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February 8, 2011

Ms. Marla Y. Jackson
Executive Director
Tennessee Manufactured Housing
Association
604 4th Avenue North
Nashville, TN 37219-1102

Re: Tennessee Residential Lending,
Brokerage and Servicing Act

Dear Marla:

This is in response to your letter dated July 30, 2010, in connection with the Tennessee Residential Lending, Brokerage and Servicing Act, Tenn. Code Ann. §§ 45-13-101, *et seq.* (the "Mortgage Act"), and its application to the manufactured home and modular housing industries.

As you know, the Mortgage Act was substantially amended effective July 31, 2009. One of the stated purposes of the Mortgage Act, as amended, is to carry out the purposes, and to be compliant with the requirements, of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008, 12 U.S.C. § 5101, *et seq.* (the "SAFE Act"). See Tenn. Code Ann. § 45-13-102.

Among other things, the SAFE Act directs states to adopt licensing and registration requirements for loan originators that meet the minimum standards specified in the SAFE Act. Overall responsibility for interpretation, implementation and compliance with the SAFE Act rests with the United States Department of Housing and Urban Development ("HUD"). If HUD determines that a state's mortgage loan origination licensing standards do not meet the minimum requirements of the SAFE Act, HUD is charged with

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establishing and implementing a licensing system for mortgage loan originators in that state.

In order to assist the states in complying with the requirements of the SAFE Act, the Conference of State Bank Supervisors (“CSBS”) and the American Association of Residential Mortgage Regulators (“AARMR”) developed model legislation, which HUD was asked to review and advise as to its sufficiency in meeting the applicable minimum requirements of the SAFE Act. HUD reviewed the model legislation and advised the public that the model legislation offers an approach that meets the minimum requirements of the SAFE Act. In advising the public of its assessment of the model legislation, HUD also presented its views and interpretations of certain statutory provisions that required consideration and analysis in determining that the model legislation meets the minimum requirements of the SAFE Act. These views and interpretations, referred to as HUD’s Commentary, can be found at <http://hud.gov/offices/hsg/rmra/safe/sfea.cfm>, along with other materials relative to the SAFE Act, including frequently asked questions.

The Mortgage Act provides, at Tenn. Code Ann. § 45-13-201(a), that no person shall act as a mortgage lender, mortgage loan broker or mortgage loan servicer in Tennessee without first obtaining a license under the Mortgage Act, and Tenn. Code Ann. § 45-13-301(a) provides that an individual, unless specifically exempted, shall not engage in the business of a mortgage loan originator with respect to any dwelling located in Tennessee without first obtaining and maintaining annually a license issued by the Commissioner, and without first being sponsored by a licensed mortgage lender, mortgage loan broker, or registered industrial loan and thrift company. “Mortgage lender,” “mortgage loan broker,” “mortgage loan servicer,” and “mortgage loan originator” are all defined in Tenn. Code Ann. § 45-13-105.

Generally speaking, the Mortgage Act applies to any individual, sole proprietorship, corporation, limited liability company, partnership, trust, association or any other legal entity, however organized, that makes, brokers, services and/or originates a residential mortgage loan. “Residential mortgage loan” is defined at Tenn. Code Ann. § 45-13-105(25) to mean any loan, including an extension of credit, primarily for personal, family or household use that is secured by a mortgage, deed of trust or other equivalent consensual security interest on a dwelling, as defined in § 103(v) of the federal Truth in Lending Act (“TILA”), codified in 15 U.S.C. § 1602(v), or residential real estate upon which is constructed or intended to be constructed a dwelling, as so defined.

TILA, at 15 U.S.C. § 1602(v), defines “dwelling” to mean a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives. In addition, Regulation Z, 12 CFR §§ 226.1, *et seq.*, which implements TILA, at 12 CFR § 226.2(a)(19), defines “dwelling” to mean a residential structure that contains 1 to 4 units, whether or not that structure is attached to real property. The term includes an individual condominium unit, mobile home, and

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trailer, if it is used as a residence. HUD has determined that, since both the SAFE Act and TILA address consumer protections for borrowers in housing finance transactions, the same interpretation applies under the SAFE Act. In addition, HUD interprets "mobile home" to include a manufactured home, as defined in the National Manufactured Housing Construction and Safety Standards Act of 1974. *See* Section C of HUD's Commentary and 42 U.S.C. § 5402(6).

With respect to the manufactured and modular housing industry, Tennessee is, I believe, somewhat unique among the states in adopting licensing and registration requirements that comply with the SAFE Act, in that Tennessee does not require a license for individuals who engage in certain activities as employees of manufactured home retailers or employees of dealers of modular building units. Specifically, Tenn. Code Ann. § 45-13-301(f) provides that a mortgage loan originator license is not required for any individual performing the activities of a manufactured home retailer or a dealer of modular building units; provided, that:

- (1) The individual either holds or is employed by a person who holds a manufactured home retailer license or a license to act as a dealer of modular building units that has been issued by the Commissioner of the Tennessee Department of Commerce and Insurance under Title 56, Chapter 126, of the Tennessee Code;
- (2) The individual does not in any way offer or negotiate terms of a residential mortgage loan, including by counseling with respect to such terms;
- (3) Neither the individual, nor the employing manufactured home retailer or dealer of modular building units, receives compensation or other gain from mortgage lender, mortgage loan broker or mortgage loan originator, or by any agent of the mortgage lender, mortgage loan broker or mortgage loan originator; and
- (4) This subsection (f) shall not apply if HUD determines by guideline, rule, interpretative letter or otherwise that the individuals must be licensed under the SAFE Act, or that this subsection (f) is otherwise inconsistent with the SAFE Act.

