

June 10, 2010

2010 Legislative Amendments to the Indiana Code Relating to First Lien Mortgage Act (the “Act”)

Effective July 1, 2010 (except as otherwise indicated)

Questions, Answers, and Administrative Interpretations: This document contains a Q&A relating to new provisions and amendments to the First Lien Mortgage Act (IC 24-4.4 et seq.). Careful review of the entire Act is recommended. The new provisions of the First Lien Mortgage Act can be found in Senate Bill 328 beginning at Section 5 (page 15) at the following link: <http://www.in.gov/dfi/SB0328.PDF>.

1. What additional exclusions or changes to existing exclusions from the Act have been adopted by the amendments contained in SB 328?

Answer – IC 24-4.4-1-202 provides that the Act does not apply to:

- Except for IC 24-4.4-2-401(2) (unique identifier issued by the National Mortgage Licensing System and Registry (NMLSR)), IC 24-4.4-2-402.3 (surety bond), IC 24-4.4-2-405(4) (report of condition filed with NMLSR), and IC 24-4.4-2-405(5) (additional financial statements filed with the department), a first lien mortgage transaction made:
 - (a) in compliance with the requirements of; and
 - (b) by a community development corporation (as defined in IC 4-4-28-2) acting as a subrecipient of funds from;
the Indiana housing and community development authority established by IC 5-20-1-3.
- Except for IC 24-4.4-2-401(2), IC 24-4.4-2-402.3, IC 24-4.4-2-405(4), and IC 24-4.4-2-405(5), a first lien mortgage transaction made by an entity that exclusively uses funds provided by the United States Department of Housing and Urban Development under Title 1 of the federal Housing and Community Development Act of 1974, Public Law 93-383, as amended (42 U.S.C. 5301 et seq.).
- An extension of credit originated by:
 - (a) a depository institution;
 - (b) subsidiaries that are:
 - (i) owned and controlled by a depository institution; and
 - (ii) regulated by a federal banking agency; or
 - (c) an institution regulated by the Farm Credit Administration.
- Except for IC 24-4.4-2-401(2), IC 24-4.4-2-402.3, IC 24-4.4-2-405(4), and IC 24-4.4-2-405(5), a credit union service organization that is majority owned, directly or indirectly, by one (1) or more credit unions.
- A first lien mortgage transaction originated by a registered mortgage loan originator, when acting for an entity described in IC 24-4.4-1-202 (6). However, a privately insured state chartered credit union shall comply with the system of mortgage loan originator registration developed by the Federal Financial Institutions Examinations Council under Section 1507 of the federal Safe and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE).
- An individual who offers or negotiates terms of a mortgage transaction with or on behalf of an immediate family member of the individual.
- An individual who offers or negotiates terms of a mortgage transaction secured by a dwelling that served as the individual's residence.
- Unless the attorney is compensated by:
 - (a) a lender;

- (b) a mortgage broker;
 - (c) another mortgage loan originator; or
 - (d) any agent of the lender, mortgage broker, or other mortgage loan originator described in clauses (a) through (c);
- a licensed attorney who negotiates the terms of a mortgage transaction on behalf of a client as an ancillary matter to the attorney's representation of the client.

2. If a person licensed or required to be licensed under the Act is also engaged in the loan brokerage business, what provisions of the Loan Brokerage Act (IC 23-2-5 et seq.) (and any rules adopted under the Loan Brokerage Act) apply to the person's loan brokerage business?

Answer – IC 24-4.4-1-202.5(1) provides that a person who is licensed under the Act and also engages in a loan brokerage business must comply with the following provisions of the Loan Brokerage Act:

- (a) IC 23-2-5-9 (Statute of frauds; required statement)
- (b) IC 23-2-5-9.1 (Real estate appraisals; improper influence; ownership interest in appraisal company)
- (c) IC 23-2-5-15 (Violation; liability for damages, interest, and attorney's fees; contract void)
- (d) IC 23-2-5-16 (Violations; felonies)
- (e) IC 23-2-5-17 (Rescission of transaction; limitations)
- (f) IC 23-2-5-18 (Account numbers; records; retention; breach of security of records; disclosure requirements; disposal of personal information)
- (g) IC 23-2-5-18.5 (Possession of funds belonging to others; duties to prospective borrower)
- (h) IC 23-2-5-20 (Prohibited acts)
- (i) IC 23-2-5-23 (Documents; license or registration number required), except for IC 23-2-5-23(2)(B) (Principal manager)
- (j) IC 23-2-5-24 (Cooperation with department of financial institutions)

3. What provisions relating to examinations and examination fees are applicable to persons required to be licensed by the Act who are also engaged in the loan brokerage business?

Answer – IC 24-4.4-1-202.5(2) provides that loan broker business transactions engaged in by persons licensed or required to be licensed under the Act are subject to examination by the department and to the examination fees described in IC 24-4.4-2-402(7)(c). Also, the department may cooperate with the securities division of the office of the secretary of state in the department's examination of loan broker business transactions and may use the securities division's examiners to conduct examinations.

