DREHER TOMKIES SCHEIDERER LLP ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES SCHEIDERER LLP

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HUD ISSUES SAFE ACT RULES

The Department of Housing and Urban Development (HUD) issued the final rule pursuant to the Secure and Fair Enforcement Mortgage Licensing Act of 2008 (SAFE Act). The Rule sets forth the minimum standards for the state licensing of residential mortgage loan originators and clarifies and interprets certain statutory provisions that pertain to the scope of the licensing requirements. The SAFE Act directs states to adopt loan originator licensing requirements that meet the minimum standards specified in the SAFE Act and Rule. The Rule is effective August 29, 2011.

The Rule addresses whether seller financing is excluded from the SAFE Act licensing requirement for loan originators. HUD states in the Rule that a "residential mortgage loan" includes an installment sales contract secured by a dwelling. The SAFE Act defines "residential mortgage loan" to mean any loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling (as defined in the Truth in Lending Act) or residential real estate upon which is constructed or intended to be constructed a dwelling. According to HUD, for purposes of the SAFE Act, "equivalent consensual security interests" specifically include installment sales contracts. HUD states that inclusion of installment sales contracts in the scope of the definition of "residential mortgage loan" is consistent with the Truth in Lending Act and Regulation Z, both of which include in the definition of "residential mortgage transaction" a purchase money security interest arising under an installment sales contract. (We note that the Truth in Lending Act and Regulation Z do not use the term loan and expressly include installment sales contracts in the definition of "residential mortgage transaction," unlike the definition in the SAFE Act.) Thus, according to the Rule, loan originator licensing is applicable to those engaged in offering installment sales contracts secured by a dwelling.

While HUD declined to adopt an exception from licensing for those involved in a small number of transactions, HUD noted that the SAFE Act requires that an individual who "engages in the business" of a loan originator with respect to the financing be licensed. Thus, an individual must be <u>engaged in the business</u> of being a mortgage loan originator to trigger the licensing requirement. In the Appendix to the Rule HUD provides the following examples of when an individual generally <u>does not</u> "engage in the business of loan originator":

(1) An individual who acts as a loan originator in providing financing for the sale of that individual's own residence, provided that the individual does not act as a loan originator or provide financing for such sales so frequently and under such circumstances that it constitutes a habitual and commercial activity.

(2) An individual who acts as a loan originator in providing financing for the sale of a property owned by that individual, provided that such individual does not engage in such activity with habitualness.

(3) An individual who does not act as a loan originator habitually or repeatedly, provided that the source of prospective financing does not provide mortgage financing or perform other loan origination activities habitually or repeatedly.

Thus, if an individual does not habitually or repeatedly engage in loan originator activities, the individual is not required to be licensed.

What does this mean for seller financing under Ohio law and the state's mortgage loan originator licensing? The Ohio Mortgage Loan Act defines "mortgage loan originator" to mean an individual who for compensation or gain, or in anticipation of compensation or gain, does any of the following:

(1) Takes or offers to take a "residential mortgage loan" application.

(2) Assists or offers to assist a borrower in obtaining or applying to obtain a "residential mortgage loan" by, among other things, advising on loan terms, including rates, fees and other costs.

(3) Offers or negotiates terms of a residential mortgage loan.

(4) Issues or offers to issue a commitment for a "residential mortgage loan" to a borrower.

"Residential mortgage loan" means any loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or on residential real estate upon which is constructed or intended to be constructed a dwelling. For purposes of this division, "dwelling" has the same meaning as in the federal Truth in Lending Act.

Under Ohio law a "loan" is legally distinct from a "retail

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installment sales contract." Thus, a retail installment sales contract cannot be a residential mortgage loan under the current Ohio definition in the Mortgage Loan Act. However, Ohio is required to be in compliance with the federal standard. It appears that Ohio will be required to amend its law to include retail installment contracts within the definition of residential mortgage loan.

Please do not hesitate to contact us with any questions. ❑

✧ *Elizabeth Anstaett and Darrell Dreher*