

How Are the Federal SAFE Act, the Federal Truth in Lending Act, State Loan Originator Regulation, and Manufactured Housing Related?

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I. Introduction

For purposes of manufactured housing, there are two major federal laws that address mortgage loan originators: the Secure and Fair Enforcement for Mortgage Licensing Act (SAFE Act)¹ and the Truth in Lending Act (TILA).²

The SAFE Act was enacted in 2008 in response to widespread misconduct by residential mortgage brokers.³ TILA was originally passed in 1968 but, in 2010, the Federal Reserve Board amended the regulations implementing the Act to address problems with mortgage brokers.⁴ Congress and the Consumer Financial Protection Bureau (CFPB) later made additional changes. Although all these changes were instigated by mortgage-broker misconduct, both the SAFE Act and TILA also apply to non-brokers involved with loan origination. The SAFE Act and TILA are completely independent of each other but both affect the majority of loans used to finance manufactured-home purchases. This summary focuses on the SAFE Act but includes comparisons to TILA.

II. Overview of the SAFE Act and its definition of “loan originator”

The SAFE Act prohibits anyone from “engag[ing] in the business of a loan originator” without meeting certain requirements, including licensing and registration,⁵ a background check, and educational requirements.⁶

The Act defines “loan originator” as an individual who both:

- Takes a residential mortgage loan application; **and**
- Offers or negotiates terms of a residential mortgage loan for compensation or gain.⁷

The definition specifically excludes:

- An individual who performs purely administrative or clerical tasks;

¹ 12 U.S.C. §§ 5101–5116.

² 15 U.S.C. §§ 1601–1667f.

³ See 12 U.S.C. § 5101. See, generally 76 Fed. Reg. 38,464 (June 30, 2011).

⁴ 75 Fed. Reg. 58,509 (Sept. 24, 2010); former Reg. Z § 1026.36(d), (e).

⁵ 12 U.S.C. § 5103.

⁶ 12 U.S.C. § 5104.

⁷ 12 U.S.C. § 5102(4)(A)(i)(I) and (II) (emphasis added).

- A person or entity that only performs real estate brokerage activities and is licensed as a real estate broker, unless that person is compensated by a lender, a mortgage broker, or other loan originator;
- Timeshares.⁸

Those meeting the SAFE Act’s definition of loan originator are divided into two categories: loan originators who require a state license, and “registered” loan originators. A registered loan originator is one that works for a depository institution such as a bank, a federally regulated subsidiary of a depository, or a lender regulated by the Farm Credit Administration.⁹ Registered loan originators are not subject to state regulation but must be registered with the National Mortgage Licensing System (NMLS).¹⁰ All other loan originators must be state licensed and registered with the NMLS.

The SAFE Act is implemented through both federal and state law. The Act directs states to establish licensing and registration systems¹¹ that meet a list of requirements detailed in the Act itself and federal Regulation H.¹² Because of the constitutional principal that federal law is supreme and preempts contradictory state law, the federal SAFE Act (and associated regulations) constrains states’ ability to regulate loan originators. States may exceed the minimum requirements but may not do less. If any state fails to meet its obligations under the Act and Regulation H, the Act directs the CFPB to step in and operate a compliant system for that state.¹³ As of this date, all states are *largely* in compliance with the SAFE Act. But, as explained below, several states have adopted exemptions that are not authorized by the Act and that may violate federal law.

III. Overview of TILA and its definition of “loan originator”

The Truth in Lending Act (TILA) is significantly broader than the SAFE Act, covering secured and unsecured credit transactions, rather than just loans secured by home mortgages. Unlike the SAFE Act, TILA mandates certain disclosures and prohibits numerous unfair practices by creditors, loan-originators, and mortgage-servicers. Overall, TILA provides much more protection to consumers than does the SAFE Act.¹⁴

⁸ 12 U.S.C. § 5102(4)(A)(ii), (iii), (iv).

⁹ 12 U.S.C. § 5102(8) (definition of “registered loan originator”). *See also* 12 C.F.R. pt. 1007 (rules regarding registration of federally-regulated loan originators such as bank loan officers).

