

# Legal Update

## New Jersey Enacts a Law to License Mortgage Loan Servicers

On April 29, 2019, New Jersey joined the ranks of US states that license mortgage loan servicers when Governor Phil Murphy signed into law the Mortgage Servicers Licensing Act (the "Servicers Act").<sup>1</sup> This legislation was considered for a number of years, but only this year did it find enough support to be enacted. With the Servicers Act due to "take effect on the 90<sup>th</sup> day next following enactment" and as it was enacted on April 29, it should be effective on July 28, 2019.<sup>2</sup> The Servicers Act will be administered by the New Jersey Department of Banking and Insurance (the "Department").

With Pennsylvania having amended its Mortgage Licensing Act last year to license mortgage loan servicers, each of the eastern-most states, except Delaware and Virginia, now license those who service residential mortgage loans. Nationwide, less than 12 states do not license those who service residential mortgage loans for others. Eventually all states will license mortgage loan servicers.

The Servicers Act imposes a licensing obligation to service "residential mortgage loans," with the term "residential mortgage loan" meaning a loan being made to a natural person with the credit extended primarily for personal, family or household use secured by a lien on real property on which there is erected or will be erected a structure with one to six dwelling units.<sup>3</sup> Given this definition, the Servicers Act does not apply

to any non-real estate secured consumer loans, commercial mortgage loans, or a commercial or business purpose loans secured by residential real estate.

### Certain Exemptions

The Servicers Act is a "stand-alone" law, separate from the state's law that licenses residential mortgage lenders and brokers, the New Jersey Residential Mortgage Lending Act (the "Mortgage Lending Act"). Fortunately, those licensed as mortgage lenders under the Mortgage Lending Act are exempt conditionally from needing to hold a separate license under the Servicers Act, as the Servicers Act provides that "[t]he following persons shall be exempt from mortgage servicer licensing requirements ... any person licensed as a residential mortgage lender pursuant to the New Jersey Residential Mortgage Lending Act,"... while acting as a mortgage servicer, provided that (a) the person meets the supplemental mortgage servicer surety bond, fidelity bond, and errors and omissions coverage requirements under section 8 of [the Servicers Act]; and (b) during any period that the license of the residential mortgage lender in this State has been suspended, the exemption shall not be effective."<sup>4</sup>

Additional exemptions from licensing are provided for, among others, (1) any bank, out-of-state bank, credit union chartered by New Jersey, federal credit union, or out-of-state credit union, provided the bank or credit union is federally insured; (2) any wholly owned subsidiary of the bank or credit union; and (3) any operating subsidiary in situations in which each owner of the operating subsidiary is wholly owned by the same bank or credit union.<sup>5</sup> These exemptions are found in subsection b of section 3 of the Servicers Act. Section 19 of the Servicers Act provides (i) a five or fewer *de minimus* exemption and (ii) an exemption for an entity exempt from the Mortgage Lending Act “while servicing residential mortgage loans made pursuant to the exemption.”<sup>6</sup> The Servicers Act does not require that the entities in this paragraph qualify for the exemption from licensing by making a filing with and being approved by the Department. The exemption for Mortgage Lending Act licensees, and for the entities found in subsection b of section 3 and in section 19 of the Servicers Act, applies to the licensing obligation of the Servicers Act and not the entire Servicers Act. Although these entities are clearly exempt from licensing, the reach of the exemptions is not clear. Indeed, the Servicers Act includes inconsistent exemption provisions.

Subsection c of section 3 of the Servicers Act provides that “the provisions of sections 9 through 12 of this Act **shall apply to any person, including a person exempt from licensure pursuant to subsection b of this section, who acts as a mortgage servicer in this State on or after the effective date of this act.**”<sup>7</sup> Section 19, however, provides that “sections 3 through 12 of this Act **shall not apply to**, among others, a person exempt from licensure as a mortgage servicer pursuant to paragraphs (1), (2), and (3) of subsection b of section 3 of this Act.”<sup>8</sup> Given these two provisions, institutions exempt from licensing pursuant to subsection b of section 3 are both subject to and exempt from needing to comply with sections 9, 10, 11, and 12 of the Servicers Act. Sections 9 through 12 cover,

among other requirements, recordkeeping, disclosures to mortgagors by the mortgage servicer upon assignment of the servicing rights, compliance with federal laws and regulations, late fees and a certain schedule of “servicing-related fees.”<sup>9</sup> New Jersey regulators will need to clarify the reach of these exemption provisions and resolve the inconsistency. Entities exempt from licensing should recognize that they may be subject to certain provisions of the Servicers Act and should review it and any guidance issued by state regulators to understand their compliance responsibilities.

## Licensing Requirements

Licensing, of course, will be through the NMLS. However, at the time of this Legal Update, the license application is not yet available through the NMLS, and New Jersey regulators informally have indicated that they are uncertain as to when applications will be available through the NMLS. In addition to the NMLS requirements, the other requirements that must be met to obtain a mortgage servicer license in New Jersey are largely typical of the requirements that must be met in other states. Companies licensed as servicers in other states should be able to obtain a license as a mortgage servicer in New Jersey without having to meet many unique New Jersey requirements. Nevertheless, some noteworthy licensing requirements of the Servicers Act include:

1. A \$100,000 surety bond for each location that conducts servicing, which is not based on servicing volume;
2. A minimum \$300,000 fidelity bond, and \$300,000 of errors and omissions coverage, with each increasing based on the mortgage servicer’s volume of servicing activities, and
3. A “servicing Qualified Individual” with at least three years of mortgage servicing experience within the five years immediately preceding the date of license application.<sup>10</sup>

Although the Servicers Act has adopted many of the provisions found in other state mortgage loan servicer licensing laws, it is unclear if the Servicers Act bucks the trend when it comes to licensing those who hold mortgage loan servicing rights. Prior to the enactment of the Servicers Act, the most recently enacted laws to license mortgage loan servicers in Ohio and Pennsylvania took the path followed by many other states and applied the mortgage servicer licensing obligation to those who hold mortgage loan servicing rights. Over 20 states now license those who acquire and hold mortgage servicing rights without actually servicing the loans. Arguably, the Servicers Act does not do so, but, given certain ambiguous provisions, discussed below, definitive guidance will need to come from state regulators.

