STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE COMPLEX
1511 PONTIAC AVENUE
CRANSTON, RI 02920

IN THE MATTER OF:	:	
Daniel Petronelli,	:	**DBR No. 09-B-0237**
Respondent.	:	

DECISION

Hearing Officer: Catherine R. Warren, Esquire

Hearing Held: June 2 and 30, 2010

Appearances:

For the Department of Business Regulation: Neena Sinha Savage, Esquire

For Daniel Petronelli, Respondent: *pro se*

I. INTRODUCTION

The above-entitled matter came before the Department of Business Regulation ("Department") pursuant to a Notice of Denial of Application for License as a Mortgage Loan Originator and of Opportunity of Hearing ("Notice of Denial") and of a Notice of Hearing and Appointment of Hearing Officer issued to Daniel Petronelli ("Respondent"). A prehearing conference was held on January 20, 2010 after which the Notice of Denial was amended by the Department. Hearings were held on June 2 and 30, 2010. The Department was represented by counsel and the Respondent represented himself. Subsequent to the hearing, both parties filed written arguments with the record closing on September 17, 2010.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 19-14.10-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

III. ISSUE

The parties stipulated to the statutory basis of the Notice of Denial as being R.I. Gen. Laws § 19-14.10-6 with the issue at hearing being whether the Respondent should be granted a mortgage broker license pursuant to R.I. Gen. Laws § 19-14.10-6.

IV. MATERIAL FACTS AND TESTIMONY

The Respondent testified on the Department's behalf. He testified that he currently performs administrative duties for Direct Finance, a mortgage broker company, and has been there since 2006. He testified that his actions for which he was convicted occurred between 1992 through 1995 during his employment at LC Wegard ("Wegard"). He testified that Wegard had opened up a branch office in Rhode Island where he was the branch manager and worked for Mike McDermott ("McDermott"). He testified that McDermott was in the New Jersey office and sent the sales scripts (the basis for the conviction) to the Rhode Island office but that he (Respondent) performed his own research. He testified he was indicted in July, 1998. He testified that he pled guilty and was sentenced to 13 months in prison and probation and is no longer on probation. The Respondent testified that he never used the scripts because he thought they were stupid. He testified that the problem with the scripts were that they omitted risks factors and were not fair and balanced taken by themselves. He testified that McDermott wrote the scripts. He testified that he asked compliance in the New Jersey office whether the scripts were OK and was told they were.

Sara Paterson Cabral ("Cabral"), Supervisor of Examinations, testified on behalf of the Department. She testified that she oversaw the examination of this application and is familiar with the Respondent's application. She testified that the Respondent was a branch manager and should have understood the operations of the office and the fraudulent activity. She testified that his failure to recognize criminal activity reflects on his competence and the mortgage industry needs honesty and integrity.

The Respondent testified on his behalf. He testified that he had been a stockbroker for eight (8) years prior to 1992. He testified that he eventually quit Wegard and took his clients with him and went to another company. He testified that after his release from prison, he worked as a mortgage broker (loan officer) for eight (8) years for three (3) different companies including Direct Finance. He testified that he didn't plead guilty to deceptive devices but rather to being part of the whole system. He testified he feels that under the Federal law, the SAFE Act (below), he falls under the seven (7) years provision since he was not convicted of fraud since conspiracy is a separate offense. He testified that he would agree to any kind of conditional license.

On cross-examination, the Respondent testified that McDermott was responsible for the sales script and faxed them to the office. He testified he that he took full responsibility for his actions when he pled guilty and he should have said "no" to the scripts. He testified that the scripts omitted risk factors and that, "I was wrong. I shouldn't have let them in the office." He testified his that he felt he was making sure the brokers gave a fair and balanced product by giving other information besides the scripts. He testified that if he is licensed, he is not intending to supervise. He testified that the scripts were already part of a company-wide practice when he joined the company.

Robert K. Harrington ("Harrington") testified on behalf of the Respondent. He testified that he is an attorney with a general practice in Rhode Island and Massachusetts. He testified he has known the Respondent for five (5) years and worked professionally with him for three (3) years. He testified he never received a complaint from a client regarding the Respondent and feels the Respondent's clients are extremely satisfied with him. See Respondent's Exhibit 16 (Harrington's letter of recommendation).

On cross-examination, Harrington testified he had a close working relationship with the Respondent as the closing attorney for the Respondent's customers. He testified that he would receive a faxed title order from the Respondent's company and would conduct the title exams and if there were any issues, he would try to resolve them. He testified he has a rudimentary knowledge of the Respondent's criminal acts.

