BANKING AND FINANCE: MORTGAGE LENDER AND BROKER ACT.

Mortgage broker may not provide compensated services in same real estate sales transaction in which affiliated real estate broker is providing compensated services. Term "partner" encompasses limited partner in mortgage broker that is organized as limited partnership.

The Honorable Terrie L. Suit
Member, House of Delegates
April 4, 2002

Issue Presented

You ask whether § 6.1-422(C) of the Code of Virginia permits a mortgage broker, who entered the business after February 25, 1989, to provide compensated services in the same real estate sales transaction in which an affiliated real estate broker is providing compensated services. In addition, you ask whether the term "partner," as used in defining an "affiliated person of a mortgage broker" in § 6.1-422(B)(5), encompasses a limited partner in a mortgage broker that is organized as a limited partnership.

Response

Responding to your first question, the mortgage broker may not provide compensated services in the same real estate sales transaction in which an affiliated real estate broker is providing compensated services. In response to your second question, the term "partner" in § 6.1-422(B)(5) encompasses a limited partner in a mortgage broker that is organized as a limited partnership.

Applicable Law and Discussion

Chapter 16 of Title 6.1 constitutes the Mortgage Lender and Broker Act and governs the licensing and activities of mortgage brokers. Specifically, § 6.1422 of the Act lists "[p]rohibited predatory practices" of such brokers. Subsections A and B of § 6.1-422 require full disclosure to borrowers of all various fees charged by licensed mortgage brokers. These subsections also prohibit such brokers from obtaining compensation or fees without notice to the borrower. Additionally, § 6.1-422(B)(5) prohibits a mortgage broker from obtaining any benefit for referrals without the borrower’s written consent, and states that a licensed mortgage broker shall not
receive compensation for negotiating, placing
or finding a mortgage loan where such mortgage
broker, or any person affiliated with such
mortgage broker, has otherwise acted as a real
estate broker, agent or salesman in connection
with the sale of the real estate which secures the
mortgage loan and such mortgage broker or
affiliated person has received or will receive any
other compensation or thing of value from the
lender, borrower, seller or any other person,
unless the borrower is given … notice in writing

Section 6.1-422(C) provides:

Notwithstanding the provisions of [§ 6.1-
422(B)(5)], no person shall act as a mortgage
broker in connection with any real estate sales
transaction in which such person, or any person
affiliated with such person (as defined in [§ 6.1-
422(B)(5)]), has acted as a real estate broker,
agent or salesman and has received or will
receive compensation in connection with such
transaction …. [Emphasis added.]

The 2001 Session of the General Assembly added the following
language to § 6.1-422(C):

However, the provisions of [the Mortgage
Lender and Broker Act] shall not be construed to
prohibit a real estate broker … who is either an
owner of an interest in a real estate firm or acts
as a real estate broker in a sole proprietorship
from having an ownership interest in a mortgage
broker …, or from receiving returns on
investment arising from such ownership interest
or payment of compensation for services
actually performed for such mortgage broker
....

Several rules of statutory construction apply to your requests.
First, "the primary objective of statutory construction is to
ascertain and give effect to legislative intent." Additionally,
statutes relating to the same subject should be considered in pari
materia. Furthermore, statutes dealing with the same subject
matter should be construed together to achieve a harmonious
result, resolving conflicts to give effect to legislative intent.
Lastly, "the plain, obvious, and rational meaning of a statute is
always to be preferred to any curious, narrow, or strained
construction."

The obvious intent of § 6.1-422 is to protect a borrower by
prohibiting a mortgage broker from profiting by self-dealing.
Specifically, the plain language of § 6.1-422(C) prohibits a
licensed mortgage broker and an affiliated real estate broker
from providing services in the same transaction. Although § 6.1-422(C) contains language outlining certain permissible activities between such brokers, reading subsection C in harmony with all provisions of § 6.1-422, it is my opinion that such language does not negate the prohibition against a mortgage broker and an affiliated real estate broker acting for compensation in the same transaction.

Accordingly, in answer to your first question, § 6.1-422(C) does not authorize a mortgage broker to provide compensated services in the same real estate sales transaction in which an affiliated real estate broker is providing compensated services.

Turning to your second question, an "affiliated person of a mortgage broker," as used in § 6.1-422(B)(5), is defined as "any person which is a subsidiary, stockholder, partner, trustee, director, officer or employee of a mortgage broker." By the plain language of the statute, the use of the term "partner" in defining an "affiliated person" encompasses a limited partner in a mortgage broker that is organized as a limited partnership. A limited partner of a limited partnership is analogous to a stockholder of a corporation, because both are affiliated with the other entity by reason of their ownership interests, and a stockholder is defined by § 6.1-422(B)(5) as an "affiliated person."

Accordingly, in answer to your second question, the use of the term "partner" in § 6.1-422(B)(5) encompasses a limited partner in a mortgage broker that is organized as a limited partnership.

Conclusion

It is my opinion that § 6.1-422(C) does not authorize a mortgage broker to provide compensated services in the same real estate sales transaction in which an affiliated real estate broker is providing compensated services, and it is my opinion that the use of the term "partner" in § 6.1-422(B)(5) encompasses a limited partner in a mortgage broker that is organized as a limited partnership.


8 The language of the 2001 amendment to § 6.1-422(C) makes clear the intent to allow real estate brokers to be affiliated with a mortgage broker and receive returns on investment arising from the ownership interest and compensation for services performed by the mortgage broker.

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