



October 5, 2018

via email & First Class Mail

Chairman Gensler
Maryland Financial
Consumer Protection Commission
c/o Department of Legislative Services
Legislative Services Building, 90 State Circle
Annapolis, MD 21401

FCPC@mlis.state.md.us

Re: Manufactured Housing

Dear Chairman Gensler,

Thank you for the opportunity to provide comments to the Maryland Financial Consumer Protection Commission (Commission) in connection with its study of manufactured housing pursuant to SB 1068/HB 1634.

The Manufactured Housing Institute (MHI) is the only national trade organization that represents every segment of the factory-built housing industry. Our members include builders, suppliers, retailers, sellers, community owners and operators, lenders and others who support the industry, including 50 affiliated state organizations. The Manufactured Housing Institute of Maryland (MHI-Maryland) is the state trade association representing the industry and a member of MHI. We have been asked by MHI-Maryland to speak on its behalf regarding the Manufactured Housing Working Group's Recommendation to the Commission dated September 12, 2018 (Recommendation), as well as issues raised during the Commission's meeting held on September 12, 2018 (Commission Meeting of September 12).

Both MHI and MHI-Maryland (collectively hereafter, MHI) believe manufactured housing is essential to addressing America's affordable housing challenges. We also believe regulatory supervision plays a critical role in consumer protection. However, burdensome legal requirements often impede or limit consumer access to financing, which hurts both customers interested in purchasing manufactured homes, as well as those currently living in manufactured homes.

Expansion of the Maryland Mortgage Program to Include Manufactured Housing

During the Commission Meeting of September 12, a representative from the Maryland Consumer Rights Coalition requested that the Maryland Mortgage Program, which is administered by the Department of Housing and Community Development, be expanded to include manufactured housing.

MHI supports the Maryland Consumer Rights Coalition's recommendation with respect to expanding the Maryland Mortgage Program to include manufactured housing; however, MHI does not support the other suggestions of the Maryland Consumer Rights Coalition, such as treating all manufactured homes as real estate and requiring the owners of manufactured housing communities to provide the opportunity for tenants to purchase the site where the tenant's manufactured home is installed.

Comments on Recommendation and Commission Meeting of September 12



It is MHI's understanding that the original proposal to license all manufactured housing retailers as mortgage loan originators contained in SB 1068/HB 1634 and the current study are in response to changes to the Truth in Lending Act made by Section 107 of the Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. 115-174 (Section 107). Section 107 received bi-partisan support in Congress and was enacted to remedy the unintended impact that Regulation Z's Loan Originator Compensation Rule (LO Comp Rule), 12 C.F.R. § 1026.36, had on the manufactured housing industry.

Neither Section 107 nor the LO Comp Rule impact who is required to be licensed as a mortgage loan originator under the SAFE Act or Maryland law. Instead, Section 107 and the LO Comp Rule address who is a loan originator for purposes of determining whether prohibited compensation is being paid in connection with a transaction secured by a dwelling, including loans secured by manufactured homes.

The LO Comp Rule provided manufactured housing retailers with an amorphous activities-based test for purposes of determining whether retailers or their employees are loan originators for that purpose, but it does not exclude the sales commission that a retailer's employee receives in connection with the sale of a home from the definition of "compensation." As a result, the manufactured housing industry was required to amend its practices to restrict the manner in which retailers provide information about available financing sources to prospective home purchasers. The most common sales practice was for a retailer to provide the consumer with a generic list of available lenders in the area that provided no additional guidance or information, leaving prospective buyers with the unenviable task of trying to determine where to submit a loan application without any understanding how the process works. Based on our research, MHI believes that many prospective borrowers choose to "shotgun send" applications to every lender on the retailer's list, despite the fact that the retailer usually knows that some of the lenders the consumer may apply to are not a good fit financially or that a certain lender's products and services would provide greater benefit to the consumer.

Out of fear that the retailer employee's compensation would be considered prohibited loan originator compensation under the LO Comp Rule (despite the employee receiving the same compensation in connection with a financed or cash transaction), employees would not provide additional assistance to the consumer. As a result, the LO Comp Rule has not benefited consumers interested in financing the purchase of a manufactured home. Instead, it has increased the origination costs of manufactured housing secured loans. For example, one of the largest manufactured housing lenders completely exited the market because of the added expense associated with processing so many applications from unqualified borrowers, which further limited the availability of consumer financing options.

Section 107 adopted a "bright-line" compensation-based approach for purposes of determining who is a loan originator under the LO Comp Rule, without changing who is required to be licensed as a mortgage loan originator in any state, including Maryland. As a result, MHI does not support the initial proposal in SB 1068/HB 1634 requiring that all manufactured housing retailers be licensed in the state as mortgage loan originators. In addition, MHI does not support generally making changes to Maryland law with respect to manufactured housing finance, other than the Recommendation's proposal to clarify the provisions in the Maryland Mortgage Lender Law that are inappropriate for a personal property secured loan and MHI's suggestion for a "bright-line" test for defining when a manufactured housing retailer is a loan originator discussed below. Beyond MHI's general concern, the following are MHI's specific concerns regarding the Recommendation and issues raised during the Commission Meeting of September 12.