Ryan Racicot ("Racicot") testified on behalf of the Respondent. He testified that he is Director of Operations at Direct Finance and he has worked with the Respondent since 2007 and has reviewed all of his files. He testified that the Respondent takes direction well and when he was working as a loan officer, he had a good relationship with his clients and consistently followed through and if the Respondent is given the opportunity, he would serve his clients well. He testified that the Respondent now works providing clerical support since he cannot be a loan officer. He testified there were no complaints against the Respondent when he working as a loan officer. See Respondent's Exhibit 20 (letter of reference from Racicot as well as a letter from Alain Valles, president of Direct Finance, in support of Respondent).

Timothy Bradford Russell ("Russell") testified on the Respondent's behalf. He testified that he worked with the Respondent as a mortgage broker in 2003 and he is

honest and trustworthy. He testified there were no issues regarding the Respondent and no complaints filed against him. He testified that they are active together in their church.

On cross-examination, Bradford testified that he worked with the Respondent from 1993 to 1995 at Wegard and again in 2002 and then worked together from 2003 and 2007 and now both work at Direct Finance where he is a loan originator. He testified that he was aware that the scripts at Wegard would be faxed to the office; however, a lot of the originators performed their own research so some used the scripts and some didn't. He testified that the scripts were not inaccurate but they were not fair and balanced but the Respondent did not use the scripts.

V. DISCUSSION

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). See *Parkway Towers Associates v. Godfrey*, 688 A.2d 1289 (R.I. 1997). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. Dept. of Environmental Management,* 553 A.2d 541 (R.I. 1989) (internal citation omitted). In cases where a statute may contain ambiguous language, the Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131

(R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. Relevant Statutes

On July 30, 2008, a new federal law, 12 U.S.C. § 5101 *et seq.* - the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (known as the "SAFE Act") – became effective.[1] The SAFE Act gave states one (1) year to pass legislation requiring the licensing of mortgage loan originators according to national standards and the participation of state agencies in the Nationwide Mortgage Licensing System and Registry. On January 5, 2009, the Department of Housing and Urban Development ("HUD") announced that it had approved model legislation for states to adopt.[2] Thus,

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[1] The SAFE Act provides in part as follows:

> In order to increase uniformity, reduce regulatory burden, enhance consumer protection, and reduce fraud, the States, through the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators, are hereby encouraged to establish a Nationwide Mortgage Licensing System and Registry for the residential mortgage industry that accomplishes all of the following objectives:
>
> (1) Provides uniform license applications and reporting requirements for State-licensed loan originators.
>
> (2) Provides a comprehensive licensing and supervisory database.
>
> (3) Aggregates and improves the flow of information to and between regulators.
>
> (4) Provides increased accountability and tracking of loan originators.
>
> (5) Streamlines the licensing process and reduces the regulatory burden.
>
> (6) Enhances consumer protections and supports anti-fraud measures.
>
> (7) Provides consumers with easily accessible information, offered at no charge, utilizing electronic media, including the Internet, regarding the employment history of, and publicly adjudicated disciplinary and enforcement actions against, loan originators.
>
> (8) Establishes a means by which residential mortgage loan originators would, to the greatest extent possible, be required to act in the best interests of the consumer.
>
> (9) Facilitates responsible behavior in the subprime mortgage market place and provides comprehensive training and examination requirements related to subprime mortgage lending.
>
> (10) Facilitates the collection and disbursement of consumer complaints on behalf of State and Federal mortgage regulators.

[2] Said announcement said as follows:

> [T]he Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators have developed model legislation to assist states in meeting the minimum requirements of the SAFE Mortgage Licensing Act. HUD has reviewed this model legislation and finds that it meets the minimum requirements of the SAFE Mortgage Licensing Act. The model legislation is available on HUD's Web site at *http://www.hud.gov/offices/hsg/sfh/reguprog.cfm,* along with HUD commentary on certain provisions of the statute, and the model legislation.

states that adopt said model act are deemed to be in compliance with the SAFE Act. The pertinent provision in the 2009 Rhode Island law that adopted said model act ("RI SAFE Act") is R.I. Gen. Laws § 19-14.10-6 which states in part as follows:

> Issuance of license. – The director or the director's designee shall not approve a mortgage loan originator license unless the director or the director's designee makes at a minimum the following findings:
>
> (1) The applicant has never had a mortgage loan originator license revoked in any governmental jurisdiction, except that a subsequent formal vacation of such revocation shall not be deemed a revocation.
>
> (2) The applicant has not been convicted of, or pled guilty or nolo contendere to, a felony in a domestic, foreign, or military court:
>
> (i) During the seven (7) year period preceding the date of the application for licensing and registration; or
>
> (ii) At any time preceding such date of application, if such felony involved an act of fraud, dishonesty, or a breach of trust, or money laundering.
>
> (iii) Pardon of a conviction shall not be a conviction for purposes of this subsection.
>
> (3) The applicant has demonstrated financial responsibility, character, and general fitness such as to command the confidence of the community and to warrant a determination that the mortgage loan originator will operate honestly, fairly, and efficiently within the purposes of this chapter.

