Dodd-Frank Act Changes Provide Relief for Manufactured Housing Retailers and Community Owners

Overview

On May 24, 2018, President Trump signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act (the Act). Through the efforts of MHI, the Act includes Section 107, Protecting Access to Manufactured Housing (Pub. L. 115-174 § 107), which amends the Truth in Lending Act (TILA) by adding an exception that excludes manufactured home retailers, sellers, and their employees from TILA's definition of mortgage originator.

Now, under this amended definition, retailers, sellers, and their employees could have additional flexibility when discussing the mortgage lending process with customers, including general statements about credit terms, rates, and qualifications, as long as they:

1. Do not receive any type of compensation or gain that is in excess of any compensation or gain received in a comparable cash transaction for participating in these discussions or engaging in these activities;
2. Disclose to the customer in writing any corporate affiliation with any creditor, and if the retailer does have a corporate affiliation and offers a recommendation, provide referral information for at least one unaffiliated creditor; and
3. Do not directly negotiate loan terms with the consumer or lender, including rates, fees, and other costs.

Retailers, sellers, and their employees could also have added flexibility when referring customers to lenders who are available to discuss financing options.

However, while this amendment changes the definition of mortgage originator under TILA, it does not amend the definition of loan originator under the Secure and Fair Enforcement for Mortgage Licensing Act (SAFE Act). Further, while state-specific SAFE Act laws regulate many of the same activities covered by TILA, some activities are different. Before engaging in activities now permitted under TILA's revised definition of mortgage originator, you should consult legal counsel about any applicable restrictions under each state's respective SAFE Act requirements.

Given that no effective date or implementation date was specified in Pub. L. 115-174 § 107, the law changed the moment the Act was signed. However, from a more practical standpoint, the change will not be complete until the Bureau of Consumer Financial Protection (BCFP) amends its definition of loan originator under Regulation Z, which is the federal regulation that implements TILA, so that the definitions are aligned and consistent.

MHI has submitted a request to the BCFP for a No-Action Letter that confirms in writing that the BCFP will not pursue administrative action against any retailer or seller for non-compliance with Regulation Z's current definition of loan originator while the BCFP is in the process of amending it to comply with the revised definition of mortgage originator under TILA. MHI also continues to encourage the BCFP to expedite the rulemaking process.

What is Changing?

Through the efforts of MHI, the definition of mortgage originator under TILA has been amended. Now, MHI is working with Acting Director Mulvaney and the BCFP to expedite the rulemaking process to ensure that Regulation Z's revised definition of loan originator is consistent with TILA and extends the same protections to retailers, sellers, and their employees.

Currently, under Regulation Z, referring a consumer to a lender, whether orally or in writing, is considered loan origination activity, even if the referral was inadvertent or unintentional. Similarly, presenting credit terms based on the consumer's specific financial characteristics or communicating with the intent to reach a mutual understanding about prospective credit terms, including the discussion of something as innocuous as monthly payment estimates, is considered loan origination activity. This meant that to avoid being classified as a loan originator, retailers, sellers, and their employees should not:

- Offer, negotiate, or advise a customer on credit terms.
- Advise a customer whether to seek or accept credit terms.
- Explain or provide advice about loan products or other available options.
- Discuss down payment amounts to determine if a customer will qualify for financing.
- Quote specific rates, terms, costs, payments, or required down payment amounts.
- Suggest a specific lender or recommend a customer apply to a specific lender.

This broad interpretation impacted the way manufactured housing retailers, sellers, and their employees conduct business. Generally, they would avoid answering common customer questions about the mortgage lending process for fear of inadvertently engaging in loan origination activity, which can involve significant fines and penalties.

Now that the definition of mortgage originator under TILA has been amended, retailers, sellers, and their employees should have added flexibility when discussing the mortgage lending process with customers once the BCFP's rulemaking is complete.

The SAFE Act Is Not Changing

In 2008, the SAFE Act was enacted, defining the term loan originator and mandating a nationwide licensing and registration system for residential mortgage loan originators. The SAFE Act prohibits individuals from engaging in mortgage loan origination activity without first obtaining a unique identification number and, if applicable, a state license. Mortgage loan originators are also required to register through the Nationwide Mortgage Licensing System (also known as the Nationwide Multistate Licensing System or NMLS).

There are also state-specific SAFE Act laws that may be more stringent. Individuals who engage in mortgage-related activities must consider both federal and state laws when advertising, selling, or financing manufactured homes, as certain actions will require registration and/or licensure. While MHI is working with Congress, the BCFP, the Conference of State Bank Supervisors, and its network of state Executive Directors to amend the SAFE Act's definition of loan originator, MHI recommends that retailers and sellers contact qualified legal counsel to discuss registration and state-specific licensing requirements.

