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Consumer Financial Services

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Nevada Deals a New Hand

Consumer Financial Services Alert

By Costas Avrakotos and Keisha Whitehall Wolfe

Holders of Mortgage Servicing Rights are not Subject to Licensing as Mortgage Servicers in Nevada.

In July 2015, the Nevada legislature dealt the mortgage industry a new hand when it passed Assembly Bill 480 (2015) (“AB 480”) to provide for the licensing of mortgage loan servicers. The legislation provided for the new licensing obligation to go into effect on January 1, 2016. For months, as the Nevada Division of Mortgage Lending (the “Division”) “slow played” its hand, the mortgage industry anxiously waited to see how the cards would be played, and whether the ambiguously worded definition of mortgage servicer would be applied to license those investors who merely hold mortgage servicing rights, as well as entities that actually service mortgage loans. Proposed regulations establishing requirements for the licensure and supervision of mortgage servicers in Nevada, however, revealed a “tell” that licensing would be required, raising the stakes for holders of mortgage servicing rights. In addition, over the fall months, mortgage servicers had become increasingly worried about getting a “seat at the table” to service Nevada mortgage loans as the 2016 date to “buy in” was fast approaching, but license applications were not yet available from the state.

On December 21, 2015, the Division held a public hearing, adopted the “Nevada Mortgage Servicer Regulations,” effective January 1st (the “Regulations”),¹ and issued a public notice that (i) mere holders of mortgage servicing rights would not be subject to mortgage servicer licensing, and (ii) mortgage servicers submitting a completed license application within 30 days of the Division beginning to accept applications could continue to operate while their application was being processed, provided the servicer complied with the applicable servicing requirements. The Division posted a memo, MLD Memo No. 2015-003 (the “Memo”), on its website regarding “Implementation of Mortgage Servicer Licensing Program and Frequently Asked Questions,” that can be found at: <http://mld.nv.gov/uploadedFiles/mldnvgov/content/About/2015-003-ServicerNotificationLetter-MortgageServicer12-21-2015.pdf>. Moreover, by year’s end, the Division had begun to accept applications for the new mortgage servicer license through the Nationwide Mortgage Licensing System (“NMLS”).

This *Alert* examines certain key issues with respect to the new mortgage servicer licensing law and its Regulations, and also shares some of the informal guidance K&L Gates has received from the Commissioner of Mortgage Lending (the “Commissioner”) as to how the new law and its Regulations will be applied. As is generally the case, informal guidance should not be considered binding on the state.

¹ As adopted, the Regulations were issued and printed as part of LCB File No. R120-15, and eventually will be codified in the Nevada Administrative Code (“NAC”). However, the exact sections of the NAC in which they will be codified are not yet known, but may begin on NAC 645F.1000. For purposes of this *Alert*, regulations will be referenced by the applicable section in R120-15.

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Servicers of Mortgage Loans Must Be Licensed in Nevada

AB 480 amended the Nevada Mortgage Lending and Related Provisions Chapter of the Nevada Revised Statutes (“NRS”), chapter 645F, to provide for the licensing and regulation of mortgage loan servicers under the Nevada Mortgage Servicer Licensing and Regulatory Act (the “Act”).² Until January 2016, entities engaged in the business of servicing mortgage loans secured by a lien on real property in Nevada had been subject to a simple registration obligation with the Division. This registration obligation under NRS section 645F.265 applied to entities servicing residential or commercial mortgage loans. Section 120 of AB 480 provided for the repeal of NRS 645F.265. Therefore, effective January 1st, entities servicing residential or commercial mortgage loans no longer need to register as servicers under NRS 645F.265.

Who Must Be Licensed as a Mortgage Servicer?

