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Oversight and Legal Enforcement of the National Mortgage Settlement

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Summary

In Autumn 2010, all 50 state attorneys general, the attorney general for the District of Columbia, the Conference of State Bank Supervisors, the U.S. Department of Justice (DOJ), the U.S. Department of Housing and Urban Development (HUD), and the U.S. Department of the Treasury (Treasury Department) initiated an investigation into foreclosure-related state and federal law violations by the nation's top five mortgage servicers: Ally Financial, Inc. (formerly GMAC, Inc.); Bank of America, Corp.; Citigroup, Inc.; JP Morgan Chase & Co.; and Wells Fargo & Co. On February 8, 2012, these state and federal officials, with the exception of Oklahoma's attorney general, announced a "National Mortgage Settlement" of certain legal claims with these five institutions. The settlement is to result in the servicers providing about \$25 billion of relief, primarily to homeowners and individuals who recently lost their homes through foreclosure. In financial terms, it constitutes the second largest legal settlement ever reached by the attorneys general, behind only the 1998 settlement with tobacco companies.

The agreements stipulate that, in exchange for a release of liability for legal claims that otherwise could have been raised against the servicers by the participating regulators, these five mortgage companies will provide five distinct forms of relief. Under the agreements, the mortgage companies shall

- comply with specified servicing standards going forward;
- provide various forms of mortgage-related consumer relief to current borrowers whose mortgages are owned and serviced by the five servicers ("Consumer Relief" component);
- provide relief to servicemembers who may have been harmed by violations of the Servicemembers Civil Relief Act (SCRA) and to improve the servicing of soldiers' mortgages to prevent future SCRA violations ("SCRA" component);
- provide compensation to certain individuals whose homes were previously foreclosed by the five servicers ("Borrower Payment" component); and
- make direct payments to federal and state governments to cover the resolution of legal claims ("Direct Settlement Payment" component).

With the exception of the Direct Settlement Payment component, the agreements also provide explicit mechanisms by which compliance of each distinct relief component will be overseen and enforced. The agreements establish an independent monitor with the primary authority to conduct oversight of the servicers' compliance with Consumer Relief and Servicing Standards of the settlement, while the enforcement powers primarily are provided to a Monitoring Committee that is composed of representatives of the state and federal regulators that are parties to the agreements. Primary oversight and enforcement of the SCRA terms reside with the DOJ. A Special Administrator is charged with identifying individuals who qualify for monetary relief under the Borrower Payment terms and with distributing those funds, while the state members of the Monitoring Committee have the authority to oversee the Special Administrator's operations.

Individual homeowners are not parties to the agreements, and the terms of the agreements do not provide individual borrowers a private right of action to enforce the agreements. Similarly, the settlement agreements do not, in any way, limit any enforcement power held by state or federal regulators that are not parties to the agreements, including the authorities of the federal banking regulators.

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Background on the National Mortgage Settlement

The National Mortgage Settlement is an outgrowth of state and federal regulatory investigations into the foreclosure practices of large mortgage servicers that were initiated in late 2010 and early 2011. These investigations were prompted by the sworn statements of employees from several large mortgage servicers and other evidence that surfaced in various foreclosure-related litigation that raised concerns that the companies were systematically engaged in mortgage documentation and procedural improprieties, especially when handling mortgages in default. These alleged transgressions included signing affidavits without personal knowledge of the facts presented in the legal documents submitted to courts to support the right to foreclose; backdating mortgage documents to fabricate evidence to give the appearance of compliance with state foreclosure requirements; failing to adhere to notarization requirements for foreclosure-related documents filed with courts; losing mortgage paperwork; assessing excessive fees against borrowers; failing to properly account for borrower mortgage payments; and failing to properly consider borrowers for eligibility in mortgage modification and other loss mitigation programs.¹ Concerns about these illicit acts provoked a number of state and federal regulators to initiate multiple investigations, enforcement actions, lawsuits, and legal settlement negotiations.

Of particular relevance to this report, all 50 state attorneys general, the attorney general for the District of Columbia, the Conference of State Bank Supervisors, the U.S. Department of Justice (DOJ), the U.S. Department of Housing and Urban Development (HUD), and the U.S. Department of the Treasury (Treasury) initiated an investigation into foreclosure-related state and federal law violations by the nation's top five mortgage servicers.² On February 8, 2012, these state and federal officials,³ with the exception of Oklahoma's attorney general,⁴ announced a "National Mortgage Settlement" of certain legal claims with these five institutions.⁵ The settlement is to result in the servicers providing about \$25 billion of relief, primarily to homeowners and individuals who recently lost their homes through foreclosure. In financial terms, it constitutes the second largest legal settlement ever reached by the attorneys general, behind only the settlement with tobacco companies in 1998.⁶

¹ See, generally, CRS Report R41491, "Robo-Signing" and Other Alleged Documentation Problems in Judicial and Nonjudicial Foreclosure Processes, by (name redacted).

² *50 States Sign Mortgage Foreclosure Joint Statement*, Nat'l Ass'n. of Attorneys Gen. Press Release, October 13, 2010, available at <http://www.naag.org/joint-statement-of-the-mortgage-foreclosure-multistate-group.php>. The five largest U.S. mortgage servicers are Ally Financial, Inc. (formerly GMAC, Inc.); Bank of America, Corp.; Citigroup, Inc.; JP Morgan Chase & Co.; and Wells Fargo & Co. *Interagency Review of Foreclosure Policies and Practices*, Fed. Reserve Sys., Office of the Comptroller of the Currency, Office of Thrift Supervision, at 5, April 2011, available at <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf>.