Frequently Asked Questions

QUESTION 1 — What is the effective date of Pub. L. 115-174 § 107?

ANSWER: Given that no effective date or implementation date was specified in Pub. L. 115-174 § 107, the law changed the moment the Act was signed into law on May 24, 2018. However, further clarification or additional changes may come when the BCFP amends it definition of loan originator under Regulation Z.

At MHI's June 2018 Legislative Fly-In, BCFP Acting Director Mick Mulvaney said that the BCFP's rulemaking process, including revision of Regulation Z's definition of loan originator, will take 12-18 months. As a temporary solution, MHI has submitted a request to the BCFP for a No-Action Letter that confirms in writing that the BCFP will not pursue administrative action against any retailer or seller for non-compliance with Regulation Z's current definition of loan originator while the BCFP is in the process of amending it to comply with the revised definition of mortgage originator under TILA. MHI also continues to encourage the BCFP to focus on Pub. L. 115-174 § 107 and expedite the rulemaking process so the definitions are consistent.

While there is legal precedent for a federal statute superseding a regulation and some consultants are advising their clients to move forward with policy changes, others recommend waiting until the BCFP's rulemaking process is complete. Regarding this decision and what is in the best interest of your company, MHI recommends contacting qualified legal counsel.

QUESTION 2 — How long will it take the BCFP to complete its rulemaking process before the final implementation of Regulation Z?

ANSWER: At MHI's June 2018 Legislative Fly-In, BCFP Acting Director Mulvaney said the BCFP's rulemaking process will take 12-18 months. As a temporary solution, MHI has submitted a request to the BCFP for a No-Action Letter that confirms in writing that the BCFP will not pursue administrative action against any retailer or seller for non-compliance with Regulation Z's current definition of loan originator while the BCFP is in the process of amending it to comply with the revised definition of mortgage originator under TILA. MHI also continues to encourage the BCFP to focus on Pub. L. 115-174 § 107 and expedite the rulemaking process.

QUESTION 3 — Do you need to be a licensed Mortgage Loan Originator to sell a manufactured home?

ANSWER: No. You do not need to be a licensed Mortgage Loan Originator to sell a manufactured home.

Frequently Asked Questions

QUESTION 4 Does profiting from the sale of a manufactured home violate Pub. L. 115-174 § 107?

ANSWER: Profiting from the sale of a manufactured home does not violate Pub. L. 115-174 § 107, as long as the community owner does not engage in financing or lending activity and is not receiving any additional compensation or gain for referring the borrower to the lender, including any payment, kickback, referral fee, or anything else of value for the referral.

QUESTION 5 What are retailers and community owners now allowed to say to customers regarding loan terms, interest rates, and financing, and what information can retailers advertise?

ANSWER: Under the new law, retailers and community owners can have general discussions with customers about interest rates and fees, typical financing options, and hypothetical loan terms. If permissible under their state's respective laws, retailers can also continue to perform administrative or clerical tasks, such as:

1. Preparing residential mortgage loan packages, which means compiling loan application materials and supporting documentation.
2. Providing general instructions to help consumers complete a loan application.
3. Gathering information on the consumer's behalf, which includes collecting and sharing supporting documentation from third parties, so the consumer can submit a completed application to the loan originator or creditor.

Note that retailers and community owners still cannot negotiate loan terms directly with consumers or lenders (including rates, fees, and other costs) and cannot discuss specific financing options that are available through specific lenders.

While Pub. L. 115-174 § 107 provides retailers and community owners with added flexibility when discussing the mortgage lending process with customers during the sale of a manufactured home, including when referring customers to lenders to discuss financing options, it does not give them authority to advertise credit terms. Retailers and community owners can make general statements about the availability of credit in advertisements, as long as they do not use specific credit terms or reference a particular lender's credit terms. Retailers and community owners can also discuss hypothetical terms in person with customers when explaining the mortgage lending process.

However, advertising requirements vary by state and advertising credit and/or loan terms may require registration and/or licensure under the SAFE Act. For additional information regarding state-specific requirements, MHI recommends contacting qualified legal counsel.

Frequently Asked Questions

QUESTION 6

Can retailers and community owners advertise monthly payment amounts and interest rates in their effort to sell a manufactured home?

ANSWER: No. Pub. L. 115-174 § 107 provides added flexibility when discussing the mortgage lending process with customers during the sale of a manufactured home, including when referring customers to lenders to discuss financing options. It does not give authority to advertise credit terms.

While the law provides that a retailer or community owner cannot directly negotiate loan terms with a consumer or lender (including rates, fees, and other costs), advertising is generally not considered negotiating; it is an invitation to negotiate. However, Regulation Z, which implements TILA, still prohibits advertising hypothetical terms, such as a down payment, an interest rate, or a monthly payment. Advertising requirements also vary by state and advertising credit and/or loan terms may require registration and/or licensure under the SAFE Act.