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You present a number of specific issues in your letter, and you have requested that we review those issues and advise whether your interpretation of them is in accordance with

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our interpretation. We will address those issues in the order in which you presented them:

(a) Compensation or gain (or expectation of compensation or gain)

1. Standard Sales Commission, Salary or Hourly Employees

QUESTION: It is our understanding that an individual who receives or expects to receive a sales commission for the sale of a manufactured/modular home or a salary or hourly wage from the retailer/dealer does not, directly or indirectly, receive/expect to receive the type of compensation or gain necessary to trigger licensing under the Mortgage Act. These types of compensation/gain do not come from a mortgage lender, mortgage loan broker or mortgage loan originator, or by any agent of the mortgage lender, mortgage loan broker or mortgage loan originator. Is our understanding correct?

ANSWER: Yes, provided that the sales commission, salary or hourly wage paid to the individual by the retailer/dealer is not in any way derived from, or based in any way upon, the financing of the sale. For example, if an individual receives a higher commission when a particular lender is used, a determination might be made that a license under the Mortgage Act is required.

2. Retailer/Dealer Sales Profit/Income

QUESTION: An employing retailer/dealer who receives/expects to receive sales profit or income from the sale of a home where the purchase may be financed by the buyer, also does not, directly or indirectly, receive/expect to receive the type of compensation or gain necessary to trigger licensing under the TN-SAFE Act. This type of compensation/gain is tied to the sale of the home and not the financing. Is our understanding correct?

ANSWER: Yes, provided that the sales profit or income received by the retailer/dealer, or which the retailer/dealer expects to receive, is not in any way derived from, or based in any way upon, the financing of the sale. For example, if a retailer/dealer receives, or expects to receive, higher sales profit or income when a particular lender is used, a determination might be made that a license under the Mortgage Act is required.

(b) Credit applications and pre-qualifications

QUESTION: It is our understanding that an individual is not performing activities that rise to the level of taking a loan application or offering or negotiating of, or counseling with respect to, residential mortgage loan terms if the individual helps with

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the completion of a credit application or credit pre-qualification – either in person, over the telephone, through the use of a lender’s on-line application/pre-qualification system or by answering questions for the customer about the application/pre-qualification – and therefore such activities would not subject the individual to licensing under the SAFE Act. Is our understanding correct?

ANSWER: It is difficult to provide a definitive answer to this question at this time. On December 15, 2009, pursuant to HUD’s charge under the SAFE Act, HUD published for public comment proposed clarifications of the SAFE Act and proposed regulations to be codified pursuant to the SAFE Act (the “SAFE Act Proposed Rule”). *See* 74 Fed. Reg. 239, 66548 (Dec. 15, 2009). The deadline for public comments was February 16, 2010, but was extended to March 5, 2010. As of the date of this letter, HUD has not yet issued final rules.

Among the important clarifications that HUD proposed to make in the SAFE Act Proposed Rule are definitions of what activities are included in “taking a residential mortgage loan application” and “offering or negotiating terms of a residential mortgage loan,” and what it means to do so “for compensation or gain.” HUD said in the SAFE Act Proposed Rule that “[t]he meanings of these terms largely determine whether or not a particular individual is subject to licensing requirements. HUD is aware of the great variety of business models that are utilized in the housing finance industry and proposes to provide definitions based on functions, rather than on job titles or labels, to further clarify whether an individual is subject to licensing requirements.

With respect to “taking an application,” HUD said in the SAFE Act Proposed Rule that “application” includes any request from a borrower, however communicated, for an offer (or in response to a solicitation of an offer) or residential mortgage loan terms, as well as the information from the borrower that is typically required in order to make such an offer. HUD views the phrase “taking an application” to mean receipt of an application for the purpose of deciding whether or not to extend the requested offer of a loan to the borrower, whether the application is received directly or indirectly from the borrower. However, HUD interprets the term “takes a residential mortgage loan application” to exclude an individual whose only role with respect to the application is physically handling a completed application form or transmitting a completed form to a lender on behalf of a prospective borrower.

HUD views the terms “offers or negotiates” broadly. HUD views these terms as encompassing interactions between an individual and a borrower where the individual is likely to seek to further his or her own interests or those of a third party. The SAFE Act Proposed Rule would clarify that the terms include interactions that are typical between two parties in an arms’ length relationship prior to entering into a contract, such as by presenting loan terms for acceptance by a prospective borrower and communicating with the borrower for the purpose of reaching an understanding about prospective loan terms. In addition, the SAFE Act Proposed Rule proposes to clarify that “offers or negotiates” includes actions by an individual that makes a prospective borrower more likely to accept a particular set of loan terms or an offer from a particular lender, where the individual

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may be influenced by a duty to or incentive from any party other than the borrower. HUD said that such actions may have the same effect on the borrower's decision as overt negotiations, but without the borrower's knowledge or understanding that other options may be available. Examples given by HUD include a contingent payment, a contractual duty to recommend one lender or product, or a pattern of steering to a lender that provides grant funding to the steering housing counselor.

