

June 24, 2013

Practice Groups:

Consumer Financial Services;

Global Government Solutions

For more news and developments related to consumer financial products and services, please visit our [Consumer Financial Services Watch blog](#) and subscribe to receive updates.

When Almost Is Not Good Enough

By: Laurence E. Platt

Where I went to school anything between a 90% and 100% was an “A.” Yes, there were gradations and curves. Maybe anything between a 90 and 93 was an A-. But I had to fall well below a 90 before my parents severely criticized my academic performance. That’s why I find the headlines surrounding the “Summary of Compliance Report” released on June 19, 2013 by Joseph A. Smith, Jr., the “Monitor” under the National Mortgage Settlement (“NMS”) so surprising.

<https://www.mortgageoversight.com/reports/summary-of-compliance/> Converting the findings into percentages, one of the five lenders scored a 100 and the others scored between a 93 and 96.

In a press release issued the same day as the Monitor’s report,

http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2013/HUDNo.13-097 HUD Secretary Donovan characterized these results as shameful and unacceptable:

“The Independent Monitor’s report is a landmark moment in our efforts to reform the servicing industry. For too long, banks have been operating behind closed doors. This report provides the public with a new and transparent look into how banks are treating homeowners. The good news is that gains have been made. The practice of robo-signing—where banks sign off on foreclosures with little or no review—has come to an end. We’ve also confirmed that the five banks have stopped charging distressed borrowers a fee just to process a loan modification request.

Unfortunately, other abuses shamefully endure. Most notably, these financial institutions consistently fail to send notices and communicate decisions to stakeholders in a timely manner. This is unacceptable. So the five financial institutions are officially on notice; they must correct these problems and pass the Monitor’s tests or the Obama administration, along with the bipartisan group of 49 state attorneys general we partnered with on this effort, will fine them up to \$5 million for each failure or haul them back into court.”

Major newspapers followed this characterization:

Washington Post: “Big Banks Are Violating National Mortgage Settlement, Report Says”

Wall Street Journal: “Banks Blundered on Mortgage Pact: Monitor Notes Failure to Meet a Number of Standards; ‘This Is Unacceptable,’ HUD Chief Says”

New York Times: “Monitor Finds Mortgage Lenders Still Falling Short of Settlement’s Terms”

Perhaps some perspective is in order. Five of the nation’s largest loan servicers agreed to a landmark global foreclosure settlement in April 2012, which included a 40-page single space list of servicing standards that they agreed to implement in phases over a short time period and test themselves for compliance. Some standards simply repeated existing law. Some could be construed to be generally accepted best practices. Some standards were derived from the requirements under the U.S. Treasury’s Home Affordable Mortgage Program. But a great number of the standards were new, micro in design, and required significant changes to management information systems and policies

When Almost Is Not Good Enough

and procedures. These new standards also had to be synchronized with inconsistent state law and GSE and FHA requirements.

Yet the servicers basically all received an A or an A- on their most recent report card, with some important and constructive comments from the Monitor on where servicers need to improve. The areas highlighted for improvement focus on notices and communications to and with borrowers - not wrongful foreclosures, failure to offer loan modifications to eligible borrowers or incorrect judicial filings.

We should feel encouraged that the largest servicers essentially were able to “turn on a dime” and implement such fundamental changes so quickly. Indeed, the effective date for the new servicing regulations issued by the Consumer Financial Protection Bureau earlier this year is delayed for a full year to give servicers a reasonable period of time to implement the changes in an orderly way. Moreover, the new regulations are considerably less prescriptive in their treatment of loss mitigation than these settlement terms, giving servicers more leeway on how they accomplish general standards.

Sure, it is no solace to an individual borrower who believes that the servicer did not communicate in a timely fashion on his or her loan to read that the servicers generally complied in all material respects with the new servicing standards. But such a communication problem is hardly shameful. Perhaps a fairer conclusion is that more work needs to be done to achieve perfection, and that essentially is how the Monitor characterized the findings. All indications are that the servicers that are subject to the global foreclosure settlement are working in good faith to that end and have made great strides. But you wouldn't know that from a review of the headlines.

