



State of New Hampshire

Banking Department

53 Regional Drive, Suite 200
Concord, New Hampshire 03301

Telephone: (603) 271-3561
FAX: (603) 271-1090 or (603) 271-0750

In Re: [REDACTED] Irrevocable Trust (“Petitioner”)

Petition for Declaratory Ruling

Document # 9847

Effective: January 6, 2011

This declaratory ruling is issued to the Petitioner with respect to the particular circumstances and facts discussed herein and represents a Department ruling on those circumstances and facts for this Petitioner only.

Pursuant to RSA 541-A:1, IV, and RSA 541-A:16, II(b), Petitioner requests a declaratory ruling with respect to certain definitions and exemptions under RSA Chapter 397-A.

Issue(s) Presented to the Department & Material Facts Presented by the Petitioner:

Does the granting of a residential mortgage loan on real property located in New Hampshire by an irrevocable trust to a beneficiary, who is the son of the grantor, fall within the “family member” exemption to licensure pursuant to RSA 397-A:4, III?

The Petitioner’s request is attached and is incorporated herein by reference (“Petition”).

Revised Statutes Annotated (RSA) at Issue:

The following New Hampshire statutes are relevant to the Petitioners’ request for a declaratory ruling (brief explanation provided for ease of reference only):

RSA 397-A:1, VIII-b	definition of “Individual”
RSA 397-A:1, VIII-c	definition of “Immediate family member”
RSA 397-A:1, XI	definition of “Loan”
RSA 397-A:1, XII	definition of “mortgage banker”
RSA 397-A:1, XIV	definition of “Mortgage loan” or “residential mortgage loan”
RSA 397-A:1, XVII	definition of “Originator” or “mortgage loan originator”
RSA 397-A:2, I	application of chapter
RSA 397-A:3, I	license required for making mortgage loans
RSA 397-A:3, II	license required for an originator
RSA 397-A:4, III	“immediate family member” exemption

All references to statutes are as they are in effect as of the date of this Declaratory Ruling.



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Ruling

Statutes and rules do not exist in a vacuum. Sound financial services policy requires a world view which takes into account facts and nuances when analyzing, interpreting and applying the law. In short – context matters.

NH RSA 397-A and the S.A.F.E. Act are designed to enhance borrower protection and reduce fraud by establishing minimum standards for licensing mortgage bankers and loan originators.¹ These protections, however, imply “a formality and commercial context that is wholly absent where an individual offers or negotiates terms of a residential mortgage loan with or on behalf of his or her immediate family.”² The law recognizes this distinction by exempting individuals who conduct residential mortgage loan transactions with or on behalf of an immediate family member. RSA 397-A:4, III.

In the instant matter, it is not an individual, but an irrevocable trust which will be granting the loan. Accordingly, the inquiry focuses on whether an irrevocable trust set up as described in the Petition, though technically not an individual as such is defined in RSA 397-A can take advantage of the “immediate family member” exemption. The answer in this case is yes.

The answer is in the affirmative because the commercial context lacking when a natural person offers a loan to a family member is also absent in the Petitioner’s fact pattern. The scenario presents a borrower who is both a beneficiary of the trust, the son of the grantor and the brother of a co-trustee. Additionally, the trustees will receive no compensation for the loan, the trust’s benefit will be limited to the interest paid on the loan (which as an income beneficiary, the borrower is potentially entitled to receive a ½ share), and the trust was established to manage assets for the benefit of the grantor’s children and grandchildren. Accordingly, the intent of the transaction is more personal than commercial.³ Further, in this context the trust vehicle through which the loan will be granted is not so removed from the grantor and the grantor’s desire to benefit her immediate family members as to push the transaction outside the personal sphere which the exemption encompasses. In addition, the proposed loan is made on reasonable terms, is consistent with the purposes of the trust and does not involve a member of the general public, thereby alleviating consumer harm concerns.

The Banking Department is charged with “regulating persons that engage in the business of offering, originating, making, funding, or brokering mortgage loans from the state of New Hampshire or mortgage loans secured by real property located in the state of New Hampshire.” RSA 397-A:2, I. The legislature also charged the commissioner with taking action in the interest of the public good, for the protection of consumers, and consistent with the policy and law of the state. RSA 397-A:20, VI. Finding that this transaction meets the spirit of the immediate family

¹ See U.S. Dept. of Housing and Urban Development; Office of Risk Management and Regulatory Affairs” Commentary on Model State Law” <http://www.hud.gov/offices/hsg/rmra/safe/cmsl.cfm>

² “SAFE Mortgage Licensing Act: HUD Responsibilities Under the SAFE Act; Proposed Rule,” 74 Federal Register 239 (Dec. 15, 2009), p 6651.

