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SECRETARY OF BANKING

October 6, 2011

**To all Persons Potentially Engaged in the Mortgage Loan Business in Pennsylvania or With Pennsylvania Residents**

On August 29, 2011, the final regulation issued by the United States Department of Housing and Urban Development (“HUD”) entitled “SAFE Mortgage Licensing Act: Minimum Licensing Standards and Oversight Responsibilities” (76 FR 38464; June 30, 2011) (the “HUD Regulation”) became effective. The HUD Regulation represents HUD’s final interpretation of key elements of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the “SAFE Act”), 12 U.S.C. § 5101 *et seq.*, which was implemented in Pennsylvania by amendments to the Mortgage Licensing Act (“MLA”), 7 Pa.C.S. § 6101 *et seq.*

As a matter of background, the SAFE Act requires each state to enact legislation that regulates individual mortgage originators consistent with the SAFE Act’s standards, including the mandatory use of the Nationwide Mortgage Licensing System and Registry (“NMLSR”). States that do not enact such legislation risk losing the ability to regulate individual mortgage originators in favor of HUD. The Conference of State Bank Supervisors (“CSBS”) and the American Association of Residential Mortgage Regulators (“AARMR”) developed a model state law for use by the states in implementing the SAFE Act, which HUD, the primary administrator of the SAFE Act, determined properly implements the SAFE Act. The amendments to the MLA that implemented the SAFE Act in Pennsylvania were based upon the CSBS/AARMR model state law.

State mortgage regulators, including the Pennsylvania Department of Banking (the “Department”), have determined that legislative changes are necessary in order to implement the HUD Regulation. However, in order to enact such legislative changes, model state law language must be approved by the federal Consumer Financial Protection Bureau (“CFPB”) as properly implementing the HUD Regulation.<sup>1</sup> The Department will be seeking amendments to the MLA in order to implement the HUD Regulation as soon as possible after model state law language is approved by the CFPB. In the meantime, the Department has determined to issue this letter in order to provide interim guidance regarding the HUD Regulation.

One of the primary purposes of the HUD Regulation was to provide further clarification regarding who must be licensed as a “loan originator” under state law.<sup>2</sup> **As a general matter, the Department will begin interpreting the provisions of the existing MLA regarding the**

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<sup>1</sup> The federal Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 transferred HUD’s authority over the SAFE Act to the CFPB effective July 21, 2011.

<sup>2</sup> The MLA uses the term “mortgage originator” instead of the HUD Regulation’s use of the term “loan originator.” The terms will be used interchangeably in this letter.

**definition of “mortgage originator” to the extent possible in a manner consistent with the HUD Regulation.** The HUD Regulation, as applied to the MLA, requires that the Department prohibit an individual from engaging in the mortgage loan business if the individual in a commercial context and habitually and repeatedly takes a residential mortgage loan application **or**<sup>3</sup> offers or negotiates terms of a residential mortgage loan for compensation or gain, or represents to the public that such an individual can or will perform these activities. *See* 24 CFR § 3400.103(b). The HUD Regulation is clear that the absence of either a commercial context or a degree of habitualness or repetition means that the activity in which an individual is engaged does not constitute the business of a loan originator. This letter will address three consistent issues that have been raised as a result of the HUD Regulation.

The HUD Regulation does not define what the term “habitually and repeatedly” means within the context of the definition of “loan originator;” further, HUD has indicated that it is not permitted to establish exceptions to the definition of “loan originator” other than those enacted in the SAFE Act. Therefore, HUD believes that it cannot set a *de minimus* amount of mortgage loan business that would qualify as not “habitual or repeated.” Without any guidance from HUD regarding this issue, the states are essentially left to interpret the HUD Regulation as they deem proper. With this in mind, and until legislation is enacted in Pennsylvania implementing the HUD Regulation, **the Department will not take exception to an individual making or brokering three (3) or less mortgage loans in a calendar year without being licensed as a mortgage originator**, provided that the individual is not employed by any state-licensed entity or advertising that the individual is able to engage in the mortgage loan business and such loans are made in compliance with all other applicable federal and state laws, including the Loan Interest and Protection Law, 41 P.S. § 101 *et seq.*

Similarly, the HUD Regulation does not define what the term “commercial context” means within the definition of “loan originator;” however, the HUD Regulation makes it clear that employees of government agencies and bona fide nonprofit organizations generally lack a pecuniary purpose for their mortgage loan business activities, and thus their employees generally do not need to be licensed as loan originators. The HUD Regulation lists certain criteria that a nonprofit organization must meet in order to be a “bona fide nonprofit organization,” such that the employees of the organization engaged in the mortgage loan business do not need to be licensed as loan originators. *See* 24 CFR § 3400.104(e)(7). Assuming that a nonprofit organization meets these criteria, the Department **will not require an employee of a bona fide nonprofit organization engaging in the mortgage loan business to become licensed as a mortgage originator**, provided that the employee is engaging in the mortgage loan business at the behest of the employing nonprofit organization.

Finally, the HUD Regulation clarifies that an installment sales contract of a residence is a “residential mortgage loan” for purposes of the SAFE Act because such contracts create an “equivalent consensual security interest on a dwelling or on residential real estate.”<sup>4</sup> As the

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<sup>3</sup> The MLA’s definition of “mortgage originator” is broader than the definition of “loan originator” contained in the HUD Regulation because the MLA uses the more-encompassing term “or” in defining the activities that require a mortgage originator license rather than “and” as is found in the HUD Regulation.

<sup>4</sup> For purposes of this letter, the term “installment sale contract” refers to a transaction otherwise known as a “lease-purchase” or “rent-to-own” contract. The term does not refer to an “installment sale contract” as defined in Section 3.10 of the Motor Vehicle Sales Finance Act (“MVSFA”), 69 P.S. § 603.10. Nothing in this letter is intended to alter the existing licensing exemption in the MLA for sellers of manufactured homes licensed under the MVSFA who finance the sale of manufactured homes under MVSFA installment sale contracts.

HUD Regulation states, “[w]hile there is no recorded lien held by the provider of financing, the fact that the seller holds title to the property until the contract has been paid in full is the practical equivalent of a lien for the purposes of the SAFE Act ... .” 76 FR 38473-38474. Because of this, **sellers of dwellings or residential real estate by means of an installment sales contract who engage in such business in a commercial context and habitually and repeatedly are required to be licensed as mortgage lenders and have their employees appropriately licensed as mortgage originators under the MLA.** This letter specifically repeals the Department’s position regarding the applicability of the MLA to sellers of residential real estate by means of installment sales contracts as announced in an interpretive letter dated August 10, 2009.

This letter is not intended as and does not constitute legal advice. Please keep in mind that this letter contains generalizations regarding the HUD Regulation discussed herein and is therefore not inclusive of all of its provisions, conditions, exceptions, and details. It is critically important for you to read the HUD Regulation and seek guidance from your legal counsel and trade association regarding the effects of the HUD Regulation on your business operations.

Questions regarding this letter should be addressed to the Licensing Division of the Bureau of Compliance, Investigation and Licensing at (717) 787-3717 or by submitting an inquiry via the Department’s website at [www.banking.state.pa.us](http://www.banking.state.pa.us). We at the Department look forward to working with you in order to seamlessly implement the HUD Regulation in Pennsylvania in the coming months.

Sincerely,



Glenn E. Moyer