



# Structured Finance and Securitization

2020 Year in Review



**HUNTON**  
ANDREWS KURTH



## INTRODUCTION

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With a handful of COVID-19 vaccines now authorized for use around the globe and many more in development, most of us look forward to getting 2020 behind us. But will everything “return to normal” in 2021? The structured finance industry has changed dramatically as so many transitioned to working from home. Quickly, we upgraded our home internet speeds and got used to meeting via Zoom, rather than in conference rooms. The old conference call cacophony consisted of New York City sirens; in 2020, our video conferences were interrupted by someone’s barking dog, quickly joined in chorus by everyone else’s barking dogs. Cats (and Rudene’s pet rabbit) parade across computers; toddlers trot up to see what mom and dad are doing. Ironically, as we stayed home, we connected.

And staying at home led to new kinds of legal work too. Right away, we advised clients about, and revised agreements to permit, electronic signatures. We also advised clients about eNotes, which have been permitted by Fannie Mae and Freddie Mac for many years. Warehouse lenders, Ginnie Mae and private-label securitizations, however, have lagged in approving this innovation. But stay-at-home orders encouraged industry participants to consider the technology with more urgency. We advised Ginnie Mae on its digital mortgage program, which was launched in a pilot in fall 2020. Also, we worked with borrowers and lenders in warehouse financings to add language to repurchase agreements and custodial agreements to accommodate hybrid closings

and eNotes. In many cases, warehouse lenders added the plumbing to permit eNotes, but turned off the water main pending internal approvals and successful dry runs with their customers. During the pandemic, our team has also been called upon by our clients to assist them on a variety and large volume of financing transactions, including distressed and rescue financings and opportunistic transactions to take advantage of the disruption in the capital markets.

In 2020, we launched a “Leading the LIBOR Transition” webinar series in an effort to assist our clients in navigating this crucial transition. Our lawyers also served as speakers and panelists in various industry conferences, were quoted in industry publications and authored numerous client alerts on various topics of relevance to the industry.

Our firm also hosted a six-week entirely remote virtual summer program, providing opportunities for summer associates to work across offices and teams, assist with pro bono projects and participate in a diversity hackathon.

We look forward to a healthy 2021, but we have learned from 2020. Among other things, the structured finance industry now knows that we can work productively at home or in the office. With this knowledge, we at Hunton Andrews Kurth know that we can continue to give you, our clients, excellent legal service, while at the same time creating a flexible work environment for our lawyers and staff.



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# FORECAST FOR 2021

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## LIBOR Transition

Based on recent announcements from the ICE Benchmark Administration (IBA), UK Financial Conduct Authority, US financial regulators, and the Alternative Reference Rates Committee, it seems likely that one-week and two-month USD LIBOR will end on December 31, 2021, and all other USD LIBORs will end on June 30, 2023. The final dates will remain unknown until IBA completes its announced consultation in 2021. Per regulatory guidance, US financial institutions should stop using LIBOR as soon as practicable, but no later than December 31, 2021 and before then should include robust LIBOR fallback language. The additional 18 months will provide many with the necessary breathing room to make economic decisions and operational changes for living in a world of SOFR (or whatever other replacement rate makes economic sense for a given product). If able, clients should move away from LIBOR sooner rather than later.

Hunton Andrews Kurth has closely studied the substantive and operational implications of the LIBOR transition for financial institutions and borrowers and is advising clients daily on LIBOR and SOFR transition issues. Our multi-disciplinary team is available to assist clients navigating this crucial transition. Our attorneys draw on years of mass amendment project experience and the firm's sophisticated technical tools to maximize efficiency. Our financial services litigation team is primed if disputes concerning LIBOR transition issues arise.

In 2020, Hunton Andrews Kurth represented Ginnie Mae in its implementation of the ARRC-recommended fallback language in new and legacy multiclass transactions. We also represented a trustee in evaluating and approving amendments to the governing legal documents of one of the largest issuers of mortgage-backed securities in order to transition its legacy LIBOR-based securities. Additionally, we worked with lenders and borrowers to revise and incorporate LIBOR fallback language, plan portfolio remediation and evaluate new SOFR products.

## Residential Mortgage-Backed Securities

The major story line in RMBS in 2020, like with most structured finance products, was and will continue to be for some time, the impact of the pandemic. In March 2020, the RMBS market (eerily similar for many of us to what transpired in March 2008 during the credit crisis) came to a screeching halt as market participants tried to digest the unforeseen and rather abrupt disruption to the global economy caused by COVID-19. Many transactions were halted mid-stream and the fate of many market participants and RMBS programs hung in the balance as a wave of margin calls were made. Large parts of the United States were placed on lockdown and millions of people lost their jobs (particularly in the retail, restaurant, entertainment and leisure industries). The CARES Act and other state legislation was introduced that provided for payment forbearance and other relief for borrowers (including foreclosure and eviction moratoriums). Mortgage loan servicers became subject to increased financial pressure as mortgage delinquency rates continued to rise and it was unclear whether some servicers (particularly non-bank servicers) would be able to continue to perform their obligations to make and carry P&I advances. However, unlike the 2008 crisis, the COVID-19 crisis was not caused by the quality of the mortgage loans and most major institutions (such as investment banks) were in a much healthier position (and not overly exposed to mortgages) in 2020 than they were in 2008. Despite the number of issues that had to be solved (both in transaction documents and in reality with respect to how participants conducted their business), the RMBS market began to stabilize and adapt, and by the summer of 2020, issuance volume continued to increase as regular RMBS issuers, and in some cases, new issuers, came to the market, only pausing briefly for the election in November.

