STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
P.O. BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 10-93

Seller-financing under the Tennessee Residential Lending, Brokerage and Servicing Act

QUESTION

Whether the Tennessee Residential Lending, Brokerage and Servicing Act, Tenn. Code Ann. §§ 45-13-101, et seq., requires an individual investment property owner to obtain a license before the individual may engage in seller-financing when he or she sells the investment property?

OPINION

An individual investment property owner who provides a purchaser with financing that qualifies as a "residential mortgage loan" must be licensed under Tenn. Code Ann. §§ 45-13-201, et seq., unless a statutory exception applies. Additionally, such an individual who provides such financing for compensation or gain or in the expectation of compensation or gain must be licensed under Tenn. Code Ann. §§ 45-13-301, et seq., unless a statutory exception applies.

ANALYSIS

The Tennessee Residential Lending, Brokerage and Servicing Act ("the Act") is codified at Tenn. Code Ann. §§ 45-13-101, et seq.[1] The purpose of the Act is "to ensure a sound system of making residential mortgage loans through the licensing, examination and regulation of mortgage lenders, mortgage loan brokers, mortgage loan servicers and mortgage loan originators." Tenn. Code Ann. § 45-13-102. The licensure of mortgage lenders, mortgage loan brokers, and mortgage loan servicers is addressed in Tenn. Code Ann. §§ 45-13-201, et seq., and the licensure of mortgage loan originators is addressed in Tenn. Code Ann. §§ 45-13-301, et seq.

Mortgage lenders, mortgage loan brokers, and mortgage loan servicers

Pursuant to Tenn. Code. Ann. § 45-13-201(a), "[n]o person shall act as a mortgage lender, mortgage loan broker or mortgage loan servicer in this state without first obtaining a license[.]" A "mortgage lender" is defined as "any person who makes a residential mortgage loan or holds the person out as able to make a residential mortgage loan." Tenn. Code Ann. §

[1] The General Assembly rewrote the Act in June of 2009; the "Tennessee Residential Lending, Brokerage and Servicing Act of 1998" was replaced in its entirety with Chapter 499 of the Public Acts of 2009. The General Assembly amended the Act to comply with the requirements of the federal "Secure and Fair Enforcement for Mortgage Licensing Act of 2008" (the "SAFE Act"), 12 U.S.C. §§ 5101, et seq., which was passed by Congress in an effort to combat predatory lending.

45-13-105(14). A "mortgage loan broker" is defined as:

> any person who for compensation or other gain, paid directly or indirectly, or in expectation of compensation or other gain, solicits, places, negotiates or originates a residential mortgage loan for another person or offers to solicit, place, negotiate or originate a residential mortgage loan for another person or who closes a residential mortgage loan that may be in the mortgage loan broker's own name with funds provided by another person and which loan is thereafter assigned to the person providing the funding of the loan, regardless of whether the acts are done directly or indirectly, through contact by telephone, by electronic means, by mail or in person with the borrower or borrowers or potential borrower or borrowers[.]

Tenn. Code Ann. § 45-13-105(15). Finally, a "mortgage loan servicer" is defined as "any person who, in the regular course of business, assumes responsibility for servicing and accepting payments for a residential mortgage loan[.]" Tenn. Code Ann. § 45-13-105(17).

Further, a "residential mortgage loan," a term that is included in all three of the definitions above, is defined as follows:

> any loan, including an extension of credit, 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 § 103(v) of the federal Truth in Lending Act, codified in 15 U.S.C. § 1602(v),[2] or residential real estate upon which is constructed or intended to be constructed a dwelling, as so defined[.]

Tenn. Code Ann. § 45-13-105(25).