C. Arguments

i. The Department's Arguments

The Respondent initially filed an application to register as a mortgage loan originator with Rhode Island on August 11, 2008 prior to Rhode Island's adoption of its own RI SAFE Act. The Respondent was initially denied on the basis of R.I. Gen. Laws § 19-14-7.[3] The Respondent then turned his application to register into an application for

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> [The purpose of the SAFE Act is] to establish a nationwide mortgage licensing system for the residential mortgage industry for the purpose of providing (1) uniform state-licensing application and reporting requirements for residential mortgage loan originators, and (2) a comprehensive database by which such mortgage loan originators may be found and tracked. This new law also imposes the obligation on states to adopt mortgage licensing requirements that meet the minimum standards specified in the law in lieu of HUD establishing and maintaining a licensing system for loan originators.
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> January 5, 2009, Federal Register, vol. 74., 312-313

[3] R.I. Gen. Laws § 19-14-7 states in part as follows:

licensing prior to December 31, 2008. On June 1, 2010, the Department amended its Notice of Intent to Deny License to include not only R.I. Gen. Laws § 19-14-7 but also R.I. Gen. Laws § 19-14.10-6 as grounds to deny said application in case it was found that R.I. Gen. Laws § 19-14.10-6 did not apply to Respondent's application since his application was prior to its enactment. See First Notice of Denial issued on November 29, 2009 and the June 2, 2010 Amended Notice of Denial. The Department's position is that the Respondent is barred forever from obtaining a license under R.I. Gen. Laws § 19-14.10-6 as his conviction involved an act of fraud, dishonesty, or breach of trust.

ii. The Respondent's Arguments

The Respondent argues that his conviction does not fall under R.I. Gen. Laws § 19-14.10-6 in that he pled guilty to conspiracy and not to fraud. Thus, he argues his conviction falls under the seven (7) year provision in R.I. Gen. Laws § 19-14.10-6(2)(i) so that he may be licensed as his conviction is over seven (7) years old and he meets the Department's standards for the licensing of felons as delineated in *In the Matter of William J. Stanton*, DBR No. 98-L-0035 (12/15/98). He represented that he would be amenable to a conditional license.

Issuance or denial of license. – (a) Upon the filing of a completed application, the payment of fees and the approval of the bond, the director or the director's designee shall commence an investigation of the applicant. The director or the director's designee shall approve the license applied for in accordance with the provisions of this chapter if he or she shall find:

(1) That the financial responsibility, experience, character, and general fitness of the applicant, and of the applicant's members and of the applicant's officers, including the designated manager of record of a licensed location, if the applicant is a partnership, limited liability company or association, or of the officers including the designated manager of record of a licensed location, and directors and the principal owner or owners of the issued and outstanding capital stock, if the applicant is a corporation, are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently within the purposes of this title.

D. The Respondent's Conviction

The Respondent testified that his conviction arose from his employment with Wegard where he was employed in the Rhode Island office which received "sales scripts" from the head office. He testified that he never used them but did confirm with the head office that the scripts were appropriate. The Respondent was indicted on July 9, 1998 on several counts for acts committed between 1992 and 1995 arising from these sales scripts. See Respondent's Exhibit 17 (docket sheet). On August 23, 1999, he pled guilty to one (1) count of 18 U.S.C. § 371 "Conspiracy to Commit Securities Fraud" (see Respondent's Exhibit One (1)) which provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The United States Federal Sentencing Guidelines called for 33 to 41 months in prison for Respondent's conviction. The Respondent was sentenced to 13 months in prison upon motion from the government based on the Respondent's substantial assistance. The Respondent was also sentenced to three (3) years of probation upon his release from prison and to pay a $15,000 fine. His supervision terminated on August 12, 2004 and he paid his judgment in full. See Respondent's Exhibits One (1), Two (2), and Three (3).[4]

[4] The Respondent also provided documents related to National Association of Securities Dealers arbitration that arose out of his Wegard employment. One arbitration decision had no finding against him and the other was settled after the Respondent argued that he had never received notice of the actual arbitration hearing. The Department did not rely on these arbitrations in its Notice and the undersigned will not consider them in this decision.

The Respondent provided a letter from the lead attorney, David Rosenfield ("Rosenfield"), in the US Attorney's Office for District of New Jersey in support of his application. See Respondent's Exhibit Four (4). Rosenfield did not appear at hearing but wrote in his letter that the Respondent substantially cooperated and provided invaluable assistance to the government which is in accord with the Respondent's reduced sentence. Rosenfield also indicated that the Respondent provided the government with the sales scripts which were at the heart of the government's case and which he believed were crucial.

