITTEE OVERSIGHT.....	11
VI.	CONCLUSION.....	11

I. INTRODUCTION

In the spring of 2007, Secretary of the Treasury Henry Paulson opined, “*An open, competitive, and liberalized financial market can effectively allocate scarce resources in a manner that promotes stability and prosperity far better than governmental intervention.*”

Mr. Paulson may be right – in the long run – but right now, twelve of the largest mortgage servicers servicing 67% of all residential mortgages must comply with strict government controls and standards imposed by the Consent Orders issued by the Office of the Comptroller of the Currency (“OCC”) and the Office of Thrift Supervision (“OTS”) for “*unsafe and unsound practices in residential mortgage servicing.*”

During the same time frame that the Consent Orders were entered, federal regulators¹ and the Attorneys General of 49 states announced a National Mortgage Settlement – the subject of Chris Peirson’s companion presentation – that ended government probes into mortgage servicing-related violations by five of the largest residential mortgage servicers: Ally Bank/GMAC, Bank of America, CitiBank, JPMorgan Chase, and Wells Fargo. The National Mortgage Settlement and the Consent Orders are separate but complementary enforcement actions and both will undergird the rules, regulations, standards, and business practices of residential mortgage servicing under government control for years to come.

Further government regulation may be looming on the horizon. U.S. Senator Jeff Merkley (Dem. Oregon), a member of the Banking, Housing and Urban Affairs Committee, has introduced the *Regulation of Mortgage Servicing Act* (S.967) to impose regulatory standards on mortgage servicers.

On October 13, 2011, the Consumer Financial Protection Bureau (“CFPB”) released the first edition of its *Supervision and Examination Manual* consisting of three parts: Part I describes the CFPB’s compliance and examination process; Part II outlines the CFPB’s examination procedures; and Part III provides templates for risk assessment reporting, examination results, and supervision plans. The Manual also includes a new set of examination practices and procedures for all bank and non-bank entities that are regulated by the CFPB and conduct mortgage servicing activities. The CFPB indicates that its first round of servicing examinations will focus on the servicing of non-performing loans and concentrate specifically on fees charged to borrowers in default, foreclosure referral practices and procedures, and loan modification processes.²

Though this paper focuses on the Consent Orders, it will be the CFPB, flexing its supervisory and enforcement powers, and not the Consent Orders that will dictate how residential mortgages are serviced in the years to come. The Consent Orders and the National Mortgage Settlement are simply harbingers of the mortgage servicing standards that will be imposed by the CFPB.

¹ Department of Justice, HUD, Department of the Treasury, Department of Agriculture, Department of Veterans Affairs, Federal Trade Commission, U.S. Trustee and Consumer Financial Protection Bureau

² The Consumer Financial Protection Bureau has a user-friendly website at www.consumerfinance.gov/regulations that generally provides in plain English all the information one needs to know about the CFPB’s regulatory authority priorities.

This presentation focuses on the OCC and OTS Consent Orders issued to twelve mortgage servicers and two outsource providers of financial services: Lender Processing Services, Inc. (“LPS”) and Mortgage Electronic Registration Systems, Inc. The Consent Orders were based on data collected in on-site individual loan file reviews at Ally Bank/GMAC, Aurora Bank, Bank of America, CitiBank, Ever Bank, HSBC, JPMorgan Chase, MetLife, OneWest, PNC, Sovereign Bank, SunTrust, U.S. Bank, and Wells Fargo. Trained examiners from the Federal Reserve System, the OCC, the Federal Deposit Insurance Corporation (“FDIC”), and the OTS conducted the on-site, loan-level reviews.

Based on the examiners’ findings published in an *Interagency Review of Foreclosure Policies and Procedures* dated April 2011, the OCC issued Consent Orders against eight national bank servicers: Bank of America, CitiBank, HSBC, JPMorgan Chase, MetLife, PNC, U.S. Bank, Wells Fargo; and non-banks LPS and Mortgage Electronic Registration Systems, Inc.³ The OTS took action against four federal savings association servicers and their holding companies: Aurora Bank, FSB; Ever Bank and its thrift holding company, Ever Bank Financial Corp.; OneWest Bank, FSB and its holding company IMB HoldCo LLC; and Sovereign Bank. The OTS⁴ and OCC based their enforcement actions on: (a) the authority granted in the Federal Deposit Insurance Act, 12 U.S.C. §1818(b); and (b) their findings that the mortgage servicing practices of the servicers named above and their outsourcers LPS and Mortgage Electronic Registration Systems, Inc. were “*unsafe and unsound practices and violations of law that had an adverse impact on the functioning of mortgage markets and compromised the public trust and confidence in mortgage servicing, the housing market, and borrowers.*”

The Consent Orders focused on the mortgage servicing operations of the big banks because servicers control the day-to-day management of mortgage loans from origination to final disposition and servicers are the sole intermediaries between borrowers and their lenders.⁵ When the borrower is paying as agreed, the servicer’s duties are ministerial: collecting mortgage payments; distributing the principal and interest from borrower’s mortgage payments to investors; administering escrow to pay taxes and insurance; and reporting to investors. When a loan goes into default, however, the demands on the servicer expand dramatically. No longer can servicing be an automated process managed by sophisticated computer algorithms, but rather human resources and trained risk management personnel must be marshaled to handle defaults. Otherwise, disaster can strike.

Since the mortgage servicing industry could not seem to handle the foreclosure crisis created by the housing bubble that burst in 2007, the Feds stepped in with Consent Orders to establish a baseline for mortgage servicing standards and expectations.

³ MERS and LPS are neither a bank nor thrift but their business practices were deemed to be inextricably intertwined in residential mortgage servicing industry.

⁴ On July 21, 2011, the regulatory responsibilities of the OTS were transferred to the OCC under the Dodd-Frank Wall Street Reforms of Consumer Protection Act and the OTS Consent Orders are now enforceable by the OCC.

⁵ One of the best reviews of the mortgage servicing industry is Adam J. Levitin and Tara Twomey’s *Mortgage Servicing*, 28 Yale Journal on Regulations 1 (Winter 2011).

Also available as part of the eCourse

[Changes and Challenges under CMBS 3.0; The New World of Mortgage Regulation; plus What Attorney General and OCC Settlements Mean for Law Firms, Lenders, Mortgage Bankers and Servicers](#)

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