¹⁰ 12 U.S.C. § 5103.

¹¹ 12 U.S.C. § 5104.

¹² 12 C.F.R. pt. 1008.

¹³ 12 U.S.C. § 5107.

¹⁴ *See generally* National Consumer Law Center, Truth in Lending (9th ed. 2015), *updated at* www.nclc.org/library.

TILA is implemented through another federal regulation—Regulation Z.¹⁵ Regulation Z’s definition of “loan originator” differs from the SAFE Act definition in some important ways. Under Regulation Z a company (including the creditor) may be a loan originator, in contrast to the SAFE Act, which applies only to individuals. TILA’s list of activities that define someone as a loan originator is also significantly broader, namely:

- Taking an application; **or**
- Offering, arranging, assisting a consumer in obtaining or applying to obtain, negotiating, or otherwise obtaining or making an extension of consumer credit for another person; **or**
- Advertising that such person can or will perform any of these activities.¹⁶

The definition expressly excludes “[a]n employee of a manufactured home retailer who does not take a consumer credit application, offer or negotiate credit terms, or advise a consumer on credit terms.”¹⁷ The Official Interpretations of this exclusion clarifies that making a referral counts as loan-originator activity.¹⁸ The loan originator rule also excludes anyone who provides seller-financing for up to three properties within a twelve-month period (if the loans meet certain criteria)¹⁹ and natural persons who provide seller financing for only one property per year.²⁰

Because TILA’s definition of loan originator is so broad, substantially all manufactured-home retailers are subject to the Act’s requirements. This includes the originators of both direct and indirect financing, including retail installment sales contracts.²¹ When a manufactured-home dealer uses a retail installment sales contract to finance the sale of a home, the dealer is the initial creditor and there must be some dealership employee who offers or arranges the credit terms. Thus, even if the salesperson avoids talking to consumers about the terms of third-party loans, the dealership will be a loan originator and subject to TILA’s requirements if it is entering into retail installment sales with consumers.

According to Regulation Z, a loan originator (under TILA) is only required to be licensed or registered under the SAFE Act if otherwise required by federal or state

¹⁵ 12 C.F.R. pt. 1026. Except in Connecticut, Maine, Massachusetts, and Oklahoma, which have special authority to implement parts of TILA through state law.

¹⁶ See Reg. Z § 1026.36(a)(1)(i) (summary). Note that this definition uses “or” rather than the “and” used by the SAFE Act, making it easier for someone to qualify as a loan originator.

¹⁷ Reg. Z § 1026.36(a)(1)(i)(B).

¹⁸ Reg. Z, Official Interpretations § 1026.36(a)(1)-1(iv).

¹⁹ Reg. Z § 1026.36(a)(4)(iii).

²⁰ Reg. Z § 1026.36(a)(5).

²¹ Reg. Z § 1026.36(a)(1) (referring to origination of “an extension of credit”); Reg. Z § 1026.2(a)(12) (broad definition of “credit”); Reg. Z § 1026.2(a)(16) (definition of “credit sale”). See also Reg. Z § 1026.36(a)(4), (5) (limited exception for small-scale seller financiers).

law.²² This means TILA defers to the SAFE Act and state law for licensing and registration requirements. If neither licensing nor registration is required, the loan originator's employer must perform a background check for originators hired after January 1, 2014 and provide periodic training.²³ TILA's coverage of loan originators is described in more detail in National Consumer Law Center, *Truth in Lending* § 9.3.2 (9th ed. 2015), *updated online at* www.nclc.org/library.

Regardless of whether someone meets TILA's definition of "loan originator," the transaction will only be covered by TILA if the lender meets TILA's definition of "creditor." Among other requirements, a lender is a "creditor" if it has made at least six loans secured by a dwelling during the preceding calendar year, at least two high-cost loans (as defined by TILA), or at least one loan through a mortgage broker.²⁴ While the application of the SAFE Act and TILA are independent, they will often apply to the same transaction when home loans are involved.

