STATE OF CONNECTICUT

DEPARTMENT OF BANKING

260 CONSTITUTION PLAZA • HARTFORD, CT 06103-1800

Howard F. Pitkin
Commissioner

October 1, 2014

Re: Mortgage Servicer Licensing Question

Your e-mail dated June 10, 2014, addressed to Carmine Costa, Director, Consumer Credit Division of this department, has been referred to me for response. In your e-mail, you request clarification of the applicability of Section 36a-718 of the Connecticut General Statutes, as amended by Public Act 14-89. Section 36a-718(a), as amended, states that:

> On and after January 1, 2015, no person shall act as a mortgage servicer, directly or indirectly, without first obtaining a license under section 5 of . . . [public act 14-89] from the commissioner for its main office and each branch office where such business is conducted, unless such person is exempt from licensure pursuant to subsection (b) of this section.

In particular, you query as to whether license requirements apply to: (1) persons that purchase and hold mortgage servicing rights but hire licensed mortgage servicers to actually perform the servicing activity, and (2) persons that purchase mortgage loans and similarly hire licensed mortgage servicers to perform the servicing activity. Based upon the following analysis, it is this department's opinion that generally, both purchasers of mortgage servicing rights and purchasers of mortgage loans who hire licensed mortgage servicers are acting indirectly as mortgage servicers and would require licensure as mortgage servicers in Connecticut, unless exempt from licensure by Section 36a-718(b), as amended, or excluded from the statutory scheme pursuant to Section 17 of Public Act 14-89.

As background on mortgage servicing rights, in Bulletin 2014-01 dated August 19, 2014, the Consumer Financial Protection Bureau ("CFPB") explained, in pertinent part, that:

> A mortgage servicer, among other things, collects and processes loan payments on behalf of the owner of the mortgage note. . . . The mortgage owner may sell the rights to service the loan, called the Mortgage Servicing Rights (MSR), separately from the note ownership. The owner of the loan or MSR may, rather than servicing the loan itself, hire a vendor – typically called a subservicer – to take on the servicing duties. . . .

Section 36a-715(3) of the Connecticut General Statutes, as amended by Public Act 14-89, defines "mortgage servicer" to mean, in pertinent part:

> [A]ny person, wherever located, who, for such 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 such payments on such person's books and records and performs such 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 such funds to the taxing authority and insurance company . . . .

Clearly, if an owner of mortgage servicing rights or an owner of mortgage loans who retains mortgage servicing rights did not hire persons to service the mortgage loans, they would be directly performing mortgage servicing and constitute "mortgage servicers". However, you raise the issue of whether such persons would be acting "indirectly" as mortgage servicers when they no longer perform the mortgage servicing themselves, but rather hire licensed mortgage servicers to perform such servicing activity.

Section 1-1(a) of the Connecticut General Statutes states that:

> In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly.

Title 36a does not contain a definition of "indirectly". Black's Law Dictionary also does not define such word. While *Merriam-Webster's Collegiate Dictionary* 592 (10th ed. 2001) defines "indirect" to mean "deviating from a direct line or course: ROUNDABOUT", such definition provides little interpretative guidance.

The principles of statutory construction have been announced by the Connecticut Supreme Court in *State v. Moulton* as follows:

> When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and

> unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .

State v. Moulton, 310 Conn. 337, 357, citing *Picco v. Voluntown*, 295 Conn. 141.

The applicability of Section 36a-718, as amended, and who is captured by the term "indirectly" is certainly not plain and unambiguous. In addition, the provision has not yet been interpreted by Connecticut courts and there is no legislative history concerning the intended scope of the provision. Therefore, we must look to possible extratextual evidence.