Mortgage origination volume is expected to increase next year as record-low mortgage rates have led to a surge in borrower demand for refinances and home purchases. As a result, we anticipate an increased volume in the number of deals during 2021, although mainly in the prime sector as the fate of the non-QM market is uncertain.



Of note, the CFPB proposed earlier in 2019 and 2020 to amend the qualified mortgage definition in the ability-to-repay rules to move away from a debt-to-income standard and Appendix Q, and replace it with a pricing threshold. On December 10, 2020, the CFPB adopted a final rule that included a set of “bright-line” loan pricing thresholds to replace the previous qualified mortgage 43% debt-to-income threshold calculated in accordance with Appendix Q (although creditors still would be required to consider a consumer’s income or assets, debt obligations, alimony, child support and debt-to-income or residual income when making a qualified mortgage, subject to less prescriptive standards as set forth in the general ATR Rules, except with the respect to the monthly qualifying payment for the subject loan which would continue to be determined in accordance with the existing qualified mortgage rule). The CFPB also created a new category of a qualified mortgage, referred to as a “Seasoned QM”, which consists of first-lien, fixed rate loans that met certain performance requirements over a seasoning period of at least 36 months; are held in portfolio until the end of the seasoning period by the originating creditor or first purchaser; comply with general restrictions on product features and points and fees; and meet certain underwriting requirements. Furthermore, on October 20, 2020, the CFPB issued a final rule extending the sunset date for the GSE patch, which exempts GSE-backed loans from complying with the Ability-to-Repay/Qualified Mortgage rules, to the earlier of (i) the mandatory compliance date of the final rule amending the general qualified mortgage definition described above (which is July 1, 2021) or (ii) the date that the GSEs exit conservatorship.

## **Reverse Mortgage Securitization**

Despite the market chill and pressure exerted on certain issuers and servicers in the spring of 2020 because of the COVID-19 pandemic, the issuance of securitizations of reverse mortgages, both for FHA-insured home equity conversion mortgages (HECMs) and proprietary reverse mortgage (not FHA-insured) rallied in late spring and summer with a remarkable recovery. Hunton Andrews Kurth continues to lead the market in securitizations of this asset as initial purchaser and issuer counsel. The market has continued to evolve with respect to the structuring of these deals to meet investor demands as well as liquidity needs of the various issuers, including with respect to the securitization of assignable mortgage loans, as well as the implementation of revolving structures in certain programs.

We expect that reverse mortgage securitizations will continue to be prolific as issuers continue to leverage buyouts of nonperforming HECMs from Ginnie Mae HMBS and continue to refine and innovate with respect to the assignable HECM securitization market. With respect to the proprietary assets, we will see a steady state of securitization backed by these products, as the issuers continue to refine their private-label reverse mortgage loan offerings for eligible borrowers.

## FORECAST FOR 2021 CONTINUED

### Credit Risk Transfer

With the proposed and final capital rules promulgated in spring and fall of 2020, the two GSEs took divergent paths in terms of the continuation of their respective risk transfer programs. It is expected that in 2021, Freddie Mac will continue their STACR issuances and have published a proposed calendar. Fannie Mae has not yet published a calendar for CAS transactions in 2021. Hunton Andrews Kurth also continues to lead the market in representing underwriters for Fannie Mae issuers looking to issue additional debt backed by previously retained credit risk transfer bonds. In addition, despite the challenges presented by the outbreak of the COVID-19 pandemic, the latter half of 2020 saw one or more issuances from each of the mortgage insurers, and the industry expects that mortgage insurers will continue to leverage the insurance-linked note structure to manage their retention requirements.

### Warehouse Financing

Our warehouse lending practice continued to grow in 2020, amid financial industry disruption, servicer liquidity concerns and increased volume of residential mortgage loan originations and refinancings. Parties reassessed standard contract terms and pricing terms in the wake of COVID-19 and its effect on the markets. Because of our deep understanding of the industry, we were able to offer our clients the service and advice they needed in this ever-changing landscape, and our client base continues to expand.

In the wake of liquidity concerns and margin calls that occurred in the early months of the COVID-19 pandemic, both warehouse lenders and warehouse borrowers are reassessing the margin provisions of their contracts. Warehouse borrowers are pushing for greater restrictions on margin calls, or the elimination altogether of margin-based financing. While still rare, non-mark to market facilities may be a trend in this market that endures beyond the pandemic era.

Early buyout (EBO) financing got a shot in the arm this year when Ginnie Mae announced longer waiting periods before EBO loans can be re-pooled into Ginnie Mae securities. An

increase in forbearances has also spurred an abundance of EBO inventory. As a result, there has been an increased need for financing EBOs. We often see EBOs given a sublimit in a broader financing, and we have seen those sublimits balloon this year to accommodate the needs of warehouse borrowers in this space. In addition, we structured innovative EBO-only facilities, many involving funds from private equity players who had not previously invested in this asset. Mortgage industry participants will be monitoring the agency forbearance periods and its effect on the EBO market.

We also saw an uptick in gestation facilities, structured in a variety of ways, including repurchase facilities and participation facilities. These facilities involve financing of agency-eligible mortgage loans once those loans have been certified for pooling by the agency's custodian. Fannie Mae and Freddie Mac offer their own early purchase programs that act as competitors to gestation facilities, but sometimes gestation lenders offer better pricing. Moreover, because Ginnie Mae is a guarantor rather than a purchaser of loans, it does not offer an early purchase program, so regardless of Fannie Mae and Freddie Mac programs, many mortgage companies seek gestation facilities including for the advantageous pricing that they offer. Among the structures we saw this year were facilities in which warehouse lenders rehypothecated loans on their warehouse lines, once those loans were certified, to investors seeking low-risk assets with greater returns than alternatives.

