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Governor

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IDAHO DEPARTMENT OF FINANCE Policy Statement 2013-01

Application of the Idaho SAFE Act to Persons Who Finance the Sale of Properties They Own by Means of a Credit Sale

I. Background

This Policy Statement is intended to address the application of the Idaho Secure and Fair Enforcement for Mortgage Licensing Act of 2009 (Idaho SAFE Act) to persons who finance the sale of properties they own by means of a credit sale.

The federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (Federal SAFE Act) and associated federal rules set forth minimum standards that all states are required to enforce in the licensing and oversight of individual mortgage loan originators. The federal Consumer Financial Protection Bureau (CFPB) is the federal agency now charged with monitoring and enforcing states’ compliance with the requirements of the Federal SAFE Act.¹

On June 30, 2011, the U.S. Department of Housing and Urban Development (HUD) published a final rule in the Federal Register setting the minimum standards that states must meet to comply with the Federal SAFE Act in licensing mortgage loan originators.² In its commentary HUD expressed the view that the Federal SAFE Act’s distinction between individuals who may meet the definition of “loan originator” (because of the activities they carry out) versus those individuals who “engage in the business” of a loan originator, means that not every individual who acts as a loan originator is necessarily subject to the Federal SAFE Act’s licensing requirements.³ HUD further clarified that individuals required to be licensed under the SAFE Act are individuals who engage in the “business of a loan originator”; that is, they act as a residential mortgage loan originator with respect to financing that is provided *in a commercial context and with some degree of habitualness or repetition* (Italics added).⁴

Addressing the situation where a property owner engages in seller financing of properties in which he or she has not lived, HUD also stated:

While the fact that the seller has not lived in the properties being sold would make it more likely that financing is provided in order to obtain a profit, and would therefore make it more likely that a commercial context is present, the infrequency with which a particular seller undertakes such actions, combined with

¹ The authorities and duties initially delegated to HUD by the Federal SAFE Act were transferred to the CFPB on July 21, 2011, pursuant to an amendment to the Federal SAFE Act by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, approved July 21, 2010).

² 76 FR 38464

³ 76 FR at 38465

⁴ *Id*

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. On the other hand, 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 and, accordingly, would be subject to SAFE Act licensing requirements.⁵

II. Can an Installment Sales Contract be a “Residential Mortgage Loan” For Purposes of the Federal SAFE Act?

A “mortgage loan originator” is defined as 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”⁶ (emphasis added).

In its commentary to the final Federal SAFE Act rule, HUD made it clear that the term “residential mortgage loan” for Federal SAFE Act purposes encompasses seller financing of properties. HUD stated:

HUD confirms the commenters’ observation that a “residential mortgage loan” includes an installment sales contract, which the commenters advise is frequently involved in seller financing. “Residential mortgage loans,” as defined by section 1503(8) of the SAFE Act, refers to typical financing mechanisms such as mortgages and deeds of trusts. In addition, the SAFE Act definition also includes “other equivalent consensual security interest on a dwelling (as the term ‘dwelling’ is defined by section 103(v) of TILA) or residential real estate upon which is constructed or intended to be constructed a dwelling,” which has the potential for including a broad range of other financing mechanisms. For the purposes of this rule, “equivalent consensual security interests” specifically include installment sales contracts, consistent with the treatment by many states of such contracts in the same manner as mortgages and purchase money mortgages offered by sellers of residential real estate. While there is no formal 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 purposes of the SAFE Act and its purposes and is comparable to the status of a mortgage in a state that follows title theory under mortgage law. Inclusion of installment sales contracts in the scope of the definition of “residential mortgage loan” is also consistent with section 103(w) of TILA and 12 CFR 226.2(a)(24) of the Federal Reserve Board’s implementing regulations (Regulation Z), both of which include in the definition of “residential mortgage transaction,” a purchase money security interest arising under an installment sales contract.⁷

⁵ 76 FR at 38474

⁶ Idaho Code 26-31-303(6)

⁷ 76 FR at 38473 and 38474

III. An Individual Must Act With Some Degree of Habitualness in Order to Engage in the Business of a Loan Originator

In its commentary to the final Federal SAFE Act rule, HUD explained that it did not have authority to establish a “de minimis” exemption from the licensing requirements of the Federal SAFE Act. But, HUD expressed its agreement that an individual must act as a loan originator with respect to financing or other origination activities performed with some degree of *habitualness* in order to engage in the “business of a loan originator.”⁸

In Appendix B to 24 CFR Part 3400, HUD provided some examples to illustrate when an individual generally does not engage in the “business of a loan originator.” Of the examples provided, the following example appears to be relevant for purposes of this Policy Statement:

- An individual who acts as a loan originator in providing financing for the sale of a property owned by that individual, provided that such individual does not engage in such activity with habitualness.

IV. The Department’s Position Regarding “Habitualness,” For Purposes of Applying the Idaho SAFE Act to Persons Who Finance the Sale of Properties They Own by Means of a Credit Sale

It is the Department’s position that the required “habitualness” or “repetition,” as a necessary element in determining that an individual engages in the “business of a loan originator,” is absent where an individual, as a credit seller of his or her own property:

- Engages in five (5) or fewer seller financed credit sale transactions in this state within any consecutive twelve (12) month period in which the property sold is a “dwelling” (as the term “dwelling” is defined by section 103(v) of the Truth in Lending Act) or residential real estate upon which is constructed or intended to be constructed a dwelling;

IF THE CFPB ISSUES A FINAL RULE, INTERPRETATION, OR FORMAL GUIDANCE PERTAINING TO THE FEDERAL SAFE ACT THAT IS CONTRARY TO THIS POLICY STATEMENT, THE IDAHO DEPARTMENT OF FINANCE WILL HAVE NO ALTERNATIVE BUT TO IMMEDIATELY AMEND OR WITHDRAW THIS POLICY STATEMENT AND ENFORCE THE IDAHO SAFE ACT CONSISTENT WITH THE CFPB’S INTERPRETATION OF THE FEDERAL SAFE ACT

Dated this 29th day of March, 2013.

/s/
GAVIN M. GEE
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⁸ 76 FR at 38467