Interpretations of similarly worded provisions in the debt collection context are instructive, especially since mortgage servicing is essentially a form of debt collection. For example, in *Ademiluyi v. Pennymac Mortg. Inv. Trust Holdings I, LLC*, 929 F. Supp. 2d 502 (2013), the United States District Court for the District of Maryland held that the owner of the mortgage debt, PennyMac Holdings, may have acted as a collection agency within the purview of the Maryland Collection Agency Licensing Act[1] when it "indirectly" engaged in debt collection activity through its agents, Citi and PennyMac Services:

> I am equally persuaded that plaintiff sufficiently alleges that PennyMac Holdings operates as a "passive" purchaser of debts in default, by virtue of its indirect collection activity, *i.e.*, collection of mortgage debts through servicing by PennyMac Services and Citi. As *Bradshaw*, *Hauk*, and *Winemiller* make clear, a "passive" debt purchaser qualifies as a collection agency by pursuing collection activities, even through a third party, such as an attorney. *See Bradshaw*, 765 F. Supp. 2d at 726-27; *Hauk*, 749 F. Supp. 2d at 366-67; *Winemiller*, 2011 U.S. Dist. LEXIS 41520, 2011 WL 1457749 at *4. Furthermore, as Judge Bennett noted in *Winemiller*, the "MCALA does not distinguish between collection agencies that use different mechanisms to collect debt." *Id.* Instead, "[i]t targets all persons and entities that do business as collection agencies." *Id.*

Ademiluyi v. Pennymac Mortg. Inv. Trust Holdings I, LLC, 929 F. Supp. 2d 502, 523 (D. Md. 2013).

The District Court came to the same conclusion concerning whether such activity constituted indirect debt collection under the Fair Debt Collection Practices Act:

> Plaintiff's theory of liability under 15 U.S.C. §§ 1692e and 1692f is that PennyMac Holdings engaged in debt collection activity indirectly, through PennyMac Services and Citi as its servicing agents. . . .

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[1] "The MCALA requires that 'a person have a license whenever the person does business as a collection agency in the State'. B.R. § 7-301(a). 'Collection agency' includes, in relevant part, a 'debt purchaser,' who is 'a person who engages directly or indirectly in the business of . . . collecting a consumer claim the person owns, if the claim was in default when the person acquired it.' *Id.* § 7-101(c)(1) (the 'debt purchaser provision')." *Id.* at 519

> For the reasons discussed earlier, I agree with plaintiff. A debt collector is not immunized from liability for collection activities merely because such actions are undertaken indirectly through an agent. *See*, *e.g.*, *Bradshaw*, 765 F. Supp. 2d at 719 (holding that debt collector could be liable under FDCPA for collection efforts undertaken by hired attorneys); *Winemiller*, 2011 U.S. Dist. LEXIS 41520, 2011 WL 1457749 at *3 (holding that plaintiff stated a claim against debt collector for conduct undertaken by subsidiaries as agents).

Id. at 528.

The Court of Appeals in Kansas faced a similar debt collection issue in *North Star Capital Acquisition, LLC v. Budd*, 266 P.3d 1253, 2012 Kan. App. Unpub. LEXIS 11 (2012). In this case, the plaintiff alleged that North Star had to be licensed by the Kansas State Bank Commissioner to collect a debt, even when the collection was done through an attorney[2]. The court distinguished the actions of an attorney acting on behalf of an entity from those of an independent contractor acting on behalf of an entity, and reasoned that the collections statute was likely subsequently amended[3] through the addition of the word "indirectly" to capture the scenario in which an independent contractor acted on behalf of an unlicensed entity:

