

FEATURE STORY

SAFE Act Final Rule Published

By: Thayer Long, President and CEO of MHI

If you are an MHI member, you know by now that last month the U.S. Department of Housing and Urban Development (HUD) published the final rule on the Secure and Fair Enforcement for Mortgage Licensing Act (SAFE). The final rule does provide clearer guidance on what HUD believes is activity which would not constitute licensing under the federal law. According to HUD and the federal law, only a person who both takes an application and offers or negotiates loan terms for compensation or gain needs to obtain a state mortgage loan originator license.

MHI strongly urges all industry members to work closely with your state association before doing anything regarding your business, and also strongly encourages the use of outside legal counsel. This article will summarize what the final rule says, and is not intended to serve as legal advice or a business plan. A more detailed version of this summary with examples was provided to MHI members last month.

1. The first area that HUD covers is defining what it means to “take an application.” Examples of activity that will not trigger licensing as per the final rule include: a) physically handling a completed application form or transmitting the completed application form to a lender on behalf of the borrower; b) assisting an applicant who is filling out an application by explaining the contents of the application and where in the application the borrower should provide his/her information. (For example, if a customer was unclear as to what a term like “gross income” meant in an application, the salesperson could explain the customary terminology in order for the customer to complete the application properly); c) describing, in general terms, the loan application process to the applicant as long as there is no discussion of particular loan products; d) conducting administrative or clerical tasks, which are defined to include the receipt, collection, and distribution of information common for processing and underwriting a loan (and necessary

communications with consumers); and f) pulling a credit report solely for the home sale purpose.

2. The second area that HUD covers is defining what it means to “offer or negotiate” the terms of a loan. Examples of what will not trigger licensing per the final rule include: a) telling the borrower the lender has sent him/her a written offer, as long as no details about the offer are shared; b) sharing of general information about a financing source and discussing hypothetical financing options; c) giving the homebuyer a list of available financing sources without recommending any of the sources; d) discussing a buyer’s ability to afford a home; e) presenting or discussing generic facts or generic rate sheets; f) providing general explanations or descriptions in response to consumer queries, such as explaining loan terminology (e.g., debt-to-income ratio) or lending policies (e.g., the loan-to-value ratio policy of the lender); g) arranging the loan closing or other aspects of the loan process, provided that any communication that includes a discussion about loan terms only verifies terms already agreed to by the borrower or prospective borrower; and h) providing borrower with information unrelated to the loan terms, such as best days of the month to schedule a closing;

3. The third area of importance is how HUD defines “compensation or gain.” According to the final rule, compensation or gain does not include the following: a) receiving a sales commission if received solely in connection with a salesperson’s sales activity; and b) physically handling an application or other documents or engaging in generic discussions *do not necessarily* constitute offering or negotiating and, accordingly, *may not* subject the individual to coverage even if they would otherwise be acting for

please turn to the next page

SAFE Act Final Rule Published

(continued)

compensation or gain. In other words manufactured home sales personnel can earn compensation without triggering licensing as long as sales commissions are received solely for home sales activities and not offering or negotiating activities.

4. HUD interestingly adds a new perspective on what it means to be engaging in the business of being a loan originator. HUD states that a person must be “engaging in the business” of a loan originator in order to be subject to the SAFE Act. A person is engaging in the business of a loan originator if he conducts the activities of a loan originator: (a) in a commercial context and (b) habitually or repeatedly. Basically, an individual must “act” or hold oneself out as a loan originator with an intention/purpose of obtaining anything or value for themselves or someone else for whom they are acting (i.e., to make a profit) and the individual must act as a loan originator habitually or with repetition.
5. Finally, in the area of “seller financing,” HUD asserts that if the seller financing is not habitual or repetitious, then the seller is not engaging in the business of a loan originator. HUD asserts, “the infrequency with which a particular seller provides financing to a buyer to facilitate the sale of the seller’s own residence is so limited that Congress could not have intended to require such sellers to obtain loan originator licenses.”

Per HUD’s rule, the following examples illustrate when an individual generally does not engage in the business of a loan originator: a) An individual who acts as a loan originator in providing financing for the sale of that individual’s own residence, provided that the individual does not act as a loan originator or provide financing for such sales so frequently and under such circumstances that it constitutes a habitual and commercial activity; b) An individual who acts as a loan originator in providing financing for the sale of a property owned by that individual, provided that such individual does not engage in such activity with habitualness; c) An individual who does not act as a loan originator habitually or repeatedly, provided that the source of prospective

financing does not provide mortgage financing or perform other loan origination activities habitually or repeatedly.

While most industry questions were answered in the final rule, it is imperative that you consult with your state association and legal counsel before taking any action.