At the end of the day this appears to be all about the elusive and unrealistic quest for perfection. Whether it is selling loans to the GSEs without a scintilla of defects on which a repurchase demand could be based without regard to materiality, or originating insured loans without a deficiency that could cause FHA or the DOJ to seek indemnification and huge civil money penalties, or foreclosing within enumerated state time lines that are known to be unrealistic and face punitive compensatory fees or confiscatory interest curtailments, or implementing the landmark servicing standards without error or face political “jawboning,” should we be asking as a matter of policy whether the government expects too much?

Is it such a surprise that lenders are skittish about lending when the standard is perfection? Why take any credit risk if the ultimate consequence of a borrower default could be disproportionate penalties and public scolding? I doubt that any branch of the federal, state or local government - or any other walk of life for that matter - could claim that it consistently performs perfectly. So then why is it so shameful and unacceptable to get an A- while still striving for a 100? Geez, I'm glad these folks are not my parents; after trying so hard, I'd be pretty discouraged about bringing home my report cards.

Authors:

Laurence E. Platt
larry.platt@klgates.com
+1.202.778.9034

Consumer Financial Services Practice Contact List

K&L Gates' Consumer Financial Services practice provides a comprehensive range of transactional, regulatory compliance, enforcement and litigation services to the lending and settlement service industry. Our focus includes first- and subordinate-lien, open- and closed-end residential mortgage loans, as well as multi-family and commercial mortgage loans. We also advise clients on direct and indirect automobile, and manufactured housing finance relationships. In addition, we handle unsecured consumer and commercial lending. In all areas, our practice includes traditional and e-commerce applications of current law governing the fields of mortgage banking and consumer finance.

For more information, please contact one of the professionals listed below.

LAWYERS

Boston

R. Bruce Allensworth	bruce.allensworth@klgates.com	+1.617.261.3119
Irene C. Freidel	irene.freidel@klgates.com	+1.617.951.9154
Stanley V. Ragalevsky	stan.ragalevsky@klgates.com	+1.617.951.9203
Brian M. Forbes	brian.forbes@klgates.com	+1.617.261.3152
Andrew Glass	andrew.glass@klgates.com	+1.617.261.3107
Sean P. Mahoney	sean.mahoney@klgates.com	+1.617.261.3202
Phoebe Winder	phoebe.winder@klgates.com	+1.617.261.3196
Gregory N. Blase	gregory.blase@klgates.com	+1.617.951.9059
Ryan M. Tosi	ryan.tosi@klgates.com	+1.617.261.3257

Charlotte

John H. Culver III	john.culver@klgates.com	+1.704.331.7453
Amy Pritchard Williams	amy.williams@klgates.com	+1.704.331.7429

Chicago

Michael J. Hayes Sr.	michael.hayes@klgates.com	+1.312.807.4201
----------------------	---------------------------	-----------------

Dallas

David Monteiro	david.monteiro@klgates.com	+1.214.939.5462
----------------	----------------------------	-----------------

Miami

Paul F. Hancock	paul.hancock@klgates.com	+1.305.539.3378
-----------------	--------------------------	-----------------

New York

Elwood F. Collins	elwood.collins@klgates.com	+1.212.536.4005
Steve H. Epstein	steve.epstein@klgates.com	+1.212.536.4830
Drew A. Malakoff	drew.malakoff@klgates.com	+1.216.536.4034

Pittsburgh

Melissa J. Tea	melissa.tea@klgates.com	+1.412.355.8385
----------------	-------------------------	-----------------

San Francisco

Jonathan Jaffe	jonathan.jaffe@klgates.com	+1.415.249.1023
Amanda D. Gossai	amanda.gossai@klgates.com	+1.415.882.8020

Seattle

Holly K. Towle	holly.towle@klgates.com	+1.206.370.8334
----------------	-------------------------	-----------------

Sydney

Andrea P. Beatty	andrea.beatty@klgates.com	+61.2.9513.2333
Daad Soufi	daad.soufi@klgates.com	+61.2.9513.2300
Abhishek Bansal	abhishek.bansal@klgates.com	+61.2.9513.2300
Jason Vongratsavi	jason.vongratsavi@klgates.com	+61.2.9513.2300

Washington, D.C.

