STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M040122A

On January 22, 2004, a Petition for Advisory Opinion was received from William H. Bradt, Esq., c/o Public Abstract Corporation, 407 South Warren Street, Syracuse, New York.

The issue raised by Petitioner, William H. Bradt, Esq., is whether the recording of a reverse mortgage placed on certain real property is exempt from the mortgage recording tax (Article ll of the Tax Law) based on the exemption provided in section 252-a.2 of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

A reverse mortgage borrower, Emma Fonti, who owns residential real property in New York and is over the age of 60, has been approved for and would like to receive the proceeds of a reverse mortgage that is in compliance with relevant federal laws and conforms to the Department of Housing and Urban Development ("HUD") regulations. Some time ago, she deeded the property to her children, who are under the age of 60, and retained a life estate interest in the property. Mrs. Fonti and her two children will be co-mortgagors in this transaction.

Applicable law and regulations

Section 252-a.2 of the Tax Law, which provides an exemption for reverse mortgages, provides:

> Reverse mortgages conforming to the provisions of section two hundred eighty or two hundred eighty-a of the real property law securing obligations of mortgagors or exempted therefrom pursuant to subdivision four of section two hundred eighty or subdivision four of section two hundred eighty-a of the real property law shall be exempt from any tax or fee imposed by this article. In each case where an exemption is claimed under this subdivision, the lender shall provide documentation in a format approved by the commissioner of taxation and finance to enable recording officers to affirmatively determine when a mortgage being presented for recording is a reverse mortgage conforming to such provisions of the real property law and entitled to an exemption under this subdivision. Where such documentation is not furnished, the maximum principal debt or obligation which shall be the measure of the tax imposed by and pursuant to the authority of this article in the case of a reverse mortgage shall be the proceeds of the loan which the authorized lender is obligated to lend the borrower at the execution of such mortgage or at any time thereafter but determined without regard to any contingency relating to the addition of any unpaid interest to principal or relating to any percentage of the future appreciation of the property securing the loan as consideration or additional consideration for the making of the loan.

> Provided, however, if subsequent to the recording of such mortgage, the proceeds which the authorized lender is obligated to lend the borrower are increased at any time, such new or further indebtedness or obligation shall be the measure of the tax at such time unless at that time an exemption is applicable under the first sentence of this subdivision or otherwise.

Section 280(4) of the Real Property Law, which deals with reverse mortgage loans for persons sixty years of age or older, provides:

> The banking board shall adopt those rules or regulations as it considers appropriate to govern reverse mortgage loans made pursuant to this section. No reverse mortgage loan shall be made unless it conforms to the requirements of this section and such rules and regulations as the banking board may adopt except those reverse mortgage loans made pursuant to section two hundred eighty-a of this article. A reverse mortgage loan made by any authorized lender, national banking association, federal savings and loan association or federal credit union in conformity with applicable federal laws and regulations specifically regulating reverse mortgage loans shall be deemed to conform to the requirements of this section unless such reverse mortgage loan fails to conform to such rules and regulations as the banking board has expressly declared to be neither preempted by, nor otherwise inconsistent with such federal laws or regulations....

Section 644.1(c)(2)(i) of the Mortgage Recording Tax Regulations (the "Regulations") provides that in order to claim an exemption from the mortgage recording taxes based on the claim that a mortgage is a reverse mortgage made pursuant to the provisions of section 280 of the Real Property Law, an affidavit, made in duplicate, signed by the mortgagee, setting forth the following must be submitted to the recording officer at the time the mortgage is presented for recording:

> *(a)* the mortgage is a reverse mortgage given by a mortgagor who is or mortgagors all of whom are at least 60 years of age;
>
> *(b)* the reverse mortgage is of real property improved by a one- to four-family residence or condominium unit that is the residence of the mortgagor or mortgagors; and
>
> *(c)* the reverse mortgage conforms to all other provisions of section 280 of the Real Property Law.

Section 79.1(b) of Part 79 of the General Regulations of the Banking Board (3 NYCRR Part 79), which governs reverse mortgages, provides:

> Neither this Part nor Parts 38, 39, 80 or 82 shall apply to any loan which conforms to the requirements of the Demonstration Program of Insurance of Home Equity Conversion Mortgages for Elderly Homeowners, also known as the "HUD/HECM" reverse mortgage loan program, 12 USC §1715z-20.