Disclosure of Affiliation between Retailer and Lender

The Recommendation includes a suggestion that manufactured home retailers that provide information regarding the financing of manufactured homes, among other things, "must provide a statement, in plain English, describing any financial relationship and/or affiliation between the retailer and the lender about whose product the retailer provides information."



While the Recommendation is intended to target a similar concern, the suggested disclosure is inconsistent with the disclosure required by section 103(d)(2)(C)(ii)(II) of the Truth in Lending Act, 15 U.S.C. § 1602(d)(2)(C)(ii)(II) (as amended by Section 107). Specifically, Section 107 requires that in order for a manufactured home retailer and its employees to be excluded from the definition of “mortgage originator” in the Truth in Lending Act, the retailer is required to disclose to a consumer any corporate affiliation with any creditor. In addition, if such a corporate affiliation exists, the retailer must identify and disclose at least one (1) unaffiliated creditor.

MHI believes that the new disclosure requirement imposed by the Truth in Lending Act sufficiently protects consumers. Providing additional inconsistent disclosures will confuse consumers, distract from one another, and distract consumers from the other important disclosures being provided in connection with the transaction. Because this is a disclosure that would need to be provided by retailers and their employees to consumers, MHI is also concerned that retailers will be unable to accurately determine whether the dealer agreements and other contracts that retailers have with lenders (*e.g.* floorplan financing agreements) contain provisions that meet the adopted statutory definition of a “financial relationship” that would need to be disclosed. Finally, if a retailer does disclose a financial arrangement with a lender that is beyond a corporate affiliation, then a consumer may, to his or her detriment, view the disclosure as an endorsement or other indication that the consumer should only apply for financing from that particular lender, instead of any of the other available and equally qualified lenders.

Foreclosure/Replevin

The Recommendation includes imposing new requirements as a matter of state law that would provide consumers with a 30-day notice of default and right to cure when the consumer defaults on a loan secured by a manufactured home, but not real property, prior to a lender repossessing or bringing an action to repossess a manufactured home. The Recommendation includes dispensing with the notice and cure period consistent with federal law, such as in the case of abandonment or surrender. In this respect, the Recommendation is consistent with the requirements imposed under federal law for a creditor to avail itself of federal interest rate preemption under section 501 of the Depository Institutions Deregulation and Monetary Act of 1980 (DIDA § 501).¹

The Commission should note that unless a home is abandoned, despite the remedies provided by law, a creditor typically must bring an replevin action in court and cannot repossess a home through the exercise of self-help remedies. In addition, MHI would like to highlight to the Commission that many lenders provide a 30-day notice of default and right to cure even when the lender is not relying on DIDA § 501 preemption.

MHI notes how important an exemption from this notice requirement is when a home is abandoned or surrendered. The exemption allows the lender to take possession, preserve, and dispose of collateral in a timely manner after a consumer has already made the decision that he or she does not wish to retain the collateral. This exemption allows for the collateral to be sold prior to further deterioration and should reduce the amount of deficiency that the consumer may potentially owe. MHI supports these Recommendations.

During the Commission Meeting of September 12, it was suggested that the right to cure period be extended to 45 days, instead of the recommended 30 days. MHI is concerned that such an extension—due to requiring additional manual servicing processes and compliance resources tailored to a timeframe unique to Maryland—will increase the cost of servicing loans secured by manufactured homes.² Ultimately, the increased servicing costs will be built into loan pricing and passed along to consumers through a higher interest rate or other means, which will likely reduce the availability of affordable financing for low to moderate income consumers in Maryland. As a result, MHI supports the Recommendation, but does not support extending the right to cure period to 45 days.

¹ 15 U.S.C. § 1735f-7a. 12 C.F.R. § 190.4(h).

² Forty-four (44) of the forty-six (46 states) that require a notice of default and right to cure require 30 days or less notice.



Consumer Protection and Private Right of Action

The Recommendation includes a proposal that manufactured housing retailers who provide information to consumers regarding financing options would need to provide an additional disclosure to consumers, on a form prescribed by the Commissioner of Financial Regulation. The disclosure would provide information regarding consumer rights and procedures for filing a complaint with the Commissioner of Financial Regulation if the consumer feels harmed or steered to an inappropriate product. The Recommendation also provides that the failure of a retailer to provide the disclosure would not provide a private right of action or impact the validity of an otherwise valid loan transaction. Regulatory enforcement of the disclosure requirement by the Commissioner of Financial Regulation would also be available.

During the Commission Meeting of September 12, members of the Commission raised concerns regarding the Recommendation's lack of a private right of action. However, MHI notes that the recommended disclosure is a disclosure that must be provided to consumers by the retailers, businesses who are beyond the control of and cannot be readily policed by the lenders providing financing. MHI believes that the proposed regulatory enforcement mechanism is sufficient because a private right of action could result in lenders being vicariously liable for a retailer's failure to provide the required disclosure. As a result, MHI supports the Recommendation's proposal that the failure to provide the disclosure would not result in a private right of action or otherwise impact the validity of a loan transaction.

