What You Need to Know About the New York Mortgage Servicing Agreement

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Introduction

When the home mortgage bubble burst in mid-2007, the initial focus was on mortgage loan originators and underwriting standards. But attention shifted to mortgage loan servicers as a result of skyrocketing foreclosures and the robo-signing crisis, as well as complaints that servicers were not modifying enough mortgages under the Treasury Department's Home Affordable Mortgage Program (HAMP). And that focus is not limited to third-party servicers. It includes banks that make and retain loans in portfolio, as well as the owners of mortgage servicing rights.[2] Because of the increased focus, there have been a number of major regulatory actions involving servicers.

One recent development occurred when the New York State Banking Department and its successor agency, the Department of Financial Services (the "Department"), announced agreements (the "Agreements") with some medium and small servicers, in which the servicers agreed to a list of mortgage servicing practices (the "NY Servicing Standards" or the "Standards").[3]

The Department had already adopted Conduct of Business Rules ("CBRs") for mortgage loan servicers, effective October 1, 2010.[4] The CBRs cover both performing and non-performing loans. Moreover, they are drafted in such a way as to apply to federally chartered banking institutions.[5] They require adequate staffing, written procedures for handling consumer inquiries and complaints and sending periodic reports to consumers, and contain rules on the crediting of payments. They also require servicers to pursue appropriate loss mitigation to avoid preventable foreclosures, and require servicers to avoid dual tracking (commencing a foreclosure proceeding when the borrower is being considered for, or is in, a trial modification). So why were the Standards needed?

Prior Enforcement Actions Involving Servicers

Certainly, the regulatory climate changed in the year between October 2010 and September 2011. In October 2010, 50 state attorneys general and 35 state banking and mortgage regulators announced that they were working together to address procedural defects in the foreclosure process, known popularly as "robo-signing.".[6] From time to time thereafter, elements of a proposed settlement with the five largest servicers leaked to the press. Various states announced that they objected to the proposal and were leaving the group. But, by September 2011, no settlement had been finalized. Indeed, on December 1, 2011, Massachusetts Attorney General Martha Coakley sued the five largest servicers for improper foreclosure practices, in part because she believed the 50-state negotiations were taking too long.[7]

In May 2011, the Federal bank regulators took enforcement action against a number of bank holding companies, banks and third party service providers, requiring them to address a pattern of deficient practices in servicing and foreclosing residential mortgages.[8] Thereafter, nine federal regulators formed an inter-agency group to discuss uniform national standards for mortgage servicing, loss mitigation and foreclosure processing that would apply to all bank and non-bank servicers. They have not yet announced any such standards.

What Prompted the NY Servicer Agreements

Despite this regulatory activity, the public perception was that not much was happening to improve the lot of delinquent mortgage borrowers. What gave New York an occasion to take further action was the fact that two investment banks -- Goldman Sachs and Morgan Stanley-- which had acquired mortgage servicers during the mortgage boom years, decided to sell their servicing subsidiaries. Because the acquisition by the purchaser required the Department's prior approval, New York had a good opportunity to announce new expectations, without going through the procedures that would be required to promulgate new servicing standards as rules.[9]

The NY Servicing Standards contain 61 numbered paragraphs that cover four important areas of servicer conduct: (1) on-boarding of delinquent borrowers (those delinquent at least 60 days) when a new servicer assumes responsibility from a former servicer, (2) loss mitigation for borrowers who are delinquent, whose default is imminent or who are in the process of foreclosure, (3) the foreclosure process, and (4) servicing of all mortgages, including application of payments, imposing servicing fees, handling complaints, and force-placing insurance.

Although the Department's jurisdiction over mortgages is limited to those on real property in New York, there is nothing in the Agreement that limits its scope to New York mortgages. The Department's press releases announcing the Agreements focus on the nationwide mortgages serviced by the signatories, and an introductory clause in the Agreement states that the signatories want to be leaders "in the mortgage servicing industry" by adhering to the Standards, which they believe are in the best interest of homeowners and investors.

While the NY Servicing Standards are contractual and apply only to the firms that have agreed to them, they are an indication of what NY will expect of servicers in the future. Moreover, the Department has stated that it is working to make these reforms the industry standard going forward.[10] This article discusses the key aspects of the Standards.

