SAFE ACT

The federal SAFE Act (Secure and Fair Enforcement of Mortgage Licensing) was enacted as a component of the Housing and Economic Recovery Act of 2008. The act put into place minimum standards for the licensing and registration of mortgage loan originators and brokers as part of the package of financial reform legislation after the subprime mortgage crisis. The Act also required each state to enact legislation consistent with the SAFFE Act's nationwide standards for state licensed loan originators. In June of 2011, HUD published the final administrative rule for the act.

The 2011 administrative rule for the SAFE Act recognized that government agencies do not operate in a "commercial context" and exempted government agencies (as well as qualified non-profit housing agencies) from the licensing provisions of the act. Specifically, in regard to government agencies, HUD indicated:

The SAFE Act does not cover employees of government agencies or housing finance agencies who act as loan originators in accordance with their duties as employees of such agencies. Individuals who act as loan originators as employees of government agencies or of housing finance agencies, as defined by this rule, are not subject to the licensing and registration requirements of the SAFE Act. Many government agencies and housing finance agencies provide direct housing assistance to low- and moderate-income people through residential mortgage loans with favorable terms. The entities that administer such government housing assistance include federal, state, and local governments and housing finance agencies.

These government entities are generally granted authority and funding and are overseen by Congress, state legislatures, or municipal councils, and are presumed to carry out their activities for the benefit of the borrowers they serve. Their employees act as loan originators in accordance with strict agency policies and pursuant to highly prescriptive statutory and regulatory requirements that federal, state, and local government public officials or elected representatives have determined are consistent with the public interest and provide adequate protections for borrowers. An individual's status as an employee of a government agency or housing finance agency ensures that the agency has the power to ensure that all aspects of the individual's conduct are consistent with the public purposes of the agency.

Another key distinction between loan originators covered by the SAFE Act and government employees administering government assistance is the pecuniary purpose for acting as a loan originator. Loan originators working in a commercial context undertake their activities in order to further the financial interests of the entity for which they work. In contrast, government agencies and housing finance agencies that carry out housing finance programs generally do so without the purpose of obtaining profit for any entity.

For these reasons, the requisite commercial context is lacking and, as a result, these individuals do not engage in the "business" of a loan originator. Consequently, the SAFE Act definition of a loan originator does not encompass governmental employees, and governmental employees are not required to obtain a state license and registration for any loan origination under a government housing assistance program. To ensure that all of the individual's actions in the course of acting as a loan originator are subject to the control of the agency or housing finance agency and are consistent with the agency's public or government mission, the individual must be an employee of the agency.

While the HUD final rule was clear in exempting government agencies and employees from the provisions of the act, the State of Wisconsin did not update Chapter 224.71 of Wisconsin Statutes ("Mortgage Bankers, Loan Originators and Mortgage Brokers") to reflect the exemption. Since the final HUD rule was enacted, various parties have reached out to the State Department of Financial Institutions, and have either not received a response, or been told that the department was working on a fix as part of a larger package of corrections to the statute. (In a random sample of legislation for four other states – Minnesota, Pennsylvania, Ohio, and Iowa – all had modified their statutes to include the exemption for government agencies and non-profits).

City of Milwaukee – Loan Activity

For over 30 years, the City of Milwaukee has operated affordable loan programs, primarily using Federal CDBG and HOME dollars. These programs provide rehabilitation loans to low income homeowners to make essential repairs to their homes. Loans are either very low interest with affordable repayment terms or deferred payment loans, where payment is not due until the property is sold or transferred upon death of the homeowner. There are no fees charged to loan fund applicants. The overwhelming majority of the City's loan clients are low income and do not qualify for conventional bank financing. Loans are generally available in the City's Community Development Block Grant Area, comprised of census tracts where the majority of the residents are low income.

The City's loan programs are monitored, reviewed and audited by the United States Department of Housing and Urban Development, the City's Comptroller Office, the City's Community Development Grants Administration, outside audit firms and other funders.

Licensing Requirements

Under the SAFE Act licensing requirements, if not exempted, the City would be required to register as a mortgage banker with the State of Wisconsin. All City employees originating loans under the programs would also be required to be licensed as mortgage loan originators. These requirements include:

- Submission of a mortgage banker license application to the State of Wisconsin
- Payment of a $1,000 licensing fee for initial licensure and $1,000 annually thereafter
- Purchase of a $300,000 surety bond
- Evidence of minimum net worth of $250,000
- Requirement to file quarterly call reports and an annual report through the Federal Mortgage Licensing Registration System (the reports are geared to a financial institutions and private firms)
- Submission of annual financial statements

In addition to the above, the City would be subject to examination and investigation by the Division of Banking at any time, including all books, accounts, records, files documents, or any other information.

City employees originating loans would be required to:

- Complete at least 20 hours of training
- Pass a written test
- Submit a $250 registration fee for initial licensing and annually thereafter
- Submit fingerprints for the purposes of a criminal background check
- Demonstrate a record of financial responsibility and a good credit history

Penalties for Not Registering

Under Section 224.77 of Wisconsin Statutes, failure to comply with the provisions of licensing statute can result in a fine of $25,000 for each violation and may also result in the Division of Banking issuing orders to among other things, "cease and desist" from conducting business.