IV. State implementation of the SAFE Act and state regulation of loan originators

All states have implemented the federal SAFE Act by adopting legislation (often called a state SAFE Act) based on a model law drafted by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators.²⁵ Notably, the model law and all state laws use a somewhat broader definition of "loan originator" than the federal SAFE Act. While the federal Act defines "loan originator" as someone who **both** takes a loan application **and** offers or negotiates loan terms,²⁶ all states have adopted a definition that includes individuals who meet **either** criterion. The model law is similar to TILA in this regard. While a state could choose to adopt the narrower federal SAFE Act definition, states may not exclude anyone who is covered by the federal version. The question of whether someone must be licensed or registered under the SAFE Act is independent of whether the same person or transaction is subject to TILA.

Representatives of the manufactured-housing industry have suggested that state licensing requirements are unreasonably burdensome and ill-suited to retail sellers of manufactured homes. This paper does not address the details of state licensing requirements. Those requirements are summarized on the website of the National Mortgage Licensing System (NMLS) Resource Center.²⁷

²² Reg. Z § 1026.36(f).

²³ Reg. Z § 1026.36(f).

²⁴ Reg. Z § 1026.2(a)(17)(v). Under TILA a mortgage broker is a loan originator not employed by the creditor. Reg. Z § 1026.36(a)(2).

²⁵ <http://mortgage.nationwidelicencingsystem.org/SAFE/NMLS%20Document%20Library/MSL-Final.pdf>.

²⁶ 12 U.S.C. § 5102(4)(A).

²⁷ See NMLS Resource Center, State Licensing Requirements, *available at* <http://mortgage.nationwidelicencingsystem.org/safe/Pages/default.aspx>. It is not clear whether this information is regularly updated.

V. Impact of state and federal law on manufactured home sales

Because purchase-money financing is often negotiated and arranged by manufactured-home dealers and the owners of manufactured-home communities, the manufactured-home industry has opposed application of the SAFE Act's licensing requirement.²⁸ Advocates for the industry have sought various exclusions or exemptions to reduce their exposure to the Act.²⁹

A. Manufactured homes are clearly covered by the SAFE Act

The SAFE Act applies to the origination of “residential mortgage loans.” That term is defined to include any loan made primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or a similar security interest on a dwelling or on residential real estate upon which a dwelling has been or will be built.³⁰ The terms “dwelling” and “residential real estate” are defined by reference to TILA,³¹ which—in turn—defines those terms as including “mobile home[s]”³² (now commonly called “manufactured homes”).

Therefore, anyone who meets the definition of “loan originator” in the context of financing a loan secured by a manufactured home must be registered and (depending on employment) state licensed. The financing may take the form of a direct loan, in which the borrower applies directly to a bank (at the dealership or otherwise). Or the financing may be through a retail installment contract, in which the dealer is the creditor (regardless of whether the loan is later assigned to someone else).

The U.S. Department of Housing and Urban Development (HUD) issued the original regulations for implementing the SAFE Act.³³ In doing so, HUD emphasized that the definition of “loan originator” is set by statute and the administrator did not have authority to change it.³⁴ “Even if a state categorizes loans secured by [manufactured homes] as chattel mortgages, the SAFE Act covers these loans”³⁵ Thus, states do not have the authority to exempt

²⁸ See 76 Fed. Reg. at 38,474 (discussing comments received by HUD regarding “mobile/manufactured homes”).

²⁹ See generally Thayer Long, *Understanding the SAFE Act*, The Journal: The Magazine for Manufactured & Modular Housing Professionals (Feb. 2010), available at www.manufacturedhousing.org/admin/template/subbrochures/1730temp.pdf.

³⁰ 12 U.S.C. § 5102(9).

³¹ The SAFE Act says “as defined in section 1602(v) of Title 15.” This reference was not changed after TILA was amended by the Dodd-Frank Act. The correct reference should probably be § 1602(w).

³² 15 U.S.C. § 1602(w) says: “The term ‘dwelling’ means a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives.”