Paragraph 4-4A of section 4235.1 of the HUD Handbook-Revision No. 1 (the "Handbook"), which covers the HUD approved Reverse Mortgage Program, provides:

> A. The borrower's age. All borrowers must be at least 62 years old when they sign the Uniform Residential Loan Application (URLA) and the HUD/VA Addendum (Form HUD 92900-A). The lender should request evidence of the ages of all borrowers, and accept all reasonable forms of evidence.

Paragraph 4-4C of section 4235.1 provides, in part:

> C. The borrower's principal residence. The property must be the principal residence of each borrower, as defined in Paragraph 4-7A of this chapter....

Paragraph 4-5 of section 4235.1 of the Handbook provides that HUD will insure Home Equity Conversion Mortgages ("HECM's") for property held in the name of an inter vivos trust, also known as a living trust. Paragraph 4-5 provides, in part:

> HUD will insure HECMs on property held in the name of an inter vivos trust, also known as a living trust. In general, a living trust is created during the lifetime of a person [as opposed to a testamentary trust which is created by the person's will after his/her death]. A living trust is created when the owner of property conveys his/her property to a trust for his or her own benefit or for that of a third party [the beneficiaries]. The trust holds legal title and the beneficiary holds equitable title. The person may name him/herself as the beneficiary. The trustee is under a fiduciary responsibility to hold and manage the trust assets for the beneficiary. The trustee's responsibilities are set out in a trust agreement.
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> Property held in a land trust is eligible for a HECM if the requirements for a living trust are met....

Opinion

The Edna Huff Trust, Adv Op Comm T&F, May 22, 1996, TSB-A-96(4)R, addressed the reverse mortgage exemption pursuant to section 252-a.2 of the Tax Law, relating to a reverse mortgage conforming to the provisions of section 280-a of the Real Property Law. The relevant provisions of section 280-a are substantively the same as section 280, but cover reverse mortgages by persons at least 70 rather than 60 years of age.

The facts in *The Edna Huff Trust*, *supra*, indicated that the grantor, Edna Huff, contributed the property to a living trust which complied with the requirements of paragraph 4-5 of section 4235.1 of the Handbook. The trustees were the grantor's adult son and daughter. A reverse equity mortgage was given by the grantor and the trustees to the Bank of New York Mortgage Company. The lien of the mortgage encumbered a single-family house and the premises were occupied solely by the grantor. The grantor created the Trust, which was irrevocable, in 1988 and conveyed the premises to the Trust. The grantor reserved a life estate in the premises upon the conveyance to the Trust.

The advisory opinion concluded that, provided that the mortgage was in conformity with federal law and regulations addressing reverse mortgages and not inconsistent with any regulations of the Banking Board, it would be deemed to conform with the requirements of section 280-a of the Real Property Law and be exempt from the mortgage recording tax under section 252-a.2 of the Tax Law. Accordingly, the mortgage could be recorded without payment of the tax if the affidavit described in section 644.1(c)(2)(ii) of the Regulations establishing the exemption was submitted to the recording officer at the time of recording.

It does not appear in the present case that the facts surrounding the reverse mortgage described by Petitioner conform to the HUD requirements. In the present case, the mortgagors consist of Emma Fonti and her two children, both of whom are less than sixty years of age. Like Edna Huff, Mrs. Fonti has retained only a life estate interest in the property, which constitutes her principal residence. However, since there is no living trust agreement, her children, the co-mortgagors, hold the remainder interest in the property. Therefore, it appears that the reverse mortgage in this case does not meet the requirements of paragraphs 4-4A and 4-4C of section 4235.1 of the Handbook.

Unless it can be demonstrated that the mortgage in this case does actually qualify under the HUD/HECM reverse mortgage loan program, it would not appear to comply with section 280 of the Real Property Law. Moreover, since the statements required under clauses (a) and (c) on the affidavit required by section 644.1(c)(2)(i) of the Regulations would not be satisfied, the reverse mortgage exemption provided under section 252-a.2 of the Tax Law would not be available.

DATED: July 19, 2004

/s/
Jonathan Pessen
Tax Regulations Specialist IV
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.