

PUBLICATION

Mortgage Legislation Update

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Despite calls from Congress and public interest groups to impose a national foreclosure moratorium, the Obama Administration continues to resist the idea. Speaking on behalf of the administration, U.S. Department of Housing and Urban Development Secretary Shaun Donovan reiterated on October 17 the Administration's position that "a national, blanket moratorium on all foreclosure sales would do far more harm than good -- hurting homeowners and home-buyers alike at a time when foreclosed homes make up 25 percent of home sales."

Secretary Donovan later stated in an October 20 interview that HUD launched an investigation into the issue last May. He noted his belief that improprieties in the foreclosure process in connection with problematic affidavits are limited to only a select number of institutions and is not indicative of a broader problem with "the underlying legal foundation for the mortgage market." Donovan stated, "[T]here have been concerns about chain of title, around MERS, other things. We're not finding any evidence of underlying structural issues in the mortgage market that would make securitization suspect or otherwise. It really is about particular institutions who are not doing their jobs."

Nonetheless, the White House continues to strongly back federal and state investigation of mortgage servicers alleged to have used problematic affidavits in the home foreclosure process. "[T]he Obama Administration has a comprehensive review of the situation underway and will respond with the full force of the law where problems are found," Secretary Donovan stated. The Administration's inter-agency Financial Fraud Enforcement Task Force, established in November 2009, has made the issue a top priority. The Task Force is made up of 20 federal agencies, 94 U.S. Attorney's Offices and dozens of state and local partners. The Federal Housing Administration (FHA) and Federal Housing Finance Agency (FHFA) have launched reviews to make sure servicers are in full compliance with the law. According to a recent Fannie Mae lender letter, fines and other punitive measures could be imposed on affiliated mortgage servicers for any extra costs the government-sponsored enterprises must bear because of servicers' improper handling of foreclosure documents.

The Office of the Comptroller of the Currency (OCC) has directed seven of the nation's largest servicers to review their foreclosure processes. According to the Federal Deposit Insurance Corporation (FDIC), the improper handling and notarization of foreclosure affidavits is largely confined to large financial institutions and not those institutions subject to direct FDIC supervision. FDIC Chairwoman Sheila Bair pins blame on servicers for the situation. She told the Urban Land Institute on October 13 that "poorly aligned incentives" in mortgage securitization deals incentivized servicers to push for foreclosure because servicers "are often required to advance principal and interest payments to securitization trusts" for nonperforming loans. Once a foreclosure is complete, Bair said, securitization trusts are quick to reimburse servicers for costs. "These incentives can have the effect of encouraging foreclosures, while discouraging modifications."

On the state level, on October 13, 49 state attorneys general and state bank regulators [formed the Mortgage Foreclosure Multistate Group \(MFMG\)](#). The MFMG "has begun inquiring whether or not individual mortgage servicers have improperly submitted affidavits or other documents in support of foreclosures in our states... The facts uncovered in our review will dictate the scope of our inquiry." The Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203) specifically gives state attorneys general authority to

investigate national banks that allegedly violate state consumer protection laws. The MFMG investigation is being directed by an executive committee comprised of attorneys general from Arizona, California, Colorado, Connecticut, Florida, Illinois, Iowa, New York, North Carolina, Ohio, Texas and Washington and regulators from the Maryland Office of the Commissioner of Financial Regulation, New York State Banking Department and the Pennsylvania Department of Banking.

The Senate Committee on Banking, Housing and Urban Affairs (chaired by retiring Senator Christopher Dodd) has scheduled a November 16 hearing on the matter. Witnesses have not yet been announced. The hearing will take place during a post-election lame duck session of the current Congress that is being convened to address budget and tax issues before the new Congress gavel into session in January. The mid-term congressional elections take place on November 2.

Separately, HUD Secretary Donovan stated that the affidavit issue has inspired a broader FHA investigation into whether the mortgage servicing industry has been properly complying with FHA guidance on loss mitigation. "Much of the attention and focus has been on issues around the affidavit process and the final steps in the foreclosure process," Donovan said on October 20. "We are very focused on making sure not just that those issues are resolved, but also the servicing process throughout."