

**THE SECURE FAIR ENFORCEMENT FOR
MORTGAGE LICENSING ACT OF 2008 (THE “SAFE ACT”) AND
THE MORTGAGE LOAN ORIGINATOR LICENSING ACT (THE “MLOLA”) –
CAN WE STILL DO LAND CONTRACTS?**

The question of the impact of the SAFE Act and MLOLA on Michigan purchase money mortgages and land contracts was first discussed in a white paper prepared for the MAR Convention held in 2009. At that time, it was concluded that both purchase money mortgages (*i.e.*, a mortgage given by a seller to secure financing extended by the seller to a buyer) and land contracts were subject to the regulations of the SAFE Act and MLOLA. The Michigan Department of Financial Insurance Services (“DIFS”) gave a reprieve on land contracts when it published a FAQ which indicated that DIFS would not consider land contracts subject to the SAFE Act or MLOLA until HUD said otherwise. Unfortunately, HUD promulgated a SAFE Act Final Rule that became effective on August 29, 2011 (the “Rule”). The Rule makes it clear that the SAFE Act and thus MLOLA govern Michigan land contracts.

At the time this article was being prepared, DIFS was in the process of finalizing FAQs for the SAFE Act and MLOLA which should help guide REALTORS® working with clients who sell properties on land contract. If DIFS’ anticipated FAQs are published after the preparation of this article but before its presentation, the presentation will be supplemented as necessary to reflect the position of DIFS.

This article highlights those portions of the SAFE Act, MLOLA and the Rule which directly impact REALTORS® working with sellers. A complete discussion of the technical requirements of the SAFE Act, MLOLA and the Rule are beyond the scope of this presentation.

1. Introduction – Brief History of the Promulgation of The SAFE Act, MLOLA and The Rule.

A. REALTORS® providing brokerage services to the public are not required to comply with MLOLA. The definition of “mortgage loan originator” specifically excludes: “. . . a person who only performs real estate brokerage activities and is licensed or registered under the laws of this state, unless the person is compensated by a lender, a mortgage broker, or other mortgage loan originator or by any agent of a lender, mortgage broker, or other mortgage loan originator.”

B. MLOLA defines “real estate brokerage activity” as providing real estate brokerage services to the public including, but not limited to, the following listed activities:

(i) Acting as a real estate agent or real estate broker for a buyer, seller, lessor, or lessee of real property.

(ii) Bringing together parties interested in the sale, purchase, lease, rental, or exchange of real property.

(iii) On behalf of any party, negotiating any portion of a contract relating to the sale, purchase, lease, rental, or exchange of real property, other than in connection with providing financing with respect to that contract.

(iv) Engaging in any activity for which a person engaged in the activity is required to be registered or licensed as a real estate agent or real estate broker under any applicable law.

(v) Offering to engage in any activity, or act in any capacity, described in subparagraph (i), (ii), (iii), or (iv).

In sum, if a REALTOR® is simply engaged in the sale of property which involves a sale on land contract, a purchase money mortgage or other form of seller financing, the REALTOR® is not subject to MLOLA. Obviously, this exemption would not apply if the REALTOR® was providing financing for the sale or the REALTOR® was being compensated by a lender,

mortgage broker or other mortgage loan originator or by any agent of a lender, mortgage broker or other mortgage loan originator.

C. Section 5 of MLOLA sets forth various activities that are exempt. These exemptions include an individual who offers and negotiates terms of a residential mortgage loan secured by a dwelling that served as his or her residence. Thus, sellers need not comply with MLOLA if they are financing the sale of their residence by way of a land contract or purchase money mortgage. Section 5 also contains an exemption for an individual who offers and negotiates terms of a “residential mortgage loan” with or on behalf of an immediate family member.

D. The SAFE Act and MLOLA only apply to seller financing involving a “residential mortgage loan.” A “residential mortgage loan” is defined as a loan primarily for personal, family or household use that is secured by a mortgage or other equivalent, consensual security interest on a dwelling or on land in which a person intends to construct a dwelling. In turn, a “dwelling” is defined as a residential structure or mobile home which contains one to four family housing units or individual units of a condominium or cooperative.

E. A purchase money mortgage is a residential loan covered by MLOLA.

F. A land contract is a residential mortgage loan covered by MLOLA.

G. Seller financing which involves vacant land not intended for construction of a residence or involves property other than a residential dwelling is not covered by MLOLA.