³³ Effective 2011, the Dodd-Frank Act transferred administration of the SAFE Act to the CFPB. Because HUD was originally tasked with adopting regulations to implement the Act, most of the discussion in this memo refers to HUD. The CFPB has not made substantive changes to the regulations.

³⁴ 76 Fed. Reg. at 38,475.

³⁵ *Id.*

manufactured-home transactions from the SAFE Act. Moreover, even if states could exempt originators of manufactured-home financing from the SAFE Act, those originators would still be subject to TILA’s background check and training requirements, which mirror core SAFE Act requirements.

B. Salespersons who arrange manufactured-home loans are loan originators under the SAFE Act

Industry advocates argue that manufactured home salespersons should be exempt from the SAFE Act because they are compensated only for arranging the *sale* of manufactured homes and not for their efforts to help buyers obtain financing.³⁶ In addition, the industry argues that salespersons do not offer or negotiate loan terms. Instead, they merely help buyers complete the loan application and put them in contact with lenders. This argument, however, fails for a number of reasons.

In practice, salespersons often do far more than simply take an application. In reality, they are effectively loan brokers, making them exactly who Congress intended to subject to the licensing requirement. Traditionally, salespersons frequently answer questions about loan terms, make suggestions, and give the customer the name or application from a particular lender or limited selection of lenders. “Steering”—when the loan originator recommends a lender based on the loan originator’s best interest, rather than the borrower’s interest—was one of the abuses that led to the SAFE Act. Manufactured-home buyers are exposed to steering not just because of compensation practices (as in other loan markets) but because the largest retailers, lenders, and manufacturers have a common corporate parent. This common ownership creates the risk that a retailer’s salesforce will be pressured to steer borrowers to their affiliated lender. Another concern is that large lenders typically require a retailer to enter into a nonexclusive contract with the lender, which can limit consumer choice.

Except for buyers who are able to pay the purchase price of a manufactured home in cash (average \$64,000),³⁷ there will be no sale and the salesperson will not earn a commission unless there is a loan. The availability of financing also enables dealers to charge more for homes. If sales were cash-only, dealers would probably need to lower prices. This means the purchase-money loan is inextricably related to the sale transaction and to the sales commission.

HUD has discouraged the argument that sales commissions should not be considered compensation. As HUD explained when issuing the final rule, “a sales commission received by an individual in the manufactured home retail industry would likely meet the definition of ‘for compensation or gain’ if it is received or

³⁶ *Id.*; 76 Fed. Reg. at 38,469, 38,474–475 (discussing industry comments submitted to HUD).

³⁷ 2013 Census Data, available at www.census.gov/construction/mhs/pdf/pricensa_all.pdf.

expected to be received ‘in connection with’ activities that constitute ‘offering or negotiating.’³⁸ Even if the salesperson merely puts the buyer in contact with a lender, the resulting commission is likely received in connection with the loan because the commission would not be paid absent the salesperson’s referral.

If a manufactured-home dealership extends credit for a purchase, someone at the dealership will almost certainly meet the definition of “loan originator.” Even if the consumer selected a home without the assistance of a salesman, someone at the dealership would need to take the consumer’s application and offer the loan terms.

Another problem with the industry’s interpretation is that, even if salespersons merely took loan applications, that is enough to make someone a loan originator under state law. As described above, states have implemented the federal Act with a broader definition of “loan originator” than the one adopted by Congress. While states could switch to the narrower federal definition, the industry would still likely need to change sales practices substantially to avoid triggering the offer-or-negotiate portion of the definition.

C. Congress did not give states or HUD authority to issue a *de minimis* standard for the SAFE Act

Industry advocates have also expressed concern that the SAFE Act poses an unreasonable burden on those who sell a small number of homes each year. This includes smaller dealers and manufactured-home communities that offer seller financing for homes they own in the park.³⁹ To address this concern, the industry has promoted a *de minimis* exception to the loan-originator definition. Such an exception would establish a threshold for how many transactions a loan originator must complete before triggering the rule.

