



March 5, 2010

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street, SW, Room 10276
Washington, DC 20410-0500

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

To Whom It May Concern:

Thank you for the opportunity to comment on HUD's proposed rule on the Secure and Fair Enforcement Mortgage Licensing (SAFE) Act standards and requirements. On behalf of the National Council of State Housing Agencies (NCSHA), I urge HUD to amend the proposed rule to exempt state Housing Finance Agencies (HFA) from the licensing requirements under the SAFE Act. If HUD determines the statute does not permit such an exemption, we urge HUD to give states the flexibility and authority to exempt HFAs from SAFE Act state licensing requirements. We also recommend HUD amend its definitions of what it means to "offer or negotiate" loan terms "for compensation or gain" to clarify that HFAs do not fall under those definitions.

We also urge HUD to either exempt or give states the flexibility to exempt bona fide nonprofit affordable housing providers, including ones that partner with HFAs, from the SAFE Act licensing requirements and to amend the proposed rule's definitions of what it means to "offer or negotiate" loan terms "for compensation or gain" to clarify that such nonprofits also do not fall under those definitions.

NCSHA represents the nation's state HFAs, which administer a wide range of affordable housing and community development programs, including tax-exempt Housing Bonds, the Low Income Housing Tax Credit, HOME, Section 8, down payment assistance, homebuyer education, loan servicing, and state housing trust funds. Through the Mortgage Revenue Bond (MRB) program, HFAs have financed almost 3 million mortgages for mostly lower income, first-time homebuyers and add approximately 120,000 more homebuyers to that number each year.

Exempt, or Allow States to Exempt, HFAs from SAFE Licensing Requirements

State HFAs are keenly aware of the importance of imposing reasonable lending standards on mortgage loan originators to protect consumers and help ensure a stable housing market and healthy economy. Chartered by state governments for a specific public purpose mission, HFAs are publicly accountable and their activities are transparent to the communities they serve. Many are public agencies or state authorities. Most are governed by public boards with members that are appointed by

state governors or legislatures or serve ex officio. HFAs are subject to administrative oversight and review by state attorneys general who enforce consumer rights and public protections.

NCSHA urges HUD to exempt state HFAs from the SAFE Act licensing requirements. If HUD determines the statute does not permit such an exemption, we urge HUD to give states the flexibility and authority to exempt HFAs from SAFE Act state licensing requirements.

Many states have exempted HFA employees from SAFE Act licensing requirements because of the HFAs' public or quasi-public status and because they have determined the HFAs' activities fall outside the SAFE Act's definitions. HFA employees are paid on a salaried-basis and are not motivated to engage in improper practices for financial gain since they receive no additional compensation or gain from individual loan transactions. As a result of their mission, governance, and standard lending practices, HFAs do not engage in the improper activities or contribute to the problems the SAFE Act is designed to address.

HUD's proposed rule would establish confusingly overbroad licensing requirements that could be interpreted as applying to HFAs. If applicable, these requirements would impose undue burdens on HFA employees and agents, likely delaying or impeding their ability to provide services to their customers. Specifically, Section 3400.103, which defines a "loan originator" as an individual who takes a residential loan application and offers or negotiates terms for compensation or gain, is too broad.

We recommend HUD limit Section 3400.103 to individuals working on behalf of "for profit entities." This would allow HFAs and other state and local government agencies to continue to provide their consumer-based programs.

Similarly, HUD's definition of "for compensation or gain" includes "any circumstances in which an individual receives or expects to receive anything of value in connection with offering or negotiating terms." We recommend HUD revise the proposed rule's definition of "compensation or gain" to exclude salaried compensation paid to employees of state HFAs who do not receive commissions based on the number of loan transactions completed. If HUD does not accept this recommendation, we urge HUD to at least limit the definition of "receiving or expecting to receive anything of value" to exclude payment of reasonable fees, costs to reimburse for the provision of services, or future servicing income that may be derived by a state agency over the life of a loan. Receipt of these items should not by itself trigger the SAFE Act registration and licensing requirements.

HUD's regulations also should exclude—or give state legislatures and regulators the flexibility to exclude—from the licensing and registration requirements those individuals employed by or under the direct supervision of state or local government agencies that deliver consumer programs, including (but not limited to) affordable mortgages, closing cost assistance, down payment loans, home equity loans, rehabilitation loans, energy savings loans, tax credit program rebate loans, loan modifications, housing counseling, and foreclosure mitigation counseling. This would allow state HFAs to react quickly in developing programs (like homebuyer tax credit advance loan programs HFAs developed in the past two years) without having to worry about licensing requirements of the employees/agents or delivery systems.

Amend the Definition of Compensation or Gain

We further recommend that HUD modify its definition of “compensation or gain” to exclude administrative fees retained by governmental agencies, including HFAs, that administer local, state, or federal government-funded programs. Governmental agencies pass along the proceeds of such programs in the form of recoverable or forgivable loans that may or may not carry an interest assessment. These government agencies often receive nothing more than an administrative fee as allowed under specific program guidelines. While such administrative fees may “compensate” program administrators, they generally provide neither “compensation” nor “gain” directly to individual employees originating the loans, as their wages are typically based on a salary or hourly rate.

