

Compliance Commentary: HUD's SAFE Act Final Rule



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On June 30, 2011, the U.S. Department of Housing and Urban Development (HUD) published the long-awaited final rule under the Secure and Fair Enforcement Licensing Act of 2008 (SAFE Act). Despite the fact that all states, jurisdictions and territories, including DC, PR, Guam and Virgin Islands, already have laws and regulations in place under the SAFE Act – as well as the Banking Agencies for Financial Institutions – HUD is responsible for setting minimum standards for licensing via this rule, requirements for the Nationwide Mortgage Licensing System and Registry (NMLSR), and was originally slated for oversight responsibility. As of July 21, 2011, the responsibility for oversight will fall under the authority of the Bureau of Consumer Financial Protection (CFPB) due to the Dodd-Frank Act. HUD received 5,132 comments in response to the proposed rule.

In crafting each state version of the SAFE Act, and with many state level exceptions, the states mostly followed the model SAFE Act legislation developed jointly by NMLSR, the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR). All states must meet the minimum standards set forth in this rule and also have the right to enact additional laws and rules for its own purposes. It is expected that there will be additional state law and regulation amendments following publication of this rule.

This final rule was highly-anticipated due to necessary clarification sought by the industry and state regulators, mostly through industry associations and other industry comments, regarding certain provisions contained in the proposed rule which would have an impact on current state laws and regulations in complying with minimum standards to be established by this rule. Some such provisions and associated concerns from the proposed to the final rule are detailed below along with some specific relevant information contained in the rule. For this purpose, the provisions in the final rule that mirror those already enacted at the state level or those in which the state exceeds requirements set forth in this rule will not be discussed.

Effective Date

The effective date for the provisions contained within this rule is August 29, 2011.

Applicability

Who is affected by this rule? All states, jurisdictions and territories (regulators and lawmakers); federal banking regulators; mortgage brokers; mortgage bankers; investors; servicers; state-licensed mortgage loan originators; registered mortgage loan originators; housing finance agencies; contract loan processors and loan underwriters. In a nutshell, it affects most everyone in order to clarify whether a license may or may not be required (primarily individual licensing).

Key Clarifications

HUD identifies some of the following issues as key clarifications sought by comments submitted, although this is not an all-inclusive list. As in the case with most provisions within the rule, you must look to the actions and/or performance of the specific individual rather than functional title of the individual.

De Minimis Exemptions – HUD comments on the fact that they have no statutory authority under the SAFE Act to establish a de minimis exemption for those who engage in the business of a loan originator infrequently. The SAFE Act provides this authority to the federal banking agencies, but not to HUD.

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There are also various states that offer de minimis exemptions for certain transactions, such as seller-financing, etc.

Employees of Government Agencies or Housing Finance Agencies – The rule clarifies that such employees are not subject to licensing under the SAFE Act, but also defines housing finance agencies for purposes of this rule.

Employees of Bona Fide Non-Profit Organizations - The rule clarifies that such employees are not subject to licensing under the SAFE Act, but also clarifies the necessity to perform such originations for public or charitable purposes. The rule provides some guidance on what constitutes a bona fide non-profit organization.

Individual Selling Own Residence/Seller-Financing/Family Members – Although HUD does not provide a clear answer to this scenario in the preamble, they do comment on the addition of “habitualness and repetition” into the language regarding “engaging in the business of a loan originator.” HUD does comment on the distinction that an individual’s interaction with the borrower that determines the licensing requirement and not the source of financing. In other words, the seller can provide the funding by using a licensed or registered loan originator to interact with the borrower. HUD comments on removal of these exceptions from the referencing provision but added them to a list of those who should not require a license under the Act in the appendix.

Individuals Involved in Material Mortgage Modifications –The short answer – this is deferred to the Bureau of Consumer Financial Protection (CFPB) for consideration. The final rule does not include the licensing of those that perform significant modifications or third-party modification specialists, but leaves the decision to the CFPB. HUD does comment on the fact that a refinance resulting in a new loan is not a modification.

Individuals Involved in Loss Mitigation – This is not specifically addressed in the rule, but left to the CFPB for consideration as well. You must continue to also look to the definition of loan originator by your primary regulator whether a state regulator or federal banking agency and the actual services performed by that individual.

Wholesale Account Executives – This is not specifically addressed in this rule. You will again need to determine specific licensing by reliance on specific definitions of loan originator by the federal banking agency or state regulator accordingly and the actual services performed by the individual to determine whether a license may be required.

Attorneys – There are some comments within the rule regarding the services performed by an attorney as falling under “engaging in the business of a loan originator.” HUD has removed the referenced provision in the final rule and moved attorneys to the list of those who should not require a license in the appendix. *Individuals Pardoned or Expunged Convictions* – HUD revised provisions regarding pardoned or expunged convictions by an individual seeking licensing so that the convictions in themselves do not render an individual ineligible for licensing.

Use of Credit Scores – HUD leaves this for determination by the states on whether a credit score may be used in determining character and fitness for licensing purposes.

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Reciprocity State-to-State – HUD does not require reciprocity of licensing from state-to-state but leaves the decision to the states on whether allowing reciprocity of specific requirements is viable given the minimum standards required for licensing.

Loan Processors and Underwriters – HUD indicates that a loan processor or underwriter is not subject to licensing requirements if they perform their duties at the direction and supervision of a state-licensed mortgage loan originator or a registered mortgage loan originator. In order to clarify this issue, HUD has added an Appendix C to the rule. This appendix identifies which circumstances may require the licensing of a loan processor or underwriter. HUD also added a definition of “origination of a residential mortgage loan” to add more clarification. There are a number of states that vary on whether loan processors or underwriters require licensing as a loan originator. You need to refer to the state specific laws and regulations if you are so regulated, as well as the services performed by these individuals – not just job title.

Additionally, HUD offers some clarification on issues regarding the terms “*taking an application*”, “*offers or negotiates*” and “*for compensation or gain*” under the definition of loan originator regarding specific comments received from the proposed rule.

Now that we have the final rule, what can we expect next? There will undoubtedly be additional state law and regulation revisions now that we have the final rule. We will have to wait and see how the CFPB comes to terms with the issues of employees engaged in loss mitigation and loan modification services.

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