

Lender Letter LL-2010-11

October 01, 2010

TO: All Fannie Mae Single-Family Servicers**Servicer Review of Procedures Relating to the Execution of Affidavits, Verifications, and Other Legal Documents****Introduction**

Issues have recently arisen with respect to potential defects with affidavits submitted by servicers in support of motions for summary judgment in states with judicial foreclosure processes. The issues pertain to whether the individuals executing the affidavits on behalf of the servicer had the required personal knowledge of the information contained in the affidavits and whether the affidavits were notarized in accordance with applicable requirements.

Fannie Mae is directing all of its servicers to immediately undertake a review of their policies and procedures relating to the execution of affidavits, verifications, and other legal documents in connection with the default process. If the servicer has any concerns with its policies and procedures or their implementation, the servicer must advise its legal counsel to contact Fannie Mae in writing immediately via e-mail to nonroutine_litigation@fanniemae.com.

Fannie Mae is also taking this opportunity to emphasize the application of existing *Mortgage Selling and Servicing Contract* (the Contract) and *Servicing Guide* provisions with regard to the following:

- Servicer's basic duties and responsibilities
- Compliance with applicable laws and mortgage documents
- Servicer's audit and control systems
- Consequences of non-performance of servicer's duties and responsibilities and non-compliance with applicable laws and mortgage documents

Servicer's Basic Duties and Responsibilities***Servicing Guide*, Part I, Section 202: Servicer's Basic Duties and Responsibilities and Section 202.04: Written Procedures**

As provided in the *Servicing Guide*, servicers service Fannie Mae mortgage loans as independent contractors, not as agents, assignees, or representatives of Fannie Mae. The servicer needs to maintain the discretion to apply appropriate judgment in dealing with borrowers and loans on a case-by-case basis, consistent with Fannie Mae's servicing policies.

As a general matter, the servicer must have sufficient and properly-trained staff, and adequate controls and quality assurance procedures in place

- to carry out all aspects of their servicing duties;
- to protect against fraud, misrepresentation, or negligence by any parties involved in the mortgage servicing processes;
- to protect Fannie Mae's investment in the security properties; and
- to provide borrowers with assistance when it is requested.

To ensure that its staff is knowledgeable in all aspects of mortgage servicing, the servicer must have fully documented written procedures and must have measures in place to determine that its officers and employees adhere to those procedures.

Part VIII, Section 101: Routine vs. Non-routine Litigation of the *Servicing Guide* requires the servicer to immediately contact Fannie Mae's Regional Counsel via e-mail if

- any routine legal proceeding becomes contested (e.g., the defendant in any proceeding files any appeal, motion for rehearing, or similar procedure); or
- the servicer receives notice of a non-routine action that involves a Fannie Mae-owned or –securitized mortgage loan or that will otherwise affect Fannie Mae's interests, regardless of whether Fannie Mae is also named as a party to the action.

Contact must be made via e-mail to nonroutine_litigation@fanniemae.com.

Compliance with Applicable Laws and Mortgage Documents

***Servicing Guide*, Part I, Section 306: Compliance with Applicable Laws**

Fannie Mae requires each Fannie Mae-approved servicer (and any subservicer or third-party originator it uses) to be aware of, and in full compliance with, all federal, state, and local laws (including statutes, regulations, ordinances, administrative rules and orders that have the effect of law, and judicial rulings and opinions) that apply to any of its origination, selling, or servicing practices or other business practices (including the use of technology) that may have a material effect on Fannie Mae. Among other things, this means that the servicer must comply with any applicable law that addresses

- fair housing,
- equal credit opportunity,
- truth-in-lending,
- wrongful discrimination,
- real estate settlement procedures,
- borrower privacy,
- escrow account administration,
- mortgage insurance cancellation,
- debt collection,
- credit reporting,
- electronic signatures or transactions,
- predatory lending,
- terrorist activity, or
- the enforcement of any of the terms of the mortgage loan.

Fannie Mae expects the servicer to be informed about all laws and regulations (as they may change from time to time) that apply to the mortgage loans and the terms of the mortgage documents of the loans it services. As further detailed in the *Selling Guide* and *Servicing Guide* (the *Guides*), in all instances, the servicer must ensure that any servicing practices that they or their representatives undertake in connection with mortgage loans they service for Fannie Mae conform to all applicable laws and regulations and are consistent with the terms of the borrower's mortgage documents, as mortgage documents may vary and applicable laws and regulations may differ from state to state. Fannie Mae does not authorize or condone any practice that is in violation of these requirements. It is a breach of the terms of the *Mortgage Selling and Servicing Contract* when the servicer fails to adhere to any pertinent laws, regulations, or mortgage insurance policies or contracts.

Servicer's Audit and Control Systems

***Servicing Guide*, Part I, Section 301: Internal Audit and Management Control Systems**

Fannie Mae expects the servicer to monitor its compliance with Fannie Mae requirements through regular quality assurance procedures it establishes and conducts. The servicer must maintain adequate internal audit and management control systems

- to ensure that mortgage loans are serviced in accordance with sound mortgage banking and accounting principles;
- to guard against dishonest, fraudulent, or negligent acts; and
- to guard against errors and omissions by officers, employees, or other authorized persons.

During Fannie Mae's regular interactions with the servicer and any reviews or audits undertaken, Fannie Mae may ask to review the servicer's written policies and procedures, as well as examples of the application of those policies and procedures to specific instances. Any servicer that fails to maintain adequate quality control measures will be in breach of its Contract.