The Servicers Act defines the term “mortgage servicer” as:

“any person, wherever located, who, for the person or on behalf of the holder of a residential mortgage loan, receives payments of principal and interest in connection with a residential mortgage loan, records the payments on the person’s books and records and performs the other administrative functions as may be necessary to properly carry out the mortgage holder’s obligations under the mortgage agreement including, when applicable, the receipt of funds from the mortgagor to be held in escrow for payment of real estate taxes and insurance premiums and the distribution of the funds to the taxing authority and insurance company; and includes a person who makes payments to borrowers pursuant to the terms of a home equity conversion mortgage or reverse mortgage.”<sup>11</sup>

The definition identifies certain specific tasks that must be performed to be a mortgage servicer subject to licensing. Merely having responsibility to perform those tasks does not make one a mortgage servicer. Therefore, it

would be reasonable to conclude that holding mortgage loan servicing rights is not a licensable activity. However, the licensing provision of the Servicers Act provides that “no person shall act as a mortgage servicer, directly or indirectly, without first obtaining a license ...”<sup>12</sup> When the licensing obligation extends to one who directly or indirectly services mortgage loans, regulators in some states, but not all states, have applied the licensing obligation to those who hold mortgage loan servicing rights. It is unclear how the New Jersey licensing obligation that applies to indirectly servicing mortgage loans should be read when the definition of mortgage servicer covers certain specific tasks that must be performed before a mortgage servicer license is needed. Given this uncertainty, soon after the Servicers Act was enacted, we sent a request to state regulators seeking clarification as to whether the Servicers Act will be applied to license those who only hold mortgage servicing rights.<sup>13</sup>

## Relationship to Federal Requirements

Licensees, and certain exempt entities, will be required to comply with the federal mortgage loan servicing practice requirements. The Servicers Act incorporates by reference all applicable federal laws and regulations that apply to mortgage servicing, including, but not limited to, those found in RESPA, Regulation X, the Truth in Lending Act and Regulation Z.<sup>14</sup> Therefore, compliance with the federal mortgage loan servicing requirements will largely keep mortgage servicers on track with meeting the New Jersey servicer practice requirements.

Some notable provisions in the Servicers Act that go beyond the federal servicing requirements are the following:

1. Upon assignment of servicing rights, a mortgage servicer must disclose a schedule of the ranges and categories of its costs and fees for its servicing-related activities;

2. A servicer will be required to keep a schedule of its servicing-related fees current, “provide a plain English explanation of the fees” and their amounts and make the schedule of its fees available to the mortgagor or its authorized representative upon request; and
3. Late fees will need to be imposed in accordance with the express requirements of the Servicers Act.<sup>15</sup>

Moreover, Section 13 of the Servicers Act sets forth a number of prohibited activities that appear to apply to both licenses and exempt entities.<sup>16</sup>

## Going Forward

In any event, licensees and exempt entities should carefully review the Servicers Act to ensure that they follow the practices of the Servicers Act from which they are not exempt, refrain from its prohibitions and abide by its generally applicable requirements.

With the Servicers Act becoming effective 90 days after its enactment, state regulators will have much to do to implement the Servicers Act and issue licenses to mortgage servicers. It is expected that regulators will post directions and information on their website and on the NMLS. Entities needing to be licensed as mortgage servicers should follow the Department’s

guidance on its website or the NMLS, as such guidance becomes available, to better ensure nothing is missed. Of course, should you have any questions, let us know how we can help.

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<sup>1</sup> In enacting the New Jersey Mortgage Servicers Licensing Act, the New Jersey Assembly considered Assembly Bill A-4997, whereas the New Jersey Senate considered Senate Bill 3417. We understand that the two bills are identical. As we further understand, Assembly Bill, A-4997 was acted on by the New Jersey Senate, and that measure was signed into law. For purposes of this Legal Update, all citations are to Assembly Bill A-4997.

<sup>2</sup> Assembly Bill A-4997, *Id.* § 22.

<sup>3</sup> *Id.* § 2.

<sup>4</sup> *Id.* § 3b(4).

<sup>5</sup> *Id.* § 3b(1) through (3).

<sup>6</sup> *Id.* § 19.

<sup>7</sup> *Id.* § 3c (emphasis added).

<sup>8</sup> *Id.* § 19 (emphasis added).

<sup>9</sup> *Id.* generally §§ 9, 10, 11 and 12.

<sup>10</sup> *Id.* §§ 8a(1), 8c, and 4a(1), respectively.

<sup>11</sup> *Id.* § 2.

<sup>12</sup> *Id.* § 3a.

<sup>13</sup> The Mortgage Lending Act does not impose a licensing obligation to purchase mortgage loans. Once the Servicers Act becomes effective, unless guidance is provided by state regulators, it is unclear if investors will still be able to purchase mortgage loans with the servicing rights without needing to be licensed as a mortgage servicer in New Jersey.

<sup>14</sup> *Id.* § 11.

<sup>15</sup> *Id.* §§ 10b, 12a, and 12b, respectively.

<sup>16</sup> *Id.* § 13.

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