

March 5, 2010

Via Federal eRulemaking Portal at <http://www.regulations.gov>

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

**Re: Docket No. FR-5271-P-01  
SAFE Mortgage Licensing Act: HUD Responsibilities under the SAFE Act;  
Proposed Rule**

The Securities Industry and Financial Markets Association (SIFMA)<sup>1</sup> appreciates the opportunity to comment on the above-referenced rule proposal by the U.S. Department of Housing and Urban Development (HUD), which offers interpretive guidance under the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the SAFE Act).<sup>2</sup> As a general matter, we praise HUD's efforts to enhance consumer protection, improve accountability, and combat fraud by developing baseline licensing standards for mortgage loan originators. We are deeply concerned, however, that the proposed rule defines the term "loan originator" in a manner that is both overbroad on its face, and beyond the scope of the SAFE Act, such that it unnecessarily threatens consumer choice and access to consumer credit. In this context, we offer the following constructive comments and recommendations.

### Overview

The SAFE Act encourages states to establish certain minimum standards in connection with the licensure and registration of individuals meeting the definition of "loan originator." The Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) drafted model legislation to help states enact SAFE Act-compliant laws (the Model State Law).<sup>3</sup> CSBS and AARMR asked HUD to review the Model State Law to determine whether it met the minimum requirements of the SAFE Act. HUD found that it did. In reaching this conclusion, HUD

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<sup>1</sup> SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit [www.sifma.org](http://www.sifma.org).

<sup>2</sup> The SAFE Act, enacted as part of the Housing and Economic Recovery Act of 2008, is codified at 12 U.S.C. § 5101 *et seq.*

<sup>3</sup> The Model State Law is available at <http://www.hud.gov/offices/hsg/ramh/mps/modellaw.pdf>.

issued written commentary that presented its interpretations of the SAFE Act and the analysis it undertook to determine that the Model State Law complied with the SAFE Act (the HUD Commentary).<sup>4</sup> The stated intention of the above-referenced rule proposal is to codify the HUD Commentary, and to clarify and interpret certain additional statutory provisions of the SAFE Act.

### **The definition of loan originator**

The SAFE Act defines a “loan originator” as “an individual who: (I) takes a residential mortgage loan application; *and* (II) offers or negotiates terms of a residential mortgage loan for compensation or gain” (emphasis supplied).<sup>5</sup> The Model State Law, however, uses the disjunctive “or” in defining the term “loan originator” and since many states have adopted the Model State Law, an individual in those states would be subject to the SAFE Act’s requirements by triggering either prong of the definition.

With respect to the first prong, the rule proposal defines the term “tak[ing] a residential mortgage loan application” in a manner that is fairly consistent with the prior HUD Commentary.<sup>6</sup> With respect to the second prong, however, the rule proposal defines the phrase “offers or negotiates terms of a residential mortgage loan” in a sweepingly broad and unprecedented manner. The preamble to the rule proposal takes the novel view that this phrase 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”; and
- “actions by an individual that make a prospective borrower more likely to accept a particular set of loan terms or an offer from a particular lender, where the individual may be influenced by a duty to or incentive from any party other than the borrower.”

Further, the rule proposal includes the following in “offers or negotiates terms of a residential mortgage loan” (emphasis supplied):

- (2) An individual ‘offers or negotiates terms of a residential mortgage loan for compensation or gain’ if the individual:
  - (i)(A) Presents for acceptance by a borrower or prospective borrower residential mortgage loan terms;

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<sup>4</sup> The HUD Commentary is available at <http://www.hud.gov/offices/hsg/ramh/safe/smlcact.cfm>.

<sup>5</sup> See 12 U.S.C. § 5102.

<sup>6</sup> Both the HUD Commentary and the rule proposal provide that the term “application” includes any request from a borrower, however communicated, for an offer (or in response to a solicitation of an offer) of residential mortgage loan terms, as well as the information from the borrower that is typically required in order to make such an offer.

- (B) Communicates directly or indirectly with a borrower or prospective borrower for the purpose of reaching an understanding about prospective residential mortgage loan terms; or
- (C) *Recommends, refers, or steers a borrower or prospective borrower to a particular lender or set of residential mortgage loan terms in accordance with a duty to or incentive from any person other than the borrower or prospective borrower; and*
- (ii) *Receives or expects to receive payment of money or anything of value in connection with the activities described in paragraph (c)(2)(i) of this section or as a result of any residential mortgage loan terms entered into as a result of such activities.*

As explained below, these expansive definitions threaten to unnecessarily encroach upon and conflict with common and beneficial business practices outside the scope of the SAFE Act.

### **Description of business practices**

Today's diversified financial institutions offer a full range of products and services through their affiliated companies, including insurance, banking, and brokerage products and services, among others. It is common practice (and is generally mutually beneficial to both parties) for such institutions to apprise their customers about these available options, as it enhances consumer choice and overall access to valuable financial products and services.

