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## MORTGAGE SERVICING UNDER FIRE

*The financial crisis has heightened investigation and litigation risks for mortgage servicers, as federal and state regulators escalate enforcement activity and private litigants advance novel legal challenges to origination and servicing practices. The authors undertake a review of recent government enforcement actions and litigation, suggesting a number of strategies that servicers should employ to reduce enforcement action and litigation risks.*

By Jonice Gray Tucker, Benjamin P. Saul, and Thomas A. Dowell \*

Over the past decade, mortgage loan servicers have been subject to increasing scrutiny by federal and state regulators, as well as private litigants. The recent financial crisis has heightened public examination of mortgage servicing practices, with litigation and enforcement activity intensifying markedly during the past 18 months. Servicers are now facing a new frontier of legal claims based on novel theories that include attacks on previously unchallenged business practices. The absence of clear, written compliance standards has provided government regulators and private plaintiffs with wide latitude to challenge servicing practices while simultaneously hampering the ability of servicers to manage growing enforcement and litigation risks in a rapidly changing environment.

Through its advanced notice of proposed rulemaking on Mortgage Acts and Practices (the “MAP rulemaking”),<sup>1</sup> the Federal Trade Commission has aimed

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<sup>1</sup> 74 Fed Reg. 26126 (June 1, 2009).

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to address this dearth of regulatory guidance. The MAP rulemaking requests public comment on loan performance and default-related issues, including loss mitigation and loan modification practices. The FTC’s requests suggest that it may be poised to issue regulations that codify the prohibitions and restrictions in consent decrees between the FTC and Fairbanks Capital, and more recently, EMC Mortgage Corporation.<sup>2</sup>

Notwithstanding the FTC’s on-going rulemaking process, enforcement agencies – particularly state attorneys general, who have been emboldened by the

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<sup>2</sup> Order Preliminarily Approving Stipulated Final Judgment, *U.S. v. Fairbanks Capital Corp. Fairbanks Capital Holding, & Basmajian*, No. 03-12219 (D. Mass. Nov. 21, 2003), modified by, *U.S. v. Select Portfolio Serv.*, No. 03-12219-DWP (D. Mass. Sept. 4, 2007); Consent Decree, *FTC v. EMC Mortgage Corp.*, No. 4:08-cv-338 (E.D. Tex. Sept. 9, 2008).

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