Costas A. Avrakotos	costas.avrakotos@klgates.com	+1.202.778.9075
---------------------	------------------------------	-----------------

Consumer Financial Services Practice Contact List

David L. Beam	david.beam@klgates.com	+1.202.778.9026
Holly Spencer Bunting	holly.bunting@klgates.com	+1.202.778.9853
Melanie Brody	melanie.brody@klgates.com	+1.202.778.9203
Krista Cooley	krista.cooley@klgates.com	+1.202.778.9257
Daniel F. C. Crowley	dan.crowley@klgates.com	+1.202.778.9447
Eric J. Edwardson	eric.edwardson@klgates.com	+1.202.778.9387
Steven M. Kaplan	steven.kaplan@klgates.com	+1.202.778.9204
Phillip John Kardis II	phillip.kardis@klgates.com	+1.202.778.9401
Rebecca H. Laird	rebecca.laird@klgates.com	+1.202.778.9038
Michael J. Missal	michael.missal@klgates.com	+1.202.778.9302
Laurence E. Platt	larry.platt@klgates.com	+1.202.778.9034
Stephanie C. Robinson	stephanie.robinson@klgates.com	+1.202.778.9856
Phillip L. Schulman	phil.schulman@klgates.com	+1.202.778.9027
David Tallman	david.tallman@klgates.com	+1.202.778.9046
Stephen G. Topetzes	stephen.topetzes@klgates.com	+1.202.778.9328
Nanci L. Weissgold	nanci.weissgold@klgates.com	+1.202.778.9314
Kris D. Kully	kris.kully@klgates.com	+1.202.778.9301
Emily J. Booth	emily.booth@klgates.com	+1.202.778.9112
Morey E. Barnes Yost	morey.barnesyost@klgates.com	+1.202.778.9215
Kathryn M. Baugher	kathryn.baugher@klgates.com	+1.202.778.9435
Andrew L. Caplan	andrew.caplan@klgates.com	+1.202.778.9094
Soyong Cho	soyong.cho@klgates.com	+1.202.778.9181
Shanda N. Hastings	shanda.hastings@klgates.com	+1.202.778.9119
Anaxet Y. Jones	anaxet.jones@klgates.com	+1.202.778.9414
Rebecca Lobenherz	becky.lobenherz@klgates.com	+1.202.778.9177
Eric Mitzenmacher	eric.mitzenmacher@klgates.com	+1.202.778.9127
Tori K. Shinohara	tori.shinohara@klgates.com	+1.202.778.9423
Kerri M. Smith	kerri.smith@klgates.com	+1.202.778.9445
Kathryn S. Williams	kathryn.williams@klgates.com	+1.202.778.9122

PROFESSIONALS**Government Affairs Advisor / Director of Licensing****Washington, D.C.**

Stacey L. Riggin	stacey.riggin@klgates.com	+1.202.778.9202
------------------	---------------------------	-----------------

Regulatory Compliance Analysts**Washington, D.C.**

Dameian L. Buncum	dameian.buncum@klgates.com	+1.202.778.9093
Teresa Diaz	teresa.diaz@klgates.com	+1.202.778.9852
Robin L. Gieseke	robin.gieseke@klgates.com	+1.202.778.9481
Brenda R. Kittrell	brenda.kittrell@klgates.com	+1.202.778.9049
Dana L. Lopez	dana.lopez@klgates.com	+1.202.778.9383
Patricia E. Mesa	patty.mesa@klgates.com	+1.202.778.9199
Daniel B. Pearson	daniel.pearson@klgates.com	+1.202.778.9881
Jeffrey Prost	jeffrey.prost@klgates.com	+1.202.778.9364

Consumer Financial Services Practice Contact List

K&L GATES

Anchorage Austin Beijing Berlin Boston Brisbane Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt
Harrisburg Hong Kong Houston London Los Angeles Melbourne Miami Milan Moscow Newark New York Orange County Palo Alto Paris
Perth Pittsburgh Portland Raleigh Research Triangle Park San Diego San Francisco São Paulo Seattle Seoul Shanghai Singapore Spokane
Sydney Taipei Tokyo Warsaw Washington, D.C. Wilmington

K&L Gates practices out of 48 fully integrated offices located in the United States, Asia, Australia, Europe, the Middle East and South America and represents leading global corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit www.klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2013 K&L Gates LLP. All Rights Reserved.