

Abusive Lending and Mortgage Packaging Services Targeted in State of the Union

Background

In his January 24, 2012, State of the Union address, President Barack Obama announced the creation of a new law enforcement task force targeting financial crimes. Specifically, President Obama tasked Attorney General Eric Holder Jr. with creating a special group of federal and state prosecutors to expand investigations into the “abusive lending and packaging of risky mortgages that led to the housing crisis.”¹

Impact of Initiative

The scope of the new initiative, and the resulting impact on the home loan servicing industry, is still somewhat unclear at this point. What is clear is that federal and state enforcement agencies are taking swift action in this area. The Justice Department recently announced a new initiative for the task force targeting fraud specific to residential mortgage-backed securities (RMBS).² Attorney General Holder announced that investigators have already issued civil subpoenas to 11 financial institutions relating to this initiative with the prospect that “more will follow.”

It is difficult to predict where this new initiative, which is a part of the larger Financial Fraud Enforcement Task Force, goes from its RMBS focus. What is apparent, however, is that the DOJ will be devoting significant time and resources into investigating and prosecuting all types of mortgage fraud. In response to the President’s directive, on Friday, January 27, 2012, Attorney General Holder stated “that we will continue to devote significant resources to combating financial fraud and be as aggressive and creative as we can in holding accountable those who, in violating the law, contributed to the financial crisis.”³

¹ See “2012 State of the Union Address,” available at <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address>.

² Attorney General Eric Holder announced the creation and devotion of extensive resources to the new “Residential Mortgage-Backed Securities Working Group” during a news conference on January 27, 2012. See January 27, 2012, DOJ Press Release “Attorney General Holder Speaks at the Announcement of the Financial Fraud Enforcement Task Force’s New Residential Mortgage-Backed Securities Working Group,” available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120127.html>.

³ *Id.*

An example of other enforcement activity in this area is the Consumer Financial Protection Bureau (CFPB).⁴ Since the CFPB became operational, it has announced or performed a series of wide-ranging initiatives concerning mortgage lending abuses, including:

- creation of a whistleblower program, including a toll-free phone number and email address, welcoming any source of information pertaining to potential consumer financial crimes in order to expedite investigations and prosecutions;
- enactment of broad-sweeping supervisory initiatives concerning the practices of both banks and nonbanks, such as those engaged in mortgage origination, brokering, servicing, loan modification, and foreclosure relief, to generally ensure compliance with federal consumer financial protection laws;
- announcement of a law enforcement partnership with the Department of Defense and the Federal Trade Commission to develop a database aimed to track and prosecute companies and individuals repeatedly targeting military personnel relating to consumer financial fraud; and
- participation in a joint task force targeting Home Affordable Modification Program-related abuses.

Using the CFPB as a predictor, it is safe to say home loan servicing institutions can expect a significant increase in both government investigations and prosecutions relating to their consumer lending practices under this task force beyond wrongdoing specific to the packaging and selling of RMBS.

In the face of such uncertainty, mortgage lending and service institutions will greatly benefit from the assistance of counsel with a breadth of expertise in the field of mortgage fraud and abuse investigations. Alston & Bird LLP possesses a team of experienced practitioners, many of whom previously worked for various United States Attorney's Offices, the Department of Justice, the Securities & Exchange Commission and various other state and federal regulators, investigating and prosecuting exactly these types of cases. Our attorneys now routinely counsel companies involved in the origination, servicing and securitization of consumer home loans.

Alston & Bird LLP Experience:

Some of our most important victories involve matters in which our representation has led to the declination of any further investigation or prosecution. We will not disclose these matters, but some of our experience in this particular area include:

- Representation of a national bulge bracket bank in both a civil and criminal investigation involving their residential mortgage-backed securities practices.
- National counsel to an independent outside auditing firm investigating one of 14 mortgage servicing firms, identified by the federal government as one of the "worst offenders" of

⁴ Congress established the CFPB, in part, to conduct rulemaking, supervision and enforcement of federal consumer financial protection laws. See <http://www.consumerfinance.gov/the-bureau/>.

“robo-signing” abuses, pursuant to a consent order entered into between the servicing firm and federal regulators. We have provided significant legal advice to the outside contractor in implementing both federal and state law compliant “test” programs designed to efficiently identify prior wholesale foreclosure abuses, as well as other legal services.

- Representation of banks, mortgage companies and servicing companies in various matters regarding the origination, servicing and foreclosure of loans, including:
 - criminal investigations into loan origination and/or foreclosure practices;
 - False Claims Act actions involving government-backed loans in many different areas, alleged improper foreclosure processes and “robo-signing” issues; and
 - state attorney general investigations into various other matters involving the origination or forfeiture of loans.
- Outside counsel to an audit committee regarding a nationwide mortgage investigation for improper origination of conventional subprime and government guaranteed loans. We also have considerable experience in the criminal enforcement of large-scale mortgage fraud prosecutions and use that experience to defend companies that may become the target of similar investigations.
- Representation of banks, as well as their officers and directors, regarding civil and criminal investigations pertaining to loan portfolios, lending practices and internal compliance and governance.

For further information and guidance, please contact the attorneys listed on the final page of this advisory.

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