

Preface

Mortgage Banking in 2008 and the beginning of 2009 was marked again by a continuing deterioration of the mortgage market and the virtual cessation of the securitization market as a result of the continued problems uncovered with respect to subprime loans. As mortgagor defaults have continued to spike, lawmakers and regulators at all levels of government have sought measures to bring relief to both an ailing market and to ailing borrowers struggling to make their payments. The meltdown of the mortgage market has put in motion a number of legal and regulatory initiatives, the results of which continue to be difficult to predict at this time.

In this time of significant market dislocation, the focus of market participants has been on how to manage their existing mortgage loan portfolios. The lack of a securitization market has brought about new opportunities for private participants (in particular private equity and hedge funds) to enter the mortgage market as secondary market participants. While the state of the industry is still in flux, there is no doubt that the year will be marked by an increased volume of private transactions. As mortgage loan portfolios continue to see increased default rates, and in light of several significant government initiatives introduced in 2008 and 2009, servicing will become an increasingly important issue for the mortgage banking industry.

In this environment, the focus of this update should come as no surprise to industry participants. In particular:

- Chapter 2 has again been rewritten to address the ever-changing regulatory environment, as well as to focus on secondary market concerns. It addresses proposed and pending statutes and regulations that can affect the secondary market as well as the most recent plans put forth by the Obama administration.
- Chapter 4 has been revised to discuss changes in certain representations and warranties necessitated by new legislation and initiatives.
- Chapter 5 has been revised to discuss the greatly expanded role of the FHA in this changing environment.
- Chapter 8 has been revised to discuss the new RESPA regulations and their impact on broker relationships and activities.

- Chapter 9 has been expanded to address the increasingly complex servicing issues and litigation that have arisen in the current environment.
- Chapter 11 has been revised to address concerns regarding servicing advances in light of the new stability plan put forth by the Obama administration.
- Chapter 13 has been revised to reflect the recent court decisions which have raised concerns about whether mortgage loans assigned into MERs would be problematic in the courts.

Each mortgage loan is a financial instrument unique to the borrower and secured by an individual piece of real estate that the law presumes is like no other. The role of the mortgage banker is to take this unique product and transform it into a fungible unit to be sold with hundreds, or thousands, of other mortgage loans that, after settlement, look surprisingly similar in the aggregate. This process begins with the taking of a loan application, works through processing and underwriting to closing, post closing, sale, and servicing. Any number of mortgage banking entities may affect or own the mortgage loan during this trajectory.

This treatise addresses the interplay and interactions among mortgage banking entities from the perspective of the secondary market. In the United States, the residential mortgage lending business was historically dominated by local savings and loan associations which originated mortgage loans to hold in their portfolios. The borrower dealt exclusively with a single institution from application through payoff. However, with the rise and growth, first, of quasi-government agencies—Fannie Mae, Freddie Mac, and Ginnie Mae—and the birth, development and continued sophistication of the private residential mortgage-backed securities market, the business of mortgage banking has changed dramatically. Now, local institutions originating mortgage loans to hold for portfolio may be the exception. Almost all volume originators must deal with other mortgage bankers for some aspects of their originations or for the sale of their mortgage loan product. For this reason, agreements need to be created and relationships must be established. With the explosion of the private mortgage-backed securities business, driven in recent years by the creation and expansion of the market in subprime mortgage loans, the requirements of that market are impossible to ignore in any comprehensive discussion of the mortgage banking business in the secondary market.

Secondary Market Residential Mortgage Transactions attempts to provide guidance and insight into the arrangements and agreements among participants in the mortgage banking business with a view towards secondary market transactions.

The book is organized by transaction type. Chapter 1 provides an overview of the product (i.e., the residential mortgage loan), the key players in the industry and the basic structural features of transactions involving the product. Chapter 2 describes the legal framework in which the mortgage banking business takes place.

Chapter 3 addresses important pre-contractual issues in connection with the purchase of mortgage loans, including the commitment letter, purchase price issues and due diligence matters. Chapter 4 outlines the important aspects of a purchase and sale of mortgage loans and the key features of any agreement documenting such a transaction. In Chapter 5, special asset types and the unique concerns that should be addressed in relation to each are discussed. These assets include subprime mortgage loans, FHA insured loans, VA guaranteed loans, cooperative loans, second lien mortgage loans, “scratch and dent” mortgage loans, and sub-performing and non-performing mortgage loans. Special attention is also given to participation structures. In Chapter 6, the closing of a purchase and sale transaction is addressed, including the basic documents delivered at closing, as well as a discussion of mortgage file delivery and issues which can arise at closing.

Chapters 7 and 8 address relationships which seek to expand the reach and scope of those in the mortgage banking business. Chapter 7 addresses ongoing relationships, such as correspondent relationships, in which mortgage loans are sold to purchasers virtually at origination, and other flow purchase arrangements. Chapter 8 discusses wholesale lending relationships, with a focus upon issues of concern in mortgage broker arrangements.

In Chapters 9, 10 and 11, the focus turns to the Mortgage Loan servicing business. Chapter 9 addresses Mortgage Loan servicing and servicing relationships with the owner of the mortgage loans. Chapter 10 addresses the purchase and financing of servicing rights as a commodity separate from the mortgage loans which give rise to them. Chapter 11 focuses on the purchase and financing of servicing receivables, a bundle of rights arising from the servicing of mortgage loans, which is also a commodity in its own right.

Chapters 12 and 13 address the emergence of new ways to expand and streamline the mortgage banking business. Chapter 12 focuses on the emergence of new vehicles to aid mortgage bankers in their quest for an expanded customer base. Chapter 13 examines new technologies and laws which will accommodate them, and which have the potential to dramatically alter the mortgage banking business as conducted today. This includes a discussion of legislation seeking to standardize and set parameters for the use of electronic media and signatures, as well as the use of MERS to obviate many of the problems inherent in hundreds of different state and local real estate laws and practices governing the recordation and transfer of title and liens on real property.

Included in the appendixes are a number of important primary regulatory materials. Also included is information for further research into certain aspects of mortgage banking; these include a list of useful web sites and other valuable points of contact in the mortgage banking industry.

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