Consumer Protections Provided Manufactured Home Borrowers

During the Commission Meeting of September 12, concerns were raised regarding the lack of consumer protections provided to borrowers who receive financing for a manufactured home that is personal property. MHI respectfully submits to the Commission that there are a multitude of consumer protections for borrowers who finance manufactured homes that are personal property, including:

- the consumer protection provisions in the Regulations implementing the interest rate preemption provisions of the Depository Institutions Deregulation and Monetary Control Act, 12 U.S.C. § 1735f-7a, 12 C.F.R. Part 190;
- the Equal Credit Opportunity Act, 15 U.S.C.A. §§ 1691, *et seq.* and Regulation B, 12 C.F.R. Part 1002 ("ECOA");
- the Fair Housing Act, 42 U.S.C.A. § 3605 ("FHAct");
- the Fair Credit Reporting Act, 15 U.S.C.A. §§ 1681, *et seq.* and Regulation V, 12 C.F.R. Part 1022 ("FCRA");
- the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, 12 U.S.C.A. §§ 1829b and 1951-1959; 31 U.S.C.A. §§ 5311-5314 5316-5332 and 31 C.F.R. Chapter X ("AML Rule");
- the Gramm-Leach-Bliley Act, 15 U.S.C.A. § 6801 *et seq.* and Regulation P, 12 C.F.R. Part 1016;
- the Truth-in-Lending Act, 15 U.S.C.A. §§ 1601, *et seq.* and Regulation Z, 12 C.F.R. Part 1026 ("TILA");
- the Home Mortgage Disclosure Act, 12 U.S.C.A. §§ 2801, *et seq.* and Regulation C, 12 C.F.R. Part 1003 ("HMDA");



- the Flood Disaster Protection Act, 42 U.S.C.A. §§ 4001, *et seq.* (“FDPA”); the S.A.F.E. Act, 12 U.S.C.A. §§ 5101, *et seq.* and Regulation G, 12 C.F.R. Part 1007, or Regulation H, 12 C.F.R. Part 1008;
- the Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692, *et seq.* and Regulation F, 12 C.F.R. Part 1006 (“FDCPA”);
- the Magnuson-Moss Warranty Protection Act, 15 U.S.C. §§ 2301-2312, 16 C.F.R. Parts 700, 701, 702 & 703;
- the Telephone Consumer Protection Act, 47 U.S.C.A. §§ 227 *et seq.* and 47 C.F.R. Part 64 (“TCPA”);
- Miscellaneous Rules Relating to Common Carriers, Subpart L, Restrictions on Telemarketing, Telephone Solicitation, and Facsimile Advertising, 47 C.F.R. § 64.1200 *et seq.*;
- the Federal Trade Commission Preservation of Consumer Claims and Defenses Rule, 16 C.F.R. Part 433;
- the Federal Trade Commission Credit Practices Rule, 16 C.F.R. Part 444; and
- the Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901 *et seq.*

In addition, Maryland law protects consumers through the Consumer Protection Act (Md. Code Com. Law §§ 13-101 *et seq.*), for unfair, deceptive, abusive practices, unique and robust credit law repossession provisions (*see, e.g.*, Md. Code Com. Law § 12-1021), Consumer Debt Collection Act (Md. Code Com. Law § 14-201 *et seq.*), preservation of consumer claims and defenses (Md. Code Com. Law § 14-1302), protection against wrongful repossessions (Md. Code Com. Law § 9-625), the Maryland Mortgage Lender Law (Md. Cod Fin. Inst. §§ 11-501 *et seq.*), and Mortgage Originators Subtitle (Md. Code Fin. Inst. §§ 11-601 *et seq.*), among other state-specific protections.

Additional Recommendations to the Commission

MHI believes that retailers should only need to be licensed as mortgage lenders/brokers and mortgage loan originators when they are compensated for activity strictly relating to financing. However, neither the Recommendation nor the Commission Meeting of September 12 included a recommendation or discussion to clearly define when a retailer is required to be licensed in the state.

Historically, the lack of clear guidance regarding when a retailer is required to be licensed and the amorphous activities-based approach used to define the scope of licensable activity has led to uncertainty about the information and assistance that retailers are permitted to provide home purchasers without the need to first obtain a license. This lack of clear guidance has also increased the regulatory burden on retailers and lenders.

As a result, MHI recommends that the Commission’s proposal include a “bright-line” test for determining when a retailer’s employees are acting as a mortgage loan originator. Specifically, MHI recommends a compensation-based test, similar to the test Congress provided in Section 107.



Conclusion

MHI thanks the Commission for the opportunity to provide feedback on the Recommendation and the Commission Meeting of September 12. MHI also thanks the Commission for taking the time to consider our views. We encourage the Commission to engage with MHI and other stakeholders as the Commission's recommendations and proposed legislation move forward. Representatives of MHI will be at the Commission's meeting on October 10 and would like the opportunity to discuss these matters with the Commission further.

Best regards,

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cc:

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