Warehouse lenders incorporated the ability to finance electronic mortgages into their lending contracts in greater numbers this year due to client demand as originators grappled with the challenges of closing record numbers of refinancings in the midst of pandemic-driven lockdowns. Fannie Mae and Freddie Mac have accepted eNotes for many years, and in 2020, Ginnie Mae launched a digital mortgage program to do the same. But eNotes will never become the norm until they gain wide acceptance among warehouse lenders. This year, we saw many warehouse lenders seriously considering the issue. Many added sublimits to facilities, but set those sublimits to zero while they continue to assess the security interest implications of this novel asset.

## FORECAST FOR 2021 CONTINUED

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The incorporation of eNotes is indicative of a broader trend to expand the types of mortgage products financed under warehouse lending facilities. We continued to serve clients in matters involving agency-eligible collateral, nonperforming and re-performing mortgage loans, REO properties, non-QM mortgage loans, traditional and small-balance commercial loans, short-term investor mortgage loans, residential tax liens, CMBS and RMBS, fix-and-flip loans, investor rental loans and reverse mortgage loans. We expect that warehouse lending will continue to be an attractive financing option for an ever-expanding list of mortgage products.

As warehouse lenders have increased their outstanding balance sheets to meet demand, we continue to see and assist warehouse lenders with limiting their exposure through participation of their facilities and rehypothecation of certain assets via back-to-back repos and other rehypothecation structures. Tax and operational considerations for some borrowers have led to the use of SUBI trust structures, and balance sheet optimization for some bank lenders has led to mortgage assets backing DTC securities that are then put on repo.

Warehouse lenders and borrowers are anticipating the transition away from LIBOR, though no universal replacement benchmark rate was settled on in 2020. Warehouse lenders have been focused on adding flexibility to their contracts for the adoption of a suitable replacement benchmark.

The new year will undoubtedly bring changes resulting from the national elections and the fits and starts of the national and global economies. We look forward to helping our clients find opportunities and succeed in spite of any unexpected challenges in the coming year.

### Single-Family Rental

The single-family rental (SFR) market continued to perform well in 2020, as we have seen new lenders and new sponsors entering the market and established sponsors continuing to expand and diversify their portfolios. We have seen mergers between sponsors, and expect that consolidation to continue in 2021. We have been particularly active in advising clients in the sales, acquisitions, financings and refinancings of SFR property portfolios of various sizes, as well as advising our REIT clients as they have expanded into this space. Sponsors have expanded their portfolios to include build-to-rent portfolios as well as partnering with home builders/developers. We expect this market and these activities to remain healthy for 2021.

### Servicing Financing

Due to the uncertainty of the duration and impact of the COVID-19 pandemic on borrowers' ability to meet their obligations under their residential mortgages, servicers obtained servicer advance financing in 2020 at levels that rivaled servicer advance financing facilities during the Global Financial Crisis. In particular, nonbank servicers big and small were laser-focused on shoring up liquidity sources to make sure they had funds available if needed to make necessary advances in private label securitizations, Ginnie Mae MBS and GSE transactions. With a national emergency declared and stay-at-home orders issued across the nation and concerns about increased furloughs, layoffs and growing unemployment rolls and resulting forbearance or delinquency spikes, servicers were bracing themselves for the absolute worst in terms of advancing obligations they would have to make. As a result, there were a number of servicers that had not previously tapped investment banks or capital markets to help cover advancing obligations, that decided in light of these changing circumstances, to seek out and establish advance facilities.



## FORECAST FOR 2021 CONTINUED

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Notably during the first and second COVID-19 waves, delinquencies did not peak to the levels anticipated, and forbearances experienced an uptick initially, but in recent months, the percentage of loans in forbearance has been declining and housing prices remained strong. While it remains to be seen what the third wave will bring to the servicer advance financing space, it is possible that facilities that have been set up in the last several months as dry powder for use if delinquencies were to spike or forbearances were to increase may be accessed and drawn down. It is also uncertain whether a significant number of forbearances will become delinquencies depending on how the economic recovery will benefit mortgagors in their portfolio. It is certainly possible for there to be upsizes of existing facilities and the creation of new advance facilities to provide yet additional liquidity. The availability of servicer advance financing will be critical as the mortgage industry weathers this pandemic and will be key to the resulting economic recovery.

### **Mortgage Servicing Rights Financing**

In 2020, we saw the continued evolution of the financing of, and structuring investments in, servicing rights and servicing cash flows, especially with regard to Fannie Mae, Freddie Mac and Ginnie Mae mortgage servicing. The impact of the COVID-19 pandemic on servicers has continued to shift from its initial outbreak through the end of 2020, and we anticipate continued change moving into the beginning of 2021. Servicers and investment banks have been working for years to develop efficient ways to finance mortgage

servicing portfolios, and continued transformation took shape throughout 2020. Fannie Mae, Freddie Mac and Ginnie Mae have been sensitive to the needs of their servicers to access greater liquidity, particularly in connection with the likely increase in costs to service loans in forbearance; however, this interest has been balanced against the need for the agencies to retain control over the servicing of their mortgage loans and ensure their servicers retain adequate servicing compensation to service those loans (including through continued involvement of the Agency Acknowledgment Agreements). The GSEs and Ginnie Mae have also actively participated in transactions ensuring their servicers have access to outside investment and to the capital markets. In particular, Ginnie Mae expanded the scope of its Acknowledgment Agreement to allow for the financing of servicing advances and participated in several financing transactions. Hunton Andrews Kurth has been actively involved in the creation of such expanded structures, including the expansions of existing master trust MSR facilities to include advance financing in addition to the financing tied to a servicer's servicing income.

