

Residential Mortgage Licensing Act Interpretative Opinions
Nebraska Department of Banking and Finance

<u>Number</u>	<u>Opinion</u>
1.	<u>Activities Requiring Licensure as a Mortgage Loan Originator</u>
2.	<u>Loan Processors and Underwriters Licensing Requirements</u>
3.	<u>Independent Loan Processing Companies</u>
4.	<u>Financial Responsibility</u>
5.	<u>Use of Unique Identifier</u>

INTERPRETATIVE OPINION NO. 1

ACTIVITIES REQUIRING LICENSURE AS A MORTGAGE LOAN ORIGINATOR

The Nebraska Department of Banking and Finance (“Department”) hereby issues this Interpretative Opinion regarding activities requiring licensure as a mortgage loan originator under the Residential Mortgage Licensing Act (“the Act”).

Neb. Rev. Stat. § 45-702(16)(a) defines the term “mortgage loan originator” as “an individual who for compensation or gain or in the expectation of compensation or gain (i) takes a residential mortgage loan application or (ii) offers or negotiates terms of a residential mortgage loan.”

Neb. Rev. Stat. § 45-727(1) provides in relevant part that “an individual, unless specifically exempted from the Residential Mortgage Licensing Act under section 45-703, shall not engage in, or offer to engage in, the business of a mortgage loan originator with respect to any residential real estate or dwelling located or intended to be located in this state without first obtaining and maintaining annually a license under the act.”

The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (“SAFE Act”) mandated that each state implement a licensing program for mortgage loan originators and set minimum standards for each state’s program. The United States Department of Housing and Urban Development (“HUD”) was given authority to administer and enforce the SAFE Act.¹

On June 30, 2011, HUD issued final rules regarding the implementation of the SAFE Act, <http://portal.hud.gov/hudportal/documents/huddoc?id=SAFERULE.pdf>.² HUD’s final rule provided additional clarification of the SAFE Act’s requirements, including clarification of definitions used in the SAFE Act, several of which are also used in the Act. Specifically, HUD provided definitions for the terms “application”, “takes a residential mortgage loan application”, and “offers or negotiates terms of a residential mortgage loan for compensation or gain” as those terms appear in the SAFE Act. These definitions are attached as Appendix A to this Interpretative Opinion and incorporated by reference. The Department adopts the same definitions for these terms as they appear in the Act.

Based upon these definitions, examples of situations in which licensure as a mortgage loan originator is required include, but are not limited to the following:

- A. Originating residential mortgage loans on behalf of a mortgage lending company (“mortgage banker”) or an installment loan company.
- B. Taking an application from an applicant even if such individual is not responsible to verify the information contained in the application, or only inputs the information into an online application or other automated system.

¹ On July 21, 2011, responsibility and enforcement of the SAFE Act was transferred from HUD to the Consumer Financial Protection Bureau.

² The regulations are now codified as Regulation H, 12 CFR 1008.

- C. Contacting a consumer to solicit such individual to submit a residential mortgage loan application, regardless of whether the caller actually takes the residential mortgage loan application.
- D. Advertising in print, electronic media, or on the internet that such individual can obtain a residential mortgage loan for consumers who respond to the advertisement.
- E. Taking residential mortgage loan applications from potential customers by a manufactured housing dealer or home builder which locates and arranges residential mortgage loans for such customers.

Examples of situations which do not involve the taking of an application or negotiating loan terms and thus do not require licensure as a mortgage loan originator, provided that such individual's role with the residential mortgage loan origination is limited to the following specific:

1. Assisting an applicant who is filling out an application by clarifying what type of information is necessary for the application.
2. Physically handling a completed application form or transmitting a completed form to a lender on behalf of an applicant, provided that the individual did not assist the borrower in completing the application and does not communicate with the applicant concerning the terms of the residential mortgage loan.
3. Contacting an applicant after the customer has submitted an application to verify the information contained in the application by obtaining documentation, such as tax returns or payroll receipts.
4. Describing the steps that a consumer would need to take to provide information to be used to determine whether the consumer qualifies for a loan or otherwise explaining the loan application process.
5. Providing general explanations or descriptions in response to consumer inquiries regarding qualification for a specific loan product, such as explaining loan terminology (i.e., debt-to-income ratio); lending policies (i.e., the loan-to-value ratio policy of the mortgage banker or installment loan company); or product-related services.
6. In response to a consumer's request, informing a consumer of the loan rates that are publicly available such as on the mortgage banker's or installment loan company's website for specific types of loan products without communicating to the consumer whether qualifications are met for that loan product.
7. Arranging the loan closing or other aspects of the loan process, including communicating with an applicant about those arrangements, provided that

communication with the consumer only verifies loan terms already offered or negotiated.

8. Providing a consumer with information unrelated to loan terms, such as the best days of the month for scheduling loan closings.
9. Communicating on behalf of a mortgage loan originator that a written offer has been sent to an applicant without providing any details of that offer.

Ultimately, the determination as to whether licensure is required will depend upon the facts of a particular case and whether the individual is taking an application from a consumer or negotiating loan terms with a consumer.

EFFECTIVE DATE: April 16, 2012

APPENDIX

- (1) **Application**—a request, in any form, for an offer (or a response to a solicitation of an offer) of residential mortgage loan terms, and the information about the borrower or prospective borrower that is customary or necessary in a decision on whether to make such an offer. 12 CFR 1008.23.
- (2) **Takes a residential mortgage loan application**—an individual “takes a residential mortgage loan application” if the individual receives a residential mortgage loan application for the purpose of facilitating a decision whether to extend an offer of residential mortgage loan terms to a borrower or prospective borrower (or to accept the terms offered by a borrower or prospective borrower in response to a solicitation), whether the application is received directly or indirectly from the borrower or prospective borrower. 12 CFR 1008.103(c)(1)
- (3) **Offers or negotiates terms of a residential mortgage loan for compensation or gain**—an individual “offers or negotiates terms of a residential mortgage loan for compensation or gain” if the individual:
- (i)(A) Presents for consideration by a borrower or prospective borrower particular residential mortgage loan terms;
 - (B) Communicates directly or indirectly with a borrower, or prospective borrower for the purpose of reaching a mutual understanding about prospective residential mortgage loan terms; or
 - (C) Recommends, refers, or steers a borrower or prospective borrower to a particular lender or set of residential mortgage loan terms, in accordance with a duty to or incentive from any person other than the borrower or prospective borrower; and
 - (ii) Receives or expects to receive payment of money or anything of value in connection with the activities described in the above paragraphs of this section or as a result of any residential mortgage loan terms entered into as a result of such activities. 12 CFR 1008.103(c)(2)

INTERPRETATIVE OPINION NO. 2

LOAN PROCESSORS AND UNDERWRITERS LICENSING REQUIREMENTS

The Nebraska Department of Banking and Finance (“Department”) hereby issues this Interpretative Opinion regarding the licensing requirements for Loan Processors and Underwriters under the Residential Mortgage Licensing Act.

Neb. Rev. Stat. § 45-702(14) defines the term “loan processor or underwriter” as “an individual who (a) performs clerical or support duties as an employee at the direction of and subject to the supervision and instruction of a person licensed, or exempt from licensing, under the Residential Mortgage Licensing Act or Nebraska Installment Loan Act and (b) does not represent to the public, through advertising or other means of communicating or providing information including the use of business cards, stationery, brochures, signs, rate lists, or other promotional items, that such individual can or will perform any of the activities of a mortgage loan originator.”

The Department interprets the term “employee” in Section 45-702(14) to mean an individual whose manner and means of performance of work are subject to the right of control of a licensed or registered mortgage banker or installment loan company and whose compensation for federal tax purposes is reported, or required to be reported, on a W-2 form issued by the controlling person.

This definition is consistent with the definition contained in the United States Department of Housing and Urban Development’s (“HUD”) final rule implementing the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (“SAFE Act”). 12 CFR 1008.23. It is also consistent with Nebraska law concerning the definition of employee in other contexts. *See generally, Williams v. Allstate Indemnity Corp.*, 266 Neb. 794, 669 N.W.2nd 455 (1995).