The terms "for compensation or gain" are proposed to be broadly defined in the SAFE Act Proposed Rule, and would include any circumstances in which an individual receives or expects to receive anything of value in connection with offering or negotiating terms of a residential mortgage loan. These terms would not be limited to payments that are contingent upon closing of a loan.

(c) Advertising and Marketing

QUESTION: It is our understanding that advertising or marketing the fact that financing is available for manufactured and modular homes sales, or that unique down payment options are available for manufactured and modular home sales, would not subject an individual to licensing under the TN-SAFE Act. These advertisements do not rise to the level of offering or negotiating of, or counseling with respect to, residential mortgage loan terms but are rather the advertising of home programs which may be available to any consumer which may qualify. Some sample ads could include – "Financing Available for New Home Purchasers," "0% down for land owners," "0% down with land," "Your land can be your down payment," "Downpayments starting at 5%," "Own land? Buy a Home," etc. Is our understanding of this correct.

ANSWER: Generally speaking, advertising or marketing the fact that financing is available, or that unique down payment options are available, for manufactured and modular home sales would not subject an individual, or the manufactured home retailer or dealer of modular building units by whom the individual is employed, to the requirement of obtaining a license under the Mortgage Act; provided: that the activities of the individual and of the employing manufactured home retailer or dealer of modular building units are limited to those set forth in Tenn. Code Ann. § 45-13-301(f); that the advertising and/or marketing is not false or misleading; and, that the specific interest rates, down payment options and other financing terms are actually available at the time of advertising or marketing.

(d) Pre-sale Discussions

QUESTION: It is our understanding that an individual who discusses with a buyer general information about available lenders that may offer programs for manufactured/modular housing, generic information about financial products/options for

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manufactured/modular housing purchasers, or monthly payment range estimates that correspond with home purchase prices, would not subject an individual to licensing under the TN-SAFE Act, as these conversations do not rise to the level of offering or negotiating of, or counseling with respect to, residential mortgage loan terms. Is our understanding of this correct?

ANSWER: Yes, an individual who discusses with a buyer general information about available lenders that may offer programs for manufactured/modular housing, generic information about financial products/options for manufactured/modular housing purchasers, or monthly payment range estimates that correspond with home purchase prices, would generally not be subject to the requirement of obtaining a license under the Mortgage Act.

(d) Guidance from HUD

QUESTION: It is our understanding that it is the position of the Tennessee Department of Financial Institutions ("TDFI") that the U. S. Department of Housing and Urban Development has not issued sufficient guidance to effect the exemption from licensing in the TN-SAFE Act for individuals performing the activities of a manufactured home retailer or a dealer of modular building units or otherwise change the TDFI's positions on these issues. Is our understanding correct?

ANSWER: Yes. As of the date of this letter, HUD has not to our knowledge determined by guideline, rule, interpretive letter or otherwise that the individuals described in Tenn. Code Ann. § 45-13-301(f) must be licensed under the SAFE Act, or that Tenn. Code Ann. § 45-13-301(f) is otherwise inconsistent with the SAFE Act.

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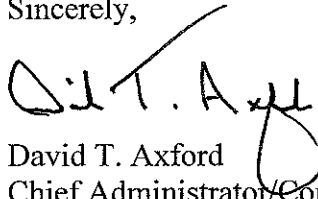
Marla, some of the answers are not as detailed or as clear as I would like them to be, but until HUD (or the Federal Consumer Protection Bureau, as the case may be) issues final rules on implementation of the SAFE Act, I am afraid that there will continue to some degree of uncertainty as to how the SAFE Act will be implemented at the state level. To the extent that you or any of your members may have other specific questions about the interpretation of the SAFE Act and/or the Mortgage Act as they relate to the manufactured home and modular housing industries, I hope that you will not hesitate to direct those questions to us. I promise that we will do our best to have any such questions answered on a timely basis. My direct-dial telephone number is (615) 253-2862, and my e-mail address is *David.Axford@tn.gov*.

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I apologize for the length of time that it has taken me to respond to your letter, and I have very much appreciated your patience. There are a number of ongoing issues that we have had to address with the implementation of the amendments to the Mortgage Act, and I regret that I was not able to give your letter the immediate attention that it deserved. I hope that you will make sure that the Tennessee Manufactured Housing Association Board of Directors and membership are aware that the delay in your obtaining a response to your inquiry was solely because of me.

With best personal regards, I remain,

Sincerely,

A handwritten signature in black ink, appearing to read "D. T. Axford". The signature is written in a cursive style with a large, sweeping initial "D".

David T. Axford
Chief Administrator/Compliance Division

DTA:mth