While HUD included a phrase in Regulation H that relates to this argument, HUD’s commentary on the rule and aspects of the Act undermine arguments that HUD or states could adopt a *de minimis* standard. According to Regulation H “[a]n individual engages in the business of a loan originator if the individual, **in a commercial context and habitually or repeatedly**” takes applications and negotiates or offers loan terms.⁴⁰ Neither the Act nor Regulation H specifies a numerical threshold for coverage. But HUD discussed the meaning of this phrase in the *Federal Register* and included examples in an appendix to the rule.

In HUD’s view, some individuals may do things covered by the definition of “loan originator” without being “in the business of a loan originator.”⁴¹ And,

³⁸ 76 Fed. Reg. at 38,471.

³⁹ See 76 Fed. Reg. 38,464, 38,474 (June 30, 2011).

⁴⁰ 12 C.F.R. § 1008.103(b).

⁴¹ 76 Fed. Reg. 38,464, 38,465 (June 30, 2011).

individuals not in the business of a loan originator are not covered by the Act.⁴² An individual can be considered to habitually or repeatedly act as a loan originator due to the individual's *own* loan origination activities or if the *lender* habitually or repeatedly makes loans or performs loan origination activities.⁴³ The examples in the appendix include individuals who finance the sale of their own residence or property. But the examples include an important (and somewhat circular) caveat: "provided that such individual does not engage in such activity with habitualness."

The example of individuals selling property they own but do not occupy is particularly relevant for the owners of manufactured-home communities. HUD refused to provide a blanket exemption for such transactions and refused to set a specific numerical threshold. Instead, it is necessary to examine the details of the transaction and how often the individual engages in such transactions. As HUD explained:

While the fact that the seller has not lived in the properties makes it more likely that financing is provided in order to obtain a profit, and therefore makes it more likely that a commercial context is present, the infrequency with which a particular seller undertakes such actions, combined with the fact that it is the individual who is providing the financing (rather than a business entity that regularly provides financing), may mean that the requisite habitualness needed to constitute "engag[ing] in the business" of a loan originator is absent.⁴⁴

The owners of manufactured-home communities—like dealers—are clearly operating a business. This could, by itself, establish the "commercial context" requirement. In addition, they likely profit from the terms of any financing they offer. Community owners will also profit when homes they sell remain in the park (as they typically do) and attract rent-paying tenants.

Because HUD refused to set a specific threshold, the only conclusion that can be drawn from the rule and HUD's commentary is that a property owner who provides seller financing *once* is not in the business of a loan originator. But someone who does so with any regularity—even twice a year—could potentially be said to habitually or repeatedly act as a loan originator.⁴⁵ Small dealers and

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 38,467.

⁴⁵ In this regard, HUD gave another example: "For example, a builder who repeatedly acts as a loan originator in the course of selling homes he or she has constructed would almost certainly satisfy the requirements of a commercial context and habitualness or repetition" *Id.* at 38,474.

community owners can avoid the need to become licensed and registered by contracting with someone else who is.

By contrast, TILA does provide a *de minimis* exception to its definition of “loan originator.” A person who provides seller-financing for up to three properties within any twelve-month period will, nevertheless, not be considered a loan originator if the seller owns all the properties and the loan terms meet certain criteria.⁴⁶ There is also a similar exception for natural persons providing seller financing for only one property per year.⁴⁷ This exception would apply to very small-scale, manufactured-home sales operations. For example, it might apply to a manufactured-home park’s sale of an occasional abandoned home to which it had acquired title. The TILA exception can be viewed as suggesting an outer limit to any exception created by HUD’s “engaging in the business” language.