The use of excess servicing strips accelerated in 2020. Servicers like the structure because it expands access to capital beyond loan facilities to private equity investors, and opens a channel of capital that is not subject to mark-to-market risk. Investor interest in excess servicing strips has expanded significantly in 2020 as private equity funds and REITs seek ways to participate in an asset that many feel can produce an attractive yield, and that can be advantageous for tax and other purposes of private equity and REIT investors.



## FORECAST FOR 2021 CONTINUED

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Hunton Andrews Kurth brings together lawyers from our structured finance, corporate secured lending, private equity, tax and bankruptcy teams to focus our combined experience on assisting our clients in developing innovative transactions for financing and investing in MSRs, excess spread related to MSRs, and working with the agencies to find realistic balancing of the market's need for efficient financing and the agencies' need for control.

In 2020, we represented and advised numerous fund investors and REITs on excess spread investments through private equity and lending structures, and several servicers in connection with joint ventures to facilitate investments in servicing cash flows. We represented lenders and borrowers on several loans secured by agency servicing rights and agency and private-label pools of excess servicing spreads associated with MSR portfolios. We also represented lenders, underwriters and issuers in several securitizations secured by Ginnie Mae, Fannie Mae, Freddie Mac and private-label MSR portfolios.

As we make the turn into 2021, interest in MSRs continues to be strong both from the servicer and investor side. With the continuing uncertainty about the future, including the level of interest rates, prepayment speeds and the continuing impact of the COVID-19 pandemic, we expect that the level of uncertainty as to the value of MSRs will continue; however, we expect that the current interest in financing and acquisition of MSRs and interests therein will remain strong and potentially increase as we manage through the coming year.

### Highlights:

- We closed multilender and bilateral secured term loans with and without delayed draw capacity, in some instances coupled with financing for private equity and REIT debt investors to produce a desirable return, each with different features tailored to the respective lender groups;
- We advised on synthetic transfers of servicing cash flows through joint venture structures to enable private equity investment in servicing cash flows while leaving the servicing performance and the related compensation with the operating servicing company without mark-to-market exposure;
- We represented underwriters in connection with structuring, amending and financing structured financing facilities backed by excess servicing spreads and MSR collateral, including the addition of servicing advance financing to such facilities as demand for such financing grew in anticipation of pandemic-driven delinquencies and increased servicer advancing requirements, under which collateralized bonds were issued, both revolving bank-funded notes and term securities, including representing investment banks in the creation of securitization structures for the financing of Freddie Mac MSR collateral; and
- We advised on the financing of investment interests in excess servicing spread investment vehicles.
- Our multidisciplinary team is dedicated to remaining at the forefront of these market developments and we expect to facilitate more innovative solutions for our bank, investor and servicer clients in the coming year.

## FORECAST FOR 2021 CONTINUED

### MSR Sales and Servicing

It has been a bumpy ride for mortgage servicing rights in 2020 as the pandemic took its toll on the economy generally and mortgage loan performance specifically. Fortunately, as the year went on and there was more clarity on government programs, like the CARES Act, and guidelines and incentives from the various government mortgage agencies, the MSR market began to see less volatility and more activity. Of course, the increase in MSR activity was also driven by a surprisingly strong housing market and historically low mortgage interest rates (also a surprise). Even with increases in delinquencies and forbearances, prepayment rates have been through the roof, negatively impacting MSR valuations and creating a disincentive for sellers of MSRs. However, originators have been able to offset the declines in MSR valuations with strong growth in origination income resulting from the refinancing boom. As the year went on and MSR inventories have increased, we have seen an uptick in both bulk and flow MSR transactions. There has been demand from servicers trying to maintain or grow their servicing portfolios and also from opportunistic MSR investors looking to take advantage of low MSR valuations and achieve an attractive rate of return. Deal size has varied, ranging from under \$1 billion to over \$20 billion in UPB. We have worked with a number of MSR and servicing clients on new or updated servicing agreements to facilitate new MSR investments and new servicing relationships. For 2021, with a pent up supply of MSRs, increased demand and hopefully an improving economy, we anticipate increased MSR activity, including both bulk and flow transactions.

### Residential Whole Loan Transactions

Despite the many economic disruptions resulting from the pandemic, the housing market and mortgage origination business has remained surprisingly strong, driven in large part by housing demand and historically low interest rates, resulting in a large supply of new mortgage loan originations. There has been strong supply and demand for prime jumbo and agency conforming loans this year. However, after seeing increased acceptance in recent years, non-QM mortgage loans have taken a big hit as a result of the pandemic and the

impact on the performance of these loans, which have had substantial delinquencies and limited government support. We anticipate an increase in nonperforming and reperforming whole loan transactions involving non-QM mortgage loans. For jumbo loans, we have seen several of the big bank aggregators get back into the whole loan purchase and securitization business. Parties are negotiating or dusting off whole loan purchase and sale agreements for both servicing released and servicing retained transactions. Sellers are participating in bulk and flow mini-bulk transactions as well as flow “conduit” arrangements. Fortunately, the RMBS market (other than the non-QM market) did not shut down completely as result of the pandemic like it did after the last global financial crisis, which has maintained liquidity for the prime jumbo mortgage market. With the hope of an improving economy, we expect whole loan mortgage activity to remain strong, with a pickup in NPL/RPL transactions in response to the increase in nonperforming loans resulting from the economic downturn.

### 2020 Regulatory/CFPB Developments and Projections for 2021

The COVID-19 pandemic created a profound impact on regulatory developments relating to the mortgage market in 2020. In March, Congress passed sweeping legislation under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) in an attempt to combat the economic effects of COVID-19. Among the provisions designed to offer economic relief are the protections provided to certain borrowers with federally-backed mortgages, including loans purchased or securitized by Fannie Mae or Freddie Mac, and loans made, insured, or guaranteed by the Department of Housing and Urban Development, Department of Veterans Affairs, or Department of Agriculture. Specifically, under Section 4023 of the CARES Act, eligible borrowers with federally-backed mortgages on 1-4 unit properties may receive forbearance for up to two, 180-day periods. Under Section 4024, multifamily borrowers with federally-backed loans may also be eligible for forbearance relief.

