

The “SAFE” Act in New Hampshire

By Jason A. Bielagus, Esq.

Since the “SAFE Act” went into effect in 2010, there have been a lot of questions about what it is, what it prohibits, and what is allowed. This article will discuss the “SAFE Act,” what it regulates, and what the exceptions are.

In 2008, Congress passed “HERA,” which contains within it the “SAFE Act,” Public Law 110-289, 12 USC § 5101 et seq.

In 2009, New Hampshire passed, “Licensing of Non-Depository First Mortgage Bankers and Brokers,” RSA 397-A, modeled on the federal SAFE Act. For this reason, RSA 397-A is often referred to as the “SAFE Act.”

RSA 397-A applies to loans secured by a mortgage interest in property that the borrower uses as a residence. RSA § 397-A:1 XIV states that:

‘Mortgage loan’ or ‘residential mortgage loan’ means any loan, including a first or second mortgage loan, primarily for personal, family, or household use which is secured in whole or in part by a mortgage, deed of trust, or other equivalent consensual security interest upon a dwelling or any interest in real property or in residential real estate.

As such, RSA 397-A applies to loans secured by a mortgage interest in property that the borrower uses as a residence. RSA 397-A does not apply to loans secured by a mortgage on property that the borrower owns as an investment, or that the borrower uses for business or commercial purposes.

In general, RSA 397-A prohibits an unlicensed lender from making a loan that is secured by a mortgage interest in property that the borrower uses as a residence. See RSA § 397-A:2 and 397-A:3, paraphrased as follows:

...Any person who engages in the business of making or brokering mortgage loans secured by real property located in this state shall be required to obtain a license from the NH Banking Department...

...It is unlawful for any individual to transact business in this state as a loan originator unless such individual is licensed under this chapter...

...An individual shall not engage in the business of a mortgage loan originator with respect to any dwelling without first obtaining and maintaining annually a license under this chapter...

This law provides for a penalty of \$25,000.00 per violation (per loan).

RSA 97-A:2, I, provides certain exceptions to the general rule:

- (a) An individual who offers or negotiates terms of a residential mortgage loan with or on behalf of an immediate family member of the individual;
- (b) An individual who offers or negotiates terms of a residential mortgage loan secured by a dwelling that served as the individual's residence;
- (c) An attorney licensed in New Hampshire performing activities that are within the definition of a loan originator, provided certain conditions are met;
- (d) An individual who acts as a mortgage banker, mortgage broker, mortgage servicer, or mortgage originator if the individual is not engaged habitually and repeatedly in such activities in a commercial context. It shall be a rebuttable presumption that an individual is not engaged in the business of a mortgage banker, mortgage broker, mortgage servicer, or mortgage originator if the individual is not involved in more than 3 loans in any consecutive 12-month period.

RSA § 397-A:4 provides additional exceptions to the general rule:

- I. Depository institutions or an institution regulated by the Farm Credit Administration.
- II. Federal, state, or local governmental agencies...
- IV. (a) Exempt nonprofit entities...

V. An owner of real property who, in any consecutive 12-month period, makes no more than 3 mortgage loans to purchasers of the property for all or part of the purchase price of the real estate against which the mortgage is secured. The owner of real property in such transactions shall not be considered to be engaged in the business of mortgage loan origination.

Given the above, when a lender will make a loan that will be secured by a mortgage, one of the following conditions must be met:

- The borrower owns the property as an investment, or uses it for business, commercial, or non-residential purposes; the borrower does not use the property as a residence;
- The lender is licensed (the lender has an NMLS license);
- The lender is a bank, or a subsidiary of a bank;
- The lender is a government agency that falls within 397-A:4, II;
- The lender is a nonprofit entity that falls within 397-A:4, IV;
- The lender and borrower are related as parent-child, or as siblings;
- The lender is the seller, and is selling one of his or his residences; or
- The lender has made no more than two loans in the last 12 months.

If one of the conditions above is met, the loan is not likely to be in violation of RSA 397-A. If none of the conditions above is met, then the loan could be in violation of RSA 397-A.

Please do not hesitate to contact us with any questions. We can be reached at:

Bielagus Law Offices PLLC
26 Concord Street
PO Box 3091
Peterborough, NH 03458
(603) 554-1612
www.bielaguslaw.com

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