



OFFICE OF HOUSING

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

March 17, 2009

Annie M. Goodwin
Commissioner
Division of Banking and
Financial Institutions
301 South Park, Suite 316
Helena, MT 59620

Dear Commissioner Goodwin:

Enclosed please find a chart summarizing our quick analysis of Senate Bill 351. The chart identifies potential inconsistencies between SB 351 and the minimum requirements of the SAFE Act that were immediately apparent. Though the chart is not offered as a comprehensive analysis of SB 351, we hope you will find it useful at this point in Montana's legislative process.

Please don't hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "William W. Matchneer III".

William W. Matchneer III
Associate Deputy Assistant Secretary for
Regulatory Affairs and Manufactured Housing

Enclosure

**MONTANA'S SAFE ACT LEGISLATION
MARCH 17, 2008**

	Montana's SAFE Act Legislation	Corresponding SAFE Act Provisions and HUD Commentary on SAFE Act, where applicable	HUD Comments
1.	<p>Sec. 4 Exemptions—proof of exemption. (1) The provisions of this part do not apply to:</p> <p>[Generally]</p>	<p>No comparable SAFE Act provision.</p>	<p>Several of the Montana legislation's exemptions from all three classes of state licensure are provided for "persons" that are not individuals but entities (agencies, developers, pension plans, GSEs, and 501(c)(3) home ownership organizations) and therefore not subject to SAFE Act-required licensing of individual loan originators anyway. Such exemptions would be noncompliant with the SAFE Act if they were construed to exempt an individual working as a loan originator who would otherwise be required to be licensed under the SAFE Act.</p>
2.	<p>Sec. 4 Exemptions—proof of exemption. (1) The provisions of this part do not apply to:</p> <p>(D) A person employed by <u>or that works as an independent contractor</u> for a licensee under this part to perform only administrative or clerical tasks as a loan processor or underwriter on behalf the licensee and who does not solicit borrowers or negotiate the terms of loans on behalf of the licensee;</p>	<p>SEC. 1504. LICENSE OR REGISTRATION REQUIRED.</p> <p>(b) LOAN PROCESSORS AND UNDERWRITERS.—</p> <p>(1) SUPERVISED LOAN PROCESSORS AND UNDERWRITERS.—</p> <p>(1) SUPERVISED LOAN PROCESSORS AND UNDERWRITERS.—</p> <p>A loan processor or underwriter who</p>	<p>The SAFE Act provides that an independent contractor who works "as a loan processor or underwriter" (i.e., who performs the listed "clerical or support duties" described in the SAFE Act) must obtain a loan originator license even though the individual does not engage in the business of a loan originator. The clause, "[O]r that works as an independent contractor for," is therefore inconsistent with the section 1504 of the SAFE Act.</p>

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		<p>does not represent to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationery, brochures, signs, rate lists, or other promotional items), that such individual can or will perform any of the activities of a loan originator shall not be required to be a State-licensed loan originator.</p> <p>(2) INDEPENDENT CONTRACTORS.—An independent contractor may not engage in residential mortgage loan origination activities <u>as a loan processor or underwriter</u> unless such independent contractor is a State-licensed loan originator. (emphasis added)</p> <p>SEC. 1503. DEFINITIONS.</p> <p>(4) LOAN PROCESSOR OR UNDERWRITER.—</p> <p>(A) IN GENERAL.—The term “loan processor or underwriter” <u>means an individual who performs clerical or support duties</u> at the direction of and subject to the supervision and instruction of—</p> <p>(i) a State-licensed loan originator; or</p> <p>(ii) a registered loan originator.</p> <p>(B) CLERICAL OR SUPPORT</p>	