Retailers and community owners can make general statements about the availability of credit in advertisements, as long as they do not use specific credit terms or reference a particular lender's available credit terms. They can also discuss hypothetical terms in person with customers when explaining the mortgage lending process. However, for additional information regarding state-specific advertising requirements, MHI recommends contacting qualified legal counsel.

QUESTION 7

Can retailers and community owners discuss general financing terms with potential buyers?

ANSWER: Yes, under Pub. L. 115-174 § 107, manufactured home retailers and owners of manufactured home communities can have general discussions with customers about interest rates and fees, typical financing options, and common loan terms. Retailers and community owners can also continue to perform standard administrative or clerical tasks required to sell a manufactured home if permitted under applicable state law. However, as state-specific SAFE Act requirements vary, MHI recommends contacting qualified legal counsel to determine what administrative or clerical activities are permitted in each jurisdiction.

Frequently Asked Questions

QUESTION 8

Can retailers and community owners now provide customers with a list of available lenders to contact to discuss financing options?

ANSWER: Yes, retailers and community owners can provide customers with a list of lenders available to discuss financing options, as long as the retailer or community owner is not receiving any type of payment, kickback, referral fee, or anything else of value for referring prospective borrowers to specific lenders.

However, if the retailer or community owner has any corporate affiliation with any lender, then this relationship must be disclosed in writing to the customer. Further, if the retailer or community owner plans to refer customers to this affiliated lender, then the retailer or community owner must also provide the customer with the contact information of at least one unaffiliated lender.

QUESTION 9

Can retailers and community owners refer customers to lenders or recommend specific lenders?

ANSWER: Under the new law, retailers and community owners can refer a customer to a lender or recommend a lender as long as they do not directly offer or negotiate loan terms on behalf of the lender or the customer. They also cannot be compensated or receive any type of benefit or gain for participating in any of these activities or for assisting lenders with these activities, including compensation for referrals.

In addition, if the retailer or community owner has any corporate affiliation with any lender, then this relationship must be disclosed in writing to the customer. If the retailer or community owner plans to refer customers to an affiliated lender, then they must provide the customer with the contact information of at least one unaffiliated lender. However, for additional information regarding state-specific requirements concerning referrals, MHI recommends contacting qualified legal counsel.

Frequently Asked Questions

QUESTION 10

Can retailers or community owners now tell customers if they have a good (or bad) relationship with certain lenders? Can they share with prospective customers information about a previous customer's experience with a specific lender?

ANSWER: Yes, under Pub. L. 115-174 § 107 retailers and community owners can share with customers information about their relationships with specific lenders. However, as the BCFP rulemaking process is not yet complete, additional rulemaking may impact this activity in the future.

Sharing of a customer's experience with a specific lender would likely be permissible under Pub. L. 115-174 § 107. However, given federal, state, and local privacy laws, MHI does not recommend sharing non-public customer information. For additional information regarding privacy requirements, MHI recommends contacting qualified legal counsel.

QUESTION 11

Are the rules regarding seller financing of manufactured homes changed by the new law?

ANSWER: No. See answers to Questions 12,13, and 14.

QUESTION 12

Does Section 107 change the requirement that to extend credit to a buyer a Mortgage Loan Originator must be engaged in the transaction?

ANSWER: No. Pub. L. 115-174 § 107 does not change the legal requirement that offering or extending credit secured by a manufactured home requires a licensed Mortgage Loan Originator.

QUESTION 13

Can retailers or community owners of manufactured homes now extend credit, in the form of installment contracts or loans, to consumers without using the services of a licensed Mortgage Loan Originator?

ANSWER: No. Any retailer or community owner who enters into a retail installment contract is a "creditor" under TILA and applicable state laws. Further, under the SAFE Act, the retailer or community owner may also need to hold an appropriate entity-level lending license, be in good standing in the appropriate jurisdiction, and employ a licensed Mortgage Loan Originator. For additional information regarding state-specific licensing requirements, MHI recommends contacting qualified legal counsel.

Frequently Asked Questions

QUESTION 14

Are owners of manufactured home communities permitted to sell one of the community's homes to a buyer and then "hold paper" for the customer (i.e. be the lender)?

ANSWER: A community owner can sell a manufactured home and then "hold paper" only if it holds the appropriate lending license, as required by state law, and employs licensed Mortgage Loan Originator.

QUESTION 15

Does anything change for community owners or community operators who offer leases with an option to purchase?

ANSWER: No. Nothing in Pub. L. 115-174 § 107 applies to community owners or community operators who offer manufactured home leases with an option to purchase.

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