³ In addition to the parties listed above, the Bureau of Consumer Financial Protection and the Federal Trade Commission also signed as parties to the agreements, but only with respect to Exhibit F, which details the federal release of legal claims.

⁴ The Oklahoma attorney general entered into a separate settlement agreement. *Oklahoma Mortgage Settlement Information*, Okla. Office of the Attorney Gen., available at <http://www.oag.ok.gov/oagweb.nsf/mortgageinfo.html>.

⁵ Consent Judgments With Bank of America, *et al.*, available at <http://www.nationalmortgagesettlement.com/>. The National Mortgage Settlement is just one of several distinct legal settlements and enforcement actions entered into/issued in response to alleged mortgage servicing misconduct.

⁶ Executive Summary of Multistate/Federal Settlement of Foreclosure Misconduct Claims, July 23, 2012, available at https://d9klfgibkqcc.cloudfront.net/NMS_Executive_Summary-7-23-2012.pdf.

The agreements stipulate that, in exchange for a release of liability for legal claims⁷ that otherwise could have been raised against the servicers by the participating regulators, these five mortgage companies will provide five distinct forms of relief.⁸ Under the agreements, the mortgage companies shall:

- comply with specified servicing standards going forward (“Servicing Standards” component);⁹
- provide various forms of mortgage-related consumer relief to current borrowers whose mortgages are owned and serviced by the five servicers (“Consumer Relief” component);¹⁰
- provide certain relief to servicemembers who may have been harmed by violations of the Servicemembers Civil Relief Act (SCRA) and to improve the servicing of soldiers’ mortgages to prevent future SCRA violations (“SCRA” component);¹¹
- provide compensation to certain individuals whose homes were previously foreclosed by the five servicers (“Borrower Payment” component);¹² and
- make direct payments to federal and state governments to cover the resolution of legal claims (“Direct Settlement Payment” component).¹³

Individual homeowners are not parties to the agreements, and the terms of the agreements do not provide individual borrowers a private right of action to enforce the agreements. Similarly, the settlement agreements do not, in any way, limit any enforcement power held by state or federal regulators that are not parties to the agreements, including the authorities of the federal banking regulators, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Federal Reserve Board), and the Federal Deposit Insurance Corporation (FDIC).¹⁴

The National Mortgage Settlement is just one of several avenues by which mortgage servicers are being held accountable for alleged mortgage-related transgressions. Notably, beginning in the fourth quarter of 2010, the federal banking regulators¹⁵ began on-site examinations of the

⁷ The legal claims that are released generally arise out of traditional servicing activities such as: payment processing; engaging in loss mitigation activities; performing foreclosure actions; escrow account administration; and maintaining and processing mortgages, promissory notes, assignments, and other legal documents. Importantly, legal claims arising out of securitization activities, criminal activities, and the actions of the Mortgage Electronic Registration Systems, Inc., a third-party service provider used by all five servicers, are not released by the agreements. Consent Judgments With Bank of America, *et al.*, at Exhibits F (release of federal claims) and G (release of state claims). See also *Fact Sheet: Mortgage Servicing Settlement*, National Mortgage Settlement, at 4, available at https://d9klfgibkqcuc.cloudfront.net/Mortgage_Servicing_Settlement_Fact_Sheet.pdf.

⁸ Consent Judgments With Bank of America, *et al.*, at Exhibits F (release of federal claims) and G (release of state claims). The servicers did not admit to any wrongdoing. *Id.* at 2.

⁹ *Id.* at Exhibit A.

¹⁰ *Id.* at Exhibit D.

¹¹ *Id.* at Exhibit H.

¹² *Id.* at Exhibit C.

¹³ *Id.* at Exhibit B.

¹⁴ *Id.* at Exhibit E.I.

¹⁵ Each these servicers is organized as a depository institution that is primarily regulated by either the Office of the Comptroller of the Currency (OCC) or the Board of Governors of the Federal Reserve System (FRB). *Interagency* (continued...)

foreclosure processes and governance protocols of the 14 largest U.S. mortgage servicers.¹⁶ The regulators reviewed a sampling of mortgage files for which there were foreclosure actions pending during calendar years 2009 and 2010.¹⁷ The examinations revealed “critical weaknesses in [the] servicers’ foreclosure governance processes, foreclosure document preparation processes, and oversight and monitoring of third-party vendors, including foreclosure attorneys.”¹⁸ As a result of these findings, the banking regulators, in April 2011, entered into binding consent orders with all 14 mortgage servicers and several of the third-party service providers that the servicers used in various ways during foreclosure processes (hereinafter, the “Federal Banking Consent Orders”).¹⁹ Numerous aspects of the Federal Banking Consent Orders overlap with the terms of the National Mortgage Settlement.²⁰ Although the focus of this report is on the National Mortgage Settlement, at times, it will highlight the points of intersection with the Federal Banking Consent Orders.

The following is a synthesis of the substantive provisions of the National Mortgage Settlement’s Servicing Standards, Consumer Relief, SCRA, Borrower Payment, and Direct Settlement Payment and an analysis of how compliance with these substantive provisions may be overseen and enforced.²¹

(...continued)

Review of Foreclosure Policies and Practices, Fed. Res. Sys., Off. of the Comptroller of the Currency, Off. of Thrift Supervision, April 2011, available at <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf>. Some of these institutions had been primarily regulated by the Office of Thrift Supervision (OTS) until the agency was recently eliminated in accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203). Both the OCC and the FRB have the duty to ensure that the depositories under their jurisdictions are being run in a safe and sound manner in all respects, including in their mortgage servicing activities. To reach this end, these federal banking regulators have the authority to conduct examinations of the institutions under their jurisdictions and have very strong and flexible enforcement powers to rectify any problems, practices, or governing controls found during the course of those examinations that may jeopardize the financial soundness of an institution. See, e.g., 12 U.S.C. §1818.