Under AB 480, the term “mortgage servicer” means “a person who directly services a mortgage loan, or who is responsible for interacting with a borrower, managing a loan account on a daily basis, including, without limitation, collecting and crediting periodic loan payments, managing any escrow account or enforcing the note and security instrument, either as the current owner of the promissory note or as the authorized agent of the current owner of the promissory note. The term includes a person providing such services by contract as a subservicing agent to a master servicer by contract. The term does not include a trustee under a deed of trust, or the trustee’s authorized agent, acting under a power of sale pursuant to a deed of trust.”³

On the one hand, the definition of mortgage servicer means a person who directly services a mortgage loan. On the other hand, the definition of mortgage servicer includes one who is responsible for interacting with a borrower. As regulators in some states apply their mortgage loan servicer licensing law to those who merely hold mortgage servicing rights because the definition of servicing includes one who has the responsibility to service mortgage loans, the Division, over the fall of 2015, considered applying the licensing obligation to those who only hold mortgage servicing rights. Indeed, the proposed regulations suggested that holders of servicing rights would need to be licensed, as the regulations provided that a person shall not transfer servicing rights to a person unless that person was licensed or exempt from licensing.

In our communications with the Division over the second half of 2015, we tried to show that reading the definition of mortgage servicer as a whole would not support the view that an entity merely holding servicing rights should be subject to licensing because: (i) the law was intended to only reach those who directly service mortgage loans, (ii) a person had to be directly interacting with the borrower or managing a loan account on a daily basis, to be subject to licensing, rather than having the responsibility to generally do so, (iii) interacting with the borrower applies to a person who is either a current owner of the promissory note or an authorized agent of the note owner, and not merely the person who holds the servicing rights, and (iv) the subservicing agent of a master servicer is expressly covered as a mortgage servicer, but a master servicer is not included as a mortgage servicer.

² The Act is not yet codified in chapter 645F. Citations in this *Alert* to the Act will be to Assembly Bill 480.

³ AB 480, § 86.2 (emphasis added).

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Given the position adopted by the Division on December 21, 2015, entities merely holding residential mortgage loan servicing rights do not need to be licensed as mortgage servicers.⁴ The FAQ portion of the Memo responds to a question of whether an entity that only holds servicing rights is required to obtain a mortgage servicer license by answering: “If a person only holds the servicing rights and does not engage in any activity described in question No. 3, a mortgage servicer license is not required.” Question No. 3 of the FAQs distinguishes two categories of persons who must be licensed as mortgage servicers (i) “any person, whether acting as the current owner of the promissory note or as the authorized agent of the current owner of a promissory note,” who provides certain services, and (ii) “a person providing the [referenced] services by contract as a subservicing agent to a master servicer by contract.”⁵

As the definition of mortgage servicer includes one who interacts with the borrower as the current owner of the promissory note, an entity that purchases mortgage loans and directly services the loans purchased would need to be licensed as a mortgage servicer, whereas an entity purchasing mortgage loans and contracting out the servicing to licensed or exempt servicers is not subject to licensing as a mortgage servicer. The Commissioner informally confirmed this view in our conversations with him over the past few weeks.

Which Mortgage Loans Are Covered by the Licensing Obligation?

As set forth above, the definition of mortgage servicer is based on servicing a mortgage loan. AB 480 does not (i) define the term “mortgage loan,” (ii) limit a “mortgage loan” to a residential mortgage loan, or (iii) exclude a commercial mortgage loan. The Commissioner informally confirmed for K&L Gates that the new servicer law is principally intended to require a licensing of all nonexempt residential mortgage loan servicers, but also could apply to servicers of certain commercial mortgage loans.

The Regulations define the term “mortgage loan” to mean:

- (1) Any loan that is secured by a mortgage, deed of trust or other consensual security interest on a dwelling located within this State or real property located within this State upon which is constructed or intended to be constructed a dwelling; or
- (2) Any loan made or arranged by a mortgage broker under 645B of NRS that is secured by a mortgage, deed of trust or other consensual security interest on commercial property located in this State that is funded by one or more private investors.⁶

⁴ As adopted, the Regulations still provide that “[a] person shall not transfer mortgage servicing rights or obligations to a person unless that person holds a license as a mortgage servicer or is a person otherwise exempt from holding a license pursuant to chapter 645 of NRS and the Nevada Mortgage Servicer Regulations.” As we understand from discussions with the Commissioner on January 6, 2016, keeping this provision as worded was an oversight, and (i) the intent of the provision is that licensable mortgage servicing activities should not be transferred to an unlicensed or non-exempt entity, (ii) merely holding mortgage servicing rights is not a licensable activity, and (iii) the Division will look to amend the Regulations to state as much at a later date.

