



March 1, 2010

Regulations Division  
Office of General Counsel  
U.S. Department of Housing and Urban Development  
451 Seventh Street, S.W., Room 10276  
Washington, D.C. 20410-0500

**RE: Docket No. FR-5271-P-01**  
**SAFE Mortgage Licensing Act: HUD Responsibilities Under the SAFE Act**

Dear Office of General Counsel:

The Manufactured Housing Institute (MHI), a trade association representing all segments of the factory-built housing industry including manufacturers, lenders, community owners, retailers, and state associations, appreciates the opportunity to comment on the Department of Housing and Urban Development's (HUD) Proposed Rules to Implement the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act) (12 U.S.C. §§ 5101-5113).

When reviewing the below comments we encourage HUD to keep in mind two of the purposes of the SAFE Act: (1) increase uniformity; and (2) reduce regulatory burden. The manufactured housing industry has been adversely affected by the SAFE Act in ways that are inconsistent with the purpose of the SAFE Act. State laws are not being applied uniformly to retail sellers of manufactured homes or personal property-only finance companies as compared to the application of the SAFE Act to traditional mortgage lenders. In addition, the regulatory burden is much greater for the manufactured housing industry than that of the mortgage lending industry.

**Section 3400.103(c)(1) – Takes an Application**

1. Amend the Rule to Incorporate Clarity from Preamble

In its preamble HUD clarifies that “takes a residential mortgage loan application” does not include an individual whose only role with respect to the application is physically handling a completed application form or transmitting a completed form to a lender on behalf of a prospective borrower. For clarity purposes, we encourage HUD to place this language in the body of its final rule. So section 3400.103(X)(x) will read:

An individual “takes a residential mortgage loan application” if the individual receives a residential mortgage loan application for the purpose of deciding (or influencing or soliciting the

decision of another) whether to extend an offer of residential mortgage loan terms to a borrower or prospective borrower (or to accept the terms offered by a borrower or prospective borrower in response to a solicitation), whether the application is received directly or indirectly from the borrower or prospective borrower. An individual whose only role with respect to the application is physically handling a completed application form or transmitting a completed form to a lender on behalf of a prospective borrower does not take an application.

## 2. Factual Scenarios - Examples of Not Taking an Application

We seek HUD's concurrence that the following activities when performed by a manufactured housing retailer or salesperson would not constitute "taking an application."

- (a) Giving a home buyer access to a kiosk in order to complete an application on-line which goes directly to a funding source.
- (b) Directing a home buyer to complete a paper application for financing.
- (c) Assisting a home buyer with general questions regarding the completion of a loan application by clarifying what type of information is necessary for the application or otherwise explaining the qualifications or criteria necessary to obtain a loan product.<sup>1</sup>
- (d) Suggesting that a home buyer may have incorrectly completed or neglected to complete parts of the application.
- (e) Describing the steps that a home buyer would need to take to provide information to be used to determine whether the home buyer qualifies for a loan or otherwise explaining the loan application process.<sup>2</sup>
- (f) Transcribing information from the home buyer and directing to funding sources. For example, entering information into an online application system on behalf of the buyer when the entered data goes directly to the lender.

### **Section 3400.103(c)(2) – Offers or Negotiates**

*Examples of Offers or Negotiates.* In its proposed rule HUD provides three examples of offering or negotiating terms of a mortgage loan: (a) presenting mortgage loan terms to a borrower for acceptance; (b) communicating directly or indirectly with a borrower for purposes of reaching an understanding about prospective loan terms; or (c) recommending, referring, or steering a borrower to a particular lender or set of loan terms, in accordance with a duty to or incentive from any person other than the borrower (emphasis added).

1. **Presenting Mortgage Loan Terms to a Borrower for Acceptance.** We understand this example of offering or negotiating is intended to focus on activities that are the equivalent to an extension of an offer. Consistent with traditional contract terms, in order

<sup>1</sup> This example is taken from the FFIEC's draft final rule.