¹⁶ The 14 largest U.S. mortgage servicers, which service close to 70% of the total volume of mortgages in the country, are: “Ally Bank/GMAC, Aurora Bank, Bank of America, Citibank, EverBank, HSBC, JPMorgan Chase, MetLife, OneWest, PNC, Sovereign Bank, SunTrust, U.S. Bank, and Wells Fargo.” *Interagency Review of Foreclosure Policies and Practices*, Fed. Res. Sys., Off. of the Comptroller of the Currency, Off. of Thrift Supervision, at 1, April 2011, available at <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf>.

¹⁷ *Interagency Review of Foreclosure Policies and Practices*, Fed. Res. Sys., Off. of the Comptroller of the Currency, Off. of Thrift Supervision, April 2011, available at <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf>.

¹⁸ *Id.* at 2-3 (internal citations omitted).

¹⁹ The third parties with which consent orders were entered included Mortgage Electronic Registration Systems, Inc. (MERS), DocX, LLC, and Lender Processing Services, Inc.

²⁰ *Interagency Review of Foreclosure Policies and Practices*, Fed. Res. Sys., Off. of the Comptroller of the Currency, Off. of Thrift Supervision, at 13, April 2011, available at <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf>. Beginning in January 2013, the OCC and Federal Reserve Board reached agreements with most of the 14 servicers to make significant changes to the April 2011 consent orders. *Independent Foreclosure Review to Provide \$3.3 Billion in Payments, \$5.2 Billion in Mortgage Assistance*, Joint Press Release, Fed. Res. Sys., Off. of the Comptroller of the Currency, January 7, 2013, available at <http://www.federalreserve.gov/newsevents/press/bcreg/20130107a.htm>. More information about the agreements announced on January 7, 2013 is available at *Corrective Foreclosure Practices*, Off. of the Comptroller of the Currency, available at <http://www.occ.gov/topics/consumer-protection/foreclosure-prevention/correcting-foreclosure-practices.html>.

²¹ It should be noted that several states secured commitments from one or more of the servicers that provide state-specific relief on top of what is required by the National Mortgage Settlement. For example, California entered into separate agreements with the servicers that require the companies to provide a minimum amount of principal forgiveness for state borrowers or else pay the state up to \$800 million. *Attorney General Kamala D. Harris Secures \$18 Billion California Commitment for Struggling Homeowners*, State of California Dept. of Justice, Press Release, (continued...)

The Servicing Standards and Consumer Relief Terms

The Servicing Standards and Consumer Relief components are discussed together because they have similar oversight and enforcement terms.

Overview of the Servicing Standards

The Servicing Standards of the agreements are designed to correct alleged servicing improprieties that prompted the National Mortgage Settlement. The agreements require the servicers to implement more than 300 specific Servicing Standards, including requirements that servicers: establish a single point of contact for each delinquent mortgage borrower; hire and maintain adequate levels of loss mitigation staff that meet minimum education, training, and experience standards; and maintain electronic documentation of servicing files and interactions with borrowers.²² The Servicing Standards also require the servicers to take steps to ensure that they are adhering to the mortgage-related protections of the SCRA, which are discussed more fully below.²³ The Servicing Standards of the settlement generally only apply to the owner-occupied, single-family, residential mortgages that are serviced by the five mortgage companies.²⁴ Each of the servicers was required to have implemented all of the Servicing Standards by no later than October 2, 2012.²⁵

Overview of the Consumer Relief Terms

The Consumer Relief component of the agreements is designed to help borrowers who are struggling to keep up with their mortgage payments and who are contending with a precarious housing market—circumstances that may have been caused in part, or exacerbated by, the alleged transgressions of the mortgage servicers. The Consumer Relief provisions of the agreements require the servicers to provide homeowners principal reductions and other types of mortgage modifications, short sales, refinancings, and similar mortgage-related relief.²⁶ The agreements require that each servicer provide minimum levels of Consumer Relief, referred to as the

(...continued)

February 9, 2012, available at <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-secures-18-billion-california-commitment>. These separate agreements generally are outside the scope of this report. For more information these side agreements, see Kevin Wack, *The State That Ate the National Mortgage Settlement*, American Banker, December 27, 2012, available at <http://www.americanbanker.com/countdown2013/news/california-the-state-that-ate-the-national-mortgage-settlement-1055479-1.html>.

²² Consent Judgments With Bank of America, *et al.*, at Exhibit A. Many of these servicing standards subsequently were promulgated through regulations issued by the Consumer Financial Protection Bureau that apply to virtually the entire mortgage servicing industry. See *2013 Real Estate Settlement Procedures Act (Regulation X) and Truth in Lending (Regulation Z) Mortgage Servicing Final Rules*, Consumer Financial Protection Bureau, available at <http://www.consumerfinance.gov/regulations/2013-real-estate-settlement-procedures-act-regulation-x-and-truth-in-lending-act-regulation-z-mortgage-servicing-final-rules/>.

²³ Consent Judgments With Bank of America, *et al.*, at Exhibit A.V.

²⁴ *Id.* at Exhibit A.IX.B. and Exhibit D.

²⁵ *Id.* at Exhibit E.A.

²⁶ *Id.* at Exhibit D.