Key Elements of the NY Servicer Agreements

Servicing Transfers

Servicers need formal on-boarding procedures for handling incoming servicing transfers.

The regulators have heard enough from frustrated consumers who have gone down the loss mitigation road with their original servicer only to have to start over with a new servicer. The Standards detail how the new servicer should treat borrowers who had requested the former servicer for loss mitigation. This includes designating a single point of contact ("SPC") within 30 days of the acquisition (see item 2 below), providing a toll-free number for new account inquiries from the effective date of the transfer until the transferred accounts have been integrated into the new servicer's platform (but not less than 90 days) and requirements for treatment of borrowers with pending loan modification applications and existing trial modifications.

For example, the Standards require the new servicer to explain to a borrower with a pending modification request any change in the loss mitigation alternative for which the borrower will be considered and the reason for the difference (e.g. the new servicer does not offer the originally requested alternative), and to provide the Borrower with a list of all information the servicer needs to evaluate the application and the time frame in which it must be supplied. A borrower with an existing trial modification must be allowed to continue making payments under the trial for the remainder of the trial period (and, if the trial period terminates in less than 60 days, the new servicer must grant an extension unless the loan is a GSE loan and the extension is inconsistent with GSE program guidelines). The servicer must also provide a list of any documents required to complete the permanent modification. Finally, if the borrower has successfully completed a trial modification and is awaiting permanent modification, the borrower must be allowed to continue making trial modification payments until the acquiring servicer can provide permanent modification documents (unless the loan is a GSE loan and such payment is inconsistent with GSE guidelines). Moreover, the permanent modification payment may not change materially from the permanent modification offered or discussed with the borrower.

Loss Mitigation

The new model for customer communications is the "Single Point of Contact."

The Business Conduct Rules require servicers to have adequate staffing to ensure that borrowers are not required to submit multiple copies of required documents to be considered for loss mitigation. They also must make available to borrowers (and their authorized representatives) current contact information for communications with the servicer's designated loss mitigation staff, including toll free telephone number(s) for direct communication with a loss mitigation staff person, fax number(s) for receipt of documents, and e-mail addresses. But they do not require a single point of contact.[11]

The Fed and OCC enforcement actions in April 2011 both required servicers to ensure continuity in the handling of borrowers' loan files during the loss mitigation and foreclosure process by appointing an "easily accessible and reliable single point of contact" with access to current information and personnel to timely inform the borrower of the current status of loss mitigation, loan modification and foreclosure activities being conducted by the servicer.

Under the NY Servicing Standards, a servicer may use one of two models for a single point of contact – one in which the servicer appoints a SPC in its initial letter to the borrower, and one in which the servicer provides for an appointment with a SPC based upon the borrower's convenience, after the borrower makes a request for loss mitigation. The reason for the "appointment" model is to accommodate borrowers whose work schedule might be inconsistent with that of a designated SPC. Once such a borrower makes a convenient appointment with a SPC, that SPC becomes his or her permanent SPC.

All communications must meet the standards in the Fannie Mae Quality Right Party Contact ("QRPC") guidelines outlined in Fannie Mae Announcement SVC 2011-08R.[12] The QRPC guideline is a uniform standard for communicating with the borrower or his/her advisor, including regarding call center benchmarks, outbound call attempts and letters and notices.

Servicers must respond to borrower requests for loss mitigation within exacting time frames.

Common complaints about both HAMP and proprietary loss mitigation programs have been the lengthy times for approval, and uncertainty about when the servicer has received all the information necessary to make its loss mitigation determination (which begins the period for making a determination).

The BCRs require servicers to make reasonable and good faith efforts "consistent with usual and customary industry standards" to engage in appropriate loss mitigation options to avoid foreclosure. The definition of loss mitigation options includes any alternative to foreclosure, such as a loan modification, reinstatement, forbearance, deed-in-lieu or short sale. (The Federal orders also refer to short refinances and cash-for-keys.) In addition, the BCRs require that servicers (i) acknowledge receipt of a request for loss mitigation and identify any additional information needed from the borrower in order to review the request, within 10 business days of receipt, and (ii) complete their evaluation of the request and respond to the borrower within 30 days of receiving all required documentation from the borrower and third parties (unless a shorter time is required under HAMP).