The servicer must design its audit and control systems to ensure that its staff complies not only with Fannie Mae requirements, but also with the legal requirements of each jurisdiction in which it operates and with the requirements of any other party that may have an interest in the way the mortgage loan is serviced. Although Fannie Mae does not specify the particular types of audit and control systems the servicer must have, Fannie Mae requires the servicer to develop a well-documented control system for those areas that represent the greatest risk exposure and potential for losses. Therefore, Fannie Mae requires the servicer to provide for at least the following:

- a delinquent loan servicing system,
- a system to control and monitor bankruptcy proceedings, and
- a foreclosure monitoring system.

If these control systems identify a problem area, the servicer must promptly take appropriate corrective action. The servicer must keep a record of any activity under these internal systems. Upon request, the servicer must make these records available for review by Fannie Mae.

The servicer must immediately conduct a review of their existing servicing processes and make corrections immediately if gaps are discovered.

Consequences of Non-performance of the Servicer's Duties and Responsibilities and Non-compliance with Applicable Laws and Mortgage Documents

At its discretion, Fannie Mae may exercise any right or remedy available under the Contract or the *Guides* if the servicer fails to comply with any of Fannie Mae's policies and requirements. The policies and requirements set forth in this Lender Letter, as with all of the policies and requirements in the *Guides*, are not intended to expand or otherwise change the legal obligations between any given borrower and Fannie Mae or the servicer. Thus, these policies and requirements are enforceable only by and for the benefit of Fannie Mae and not for any mortgagor, borrower, or other third party.

Agreement to Indemnify and Hold Harmless

As stated in the Contract, the lender will indemnify Fannie Mae and hold Fannie Mae harmless against all losses, damages, judgments, or legal expenses that result from its failure in any way to perform its services and duties in connection with servicing mortgage loans or managing or disposing of property according to this Contract or the *Guides*.

If any private entity or governmental agency sues Fannie Mae, makes a claim against Fannie Mae, or starts a proceeding against Fannie Mae based on the lender's acts or omissions in servicing mortgage loans or managing or disposing of property, the lender's obligation to indemnify and hold Fannie Mae harmless must be met regardless of whether the suit, claim, or proceeding has merit.

Compensatory Fees

Servicing Guide, Part I, Section 207: Imposition of Compensatory Fees and Announcement SVC-2010-12, Foreclosure Time Frames and Compensatory Fees for Breach of Servicing Obligations

If Fannie Mae believes that the servicer is failing to comply with Fannie Mae's servicing requirements, Fannie Mae may pursue a variety of remedies, either to correct a specific problem or to improve the servicer's overall performance. One possible remedy is the imposition of a compensatory fee to compensate Fannie Mae for damages and to emphasize the importance Fannie Mae places on a particular aspect of the servicer's performance. Sometimes, a compensatory fee will relate to the action the servicer took or failed to take for a specific mortgage. At other times, the compensatory fee may relate to the effect that the servicer's deficiencies may have on Fannie Mae's cash flow.

Fannie Mae may charge a compensatory fee to provide the servicer a financial incentive to correct its servicing problems and improve the quality of its performance.

Specific Breaches of Contract

Mortgage Selling and Servicing Contract, Section VIII, A: Specific Breaches of Contract

Specific breaches of the Contract as they relate to execution of affidavits, verifications, and other legal documents include the following:

- **Failure To Properly Foreclose Or Liquidate:** Where a mortgage loan is in default and the lender is required or has decided to foreclose or liquidate, it is a breach if the lender fails to take prompt and diligent action consistent with applicable law or regulations to foreclose on or otherwise appropriately liquidate such mortgage loan and to perform all incident actions.
- **Failure To Properly Manage, Dispose Of, Or Effect Proper Conveyance Of Title:** It is a breach if any mortgage loan serviced by the lender has been foreclosed on or the possession or title to the property has been taken by Fannie Mae or on Fannie Mae's behalf, or on behalf of other owners of a participation interest in the mortgage loan, and the lender:
 - fails to properly manage, dispose of or effect proper conveyance of title to the mortgaged property; or
 - fails to do the above in accordance with the Contract, the *Guides*, and any pertinent laws, regulations, or mortgage insurance policies or contracts.

Remedies for Breach of Contract

Servicing Guide, Part I, Section 201.09: Remedies for Breach of Contract

Fannie Mae may terminate the lender's Contract (or its individual selling arrangement or servicing arrangement) with cause at any time and immediately if the lender breaches any of the provisions of the Contract, including but not limited to, a failure to follow the requirements of the *Guides* to meet Fannie Mae's net worth and other financial requirements, or to meet any of the other eligibility requirements specified in the Contract. The breach of any representation, warranty, or covenant and the submission of inaccurate data also may be grounds for termination of the Contract. Specifically, the following are some of the events that constitute a breach of the servicer's contractual agreements:

- the servicer's failure to comply with any provision of the *Servicing Guide*;
- the servicer's failure to take diligent action consistent with applicable law in connection with a foreclose of any mortgage that is in default; or
- the finding by a court of competent jurisdiction that the servicer, or any of its principal officers, has committed an act that constitutes civil fraud, or the conviction of the servicer or its officer(s) for any criminal act that is related to the servicer's mortgage servicing activities, if Fannie Mae believes that such act materially and adversely affects the servicer's reputation or the reputation or interests of Fannie Mae.

In lieu of exercising Fannie Mae's right to terminate the Contract (or the lender's selling arrangement or servicing arrangement), Fannie Mae may pursue a variety of other remedies. These other remedies include, but are not limited to, requiring the lender to indemnify Fannie Mae for losses or requiring the lender to repurchase a mortgage.

Servicers should contact their Servicing Portfolio Manager, Servicing Consultant, or the National Servicing Organization's Servicer Support Center at 1-888-FANNIE5 (888-326-6435) with any questions on this Lender Letter.

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