Neb. Rev. Stat. § 45-727(3) provides that an “independent agent shall not engage in the activities as a loan processor or underwriter unless such independent agent loan processor or underwriter obtains and maintains a [mortgage loan originator license.]” The Department interprets the term “independent agent” in Section 45-727 to mean any individual who does not meet the definition of employee as outlined above.

The Department interprets Section 45-702(14) to also require that the loan processor or underwriter be subject to the supervision of a licensed or registered mortgage loan originator. This interpretation is consistent with Section 1503 of the SAFE Act and with HUD’s final rules.

The Department notes that the licensed or registered loan originator does not necessarily have to be the loan processor’s direct or immediate supervisor. However, the SAFE Act’s usage of functional terms (i.e. “at the direction of and subject to the supervision of [a loan originator]”) make it clear that there must be an actual connection between the licensed or registered loan originator’s direction, supervision, and instruction and the loan processor or underwriters’ performance, as opposed to a nominal relationship on an organizational chart. A single licensed loan originator may be able to effectively direct, supervise, and instruct multiple loan processors or underwriters depending upon all the facts and circumstances. 76 FR 38486; *See also*

Appendix C to 12 CFR Part 108 (provides additional interpretations concerning independent contractor loan processors and underwriters).

Therefore, an individual who conducts clerical and support duties, as defined in Section 45-702(4), who is an employee of a licensed or registered mortgage banker or installment loan company, and who is supervised by a licensed or registered mortgage loan originator is not required to obtain a mortgage loan originator license to act as a loan processor or underwriters. All individuals who do not meet these requirements must be licensed as mortgage loan originators in order to conduct loan processing and underwriting activities.

EFFECTIVE DATE: April 16, 2012

INTERPRETATIVE OPINION NO. 3

INDEPENDENT LOAN PROCESSING COMPANIES

The Nebraska Department of Banking and Finance (“Department”) hereby issues this Interpretative Opinion regarding the licensing requirements for Independent Loan Processing Companies under the Residential Mortgage Licensing Act.

Neb. Rev. Stat. § 45-702 (15) defines the term “mortgage banker or mortgage banking business” to mean “any person (a) other than (i) a person exempt under section 45-703, (ii) an individual who is a loan processor or underwriter, or (iii) an individual who is licensed in this state as a mortgage loan originator and (b) who, for compensation or gain or in the expectation of compensation or gain, directly or indirectly makes, originates, services, negotiates, acquires, sells, arranges for, or offers to make, originate, service, negotiate, acquire, sell, or arrange for a residential mortgage loan.”

The Department interprets the term “originate(s)” in Section 45-702(15) to mean any residential mortgage loan-related activity from the taking of a residential mortgage loan application through the completion of all required loan closing documents and funding of the residential mortgage loan. This definition is consistent with the definition of “origination of a mortgage loan” as such term is used in the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (“SAFE Act”) and in the United States Department of Housing and Urban Development’s SAFE Act final rule. 12 CFR 1008.103.

The Department is aware that there are entities which provide third-party processing services for lenders originating residential mortgage loans secured by dwellings located in Nebraska. Loan processing and underwriting are activities that are an essential component of the origination of the residential mortgage loan and they occur between the taking of the application and the closing and funding of the residential mortgage loan. Therefore, these activities constitute “originating a mortgage loan” and an entity performing loan processing and underwriting services in connection with residential mortgage loans secured by a dwelling located in Nebraska is acting as a mortgage banker. Such entity must be licensed in accordance with Section 45-705 or must qualify for an exemption from licensure pursuant to Section 45-703.

In the case of an independent loan processing or underwriting company which has obtained a mortgage banker license (or qualifies for an exemption from licensing), the individuals who conduct the loan processing and underwriting activities do not need to be licensed if they are employees of the company and supervised by a licensed or registered mortgage loan originator.¹ All other individuals who are not employees of the licensee and supervised by a licensed or registered mortgage loan originator are required to obtain a mortgage loan originator license prior to conducting loan processing or underwriting on behalf of an independent mortgage processing company.