4. How can a creditor preserve the right to collect a deficiency against a debtor in a short sale of a first lien mortgage transaction?

Answer – IC 24-4.4-2-201(3) provides that payment accepted by a creditor, servicer, or creditor's agent in connection with a short sale constitutes payment in full satisfaction of the first lien mortgage transaction unless the creditor, servicer, or creditor's agent obtains:

- (a) the following statement: "The debtor remains liable for any amount still owed under the first lien mortgage transaction."; or
- (b) a statement substantially similar to the statement set forth in subdivision (a);

acknowledged by the initials or signature of the debtor, on or before the date on which the short sale payment is accepted. See also IC 24-4.5-3-105 and IC 24-4.5-3-209.

5. Is a person who is the creditor in one or more first lien mortgage transactions in Indiana required to obtain from the Department a license under the Act?

Answer – Yes. IC 24-4.4-2-401(1) provides:

- Unless a person subject to this Act has first obtained a license from the department, the person shall not engage in Indiana as a creditor in first lien mortgage transactions.
- Prior law required a person who was *regularly engaged* in making first lien mortgage transactions to obtain a license. [Emphasis added.]
- A person was "regularly engaged" as a creditor in first lien mortgage transactions in Indiana if:
 - (a) the person acted as a creditor in first lien mortgage transactions in Indiana more than five (5) times in the preceding calendar year; or
 - (b) the person did not meet the numerical standards set forth in subdivision (a) in the preceding calendar year, but has or will meet the numerical standards set forth in subdivision (a) in the current calendar year.
- The *de minimis* exclusion has been eliminated in order for the Act to comply with the federal Safe and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE).

6. Can a creditor with multiple legal entities obtain a single license?

Answer – No. IC 24-4.4-2-401(1) provides that each legal entity that engages in Indiana as a creditor in first lien mortgage transactions must obtain a license.

7. Is a creditor organized under a single entity but with multiple branch locations required to obtain a license for each location?

Answer – No. IC 24-4.4-2-401(1) provides that a separate license is not required for each branch of a legal entity licensed under the Act.

8. What are the requirements to apply for a first lien mortgage lending license?

Answer – Each creditor licensed under the Act and entity exempt from licensing under the Act shall register with and maintain a valid unique identifier issued by the NMLSR.

- Each licensed mortgage loan originator must be employed by, and associated with, a licensed creditor, or an entity exempt from licensing under the Act, in the NMLSR in order to originate loans.

IC 24-4.4-2-401(2)

- In order for the department to find that the professional training and experience, financial responsibility, character, and fitness of:
 - the applicant and any significant affiliate of the applicant;
 - each executive officer, director, or manager of the applicant, or any other individual having a similar status or performing a similar function for the applicant; and
 - if known, each person directly or indirectly owning of record or owning beneficially at least ten percent (10%) of the outstanding shares of any class of equity security of the applicant

are such as to warrant belief that the business will be operated honestly and fairly within the purposes of the Act, evidence of compliance for the following must be submitted:

- (a) criminal background checks, as described in IC 24-4.4-2-402.1, including a national criminal history background check (as defined in IC 10-13-3-12) by the Federal Bureau of Investigation, for the individuals described in the preceding bullet point;

- (b) credit histories as described in IC 24-4.4-2-402.2 for the individuals described the preceding bullet point;
 - (c) surety bond requirements as described in IC 24-4.4-2-402.3;
 - (d) a review of licensure actions in Indiana and in other states; and
 - (e) other background checks considered necessary by the director.
- IC 24-4.4-2-402(4)

- Complete information about making application for a first lien mortgage lending license can be found on the NMLSR resource center at:
<http://mortgage.nationwidelicensingsystem.org/Pages/default.aspx>

9. What are the requirements for renewal of a first lien mortgage license?

Answer – IC 24-4.4-2-403(1) provides that a license issued under the Act must be renewed through the NMLSR not later than December 31 of each calendar year.

- The minimum standards for license renewal for a creditor include the following:
 - (a) The creditor has continued to meet the surety bond requirement under IC 24-4.4-2-402.3.
 - (b) The creditor has filed the creditor's 1 call report in a manner that satisfies IC 24-4.4-2-405(4).
 - (c) The creditor has paid all required fees for renewal of the license.
 - (d) The creditor and individuals described in IC 24-4.4-2-402(2) continue to meet all the standards for licensing contained in IC 24-4.4-2-402.

10. Under what circumstances can a director, officer or employee of a creditor be removed from office or employment?

Answer – IC 24-4.4-2-404.1 provides:

- If the director determines that a director, an officer, or an employee of a creditor:
 - (a) has committed a violation of a statute, a rule, a final cease and desist order, any condition imposed in writing by the director in connection with the granting of any application or other request by the creditor, or any written agreement between the creditor and the director or the department;
 - (b) has committed fraudulent or unconscionable conduct; or
 - (c) has been convicted of or has pleaded guilty or nolo contendere to a felony under the laws of Indiana or any other jurisdiction;

the director, subject to subsection (2), may issue and serve upon the officer, director, or employee a notice of the director's intent to issue an order removing the person from the person's office or employment, an order prohibiting any participation by the person in the conduct of the affairs of any creditor, or an order both removing the person and prohibiting the person's participation.