## FORECAST FOR 2021 CONTINUED

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State-level legislative efforts also sought to provide economic relief to borrowers impacted by the coronavirus pandemic in 2020, including legislation aimed at covering the gaps of the CARES Act in providing protections to borrowers with non-federally backed mortgages. For example, New York passed expansive forbearance relief measures applicable to qualifying mortgage loans originated or serviced by any New York regulated institution.

As a result, we expect regulators in the coming year to carefully examine the servicing practices of and actions taken by financial institutions and mortgage loan servicers in response to the CARES Act and state forbearance laws. Areas that may be subject to increased scrutiny will include whether forbearance relief was equally marketed or available to eligible borrowers, whether interest or other charges were imposed on borrowers receiving forbearance or other forms of payment accommodations, and whether borrowers receiving relief experienced negative credit reporting as a result of a payment accommodation, among others.

In addition, given the upcoming change in the presidential administration, we expect a major shift in the priorities and focus of the federal consumer protection agencies, including the Consumer Financial Protection Bureau (CFPB), the watchdog agency created under the Obama administration. During Trump's tenure, the CFPB took a step back from the Obama-era focus on enforcement and instead focused on preventative rulemaking measures. But, if conventional wisdom holds true, President-elect Biden will likely replace the current director of the CFPB—Trump-appointee Kathy Kraninger—and enforcement activity will likely pick up soon thereafter.

With Biden expected to take office on January 20, 2021, a change in the regulatory climate is just around the corner. The new administration is likely to take immediate action in more closely scrutinizing the practices of banks and other financial service providers and push for additional legislation designed to further protect consumers impacted by COVID-19.

### Tax Impacts on Structured Finance and Securitization

The CARES Act created a number of unique issues for real estate securitizations relating to forbearance and deferral of mortgage loan payments, and Hunton Andrews Kurth tax attorneys were involved in developing helpful guidance that the Treasury Department issued mere weeks later. Over the course of this year, our tax attorneys developed and implemented tax structuring solutions and mortgage loan qualification criteria. More changes will be coming in 2021 as these relief provisions will no longer be available to borrowers. However, forbearance periods on existing agreements will extend well into the next year, so tax structuring and mortgage loan qualification will continue to be prominent issues in 2021.

In 2020, we saw SOFR come into common use as an index in floating-rate lending transactions as a replacement for LIBOR. The proposed Treasury Department regulations issued in the fall of 2019 gave taxpayers some certainty that qualified LIBOR replacement provisions would not trigger unintended deemed exchange of a debt instrument. Additional guidance issued in October 2020 created further safe harbors for the tax treatment of model LIBOR transition provisions drafted by the Alternative Reference Rates Committee and the International Swaps and Derivatives Association. This year, Hunton Andrews Kurth tax attorneys were also involved in seeking additional relief for REMICs in dealing with LIBOR transition. In 2021, we expect to see the market continue to shift away from using LIBOR as an index for floating-rate lending transactions and the safe harbor LIBOR replacement provisions coming into common usage.

Finally, given that Democrats won both Georgia Senate seats in the January runoff elections, we can expect some effort to make good on the Biden campaign's tax reform platform, including removing the SALT deduction cap, increasing the corporate income tax rate, creating a refundable advanceable first-time home buyer tax credit and eliminating the 1031 exchange benefits.

## FORECAST FOR 2021 CONTINUED

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### Fix-and-Flip Loans

Although the past year bore witness to unprecedented economic and market disturbances, the fix-and-flip/bridge loan market remained resilient overall. Originations and related secondary market trading, financing and securitization activities continued their strong pace and the outlook for 2021 is generally optimistic. The asset class in general has seen an influx of new purchasers and investors as well as an increase in financing activity, which bodes well for the new year as long as originations can keep pace. There are several unknowns that may affect market performance including increased foreclosure and eviction activity as well as changing home buying trends due to the effects of the pandemic. That said, fix-and-flip/bridge loan market participants may be able to take advantage of new opportunities and developments in various geographic markets due to such changing circumstances.

### Stressed Credit Response

During the pandemic, our team has been called upon by our clients to assist them on a variety of distressed and rescue financings and opportunistic transactions to take advantage of the disruption in the capital markets. We represented a number of public REITs in managing debt facilities in the wake of rapid and deep margin calls resulting from the collapse of MBS and related asset values in March and April. We immediately assembled a team of Restructuring, Lending, Equity Capital Markets and Structured Finance lawyers to represent these REITs on comprehensive forbearance negotiations across their credit facilities, including especially mark-to-market warehouse financing. The second stage for one such REIT entailed a complete restructuring and replacement of the company's credit facilities, corporate and structured, and equity infusions.

We also represented a number of private equity investors on comprehensive and coordinated investments in distressed leveraged companies, combining PIPEs, warrants, secured lending and structured finance components, again requiring multi-disciplinary teams working together for a common goal at lightning speed. Our Structured Finance team is deeply integrated with our other transactional practices, not a silo, and we function as one to bring comprehensive coverage whenever circumstances require.