Financial advisors ("FAs") employed by a registered securities broker-dealer affiliate of a full-service firm typically offer financial counseling services to their customers and prospective customers (collectively, "customers"). These services include assessing the financial situation of customers, selecting and opening the right financial accounts for customers, developing solutions to meet the financial goals and objectives of customers, and periodically reviewing financial strategies for customers. Among other things, FAs may discuss retirement, education, insurance, investment, wealth transfer, and borrowing needs with customers.

FAs introduce their customers to financial products offered by affiliates of the securities broker-dealers. These may be investment products (such as mutual funds or annuities) or credit products (such as residential mortgage loans). FAs receive compensation from their employer securities broker-dealer for their services, as well as for introducing the affiliate products to customers.

When the FAs refer residential mortgage loans offered by a lender affiliate to customers, they do so by (1) communicating with their customers in-person or by telephone; (2) mailing to their customers brochures and other marketing materials describing the lender affiliate and some of the general features of the mortgage loan products that it offers;<sup>7</sup> and/or (3) providing their customers with a 1-800 number operated by the lender affiliate.

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<sup>7</sup> All brochures designate the lender affiliate as the lender and state that the customer may, among other things, contact the lender affiliate for more information. None of the brochures constitute or resemble loan applications.

The securities broker-dealers and their FAs do not participate in the mortgage loan origination process—that is, they do not provide or take mortgage loan applications, quote or lock-in interest rates, negotiate loan terms, or otherwise act as an agent of the customer or the lender affiliates. Additionally, neither the securities broker-dealers nor their FAs hold themselves out as being able to broker or make mortgage loans. While the limited marketing activities performed by the FAs are purely incidental to their core securities brokerage and investment advisory activities, and constitute a *de minimus* percentage of their actual business, the overall success of the lender affiliates’ enterprise relies heavily on the FAs’ performance of such activities.

Though, as noted earlier, FAs typically receive compensation from their employer firms for introducing an affiliate’s products, it is important to note that neither the securities broker-dealers nor their FAs receive any compensation from customers or any sales or referral-based compensation from the lender affiliate as a result of performing the limited marketing activities. Further, customers are not charged any fees for performance of the limited marketing activities. In other words, the pricing to a customer of a loan from a lender affiliate is the same whether the customer is introduced to the lender affiliate via the limited marketing activities of an FA, or whether the customer were to directly access the lender affiliate.

### **Prospective conflict with beneficial business practices**

Under the new HUD rule proposal, an FA employed by the broker-dealer affiliate of a full-service firm that informs his customer about the availability of home financing options from the firm’s affiliated mortgage lender as described above arguably would be subject to the SAFE Act’s registration, licensing, background investigation, education and testing requirements. This result is both unnecessary and undesirable for the following reasons, among others:

- Neither the statutory language nor legislative history of the SAFE Act support a definition of “offers or negotiates” that encompasses the limited marketing activity described above.
- Neither the Model State Law, nor HUD Commentary, nor HUD Frequently Asked Questions about the SAFE Act,<sup>8</sup> nor any other HUD guidance, provides any predicate or basis for the expansive new definition.
- The Federal Deposit Insurance Corporation’s (“FDIC”) draft final SAFE Act rule does not define “offers or negotiates” in a way that would encompass the limited marketing activities performed by securities broker-dealers and their FAs.
- The FA is merely making an introduction to an affiliated mortgage lender. The mortgage lender’s loan originator employees are already subject to federal banking agency or state SAFE Act requirements. Thus, requiring the FA to be licensed as well would not further any of the purposes

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<sup>8</sup> The HUD FAQ’s about the SAFE Act are available at <http://www.hud.gov/offices/hsg/ramh/safe/safeactfaq.pdf>.

of the SAFE Act (consumer protection, accountability, anti-fraud) – which supports the view that the SAFE Act was never intended to extend to such limited marketing activity.

- If FAs would be subjected to the licensing requirements of the SAFE Act, then brokerage firms would likely cease such limited marketing activity. Consequently, FAs would not inform their clients about the mortgage products of their affiliated companies, thereby diminishing consumer choice and access to home financing.
- Brokerage firms and individual brokers are already subject to extensive regulation and oversight by the SEC, FINRA and state securities regulators, including rigorous registration, education and testing requirements, as well as publicly available disclosures about the broker's background and conduct.

In keeping with the stated purposes of the SAFE Act, we recognize that any limitations adopted by HUD to the rule proposal should be narrow in scope. In this regard, we urge HUD, for the benefit of both consumers and their financial service providers, to adopt an amendment defining the phrase “offers or negotiates terms of a residential mortgage loan” that excludes an FA that introduces or recommends a borrower or prospective borrower to a lending affiliate, so long as the activities performed by the FA are limited in scope and are compliant with the requirements of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*

Sincerely,

A handwritten signature in blue ink, appearing to read "Ken Bentsen", with a long horizontal flourish extending to the right.

Kenneth E. Bentsen, Jr.  
Executive Vice President, Public Policy and Advocacy