³ The use of the term “commercial” is not meant to imply that the loan is not a residential mortgage loan subject to RSA 397-A absent an exemption.



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member exemption satisfies the regulatory balance articulated by the legislature as to do otherwise could lead to an absurd or unjust end.⁴

Whereas, finding that this ruling is appropriate to the public interest and consistent with the purposes fairly intended by the policy and provisions of New Hampshire banking laws.

The Petitioner's request for an exemption from RSA 397-A under RSA 397-A:4, III for the transaction described in the Petition is hereby **GRANTED**.

/S/

Robert A. Fleury, Deputy Commissioner
New Hampshire Banking Department

1/6/2011
Date

⁴ See In re Alex C. – NH – 2009-399 (Nov. 30, 2010).



July 23, 2010

New Hampshire Bank Commissioner
New Hampshire Banking Department
53 Regional Drive Suite 200
Concord, NH 03301
Attn: General Counsel/DCR

Petition for Declaratory Ruling on Exemption from the Provisions of Chapter 397-A of the New Hampshire Revised Statutes Annotated (New Hampshire SAFE Act)

Dear Commissioner:

This letter constitutes a Petition requesting that you issue a ruling pursuant to the Declaratory Ruling Procedure and Process adopted by the New Hampshire Banking Department that [REDACTED] (the "Bank") and [REDACTED] as Trustees of the [REDACTED] Irrevocable Trust (the "Trust"), shall be exempt from the provisions of Chapter 397-A of the New Hampshire Revised Statutes Annotated (the "RSA"), known as the "New Hampshire SAFE Act," if they make a loan on behalf of the Trust to a beneficiary of the Trust secured by a mortgage of the beneficiary's residence in New Hampshire. This firm represents the Bank, which is the Petitioner in this matter, as a Trustee of the Trust. The Petitioner's address is:

[REDACTED]

The material facts supporting this Petition for a favorable ruling exempting the Trust from the provisions of RSA Chapter 397-A, which impose licensing requirements on any person engaged in the business of offering, originating, funding or brokering residential mortgage loans, are as follows:

1. The beneficiary of the Trust who would be receiving the mortgage loan is the son of the grantor of the Trust.
2. The Co-Trustee of the Trust, [REDACTED] is the sister of the beneficiary.
3. Both [REDACTED] as Co-Trustee, and, [REDACTED] as the grantor of the Trust, approve the loan.

4. The loan will be in the amount of \$225,000, which constitutes approximately 18% of the assets of the Trust, and will bear interest at the long-term applicable federal rate for monthly compounding (the "AFR Rate") in effect as of the date the loan is made to the beneficiary.

5. The Trustees of the Trust will not receive any compensation or other economic gain from making the mortgage loan to the beneficiary, and the Trust's economic benefit will be limited to the interest paid on the loan at the AFR Rate.

6. The Trust is not in the business of making, brokering, offering or funding residential mortgage loans; its sole purpose is to provide a vehicle for the Trustees to manage the assets contributed to the Trust by its grantor [REDACTED] for the benefit of her children and grandchildren.

7. The beneficiary receiving the mortgage loan is an "immediate family member" of the grantor of the Trust, as "immediate family member" is defined in RSA 397-A: 1(VIII-C) to include an individual's spouse, child, sibling, parent, grandparent and grandchild.

8. The beneficiary receiving the mortgage loan is an income beneficiary of the Trust, thereby potentially entitled to receive approximately one-half (1/2) of the interest paid to the Trust on the mortgage loan.

The Petitioner requests on behalf of the Trustees and the Trust a ruling that the mortgage loan which the Trustees contemplate making on behalf of the Trust to one of its beneficiaries qualifies for the exemption from the licensing requirements of RSA Chapter 397-A set forth in RSA Section 397-A: 4 (III), which specifically exempts from such licensing requirements "any individual who offers or negotiates terms of a residential mortgage loan with or on behalf of an immediate family member of the individual." In support of this position, we make the following points:

1. RSA Chapter 397-A was adopted to regulate "persons that engage in the business of offering, originating, making, funding, or brokering mortgage loans from the State of New Hampshire or mortgage loans secured by real estate located in the State of New Hampshire" (RSA Section 397-A: 2 (I)). The provisions of such Chapter 397-A were amended in 2008 and 2009 to conform to the licensing requirements imposed on the various states pursuant to the Secure and Fair Enforcement Act of 2008 (the "SAFE Act"). As described by the U.S. Department of Housing and Urban Development on its Home and Communities website at <http://www.hud.gov/hsg/ramh/safe/smllicact.cfm>, "the SAFE Act is designed to enhance consumer protection and reduce fraud by encouraging states to establish minimum standards for the licensing and registration of state-licensed mortgage loan originators and for the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) to establish and

maintain a nationwide mortgage licensing system and registry for the residential mortgage industry”