<sup>2</sup> This example is taken from the FFIEC's draft final rule.

to qualify as an offer, the item or terms that are being presented to the home buyer must be items or terms that are capable of acceptance. Otherwise, an offer has not been made.

Therefore, MHI seeks HUD's concurrence that the following activities when performed by a manufactured housing retailer or salesperson do not rise to the level of an offer under the SAFE Act.

- (a) The mere sharing of general information about a financing source, such as available financing.
- (b) Acting as a passive conduit between the home buyer and the financing source without engaging in specific discussion of financing options from a particular funding source.
- (c) Discussing hypothetical financing options.
- (d) Presentation of a spectrum of options.
- (e) Giving the home buyer a list of available financing sources without recommending any of the sources.

2. **Communicating Directly or Indirectly with a Borrower for Purpose of Reaching an Understanding about Prospective Loan Terms.** We understand that it is HUD's intention to capture communication between the home buyer and the manufactured housing retailer or the salesperson that rises to the level of mutuality, i.e., agreement on specific loan terms.

Therefore, MHI seeks HUD's concurrence that the following communications between a home buyer and a manufactured housing retailer or salesperson do not rise to the level of negotiating under the SAFE Act.

- (a) Discussing the home buyer's ability to afford a particular home, i.e., examples of monthly payments for a particular home.
- (b) Discussion of various alternative financing options.
- (c) Presentation and/or discussion of generic facts sheet or generic rate sheets (which may be provided by financing sources).
- (d) Closing personal property transactions. A retailer may assist a home buyer by receiving closing documents from the lender. The retailer will deliver the closing documents to the home buyer for review and signature. Since the home buyer and the lender already agreed upon the loan terms, there is no offering or negotiating. Additionally, there is no reasonably available alternative for closing personal property transactions, as third party closing agents limit their services almost exclusively to real estate-secured transactions (e.g., closing attorneys, title agents, etc.).

3. **Recommend, Refer or Steer A Borrower to a Particular Lender or Set of Loan Terms, in Accordance with a Duty to or Incentive from any Person Other than the Borrower.** We understand that in order for a manufactured housing retailer or sales person to trigger this example of offering or negotiating, the retailer or salesperson must act as a result of a duty to a financing source or the retailer or salesperson acts in order to receive an incentive from the financing source. Without the duty to the financing source or the incentive from the financing source, this example of offering or negotiating will not be met.

MHI therefore seeks HUD's concurrence that the following examples do not constitute recommending, referring, or steering a home buyer.

- (a) Forwarding a completed application to only those financing sources that will consider the home buyer's application.
- (b) Forwarding a completed application to a limited scope of lenders.
- (c) Giving the home buyer a list of available financing sources without recommending any of the sources.

MHI seeks HUD's concurrence that the duty must flow to the financing source and the incentive must come from the financing source and therefore, the following would not qualify as a duty or incentive.

- (a) The desire to sell a manufactured home.
- (b) The commission resulting from the sale of a manufactured home.
- (c) A sales person's salary.

MHI seeks HUD's guidance on whether the following items are considered incentives or duty to act on behalf of the financing source.

- (a) A pre-arranged agreement between the retailer or sales person and the financing source with regard to available financing and underwriting guidelines.

4. **Compensation or Gain.** The receipt of compensation or gain is critical to the trigger of licensing requirements under the SAFE Act. We therefore seek HUD's agreement that the following examples are not considered compensation or gain.

- (a) A sales person's commission for the sale of a manufactured home to the extent that the commission received is the same in a financed transaction as that in a cash transaction. In this situation, there is no direct or indirect correlation between the compensation or gain and the taking of an application or the offering or negotiating of a loan.
- (b) Any benefit which is the same in a financed transaction as that in a cash transaction. In this situation, there is no direct or indirect correlation between the compensation or gain and the taking of an application or the offering or negotiating of a loan.

