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A legal update from Dechert's Finance and Real Estate, Financial Institutions and White Collar and Securities Litigation Groups

Mortgage Foreclosures in the Spotlight

Issues regarding the process of handling mortgage foreclosures have captured widespread attention during the last several weeks. While this is largely a documentation issue that is likely to be rectified relatively promptly by most lenders and servicers, allegations that large numbers of foreclosures have been processed without an adequate review of the relevant facts and that documents used in the foreclosure process did not meet legal requirements have raised broad concerns among the government and industry, investor and consumer groups about the mortgage finance business. Thus, the continuing task is the reconstruction of the credibility of mortgage finance systems.

On the ground, there are significant aftershocks from the documentation disclosures, in the form of market and regulatory reaction:

- Borrowers' lawyers have brought a range of challenges in an effort to protect them from foreclosure, including allegations regarding allegedly improper foreclosure practices, claims relating to the use of the Mortgage Electronic Recording System (MERS) and challenges to the operation of the Home Affordable Modification Program (HAMP) in regard to loan modifications.
- The Attorneys General of all 50 states have announced a coordinated investigation of the mortgage servicing industry.
- The Office of the Comptroller of the Currency has reportedly initiated examinations of the foreclosure and loss-mitigation procedures at large national banks.
- The Federal Housing Finance Agency has instructed Fannie Mae and Freddie Mac to require their servicers to review foreclosure-related actions to ensure that any affidavits that have been filed were correct and complied with applicable law.
- Institutional investors, as well as the Federal Reserve Bank of New York, are seeking with

increasing insistence to have the mortgage-backed securities they hold repurchased, based on questions regarding the servicing or credit quality of the underlying mortgage loans.

- To the extent that issues related to foreclosure processing may impact the stock price or financial performance of bank holding companies, shareholders may explore the possibility of alleging securities violations or mounting derivative actions against directors or officers.

Firms that participate in all phases of the home mortgage process from origination to securitization, servicing and foreclosure are likely to be drawn into some aspect of the current controversy and investigations. Our experience suggests that, to prepare for such potential challenges to past and current business practices and to reestablish credibility in the marketplace and with regulators, these parties should consider the following:

- An independent review of potential trouble areas to provide objective support for the essential integrity of the processes used in the past or to guide future efforts to identify potential remedial steps for operational and legal processes;

- Participation by the audit committee or a special committee of the board of directors in order to provide appropriate board oversight and reassurance;
- Developing a strategy to address the concerns of regulators, particularly where companies may be subject to the jurisdiction of more than one state or federal financial regulatory agency, including how to deal with potential concurrent civil and criminal investigations, cease and desist orders, civil money penalties and various forms of restitution;
- The dynamics of responding to multiple Attorneys General investigations and multi-faceted litigation and settlement processes, including shareholder and derivative suits;
- The impact on and potential liability of or to business partners, service providers, counterparties, investors and others in the mortgage finance chain.

While the documentation deficiencies that have been alleged appear to be fixable, the aftermath of addressing regulatory, investor and consumer concerns in order that the country can once again enjoy an efficient, effective and reliable mortgage finance system will require more attention and thought. Success in that regard is likely to be the product of significant remedial and proactive actions that rebuild confidence in institutions and processes.



Dechert has assembled a cross-disciplinary team of attorneys with experience in regulatory enforcement defense, class actions, financial institution regulatory matters and residential mortgage finance and servicing to assist clients in responding to these issues. For questions about these mortgage foreclosure and related developments, please contact any of the attorneys listed below or the Dechert attorney with whom you regularly work.

Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit our [Finance and Real Estate](#), [Financial Institutions](#) and [White Collar and Securities Litigation](#) pages.

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