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HUD Issues SAFE Act Final Rule: Implications for Housing Counseling Agencies and Other Nonprofit Organizations

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Housing counseling agencies and other nonprofits have achieved a regulatory success that will help them to better serve consumers. After more than a year and a half in the making, on June 30, 2011, the U.S. Department of Housing and Urban Development (“HUD”) published its “Final Rule”¹ establishing minimum standards for state compliance with the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the “SAFE Act” or “Act”).²

The Final Rule codifies the minimum standards that will be used to determine whether a state has implemented a system for licensing and registering mortgage loan originators as required by the SAFE Act. The Final Rule expressly provides HUD-approved housing counseling agencies with multiple grounds to assert to state regulators that their housing counselors should not be required to be licensed as mortgage loan originators under state licensing schemes.

The Final Rule is dramatically different in its treatment of employees of HUD-approved housing counseling agencies and bona fide nonprofits from HUD’s draft final rule published in 2009 and its prior guidance.³ The prior guidance had left the door open for states to require mortgage loan origination licensing of housing counselors and other employees of nonprofit organizations. The shift in focus reflects HUD’s response to an unprecedented number of comments from housing counseling agencies and their counselors that advocated for this interpretation, as well as industry outreach to HUD, key members of Congress, state regulators, and other stakeholders.

Here are a few of the key clarifications in the Final Rule:

Traditional housing counseling is not mortgage loan origination. The SAFE Act does not require licensure of individuals engaged in traditional housing counseling activities because such activities do not amount to “engaging in the business of a loan originator,” which determines whether an individual must be licensed. HUD notes:

[A]n individual engaging solely in traditional housing counseling services generally does not “take a residential mortgage application and offer or negotiate terms of a residential mortgage loan for compensation or gain” within the meaning of the SAFE Act, and this final rule and therefore would not have to be licensed under the SAFE Act....In general, traditional housing counseling activities, such as those described in 24 C.F.R. part 214, do not involve either taking a residential mortgage loan application or offering or negotiating residential mortgage loan terms for compensation or gain within the meaning of the SAFE Act and this final rule.⁴

HUD warns, however, that “it is the substance of an individual’s activities, and not the label, profession, or job title of the individual that determines whether an individual is engaged in the business of a loan originator.”⁵ As a result, if a housing counselor is in fact engaged in the business of a loan originator, then “despite the individual’s professional label as a housing counselor, the individual must be state licensed.”⁶

The SAFE Act does not cover employees of (1) government agencies; and (2) bona fide nonprofit organizations who act as loan originators only as part of their duties because they are not engaging in the business of a loan originator and, thus, do not require licensure by states.

With regard to nonprofit organizations the Final Rule states:

HUD recognizes that the mere fact of an organization’s 501(c)(3) status is insufficient to conclude that its employees who act as loan originators necessarily do so for the benefit of the borrower and for

public or charitable purposes, rather than for the profit of the organization or another entity or individual. Instead, the organization's activities, purpose, incentive structures, and loan products must be considered in order to determine that its employees who act as loan originators do so outside of a commercial context.⁷

In particular, HUD's definition of "loan originator" provides that in determining whether a nonprofit organization is a bona fide nonprofit organization, a state supervisory authority must consider, at a minimum, the following seven-factor list of criteria: (1) Maintains tax-exempt status under section 501 (c)(3) of the Internal Revenue Code of 1986; (2) Promotes affordable housing or provides homeownership education, or similar services; (3) Conducts its activities in a manner that serves public or charitable purposes; (4) Receives funding and revenue and charges fees in a manner that does not incentivize the organization or its employees to act other than in the best interests of its clients; (5) Compensates employees in a manner that does not incentivize employees to act other than in the best interests of its clients; (6) Provides to or identifies for the borrower residential mortgage loans with terms that are favorable to the borrower and comparable to mortgage loans and housing assistance provided under government housing assistance programs; and (7) Meets such other standards that the state determines appropriate.⁸

Individuals who only engage in loan modifications or are third-party loan modification specialists should not be subject to mortgage loan origination licensing. HUD leaves to the Consumer Financial Protection Bureau ("CFPB") the issue of whether such individuals should be licensed under the SAFE Act. That being said, HUD also provides that individuals involved in refinance transactions are subject to licensing under the SAFE Act. "A refinancing results in a new loan, not a modified loan."⁹

HUD has included a set of appendices as part of the Final Rule, which provides examples of individuals who should and should not be licensed under the SAFE Act. This is an approach similar to the one the federal Banking Agencies took in their SAFE Act Final Rule, which is applicable to employees of federally regulated financial institutions.

The SAFE Act establishes the minimum floor for state regulation of loan originators. After the SAFE Act's enactment on July 30, 2008, the states moved to enact or amend laws to license mortgage loan originators. As a result, some of the states have enacted statutes or taken interpretative views that are broader in scope than the SAFE Act's licensing requirements and the Final Rule's minimum standards. Some of these states have sought to regulate tax-exempt organizations' housing counseling and loan origination services. Now that HUD has clarified that housing counselors employed by HUD-approved housing counseling agencies fall outside of the scope of the SAFE Act there may be a shift in these states' positions.

On July 21, 2011, HUD's rulemaking authority under the SAFE Act was transferred to the CFPB pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.

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¹ SAFE Mortgage Licensing Act: Minimum Licensing Standards and Oversight Responsibilities, 76 Fed. Reg. 38464 – 38501 (June 30, 2011) ("SAFE Act Final Rule"), to be codified at 24 C.F.R. Parts 30 and 3400.

² The SAFE Act was enacted as part of the Housing and Economic Recovery Act of 2008, Pub. L. 110–289 (July 30, 2008), codified at 12 U.S.C. § 5101-5116.

³ 74 Fed. Reg. 66548-66562 (Dec. 15, 2009); see also "HUD Seeks Comment on SAFE Mortgage Licensing Act Responsibilities: Housing Counselors in the Crosshairs?" (Dec. 22, 2011) available at <http://www.venable.com/hud-seeks-comment-on-safe-mortgage-licensing-act-responsibilities-housing-counselors-in-the-crosshairs-12-22-2009/>.

⁴ SAFE Act Final Rule at 38478.

⁵ SAFE Act Final Rule at 38748.

⁶ Id.

⁷ SAFE Act Final Rule at 38466.

⁸ SAFE Act Final Rule at 38466.

⁹ SAFE Act Final Rule at 38468.

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