United States v. Hart, et al., 273 F.3d 363 (C.A. 3 (N.J.) 2001) denied the trial and/or sentencing appeals of other Wegard co-conspirators including Joseph Orlando ("Orlando") based on their convictions and sentencing after their trial. In his letter, Rosenfield indicates that the Respondent's assistance was invaluable in obtaining Orlando's conviction. Said case indicates that Orlando and other higher ups (higher than Respondent) at Wegard used false and misleading sales scripts which they destroyed and denied using. This confirms Rosenfield's representations and the Respondent's testimony regarding his assistance *vis a vis* providing copies of the sales scripts.

The Respondent was indicted for violating 15 U.S.C. § 78j(b) (manipulative or deceptive devices),[5] 17 C.F.R. 240.10b-5 (employment of deceptive devices), 18 U.S.C. § 2

[5] Said statute says in part as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--
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> ***
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> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(principal), and 15 U.S.C. § 78ff (penalties) but those charges were dismissed. He pled guilty to the conspiracy charge. See Respondent's Exhibits One (1) (judgment), 18, and 19.

E. Whether the Conviction Falls Under Fraud, Dishonesty, or Breach of Trust

The Department relied on *Hammerschmidt v. United States*, 265 U.S. 182 (1924) to support its argument that the Respondent's conviction falls under the fraud, dishonesty or breach of trust elements of the RI SAFE Act. In relation to a 18 USC § 371 ("§ 371") conviction, *Hammerschmidt* found as follows:

> To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention. It is true that words 'to defraud' as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods or schemes. *Id.*, at 188.

A survey of § 371 convictions describe the conspiracy statute and its requirements as follows:

> The general federal conspiracy statute, section 371 . . . makes it a crime for "two or more persons [to] conspire ... to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." [footnote omitted]. It is distinct from the substantive crime contemplated and is charged as a separate offense. [FN2][6] . .
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> ***
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> Section 371's "defraud" clause broadly applies to "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of [the Federal] government." [footnote omitted]. Virtually any method used to defraud the United States will suffice for the purposes of the

[6] Footnote two (2) of the article: *Pinkerton v. United States*, 328 U.S. 640, 644 (1946) ("conspiracy is a partnership in crime" distinct from substantive offense); *United States v. Rabinowich*, 238 U.S. 78, 88 (1915) (conspiracy and substantive offense separate crimes).

statute. [footnote omitted]. It is not necessary that the conspiracy subject the government to property or pecuniary loss. [footnote omitted]. While the "statutory language [of section 371] is not confined to fraud as that term has been defined in the common law", [FN11][7] and although the Supreme Court's language in *Hammerschmidt v. United States* [footnote omitted] seemed to require that the means to defraud be dishonest, [footnote omitted] Supreme Court cases both prior and subsequent to *Hammerschmidt* have upheld conspiracy convictions which did not charge dishonest or deceptive means. [FN14][8] Some courts of appeal have affirmed convictions on conspiracy counts absent allegations of fraud or dishonesty, [FN15][9] while other circuits require such a showing. [FN16][10]

31 Am. Crim. L. Rev. 591, 591 -595 (1994)

In relation to § 371, the U.S. Supreme Court in *Dennis v. U.S.* 384 U.S. 855, 860-861 (1966) found as follows:

> Nor can it be concluded that a conspiracy of the described nature and objective is outside the condemnation of the specific clause of s 371 relied upon in the indictment, which charges a conspiracy 'to defraud the United States, or any agency thereof in any manner or for any purpose.' It has long been established that this statutory language is not confined to fraud as that term has been defined in the common law. It reaches 'any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government,' *Haas v. Henkel*, 216 U.S. 462. . . quoted in *United States v. Johnson*, 383 U.S. 169, 172 (footnote omitted). See also, *Lutwak v. United States*, 344 U.S. 604 . . . *Glasser v. United States*, 315 U.S. 60 . . . *Hammerschmidt v. United States*, 265 U.S. 182.

U.S. v. Caldwell, 989 F.2d 1056, 1058-1059 (C.A.9 (Or.) 1993) addressed the issue of what kind of fraud or dishonesty is required under § 371 by reviewing the history of § 371 cases as follows:

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[7] Footnote Eleven (11) of the article: *Dennis* [*v. United States*], 384 U.S. [855] at 861 [1966].

[8] Footnote 14 of the article: *Dennis*, 384 U.S. at 861; *Haas* [*v. Henkel*], 216 U.S. at 480 [1910].

[9] Footnote 15 of article: See [*U.S. v.*] *Hooks*, 848 [, 785] F.2d at 792 (purpose of conspiracy to impair, obstruct, or defeat "lawful function of any department of Government"); *United States v. Shoup*, 608 F.2d 950, 963-64 (3d Cir.1979) (conviction for § 371 conspiracy upheld without proof of dishonesty or trickery).

