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Interpretation Re: Governmental Entity Liens and RSA 397-A

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I. Background

The Secure and Fair Enforcement Mortgage Licensing Act of 2008 (SAFE Act) was enacted on July 30, 2008 as part of the Housing and Economic Recovery Act of 2008 to “increase uniformity, reduce regulatory burden, enhance consumer protection, and reduce fraud” with regard to mortgage loan origination.¹ The law directed states to implement licensing and registration requirements for loan originators that meet the minimum standards specified in the SAFE Act. A state’s failure to implement such requirements results in the Department of Housing and Urban Development (HUD) regulating loan originators in that state. Pursuant to this federal mandate, NH RSA 397-A was amended to require licensing for mortgage loan originators effective April 1, 2009. It was further amended effective July 31, 2009.

Under the federal SAFE Act, a loan originator is someone who “takes a residential loan application” AND “offers or negotiates terms of a residential mortgage loan for compensation or gain.”² Subsequently, model legislation endorsed by HUD and adopted and enacted by New Hampshire changed the above referenced “AND” to an “OR,” which broadened the definition of a loan originator.³ The definition of a “mortgage loan” includes any loan secured by a *consensual security interest on a dwelling or any interest in real property or in residential real estate* (collectively referred to herein as “real property”).⁴

Liens against real property issued by a governmental entity⁵ to secure payment of a debt for governmental services such as taxes, water and sewer are non-consensual security interests; however, it is noted that if payment of a governmental lien is negotiated such activity could be

¹ P.L. 110-289, Title V – S.A.F.E. Mortgage Licensing Act, sec. 1502.

² P.L. 110-289, Title V – S.A.F.E. Mortgage Licensing Act, sec. 1503 (3)(A)(i).

³ RSA 397-A:1, XIV. HUD’s endorsement can be found at <http://www.hud.gov/offices/hsg/ramh/safe/cmsl.cfm>

⁴ See definitions at RSA 397-A:1, XIV (mortgage loan or residential mortgage loan), VI-c (dwelling), XXI (real property) and XXI-b (residential real estate).

⁵ Pursuant to 397-A:3,V(a) “governmental entities” means federal, New Hampshire state, and New Hampshire municipal governments, and the agencies, instrumentalities, and corporations thereof. The same definition is utilized for this analysis.

viewed as creating a “consensual security interest” if one reads RSA 397-A broadly. Such an interpretation would have the effect of subjecting governmental employees who negotiate payment plans or settlements to RSA 397-A regulation as mortgage loan originators and, correspondingly, the governmental entity to regulation as a mortgage broker or mortgage servicer.

II. Facts

Governmental entities perform numerous services and activities involving legislatively enabled authority to place liens on real property. Such services range from welfare administration under RSA 165, to laying out highways under RSA 231. The most significant activity, however, is tax collection under RSA 80. A non-exhaustive list of said lien authorities is as follows:

- Electric, Gas, and Water Systems RSA 38:22
- Housing Standards RSA 48-A:6
- Manufactured Housing Taxes RSA 72:7-a
- Tax Deferrals for Elderly and Disabled RSA 72:38-a
- Property Taxes RSA 73:25
- Timber Tax RSA 79:6
- Land Use Change Tax RSA 79-A:7
- Conservation Restrictions RSA 79-B:9
- Community Revitalization RSA 79-E:10
- Farm Structures RSA 79-F:4
- Tax Collection RSA 80
- Public Health Nuisances RSA 147:17-b
- Sewers RSA 149-I:11
- Hazardous Buildings RSA 155-B:9
- Local Regulated Excavations RSA 155-E:2
- Welfare RSA 165:28
- PILOT’s for Health and Education RSA 195-D:15
- Laying Out Highways RSA 231:30
- Public Parking Facilities RSA 231:124
- Planning and Zoning RSA 676:17-a

III. Finding

RSA 397-A was not intended to nor does it regulate involuntary or non-consensual liens. The liens listed above are involuntary and non-consensual, that is to say the consumer has no power or authority to stop the issuance of the lien should the governmental entity have grounds to issue one. The fact that some terms of payment or the total amount of the underlying amount due may be negotiated between a consumer and the governmental entity does not make the issuance or the totality of the lien consensual.

Accordingly, I find that liens issued by governmental entities pursuant to statutory authority are involuntary liens and do not create a “consensual security interest” as is required for a mortgage loan under RSA 397-A:1,XIV. This finding holds if terms of payment or the total sum of the lien are negotiated. As a result, 397-A does not apply to governmental entity liens that attach pursuant to statute regardless of whether the lien is a result of a negotiated settlement or other agreement, provided such lien could still attach absent such settlement or agreement.