

- **SAFE ACT SYNOPSIS**
- **KEY PHRASES**
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- **KEY QUESTIONS & SCENARIOS**
- **LICENSING INFORMATION**

**DISCLAIMER**

This information is not intended, and should not be construed, to be legal advice. Before taking any action based on this information you are strongly encouraged to, and should, consult with a qualified legal professional to whom you have provided all pertinent facts and information as to your personal situation. This information is intended to be general information only and, as such, it is provided with no guarantee as to its timeliness, completeness or accuracy. You should consult with your chosen advisor for the most complete and up-to-date information and guidance concerning the provisions of the Safe Mortgage Licensing Act and its California implementing legislation, Senate Bill 36.

# ManuFacts

SPECIAL EDITION

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## The SAFE Act

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CMHI President

It is not the purpose of this Special Edition of *ManuFacts* to debate the Safe Act, rather it is our purpose to help you understand the Act and its essential requirements so you can take the necessary steps to ensure compliance.

Hopefully this information will help you decide whether your business model requires that you and/or any of your employees must be, or can benefit from being, licensed as a mortgage loan originator.

This Special Edition will provide:

- A brief Safe Act synopsis
- Key Phrases
- Key Definitions
- Key Scenarios designed to answer specific situational questions.

### Safe Act Synopsis

Basically, the Safe Act requires that an individual, with very limited exceptions, performing specified acts must be licensed as a mortgage loan originator (MLO).

A MLO is an individual who for, or in the expectation of, compensation or gain takes a residential mortgage loan (RML) application or offers or negotiates terms of a RML.

The Federal Safe Act was signed into law on July 30, 2008. California's implementing legislation, Senate Bill 36,

became effective on October 11, 2009. The effective date for licensure of mortgage loan originators is July 31, 2010, if applied for through the Department of Corporations, or December 31, 2010 if the applicant has a valid real estate license and applies through the Department of Real Estate.

Additionally, Section 50002 of the Financial Code states, "No person shall engage in the business of making residential mortgage loans or servicing residen-



tial mortgage loans, in this state, without first obtaining a license from the Commissioner."

### Key Phrases

As you apply the following Key Definitions, please pay particular attention to the following **key phrases**:

• **"For acceptance"** means: Of a specific residential mortgage loan and its terms

• **"For the purpose of"** means: Acceptance by the borrower, influencing decision of another, reaching an agreement about a specific RML or terms, acceptance of the borrower

• **"For compensation or gain"** means: Any circumstances in which an individual receives or expects to receive anything of value in connection with offering or negotiating terms of a RML. These terms would not be limited to payments that are contingent upon closing of a loan" (HUD proposed rule).

• **"Passive conduit"** means: Administrative & clerical - communicating general and common knowledge information not related to a specific RML and terms.

These phrases will be very important in determining whether an individual's specific actions require a mortgage loan originator license.

The following eight Key Definitions, all of which are detailed in the California Finance Code and/or the Safe Act, are essential to understanding the applicability of the Safe Act and its implementing legislation (SB 36, Calderon). These definitions set the stage for understanding the questions and scenarios section that follows.

### Key SAFE Act Definitions

**I. "RESIDENTIAL MORTGAGE LOAN"(RML)** means any loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent

# The SAFE Act.....continued

consensual security interest on a dwelling, as defined in Section 103(v) of the federal Truth in Lending Act, or residential real estate upon which is constructed or intended to be constructed a dwelling.

CFC Section 22012(e)

**II. "DWELLING"** means a residential structure that contains one to four units, whether or not that structure is attached to real property. **The term includes an individual condominium unit, cooperative unit, mobilehome, or trailer, if it is used as a residence.**

CFC Section 22012(e)

**III. "MORTGAGE LOAN ORIGINATOR" (MLO)** means an individual who, for compensation or gain, or in the expectation of compensation or gain, takes a residential mortgage loan application or offers or negotiates terms of a residential mortgage loan.

CFC Section 22013(a)

**MORTGAGE LOAN ORIGINATOR DOES NOT INCLUDE** an individual who performs purely administrative or clerical tasks on behalf of a person meeting the definition of a mortgage loan originator.