[10] Footnote 16 of article: See [*U.S. v.*] *Pintar*, 630 F.2d [, 1270 1980] at 1277-79 (use of federal agency funds to defraud agency: *Dennis* still requires deceit); [*U.S. v.*]*D'Andrea*, 585 F.2d [, 351] at 1354 [*cert. den.* 440 U.S. 983 (1979)] (government must show that interference with lawful government function was accomplished through deceit and trickery); *United States v. Peltz*, 433 F.2d 48, 51-52 (2d Cir.1970) (stating *Hammerschmidt* only narrowed *Haas* holding and that demonstration of trickery and deceit still required), *cert. denied*, 401 U.S. 955 (1971).

The "defraud clause" of 18 U.S.C. § 371 prohibits all conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose." While this seems to cover only defrauding in the normal sense of the word-acquiring another's property by intentional misrepresentations-the word "defraud" has been read much more broadly. "Defrauding" the government under section 371 means obstructing the operation of any government agency by any "deceit, craft or trickery, or at least by means that are dishonest." *Hammerschmidt v. United States,* 265 U.S. 182, 188 . . . (1924). The conspiracy need not aim to deprive the government of property. *Haas v. Henkel,* 216 U.S. 462, 479 . . . (1910). It need not involve any detrimental reliance by the government. *Dennis v. United States,* 384 U.S. 855 . . . (1966). Neither the conspiracy's goal nor the means used to achieve it need to be independently illegal. *United States v. Tuohey,* 867 F.2d 534, 537 (9th Cir.1989). To convict someone under . . . § 371 the government need only show (1) he entered into an agreement (2) to obstruct a lawful function of the government (3) by deceitful or dishonest means and (4) at least one overt act in furtherance of the conspiracy. *Hammerschmidt* . . . at 188 . . . *United States v. Boone,* 951 F.2d 1526, 1543 (9th Cir.1991). . . .

Yet the government [in this case] proposes an even broader reading of section 371, one that eliminates element (3) altogether. It contends *any* conspiracy to obstruct a government function is illegal, Gov't Brief at 15-16, even if the obstruction is not done deceitfully or dishonestly. ***

We think not. The Supreme Court has made it clear that "defraud" is limited only to wrongs done "by deceit, craft or trickery, or at least by means that are dishonest." *Hammerschmidt,* 265 U.S. at 188 . . . (footnote omitted). Obstructing government functions in other ways-for example, by violence, robbery or advocacy of illegal action-can't constitute "defrauding." *Id.; see also United States v. Murphy,* 809 F.2d 1427, 1431-32 (9th Cir.1987) (not disclosing something that one has no independent duty to disclose isn't conspiracy to defraud, even if it impedes the IRS). [FN3]

> FN3. As the government points out, some recent cases do talk of section 371 punishing any conspiracy to obstruct a function of the government, without mentioning the dishonest means requirement. *See Dennis,* 384 U.S. at 861 . . . (dictum); *United States v. Johnson,* 383 U.S. 169 . . . (1966) (dictum); *Tuohey,* 867 F.2d at 537 (dictum). But we answer this argument the same way *Hammerschmidt,* 265 U.S. at 187 . . . did when distinguishing *Haas,* 216 U.S. at 479 . . . a case that also seemed to read "conspiracy to defraud" as broadly as the government suggests: Because those cases involved deceitful and dishonest conduct, they didn't have to decide whether section 371 reached conspiracies to obstruct the government in ways that were neither deceitful nor dishonest. *See Dennis,* 384 U.S. at 858 . . . (defendants lied to the government); *United States v.*

> *Johnson,* 337 F.2d 180, 185-86 (4th Cir.1964) (defendants bribed government officials), *aff'd as to that point,* 383 U.S. 169, 86 . . . (1966); *Tuohey,* 867 F.2d at 538 (defendants failed to make required disclosures).
>
> Certainly the Supreme Court thinks *Hammerschmidt* is still good law: *McNally v. United States,* 483 U.S. 350, 358-59 & n. 8 . . . (1987), cited (albeit in dictum) *Hammerschmidt's* "deceit, craft or trickery" language as representing the correct reading of section 371. Moreover, *Dennis* itself cited *Hammerschmidt* with no indication it was being overruled.

The obvious difference between a conspiracy and the substantive crime is that someone convicted of a conspiracy hasn't necessarily carried out the substantive crime which the conspirators were conspiring to commit.[11] In addition, not all conspirators are necessarily aware of every aspect of the conspiracy.[12] Thus, the Respondent argued that his conviction cannot fall under the dishonest or fraudulent categories as those charges were dismissed and he was not convicted of the substantive crime. In terms of establishing the category into which Respondent's conviction falls, it is helpful to review laws with similar provisions that have been previously passed by Congress.

i. FDIC Intepretation

The Federal Deposit Insurance Act, 12 USC § 1829, prohibits certain individuals with certain convictions from owning or controlling (etc.) certain types of insured depository institution unless they have received prior consent from the Federal Deposition Insurance Corporation ("FDIC"). Said statute provides in part as follows:

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[11] *United States v. Indelicato*, 800 F.2d 1482, 1483 (C.A.9 (Cal.) 1986) (conspiracy is established by an agreement to engage in criminal activity, one or more overt acts taken to implement the agreement, and the requisite intent to commit the substantive crime).

