

# Legislative Highlights

## *Mid-Term Election Shake Up*

The Republican takeover of the House of Representatives and the now-close balance of power in the Senate will bring important changes to Capitol Hill, when the 112th Congress convenes in January. In the House, Rep. Lamar Smith (R-Texas) will become the new chairman of the House Committee on the Judiciary, while Rep. Spencer Bachus (R-Ala.) will chair the Financial Services Committee. The new chairs have a very different policy orientation than the members they replaced, John Conyers (D-Mich.) and Barney Frank (D-Mass.). Banks and other financial firms have been on the defensive since their role in the economic downturn, and financial-services lobbyists may now find a more sympathetic audience on Capitol Hill. The two House committees will likely each have some freshman members eager to reverse the agenda of the last two years.

Both committees may want to revisit parts of the Dodd-Frank law, such as the provisions for the orderly liquidation of financial entities that pose a systemic risk. Rep. Smith, for example, favored more of a chapter 11-style reorganization for these failing entities, rather than a government-driven approach favored by the FDIC and Treasury. Many of the Dodd-Frank details are to be developed by some 250 rulemakings by a dozen agencies over the next two to five years. The new House majority may seek to be more involved in this process, and the committees will also play a major role in any reform of the financially-troubled GSEs, Fannie Mae and Freddie Mac, as well as the ongoing crisis of faulty processes in home foreclosure. The committees will also likely be interested in the developments at the new Consumer Financial Protection Bureau (CFPB). While Congress built the CFPB to be insulated from the congressional appropriations process once it is fully

operational in July 2011, until then it is funded by appropriations from the Treasury Department and House Republicans are likely to scrutinize the CFPB's broad agenda. Meanwhile, the important Committee on Oversight and Government Reform will be headed by Rep. Darrell Issa (R-Calif.), who has signaled that he will have an active oversight agenda of the Obama administration.

Across the Capitol, Sen. Charles Grassley (R-Iowa) will become the Ranking minority member of the Senate Judiciary Committee. Sen. Grassley was the lead sponsor of the 2005 BAPCPA amendments. Sheldon Whitehouse (D-R.I.), the sponsor of legislation to ease rules for small business cases in chapter 11 (S. 3675), remains as chairman of the Courts' subcommittee. On the Banking Committee, Sen. Tim Johnson (D-S.D.), another BAPCPA co-sponsor, is in line to take over as committee chairman, replacing Sen. Chris Dodd. In terms of pending legislation, it is not likely that the small business bill or items such as the bill to ease the discharge of private student loans (H.R. 5043) or organized labor's chapter 11 reforms (S. 3157; H.R. 4677) will fare well in the new Congress.

## *Foreclosure Fiasco Featured at COP, Hill Hearings*

It is still unclear how serious and widespread the deficiencies are in the foreclosure process. The Senate Banking Committee held an oversight hearing on Nov. 16 to discuss various problems in mortgage servicing from securitization to foreclosure, and the House followed with a hearing. Prof. **Adam Levitin** (Georgetown Law Center; Washington, D.C.) was among the witnesses.

An Oct. 27 hearing of the Congressional Oversight Panel (COP) on the failures of the TARP-funded Foreclosure Mitigation Program evolved into an assessment of the expansive and systemic due-process errors in the foreclosure process. Prof.

**Katie Porter** (visiting professor at Harvard Law School) testified that the foreclosure process lacks integrity in a number of ways and that these problems threaten a housing recovery while undermining federal efforts to promote foreclosure mitigation.

## *Time for a MERS "Fix-It" Bill?*

According to a recent CNBC report that has gone viral, there is speculation on Capitol Hill that Congress might consider measures intended to bolster the legal status of a controversial bank-owned electronic mortgage-registration system that contains about 60 percent of all outstanding mortgages. The system, known as MERS (Mortgage Electronic Registry System), was set up in 1997 to track ownership of home loans as they move from mortgage originator through the financial system to the trusts set up when mortgage securities are sold. The system has come under scrutiny by critics who charge MERS with facilitating slipshod practices. Lawyers have recently filed lawsuits, claiming that banks owe states billions for mortgage recording fees they avoided by using MERS. If courts rule against MERS, the damage could be catastrophic, with some estimates in the \$60 billion to \$120 billion range in damages and penalties from unpaid recording fees. Many states impose penalties between \$5,000 and \$10,000 each time a recording fee is unpaid. Critics also say that sloppiness at MERS has botched chain of title for many mortgages. They say that MERS lacks standing to bring foreclosure actions, and the faulty chain of title casts doubts on whether anyone has clear enough ownership to foreclose on a defaulting borrower. It is speculated that Congress may attempt to prevent any MERS meltdown from occurring by enacting a federal law that would limit MERS exposure on the state law recording-fee issue, and perhaps retroactively approve mortgage transfers conducted through the MERS private database. ■

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