

**SAFE ACT – NH RSA 397-A**  
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(April 2023)

Legislative History. In 2008, Congress passed “HERA,” which contained 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. New Hampshire then modified RSA 397-A extensively in 2016, and made some additional changes in 2018, 2019, and 2021.

Applicability. RSA 397-A applies to loans that are for personal, family, or household use, and are secured by a mortgage interest in property used as a dwelling. 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.

Then, “dwelling,” “real property” and “residential real estate” are defined in § 1, VI-c, XXI, and XXI-b, respectively:

"Dwelling" means a residential structure or mobile or manufactured home which contains one to 4 family housing units located in New Hampshire whether or not attached to real property, or individual units of condominiums or cooperatives. The term includes manufactured housing, a mobile home, and a trailer if it is used or intended to be used as a residence.

"Real property" means a dwelling or land and the improvements which are affixed thereon or are intended to be affixed thereon, including, but not limited to, single-family homes and multifamily dwellings not exceeding 4 units, wholly or partly used or occupied, or intended to be used or occupied, as the home or residence of one or more persons.

"Residential real estate" means any real property located in New Hampshire, upon which is constructed or intended to be constructed a dwelling.

Given the definitions above, RSA 397-A applies to loans for personal, family, or household use, and which are secured by a mortgage on a dwelling or residential real estate.

General Rule. In general, RSA 397-A prohibits an unlicensed lender from making a loan that is secured by a mortgage interest in residential real estate or a dwelling. Under § 2, I, “This chapter shall provide for the department's regulation of persons that engage in the business of a mortgage banker, mortgage broker, mortgage servicer, or mortgage originator for a mortgage loan from the state of New Hampshire or a mortgage loan secured by real property located in the state of New

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Hampshire. Then, under § 3, I, “Prior to engaging in the business of a mortgage broker, mortgage banker, mortgage originator, or mortgage servicer, a person shall obtain and maintain a license under this chapter.” Furthermore, under § 17, II, “It shall be unlawful for a person not being properly licensed as required by this chapter, to engage in the business of a mortgage banker, mortgage broker, mortgage servicer, or mortgage loan originator.”

A person who violates RSA 397-A could be subject to a cease-and-desist order (under § 19), or charged with a misdemeanor or felony (under § 20). Penalties includes fines of up to \$2,500 per violation.

Exceptions. RSA 397-A, §§ 1, 2, and 4, provide several exceptions.

First, there is the commercial real estate exception. Under the definitions in RSA 397-A:1, as discussed above, RSA 397-A applies to loans for personal, family, or household use, and which are secured by a mortgage on a dwelling or residential real estate. Therefore, conversely, RSA 397-A does not apply to real estate used as an investment, or for business or commercial purposes.

Second, under RSA 397-A:2, I, RSA 397-A does not apply to:

The following persons are not considered to be engaged in the business of activities requiring regulation under this chapter:

(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)(1) An attorney licensed in New Hampshire performing activities that are within the definition of a loan originator, provided that...[subject to certain requirements]

(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.

Note that above, RSA 397-A does not apply to loans between “immediate family members.” Section 1, VIII-b, defines “immediate family members” as, “...a spouse, child, sibling, parent, grandparent, or grandchild...” and, “...includes stepparents, stepchildren, stepsiblings, and adoptive relationships.”

Also note that under (b) above, an owner of residential real estate can sell his or her residential real estate and, in exchange, take back a mortgage.

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Furthermore, under (d) above, there is the exception of 3 loans or less in any consecutive 12-month period, “...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.”

Third, there are the exceptions provided for under RSA 397-A:4 –

The provisions of this chapter shall not apply to:

I. Depository institutions or an institution regulated by the Farm Credit Administration.

II. Registered mortgage loan originators, when acting for an entity described in paragraph I or for a subsidiary that is owned and controlled by an entity described in paragraph I.

III. Federal, state, or local governmental agencies, instrumentalities, and corporations and the employees of such entities who act as loan originators and mortgage servicers pursuant to their official duties as employees of the entities provided that with regard to those activities that would otherwise be within the scope of this chapter...[subject to certain requirements]

IV. (a) Exempt nonprofit entities...[subject to certain requirements]

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.

Analysis. When a lender will make a loan that will be secured by a mortgage, one of the following conditions must be met:

- The mortgaged real estate is an investment, or the mortgagor uses it for business or commercial purposes; the mortgaged real estate is not a dwelling or residential real estate (RSA 397-A:1 and 2);
- The mortgagor and mortgagee are immediate family members (i.e., related as spouses, parent-child, siblings, grandparent-grandchild, stepparent-stepchild, stepsiblings, or adoptive relationships) (RSA 397-A:2, I, a);
- The mortgaged premises were the dwelling and residence of the mortgagee (RSA 397-A:2, I, b);
- The mortgagee is not involved in more than 3 loans in any consecutive 12-month period (RSA 397-A:2, I, b);

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- The mortgagee is a bank, or regulated by the Farm Credit Administration (RSA 397-A:4, I);
- The mortgagee is licensed under RSA 397-A (the mortgagee has an NMLS license) (RSA 397-A:4, II);
- Federal, state, or local governments (subject to certain requirements) (RSA 397-A:4, III);
- Exempt nonprofit entities (subject to certain requirements) (RSA 397-A:4, IV); or
- Mortgagor is 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 (RSA 397-A:4, V).

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

When drafting a mortgage, the drafter should consider stating in the mortgage deed which condition above applies.

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