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March 5, 2012

Raj Date
Special Advisor to the Secretary of the Treasury
Bureau of Consumer Financial Protection
1500 Pennsylvania Avenue, NW (Attn: 1801 L Street)
Washington, DC 20220

Re: Docket No. CFPB-2011-0039

[Electronically submitted: <https://www.regulation.gov>]

Dear Mr. Date:

On behalf of the more than one million members of the National Association of REALTORS®, I am pleased to provide comments to the Consumer Financial Protection Bureau (CFPB) on efforts to streamline inherited regulations transferred to the Bureau as a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

The National Association of REALTORS® (NAR) is America's largest trade association, including NAR's eight affiliated institutes, Societies and Councils, five of which focus on commercial transactions. REALTORS® are involved in all aspects of the residential and commercial real estate industries and belong to one or more of some 1,400 local associations or boards, and 54 state and territory associations of REALTORS®.

The Bureau requested information on streamlining inherited regulations to identify promising opportunities to update, modify, or eliminate outdated, unduly burdensome, or unnecessary provisions. The Bureau also noted that differences in definitions of key terms may cause confusion, presenting an opportunity for standardization where underlying statutes permit. NAR supports efforts to streamline competing definitions and recommends making the harmonization of certain rules and definitions as they apply to seller financing a priority. The goal should be to ease or remove unnecessary red tape and regulatory burden that make little or no sense in the context of seller financing, which fills a crucial gap for many consumers seeking mortgage financing.

TILA Definition of Creditor

The proposed rule to implement the ability-to-repay requirements of the Truth in Lending Act (TILA), made by Title XIV of the Dodd-Frank Act, was published by the Federal Reserve Board in the Federal Register on May 11, 2011. Authority for this rulemaking transferred to the CFPB on July 21, 2011. Section 226.43(c) of the proposed rule states that no creditor may make a mortgage loan without making a reasonable and good faith determination, based on verified and documented information, that the consumer has the ability to repay the loan. A



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creditor is defined in the TILA regulations as a person who regularly extends consumer credit which is payable by agreement in more than four installments. A person who *regularly extends* consumer credit is one who extends such credit “more than 5 times for transactions secured by a dwelling in the preceding calendar year.”¹ If a person did not meet the numerical standards in the preceding calendar year, the numerical standards are applied in the current year.

Under the definition of creditor, seller financing for the sale of a residence is not subject to the ability-to-repay requirements unless the person extending consumer credit does so more than 5 times in the pertinent calendar year. REALTORS® report to NAR that seller financing is a crucial source of mortgage lending in many markets, especially in times of economic stress. Sellers who provide financing for their own property are not routinely engaged in lending. These seller financiers are typically homeowners and small investors who, from time to time or once in a lifetime, sell property they own. These sellers may own property that does not fit typical lender criteria or is located in an underserved or rural area, or may be unable to find borrowers who qualify for traditional loans.

TILA Definition of Mortgage Originator

Section 1401 of the Dodd-Frank Act adds a new section 103(cc)(2) to TILA, defining the term mortgage originator. The definition excludes persons who provide mortgage financing for the sale of no more than 3 properties in any 12 month period, if the financing meets certain criteria: (i) the seller did not construct the home, (ii) the loan is fully amortizing, (iii) the seller determines and documents that the buyer has a reasonable ability to repay the loan, (iv) the loan has a fixed rate or is adjustable after 5 or more years (subject to reasonable annual and lifetime caps), and (v) the loan meets any other criteria set by the Federal Reserve Board. There is considerable confusion about how this definition fits with other statutory and regulatory provisions.

In the preamble to the final rule issued in 2010 by the Federal Reserve Board implementing the loan officer compensation requirements, including changes made by section 1403 of the Dodd-Frank Act, the Board states that “[t]he definition of ‘loan originator’ . . . is consistent with the Reform Act’s definition of ‘mortgage originators’ in TILA section [which] . . . excludes certain persons and entities that originate loans but are also creditors that provide seller financing for properties that the originator owns.”² The Board explained that, because persons providing seller financing are “‘creditors’ and are not loan originators using table funding, they are not covered by final rules that are applicable to loan originators.” As noted above, these persons are exempt from the definition of creditor if they make five or fewer loans in a calendar year.

SAFE Act Definition of Loan Originator

In 2011, HUD published its final Secure and Fair Enforcement Mortgage Licensing Act of 2008 (SAFE Act) rule³ that requires licensing only of individuals engaged in the business of a loan originator. Individuals are engaged in the business of a loan originator if, in a commercial context and habitually or repeatedly, they (a) take a mortgage loan application and offer or negotiate loan terms for compensation or gain or (b) represent to the public they can perform such activities. State law is expected to govern what it means to act “habitually or repeatedly.”

NAR Recommendations for Harmonizing Definitions

Exemption from Creditor Definition. NAR supports the current exemption from the definition of creditor for those who make five or fewer mortgage loans annually, including those providing seller financing and other infrequent lenders. The final ability-to-repay rule should not tighten the existing definition of creditor. NAR would support a decision to increase the exemption threshold to relieve more small lenders from regulatory burden.

Harmonize TILA and SAFE Act Definitions. NAR urges the CFPB to confirm that those engaged in seller financing are not loan originators for purposes of the loan officer compensation requirements because the

¹ 12 CFR § 226.2(a)(17)(v).

² 75 Fed. Reg. 58510 (September 24, 2010).

³ 24 CFR Part 3400, 76 Fed. Reg. 38464 (June 30, 2011).

prohibition on steering incentives make no sense in the context of seller financing. To the extent you determine there is some applicability, NAR urges that the exclusion in TILA section 103(cc)(2)(E) for seller financing meeting the specified criteria be modified using the authority you have under TILA to make the exclusion practicable, consistent with what we believe is the intended purpose. Applying the loan origination rule to seller financing would be a substantive change we believe would require notice and comment rulemaking.

Standardization with SAFE Act. To minimize confusion, NAR recommends that you include, in the final TILA ability-to-repay rule, an additional exemption for individuals providing seller financing who are exempt from licensing as a loan originator under the SAFE Act.

We believe that these practical changes will ensure that seller financing will still be available, to the benefit of consumers as well as property owners, in markets that have extremely limited financing options available, if it is available at all. Our recommendations are more fully explained in our July 22, 2011, comment on the ability-to-repay proposed rule.

Conclusion

Certain rules and definition as they apply to seller financing present opportunities for harmonization. NAR supports efforts to streamline competing definitions and believes our recommendations are practical measures to make it easier for homeowners and small investors to comply with regulations inherited by the CFPB. Seller financing plays an important role in financing the sale of real estate, especially when credit is tight, and practical measures simplifying compliance with the inherited regulations will ensure its continued availability for consumers.

If you have any questions, please feel free to let me know or contact Charlie Dawson, NAR Policy Representative for Financial Services, 202.383.7522 or cdawson@realtors.org.

Sincerely,



Maurice "Moe" Veissi
2012 President, National Association of REALTORS®