⁵ The services referenced in Question No. 3 of the FAQ are those that are set forth in the statute of (i) directly servicing a mortgage loan, or (ii) being responsible for interacting with the borrower or managing a mortgage loan account on a daily basis of, among other acts, collecting or crediting periodic payments. As set out in Question No. 3, these services are licensable only if the person performing the services is the owner of the promissory note, an authorized agent of the current owner, or a contractor for the subservicing agent of the master servicer.

⁶ R120-15, § 12.

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Given this definition, a license would be needed to service a limited subset of commercial mortgage loans, involving the “private money lending business” in Nevada. As stated in FAQ No. 4 of the Memo, “unless a person services a loan secured by commercial property that was made or arranged by a mortgage broker under NRS 645B, and funded by one or more private investors, a mortgage servicer license is not required to service loans secured by commercial property.” Stated more directly, a mortgage servicer license is required to service commercial mortgage loans made or arranged by a Nevada licensed mortgage broker, which loans were funded by one or more private investors. Otherwise, no license (and no registration under section 645F.265 as of January 1, 2016,) is required to service any Nevada commercial mortgage loans.

Who is Exempt from Licensing as a Mortgage Servicer?

Section 86.7 of AB 480 provides that “[t]he provisions of sections 86.3 to 86.7, inclusive, of this act do not apply to” certain persons including, among others:

- A depository financial institution, as defined in NRS 645E.060, or any subsidiary or holding company of a depository financial institution if such entity maintains its principal place of business or a branch office in this State.
- A real estate investment trust, as that term is defined in 26 U.S.C. Section 856(a), unless the business conducted by the trust in this State is not subject to supervision by the appropriate regulatory body of a jurisdiction outside of this State.
- Any trustee of an employee benefit plan, as that term is defined in 29 U.S.C. Section 1002(3), who makes a residential mortgage loan directly from money in the plan.
- A mortgage servicer that, in the aggregate with any affiliates, services not more than 10 residential mortgage loans in this State during a calendar year.
- A person licensed pursuant to the provisions of chapter 645B, 645E or 675 of NRS [the Mortgage Brokers and Agents Act, the Mortgage Bankers Act, and the Installment Loan and Finance Act, respectively] who is collecting payments on a mortgage loan or servicing one or more mortgage loans made or arranged by the person under his or her license.

The exemption for a subsidiary or holding company of a depository institution is unclear as to whether (i) the depository institution must maintain its principal office or a branch office in Nevada for its subsidiary or holding company to be exempt, or (ii) only the subsidiary or holding company must maintain such a Nevada office to be exempt. We have requested clarification from the Division. A REIT is exempt, unless the business conducted by the REIT in Nevada is not subject to supervision by the appropriate regulatory body of a jurisdiction outside Nevada, but this exemption does not provide what constitutes (i) “supervision,” or (ii) an appropriate regulatory body, of the REIT. The issues relevant to the “REIT exemption” will need to be addressed with the Division.

The statutory language does not provide that a filing must be made with, and approved by, the Division, for the entities set out in section 86.7 to be exempt from the Act. The Regulations, however, provide that a person claiming an exemption under section 86.7 of AB 480 “has the burden of demonstrating that the person qualifies for such an exemption.” No

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further guidance is provided as to whether: (i) the exempt entity must make a filing with the Division to be approved as exempt, or (ii) the exempt entity should be prepared to demonstrate or show proof that it qualifies for the exemption if challenged by regulators or in a civil proceeding. This issue merits clarification from the Division.

Finally, with respect to the exemptions, we note that the language of the statute, as set out above, expressly states that the identified exempt institutions and persons are exempt from “sections 86.3 to 86.7, inclusive, of this act.” As sections 86.3 to 86.7 include the obligations for a mortgage servicer (i) to be licensed, and (ii) to comply with, among other laws, “any other applicable federal or state law or regulation or any order of the Commissioner,” it would appear that the exempt institutions under section 86.7 are exempt from both licensing and the Regulations.

