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## Is SAFE mortgage reform law squeezing the real estate market?

Despite state and federal measures to clarify the SAFE Act -- the sweeping legislative effort to regulate the nation's mortgage industry -- much uncertainty remains. By casting a wide licensing net for mortgage originators, the law has snagged attorneys, real estate brokers and even homeowners who provide seller-financing to buyers.

At issue is what acts trigger the licensing requirement. For lawyers, it is "ancillary services" that lawyers provide to clients when attempting to negotiate mortgages and for Realtors, it is how many seller-financed real estate sales can an owner do in one year before becoming "habitually" engaged in the mortgage business.

Both the U.S Department of Housing and Urban Development and the state Banking Department say the other is responsible for interpreting the language, but the real estate and legal communities are hungry for a straight answer.

This lack of legal precision, along with an aggressive enforcement by the state banking commissioner, has put a wet blanket of caution over an already tepid real estate market, Realtors and lawyers claim.

"While the (SAFE Act) has been beneficial, it is so gray that you can't look at it and say, 'OK, we can do that'," said Matt Johnson, an attorney with Devine Millimet who represents the New Hampshire Association of Realtors.

Johnson said he regularly advises Realtors "to be patient and be careful."

### Rules confusion

The federal Secure and Fair Enforcement Mortgage Licensing Act was enacted in 2008. It is designed to pressure states to pass similar provisions and begin licensing mortgage originators or live under the onerous federal legislation.

The licensing process has proven to be difficult, requiring applicants to pass two tests, and undergo a criminal background and credit check.

The state moved quickly -- faster than most other states -- and in 2009 adopted a local companion bill. Between the speed and severity of the state's law -- which state HUD director Greg Carson says is "one of the strictest laws" in the country -- it has been a rocky test run.

Newly appointed state Banking Commissioner Ron Wilbur is sifting through the regulations.

"I understand the frustration," he said, "What we want is a workable statute that allows commerce to continue."

The confusion, he said, is a result of the "broad-brush" approach that is often used when enacting sweeping "correcting" reforms, and they are followed by "adjustments for practicality."

Last legislative session, two laws were approved -- one exempting accountants and certain other professionals from some of the licensing requirements and the other setting a maximum of three seller-financed sales per year -- but a last-minute amendment acknowledged that federal rules trump state law.

HUD has the rulemaking authority, but can't exempt certain groups. In late July, a much-anticipated HUD final rule was released, but it provided a definition, not a number to the number of times a seller can provide financing.

A licensee, it said, is someone "habitually" engaged in the mortgage business. Carson said these clarifications are best left to the states so they can custom-fit regulations.

HUD has been criticized, he said, "for being too definitive or not definitive enough."

Others, like John Splendore, a Manchester attorney and co-owner of United Title and Escrow Services, said, "the Banking Department needs to weigh in and provide some clarity."

It, after all, has the enforcement authority and regularly writes advisory letters, he said.

### **Thorny issue**

From the start, lawyers argued that they should remain exempt, like depository bankers, because they already operate under strict scrutiny and consumers would be denied legal representation if they were prohibited from negotiating financing arrangements.

The thorny issue of foreclosure proceedings, especially short sales, has become a key issue, which was exasperated by the aggressive and singular business practice of Concord attorney Dan Dargon of helping clients modify their mortgages.

Dargon's work was hardly ancillary, but he argued that as a lawyer he was exempt from the new licensing law. Few agreed, and recently the state Banking Department ordered him to pay more than \$330,000 in fines and restitution for modifying mortgages without a license. His firm has since closed, and Dargon announced he plans to join the Army.

The Realtors Association was concerned that sellers, who provided owner-financing -- which they argue is essential during tough times -- would be required to become licensed under SAFE.

And, even with the state law setting a maximum of three seller-financed transactions, few lawyers will take the risk.

Andy Smith, a real estate broker in Franconia, knows this well. He had a buyer and seller agree on terms that included seller financing to convey a multi-family property, but the seller's attorney advised against it. "The attorney was not going to go out on a limb," he said.

Such caution may be unwarranted, but no one wants to be the test case, said Splendore.

"I'm hesitant to advise a client that it seems like you can (provide owner financing)," he said, "unless it is strictly commercial -- like a warehouse." (The SAFE Act only applies to residential properties.)

Meanwhile, the real estate market sputters along, with a large inventory of residential properties and foreclosures, while slowing, still stubbornly high.

"It's dramatically affecting commerce," said Hampstead attorney Marie Sapienza, who's also a state representative. "I'm an attorney -- I want to help my client." But, until there is more clarity, she said, she feels she can't.

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