The NY Servicing Standards require an even shorter time period. They give the servicer only five (as opposed to the BCRs' ten) business days after receipt of a loss mitigation inquiry to inform the borrower (or representative) of what additional

documents are required. Like the BCRs, the Standards require the servicer to make a modification determination no later than 30 days after receipt of the complete application, absent compelling circumstances beyond servicer's control. They also require servicers to facilitate compliance with loss mitigation alternatives or non-foreclosure options in the time frames outlined in state and federal laws and the requirements of the Federal Making Home Affordable program,[13] the GSEs or other state, federal or local borrower assistance programs. In addition, there are separate time frames for escalations: The servicer must send a written acknowledgement containing prescribed information within 3 business days of receiving the case, and must use best efforts to resolve the case within 15 days of receipt. The resolution date may be extended another 15 days, but total time to resolve the escalated case may not exceed 30 days. The servicer has another 5 business days to notify the borrower of the resolution.

Although the loss mitigation requirements of the Agreement are similar to those of the BCRs, the Standards, combined with the new requirements with respect to loss mitigations when a new servicer assumes responsibility and the new requirements for multiple escalations of denials, show the importance that the Department places on timely processing of requests for loss mitigation.

There must be at least two independent reviews of loan mod denials.

At the borrower's request, the SPC must escalate the borrower's loan file to someone responsible for escalated cases. In addition, the servicer must perform an independent review of each denial of a request for a loan modification, and, if the denial is upheld, it must communicate the reason for the denial to the borrower. If the borrower disagrees, the servicer must refer the case for a second independent escalation, and may not proceed with a foreclosure until the independent review process is complete. Although the BCRs provided for escalation, they did not require two different review procedures.[14]

Servicers must eliminate dual tracking.

The NY Servicing Standards require the servicer to ensure that a borrower who is pursuing loan modification or another loss mitigation alternative is not referred to foreclosure, if that is consistent with the guidelines of the Federal Housing Finance Association for GSE loans. This was also a requirement of the cease and desist orders of the Federal Regulators.[15] But the CBRs had only admonished servicers to "avoid" dual tracking.

Foreclosures

Affidavits in foreclosure proceedings must be executed by individuals who have conducted a personal review of the loan file; the foreclosing entity must represent that it has an enforceable interest in the note and mortgage; the note and mortgage must be in the possession of the foreclosing entity or its custodian; and the servicer must withdraw any pending foreclosure action that does not comply with these requirements.

The Standards contain detailed requirements regarding the foreclosure process. First, servicers must ensure that the affidavits and sworn statements submitted in foreclosure proceedings are executed by individuals with actual personal knowledge of the matters contained therein, based on the individuals' personal review of the borrower's loan file.[16] Second, the servicer must have a process to ensure that, in any foreclosure on a mortgage it services, (i) the foreclosing entity has a documented enforceable interest in the promissory note and mortgage under applicable law, or otherwise possesses the legal right to foreclose,[17] (ii) the summons and complaint contains an affirmative allegation that, at the time the proceeding is commenced, the foreclosing entity is the owner and holder of the subject mortgage and note,[18] has a security interest entitling it to foreclose on the subject mortgage, or has been delegated the authority to institute the foreclosure action, and (iii) the originals of the mortgage and note are in the possession and control of the foreclosing entity or its custodian (or, if they have been lost, the servicer complies with applicable law to establish the right to enforce them).

If any borrower is found to have been wrongfully foreclosed, the servicer must ensure that the borrower's equity in the property is returned, if the property has not been sold to a third party, or must adequately compensate the borrower for the wrongful foreclosure, if the property has been sold to a third party. While this remedy is contained in the section on possession of the note, it is clear that the Department believes it also applies to other requirements of the foreclosure process. The Department's press release on the agreements states that the agreement requires servicers to withdraw any pending foreclosure actions in which filed affidavits were robo-signed or otherwise not accurate.

