



## ARIZONA DEPARTMENT OF FINANCIAL INSTITUTIONS

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### **REGULATORY BULLETIN**

**EA-12-01**

DATE: August 27, 2012

TO: All Escrow Agents

The purpose of this Regulatory Bulletin is to bring to the attention of escrow agents the licensing requirements for loan originators.

A.R.S. § 6-991(12)(a): "Loan originator": (a) Means a natural person who for compensation or gain or in the expectation of compensation or gain does any of the following: (i) Takes a residential mortgage loan application. (ii) Offers or negotiates terms of a residential mortgage loan. (iii) On behalf of a borrower, negotiates with a lender or noteholder to obtain a temporary or permanent modification in an existing residential mortgage loan agreement.

The licensing requirement for loan originators may apply to realtors, escrow agents or any other professionals or individuals if such a person engages in negotiations with a lender on behalf of a property owner regarding modification of an existing residential mortgage loan agreement, and if he or she does so for compensation or gain or in the expectation of compensation or gain. *See A.R.S. § 6-991.* Accordingly, unless exempted pursuant to A.R.S. §§ 6-991(12)(b) or 6-991.01, an individual engaging in negotiations on behalf of a borrower to obtain a loan modification is required to be licensed as a loan originator by the Arizona Department of Financial Institutions.

Whether communications regarding a modification of the mortgage loan agreement constitute "negotiations" within the meaning A.R.S. § 6-991(12)(a)(iii) calls for a fact specific inquiry and depends on particular circumstances of each transaction. As stated in the Department of Housing and Urban Development's ("HUD") Final Rule "SAFE Mortgage Licensing Act: Minimum Licensing Standards and Oversight Responsibilities," "acting as a conduit between the homebuyer and a financing source" could constitute a mere administrative task, if the activity consists of merely physically handling or faxing a document in accordance with the unsolicited request of the borrower or of a licensed loan originator, or it could constitute taking an application or offering or negotiating loan terms, depending on the facts and circumstances." See Final Rule, 76 Fed. Reg. 126, 38464, 38470 (June 30, 2011) (codified in 24 CFR pts. 30 and 3400). See also 24 C.F.R. § 3400.103(c)(2).<sup>1</sup>

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<sup>1</sup>An individual "offers or negotiates terms of a residential mortgage loan for compensation or gain" if the individual: (i)(A) Presents for consideration by a borrower or prospective borrower particular residential mortgage loan terms; (B) Communicates directly or indirectly with a borrower, or prospective borrower for the purpose of reaching a mutual understanding about prospective residential mortgage loan terms; or (C) Recommends, refers, or steers a borrower or prospective borrower to a particular lender or set of residential mortgage loan terms, in accordance with a duty to or incentive from any person other than the borrower or prospective borrower; and (ii) Receives or expects to receive payment of money or anything of value in connection with the activities described in paragraph (c)(2)(i) of this section or as a result of any residential mortgage loan terms entered into as a result of such activities). 24 C.F.R. § 3400.103(c)(2).

For more guidance on what types of communications constitute negotiations, please review the HUD's Final Rule interpreting the SAFE Act. *See* 24 CFR 3400.23; 3400.103(c)(2); Appendix A to 24 CFR Part 3400.

<http://mortgage.nationwidelicensingsystem.org/SAFE/NMLS%20Document%20Library/HUD%20Final%20SAFE%20Act%20Rule.pdf>

In addition to concerns regarding licensing, **escrow agents are reminded of their neutral role and statutory responsibilities, which include an implied duty to avoid any activity that would put an escrow agent in a position of a person who has rights, title or interest in connection with the sale, which such an escrow agent is charged with administering.** *See* A.R.S. § 6-801(4) (defining the terms "escrow" and "escrow agent"). Lastly, **escrow agents are reminded of their duties to comply strictly with the terms of the escrow agreement and to disclose facts that a reasonable escrow agent would perceive as evidence of fraud being committed on a party to the escrow.**

**For questions regarding this Regulatory Alert please contact Financial Services Division at (602) 771-2777.**