**IV. "ADMINISTRATIVE OR CLERICAL TASKS"** means the receipt, collection, and distribution of information common for the processing or underwriting of a loan in the mortgage industry and communication with a consumer to obtain information necessary for the processing or underwriting of a residential mortgage loan, **to the extent that the**

**communication does not include offering or negotiating loan rates or terms, or counseling consumers about residential mortgage loan rates or terms.**

In this instance, counseling means advising or urging acceptance of the terms of a specific RML.

CFC Section 22013(b)(1)

**V. A DEALER, as defined in Section 18002.6, OR A SALESPERSON, as defined in Section 18013,** is not required to be licensed as a mortgage loan originator if the dealer or salesperson performs only administrative or clerical tasks on behalf of a person meeting the definition of a mortgage loan originator, **and if the dealer or salesperson does not accept compensation from a lender, mortgage loan originator, or from any agent of any lender or mortgage loan originator.**

SB 36 – Section 85  
HSC – Section 18034

**VI. "TAKES AN APPLICATION"**

(c)(1) 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.**

(2) An individual "offers or nego-

tiates 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;

(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.

SAFE Act – Section 3400.103(2)(C)(1)(2)

**VII. "COMPENSATION OR GAIN"** means when an individual receives or expects to receive **anything of value in connection with offering or negotiating terms of a residential mortgage loan.**

SAFE Act – Section 3400.103(C)(ii)



## The SAFE Act.....continued

### VIII. "ENGAGE IN THE BUSINESS OF A MORTGAGE LOAN ORIGINATOR"

An individual engages in the business of a loan originator if the individual:

- Takes a residential mortgage loan application; or
- Offers or negotiates terms of a residential mortgage loan for compensation or gain; or
- Represents to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationary, brochures, signs, rate lists, or other promotional items), that such individual can or will provide any of the services or perform any of the activities of a mortgage loan originator.

SAFE Act – Section 3400.103

"ENGAGE IN THE BUSINESS" also means, without limitation, making residential mortgage loans or servicing residential mortgage loans or both".

CFC – Section 50003(g)

#### Key Questions/Scenarios

The following is our current understanding as to how those definitions apply to us and to key questions our members have about the applicability of the Safe Act.

**But first please understand that the following information is not intended, and should not be construed, to be legal advice.**

**The scenarios discussed herein represent CMHI's current understanding concerning specific sections of the Safe Mortgage**

**Licensing Act and its California implementing legislation, Senate Bill 36. Before taking any action based on this information you are strongly encouraged to, and should, consult with a qualified legal professional to whom you have provided all pertinent facts and information as to your individual situation.**

Now, let's turn to some of the key questions we have received:

#### I. Dealer/Salesperson Exemption

**I have heard that the Safe Act requires dealers to be licensed as mortgage loan originators. I have also heard that dealers are exempt from the Act. Which is the correct answer?**

We have a qualified exemption. Remember, it's the actions of the individual that triggers the license requirement. Therefore:

- **A dealer, as defined in Section 18002.6, or a salesperson, as defined in Section 18013 of the HSC, is not required to be licensed as a mortgage loan originator if the dealer or salesperson performs only administrative or clerical tasks on behalf of a person meeting the definition of a mortgage loan originator, and if the dealer or salesperson does not accept compensation from a lender, mortgage loan originator, or from any agent of any lender or mortgage loan originator.**

**Remember HUD will focus on a "function test"... if an individual performs the acts of an MLO, that person must be licensed, no matter the person's job title or job description.**

SB 36 – Section 85

HSC – Section 18034

#### II. Takes An Application

**What is meant by "taking an application"?**

Pursuant to Section 3400.103(c) (1) of HUD's proposed rule 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 the borrower.

In its preamble to the **proposed rule** \*for the Safe Act, HUD interprets the term "takes a residential mortgage loan application" to exclude 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.**

**Therefore it is our understanding that the following scenarios would not constitute "taking an application":**

- Giving a home buyer access to a kiosk in order to complete an application on-line which goes directly to a funding source.
- Directing a home buyer to complete a paper application for financing.
- 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 nec-



## The SAFE Act.....continued

- 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.
- Transcribing information from the home buyer and directing it 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.

In each of these scenarios, the retailer/salesperson is acting as a **passive administrative and clerical conduit** and is not offering or negotiating terms of a residential mortgage loan.