“Commitment Amount.” The combined minimum Commitment Amount equals approximately \$20 billion of relief. Servicers earn varying levels of credit towards the Commitment Amount for each type of relief provided based on a complex scoring system explained in Exhibit D-1 of the agreements.²⁷ The scoring system is structured to encourage servicers to deliver types of relief that are deemed most beneficial to consumers and to do so sooner rather than later.²⁸ For example, servicers generally will get \$1.00 of credit for every \$1.00 of principal forgiveness on first lien mortgages, but they will only receive \$0.10 of credit for every \$1.00 of waived deficiency claims against borrowers.²⁹ As a result, servicers likely will not get a dollar-for-dollar credit for the gross amount of relief provided.³⁰

The Consumer Relief terms of the settlement generally only apply to the owner-occupied, single-family, residential mortgages that are *owned and serviced* by the five mortgage companies.³¹ As a result, borrowers of mortgages that are serviced by one of the five servicers but that are owned or guaranteed by others, such as Fannie Mae or Freddie Mac, do not qualify for the settlement’s Consumer Relief.

Oversight of the Servicing Standards and Consumer Relief Terms

The agreements establish an independent Monitor with the primary authority to conduct oversight of the servicers’ compliance with the Servicing Standards and Consumer Relief terms.³² Each servicer and the Monitor must agree on a Work Plan that details both how the servicers will implement the Servicing Standards and the Consumer Relief requirements, as well as how the Monitor will evaluate the servicers’ compliance with these aspects of the agreements.³³

Exhibit E-1 of the settlement agreements outlines specific Metrics that the Monitor will use to measure compliance with the Servicing Standards. Exhibit E-1 also establishes a maximum permissible cushion of error, called a “Threshold Error Rate,” associated with each Metric.³⁴ The Threshold Error Rates play an important role in the enforcement of the Servicing Standards and Consumer Relief provisions of agreements, which are discussed in the following section of this report. The terms of the agreements also allow the Monitor to impose additional Metrics and Threshold Error Rates beyond those provided in Exhibit E-1, under certain circumstances.³⁵

²⁷ *First Take: Progress Report from the Monitor of the National Mortgage Settlement*, Office of Mortgage Settlement Oversight, at 4, August 29, 2012, available at <https://www.mortgageoversight.com/wp-content/uploads/2012/08/ProgressReport08292012.pdf>.

²⁸ Consent Judgments With Bank of America, *et al.*, at Exhibit D-1.

²⁹ *Id.*

³⁰ *First Take: Progress Report from the Monitor of the National Mortgage Settlement*, Office of Mortgage Settlement Oversight, at 4, August 29, 2012, available at <https://www.mortgageoversight.com/wp-content/uploads/2012/08/ProgressReport08292012.pdf>.

³¹ Consent Judgments With Bank of America, *et al.*, at Exhibit A.IX.B. and Exhibit D.

³² *Id.* at Exhibit E.C.5. Exhibit E also outlines how servicers must implement the agreements. Each servicer must establish a timeline for the implementation of the settlement’s Servicing Standards and Consumer Relief requirements, prioritized based on their complexity and importance to borrowers. *Id.* at Exhibit E.A. Servicers must make reasonable attempts to comply with these timelines, but may request extensions from the Monitor. *Id.*

³³ *Id.* at Exhibit E.C.11-15.

³⁴ Consent Judgments With Bank of America, *et al.*, at Exhibit E.C.11.

³⁵ *Id.* at Exhibit E.C.12.

The Consumer Relief requirements of the Work Plans generally detail how each servicer plans to satisfy its minimum Commitment Amount based on the credit scoring system provided in Exhibit D-1 of the agreements.

Each servicer is required to establish an Internal Review Group to conduct compliance reviews of its progress in implementing the Metrics and satisfying the Consumer Relief requirements, and to provide “general statistical data on Servicer’s overall servicing performance.”³⁶ Servicers must publish the findings of those reviews in quarterly Compliance Reports.³⁷ Individuals comprising the Internal Review Groups must be “independent from the line of business whose performance is being measured.”³⁸

The Monitor generally must be provided access to the Internal Review Groups’ reports, consumer complaint documents, work papers, and other information held by the servicers to allow him to independently evaluate each servicer’s compliance with the settlement terms and to verify the accuracy of the information provided in the Compliance Reports.³⁹ The Monitor may have the work of each Internal Review Group independently reviewed.⁴⁰ The Monitor also must generate regular reports on his oversight activities and the servicers’ compliance. The Monitor’s Compliance Reports are to be filed with federal District Court for the District of Columbia (D.C. federal District Court) and distributed to the Servicers and the Monitoring Committee.⁴¹ To date, the Monitor has filed two Compliance Reports: the first was released on June 19, 2013, and the second was released on December 4, 2013.⁴²

Enforcement of the Servicing Standards and Consumer Relief Terms

Generally

A Monitoring Committee that is composed of representatives of the state and federal regulators that are parties to the agreements primarily is responsible for enforcing the Servicing Standards and Consumer Relief terms.⁴³ The state and federal parties, acting through the Monitoring Committee or individually, have the authority to enforce the Servicing Standards and Consumer Relief terms.⁴⁴ “Unless immediate action is necessary in order to prevent irreparable harm,” one or more of the parties must provide advanced notice to the Monitoring Committee about the

³⁶ *Id.* at Exhibit E.D.1.

³⁷ *Id.*

³⁸ *Id.* at Exhibit E.C.7.

³⁹ *Id.* at Exhibit E.C.16-18.

⁴⁰ *Id.* at Exhibit E.C.23.

⁴¹ *Id.* at Exhibit E.D.4.

