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## New York's Proposed Foreclosure Fraud Prevention Act Would Criminalize "Robo-Signing"

On June 22, the New York State Assembly passed the "Foreclosure Fraud Prevention Act of 2012," which defines residential mortgage foreclosure fraud and criminalizes "robo-signing" and other "fraudulent or deceptive" practices by agents or managers in the residential mortgage business.<sup>1</sup> While the state Senate did not act on the proposed legislation before adjourning its regular session — and as a result there is little chance the bill will be enacted this year — the bill represents the latest attempt by state governments to impose criminal liability on fraudulent foreclosure practices by mortgage servicers or their employees.

Under the proposed Act, a person who is an agent of a company engaged in the residential mortgage business would commit "residential mortgage foreclosure fraud" by intentionally engaging in "fraud or deception by authorizing, preparing, executing, offering or presenting for filing" documents which such person (i) knows contains a material false statement (or material omission) and (ii) knows or believes will be publicly filed in connection with a pending or prospective residential mortgage foreclosure action.<sup>2</sup> It is worth noting that while the offense would require an intentional act, it does not include a separate intent element requiring that the proscribed conduct be done "with intent to defraud or deceive." As a result the crime of "residential mortgage foreclosure fraud" could potentially include a range of conduct beyond the foreclosure practices targeted by the bill's sponsors. Residential mortgage foreclosure fraud would be a Class A

misdeemeanor punishable by up to one year in jail and a \$1,000 fine.<sup>3</sup> Residential mortgage foreclosure fraud committed with respect to five or more pending or prospective residential mortgage foreclosure actions within a one-year period — which would include conduct often referred to as "robo-signing" — would be a Class E felony punishable by a sentence of up to four years in jail.<sup>4</sup> The legislation also targets mortgage executives who know that an agent is engaged in residential mortgage foreclosure fraud and who fail to take "reasonable measures" to prevent such conduct from continuing.<sup>5</sup> Such failure to act by managers and executives would also be a class E felony.<sup>6</sup> Notably, the bill does not define the term "reasonable measures" or create a safe harbor by specifying circumstances under which managers and executives will be deemed to have taken "reasonable measures."

New York Attorney General Eric T. Schneiderman announced the introduction of the bill — which was sponsored by state Assembly member Helene Weinstein (D-Brooklyn) — on June 14. In a press release, Attorney General Schneiderman said, "By treating foreclosure fraud as the serious crime that it is, we can deter future abuse and spare untold numbers of families the trauma of wrongful foreclosure. This legislation will ensure that employees

<sup>1</sup> N.Y. State Assem. 10629-A, 2012 Leg., 235th Sess. (N.Y. 2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*; N.Y. Penal Law §§ 70.15, 80.05 (McKinney 2012).

<sup>4</sup> N.Y. State Assem. 10629-A, 2012 Leg., 235th Sess. (N.Y. 2012); N.Y. Penal Law § 70.00 (McKinney 2012).

<sup>5</sup> N.Y. State Assem. 10629-A, 2012 Leg., 235th Sess. (N.Y. 2012).

<sup>6</sup> *Id.*

involved in these fraudulent and abusive practices, and their supervisors who allow the misconduct to continue, will be held accountable for their crimes.”<sup>7</sup> Despite Attorney General Schneiderman’s support and the bill’s swift passage in the Assembly, it is unlikely the proposed legislation will pass the Senate and become law before the 2012 legislative session formally adjourns in January. The Senate would have to convene a special session to vote on the bill. Of course, the Assembly and the Senate can take up the proposed legislation in the 2013 session (following November’s elections), but the new Assembly would need to re-enact the bill.

Attorney General Schneiderman has actively participated in various recent efforts to police residential mortgage fraud and investigate the role played by residential mortgage-backed securities in the 2008 financial crisis. In February of this year, his office reached a \$136 million settlement with the nation’s five largest mortgage servicers in connection with alleged foreclosure abuse involving New York homeowners.<sup>8</sup> Earlier in 2012, U.S. Attorney General Eric Holder announced that Attorney General Schneiderman would chair the newly-formed Residential Mortgage-Backed Securities Working Group, an outgrowth of the Financial Fraud Enforcement Task Force established by President Obama in November 2009.<sup>9</sup> The Working Group — a coalition of dozens of prosecutors, FBI agents, attorneys and analysts sponsored by the Department of Justice — aims to investigate instances of alleged misconduct surrounding the packaging, selling and valuing of residential mortgage-backed securities before

the housing market collapsed and to provide relief to affected homeowners.<sup>10</sup>

To date, the Working Group’s efforts have focused on issuing civil subpoenas and collecting documents, and Attorney General Schneiderman has cited the need for more resources to speed the pace of investigations.<sup>11</sup> In May, the Working Group announced a new whistleblower website aimed at corporate insiders who worked in the residential mortgage-backed securities industry and may have witnessed financial misconduct.<sup>12</sup> The website asks insiders who witnessed or have evidence of “false or misleading statements, deception or other misconduct by market participants such as loan originators, sponsors, underwriters, trustees, and others in the creation, packaging, and sale of RMBS” to report such information to the Securities Exchange Commission or the United States Attorney General.<sup>13</sup> It offers substantial financial incentives for whistleblowers (up to 30% of any monetary recovery by the government) as well as federal whistleblower protection.<sup>14</sup>

We expect to see more legislation and other government initiatives affecting the residential mortgage industry.



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<sup>7</sup> Press Release, N.Y. State Office of the Attorney General, A.G. Schneiderman Introduces Legislation to Protect New Yorkers From Foreclosure Fraud (June 14, 2012), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-introduces-legislation-protect-new-yorkers-foreclosure-fraud>.

<sup>8</sup> Press Release, N.Y. State Office of the Attorney General, A.G. Schneiderman Secures \$136 Million for Struggling New York Homeowners in Mortgage Servicing Settlement (February 9, 2012), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-secures-136-million-struggling-new-york-homeowners-mortgage-servicing>.

<sup>9</sup> Press Release, U.S. Department of Justice, A.G. Holder Speaks at the Announcement of the Financial Fraud Enforcement Task Force’s New Residential Mortgage-Backed Securities Working Group (January 27, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120127.html>.

<sup>10</sup> *Id.*

<sup>11</sup> Jean Eaglesham, *Investigators Seek More Firepower*, Wall Street Journal, May 24, 2012, available at <http://online.wsj.com/article/SB10001424052702304065704577424571073791362.html>.

<sup>12</sup> Report Residential Mortgage-Backed Securities Fraud, <http://www.stopfraud.gov/rmbs.html>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

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## Contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the authors listed.

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