- A violation, practice, or breach specified in subsection (1) is subject to the authority of the director under subsection (1) if the director finds any of the following:
 - (a) The interests of the creditor's customers could be seriously prejudiced by reason of the violation or practice.
 - (b) The violation, practice, or breach involves personal dishonesty on the part of the officer, director, or employee involved.
 - (c) The violation, practice, or breach demonstrates a willful or continuing disregard by the officer, director, or employee for state and federal laws and regulations and for the consumer protections contained in this article.
- A person who:
 - (a) has been convicted of; or
 - (b) has pleaded guilty or nolo contendere to;

a felony under the laws of Indiana or any other jurisdiction may not serve as an officer, a director, or an employee of a creditor, or serve in any similar capacity, unless the person obtains the written consent of the director.

- A creditor that willfully permits a person to serve the creditor in violation of IC 24-4.4-2-404.1(3) is subject to a civil penalty of five hundred dollars (\$500) for each day the violation continues.

11. What are the requirements for a first lien mortgage creditor to offer reverse mortgages?

Answer – IC 24-4.4-2-503 provides:

- A creditor in a first lien mortgage transaction that:
 - (1) qualifies as a home equity conversion mortgage under the Federal Housing Administration's program; or
 - (2) otherwise constitutes a reverse mortgage;shall provide the debtor with a pamphlet that is approved by the department and that describes the availability of reverse mortgage counseling services provided by housing counselors approved by the Secretary of the United States Department of Housing and Urban Development (HUD), as provided in 24 CFR 206.41(a).
- The debtor must receive the counseling approved by HUD and present the creditor with the certificate described in 24 CFR 206.41(c) before the creditor may make a first lien mortgage transaction to the debtor.

12. What examination rights does the department have if a creditor contracts with an outside vendor?

Answer – IC 24-4.4-3-104 (6) provides:

- If a creditor contracts with an outside vendor to provide a service that would otherwise be undertaken internally by the creditor and be subject to the department's routine examination procedures, the person that provides the service to the creditor shall, at the request of the director, submit to an examination by the department.
- If the director determines that an examination is necessary or desirable, the examination may be made at the expense of the person to be examined.
- If the person to be examined refuses to permit the examination to be made, the director may order any creditor that is licensed under the Act and that receives services from the person refusing the examination to:
 - (a) discontinue receiving one (1) or more services from the person; or
 - (b) otherwise cease conducting business with the person.

13. What conduct constitutes a violation of the Act?

Answer - IC 24-4.4-3-104.6 provides that it is a violation of this article for a person or individual subject to this article to:

- directly or indirectly employ any scheme, device, or artifice to defraud or mislead borrowers or lenders or to defraud any person;
- engage in any unfair or deceptive practice toward any person;
- obtain property by fraud or misrepresentation;
- solicit or enter into a contract with a borrower that provides in substance that the person or individual subject to this article may earn a fee or commission through "best efforts" to obtain a loan even though no loan is actually obtained for the borrower;

- solicit, advertise, or enter into a contract for specific interest rates, points, or other financing terms unless the terms are actually available at the time of soliciting, advertising, or contracting;
- conduct any business covered by the Act without holding a valid license as required under the Act, or assist or aid and abet any person in the conduct of business under the Act without a valid license as required under the Act;
- fail to make disclosures as required by the Act or regulation adopted under the Act and any other applicable state or federal law regulation;
- fail to comply with the Act or rules adopted under the Act, or fail to comply with any other state or federal law, rule, or regulation, applicable to any business authorized or conducted under the Act;
- make, in any manner, any false or deceptive statement or representation, with regard to the rates, points, or other financing terms or conditions for a mortgage transaction, or engage in bait and switch advertising;
- negligently make any false statement or knowingly and willfully make any omission of material fact in connection with any information or reports filed with a governmental agency or the NMLSR or in connection with any investigation conducted by the director or another governmental agency;
- make any payment, threat, or promise, directly or indirectly, to any person for the purposes of influencing the independent judgment of the person in connection with a mortgage transaction, or make any payment, threat, or promise, directly or indirectly, to any appraiser of a property, for the purposes of influencing the independent judgment of the appraiser with respect to the value of the property;
- collect, charge, attempt to collect or charge, or use or propose any agreement purporting to collect or charge any fee prohibited by the Act;
- cause or require a borrower to obtain property insurance coverage in an amount that exceeds the replacement cost of the improvements as established by the property insurer;
- fail to account truthfully for money belonging to a party to a mortgage transaction; or
- knowingly withhold, abstract, remove, mutilate, destroy, or secrete any books, records, computer records, or other information subject to examination under the Act.