⁴² The Monitor’s Compliance Reports are available at <https://www.mortgageoversight.com/reports/>. Additionally, the Monitor issued seven documents designed to inform the public of the progress the servicers have made to implement the Servicing Standards and Consumer Relief components of the settlement, offering the raw data of Consumer Relief provided, as self-reported by the servicers, that the Monitor ultimately audited as part of the Compliance Reports. These consumer relief reports are available at <https://www.mortgageoversight.com/reports/>.

⁴³ Consent Judgments With Bank of America, *et al.*, at IV.8. and Exhibit E.

⁴⁴ *Id.* at Exhibit E.J.2.

desire to initiate an enforcement action.⁴⁵ The Monitoring Committee has 21 days to determine whether or not to initiate the enforcement action.⁴⁶ If the Monitoring Committee decides to not initiate the action, the individual party (or parties) may bring the enforcement action no sooner than 21 days after the Committee's decision.⁴⁷

The Monitor, the Monitoring Committee, and each servicer have the right to petition the D.C. federal District Court to settle disagreements over the enforcement and implementation of the agreements.⁴⁸

Servicing Standards

If a quarterly Compliance Report shows that a servicer has exceeded a Threshold Error Rate for a particular Metric in its Work Plan, the servicer is considered to be in Potential Violation of the Servicing Standards of the agreement.⁴⁹ Upon the discovery of a Potential Violation of the settlement terms, the servicer has a chance to cure the Potential Violation by implementing a corrective action plan and getting back within the acceptable Threshold Error Rate.⁵⁰ The servicer generally has until the next quarterly Compliance Report to cure the Potential Violation.⁵¹ The servicer also is responsible for providing remediation to individuals who are materially harmed by a Potential Violation.⁵²

If a servicer fails to cure a Potential Violation, it may be subject to additional penalties. A servicer that violates the same Metric during the cure period or the quarter following the Potential Violation is considered to have committed an Uncured Violation.⁵³ In addition to providing remediation, servicers may be assessed court-ordered civil penalties of up to \$1 million for each Uncured Violation and up to \$5 million for subsequent violations of the same Metric.⁵⁴ Any such penalties generally will be distributed to reimburse the Monitoring Committee or the individual parties for the costs of raising the enforcement action and then to the states in accordance with the same formula for distribution of the states' Direct Settlement Payment pursuant to Exhibit B of the agreements, which is discussed below.⁵⁵

Additionally, if the Monitor "reasonably conclude[s]," based on any facts or information received, that the servicer "may be engaged in a pattern of noncompliance with a material term of the Servicing Standards that is reasonably likely to cause harm to borrowers," the Monitor is

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* It is unclear if any remedies other than specific performance would be available through a judicial enforcement action.

⁴⁸ *Id.* at Exhibit E.G. and Exhibit E.J.2.

⁴⁹ *Id.* at Exhibit E.E.

⁵⁰ *Id.* at Exhibit E.2-3.

⁵¹ *Id.* at Exhibit E.E.3.

⁵² *Id.* at Exhibit E.E.5.

⁵³ *Id.* at Exhibit E.4.

⁵⁴ *Id.* at Exhibit E.J.3. Servicers that commit Uncured Violations also may be required to provide non-monetary equitable relief, such as specific performance. *Id.*

⁵⁵ *Id.* at Exhibit E.J.3.(c). "In the event of a penalty based on a violation of a term of the Servicing Standards that is specifically related to conduct in bankruptcy, the penalty shall be allocated to the United States or as otherwise directed by the Director of the United States Trustee Program." *Id.* at Exhibit E.J.3.(c)2.

required to investigate the veracity of the matter.⁵⁶ If the Monitor's initial conclusions are confirmed by the review, he may add new Metrics to the noncompliant servicer's Work Plan and may require the servicer to initiate a corrective action plan to rectify the problems.⁵⁷

Consumer Relief

The agreements stipulate that the servicers must satisfy 75% of their Consumer Relief requirements within two years of the settlement start date (March 1, 2012) and 100% of the Consumer Relief requirements within three years of the settlement start date.⁵⁸ If a servicer fails to comply with both the two- and three-year targets, the servicer must pay a sum equal to 140% of the unmet Commitment Amount.⁵⁹ If a servicer meets the two-year target but fails to meet the three-year target, the servicer must pay an amount equal to 125% of the unmet Commitment Amount.⁶⁰ Half of any payments made for failure to satisfy the Consumer Relief requirements are to be made to the federal government, while the other half of the payments will go to the state parties and be distributed in accordance with the same formula that applies to the Direct Settlement Payment established by Exhibit B.⁶¹

The Servicemembers Civil Relief Act Terms

The SCRA, Generally

The Servicemembers Civil Relief Act (SCRA), enacted in 2003, is an expansion of a precursor, the Soldiers' and Sailors' Civil Relief Act of 1940. The SCRA provides protections from certain financial burdens incurred before individuals enter active military duty.⁶² The SCRA is designed "to enable [servicemembers] to devote their entire energy to the defense needs of the Nation; and to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service."⁶³

Sections 533, 521, and 527 of the SCRA provide mortgage-related protections. Section 533 restricts the ability of lenders to initiate foreclosures on properties acquired before active duty service without prior court approval during and one year after the homeowners' active duty service.⁶⁴ SCRA Section 521 requires lenders, prior to securing an uncontested default judgment on a mortgage (or another debt), to file an affidavit with a court attesting to the fact that the debtor is not an active duty servicemember or that the lender was unable to confirm that the

⁵⁶ *Id.* at Exhibit E.C.19.

⁵⁷ *Id.* at Exhibit E.C.23.

⁵⁸ *Id.* at Exhibit D.10.a-b.

⁵⁹ *Id.* at Exhibit D.10.d.

⁶⁰ *Id.*

⁶¹ *Id.* at Exhibit E.J.3.(c)3.