> North Star suggest [sic] that its reading of the earlier statute—under which there would be a loophole for any lender that hired (or had to hire) an attorney—is confirmed by the legislature's decision to amend the statute. A much more likely loophole that the legislature may have sought to eliminate is that of an independent contractor—not an attorney—that might undertake to collect from Kansas consumers on supervised loans. Before the amendment, the United States District Court for the District of Kansas found that an independent contractor collecting on loans "can only be described as an indirect process for receipt of income on the loans." Under that finding, a trust that obtained the equitable ownership of a loan through assignment was not in violation of K.S.A. 16a-2-301 when another entity serviced the loan (by collecting the payments) as an independent contractor. *Pilcher v. Direct Equity Lending*, 189 F. Supp. 2d 1198, 1211 (D. Kan. 2002). . . .
>
> We think it at least as likely that the statutory amendment here was directed at the independent-contractor situation referenced in *Pilcher* as that it was intended to plug a loophole under which an entity could avoid the limits of K.S.A. 16a-2-301 merely by hiring an attorney. We note that a comment prepared by the Office of the State Bank Commissioner suggests that the amendment was directed at the independent-contractor situation. See K.S.A. 2010 Supp. 16a-2-301, Kansas Comment 2010

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[2] K.S.A. 16a-2-301(2), as it existed before July 1, 2009, "taking assignments of and undertaking direct collection of payments from or enforcement of rights against debtors arising from supervised loans". *Id.* at *7-*8.

[3] The legislature later amended the statute to prohibit "taking assignments of and directly or indirectly . . . enforcing rights" from supervised loans. K.S.A. 2010 Supp. 16a-2-301(1)(c). *Id.* at *20.

> ("Legislation adopted in 2009 clarifies that a person taking assignment of supervised loans but using independent contractors to either collect on such loans or to enforce the assignees' rights . . . is required to have a supervised lending license.").

Id. at *22.

Furthermore, the circumstances surrounding the enactment of Connecticut's mortgage servicer legislation support the premise that it is likely remedial and should be interpreted broadly. Since at least 2012, mortgage servicers have come under significant scrutiny by state and federal regulators. In February 2012, 49 state attorneys general, including Connecticut and the CFPB (collectively "Regulators"), announced a settlement with the nation's five largest bank mortgage servicers. The settlement provided various provisions of consumer relief and set forth national servicing standards, including requiring better communication with borrowers and adequate staffing levels and training. In February 2014, the Regulators reached a similar settlement with Ocwen and its affiliates, the largest nonbank servicer at the time. Also in 2014, new rules issued by the CFPB affecting the servicing industry became effective. In its commentary to such proposed rules, the CFPB remarked, "[t]he Bureau's proposed rules under Regulation Z and X represent another important step towards establishing uniform minimum national standards. When adopted in final form, the Bureau's rules will apply to all mortgage servicers, whether depository institutions or non-depository institutions, and to all segments of the mortgage market, regardless of the ownership of the loan". 77 Fed. Reg. 57200, 57205 (Sept. 17, 2012).

Considering the aforementioned circumstances and caselaw extratextual evidence, it is this department's position that indeed owners of mortgage servicing rights and mortgage loans are acting *indirectly* as mortgage servicers when they contract out such functions. As the Court in *North Star* noted, "[i]t is a common rule that '[a] party should not be permitted to accomplish indirectly what it cannot accomplish directly'" (*North Star* citing *Wilson v. American Fidelity Ins. Co.*, 229 Kan. 416, Syl. ¶ 3, 625 P.2d 1117 (1981)), and entities should not be allowed to escape regulation by using different mechanisms to perform a regulated function. (*See Ademiluyi, id.*) Except for the hiring of a third-party mortgage servicer, these persons would be performing mortgage servicing activity directly and constitute "mortgage servicers". Accordingly, both owners of mortgage servicing rights and owners of mortgage loans for which mortgage servicing rights have been retained, who hire licensed mortgage servicers to perform the mortgage servicing necessitated by ownership, would require licensure as mortgage servicers in Connecticut, unless exempt from licensure by Section 36a-718(b), as amended, or excluded from the statutory scheme pursuant to Section 17 of Public Act 14-89.

Please be cautioned that this conclusion represents the general position of this department based on the scenarios presented and whether licensure is indeed needed for a particular person must be determined on a case-by-case basis in light of all the facts and circumstances.

If you should have any further questions, please do not hesitate to contact the undersigned at (860) 240-8202.

Very truly yours,

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