The robo-signing and wrongful foreclosure problems have been addressed before, by both the New York courts and the Department. Since August 2010, the Rules of the Chief Administrator of the New York Courts have required attorneys in foreclosure proceedings to file an affidavit stating that they have communicated with a representative of the plaintiff, and were told that such person personally reviewed plaintiff's records for factual accuracy and confirmed the accuracy of the allegations in

the complaint and any supporting affidavits or affirmations filed with the court, as well as the accuracy of the notarizations contained in the supporting documents.[19] On October 8, 2010, the Banking Department wrote a letter to over 20 major servicers, requesting them to conduct an internal review of their foreclosure practices in New York and provide information to the Department, including (i) their procedures for verifying affidavits in support of foreclosure actions, (ii) a list of employees or agents who executed foreclosure documents without direct personal knowledge of the facts, or with other irregularities, and (iii) the measures the firm was taking to ensure that its foreclosure practices are in compliance with New York law. The Department requested that, pending a determination that the firm's foreclosure practices were in compliance with New York law, the firms suspend foreclosure actions in New York.[20] The new Standard, however, ensures that the Department may take enforcement actions against firms that agree to the Standards and violate them.

It's important for servicers to oversee third-party vendors, such as law firms and other agents, including their own subsidiaries.

In the enforcement actions by the federal bank regulators, the regulators noted that the servicers had failed to sufficiently oversee outside counsel and other third-party providers handling foreclosure services. From any risk management standpoint – including economic risk and reputational risk – a servicer that outsources its servicing and foreclosure responsibilities should supervise its designated agents. Moreover, the fact that the Department required both Goldman Sachs and Morgan Stanley to enter into the Agreement for Mortgage Servicing Practices clearly indicates that the Department believes that the control person of a mortgage servicer should ensure that its subsidiary is supervising its third-party servicers.

All Loans

There are new limits on force-placed insurance and fees.

Force-placed insurance was addressed in Part 419.14 of the Business Conduct Rules, which prohibited a servicer from (i) force-placing hazard, homeowner's or flood insurance on the mortgaged property when it knows or has reason to know that the borrower has an effective policy; (ii) failing to provide written notice to a borrower upon taking action to place insurance on the mortgaged property, including a clear, conspicuous statement of how the borrower may prove the required coverage is in place, (iii) placing insurance, or requiring the borrower to obtain insurance, in excess of the replacement cost of the improvements on the mortgaged property; and (iv) failing to refund unearned premiums paid by or charged to the borrower after the borrower provides reasonable proof of coverage, so the force-placed insurance is no longer necessary.

The Standards go even further, although they apply only to hazard insurance. They allow a servicer to force-place insurance only if the servicer has provided, over two months, notice that it lacks proof of insurance and that, if such proof is not provided, the servicer may obtain insurance that will be significantly more costly, and provide less protection, to the borrower. The amount of forced-placed insurance may not exceed the lower of (i) the borrower's latest coverage, if it complied with the mortgage requirements, (ii) the outstanding balance of the loan, or (iii) the replacement cost of the improvements on the mortgaged property. The Standards prohibit the servicer from purchasing a master hazard insurance policy from an affiliated entity, and require the servicer to ensure that the premiums are reasonable in relation to the claims that may be incurred.

Recent press reports indicate that the Department is investigating force-placed insurance -- including by affiliates of national banks -- to determine whether conflicts of interest or kick-backs are involved.[21]

Borrower payments must be applied to principal and interest (and tax and insurance) before fees.

Restrictions on fees are designed to prevent the layering of late fees and other fees and the use of suspense accounts in ways that compound borrower delinquencies and defaults. Under the BCRs, a fee may be charged only if: (a) it is expressly authorized and clearly and conspicuously disclosed by the loan instruments and not prohibited by law; (b) it is expressly permitted by law and not prohibited by the loan instruments; or (c) it is not prohibited by law or the loan instruments and is a reasonable fee for a specific service requested by the borrower, and assessed only after clear and conspicuous disclosure is given to the borrower and the borrower expressly consents to pay it. The BCRs also require that all amounts received by a servicer on a mortgage loan at the address where the borrower has been instructed in writing to make payments be accepted and credited, or treated as credited, on the business day received, if the borrower has provided sufficient information to credit the account. Moreover, for all mortgage loans originated after January 1, 2011, the BCRs require that payments be credited to the interest and principal due on the loan before crediting the payments to taxes, insurance, or fees, except where inconsistent with Federal law.[22]