**Loan Processor.** Section 3400.23 of the proposed rule provides that a loan processor is an individual who performs his or her duties at the direction of and subject to the supervision and instruction of a state-licensed loan originator. We seek HUD's clarification that the state-licensed loan originator who supervises an individual who tangentially performs clerical and support tasks is not required to be that individual's direct supervisor. As long as the state-licensed loan originator directs, supervises and instructs the loan processor, he or she is not required to be the loan processor's immediate/direct supervisor.

**De Minimis Exemption.** We encourage HUD to follow the recommendation of the Federal Agencies and consider a de minimis exception for certain individuals.<sup>3</sup> In their draft final rule, the Federal Agencies suggest that an individual who does not regularly or principally function as a loan originator, for example has acted as a loan originator for 5 or fewer residential mortgage loans in the past 12 months, is not subject to the SAFE Act. Similarly, we ask HUD to consider the small manufactured housing communities who may take very few applications in a 12 month period. Consideration is requested based on the uniqueness of the industry. A small community is not motivated by the same incentives as a mortgage lender. A community is motivated to find the best home for the buyer and maintain that person within their community. These are typically family-run businesses with very few home sales within any 12-month period.

**HUD's Express Authority to Review State's Laws.** We respectfully suggest that HUD's review of state SAFE Acts is limited in scope. In HUD's July 2009 Report to Congress, HUD acknowledges that it is "charged by the SAFE Act with establishing and maintaining a loan originator licensing and registration program for any state or territory that does not have in place a process for licensing and supervising loan originators that meets the requirements of the SAFE Act, or that fails to participate in the NMLSR." The requirements of the SAFE Act that Congress authorized HUD to review for compliance is limited to three sections of the SAFE Act. Specifically, section 5107 of the SAFE Act, entitled "Secretary of Housing and Urban Development Backup Authority to Establish a Loan Originator Licensing System" provides that after the time periods for compliance allowed by the statute, if the "Secretary determines that a State does not have in place by law or regulation a system for licensing and registering loan originators that meets the requirements of sections 5104 and 5105 and subsection (d) of [section 5107], or does not participate in the Nationwide Mortgage Licensing System and Registry, the Secretary shall provide for the establishment and maintenance of a system for the licensing and registration by the Secretary of loan originators operating in such State as State-licensed loan originators." HUD's review of state compliance is limited to sections 5104, 5105 and 5107(d). HUD is not given express authority to approve or deny state definitions of loan originators or exclusions for individuals traditionally regulated by the states.

**State's Sovereign Rights to Create Exclusions.** The states have the right to interpret their SAFE Acts in order to enact and implement their own laws covering or excluding certain persons and activities. Congress did not give HUD the broad authority to preempt a state's interpretation and implementation of section 5102 of the SAFE Act. We respectfully suggest that HUD will exceed its statutory scope of review if it interprets states' exclusions as non-compliant with the SAFE Act. A determination by HUD that manufactured housing retailers and salespersons are included in the definition of loan originator will be given deference only if there is ambiguity in the SAFE Act and Congress either explicitly or implicitly delegated authority to HUD to cure that ambiguity. See, *American Bar Ass'n v. F.T.C.*, 430 F.3d 457, 469 (D.C. Cir. 2005).

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<sup>3</sup> See Federal Agencies draft final rules pages 18-19.

**Delayed Effective Date.** Section 3400.107 of HUD's proposed rules authorize HUD to approve a later effective date upon a state's demonstration that substantial numbers of loan originators (or of a class of loan originators) face unusual hardship. We request HUD consider allowing the demonstration of unusual hardship to be proven on a national basis by industries suffering unusual hardship.

In addition, we request HUD consider issuing a statement to the states permitting a delayed effective date in the licensing of loan originators. A delayed effective date will give states time to address HUD's comments and amend laws, if necessary. Once the laws are in final form, the industry will be able to appropriately interpret laws and determine who must be licensed as a loan originator.