### European Securitization Market Update

The European securitization markets started the year buoyantly as the market saw increased issuance and became more accustomed to new regulation including the Simple, Transparent and Standardized (STS) regulations and the Securitization Regulation as a whole. But as elsewhere in the world, the market was hit badly by the COVID-19 pandemic. Government assistance has been prompt though and the markets have been assisted by the increased liquidity provided by governments across Europe. The United Kingdom left the European Union in early 2020 and following a transition period is no longer part of the EU single market, customs Union and trade deals. A Trade and Cooperation Agreement applies to relations between the UK and European Union and provides for tariff-free trade in goods and limited market access in terms of services. An agreement in relation to financial services as a whole remains to be negotiated.

Hunton Andrews Kurth's London office has been active in advising clients on new transactions in Europe and on the regulatory impacts of marketing US transactions to European investors. Transactions have been in the consumer loan, corporate loan, RMBS and trade receivables markets. The firm also has an active practice in the solar securitization markets in Europe, Africa and the Middle East. The London tax team has been active advising the firm's transactional lawyers in London and the US offices. Set out below is a summary of certain new reporting rules in Europe.



## FORECAST FOR 2021 CONTINUED

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A recently introduced European Directive (known as “DAC 6”) imposes an obligation on EU-based taxpayers and their advisers to report certain types of cross-border transactions to their domestic tax authorities, for onward sharing with other tax authorities in the EU. The primary reporting obligation is on the advisers to the deal – known as “intermediaries”, and defined very broadly – provided they have some sort of nexus with the EU, rather than on the transaction parties themselves.

For a transaction to be reportable, at least one party to the transaction must be resident in an EU Member State, and the structure must display one or more of the specified “hallmarks”. Although the rules’ stated aim is to target tax avoidance arrangements, certain hallmarks are more indicative of a tax avoidance motive than others. Cross-border structured finance transactions are potentially within scope, and therefore financial institutions and relevant intermediaries should ensure they have systems to enable them to monitor potentially reportable cross-border deals in which they are involved. There is also a retrospective feature to the regime, meaning that deals going back to June 2018 are potentially within scope. Further to the UK’s departure from the European Union, the UK government has announced it will cease to apply these rules in the UK, but they will remain relevant throughout the remainder of the EU.

### Fintech

Although the pandemic may have slowed or delayed activity in certain areas of the fintech space in 2020, activity continued apace in other parts of the market. Payments platforms and credit card products were active. With their normal small business lending activity contracting due to the impact of COVID shutdowns on their small business clients, some existing fintech platforms pivoted and applied their technology to become Paycheck Protection Program lenders under the CARES Act.

The settlement of Colorado’s true lender litigation against Avant and Marlette was an important development for the bank partnership model used by many fintech consumer lending platforms. The settlement represents the first time a regulator has set out a framework for establishing that a bank partner is the true lender in relationship with a fintech in the context of a contemporary structure. How the settlement will be viewed by regulators in other jurisdictions and market participants will be closely watched.

The issuance of rules by the FDIC and the OCC codifying the “valid when made” rule, designed to lessen the shadow of the *Madden* decision and provide clarity on loan assignee rights, has sparked a number of legal challenges from states, furthering the divide between state and federal consumer finance regulators. Market participants continue to monitor the ongoing litigation and regulatory changes with a hope that there emerges meaningful clarity with respect to the ability of assignees of loans originated via fintechs in partnership with banks to assert contractual rates of interest.

Hunton Andrews Kurth’s 2020 activities in the fintech area included, among other things, representing purchasers of Paycheck Protection Program loans from fintech lenders, representing online lenders and loan sellers in securitizations and whole loan sales, advising online platforms on federal and state regulatory compliance and related matters (including investigations), developing flow purchase programs for online platforms and their investors, advising lenders to online lending platforms, establishing funds to invest in US fintech assets, advising offshore fund and nonfund investors in US federal income tax aspects of investing in US marketplace loans and other fintech assets, and representing banks providing origination services and warehouse programs to online lending platforms.

## THOUGHT LEADERSHIP

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In 2020, our lawyers spoke on panels, were quoted in industry publications, and authored client alerts covering a range of topics in the structured finance and securitization industry:

- Rudene Haynes was quoted in the article, “How Private Financing for Mortgage Servicers’ Advances is Holding Up” in *National Mortgage News* in December 2020.
- Amy Williams, Rudene Haynes and Janet McCrae spoke at IMN’s ABS East conference in December 2020. Amy moderated a panel on housing market trends; Rudene was a panelist on the servicer advance financing panel; and Janet was a panelist on the credit risk transfer market panel.
- Amy Williams, Rudene Haynes and Tina Locatelli served as co-moderators for the webinar, *Letting Go of LIBOR: Evaluating Fallbacks and Mitigating Risk*, in November 2020.
- Brent Lewis was a panelist on the RMBS panel for PLI’s New Developments in Securitization program in November 2020.
- Amy Williams, Rudene Haynes and Tina Locatelli served as co-moderators for the webinar, *Leading the LIBOR Transition: GSE and Government Mortgages and Securitizations*, in October 2020.
- Mike Nedzbala spoke at IMN’s Mortgage Servicing Right’s Forum on the panel, “Where Is Liquidity? Flow Agreements, Co-Issue, Bulk Sale Activity & Transaction Management” in October 2020.
- Tom Hiner spoke at IMN’s Mortgage Servicing Right’s Forum on the topic of Investing in Excess Servicing in October 2020.
- Rudene Haynes was quoted in the article, “Servicers Sidestep Tax Squeeze” in *Asset-Backed Alert* in October 2020.
- Amy Williams, Brent Lewis, Tara Elgie, Tina Locatelli, Shannon Daily and Will Van Thunen hosted a webinar, *Letting Go of LIBOR: A Look at Residential Mortgage Loans and RMBS*, in September 2020.
- Amy Williams, Steven Becker, Tara Elgie, JR Smith and Jason Harbour hosted a webinar, *Going Paperless Without Going Naked – Warehouse Financing During a Global Pandemic*, in September 2020.
- Kim MacLeod and Jessica Tobin hosted a webinar, *Navigating Credit Agreement Compliance Amid COVID-19 and Beyond*, in September 2020.
- Rudene Haynes was featured in *Virginia Lawyers Weekly* in the article “Finance Lawyer Shines Light on COVID’s Health Disparities” in September 2020.
- Amy Williams, Joe Buonanno and Kim MacLeod presented a webinar on legal and transactional issues related to LIBOR transition for the Association of Corporate Counsel in July 2020.
- Mike Nedzbala spoke at IMN’s Mortgage Servicing Rights June Update on the panel, “Is it a Generational Opportunity to Buy? MSR Opportunities for the Investor” in June 2020.
- Rudene Haynes was quoted in the article, “Servicers Gain Breathing Room” in *Asset-Backed Alert* in June 2020.
- Tara Elgie, Erin Fonte and Amy Williams hosted a webinar, *Sinking the Ink: eNotes, eMortgages and Hybrid Closings Amid COVID-19 and Beyond*, in June 2020.
- Amy Williams served as moderator for the LIBOR transition panel during Hunton Andrews Kurth’s Women in Capital Markets Forum in March 2020.