The Standards add a number of requirements. First, any attorney's fees charged in connection with a foreclosure action must be consistent with the Fannie Mae Allowable Attorney and Trust Fee Schedule. Second, the servicer may not impose a late fee when the only delinquency is of late fees on an earlier payment, and the payment is otherwise a full payment for the applicable period and is paid when due (or within any applicable grace period). For this purpose, payment should be applied first to the current installment and then to the delinquent installment and then to delinquency and other charges. Third, late charges may not be greater than the past due amount, may not be collected from the escrow account or from escrow surplus without the approval of

the borrower; may not be deducted from a regular payment, may not be assessed after the borrower has submitted a complete loan modification application, and may not be assessed if the borrower is making timely trial modification payments or has asked for approval of a short sale. Fourth, property valuation fees may not be imposed more than once in a 12 month period unless the property valuation is to facilitate the borrower's application for an alternative to foreclosure. Fifth, the servicer may not mark up fees charged by third-party default service providers or accept referral fees from such providers. Finally, the servicer must periodically evaluate the fees it charges a borrower to determine if their frequency was excessive under the terms of the borrower's loan documents or applicable federal and state laws and whether they exceeded guidelines established by the GSEs or applicable to federally insured transactions.

The Department will be monitoring complaints to determine whether servicers are meeting the new standards.

The NY Servicing Standards require that all complaints be recorded and assigned a tracking number. Moreover, all complaints must be resolved within 30 days of receipt if all information required to make a determination is provided to the servicer. [23] Information about the status of complaints must be maintained in the servicing file as well as in a separate complaint history file. Clearly, the Department will be watching complaints to determine if the servicer is complying with legal requirements and with the requirements of the NY Servicing Standards.

In contrast, the Business Conduct Rules do not require that complaints be maintained in two places. Part 419.13(b) requires servicers to maintain a telephone log and a file of all written correspondence, including fax transmissions and e-mail correspondence, relating to servicing each mortgage loan, including communications with the borrower or an authorized representative.

Although the paragraphs of the Standards involving complaints are surrounded by provisions involving loss mitigation, they are not specific to loss mitigation, and there is no reason to believe they are limited to complaints about the loss mitigation process.

The key is adequate staffing and training.

The Federal regulators found that the major bank-affiliated servicers did not devote sufficient financial, staffing and managerial resources to ensure proper administration of their foreclosure processes. They required servicers to develop processes to ensure that staffing levels for mortgage servicing and foreclosure, including collections, loss mitigation and loan modification, are adequate to meet current and expected workload demands. The Business Conduct Rules, as part of the servicer's duty of fair dealing, required servicers to provide trained personnel and telephone facilities sufficient to respond promptly to borrower inquiries about their mortgage loans.

The NY Servicing Standards require that servicers maintain staff in sufficient numbers who are adequately trained. Factors to be considered in determining the adequacy of staffing include (a) the size of the servicer's loan portfolio; (b) its percentage of delinquent loans; (c) the percentage of loan modification or other loss mitigation requests; (d) the number of pending foreclosure actions; (e) the knowledge and experience level of existing staff; (f) the loan to employee ratio; and (g) the results of examinations of its compliance and internal audit departments, including reviews of its document management system.

Conclusion

Many of the Standards are not new. Their objectives were addressed in some form by the Business Conduct Rules or the Consent Orders of the Federal bank regulators. But the Standards are more detailed and have ratcheted up expectations. They are likely to raise the bar for servicer performance in the minds of borrowers and consumer advocates.

The Standards are not rules. In order to make them generally applicable, either every servicer would have to agree to them by contract, or the Department would have to follow the requirements of the State Administrative Procedures Act.[24] However, it is possible that the Department does not want to update the BCRs until the initiatives being discussed by other regulators have been announced. That includes the 50-state AG group, the efforts of the CFPB and the Federal Banking Regulators to develop a uniform servicing standard, the FHFA's proposals with respect to servicing fees, and various settlements of mortgage servicing litigation.

