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IDAHO DEPARTMENT OF FINANCE

Guidance Regarding What Constitutes Mortgage Lending Activities Under the Idaho Residential Mortgage Practices Act

I. Background

The Idaho Department of Finance continues to receive inquiries from businesses and individuals who make loans on real property, and who inquire whether they must be licensed under the Idaho Mortgage Practices Act (Act). In some instances, these lenders believe they are not required to be licensed because they make, what they claim to be, "commercial loans," or because the property that secures the loan is going to be used for income or investment purposes. They believe the Act requires only licensure of lenders making "residential" or "personal" loans. The Department has issued this Guidance to provide clarity on the scope of the licensing requirements under the Act.

II. Definition of Mortgage Lending Activities

The Act requires a license when a person (which can be a company, individual, or organization) that lends money engages in "mortgage lending activities" which include, in part, activities wherein a lender accepts or offers to accept applications for residential mortgage loans with the expectation of making a profit or gain (see Idaho Code § 26-31-201(7)).

III. Definition of Residential Mortgage Loan

The term "residential mortgage loan" is a defined term and means "any loan that is secured by a mortgage, deed of trust or other equivalent consensual security interest on a dwelling as defined in section 103(w) of the truth in lending act, located in Idaho, or on residential real estate." Idaho Code § 26-31-102(15).

IV. Definition of Residential Real Estate

Idaho Code § 26-31-102(16) defines "residential real estate" as "any real property located in Idaho upon which is constructed or intended to be constructed a dwelling as defined in section 103(w) of the truth in lending act."

V. Definition of Dwelling

A "dwelling," as defined in the Truth in Lending Act, is a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives. 12 U.S.C. § 1602(w).

VI. License Requirements

It is the Department's position that if a lender makes a loan to a borrower, to be secured by an existing dwelling, or by a dwelling that the borrower intends to construct, purchase, or refinance with the proceeds, the lender is making a residential mortgage loan and must be licensed under the Act.

It is also the Department's position that if the lender makes a loan to a borrower, secured by *more* than one dwelling that the borrower intends to construct, purchase, or refinance with the proceeds, the lender is not making a residential mortgage loan and is not required to be licensed under the Act. To determine whether a lender is required to be licensed, the decisive factor is not whether the loan is commercial in nature, but whether the lender is making a "residential mortgage loan" secured by property defined above.

For example, a lender could make a series of loans to a builder that are each secured by a separate parcel of property, and the builder uses the proceeds of each loan to construct a dwelling on the securing property. In this scenario, the lender must be licensed under the Act. Even though the loans to the builder may be considered by some to be commercial in nature, again – that is not a determining factor. Rather, in this scenario, the lender must be licensed because the builder will use the loan(s) to construct a dwelling on residential real estate.

Alternatively, a lender could make one loan secured by multiple parcels of property, or a single parcel of property, to a builder who uses the proceeds to build a number of dwellings on the property or properties. Because the security for the loan proceeds in this scenario consists of *more* than one dwelling, the loan is not secured by "residential real estate" as defined in the Act. Therefore, the lender need not be licensed.

Additionally, if a lender makes a loan that a borrower uses to acquire and rehabilitate, or just rehabilitate, a single dwelling that also secures the loan, the lender is engaged in the practice of mortgage lending activities and must be licensed. If the loan is secured by more than one dwelling and is used to acquire and rehabilitate, or just rehabilitate, those dwellings, the lender is not engaged in mortgage lending activities and is not required to be licensed under the Act.

Finally, a lender who does not engage in "mortgage lending activities" under the Act, but utilizes a mortgage broker, licensed under the Act, to originate any loan described in this Guidance, is not required to be licensed under the Act.