⁶² For an in-depth analysis, see CRS Report RL34575, *The Servicemembers Civil Relief Act (SCRA): An Explanation*, by (name redacted).

⁶³ 50 U.S.C. app. §502.

⁶⁴ 50 U.S.C. app. §533.

debtor was not an active duty servicemember.⁶⁵ Additionally, Section 527 of the SCRA caps interest rates that may be assessed on mortgages (and other debts) incurred before active duty at 6%.⁶⁶ The SCRA is enforceable by the U.S. Attorney General,⁶⁷ as well as through private rights of action.⁶⁸

Overview of the Settlement's SCRA Terms

The National Mortgage Settlement builds on the statutory protections of the SCRA by requiring each of the servicers to review its mortgage files to identify and provide financial compensation to any individual whose SCRA rights were violated over a specified period. Through the agreements, the five servicers also agreed to expand the class of individuals who are eligible for SCRA protections and to implement policies, procedures, and employee training programs to ensure SCRA-compliance in the future.⁶⁹

The settlement agreements stipulate that the servicers must provide compensation to any servicemember who was subject to a completed foreclosure between January 1, 2006 and March 2012 in violation of the SCRA Section 533⁷⁰ or Section 521.⁷¹ To accomplish this, the agreements require the servicers to hire an independent consultant to review all foreclosures that took place over the more than five-year span that are known to have involved a servicemember who was eligible for SCRA protections in order to verify SCRA compliance.⁷² The independent consultant also must conduct a similar review of *a sampling of all* foreclosures initiated during that five-year period for SCRA compliance.⁷³ The servicers must provide compensation to any servicemember harmed by SCRA violations during that time.⁷⁴ The settlement's SCRA restitution requirements expand on what is required under the Federal Banking Consent Orders, which mandate similar payments to servicemembers who were subject to foreclosure actions in 2009 and 2010.⁷⁵

⁶⁵ 50 U.S.C. app. §521.

⁶⁶ 50 U.S.C. app. §527.

⁶⁷ 50 U.S.C. app. §597.

⁶⁸ 50 U.S.C. app. §597a.

⁶⁹ Consent Judgments With Bank of America, *et al.*, at Exhibit H and Exhibit A.V.

⁷⁰ The federal government resolved SCRA Section 533 claims against Bank of America through a consent order entered into prior to the National Mortgage Settlement agreements. *United States v. BAC Home Loans Servicing, L.P.* (C.D. Cal. 2011), available at <http://www.justice.gov/crt/about/hce/documents/bacsettle.pdf>. As a result, the National Mortgage Settlement agreement with Bank of America does not cover Section 533 claims. However, claims arising under Sections 533, 521, and 527 against the other four servicers, as well as claims arising under SCRA Sections 521 and 527 against Bank of America are dealt with in the National Mortgage Settlement agreements.

⁷¹ Consent Judgments With Bank of America, *et al.*, at Exhibit H.II.a.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Interagency Review of Foreclosure Policies and Practices*, Fed. Res. Sys., Off. of the Comptroller of the Currency, Off. of Thrift Supervision, at 3, April 2011, available at <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf>. See, also, the text associated with notes 16-19 above. Each of the individual consent orders is available at <http://www.occ.gov/topics/consumer-protection/foreclosure-prevention/correcting-foreclosure-practices.html> and <http://www.federalreserve.gov/newsevents/press/enforcement/20110413a.htm>. Beginning in January 2013, the Federal Reserve Board and OCC reached agreements with most of the 14 servicers through which the foreclosure reviews that were mandated by the April 2011 consent orders will be replaced by a remediation and borrower assistance framework. *Independent Foreclosure Review to Provide \$3.3 Billion in Payments, \$5.2 Billion in Mortgage Assistance*, Joint Press Release, Fed. Res. Sys., Off. of the Comptroller of the Currency, January 7, 2013, (continued...)

The National Mortgage Settlement Agreements also require the servicers to provide compensation to mortgage borrowers harmed by violations of SCRA Section 527's interest rate cap.⁷⁶ To find these individuals, the agreements call for an independent consultant to review either all or a sampling of all mortgage files from January 1, 2008 on in which a mortgage borrower requested rate cap relief under Section 527.⁷⁷

The financial relief that is to be provided for violations of Sections 533, 521, and 527 is explicitly specified in the agreements.⁷⁸ For wrongful foreclosures in violation of either Sections 533 or 521, each servicer is required to pay: (1) the higher of either \$116,785 or an amount consistent with what is required to be paid for violations of Section 533 or 521 under the Federal Banking Consent Orders; plus (2) an amount equal to the equity lost as a result of the wrongful foreclosure; plus (3) interest on the lost equity.⁷⁹ Under the settlement terms, the amount calculated in (1) will go exclusively to the relevant servicemember, while the amounts in (2) and (3) will be shared between the servicemember and any co-borrowers on the mortgage.⁸⁰

For violations of SCRA Section 527's rate cap, the servicers must pay: an amount equal to all charges in excess of the rate cap, plus interest on that amount; and (2) the higher of either \$500 or three times the amount of refund calculated in (1).⁸¹ The settlement agreements specify that the amount in (1) will be shared among the servicemember and all co-borrowers on the promissory note that secures the mortgage, while all amounts calculated in (2) will be paid exclusively to the servicemember.⁸²

When calculating how much is owed under the settlement agreements for violations of Sections 533, 521, and 527, the DOJ will take into account any relief provided pursuant to private SCRA litigation and the Federal Banking Consent Orders.⁸³ In other words, to the extent that a covered servicer provided payments to a borrower for violations of the mortgage-related SCRA provisions in compliance with the Federal Banking Consent Orders or any other action, that servicer generally will not have to pay the same servicemember the same financial compensation twice.⁸⁴ However, the servicer will be required to provide any additional compensation owed to the

(...continued)

available at <http://www.federalreserve.gov/newsevents/press/bcreg/20130107a.htm>. More information about the agreements announced on January 7, 2013 is available at *Corrective Foreclosure Practices*, Off. of the Comptroller of the Currency, available at <http://www.occ.gov/topics/consumer-protection/foreclosure-prevention/correcting-foreclosure-practices.html>.