### III. Offering/Negotiating/Communicating/Steering

#### a. Offering/Negotiating What constitutes offering?

Generally, an offer is not an offer unless it is capable of being accepted. If the retailer or salesperson is, as a **passive conduit**, merely passing information to the home buyer, an offer which can only be accepted by the borrower and the lender has not been made. **Consequently, it is our understanding that the following would not constitute an offer or offering:**

- The mere sharing of general information about a financing source, such as available financing.
- Acting as a **passive conduit** between the home buyer and the financing source without engaging in specific discussion of fi-

ancing options from a particular funding source.

- Discussing hypothetical financing options, i.e. options not related to a specific financing source.
- Giving the home buyer a list of available financing sources without recommending any of the sources.

#### b. Communicating How is communicating related to offering or negotiating?

It is HUD's position that communicating "directly or indirectly with a borrower or prospective borrower **for the purpose of reaching an understanding** about a prospective residential mortgage loan \*\* constitutes offering or negotiating.

In this instance, the word "understanding" does not mean comprehension of the terms, rather it means agreement as to specific residential mortgage loan terms.

Therefore, it is our understanding that the following scenarios **would not rise to the level of negotiating:**

- Discussing the home buyer's ability to afford a particular home, i.e., examples of monthly payments for a particular home.
- Discussion of various alternative financing options
- Presentation and/or discussion of generic fact sheets or generic rate sheets.

#### c. Steering

How is steering related to negotiating or offering?

Negotiating terms of a residential loan occurs if an individual 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.**

Without the duty to the financing source or the incentive from the financing source, this example of offering or negotiating will not be met.

**Consequently, it is our understanding that the following do not constitute offering or negotiating:**

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

**Additionally, it is our understanding that the duty and the incentive must be to and from the lender and therefore the following would not qualify as a duty or incentive:**

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

Safe Act Section 3400.103(c)(2)

### IV. Compensation or Gain

Is there a clear definition of compensation or gain?



## The SAFE Act.....continued

HUD's proposed rule defines compensation or payment of money or gain to include circumstances in which an individual receives or expects to receive anything of value **in connection with offering or negotiating terms of a residential mortgage loan.**

Because this definition is dependent on "offering or negotiating a loan", **it is our understanding that the following are not considered compensation or gain:**

- A sales person's sales commission for the sale of a manufactured home to the extent that the commission received is the same in a cash transaction as that in a financed 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.
- 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.

Safe Act Section 3400.103(c)(2)(c)(ii)

\* Federal Register/Vol.74  
No. 239—December 15, 2009  
24CFR Parts 34 & 3400

\*\*Federal Register/Vol.74  
NO. 239—December 15, 2009  
24 CFR Section 3400.103 (c)(2)(B)

By now you hopefully have an initial understanding as to whether your business model requires mortgage loan originator licensure.

You may apply for an MLO license through the Department of Corporations or, if you have a real estate license, through the Department of Real Estate.

You will need to take 20 hours of education classes before taking the required test. The classes may be taken on-line but the test must be taken in person at a testing center. At my last count, there were 36 centers in California.

You must be sponsored/employed by a licensed finance lender or broker and registered on the Nationwide Mortgage Licensing System and Registry.

There is a process through the Department of Corporations to be licensed as a sole proprietor.

**NOTE:** - Recognition and a special thank you to Thayer Long, Brian Cooney, the MHI staff and the members of MHEC whose good work and response to HUD's SAFE Act Proposed Rule served as the basis for the foregoing Key Scenarios.

### Resources

For specific questions about the licensing process, you can contact:

**Financial Strategies at**  
[www.mymortgagetrainer.com](http://www.mymortgagetrainer.com)

**Department of Corporations (DOC) Commissioner:**  
**Preston DuFauchard**  
320 West 4th Street, Ste. 750  
Los Angeles, CA 90013-1105  
(213)576-7500  
[www.corp.ca.gov](http://www.corp.ca.gov)

**Department of Real Estate (DRE) Commissioner:**

**Jeff Davi**  
2201 Broadway  
Sacramento, CA 95818-2500  
(877)373-4542  
[www.corp.ca.gov](http://www.corp.ca.gov)

Both the DOC and DRE operate under the authority of the State of California Business, Transportation & Housing Agency.

**Secretary of the Agency:**

**Dale E. Bonner**  
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