## THOUGHT LEADERSHIP CONTINUED

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### Client Alerts and Publications

[Ho, Ho, Ho...IBA Likely to Extend Certain USD LIBORs to June 30, 2023, December 2020](#)

[Will Congress Save Us From Going Over The LIBOR Cliff?, October 2020](#)

[Ginnie Mae Tackles Legacy LIBOR Multiclass Securities, October 2020](#)

[CFPB Issues Final Rule Extending the Sunset Date for GSE Patch, October 2020](#)

[CFPB Proposes Significant Changes to Regulations Governing Qualified Mortgages, September 2020](#)

[ARRC Announces Best Practices for LIBOR Transition, June 2020](#)

[New York Federal Reserve Publishes Updated FAQs for the 2020 Term Asset-Backed Securities Loan Facility \(TALF\), June 2020](#)

[SEC Amends Financial Disclosure Requirements for Acquisitions and Dispositions, June 2020](#)

[Leading the LIBOR Transition, May 2020](#)

[New York Fed Releases Frequently Asked Questions on the Term Asset-Backed Securities Loan Facility \(TALF\), May 2020](#)

[Ginnie Mae Announces Pass-Through Assistance Program Related to COVID-19, April 2020](#)

[Securizations by Independent Oil and Gas Companies, April 2020](#)

[Primary Dealer Credit Facility and Commercial Paper Funding Facility – COVID-19 Response, March 2020](#)

[Structured Finance Association Calls on Fed to Support US Consumers, Businesses, March 2020](#)



## RANKINGS AND AWARDS

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Over the past year, our structured finance team and individual lawyers have received a number of awards or recognitions and are consistently ranked among the top legal advisors in industry rankings and league tables.

- The firm ranked second for both underwriter counsel and issuer counsel for US asset- and mortgage-backed securitization in *Asset-Backed Alert's* 2020 year-end league tables. Combined, the firm was the most active law firm in 2020 in representing both underwriters and issuers, with a total of 142 deals and a total issuance value of more than \$65 billion.
- The firm received a Tier One ranking by *The Legal 500* for Structured Finance, with several lawyers receiving individual accolades.
- The firm received a Band Two ranking by *Chambers USA* for Capital Markets: Securitization, with several lawyers receiving individual rankings.
- The firm received a Tier Two ranking by US News Media Group for Securitization and Structured Finance Law.
- The firm was recognized as a “Leading Law Firm in US Securitization Industry” by *Asset-Backed Alert*.
- Vicki Tucker, a Structured Finance and Securitization counsel who retired at the end of September, has been awarded the American Bar Association’s annual Jean Allard Glass Cutter Award for her outstanding lifetime achievements. Each year, the award is presented to an exceptional woman business lawyer who has made significant contributions to the profession and the Business Law Section.



## DIVERSITY AND INCLUSION

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We believe that the recruitment, retention, and promotion of a diverse and inclusive workforce optimizes our ability to deliver excellent client service, including alignment with our clients' interests of staffing their legal teams with diverse talent. We are committed to being intentional in terms of implementing and promoting professional development opportunities and programming designed to appropriately recognize our women and minority lawyers and to provide career-enhancing pathways that will motivate them to grow and prosper at the firm.

The following are some highlights of our team's recent activities and initiatives to support the firm's commitment to diversity & inclusion:

- Three of the last four advancements to partner have been women or minority promotions.
- The three most recent attorneys named counsel were women.
- Nearly 30% of our structured finance team self-identify as being diverse, and minorities are represented in every seniority category, from partner to law clerk.
- Nearly 40% of our structured finance team are female.
- Over 40% of our partners are female, diverse or both.
- Our women structured finance lawyers participated in the 2020 WIN Summit on December 8, a full-day virtual learning experience bringing together inspirational women for powerful discussions exploring leadership solutions, actionable strategies, and lessons on negotiation.
- On September 17, 2020, Rudene Haynes moderated a webinar, "Facts, Faith and the Health Equity: Justice in Our Community" with Robert Winn, the recently appointed director of VCU Massey Cancer Center, Rev. F. Todd Gray of Fifth Street Baptist Church, Vanessa Sheppard, associate director of Massey, and Delegate Delores McQuinn. The event focused on health disparities, racial inequities and the impacts on cancer research, treatment and outcomes in particular relation to the Black community. The webinar (and their education on health disparities in the Black community during COVID-19 more generally) received coverage in a recent *Virginia Lawyers Weekly* article.
- Rudene Haynes currently serves as a firm wide hiring partner, and Janet McCrae and Steven Becker serve as co-heads of attorney hiring for the New York office. Most recently in this role, Rudene spearheaded a six-week entirely remote virtual summer program, providing opportunities for summer associates to work across offices and teams, assist with pro bono projects and participate in a diversity hackathon. Steven and Janet are committed to expanding the pipeline of diverse prospective candidates for the NYC summer program.
- Janet McCrae also serves as co-chair of the New York office Diversity Initiative.
- Brit Mohler serves on the Women's Subcommittee of the firm's Diversity & Inclusion Committee.
- In 2020, Jendy Daglio was named as one of the four recipients of the Greater Richmond Bar Foundation's Volunteer of the Year award for her efforts with the Eviction Diversion Program.