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		<p>DUTIES.—For purposes of subparagraph (A), the term “clerical or support duties” may include—</p> <p>(i) the receipt, collection, distribution, and analysis of information common for the processing or underwriting of a residential mortgage loan; and</p> <p>(ii) communicating with a consumer to obtain the information necessary for the processing or underwriting of a loan, to the extent that such communication does not include offering or negotiating loan rates or terms, or counseling consumers about residential mortgage loan rates or terms.</p>	
3.	<p>Sec. 4 Exemptions—proof of exemption. (1) The provisions of this part do not apply to:</p> <p>(F) A <u>person</u> who offers, negotiates, or provides financing in conjunction with the sale of <u>real property owned by that person</u> and that is secured by a contract for deed, mortgage, deed of trust, or other equivalent security interest on the real property sold;</p>	<p>HUD's Commentary on the SAFE Act:</p> <p>HUD's commentary issued in conjunction with HUD's review of the CSBS/AARMR model legislation provides that “the commercial context implied by the taking of an "application" is also absent where an individual seller provides financing to a buyer pursuant to the sale of <u>the seller's own residence</u>. The frequency with which a particular seller provides financing is so limited that HUD's view is that Congress did not</p>	<p>As worded, the Montana legislation may be read to exempt from licensing those individuals (and entities) who engage in the business of a loan originator with respect to property they own, even if the individual is a commercial developer selling potentially thousands of homes. To avoid this interpretation, which would not be consistent with the SAFE Act, “[P]erson” and “real property owned by that person” must be changed to “individual” and “the seller's own residence” to comply with the SAFE Act</p>

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		intend to require such sellers to obtain loan originator licenses.”	as elaborated upon in HUD's commentary that accompanied HUD's review of the CSBS/AARMR model legislation.
4.	<p>Sec. 3 Definitions</p> <p>(21) “Mortgage Servicer Loss Mitigation Specialist” means a person who on behalf of the person making the residential mortgage loan works with a borrower who is in default or in foreseeable likelihood of a default to modify or refinance either temporarily or permanently the borrower's obligations in order to avoid foreclosure or otherwise to finalize collection through the foreclosure process.</p> <p>Sec. 4 Exemptions—proof of exemption. (2) The department may exempt from this part mortgage servicer loss mitigation specialists if the department determines that an exemption of a mortgage servicer loss mitigation specialist is not in violation of the Secure and Fair Enforcement for Mortgage Licensing Act, Title V of the Housing and Economic Recovery Act, Public Law 110-289.</p>	No comparable provision in the SAFE Act.	At this time HUD has not made a formal determination as to the applicability of the SAFE Act to a modification or refinancing. The definition of “mortgage servicer loss mitigation specialist,” combined with Section 4(2) of the Montana legislation, is not inconsistent with the SAFE Act so long as Section 4(2) is not construed as displacing HUD's authority to interpret the SAFE Act.

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5.	<p>Sec. 5 Loan processors and Underwriters. (2) <u>A loan processor or underwriter who is an independent contractor</u> may not engage in residential mortgage loan originator activities of a loan processor or underwriter unless licensed as a mortgage broker or a mortgage loan originator under this part. Each independent contractor loan processor or underwriter licensed as a mortgage broker or a mortgage originator shall maintain a valid unique identified issued by the nationwide mortgage licensing system and registry.</p>	<p>SEC. 1504. LICENSE OR REGISTRATION REQUIRED.</p> <p>(b) LOAN PROCESSORS AND UNDERWRITERS.—</p> <p>(1) SUPERVISED LOAN PROCESSORS AND UNDERWRITERS.— * * *</p> <p>(2) INDEPENDENT CONTRACTORS.—<u>An independent contractor</u> may not engage in residential mortgage loan origination activities <u>as a loan processor or underwriter</u> unless such independent contractor is a State-licensed loan originator. (emphasis added)</p> <p>SEC. 1503. DEFINITIONS.</p> <p>(4) LOAN PROCESSOR OR UNDERWRITER.—</p> <p>(A) IN GENERAL.—The term “loan processor or underwriter” <u>means an individual who performs clerical or support duties</u> at the direction of and subject to the supervision and instruction of—</p> <p>(i) a State-licensed loan originator; or</p> <p>(ii) a registered loan originator.</p> <p>(B) CLERICAL OR SUPPORT DUTIES.—For purposes of subparagraph</p>	<p>See item no. 2.</p> <p>The Montana legislation rearranges the wording of Section 1504 of the SAFE Act pertaining to loan processors and underwriters. Although the wording of Section 5 of the Montana legislation is different from that in Section 1504, the assumption is that the interpretation given Section 5 is the same as that given Section 1504 of the SAFE Act, which is to require an individual who performs the “clerical and support duties” of a loan processor or underwriter to be licensed if the individual is an independent contractor.</p>