Nevertheless, given the recent litigation against lenders and servicers, servicers may wish to be proactive in adopting the Standards, so that they can tell both the courts and their customers that they follow "best practices."

Footnotes

[1] Marjorie E. Gross is a lawyer in New York. She was the General Counsel of the New York State Banking Department from June 2007 through September 2011. The opinions expressed in this article are those of the author and are unrelated to those of the New York Department of Financial Services.

[2] See N.Y. State Banking Department, Industry Letter, Obligation of Organizations Exempt from Licensing as Mortgage Loan Servicers to Comply with Mortgage Servicer Notice and Conduct of Business Rules (Oct 20, 2010)(an exempt organization is considered a mortgage loan servicer when it collects principal and interest payments on loans it holds in portfolio, as well as when it services loans for

third parties); 3 NYCRR Part 418.3(d)(the term "servicing mortgage loans" includes a person who makes or holds a mortgage loan if such person also directly or indirectly is the holder of the mortgage servicing rights).

[3] See New York State Department of Financial Services and Banking Department, Agreement on Mortgage Servicing Practices with Ocwen Financial Corporation, Litton Loan Servicing LP and Goldman Sachs Bank USA (Aug. 2011), http://www.dfs.ny.gov/about/press/clocwen.pdf; Press Release, Banking Department, Superintendent Lawsky Announces Agreement With Goldman Sachs, Ocwen, Litton On Groundbreaking New Mortgage Practices (Sept. 1, 2011), http://www.dfs.ny.gov/about/press/pr110901.htm; Press Release, Dep't of Financial Services, Superintendent Lawsky Announces Agreements With Morgan Stanley, Saxon, AHMSI & Vericrest On Groundbreaking New Mortgage Practices (Nov. 10, 2011), http://www.dfs.ny.gov/about/press/pr1111101.htm. The Agreements with Morgan Stanley, Saxon, AHMSI and Vericrest are not published on the Department's website. This article is based on the Ocwen Agreement.

[4] The Banking Department was given the authority to regulate mortgage loan servicers in 2008. It first adopted rules requiring the registration of servicers. 3 NYCRR Part 418. It adopted the Conduct of Business Rules in 2010. 3 NYCRR Part 419. See also Banking Department, All Industry Letter, Mortgage Loan Servicers Proposed Business Conduct Rules -- Part 419 of the Superintendent's Regulations (Dec. 15, 2009), http://www.dfs.ny.gov/legal/industry_circular/banking/ilmb091215a.htm; and Banking Department, Press Release, New Business Conduct Rules Hold Mortgage Loan Servicers Accountable for Dealings with Homeowners (Aug. 10, 2010), http://www.dfs.ny.gov/about/press/pr100810.htm

[5] The Conduct of Business Rules apply to all persons servicing mortgage loans in New York, whether or not they are required to be registered under the Banking Law. This applies even to banks servicing their own mortgage loans. See Banking Department, Industry Letter. Obligation of Organizations Exempt from Licensing as Mortgage Loan Servicers to Comply with Mortgage Servicer Notice and Conduct of Business Rules (Oct 20, 2010). It also would apply to federally-chartered institutions. Aspects of the BCRs that might be problematical under the National Bank Act's prohibition of "visitation" by state regulators apply only to servicers that are required to be registered or are exempt organizations regulated by the Superintendent, such as mortgage bankers. See, e.g., Part 419.12. Because of the visitation prohibition, the Department cannot examine national banks for compliance. However, it could bring (or ask the Attorney General to bring) actions against national banks as a result of consumer complaints, and violations of the rules may be considered by the courts in foreclosure proceedings.

[6] See Press Release, N.Y. State Banking Dep't, Banking Department Requires Mortgage Servicers to Suspend Foreclosure Actions Pending Thorough Review (Oct. 13, 2010). http://www.dfs.ny.gov/about/press/pr101013b.htm.

[7] See Press Release, Mass. Attorney General, Five National Banks Sued by AG Coakley in Connection with Illegal Foreclosures and Loan Servicing, (Dec. 1, 2011), http://www.mass.gov/ago/news-and-updates/press-releases/2011/five-national-banks-sued-by-ag-coakley.html.