EFFECTIVE DATE: April 16, 2012

¹ See Interpretative Opinion #2

INTERPRETATIVE OPINION NO. 4

FINANCIAL RESPONSIBILITY

The Nebraska Department of Banking and Finance (“Department”) hereby issues this Interpretative Opinion regarding the financial responsibility requirements required for issuance of a mortgage loan originator license.

Neb. Rev. Stat. § 45-729(1)(c) of the Residential Mortgage Licensing Act provides that the director shall not issue a mortgage loan originator license unless the director makes at a minimum the following findings:

(1)(c) The applicant has demonstrated financial responsibility, character, and general fitness such as to command the confidence of the community and to warrant a determination that the mortgage loan originator will operate honestly, fairly, and efficiently within the purposes of the Residential Mortgage Licensing Act. For purposes of this subsection, an individual has shown that he or she is not financially responsible when he or she has shown a disregard in the management of his or her own financial condition. The director may consider the following factors in making a determination as to financial responsibility:

- (i) The applicant's current outstanding judgments except judgments solely as a result of medical expenses;
- (ii) The applicant's current outstanding tax liens or other government liens and filings;
- (iii) The applicant's foreclosures within the past three years; and
- (iv) A pattern of seriously delinquent accounts within the past three years by the applicant;

In analyzing an applicant or licensee’s financial responsibility, the Department will consider many factors including, but not limited to, the following:

- (A) Outstanding judgments.
- (B) Tax or other government liens.
- (C) A pattern of delinquent child support payments.
- (D) Outstanding collection accounts.
- (E) Outstanding accounts with a remaining balance.
- (F) Accounts that are ninety (90) days or more past due.
- (G) A pattern of delinquent accounts.
- (H) A foreclosure within the preceding three years.

- (I) A bankruptcy active within the preceding 10 years.

The Department does not consider any of the factors above if those factors are related solely to medical debts. However, it is the responsibility of the applicant or licensee to supply information to the Department to document that the debts are medically related.

In addition, the Department does not consider a credit score in making a determination as financial responsibility. Furthermore, the presence of a particular factor will not automatically result in a finding that a person is not financially responsible. Instead, the Department determines financial responsibility based upon the facts associated with each individual application. The presence of an item above would warrant further inquiry by the Department.

If an individual has any of the items listed above, the individual must provide additional supporting documentation to the Department. If sufficient documentation of the items listed above is not submitted at the time of application, the Department will contact the individual. The Department may use secure, electronic messages sent directly to the individual and the posting of deficiencies on the individual's Nationwide Mortgage Licensing System record.

Additional documentation requested by the Department may include, but is not limited to, the following:

- (1) Narrative explaining the circumstances which surround the adverse item reported.
- (2) Satisfaction of judgment.
- (3) Bankruptcy discharge order or dismissal.
- (4) Bankruptcy schedules.
- (5) Satisfaction of tax or other governmental lien.
- (6) Letters or agreements establishing a repayment plan.
- (7) Account statements, receipts, bank statements, cancelled checks or other documentation which establishes the balance due, and the date and the amount of payments
- (8) Explanations concerning an ongoing settlement negotiation or dispute between the individual and creditor or creditor's assignee

After review of these items, the Department will make a determination as to whether a person meets the financial responsibility requirement. To make this determination, the Department may consider the following factors:

- (a) Whether the individual has provided complete information as requested by the Department.

- (b) The number of delinquent accounts, collection accounts, judgments, liens and charged off items.
- (c) The amount of any delinquent accounts, collection accounts, judgments, liens and charged off items.
- (d) The age of any delinquent accounts, collection accounts, judgments, liens and charged off items.
- (e) The length of time since a discharge in bankruptcy.
- (f) Any viable repayment agreements with creditors or creditor's assignees concerning delinquent accounts, collection accounts, judgments, liens and charged off items.
- (g) Good faith negotiation and repayment plans concerning any past due tax liability.
- (h) Failure to make payments pursuant to a repayment plan negotiated with a creditor or governmental tax agency.

