

**SELLER FINANCING:**  
**ANY PROBLEMS UNDER THE SAFE ACT OR MICHIGAN LAW**

In an effort to crack down on mortgage fraud, Congress passed the Safe and Fair Enforcement for Mortgage Licensing Act (the "SAFE Act"). The SAFE Act in turn requires states to establish uniform regulations and minimum licensing requirements for mortgage loan originators. Thus, Michigan passed the Mortgage Loan Originator Licensing Act, Act 75 of 2009 (the "Originator Act"). Questions have arisen as to whether REALTORS® or their client/sellers are subject to the Originator Act when a property is sold on land contract, purchase money mortgage or some other form of seller financing.

**REALTORS® AND THE ORIGINATOR ACT**

REALTORS® providing brokerage services to the public are not required to comply with the Originator Act, but the legal analysis is rather tortured to get to this simple conclusion. The definition of "mortgage loan originator" specifically excludes ". . . a person who only performs real estate brokerage activities and is licensed or registered under the laws of this state, unless the person is compensated by a lender, mortgage broker, or other mortgage loan originator or by any agent of a lender, mortgage broker, or other mortgage loan originator." The Originator Act then defines "real estate brokerage activity" as any activity that involves the provision of real estate

brokerage services to the public, including but not limited to the following listed activities:

- (i) Acting as a real estate agent or real estate broker for a buyer, seller, lessor, or lessee of real property.
- (ii) Bringing together parties interested in the sale, purchase, lease, rental, or exchange of real property.
- (iii) On behalf of any party, negotiating any portion of a contract relating to the sale, purchase, lease, rental, or exchange of real property, other than in connection with providing financing with respect to that contract.
- (iv) Engaging in any activity for which a person engaged in the activity is required to be registered or licensed as a real estate agent or real estate broker under any applicable law.
- (v) Offering to engage in any activity, or act in any capacity, described in subparagraphs (i), (ii), (iii), or (iv).

In sum, if a REALTOR® is engaged in the sale of property which includes a sale on land contract, purchase money mortgage or other form of seller financing, the REALTOR® is not covered by the Originator Act. Obviously, this would not be the case if the REALTOR® was providing financing for the transaction or, as indicated above, the REALTOR® was being compensated by a lender, mortgage broker or other mortgage loan originator by any agent of a lender, mortgage broker or other mortgage loan originator. REALTORS® who have affiliated business relationships with lenders or mortgage brokers will need

to have their attorneys review the Originator Act to determine if they need to comply with the Originator Act.

### **SELLERS AS LENDERS**

The definition of “residential mortgage loan” contained in the Originator Act neither expressly includes nor expressly excludes land contracts or purchase money mortgages. However, Section 5 of the Originator Act sets forth various exempt persons. These exempt persons include an individual who offers and negotiates terms of residential mortgage loan secured by a dwelling that served as his or her residence. Thus, even if a “residential mortgage loan” under the Originator Act is deemed to include a land contract and/or a purchase money mortgage, a seller is nonetheless clearly exempt under Section 5 of the Act in connection with the sale of his or her own principal residence. Section 5 also contains an exemption for an individual who offers or negotiates terms of a “residential mortgage loan” with or on behalf of an immediate family member.

### **SALES OF REAL ESTATE OTHER THAN THE SELLER’S RESIDENCE**

Assume that a seller is selling a second home, a rental property or some parcel of real estate other than his or her principal residence through the use of a land contract, purchase money mortgage or some other form of seller financing. Would that seller be subject to compliance with the Originator Act?

The key to determining whether or a seller selling real estate other than his or her principal residence would be subject to the Originator Act is in

the definition of “residential mortgage loan.” The Originator Act defines a residential mortgage loan as “. . . 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 residential real estate on which a person has constructed or intends to construct a dwelling.” It should be noted that the Originator Act also (rather unhelpfully) defines “residential real estate” as “. . . any real property located in this state on which a person has constructed or intends to construct a dwelling.” In turn, the Originator Act defines a “dwelling” by reference to the Truth in Lending Act. A “dwelling” under that statute is a residential structure or mobile home which contains 1-4 family housing units, or individual units of condominiums or cooperatives.

It is clear from these definitions that if the seller financing involves vacant land, a party store or anything other than a residential dwelling on land contract or with a purchase money mortgage, that seller does not need to comply with the Originator Act. It would also appear that a sale of a residential dwelling with a purchase money mortgage would be deemed a “residential mortgage loan.” What may be less clear is whether a sale of this same residential dwelling on land contract would be deemed to involve a “residential mortgage loan” – *i.e.*, whether a land contract seller would be deemed to be taking a “consensual security interest on a dwelling or residential real estate.”

It is our opinion based on Michigan case law that a very strong argument can be made that a sale on land contract does result in the creation of a consensual security interest on the sold parcel. It is well settled in Michigan that the vendee in a land contract (the buyer) is vested with equitable title in the land and legal title remains in the venter as security for payment of the purchase price. While legal title is held by the seller as security for payments on land contract, "equitable title passes to the buyer/vendee upon proper execution of the contract." *Zurcher v Herveat*, 238 Mich App 267, 291 (1999).

In considering whether land contract vendees have an insurable interest in property, the Michigan Court of Appeals has held that sellers assume: "the same position and status as a mortgagee for purposes of applying a mortgage clause to govern the rights of the vendor under an insurance policy issued to the land contract vendee." *Singer v American States Ins*, 245 Mich App 370, 378 (2001).

Based on this analysis, it is quite likely that a court would conclude that a land contract sale involving a residential property is in fact a "residential mortgage loan" within the meaning of the Originator Act.

### **CONCLUSION**

REALTORS® who are simply performing their regular duties in conjunction with a seller who is providing some form of seller financing, are not required to comply with the requirements of the Originator Act. Further, sellers

who are selling their own residence or non-residential property through some form of seller financing, do not need to comply with the Originator Act. Sellers who are offering seller financing on any type of property to members of their immediate family are similarly exempt. On the other hand, sellers who do not fit in any of these categories – *i.e.*, sellers who are selling residential property other than their principal residence to persons other than members of their immediate family through the use of some form of seller financing – may be required to comply with the Originator Act. These sellers should seek the advice of legal counsel.

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