[8] Press Release, Board of Governors, Federal Reserve issues enforcement actions related to deficient practices in residential mortgage loan servicing and foreclosure processing (April 13, 2011), http://www.federalreserve.gov/newsevents/press/enforcement/20110413a.htm (containing, as attachments, the 12 enforcement orders and the Interagency Review of Foreclosure Policies and Practices), and Press Release, Office of Comptroller of the Currency, OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices (April 13, 2011), http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html (containing, as attachments, the 8 OCC orders and the Interagency Review. For a representative order, see OCC Order against Bank of America at

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http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47b.pdf (hereinafter, the "OCC BofA Order"). The entities included Bank of America Corporation; Citigroup Inc.; Ally Financial Inc.; HSBC North America Holdings, Inc.; JPMorgan Chase & Co.; MetLife, Inc.; The PNC Financial Services Group, Inc.; SunTrust Banks, Inc.; U.S. Bancorp; and Wells Fargo & Company. Collectively, the servicers represented 65 percent of the servicing industry. See also Board of Governors of the Federal Reserve System, "*On mortgage servicing,"* Statement for the Record, Submitted to Subcommittees on Financial Institutions and Consumer Credit and Oversight and Investigations, Committee on Financial Services, U.S. House of Representatives, Washington, D.C. (July 7, 2011).

[9]NY Banking Law §594-b requires approval of a change of control of a registrant. An introductory clause to the Ocwen Agreement states that the Superintendent has conditioned the issuance of a "no objection" letter to the change of control upon Ocwen's commitment to adhere to the Standards. The Morgan Stanley Press Release also refers to Agreements with American Home Mortgage Servicing and Vericrest, but does not explain what prompted them. Each firm was the subject of a control change or license application. The Department's September 30, 2011 Weekly Bulletin notes that AHMSI Holdings, Inc. had filed an application the previous week to acquire an interest in American Home Mortgage Servicing, Inc. A number of individuals filed an application for a servicing license for Vericrest Financial, Inc. on March 21, 2011. The Fed also used the Litton sale to enter into a cease and desist order with Goldman Sachs. See Press Release, Federal Reserve Board, Federal Reserve Board announces a formal enforcement action against the Goldman Sachs Group, Inc. and Goldman Sachs Bank USA (Sept. 1, 2011), http://www.federalreserve.gov/newsevents/press/enforcement/enf20110901f1.pdf.

[10] N.Y.S. Dep't of Financial Services, Working Group Report on Ways to Improve Efficiency and Effectiveness of Regulation (Dec. 30, 2011), http://www.dfs.ny.gov/reportpub/dfsrpt_205a.pdf, at cover letter and page 5.

[11] Similarly, the Fannie Mae Borrower Delinquency Management Model requires the servicer to allow a borrower to contact one individual or a dedicated *team of individuals* in the servicer's organization to obtain information on foreclosure prevention alternatives. The team deal with the borrower throughout the delinquency and foreclosure process.

[12] Since the Government Sponsored Enterprises (GSE), such as Fannie Mae and Freddie Mac, are large owners of mortgages, their rules for servicers often set the parameters for servicing. See, e.g., Fannie Mae, *Single Family Servicing Guide*, Part III: General Servicing Functions, Part VII: Delinquency Management and Default Prevention, and Part VIII, Chapter 1: Foreclosures. In June 2011, as a result of the scandals involving "robo-signing" and wrongful foreclosures, Fannie Mae published Servicing Announcement SVC-2011-8, "Delinquency Management and Default Prevention," which contained prescriptive new servicing standards with respect to the method and frequency of contacts with delinquent borrowers. See https//www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2011/svc1108.pdf and https://www.efanniemae.com/le/slr/pdf/achievingqrpc.pdf. The agreement with Ocwen and Goldman Sachs, which was signed on August 31, 2011, referred to SVC 2011-08. On September 2, Fannie Mae revised the SVC letter to clarify certain requirements.

[13] These include the Home Affordable Modification Program, the Home Affordable Refinance Program , the Home Affordable Foreclosure Alternatives Program, and the Home Affordable Unemployment Program.