2. Given the consumer protection and anti-fraud purpose of the SAFE Act and RSA Chapter 397-A, it is clear that loans such as the one proposed to be made by the Trust to one of its beneficiaries are outside the scope and purpose of such legislation. The Trust does not engage in the business of “offering, originating, making, funding, or brokering mortgage loans” in New Hampshire or anywhere else, and does not engage in consumer transactions of any type with the general public. As stated above, the purpose of the Trust is to manage the assets contributed to the Trust for the benefit of its beneficiaries, which include the individual who will be receiving the residential mortgage loan from the Trust. To require the Trust to be licensed as a residential mortgage lender subject to a nationwide mortgage licensing system and registry simply to make a residential mortgage loan to a beneficiary of the Trust is inconsistent with the stated purposes of the SAFE Act and RSA Chapter 397-A.

3. The exemption from the provisions of RSA Chapter 397-A for residential mortgage loans to immediate family members should include trusts set up as estate planning vehicles by individuals for the benefit of their immediate family members. While an “individual” is defined as “a natural person” (RSA Section 397-A:1(VIII-b)), a trust set up by an individual should receive the same treatment under RSA Chapter 397-A as its grantor. Assuming that the exemption is available to individuals making residential mortgage loans to immediate family members because the underlying purpose of the statute to “enhance consumer protection and reduce fraud” does not come into play in such transactions, the same rationale applies to family trusts such as the Trust. Since it is common practice today to establish family trusts to manage and protect family wealth, it does not make sense to exclude such trusts from the exemption otherwise available to the individuals who establish the trusts. For purposes of the “immediate family member” exemption, the Trust should stand in the shoes of its grantor. Otherwise, grantors of family trusts will be limited in their ability to make residential mortgage loans to immediate family members which they otherwise would be permitted to make. The requirement that such trusts be licensed under Chapter 397-A will effectively reduce the scope of the immediate family exemption since it is unlikely a family trust will go through the process, and incur the expense, of becoming a licensed mortgage banker simply to be able to loan money to a beneficiary secured by a mortgage of the beneficiary’s residence.

4. As stated above, a mortgage loan from a trust which has a regulated national bank as a trustee, to a beneficiary of the trust who is the son of the grantor of the trust, is clearly not the type of residential mortgage loan that Chapter 397-A intended to regulate. The Trustees and the Trust, by making a single residential mortgage loan to a beneficiary for no compensation or other economic gain (other than interest on the loan at the AFR Rate), is not thereby in the business of “offering, originating, making, funding, or brokering mortgage loans.” The residential mortgage loan in this instance (i) is clearly intended to benefit a beneficiary of the Trust who has requested the loan, (ii) is consistent

with the purposes of the Trust, (iii) is made on reasonable terms, does not involve a member of the general public, and (iv) is made on terms which the Trustees have deemed to be within the scope of their fiduciary duties to the beneficiaries of the Trust. Furthermore, the beneficiary who has requested and will be receiving the mortgage loan, is an income beneficiary of the Trust, thereby being potentially entitled to receive approximately one-half (1/2) of the interest paid to the Trust on the mortgage loan. Given these factors, the beneficiary of the Trust receiving the mortgage loan is clearly not the type of consumer in the context of this transaction that the SAFE Act and Chapter 397-A are intended to protect.

5. The definitions of "mortgage banker", "mortgage broker" and "mortgage lender" set forth in RSA 397-A: 1(XII), (XIII) and (XIII-a), all provide that the person is making, originating, brokering or funding mortgage loans "for compensation or gain, or in the expectation of compensation or gain, either directly or indirectly." Other than the payment of interest on the loan at the AFR Rate, neither the Trustees nor the Trust will receive any profit or other economic gain, nor will the Trustees have any motive or expectation of profit or other economic gain, from the proposed mortgage loan. Accordingly, the Trustees and the Trust clearly do not fit within the category of persons that the SAFE Act and RSA Chapter 397-A have targeted for regulation.

For the reasons set forth above, Petitioner requests a declaratory ruling by the Bank Commissioner that the residential mortgage loan described in this Petition be deemed exempt from the provisions of RSA Chapter 397-A pursuant to RSA Section 397-A: 4 (III).

To Petitioner's knowledge, the issue raised in this Petition is (a) not under examination by the Banking Department, and/or (b) not pending in litigation.

This Petition has been reviewed by the Petitioner and the facts and law presented are true, accurate and complete to the best of the Petitioner's knowledge and belief.

If you have any questions or require further information regarding this matter, please contact the undersigned.

Very truly yours,


Curtis W. Little, Jr.

CWL/sce