**Moratorium on Enforcement of Loan Originator Laws.** For the reasons stated above, we also believe that a moratorium on enforcement of the current state SAFE Act laws is in the interest of all affected until the state laws are final and compliance is achievable. We therefore, request HUD consider issuing a statement to the states permitting a moratorium on enforcement of the licensing requirements for state-licensed loan originators.

**Loan Assumptions.** We encourage HUD to agree that assumptions are not the equivalent of a new loan subject to the SAFE Act because assumptions do not result in the extinguishment of an existing loan and the replacement by a new loan, but rather the loan is assumed by a new obligor.<sup>4</sup> We strongly urge HUD to consider the importance of consistency in the application of the SAFE Act and apply the rationale from the Federal Agencies draft final rule, that individuals engaged in assumptions are not acting as loan originators as defined in the SAFE Act.<sup>5</sup>

**Application of the SAFE Act to the Manufactured Housing Industry.** Congress expressly stated two objectives of the SAFE Act are to create uniformity and reduce regulatory burden. These two objectives are not being met when it comes to the manufactured housing industry. In fact, there are unintended consequences placing significant increased burden on the manufactured housing industry as a result of the states' implementation of the SAFE Act. There is also unequal application of the laws and licensing requirements on the manufactured housing industry.

As the states enacted their SAFE Acts, many also amended their mortgage lending laws to incorporate the SAFE Act definition of mortgage loan. This resulted in the inclusion of personal property transactions in state mortgage lending laws. Personal property finance lenders are now finding themselves subject not only to state sales finance and installment loan laws and licensing regimes, but they are now also subject to mortgage licensing and compliance requirements.

The result is dual licensing requirements for personal property lenders (and transactions) in many states. The traditional mortgage lender is not subject to the same dual licensing requirements. This is an unequal application of the SAFE Act to the manufactured housing industry and a significant increase in regulatory burden.

Personal property finance lenders must immediately become licensed under a mortgage lending scheme and/or comply with the substantive requirements of the state mortgage lending laws.

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<sup>4</sup> See page 24 of Federal Agencies draft final rule.

<sup>5</sup> See pages 24 & 25 of the Federal Agencies draft final rule.

This will result in duplicative disclosures to the consumer for the same transaction, conflicts between rates and charges, and in many instances duplicative examinations for the same transactions by different state agencies. Personal property finance lenders have been put in a disadvantaged competitive position. The cost of the new regulatory burdens will outweigh remaining in the business of personal property financing.

We seek HUD’s assistance in guiding the states to reconsider the application of their amended laws and focus on the intent and purpose of the SAFE Act: (i) to license *individuals* (not to create new licensing requirements for already sufficiently regulated entities); and to (ii) create uniformity and reduce regulatory burden.

**Implementation of the SAFE Act through NMLSR is not Meeting its Minimum Goals.**

HUD is required to oversee the successful implementation of the NMLSR system. This requires state licensing of individuals acting as loan originators, including obtaining a unique identifier. Although not a prerequisite of the SAFE Act, the NMLSR creates sponsorship of an individual loan originator as a condition precedent to license approval. An individual loan originator can not work until he or she is sponsored by an entity in the NMLSR. Typically, the sponsoring entity must be the loan originator’s employer.

In the manufactured housing industry, at least three types of entities may employ loan originators: (i) personal property-only finance lenders; (ii) retail sellers of manufactured homes; and (iii) owners of manufactured housing communities. These entities typically hold sales finance company licenses, installment loan licenses, or retail seller licenses. Because NMLSR does not include these licenses in its system, these entities are unable to sponsor their employees. This is a fatal flaw in the NMLSR system. We encourage HUD to address this NMLSR flaw by creating an exempt status to allow these personal property finance lenders, retail sellers and community owners to sponsor their loan originator employees.

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MHI and its members look forward to working with HUD in the months ahead regarding the matters raised in this comment letter.

Sincerely,



Thayer Long  
Executive Vice President  
Manufactured Housing Institute