How Does a Mortgage Servicer Comply with the Licensing Obligation?

With the new mortgage servicer licensing obligation having taken effect January 1st, questions have arisen as to what nonexempt mortgage servicers should do. The Memo provides guidance as to how mortgage servicers should proceed. The Memo provides that -- “Once the Division begins accepting applications, a person requiring licensure ... will have a 30 day period to submit a complete application (emphasis added).” “If a person submits a completed license application, they may continue to operate while the license application is being processed,” subject to other requirements of the licensing statute and the Regulations. The Commissioner informally confirmed that if a completed application is submitted within the 30-day period of the license application becoming available, the mortgage servicer will be permitted to service mortgage loans while the application is being processed, without being subject to sanctions, provided the mortgage servicer complies with all other requirements of the Act and its regulations. Note that it is not sufficient for an application to be submitted in part, but rather, a completed application must be submitted. No guidance has been provided as to when a submitted application is considered complete. A mortgage servicer who fails to submit a completed application within this 30-day period may be subject to administrative discipline.

The Division was prepared to begin accepting applications for the new mortgage servicer license through the NMLS as of December 24, 2015. However, as we understand from the Commissioner, given certain end-of-the-year NMLS maintenance considerations, the NMLS was not prepared to accept applications until December 29, 2015. Recognizing that applications could not be submitted in the NMLS until December 29th, the Commissioner has indicated that he is considering extending the date by which an application can be submitted for a servicer to be able to continue to operate until the end of January. If the date is extended, notice is expected to be posted on the Division’s website or the NMLS.

What Type of License Is Needed?

The Memo Issued by the Division Provides Certain Guidance.

1. Supplemental Mortgage Servicer License

A person who holds a Nevada Mortgage Banker or Mortgage Broker license must obtain a Supplemental Mortgage Servicer License before acting as, offering to act as or providing the services of a mortgage servicer on any loans that the person did not make or arrange. If the person only acts as a servicer on loans that he or she made or arranged under his or her

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mortgage banker or mortgage broker license, a mortgage servicer license is not required under the Act

An application for the supplemental mortgage servicer license should be made through NMLS and include:

- Content and information required by the Commissioner;
- A fee of not more than \$1,000;
- Financial statement that demonstrates that the applicant meets the specified minimum net worth;
- A surety bond (the Commissioner may provide a single form that satisfies both the supplemental mortgage servicer license and either the mortgage banker or mortgage broker license);
- A list of locations of the principal office and each branch office;
- A list of contact persons for each office, including the name, telephone number and email address for each contact person; and
- A designated qualified individual who has been approved by the Commissioner for each principal and branch office. However, if the person engages in activities as a mortgage servicer and mortgage banker or mortgage broker at the same location, a single qualified individual may be appointed to that location.

2. Mortgage Servicer License -- Not Currently Licensed in Nevada

A person that services mortgage loans must submit an application for a Nevada mortgage servicer license for its principal office location if that person is not currently licensed as a Nevada Mortgage Banker, Mortgage Broker or Escrow Agency. Although an office in Nevada is required as a condition of obtaining a license as a mortgage banker or a mortgage broker, the Commissioner informally confirmed that an entity seeking a mortgage servicer license will not be required to maintain an office in Nevada. Licensing will not be required for branch offices, but an applicant for a servicer license must provide the Division with (i) a list of any branch office locations from which it conducts any mortgage servicing activity, and (ii) other branch office required information. Although a separate license is not needed for each location, a separate license is needed for each assumed name used.

