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Client Alert: The Federal Agency Mortgage Settlements

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Bankers will recall that certain mortgage servicing organizations, many affiliated with large banking organizations, agreed to a comprehensive settlement process with regard to a variety of claims relating to residential mortgages generated in the 2009-2010 timeframe as part of enforcement actions commenced in 2011.

The original settlement put in motion a process whereby mortgages would be subject to an independent case-by-case foreclosure review process to determine whether there had been improprieties with regard to processing the loans or in the foreclosure process. That process resulted in advertisements on radio and other media by federal banking agencies encouraging borrowers to come forward to have their mortgages and foreclosure processes reviewed by independent parties to determine whether they may have defenses against payments or actual claims against lenders or servicers. This was a new and somewhat unusual role for banking agencies. Some reports indicated that the average review cost for the "independent consultants" under the original settlement program was $10,000 or more per loan.

On January 7, 2013, the Office of the Comptroller of the Currency (OCC) and the Federal Reserve Board announced an agreement in principle by the agencies with 10 of the institutions involving payment of more than $8.5 billion in cash and other "mortgage assistance" to eliminate the independent foreclosure review process. The settlement amount is divided into pools of $3.3 billion for direct payments to borrowers and $5.2 billion in "mortgage assistance" (including loan modifications and forgiveness of deficiencies). The settlement would terminate the case-by-case independent review process for the participating institutions, establish a "payment agent" to administer payments, and put in place a less formal process for claims designed to enable eligible borrowers to be paid more quickly. Agencies will continue to seek similar settlements with servicers that are not party to the referenced agreement.

The announcement omits details of the settlement, which are important for a full understanding of the impact of the settlement, who it impacts, eligibility standards and relevant terms. It did not indicate that further information would be forthcoming.

Interestingly, the announcement indicates (without additional detail) that eligible borrowers will "... receive compensation whether or not they filed a request for review..., and borrowers do not need to take further action to be eligible for compensation." In addition: "Borrowers will not be required to execute a waiver of any legal claims they may have against their servicer as a condition for receiving payment."

As a result, the arrangement provides that eligible borrowers are "... expected to receive compensation ranging from hundreds of dollars up to $125,000 depending on the type of possible servicer error." Reports indicate that payments will be made to the 3.8 million borrowers with loans subject to servicing the settlement participants. These payments will be made whether or not those borrowers can demonstrate that there were errors in the servicing or whether they were, in fact, harmed.

On January 16, the Federal Reserve announced entry into additional agreements in principle with Goldman Sachs and Morgan Stanley, providing for payment of $557 million in cash and other assistance to mortgage borrowers. The Federal Reserve indicates that these agreements are similar to those announced on January 7, and involve $232 million in direct payments to eligible borrowers and $325 million in other assistance including loan modifications and forgiveness of deficiencies. According to the Federal Reserve announcement, the settlement will impact more than 220,000 borrowers involved in foreclosures with servicing subsidiaries of Goldman and Morgan Stanley, with cash compensation in the same range as in the agreement announced on January 7.

The pot grew with another announcement on January 18 regarding a similar agreement in principle with HSBC, adding another $249 million in settlement funds consisting of $96 million in direct payments and $153 million in other assistance.

Combining the settlements announced on January 7,16 and 18, the Federal Reserve states that an aggregate of $3.6 billion in cash and $5.7 billion in "mortgage assistance" will be provided to nearly 4.2 million borrowers. Still more may follow as the federal regulators continue negotiations with mortgage industry participants.

Eligible borrowers are expected to be provided with information by the payment agent by the end of March, 2013, which may trigger unexpected inquiries to bankers and other lenders.

Participation in the settlements would apparently constitute fulfillment of the independent review process required by the 2011 enforcement actions. Despite participation in the settlements, no waivers of claims will be required from borrowers and the institutions will apparently remain subject to claims by borrowers and others with regard to mortgage activities. Perhaps further details will be forthcoming regarding these agreements and their impact on the institutions involved, as well as other institutions which are not presently parties.