As stated in (e) above, the Department will consider the length of time that has elapsed since a debtor has received a bankruptcy discharge. The Department does not consider the bankruptcy filing itself in making a determination as to financial responsibility. The Department will, however, examine the circumstances which led to the bankruptcy and will consider whether an individual has been using credit responsibly since receiving his or her discharge. New delinquencies and subsequent bankruptcy filings will reflect negatively upon the person's financial responsibility.

In order to make this determination post bankruptcy, a sufficient period of time must elapse for the Department to review the individual's use of credit after bankruptcy. Therefore, the Department will require a minimum of six months credit history after receiving a Chapter 7 discharge prior to it making a determination that such an individual is financially responsible. For Chapter 13 bankruptcies with confirmed bankruptcy plans, the Department will examine whether the individual is making the payments required by his or her Chapter 13 bankruptcy plan and may condition a license upon the individual continuing to make his or her required payments.

As stated in (f) and (g) above, the Department will also consider the existence of any repayment agreements with creditors and the good faith negotiation and repayment plans concerning tax liabilities. The Department may condition a license upon the licensee continuing to meet the requirements of the repayment plans. Such conditions may include requiring a licensee to submit periodic reports to the Department documenting that the individual has continued to make payments as agreed.

Financial responsibility is a continuing requirement for mortgage loan originators and must be met at all times, not just at initial licensing and at renewal. The Department may conduct such investigation as it deems necessary to determine whether a licensed mortgage loan originator continues to meet the financial responsibility requirement. Failure to meet the requirement may result in an initial license application being denied, a renewal request being denied, or a license being suspended or revoked.

EFFECTIVE DATE: April 16, 2012

INTERPRETATIVE OPINION NO. 5

USE OF UNIQUE IDENTIFIER

The Nebraska Department of Banking and Finance (“Department”) hereby issues this Interpretative Opinion regarding the use of the unique identifiers in advertisements and solicitations.

Neb. Rev. Stat. § 45-702(31) defines the term “unique identifier” as a number or other identifier assigned by protocols established by the Nationwide Mortgage Licensing System and Registry (“NMLS”).

The NMLS has established protocols to assign a unique identifier to each company, branch, and individual for whom an account has been established on the NMLS. The NMLS unique identifier is in numeric form. Each company, branch, and individual receives a unique number.

Congress enumerated several objectives for NMLS in Section 1502 of the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (“SAFE Act”). One objective was for the NMLS to “Provide consumers with easily accessible information, offered at no charge, utilizing electronic media, including the Internet, regarding the employment history of, and publicly adjudicated disciplinary and enforcement actions against, loan originators.” 12 USC § 5101.

To meet the Congressional objective, the NMLS has established a web site where consumers can research the background of their mortgage lending company (“mortgage banker”) and mortgage loan originator at <http://www.nmlsconsumeraccess.com> (“NMLS Consumer Access”). NMLS Consumer Access contains information about each mortgage banker and mortgage loan originator including licensing history and employment history. In addition to information about state licensed entities and individuals, NMLS Consumer Access also contains the same information as it pertains to mortgage loan originators who work for depository institutions who are registered pursuant to Section 1507 of the SAFE Act.

Neb. Rev. Stat. § 45-736 provides “The unique identifier of any licensee originating a residential mortgage loan shall be clearly shown on all residential mortgage loan application forms, solicitations, or advertisements, including business cards or web sites, and any other documents as established by rule, regulation, or order of the director.”

The purpose of Section 45-736 is to insure that mortgage bankers and mortgage loan originators are providing their unique identifier to potential customers so that those customers can research the mortgage banker and/or mortgage loan originator’s

background before doing business with such individual. The unique identifier is an important tool for consumers as they use NMLS Consumer Access. Since each entity, branch, and individual has a unique identifier, a consumer can use the unique identifier to confirm that they are reviewing the correct person or entity's record. Requiring loan originators to provide potential borrowers with the unique identifier therefore enhances one of Congress' objectives in enacting the SAFE Act.