[12] *United States. v. Sophie*, 900 F.2d 1064, 1080 -1081 (C.A.7 (Ill.) 1990) held as follows:

> To convict a defendant for participating in a conspiracy, the government must show that the defendant was a party to an agreement to commit an unlawful act, and that one of the conspirators committed an overt act to further the agreement. See *United States v. Mealy,* 851 F.2d 890, 895-96 (7th Cir.1988). . . . But to be a member of a conspiracy, a person does not need to know or participate in every detail of the conspiracy, or to know all the conspiracy's members. *United States v. Davis,* 838 F.2d 909, 913 (7th Cir.1988).

Penalty for unauthorized participation by convicted individual

(a) Prohibition
(1) In general
Except with the prior written consent of the Corporation--
(A) any person who has been convicted of any criminal offense involving dishonesty or a breach of trust or money laundering, or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense, may not--
***
(2) Minimum 10-year prohibition period for certain offenses
(A) In general
If the offense referred to in paragraph (1)(A) in connection with any person referred to in such paragraph is--
(i) an offense under--
(I) section 215, 656, 657, 1005, 1006, 1007, 1008, 1014, 1032, 1344, 1517, 1956, or 1957 of Title 18; or
(II) section 1341 or 1343 of such title which affects any financial institution (as defined in section 20 of such title); or
(ii) the offense of conspiring to commit any such offense.

The FDIC Statement of Policy regarding the above-cited Section 19 and convictions of crimes involving dishonesty, breach of trust, or money laundering stated in part as follows:

> Dishonesty or Breach of Trust. The conviction or program entry must be for a criminal offense involving dishonesty, breach of trust or money laundering. "Dishonesty" means directly or indirectly to cheat or defraud; to cheat or defraud for monetary gain or its equivalent; or wrongfully to take property belonging to another in violation of any criminal statute. Dishonesty includes acts involving want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and may include crimes which federal, state or local laws define as dishonest. "Breach of trust" means a wrongful act, use, misappropriation or omission with respect to any property or fund which has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation or omission.
>
> Whether a crime involves dishonesty or breach of trust will be determined from the statutory elements of the crime itself. All convictions for offenses concerning the illegal manufacture, sale, distribution of or trafficking in controlled substances shall require an application.
>
> 63 FR 66177-01 (December 1, 1998).

ii. 18 USC § 1033

18 USC § 1033 provides in part as follows:

> (e)(1)(A) Any individual who has been convicted of any criminal felony involving dishonesty or a breach of trust, or who has been convicted of an offense under this section, and who willfully engages in the business of insurance whose activities affect interstate commerce or participates in such business, shall be fined as provided in this title or imprisoned not more than 5 years, or both.
>
> (B) Any individual who is engaged in the business of insurance whose activities affect interstate commerce and who willfully permits the participation described in subparagraph (A) shall be fined as provided in this title or imprisoned not more than 5 years, or both.
>
> (2) A person described in paragraph (1)(A) may engage in the business of insurance or participate in such business if such person has the written consent of any insurance regulatory official authorized to regulate the insurer, which consent specifically refers to this subsection

This law is part of the Violent Crime Control and Law Enforcement Act of 1994. In order to assist state insurance regulators who are charged with reviewing applications for permission to engage in the business of insurance despite a felony conviction involving dishonesty or breach of trust, the National Association of Insurance Commissioners ("NAIC")[13] issued "Guidelines for State Insurance Regulators to the Violent Crime Control and Law Enforcement Act of 1994: 18 U.S.C. §§ 1033-1034" (adopted 1998, amended 2010) ("Guidelines"). Said Guidelines discuss the statute's undefined terms:

> The statute does not list or define felonies that involve dishonesty or breach of trust. Identical language appears in several Federal statutes. . . . There do not appear at this time to be any court decisions outlining standards for determining which crimes involve dishonesty or breach of trust in the context of either Section 1033 or 1034.
>
> Federal courts seem to apply a "you know it when you see it" test. *See, e.g., FDIC v. Mallen,* 661 F. Supp. 1003, 1006 (N.D. Iowa 1987) [holding that

[13] The NAIC consists of elected or appointed officials who regulate insurance within their state. See www.naic.org.

the crime of making a false statement or entry to a Federal agency is obviously one of "dishonesty or breach of trust" within the meaning of the Federal Deposit Insurance Act]. ***

More illuminating are cases decided under Federal Rule of Evidence 609(a)(2), which provides that, for the purpose of attacking the credibility of a witness, "evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment." The Conference Committee report on Rule 609 describes what Congress meant by the phrase "dishonesty or false statement:"

> By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully. [footnote omitted]
>
> ***