In considering the definitions above, an individual investment property owner who provides a purchaser with financing that qualifies as a "residential mortgage loan" meets the definition of a "mortgage lender," at a minimum. As noted above, a "mortgage lender" is broadly defined as "any person who makes a residential mortgage loan or holds the person out as able to make a residential mortgage loan." Tenn. Code Ann. § 45-13-105(14). Further, the General Assembly has provided that the provisions of Tenn. Code Ann. §§ 45-13-101, *et seq*., are remedial and shall be liberally construed. Tenn. Code Ann. § 45-13-104. Accordingly, an individual investment property owner who provides a purchaser with financing that qualifies as a "residential mortgage loan" constitutes a "mortgage lender" because such an individual is a "person who makes a residential mortgage loan." Moreover, depending on the facts and circumstances with respect to the individual seller, the definitions of "mortgage loan broker" and "mortgage loan servicer" could be met, as well.

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[2] 15 U.S.C. § 1602(v) provides: "The term „dwelling' means a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives."

Consequently, an individual investment property owner who provides a purchaser with financing must be licensed pursuant to Tenn. Code Ann. §§ 45-13-201, *et seq*., unless the loan is not a "residential mortgage loan" or one of the statutory exceptions to licensure applies. As set forth above, subsection (a) of Tenn. Code. Ann. § 45-13-201 provides that "[n]o person shall act as a mortgage lender, mortgage loan broker or mortgage loan servicer in this state without first obtaining a license[.]" Subsection (b) of Tenn. Code Ann. § 45-13-201, however, provides:

> The requirement of a license under subsection (a) and this chapter do not apply to any of the following:
>
> > (1) Any depository institution;
> > (2) Any subsidiary of a depository institution that is owned and controlled by the depository institution and regulated by a federal banking agency;
> > (3) Any institution regulated by the farm credit administration;
> > (4) Any individual who makes a residential mortgage loan to, or offers or negotiates terms of a residential mortgage loan with or on behalf of, an immediate family member of the individual;
> > (5) An individual who makes a residential mortgage loan, or simply offers or negotiates terms of a residential mortgage loan, when the loan is secured by a dwelling that served as the individual's residence; and
> > (6) A licensed attorney who negotiates the terms of a residential mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client, unless the attorney is compensated by a mortgage lender, a mortgage loan broker, a mortgage loan originator or by any agent of the mortgage lender, mortgage loan broker or mortgage loan originator.

Further, subsection (c) of Tenn. Code Ann. § 45-13-201 provides:

> The requirement of a license to act as a mortgage lender under subsection (a) and the requirements of this chapter pertaining to mortgage lenders, unless otherwise stated, do not apply to any registrant making residential mortgage loans that is authorized to do so under the Industrial Loan and Thrift Companies Act, compiled in chapter 5 of this title; provided, however, that all mortgage loan originators of the registrant must be licensed under part 3 of this chapter.

Subsections (b)(1), (2), (3) and (6) of Tenn. Code Ann. § 45-13-201 are clearly not applicable to the question you raise. Subsection (b)(5) also does not appear to apply because we assume from your usage of the term "investment property" that the individual is not selling property that he or she held as a residence prior to the sale. Thus, subsection (b)(4) is the only exception in Tenn. Code Ann. § 45-13-201(b) that could apply. If the individual investment property owner is making a residential mortgage loan to an immediate family member, licensure is not required under Tenn. Code Ann. §§ 45-13-201, *et seq*. The exception contained in subsection (c) of Tenn. Code Ann. § 45-13-201 could also apply if the individual in your question is authorized to make residential home loans under the Industrial Loan and Thrift

Companies Act. It should be noted, however, that subsection (c) only provides an exception from licensure for "mortgage lenders"; if the individual meets the definition of a "mortgage loan broker" or "mortgage loan servicer," the individual must still be licensed pursuant to the provisions of Tenn. Code Ann. §§ 45-13-201, *et seq*.

Mortgage loan originators

The Act contains additional licensure provisions for individuals who meet the definition of a "mortgage loan originator." *See* Tenn. Code Ann. §§ 45-13-301, *et seq*. Tennessee Code Annotated § 45-13-301(a) provides:

> An individual, unless specifically exempted under subsection (b),[3] shall not engage in the business of a mortgage loan originator with respect to any dwelling located in this state without first obtaining and maintaining annually a license issued by the commissioner and without first being sponsored in accordance with § 45-13-303. Each individual must register with and maintain a valid unique identifier issued by the Nationwide Mortgage Licensing System and Registry in order to qualify for a mortgage loan originator license. The issuance of a mortgage lender or mortgage loan broker license to an individual does not exempt that individual from the requirements of this section.