[14] See 3 NYCRR Part 419.11(d), which requires a servicer that determines that the borrower cannot be approved for a loan modification or other requested loss mitigation option to notify the borrower with specificity of the reasons for the determination, and provide contact information for a person at the mortgage servicer to reconsider such a denial and any other foreclosure prevention alternatives for which the borrower may be considered.

[15] See OCC BofA Order, supra note 8, Article 9.

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[16] In their enforcement actions, the Federal regulators found that servicers had litigated foreclosure proceedings without always ensuring that either the promissory note or the mortgage document were properly endorsed or assigned and, if necessary, in the possession of the appropriate party at the appropriate time. They also found that the servicers filed documents in court in which their employees made representations that they asserted were based on personal knowledge or on a review by the affiant of the relevant books and records, when, in many cases, they were not, or were not properly notarized. See Federal Reserve System, Office of the Comptroller of the Currency and Office of Thrift Supervision, Report, Interagency Review of Foreclosure Policies and Practices, "Affidavit and Notarization Practices," April 2011, http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf.

[17] Loan notes and mortgages are instruments under the Uniform Commercial Code in New York, and the transfer of such instrument is governed by the UCC. See generally Permanent Editorial Board for the Uniform Commercial Code, Draft Report, *UCC Rules Applicable to the Assignment of Mortgage Notes and to the Ownership and Enforcement of Those Notes and the Mortgages Securing Them*, (March 29, 2011), available at http://extranet.ali.org/directory/files/PEB_Report_on_Mortgage_Notes-Circulation_Draft.pdf.

[18] New York's Real Property Actions and Proceedings Law, § 1302, requires that a complaint served in a foreclosure proceeding relating to a high-cost home loan or a subprime home loan contain an affirmative allegation that, at the time the proceeding is commenced, the plaintiff is the owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action. Although there was a proposal during the 2011 legislative session to amend that section to apply it to all mortgages, it was not passed. See New York State Legislature, 2011 Session, S0697/A629-B.

[19] See form of affidavit, available at http://www.nycourts.gov/attorneys/foreclosures/Affirmation-Foreclosure.pdf.

[20] See N.Y. State Banking Dep't, Press Release, Banking Department Requires Mortgage Servicers to Suspend Foreclosure Actions Pending Thorough Review (October 13, 2010), and Industry Letter, Review of Foreclosure Practices, Including Verifying Affidavits (October 8, 2010), http://www.dfs.ny.gov/legal/industry_circular/banking/ilmb101008.htm.

[21] See Louise Story, *Big Banks Facing Inquiry Into overpriced Homeowners' Insurance*, N.Y. Times, Jan. 11, 2012 at B1.

[22] See 3 NYCRR Part 419.6.

[23] The Business Conduct Rules require servicers to follow the requirements relating to "qualified written requests" pursuant to RESPA, 24 C.F.R. section 3500.21, and to have procedures and systems in place to respond to and resolve borrower inquiries and complaints "in a prompt and appropriate manner." They also require a toll-free telephone number or collect calling services through which any borrower may direct telephone inquiries to live and trained complaint personnel during regular business hours. See 3 NYCRR Part 419.4.

[24] The Standards are not the only instance when the Department announced a servicing standard without rulemaking. The Superintendent acted by agreement again when the law firm of Steven Baum, which handled 40 percent of the foreclosure work in New York, announced on November 21, 2011 that it would go out of business. The Superintendent entered into agreements with "certain servicers" that they would not charge borrowers any penalties, fees, costs or interest accrued resulting directly from such delays in foreclosure proceedings necessitated by the substitution of foreclosure counsel. On December 19, he issued an "Industry Letter," to all servicers notifying them of the Department's position that servicers, consistent with their duty of good faith and fair dealing in servicing practices under Part 419.2, should not

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charge borrowers any penalties, fees, costs or interest accrued due to such delays. See Press Release, Dep't of Financial Services, Superintendent Lawsky Protects Homeowners In Foreclosure From Delays Caused By Abusive Law Firm’s Closing (Dec. 16, 2011)(which identified one firm -- Ocwen), and Industry Letter, Withholding Charges to Borrowers Due to Closing of the Baum Firm (December 19, 2011), http://www.dfs.ny.gov/legal/industry_circular/il2011_1219.htm, which refers to "certain servicers," but does not identify them.