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		<p>(A), the term "<u>clerical or support duties</u>" may include—</p> <p>(i) the receipt, collection, distribution, and analysis of information common for the processing or underwriting of a residential mortgage loan; and</p> <p>(ii) communicating with a consumer to obtain the information necessary for the processing or underwriting of a loan, to the extent that such communication does not include offering or negotiating loan rates or terms, or counseling consumers about residential mortgage loan rates or terms.</p>	
6.	<p>Sec. 16 Waiver of Education Requirements for Current Mortgage Broker and Mortgage Loan Originator Licensees.</p> <p>(1) Upon application by a current mortgage broker or mortgage loan originator licenses for license renewal, the department shall grant a waiver of the prelicensing education requirements established in [section 7] and the Secure and Fair Enforcement for Mortgage Licensing Act, Title V of the Housing and Economic Recovery Act of 2008, Public Law 110-289, if:</p> <p>* * * * *</p>	No comparable provision.	The SAFE Act does not appear to permit waiver of basic licensing requirements for any individual.

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7.	<p>Sec. 3 Definitions</p> <p>(24) (a) "Originate" means:</p> <p>(i) taking a residential mortgage loan application;</p> <p>(ii) offering or negotiating terms of a residential mortgage loan for compensation or gain; or AND</p> <p>(iii) assisting a consumer in obtaining or applying to obtain a residential mortgage loan by, including but not limited to:</p> <p>(A) advising on loan terms including rates, fees, other costs;</p> <p>(B) preparing loan packages; and</p> <p>(C) collecting information on behalf of the consumer with regard to a residential mortgage loan.</p> <p>(b) The term does not include the performance of purely administrative or clerical tasks as a loan processor or underwriter;</p>	<p>SEC. 1503. DEFINITIONS.</p> <p>(3) LOAN ORIGINATOR.—</p> <p>(A) IN GENERAL.—The term “loan originator”—</p> <p>(i) means an individual who—</p> <p>(I) takes a residential mortgage loan application; and</p> <p>(II) offers or negotiates terms of a residential mortgage loan for compensation or gain;</p> <p>(B) OTHER DEFINITIONS RELATING TO LOAN ORIGINATOR.—</p> <p>For purposes of this subsection, an individual “assists a consumer in obtaining or applying to obtain a residential mortgage loan” by, among other things, advising on loan terms (including rates, fees, other costs), preparing loan packages, or collecting information on behalf of the consumer with regard to a residential mortgage loan.</p>	<p>Although the SAFE Act includes, in Section 1503(B), “other definitions relating to loan originator,” the SAFE Act does not include these other definitions as a third prong to the definition of loan originator. The SAFE Act’s definition of mortgage loan origination provides the minimum requirements for licensure. In including the language of Section 1503(B) of the SAFE Act as a third prong in the definition of “originates” in the Montana legislation, the construction of this definition cannot exclude any individuals who would otherwise be included under the SAFE Act’s two-pronged test.</p>
8.	<p>Sec. 3 Definitions:</p> <p>(28) “Residential Mortgage Loan” means a loan primarily for personal,</p>	<p>Sec. 1503</p> <p>(3)(A) In general.- The term “loan originator”</p> <p>(i) means an individual who-</p>	<p>The definition of “residential real estate” is consistent with the SAFE Act so long as it is not relied on to construe the exemption for “nonresidential real estate”</p>