Assuming an exemption to licensure does not apply, an individual meeting the definition of a mortgage loan originator must obtain a mortgage loan originator license. As set forth above, the issuance of a mortgage lender or mortgage loan broker license to an individual does not exempt that individual from the licensure requirements of Tenn. Code Ann. § 45-13-301.

A "mortgage loan originator" is defined in Tenn. Code Ann. § 45-13-105(16)(A) as follows:

> (A) In general, "mortgage loan originator":
> (i) Means an individual who for compensation or gain or in the expectation of compensation or gain:
> (a) Takes a residential mortgage loan application; or
> (b) Offers or negotiates terms of a residential mortgage loan;
> (ii) Does not include an individual engaged solely as a loan processor or underwriter except as otherwise provided in § 45-13-301(d);
> (iii) Does not include a person or entity that only performs real estate brokerage activities[4] and is licensed or registered in accordance with Tennessee law,

[3] Subsection (b) of Tenn. Code Ann. § 45-13-301 exempts "[r]egistered mortgage loan originators, as defined in § 45-13-105, as well as any individuals described in § 45-13-201(b)." (The exceptions set forth in Tenn. Code Ann. § 45-13-201(b) are discussed in the preceding section of this opinion.) Further, subsection (f) of Tenn. Code Ann. § 45-13-301 exempts certain individuals performing the activities of a manufactured home retailer or a dealer of modular building units.

[4] "Real estate brokerage activities" are described in Tenn. Code Ann. § 45-13-105(16)(B).

> unless the person or entity is compensated by a mortgage lender, mortgage loan broker, or other mortgage loan originator or by any agent of the mortgage lender, mortgage loan broker or other mortgage loan originator; and
>
> (iv) Does not include a person or entity solely involved in extensions of credit relating to timeshare plans, as defined in 11 U.S.C. § 101(53D).

Assuming subdivisions (ii) – (iv) of Tenn. Code Ann. § 45-13-105(16)(A) do not apply, an individual investment property owner who provides a purchaser with financing meets the definition of a "mortgage loan originator" when the financing qualifies as a "residential mortgage loan" and the individual provides the financing for compensation or gain or in the expectation of compensation or gain. *See* Tenn. Code Ann. § 45-13-105(16)(A)(i). Accordingly, such a person is subject to the licensure provisions of Tenn. Code Ann. § 45-13-301(a) unless an exemption from licensure applies. *See* Tenn. Code Ann. § 45-13-301(b), (f).

In sum, an individual investment property owner who provides a purchaser with financing that qualifies as a "residential mortgage loan" must be licensed under Tenn. Code Ann. §§ 45-13-201, *et seq*., unless a statutory exception applies. Additionally, such an individual who provides such financing for compensation or gain or in the expectation of compensation or gain must be licensed under Tenn. Code Ann. §§ 45-13-301, *et seq*., unless a statutory exception applies. Failure to procure a license when it is required, either pursuant to Tenn. Code Ann. § 45-13-201 or Tenn. Code Ann. § 45-13-301, results in a violation of Tenn. Code Ann. § 45-13-401(4), which provides that "[i]t is a violation of this chapter for any person subject to this chapter to [c]onduct any business covered by this chapter without holding a valid license as required under this chapter or assist or aide and abet any person in the conduct of business under this chapter without a valid license as required under this chapter[.]"

ROBERT E. COOPER, JR.
Attorney General and Reporter

BARRY TURNER
Deputy Attorney General

LAURA T. KIDWELL
Senior Counsel

Requested by:

The Honorable Craig Fitzhugh
State Representative
33 Legislative Plaza
Nashville, TN 37243-0182