⁷⁶ Consent Judgments With Bank of America, *et al.*, Exhibit H.II.b.

⁷⁷ *Id.*

⁷⁸ In some instances what is to be provided pursuant to the terms of the settlement agreements exceeds potential compensation available under the ordinary provisions of the SCRA and the remediation requirements under the Federal Banking Consent Orders.

⁷⁹ Consent Judgments With Bank of America, *et al.*, Exhibit H.II.a.

⁸⁰ *Id.*

⁸¹ *Id.* at Exhibit H.II.b.

⁸² *Id.*

⁸³ *Id.* at Exhibit H, notes 6 and 8.

⁸⁴ Any payment received under the National Mortgage Settlement “will not be offset by payments” made pursuant to the terms of the Federal Banking Consent Orders. *Financial Remediation Framework Frequently Asked Questions*, Fed. Res. Sys. and Off. of the Comptroller of the Currency, at 11, June 21, 2012 (Updated Nov. 20, 2012), available at <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20120621b1.pdf>.

servicemember based on the terms of the settlement agreements that exceed that which previously was provided.

In addition to the financial relief, the National Mortgage Settlement agreements also require the servicers to take concrete steps to ensure their employees comply with the SCRA going forward⁸⁵ and to mandate that their employees take courses designed to teach them how to service mortgages owned by servicemembers.⁸⁶

Oversight and Enforcement of the SCRA Terms

The DOJ holds the authority to oversee compliance with the National Mortgage Settlement's SCRA terms. The DOJ must approve of the independent consultants chosen to conduct the settlements' SCRA reviews, as well as their analytical methodologies.⁸⁷ The independent consultants also are required to provide the DOJ the data they use to conduct the reviews so that the DOJ may conduct its own analysis of compliance.⁸⁸ Based on the reviews of the independent consultants and on its own analysis, the DOJ will identify who has suffered violations of the SCRA.⁸⁹ The servicers will have 30 days to rebut the DOJ's conclusions.⁹⁰ The DOJ then will determine the level of compensation that must be provided to borrowers in accordance with the standards spelled out in the agreements, while also taking into account any relief already provided as a result of the Federal Banking Consent Orders or other measures. Servicers will have 10 days after the DOJ makes a final determination to petition for judicial review of the DOJ's conclusions.⁹¹ The court generally may only review the record for "clearly erroneous factual determination[s]" made by the DOJ.⁹² Upon finding a violation, servicers will be required to contact the three major credit bureaus (Experian, Equifax, and TransUnion) to ask that any negative information associated with the violation be removed from the servicemembers' and their co-borrowers' credit reports.⁹³ The agreements also require the servicers "to indemnify the servicemember and his or her co-borrower(s) against any third-party pursuing any deficiency that was remaining on the servicemember's SCRA-protected mortgage or junior lien after a foreclosure was completed in violation of the SCRA."⁹⁴

The agreements place the onus on the servicers to contact borrowers using form letters (provided in Exhibits H-1 and H-2 of the agreements)⁹⁵ that are due financial relief for violations of the SCRA.⁹⁶ The servicers must maintain and provide the DOJ an accounting of all letters mailed, checks sent, and credit report changes requested.⁹⁷ The servicers must also submit quarterly

⁸⁵ Consent Judgments With Bank of America, *et al.*, Exhibit H.III and Exhibit A.V.

⁸⁶ *Id.* at Exhibit H.IV.

⁸⁷ *Id.* at Exhibit H.II.a-b.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at Exhibit H.II.d.

⁹² *Id.*

⁹³ *Id.* at Exhibit H.II.c.

⁹⁴ *Id.*

⁹⁵ *Id.* at Exhibit H-1 and Exhibit H-2.

⁹⁶ *Id.* at Exhibit H.II.a-b.

⁹⁷ *Id.*

reports to the DOJ that provide analysis of their compliance with the SCRA terms of the settlement agreements.⁹⁸

In addition, the servicers must provide the DOJ with the company policies and procedures that they will put in place to ensure servicing compliance with the SCRA going forward, as well as any future changes to those policies and procedures, for the DOJ's approval.⁹⁹ Similarly, the DOJ must approve of proposed SCRA training programs.¹⁰⁰

Borrower Payment Terms

Overview of the Borrower Payment Terms

The settlement agreements require the five servicers to pay just under \$1.5 billion to an interest bearing escrow account to be distributed by a Special Administrator to provide remedial relief to qualifying mortgage borrowers whose homes were foreclosed between January 1, 2008 and December 31, 2011 and, in the process, may have suffered harm as a result of the alleged misconduct detailed in the agreements.¹⁰¹ The Special Administrator charged with distributing the Borrower Payments was appointed by the state members of the Monitoring Committee.¹⁰² In order to receive a Borrower Payment, borrowers had to submit a claim requesting such relief, but they did not need to prove that they were actually harmed.¹⁰³ The deadline to submit a claim has expired. The Special Administrator mailed notices and claim forms to all individuals believed to be eligible for relief.¹⁰⁴ Individuals also could have submitted a claim form electronically through the National Mortgage Settlement's website.¹⁰⁵ Each qualified claimant received a uniform payment of \$1,480, which was determined based on the number of claims that were submitted. The payments began being mailed to claimants on June 10, 2013.¹⁰⁶

Oversight and Enforcement of the Borrower Payment Terms

The servicers were required to give the Special Administrator "all information ... reasonably necessary" to implement the Borrower Payment component of the agreements.¹⁰⁷ The Special Administrator must issue a final report detailing which claimants received payment.¹⁰⁸

⁹⁸ *Id.* at Exhibit H.III.b.