H. Under the Rule, not every person who acts a “loan originator” must be licensed. Instead, under the Rule, a license with MLOLA is required only for those persons who “engage in the business of loan origination.” The Rule states that persons are engaged in the business of a loan originator if they habitually or repeatedly in a commercial context take residential mortgage

loan applications; offer or negotiate terms of a residential mortgage loan for compensation or gain or otherwise hold themselves out to the public to be in the business of a mortgage loan originator.

I. Under the Rule, a person must be licensed if he or she “offers or negotiates terms of a residential mortgage loan for compensation” or gain. In turn, the Rule provides that an individual “offers or negotiates terms of a residential mortgage loan for compensation or gain” if the individual: (i) presents for consideration by a borrower (*i.e.*, land contract vendee or purchase money mortgage purchaser) particular mortgage loan terms; (ii) communicates directly or indirectly with a borrower for purposes of reaching an understanding about residential mortgage terms; or (iii) recommends, refers or steers a borrower to a specific lender or particular residential mortgage terms pursuant to a duty or incentive (*e.g.*, payment) from any person other than the borrower; AND such individual receives or expects to receive payment in connection with the above-described activities.

J. MLOLA does not contain a minimum number of residential mortgage loan transactions (*i.e.*, land contracts or purchase money mortgages) before an individual is required to be licensed as a mortgage loan originator under MLOLA.

K. MLOLA specifically provides the following exemptions from the licensing requirements under MLOLA:

- 1) A registered mortgage loan originator, when acting for a depository institution, a subsidiary of a depository institution that is owned and controlled by that depository institution and is regulated by a federal banking agency, or an institution regulated by the farm credit administration; and

- 2) A licensed attorney who negotiates the terms of a residential mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client, unless the attorney is compensated by a lender, mortgage broker, or other mortgage loan originator or by any agent of a lender, mortgage broker, or other mortgage loan originator.

L. Generally, an employee of a bona fide nonprofit organization or a volunteer for such an organization who engages in the business of a mortgage loan originator is not required to be licensed under the Rule. At least preliminarily, DIFS takes the position that the same persons are not required for licensure under MLOLA.

M. Under the Rule and HUD's commentary to the Rule, the following specific seller financing transactions do not require a mortgage loan originator's license:

- 1) An individual who sells his or her own residence in a seller financed transaction, and pursuant to the transaction, offers or negotiates the terms of a residential mortgage loan;
- 2) An individual who sells his or her vacation home in a seller financed transaction and, pursuant to the transaction, offers or negotiates the terms of a residential mortgage loan;
- 3) An individual who sells an inherited property in a seller financed transaction, and, pursuant to the transaction, offers or negotiates the terms of a residential mortgage loan;
- 4) An individual who sells his or her dwelling to an immediate family member (spouse, child, sibling, parent, grandparent, grandchild, step parent, stepchildren, stepsiblings, and adopted relationships) in a seller

financed transaction and, pursuant to the transaction, offers or negotiates the terms of a residential mortgage loan.

A mortgage loan originator license is not required for the above-described transactions provided that such activity is not “habitual.”

N. DIFS, in a preliminary draft of FAQs, has indicated that an activity will be deemed “habitual” under the following standard:

Unless other evidence to the contrary indicates that an individual is ‘engaged in the business’ of loan origination, during a 12-month period from January 1 to December 31, an individual will not be considered to be engaged in the business of mortgage loan origination if the individual is not engaged in any activity under the MLOLA except seller financing transactions AND the individual, together with any affiliates, originates three or fewer mortgage loan transactions. If four or more transactions are originated within such 12-month period, DIFS will presume the individual is ‘engaged in the business’ and licensure as a mortgage loan originator is therefore required.

In other words, a seller can engage in seller financing 3 times per calendar year without being “habitual,” *e.g.* licensed with MLOLA.

O. A seller who regularly sells residential properties on land contract or through purchase money mortgages cannot avoid licensure under MLOLA by working through a real estate broker or salesperson who is licensed under MLOLA. Unfortunately, provisions of the Mortgage Brokers, Lenders, and Servicers Licensing Act prohibit this activity unless the real estate broker or salesperson is licensed under the MBLSLA.

Again, DIFS will or may already have published its FAQs for MLOLA by the time this article is presented. If the publication of those FAQs does not occur prior to the presentation of this article, any inconsistencies between this article and the DIFS FAQs will be described in a follow-up article in the Michigan REALTOR®.

Michigan Association of REALTORS®
August 2013

G:\docs\1000\C1004\M446\Enforcement of Safe Act & MLOLA.doc