## NEW TEAM PARTNERS AND COUNSEL

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### **Jonathan Kim**

#### **Partner, Charlotte**

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Jonathan Kim was promoted to partner in April 2020. Jonathan serves as counsel to financial institutions and other market participants in capital markets matters with a primary focus on the financing, trading and securitization of various mortgage loan asset classes. His experience includes the representation of sellers, servicers, borrowers, lenders, issuers and underwriters in connection with mortgage-backed structured finance transactions. He also advises clients on compliance with enacted or proposed legislation, rules and regulations promulgated by the Securities and Exchange Commission, the Consumer Financial Protection Bureau and other governmental authorities.



### **Brit Mohler**

#### **Partner, New York**

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Brit Mohler was promoted to partner in April 2020. Brit represents borrowers, lenders, issuers and underwriters with respect to the financing and securitization of various asset classes primarily related to servicing rights, residential mortgage loans and credit risk collateral. She has experience advising clients in matters regarding servicer advance financing, excess spread in residential mortgage servicing rights and residential and other asset-backed securitizations.



### **Jennifer "Jendy" Daglio**

#### **Counsel, Richmond**

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Jennifer "Jendy" Daglio was promoted to counsel in March 2020. Jendy's practice focuses on structured finance, asset securitization, mortgage servicing rights, and other corporate finance transactions. She represents lenders and borrowers in a variety of financings including: repurchase and warehouse facilities involving residential and commercial mortgage loans, student loans, and agricultural loans; securitizations of mortgage servicing rights; and servicer advance financing facilities. Jendy's experience also includes providing advice on residential mortgage loan originations, regulatory matters including TRID and RESPA compliance, and compliance with Fannie Mae and Freddie Mac seller guides.



### **Tina Locatelli**

#### **Counsel, Miami**

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Tina Locatelli was promoted to counsel in March 2020. Tina's practice focuses on structured and corporate finance, including agency mortgage-backed securities and mortgage warehouse facilities. Tina has advised clients on global financing programs, including commercial paper facilities, issuances of US covered bonds and synthetic credit-linked notes, securitizations of US, UK, Korean and Malaysian residential mortgage loans, HELOCs, student loans, auto loans and credit cards, and issuances of short and long-term debt in the US, Latin America, Europe, Australia and Thailand. Tina is co-leader of the firm's LIBOR Transition client service team, and she has significant experience advising clients on complex matters involving a broad spectrum of business, legal, regulatory, risk management, and compliance issues.

## KEY CONTACTS

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**Tom Hiner**

**Partner, New York**

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Tom is a versatile lawyer with broad corporate finance experience, having represented financial institutions for over 26 years in acquisitions, asset-based finance, structured secured lending, venture capital and asset securitization transactions. Tom frequently works side by side with lawyers from our M&A, business lending, private equity, tax and bankruptcy teams in structuring and executing transactions, providing clients with a comprehensive approach to their structured finance transactions in a complex and constantly changing market. In recent years, Tom has emerged as a notable figure in mortgage servicer finance. In the last decade, he has led over 60 transactions for the financing of servicer advance receivables. The structures range from revolving loans to master securitization trusts that combine revolving variable funding notes with term asset-backed securities placed with institutional investors.



**Mike Nedzbala**

**Partner, Richmond**

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Mike handles complex, fast-paced negotiations on a wide range of secondary market transactions involving residential mortgage loans and mortgage servicing rights. He has been involved in the mortgage loan market since its inception. For over 25 years, he's seen the asset class evolve from early days to bull market to financial crisis and beyond. His long-term perspective on mortgage loans and their regulatory overlay allows him to be creative and persuasive in even the most challenging deals, and makes him an effective advocate in large transactions involving novel structures and numerous counterparties. With a successful track record on hundreds of transactions, Mike has represented banks, hedge funds, private equity investors, REITS, servicers, mortgage companies and others. In recent years, Mike has become especially well known for his work on MSR transactions and his understanding of how the servicing industry works.

## ABOUT US

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Hunton Andrews Kurth LLP is a longstanding market leader in structured finance and securitization. For more than 35 years, we have represented clients in connection with mortgage-backed and asset-backed securities offerings and other structured financing matters. Our practice is at the forefront of the development of securitization and structured finance techniques, and is closely aligned with our tax, restructuring, bankruptcy, regulatory, M&A, private equity, capital markets and energy practices. In a time that calls for creativity and opportunistic multi-disciplinary transactions, we are well positioned to invent and implement new structures with our clients.

Hunton Andrews Kurth LLP is a global law firm of more than 1,000 lawyers handling transactional, litigation and regulatory matters for clients in a myriad of industries including energy, financial services, real estate, retail and consumer products and technology. Areas of practice focus include capital markets, mergers and acquisitions, intellectual property, P3, public finance and infrastructure, and privacy and cybersecurity. With offices across the United States and in Europe, the Middle East and Asia, we're aligned with our clients' businesses and committed to delivering exceptional service.

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