



MARYLAND COMMISSIONER OF
FINANCIAL REGULATION
INDUSTRY ADVISORY
REGULATORY GUIDANCE



August 19, 2021

(Amending and replacing guidance issued July 28, 2021)

Employment of Mortgage Loan Originators:
W-2 Compensation not Mandated under Maryland Law
– And –
Dual Capacity in Real Estate Sales

In response to inquiries received from licensees, the Commissioner is providing the following guidance regarding certain issues relating to the employment of licensed mortgage loan originators (MLOs).

W-2 Compensation (Not Mandatory)

Md. Code Ann., Financial Institutions (FI) §11-602 prohibits the licensure of independent contractors as MLOs. FI §11-601 defines an independent contractor as “a person whose compensation is paid without a deduction for federal or State income tax.” Therefore, a mortgage lender licensee or a person exempt from licensure may not compensate an MLO other than through a W-2 relationship unless the employer withholds and remits federal and State income tax in accordance with applicable law and regulation, and reports this withholding through the appropriate form documenting that compensation.

FI §11-603 permits a person to act as an MLO “only when acting within the scope of employment” with a mortgage lender licensee or exempt person and prohibits an MLO from being employed by more than one lender. Further, Code of Maryland Regulations (COMAR) 09.03.06.23 requires a mortgage lender licensee to “at all times reasonably and adequately supervise those activities of the mortgage loan originator that are conducted within the scope of the mortgage loan originator’s employment.” Therefore, an MLO, whether compensated through a W-2 relationship or through some other relationship (such as through a Form 1099) may originate loans for only one employer, and must be reasonably and adequately supervised by that employer in full compliance with COMAR 09.03.06.23.

NOTE: The above guidance pertains solely to the licensing and conduct of MLO’s under Maryland’s Mortgage Loan Originators law. **It is not, and should not be construed as, guidance regarding the application of federal or state tax laws to these situations, nor should it be used in determining whether or not compensation of a particular MLO through a relationship other than W-2 is permissible under such tax laws.** Licensees should consult with a qualified legal or accounting professional regarding such matters. The Office of the Commissioner of Financial Regulation does not provide information or advice regarding tax laws.

Dual Capacity in Real Estate Sales

Maryland's Mortgage Loan Originator statute does not prohibit an MLO from receiving compensation for originating a mortgage loan for the purchase of a property while also receiving compensation as a real estate agent for the sale of that property. However, the Commissioner would consider the failure to timely disclose certain information regarding this dual capacity to be a violation of a MLO's duty of good faith and fair dealing in the MLO's communications and transactions with a borrower as required in COMAR 09.03.09.04; further, such a failure could be deemed an unfair, deceptive, and/or abusive act or practice. To avoid any such violation, an MLO who seeks to provide, for compensation, mortgage loan origination services to a homebuyer, while also receiving compensation as a real estate agent for the sale of the property, should disclose at a minimum to the borrower at or before the time of application:

- The MLO's NMLS Unique Identifier;
- The name and NMLS Unique Identifier of the MLO's employing lender;
- The fact that the MLO expects to receive compensation if the mortgage loan is made by the employing lender, in addition to any compensation received for the sale of the property;
- The fact that the borrower is not required to use the MLO for origination of the mortgage loan, and may choose a different MLO and/or a different lender; and
- The fact that the MLO cannot guarantee the borrower the best available loan terms.

In order to ensure that compliance with applicable law and regulation can be subsequently verified, the Commissioner strongly recommends that the disclosure be made in writing, and that a copy be retained by the lender.

NOTE: The above guidance notwithstanding, Md. Code Ann., Commercial Law §12-808, explicitly prohibits a mortgage broker from receiving a finder's fee (broker fee) if the broker (including an MLO employed by the mortgage broker) "is also acting as a real estate broker, insurer, salesman, attorney-at-law, or agent thereof in connection with the subject property or transaction."

For questions about this advisory, please contact Christine Brooks, Director of Mortgage Supervision, by phone at (410) 230-6074 or by email at christine.brooks@maryland.gov.

The Office of the Commissioner of Financial Regulation, a division of the Maryland Department of Labor, is Maryland's consumer financial protection agency and financial services regulator. For more information, please visit our website at www.labor.maryland.gov/finance.