Questions have arisen concerning the type of advertising or solicitation which must contain the unique identifier and the manner of displaying the unique identifier. In response to these questions, the Department interprets Section 45-736 to include the following requirements pertaining to disclosure of a mortgage banker or mortgage loan originator's unique identifier in solicitations or advertisements:

1. A web site established by a mortgage banker and used to solicit residential mortgage loan applications must disclose the mortgage banker's unique identifier.
2. A web site established by a mortgage loan originator and used to solicit residential mortgage loan applications must disclose the mortgage loan originator's unique identifier and the unique identifier of any mortgage banker identified in the advertisement.¹
3. A web site established by a mortgage banker which contains a list of employees or that otherwise identifies one or more mortgage loan originators (for example, a welcome message from the President of the company who is licensed as a mortgage loan originator, or an invitation for the reader to contact one or more loan originators for further information) must contain the unique identifier of the mortgage banker and each mortgage loan originator identified.
4. Business cards and stationery which identifies a mortgage banker and/or one or more mortgage loan originators must contain the unique identifier of each mortgage banker and/or mortgage loan originator identified.
5. Mail or email solicitations which identify a mortgage banker and/or one or more mortgage loan originators must contain the unique identifier of each mortgage banker and/or mortgage loan originator identified.

¹ A mortgage loan originator does not need to disclose his or her unique identifier in connection with a web site that is not used for the purpose of soliciting residential mortgage loan applications. For example, a mortgage loan originator would not need to disclose his or her unique identifier on a social networking web site such as Facebook unless it was being used to solicit residential mortgage loan applications.

6. Print, audio, and video advertisements which identify a mortgage banker and/or one or more mortgage loan originators must also contain the unique identifier of each mortgage banker and/or mortgage loan originator identified.
7. An outbound, pre-recorded telephone solicitation which identifies a mortgage banker and/or one or more mortgage loan originators must also contain the unique identifier of each mortgage banker and/or mortgage loan originator identified.
8. Internet postings including, but not limited to, bulletin boards such as Craigslist, which solicit residential mortgage loan applications and identify a mortgage banker and/or one or more mortgage loan originators must also contain each mortgage banker and/or mortgage loan originator's unique identifier.
9. Promotional items, including, but not limited to, pens, rulers, calendars, refrigerator magnets, etc., which identify a mortgage banker and/or one or more mortgage loan originators must also identify the unique identifier of each mortgage banker and/or mortgage loan originator identified.

By contrast advertising or solicitations which do not identify individual mortgage loan originators do not need to contain the unique identifiers of the individual mortgage loan originators who originate loans on behalf of the mortgage banker. Section 45-736 does not require a mortgage banker to list its mortgage loan originators in any advertising or solicitation that it may conduct, nor does it require the mortgage banker to include a list of mortgage loan originators on its web site. However, once the mortgage banker identifies one or more specific mortgage loan originators, it must also identify the unique identifiers for such individuals.

The Department would further interpret Section 45-736 to require the following as it pertains to the disclosure of the unique identifiers of both mortgage bankers and mortgage loan originators:

1. The unique identifier must appear in legible type, or in the case of an audio solicitation such as a radio advertisement, the disclosure must be audible.
2. The unique identifier must be identified on all advertising and solicitations including those advertisements and solicitations which are not directly soliciting consumers. For example, a marketing piece directed to real estate agents which identifies one or more mortgage loan originators must contain the unique identifier of each mortgage loan originator identified.

3. The unique identifier must be immediately preceded by “Nationwide Mortgage Licensing System Number,” “NMLS #” or other similar derivative.
4. The unique identifier must appear immediately after or immediately below the mortgage loan originator’s or mortgage banker’s name so that the consumer will be readily able to associate the unique identifier with the correct mortgage loan originator.
5. If both a mortgage banker’s and a mortgage loan originator’s unique identifiers appear on the same document, it must be readily apparent which unique identifier belongs to the mortgage banker and which unique identifier belongs to the mortgage loan originator.

EFFECTIVE DATE: February 7, 2013
Originally Issued April 2, 2012