Avoid Potential Negative Impact on Nonprofits

We are also concerned about the potential impact of the SAFE Act and HUD’s proposed rule on nonprofit affordable housing providers HFAs partner with to serve underserved people and places. Nonprofits serve as vital partners to state HFAs, in their roles to ensure first-time homebuyers are knowledgeable of the home buying and mortgage loan processes, as well as to advocate for homebuyers in need of foreclosure prevention assistance. Many states administer programs that offer subordinate mortgages and down payment and closing cost assistance grants to low-income buyers. These programs, which are funded by both state and federal funds, including the HOME Investment Partnership program, operate through a network of local governments and nonprofit entities throughout the state.

Under HUD’s proposed rule, many nonprofits who partner with HFAs to administer loan and grant programs to the same underserved borrowers that HUD serves may be required to be state-licensed. This would be costly and administratively burdensome at a time when they are struggling to respond to increased demands for their services. The cost of obtaining and maintaining a license could be prohibitive for small or undercapitalized nonprofits. Many may no longer be able to participate in state HFA programs. Because there are few other entities willing to step in and administer programs that yield little or no financial return for their own benefit, many underserved potential homebuyers and communities may suffer as a result.

NCSHA encourages HUD to exempt, or provide states flexibility to exempt, HUD-approved nonprofits from the state SAFE Act licensing requirement on the basis of the consumer protections they already provide and the definition of “compensation or gain,” as previously discussed with respect to HFAs. For similar reasons, NCSHA also recommends that the definition of “compensation or gain” exclude salaried compensation paid to employees of nonprofit housing counseling agencies, who often work on behalf of the borrowers in order to help them attain affordable mortgages and who profit in no way from their role in the loan origination or modification process. In addition, we recommend the proposed rule make clear that consultations with counseling agency employees do not fall under the definition of an “offer or negotiation of loan terms.”

In addition, in HUD’s explanation of “offering and negotiating” loans, HUD broadens the definition so it appears it would apply to a nonprofit homebuyer counseling agency that refers borrowers to a partner lender and collects a fee from the lender (such as a “package preparation fee” or a “homebuyer preparation fee”). It is common practice in the nonprofit counseling industry for a nonprofit to collect such a fee from a lender above and beyond any direct or administrative fee it may receive for pre-purchase homebuyer education, homebuyer advocacy, or grant administration.

Such lender-paid fees help sustain counseling agencies and nonprofits and help integrate homebuyer education into the home buying process. Though lenders may recover the costs of such fees from home buyers, the payment of fees to nonprofit counseling agencies is not inherently problematic, nor does it suggest a pattern of steering that is detrimental to borrowers, especially since a major role of nonprofits is to analyze loan products and encourage borrowers toward the most favorable loan products for them.

Do Not Apply the SAFE Act to Third Party Loan Modification Specialists

We are also concerned about the proposed rule's impact on third party loan modification specialists. We urge HUD to limit this impact by modifying the proposed rule's preamble and definitions to allow third party loan modification specialists to operate without a license requirement, at least for an extended period of time.

The SAFE Act defines a loan originator, in part, as an individual who takes a residential mortgage loan application and offers or negotiates terms of a residential mortgage loan for compensation or gain. The preamble to the proposed rule says that the term "offers or negotiates" includes "interactions between an individual and a borrower where the individual is likely to seek to further his or her own interests or those of a third party." HFA-supported foreclosure counselors often act as an advocate for a homeowner when negotiating with a lender. While foreclosure counselors may "take residential mortgage applications," they do not offer or negotiate terms for compensation or gain or "seek to further his or her own interests or those of a third party."

We do not believe that state agency and nonprofit third party loan modification specialists should be covered by the definition of "loan originator." Typically, state agency and nonprofit counseling agency employees who assist consumers in restructuring and renegotiating existing loans are already subject to oversight, training, and strict administrative scrutiny. To require they become licensed would unnecessarily delay, burden, and increase the cost of delivering services to consumers. In some areas and communities, additional burden may discourage the provision of services completely at a time when we should be encouraging and furthering their efforts.

Foreclosure counselors receive their compensation regardless of whether their clients' mortgage loans are modified, refinanced, or foreclosed. This compensation arrangement, we believe, falls outside of what would be a reasonable interpretation of "compensation or gain," such as the receipt of origination fees or loan interest. Therefore, we recommend that HUD clarify that payment of money or anything of value to a counselor or counseling agency is not considered "compensation or gain" unless it is received from a mortgage lender, or the mortgage lender requires the homeowner to compensate the counselor.

Thank you for your consideration of our comments. Please do not hesitate to contact me if we can provide additional information.

Sincerely,



Garth Rieman
Director, Housing Advocacy and Strategic Initiatives