Apparently, Congress intended Rule 609 to render admissible only those prior convictions which impact upon a witness' credibility. The commission of "perjury or other crimes or acts of individual dishonesty, or untrustworthiness (e.g., offenses involving theft or fraud, bribery, or acts of deceit, cheating or breach of trust) will usually have a very material relevance" to the credibility of a witness. *United States v. Bartlett*, No. CV-92-2448, 1993 WL 372267 (E.D.N.Y. Sept. 9, 1993). On the other hand, crimes that do not involve an element of deceit do not fall within the Rule. Courts have repeatedly held that drug crimes are not necessarily crimes of "dishonesty or false statement" within the meaning of the Rule. (citations omitted). Other types of crimes fall near the border, and good arguments can be made on both sides of the issue. Note in particular that the Federal Rules Advisory Committee considered it "unduly broad" to treat bank robbery or bank larceny as crimes of dishonesty, while the *Bartlett* court three years later recognized dishonesty as an inherent element of any theft offense.

Congress appeared to aim toward a similar target when it included "dishonesty or breach of trust" language in other Federal statutes. . . . Both Fed. R. Evid. 609 and the FDIC Act are concerned with crimes that bear on a person's credibility. If a person has been convicted of a crime involving an element of deceit, there exists substantial reason to question that person's tendency to testify truthfully, and to direct the affairs of a bank honestly. Presently there is no authority on point so it is logical to presume that Congress had the same intent when it included the phrase "dishonesty or breach of trust" in these new Federal statutes.

***

> As a general statement, crimes involving dishonesty involve some element of deceit, misrepresentation, untruthfulness or falsification. Crimes involving breach of trust are based on the fiduciary relationship of the parties and the wrongful acts violating that relationship. Research has disclosed that it is fairly difficult to produce a generic definition of a crime of dishonesty or breach of trust that can be readily applied in all the states.

iii. Breach of Trust

Based on the above discussions the Respondent's conviction clearly does not fall under the category of breach of trust: no breach of fiduciary duty; no misuse of position.

iv. Fraud

Interestingly, neither the FDIC nor the Federal Insurance statutes contain a prohibition against a conviction relating to fraud. Obviously, a felony conviction regarding fraud would be considered to be a crime of dishonesty. § 371 speaks of defrauding the U.S. government but the term "defraud" has been broadly interpreted so that it does not apply to common-law fraud. The SAFE Act must have intended that some convictions under the fraud category would not fall under the dishonest category despite the fact that the dishonest category would most likely include a conviction that includes fraud as an element. Considering the broad interpretation of the term defraud used in § 371 and discussed above, the Respondent's conviction does not fall under the fraud category because fraud is not required for a conviction under § 371.

v. Dishonesty

This is the crux of the matter. The Respondent argues that his felony conviction is not considered an act of dishonesty because he was convicted of conspiracy and not the actual crime. Nonetheless, the FDIC's Statement of Policy looks at the statutory elements of the crime. The NAIC reviews such convictions in light of Rule of 609 regarding convictions that tend to show dishonesty and lack of credibility if testifying at

trial. Clearly, the intent of SAFE Act is to bar certain types of felonies but not others. The FDIC's Statement of Policy specifically included drug offenses as a crime that required an application to the FDIC. But a review of the NAIC Guidelines demonstrates that drug crimes and armed robbery convictions are often excluded from the category of crimes of dishonesty. The Respondent argued that it is illogical to allow the licensing of those convicted of armed robbery but not him. But as discussed in the NAIC Guidelines, the issue is a person's credibility and trustworthiness.

As discussed, the case law on the requirement of fraud or dishonesty for a conviction under § 371 is mixed. This is not a surprise since § 371 prohibits conspiring to commit any offense against the United States **or** to defraud the United States with "defraud" being interpreted with great latitude by the courts. Thus, it has been found that "fraud" is not needed to be proved for a conviction. See *Hammerschmidt* (deceit, craft, trickery, and dishonesty). In 1966, *Dennis* reiterated that the statutory element of fraud is not as it has been defined in common law but rather any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government falls under § 371. In *Dennis*, the conspiracy was to file false affidavits with the National Labor Relations Board. In 1993, *Caldwell* found that *Dennis* rejected fraud as a required element but did not address whether § 371 would cover a conspiracy without dishonesty or deceit since the *Dennis* conspiracy involved deceit or dishonesty (lying to the government). Thus, dishonesty or deceit is still required.

While Respondent is correct that he was not convicted of manipulative or deceptive devices which would have easily fallen under the fraud or dishonest category, his conspiracy conviction required that the co-conspirators act by dishonest or deceitful

means. Thus, while a conspirator is not necessarily aware of all aspects of the conspiracy, the elements required for a conviction include a dishonest act. *Hammerschmidt, Dennis, Caldwell, infra.* In addition, as discussed in the Guidelines, Rule 609 tries to reach crimes that require some element of deceit, untruthfulness, or falsification. The Respondent's conviction required an act of dishonesty so under the Guidelines, it would fall under the 18 USC § 1033's dishonesty provision.