An application for the mortgage servicer license should be made through NMLS and include:

- Content and information required by the Commissioner;
- A fee of not more than \$2,500;
- Consent authorizing the Commissioner to conduct a background investigation of the applicant and each control person. The background investigation may include such things as a criminal background check, a credit report and review of applicable regulatory actions;
- Financial statement that demonstrates that the applicant meets the specified minimum net worth of \$100,000;
- A surety bond;

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- A current schedule of the ranges of costs and fees the mortgage servicer charges a borrower for its servicing-related activities;
- A statement prescribed by the Nevada Division of Welfare and Supportive Services of the Department of Health and Human Services;
- A list of locations of the principal office and each branch office;
- A list of contact persons for each office, including the name, telephone number and email address for each contact person;
- A designated qualified individual who has been approved by the Commissioner for each principal and branch office;

3. Mortgage Servicer License -- Escrow Agency Transition

A person who is currently licensed with the Division as an escrow agent that services mortgage loans pursuant to that license, and wishes to continue servicing mortgage loans, should apply for a new mortgage servicer license. The Memo states that the escrow agency will be able to transition to a mortgage servicer license without incurring a new license fee or background investigation, but the person must meet all the other requirements of the license. If the person only engages in servicing activities under its escrow agency license, the person may surrender the escrow agency license. However, if the person engages in other escrow services in addition to the servicing activities, the person should maintain both the escrow agency license and the mortgage servicer license.

Mortgage Servicers Must Comply with Servicing Regulations

As we understand, the Division intends (i) that licensed mortgage loan servicers comply with all of the federal rules applicable to mortgage loan servicers, and (ii) to enforce those rules. The Act provides as much, stating that, among other requirements, “a mortgage servicer shall comply with:

- (a) The relevant provisions of 12 C.F.R. Part 1024, commonly known as Regulation X, and 12 C.F.R. Part 1026, commonly known as Regulation Z, as those regulations are amended by the Final Servicing Rules issued by the Consumer Financial Protection Bureau in 78 Federal Register 10696 and 10902 on February 14, 2013, and any amendments thereto.”⁷

The Regulations reinforce the obligations to comply with all federal servicing laws and regulations relating to mortgage servicing, and provide authority to the Commissioner to impose disciplinary measures for violations of those provisions.⁸ Although the Act provides that exempt institutions under section 86.7 are exempt from such statutory and regulatory obligations, such exempt institutions still must determine their compliance obligations with the federal servicing rules and regulations as a matter of federal law.

We have not yet fully examined all of the Regulations to which licensed mortgage servicers will be subject, but we note two provisions, given certain similar requirements in the NMLS. The Regulations provide that “a mortgage servicer shall report to the Commissioner any disciplinary or enforcement action, denial of an application for a license or registration,

⁷ AB 480, § 86.5.

⁸ See R120-15, § 38.

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settlement agreement or other similar action involving the mortgage servicer and another state or federal regulator. The mortgage servicer shall file a report with the Commissioner within 10 days after the action, in a manner prescribed by the Commissioner.”⁹ As the NMLS requires the reporting of such sanctions to be made in the NMLS within 30 days of the event, the Regulations will add to the burden of satisfying the obligation to report sanctions.

The Regulations also provide that, upon request, “a mortgage servicer shall submit to the Commissioner, on a date and in a form prescribed by the Commissioner, a report of the mortgage servicer’s activities.”¹⁰ The Regulations also specify what must be in the report, and that the Commissioner may require such reporting on a quarterly, semi-annual, or annual basis on the dates set by the Commissioner.¹¹ The Regulations do not provide that the Mortgage Call Report filed in the NMLS will be sufficient to meet this reporting obligation, so further direction from the Division will be needed as to reconciling the two reporting obligations for licensed mortgage servicers.

As the Act’s licensing and regulatory provisions are implemented, further clarity will be evident as to the manner in which (i) the licensing obligations and exemptions will be applied, and (ii) the requirements to obtain a license can be satisfied. Undoubtedly, additional questions also will arise as to licensing and the exemptions, and the manner in which the servicing regulations will be applied. Should any questions arise as to your servicing activities in Nevada, please reach out to us by phone or email if you would like our assistance. Costas Avrakotos can be reached at 202-778-9075, or by email at costas.avrakotos@klgates.com, Keisha Whitehall Wolfe can be reached at 202-778-9124 or by email at keisha.whitehallwolfe@klgates.com.

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⁹ *Id.* § 42.

¹⁰ *Id.* § 45.

¹¹ *Id.*

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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.

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