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	<p>family, or household use secured by a mortgage, deed of trust, or other equivalent consensual security interest on a <u>dwelling</u>, as defined in regulation Z of the Truth in Lending Act, 12 CFR 226.2, or on residential real estate located in Montana.</p> <p>(29) "Residential Real Estate" means any <u>real property</u> located in the state of Montana upon which is constructed a dwelling or upon which a dwelling is intended to be built within a 2-year period, subject to 24CFR 3500.5(b)(4).</p> <p>Sec. 4. (1) (H) A person engaged solely in nonresidential or commercial real estate lending:</p>	<p>(I) takes a <u>residential mortgage loan</u> application; and (II) offers or negotiates terms of a <u>residential mortgage loan</u> for compensation or gain;</p>	<p>lending in Section 4(1)(H) of the Montana legislation. Doing so could result in erroneously excluding certain transactions, such as manufactured housing chattel loans, from coverage.</p>
9.	<p>Section 3. Definitions.</p> <p>(18) "Mortgage broker" means a person or entity that provides services for a fee as an intermediary between a borrower and a mortgage lender in obtaining financing for the borrower that is to be secured by a residential dwelling containing one to four units, for between one and four families that is licensed</p>	<p>SEC. 1503. DEFINITIONS.</p> <p>(3) LOAN ORIGINATOR- (A) IN GENERAL- The term 'loan originator'--(i) means an individual who- (I) takes a residential mortgage loan application; and (II) offers or negotiates terms of a residential mortgage loan for compensation or gain;</p>	<p>The definitions of "mortgage lender" and "mortgage broker," when read together with the definition of "mortgage loan originator" appear to omit individuals who are performing loan origination activities and are not working for a (state licensed) mortgage lender or (state licensed) mortgage broker, but who are also not exempted from state licensing under the SAFE Act's definition of "registered loan</p>

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<p>with the state, and that is registered with and maintains a unique identifier through the nationwide mortgage licensing system and registry.</p> <p>(19) (a) "Mortgage lender" means a person, licensed by the state, that WHO IS REGISTERED WITH AND MAINTAINS A UNIQUE IDENTIFIER THROUGH THE NATIONWIDE MORTGAGE LICENSING SYSTEM AND REGISTRY AND DOES ANY OF THE FOLLOWING:</p> <p>(I) closes a residential mortgage loan;;</p> <p>(II) advances funds, offers to advance funds, or commits to advancing funds for a residential mortgage loan applicant.</p> <p>(B) A mortgage lender may also be licensed as a mortgage broker upon meeting the qualifications for that license WHO ALSO PERFORMS THE ACTIVITIES OF A MORTGAGE BROKER MUST BE LICENSED AS A MORTGAGE BROKER, AS PROVIDED IN [SECTION 7], AND BE REGISTERED WITH AND MAINTAIN A UNIQUE IDENTIFIER THROUGH THE NATIONWIDE</p>	<p>(7) REGISTERED LOAN ORIGINATOR- The term 'registered loan originator' means any individual who--</p> <p>(A) meets the definition of loan originator <u>and is an employee of--</u></p> <p>(i) a depository institution;</p> <p>(ii) a subsidiary that is--</p> <p>(I) owned and controlled by a depository institution; and</p> <p>(II) regulated by a Federal banking agency; or</p> <p>(iii) an institution regulated by the Farm Credit Administration; and</p> <p>(B) is registered with, and maintains a unique identifier through, the Nationwide Mortgage Licensing System and Registry.</p> <p>SEC. 1504. LICENSE OR REGISTRATION REQUIRED.</p> <p>(a) In General- Subject to the existence of a licensing or registration regime, as the case may be, an individual may not engage in the business of a loan originator without first--</p> <p>(1) obtaining, and maintaining annually-</p> <p>-</p> <p>(A) a registration as a registered loan</p>	<p>originator." For example, individuals who are performing loan origination activities on behalf of a federally regulated banking institution, but are not employees of such institution do not appear to be covered under the Montana legislation. The SAFE Act requires these individuals to be licensed under state law. The SAFE Act requires all "loan originators" to be licensed unless they are permitted to be "registered loan originators" as defined under the SAFE Act.</p>

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<p>MORTGAGE LICENSING SYSTEM AND REGISTRY.</p> <p>(b)(C) The term does not include mortgage lenders that are:</p> <ul style="list-style-type: none"> (i) depository institutions; (ii) subsidiaries that are owned and controlled by a depository institution and regulated by a federal banking agency; or (iii) institutions regulated by the federal farm credit administration. <p>(20) (a) "Mortgage loan originator" means an individual who is employed by a mortgage broker OR A MORTGAGE LENDER to assist borrowers by originating a residential loan, who is licensed by the state, and who is registered with and maintains a unique identifier through the nationwide mortgage licensing system and registry.</p> <p>(b) The term does not include an individual engaged solely as a loan processor or underwriter.</p>	<p>originator; or</p> <p>(B) a license and registration as a State-licensed loan originator; and</p> <p>(2) obtaining a unique identifier.</p>	