⁹⁹ *Id.* at Exhibit H.III.

¹⁰⁰ *Id.* at Exhibit H.IV.

¹⁰¹ *Id.* at III.4., Exhibit B.2.a., and Exhibit C.

¹⁰² *Id.* at Exhibit C.2.

¹⁰³ *Id.* at Exhibit B.2.a.

¹⁰⁴ See *Payment to borrowers who lost their homes to foreclosure*, available at <http://www.nationalmortgagesettlement.com>.

¹⁰⁵ National Mortgage Settlement Claim Filing Site, available at <https://nationalmortgagesettlementclaim.com/>.

¹⁰⁶ See *Payment to borrowers to begin June 10, 2013*, available at <http://www.nationalmortgagesettlement.com>.

¹⁰⁷ Consent Judgments With Bank of America, *et al.*, at Exhibit C.3.

¹⁰⁸ *Id.* The state members of the monitoring committee may conduct on-site examinations of the Special Administrator to ensure compliance with the Borrower Payment component of the settlement agreements. *Id.* at Exhibit C.4.

Direct Settlement Payment to the State and Federal Parties

Overview of the Direct Settlement Payment

The servicers' Direct Settlement Payment to both the state and federal parties is approximately \$5 billion.¹⁰⁹ The payment is intended to cover the release of the state and federal legal claims that the parties could have raised against the servicers, as well as to resolve certain specific lawsuits previously initiated against some of the servicers named in the settlement.¹¹⁰

The payments to the federal government generally were distributed to the Federal Housing Administration's Capital Reserve Account; the Veteran Housing Benefit Program Fund, which is administered by the Department of Veterans Affairs; and the Rural Housing Service, which is administered by the Department of Agriculture.¹¹¹

Each individual state has received a specific amount of the Direct Settlement Payment, as established in Exhibit B1.¹¹² Exhibit B of the settlement agreements provides the general parameters by which the states may use these funds. Exhibit B states that, "[t]o the extent practicable," the state's portion of Direct Settlement Payment "shall be used for purposes intended to avoid preventable foreclosures, to ameliorate the effects of the foreclosure crisis, to enhance law enforcement efforts to prevent and prosecute financial fraud, or unfair or deceptive acts or practices and to compensate the States for costs resulting from the alleged unlawful conduct of the [servicers]."¹¹³

Additionally, each state party negotiated state-specific parameters, provided for in Exhibit B2 of the agreements, that guide how the Direct Settlement Payment is to be allocated. The state-specific parameters vary widely in both specificity and flexibility.¹¹⁴

For example, the approximately \$100 million allocated for the state of Georgia went to the state's general treasury fund, where it may be appropriated by the state's general assembly "for any purposes permitted under state law...."¹¹⁵ In contrast, the terms of Exhibit B2 detail specific allocations and the purposes of those allocations for North Carolina's portion of the Direct Payment Amount. Of the approximately \$60 million allocated to North Carolina, \$5.74 million was designated to go to a civil penalty fund established under state law; \$30.6 million was designated to go the North Carolina Housing Finance Agency for specified purposes; \$6.69 million was designated to go to Conference of District Attorneys of the North Carolina Administrative Office of the Courts for certain specified purposes; \$2.87 million was designated

¹⁰⁹ *Id.* at Exhibit B. See also Executive Summary of Multistate/Federal Settlement of Foreclosure Misconduct Claims, July 23, 2012, available at https://d9klfgibkqcuc.cloudfront.net/NMS_Executive_Summary-7-23-2012.pdf.

¹¹⁰ Consent Judgments With Bank of America, *et al.*, at Exhibit B.

¹¹¹ *Id.* at Exhibit B.1.a.

¹¹² *Id.* at Exhibit B1.

¹¹³ *Id.* at Exhibit B.1.b. The maximum of 10% of the states' Direct Settlement Payment "may be designated as a civil penalty, fine, or similar payment." *Id.*

¹¹⁴ *Id.* at Exhibit B2.

¹¹⁵ *Id.*

to go to the state Bureau of Investigation to enhance its ability to investigate financial crimes; \$4.78 million was designated to go to the Consumer Protection Division of the state's Department of Justice for certain purposes; and \$8.6 million was designated to go to the state's general treasury fund "as compensation for costs and economic losses sustained by the State due to mortgage fraud and foreclosure misconduct."¹¹⁶

Oversight and Enforcement of the Direct Settlement Payment

The agreements do not explicitly establish a means of enforcing or overseeing the Direct Settlement Payment terms.¹¹⁷ As a result, the agreements seem to leave oversight and enforcement of the Direct Settlement Payment terms to the political processes that typically apply to government spending at the federal level and within each of the 49 states and the District of Columbia.¹¹⁸

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

¹¹⁶ *Id.*

¹¹⁷ *Id.* at Exhibit B and Exhibit C.

¹¹⁸ The Oklahoma attorney general entered into a separate settlement agreement. *Oklahoma Mortgage Settlement Information*, Okla. Office of the Attorney Gen., available at <http://www.oag.ok.gov/oagweb.nsf/mortgageinfo.html>.

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