Therefore, based on the above discussion, the Respondent's conviction is a dishonest felony conviction as set forth in R.I. Gen. Laws § 19-14.10-6(2)(ii).

E. R.I. Gen. Laws § 19-14-7, R.I. Gen. Laws § 19-14.10-13, and *Stanton*

The Respondent initially applied for registration and then a license under the old Rhode Island licensing law, R.I. Gen. Laws § 19-14-7. Under that old law, the Department would have reviewed the Respondent's application and determined whether in light of his conviction he could be licensed using the criteria set forth for the licensing of felons in *In the Matter of William J. Stanton*, DBR No. 98-L-0035 (12/15/98).

However, prior to a determination on that matter, the RI SAFE Act became effective and the Respondent's application was required to be evaluated pursuant to R.I. Gen. Laws § 19-14.10-6. Even if the Respondent had been licensed under the State's old licensing law, a renewal application pursuant to R.I. Gen. Laws § 19-14.10-13[14] would

[14] R.I. Gen. Laws § 19-14.10-13 states in part as follows:

> Enforcement authorities, violations and penalties. – (a) In order to ensure the effective supervision and enforcement of this chapter the director or the director's designee may, pursuant to chapter 42-35:
>
> (1) Deny, suspend, revoke, condition or decline to renew a license for a violation of this chapter, rules or regulations issued under this chapter or order or directive entered under this chapter.
>
> (2) Deny, suspend, revoke, condition or decline to renew a license if an applicant or licensee fails at any time to meet the requirements of § 19-14.10-6 or 19-14.10-9, or withholds information or makes a material misstatement in an application for a license or renewal of a license.

have required an evaluation of whether his conviction fell under the categories established in R.I. Gen. Laws § 19-14.10-6 as discussed above.

R.I. Gen. Laws § 19-14.10-6 speaks of new licenses. However, R.I. Gen. Laws § 19-14.10-13(1) and (2) also speaks of new licenses and renewals of licenses. There is a statutory argument that a conditional license may be permitted under R.I. Gen. Laws § 19-14.10-13. The Department's position is that that conditional licensing provision only applies to certain parts of the statute. The Respondent chose not to pursue this argument (see email of September 8, 2009) and instead argued that his felony was not a felony of dishonesty and thus, under *Stanton*, he could be licensed. Without providing a detailed analysis under *Stanton*,[15] the Respondent provided evidence that he most likely would have met the *Stanton* criteria for obtaining either a license or a conditional license. Unfortunately for the Respondent this cannot be considered since under R.I. Gen. Laws § 19-14.10-6, his felony is a felony of dishonesty. However, it is an open question regarding the statutory interpretation of R.I. Gen. Laws § 19-14.10-13 and conditional licensing that the Respondent may choose to pursue another day.

VI. FINDINGS OF FACT

1. On or about on November 29, 2009, a Notice of Denial of Application for License as a Mortgage Originator and of Opportunity of Hearing was issued by the Department to the Respondent. On or about June 1, 2010, an amended Notice of Denial was issued to the Respondent. On or about December 10, 2009, an Order Appointing

[15] Considerations in this area include: (i) when the misconduct took place, (ii) whether the misconduct was a misdemeanor or a felony, (iii) the type of sentence imposed, (iv) the age of the applicant at the time of the misconduct, (v) the reason(s) given by the applicant for committing the misconduct and the applicant's acknowledgement of responsibility for the crime(s), and (vi) whether the misconduct relates to the license for which applicant has applied. *Stanton*, at 5-6.

Hearing Officer and Providing Notice of Pre-Hearing Conference was issued by the Department to the Respondent.

3. A prehearing conference was held on January 20, 2010. A hearing was held on June 2 and 30, 2010. The record closed on September 17, 2010.

4. On August 23, 1999, the Respondent pled guilty to one (1) count of 18 U.S.C. § 371 "Conspiracy to Commit Securities Fraud."

5. The facts contained in Section IV and V are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 19-14.10-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

2. The Department has met its burden to deny the Respondent's application for a mortgage broker's license under R.I. Gen. Laws § 19-14.10-6 since his conviction involved an act of dishonesty.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the Respondent's application for License be denied.

Dated: 12/15/10

Catherine R. Warren
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

✓ ADOPT
_____ REJECT
_____ MODIFY

Dated: 12-17-2010

A. Michael Marques
Director

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify on this 17th day of December, 2010 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail, postage prepaid to –

Mr. Daniel Petronelli
275 Crescent Street
West Bridgewater, MA 02379

and by electronic-delivery to Neena Sinha Savage, Esquire and Joseph Torti, Deputy Director, Sara Paterson Cabral, Supervisor, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, Rhode Island.

R B Ellison