In addition to the text of the SAFE Act and regulation, HUD has clearly rejected the industry’s request for a *de minimis* exemption. In a September 2010 letter to Congressman Spencer Bachus, HUD observed that the federal Act authorizes federal *banking* agencies to create a *de minimis* standard for *registered* loan originators but does not give HUD the same authority in regard to *state-licensed* originators.⁴⁸ And again, in the *Federal Register* notice announcing the final rule, HUD clearly stated: “HUD has no authority under the SAFE Act to establish a ‘de minimis’ exemption that would shield individuals who do engage in the business of a loan originator from the SAFE Act’s licensing requirements, but who do so infrequently.”⁴⁹

Courts would likely agree that HUD lacks this authority. Based on traditional rules of statutory interpretation, Congress’s decision to expressly give this authority to federal banking agencies—without specifically giving it to any other agencies or the states—implies that nobody other than the federal banking agencies is permitted to create a *de minimis* standard. And if HUD cannot grant such an exemption, states could not grant it either. The constitutional principal of federal preemption suggests that states could not create an exception to a rule if the exception does not exist in the federal version of that rule.⁵⁰

Nevertheless, according to a review by the Manufactured Housing Institute, an industry advocacy group, a number of states have adopted *de minimis* exemptions

⁴⁶ Reg. Z § 1026.36(a)(4)(iii).

⁴⁷ Reg. Z § 1026.36(a)(5).

⁴⁸ Letter to Rep. Spencer Bachus from Peter A. Kovar, Asst. Sec. for Congressional and Intergovernmental Relations, U.S. Dept. of Hous. and Urban Dev. (Sept. 10, 2010), *available at* www.manufacturedhousing.org/admin/template/subbrochures/HUD%20response%20Frank-Bachus.pdf.

⁴⁹ 76 Fed. Reg. 38,464, 38,467 (June 30, 2011).

⁵⁰ Neither the Act nor Regulation H has a *de minimis* exemption.

for certain loan originators.⁵¹ We are not aware of whether any courts have ruled on whether these exemptions violate the federal SAFE Act. But these exemptions appear to go beyond the narrow limits described by HUD. It would be unwise for dealers to rely on these exceptions because they appear to be inconsistent with the SAFE Act.

Other states have issued guidance addressing the coverage of various manufactured-home loan originators.⁵² California, for example, exempts “[o]wners of mobile home parks who occasionally carry back paper (chattel loans) on units in their parks that they sell to occupants.”⁵³ This exemption could potentially be construed as compliant with the Act and Regulation H but only so long as “occasionally” is not interpreted to encompass park owners who engage in these activities habitually or repeatedly. Informal guidance from Florida, in contrast, more closely follows the letter and spirit of the Act. Florida’s guidance declines to grant a blanket exemption to manufactured-home dealers. Instead it observes that dealership employees who are “accustomed to assisting prospective customers in obtaining financing ... may need to consciously change their manner of interacting with customers to avoid engaging in loan origination.”⁵⁴

VI. Conclusion

Overall, manufactured-home retailers that provide or assist with financing are required to involve a state-licensed loan originator in the transaction. But, even if state law does not require a licensed loan originator, most financing transactions will be subject to the Truth in Lending Act’s substantive rules for loan originators.

For questions, contact Andrew Pizor in the National Consumer Law Center’s Washington, D.C. office (202-452-6252).

⁵¹ See Manufactured Hous. Inst., 2011 and 2012 State Laws/Regulations on Licensing for Individuals Engaged in Seller Financing (Habitualness Standard), *available at* <http://www.manufacturedhousing.org/webdocs/Summary%20of%20State%20SAFE%20Act%20Laws.pdf>.

⁵² See Manufactured Hous. Inst. website collecting interpretative letters, *available at* www.manufacturedhousing.org/lib/showtemp_detail01.asp?id=1888&cat=whats_hot.

⁵³ Letter to Charles Johaneck, U.S. Dept. of Hous. and Urban Dev. from Marjorie M. Berte, Cal. Bus., Transportation and Hous. Agency (June 21, 2010), *available at* www.manufacturedhousing.org/admin/template/subbrochures/California.pdf.

⁵⁴ Letter to James R. Ayotte from William Oglo, Florida Offc. of Fin. Reg. (Jan 11, 2011), *available at* <http://www.manufacturedhousing.org/admin/template/subbrochures/Florida.pdf>