

Compliance, LO Tools; Deep Dive Into W-2 vs. 1099 and the SAFE Act

By: Rob Chrisman | Mbn, Jan 13 2020, 9:03 AM

Lenders, and all financial sector firms, continue to ruminate on the privacy law in California that now gives people the right to access and delete personal data companies have collected. LOs are ready and willing to delete all client information from their database, right? The law applies to any firm that has clients in the state. SIFMA provided [comments](#) on the policy, and other groups have plenty of [warnings](#) for financial firms. Pay attention, lest your state enact something similar. Susan Milazzo, the CEO of [the California MBA](#), wrote, "The CCPA gives consumers the right to ask businesses, that fit certain criteria, to provide them all of the personal information that business has on them and/or ask the business to delete that information."

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Earlier this month, I characterized the California Consumer Privacy Act (CCPA) as "state news." A few readers wrote in to point out that CCPA affects businesses with customers in California, not just those based here in the Golden State. Fortunately, mortgage tech providers have their eyes on the ball. Top of Mind announced its Surefire CRM is ready to make CCPA compliance easy for mortgage lenders. The platform's latest updates give lenders the flexibility to provide consumer marketing information when required and to delete it upon request. Says CEO Bill Hayes, "We have upped our already formidable compliance game to ensure Top of Mind clients are CCPA-ready. Lenders can feel confident that the Surefire support team will handle CCPA requests with diligence and care." The company's [CCPA Guide](#) outlines key processes affected by CCPA and how to submit a ticket.

W-2 Versus 1099

We've just wrapped up the calendar year, and by most accounts decent originators had a good year in 2019. And now... **what about paying taxes?** Lenders pay their mortgage loan originators (MLOs, or LOs) W-2 or 1099: is one or the other "against the law"? Is a payroll method a recruiting tactic? What happens when DRE Brokers hire independent contractor mortgage loan originators? Do state laws differ from federal laws, and do those differ from Agency rules (HUD, for example), and where does the SAFE Act fit in? Let me say this up front: an informal, non-scientific poll conducted by yours truly shows that W-2 dominates.

Of course MLOs should remember that [their compensation should not result in the steering](#) of borrowers toward one program or another. This is a very tangled hypothetical—especially with people still sorting through California's [AB5](#) fallout. Many do not know the difference legally between an MLO, a mortgage brokerage, and a net branch. An MLO is not a mortgage broker.

Those in the business should know that the issue of W-2 vs. 1099 depends on the facts and circumstances of the job, not what license you hold. An MLO license from DBO, or a real estate license with an MLO endorsement from DRE, it still depends on the job. Recall back some years when the industry looked to the CFPB for [payroll guidance](#). The CFPB MLO comp rule squelched 1099, and focused on W-2. (And

state laws do not supersede a Federal MLO Comp law.)

Some believe that the CFPB rule writers were anti small business and this was exemplified in the MLO comp rule. They point to lenders still running some form of net branch operation, which most regulators agree is illegal, and the individual branches are being 1099'd. Why? Because they are free to charge 4+ points and regulators don't want to lose companies? Possibly.

The W2 vs. 1099 question involves CFPB and HUD rules regarding loan officers, state and federal labor laws, definitions of broker versus banker versus loan officer, SAFE Act/state licensing laws, etc. [As I understand it](#), the reason Realtors can still be paid on a 1099 is because their strong support in numbers when they went to lobby for an exception. In California there is a new law defining independent contractors that applies to everyone in the state, including mortgage brokers (realtors have a special exemption). Employees (and employers) are all subject to federal and state wage hour rules. The CFPB refers to Mortgagee Letter 2006-30 and affirms it will follow HUD's rule, which is to say that Mortgage Brokers and Mortgage lenders must pay their loan officers W-2 and that 1099 is illegal under HUD/CFPB Guidelines.

From California Melissa Richards, CMB, a Partner of Financial Services Regulation & Enforcement with Mayer Brown, has thoughts on the topic of DRE Brokers hiring independent contractor mortgage loan originators, taken largely from Section I of the draft letter she prepared for the California MBA to the California Department of Real Estate. Below is Ms. Richards's notes.

The federal SAFE Act and its implementing Regulation H (12 CFR Part 1008) requires states to impose state licensing on individual loan officers referred to as "mortgage loan originators" or "MLOs." [12 CFR §1008.103.] The SAFE Act further directs states to require individual loan officers to meet minimum eligibility criteria for MLO licensure that includes a requirement for the loan officer to be employed by a single sponsoring employer that holds state mortgage lender and/or mortgage broker licensing. Alternatively, if the individual is self-employed, they must hold both MLO licensure and state mortgage lender/broker licensure. [12 CFR §1008.103, supplemented by NMLS Resource Center including "Creating Relationships and Sponsorships" resource page.] In fact, the only reference made in Regulation H to allowed independent contractors is in the context of loan underwriters and loan processors in Section 1008.103(d).] Of note, there is no distinction in MLO license eligibility criteria presented in the federal SAFE Act and its Regulation H between MLOs working for mortgage lenders vs mortgage brokers.

(Some will say that) the SAFE Act, and its regulations, does not give definition to the term "employee." That statement is taken directly from CFPB's SAFE Act 2012 Examination Manual in reference to the other SAFE Act Regulation G for financial institution MLO registrants. The SAFE Act's Regulation H for state licensed MLO's does give definition to the term "employee:" an individual (i) whose manner and means of performance of work are subject to the right of control of, or are controlled by, a person, and (ii) whose compensation for Federal income tax purposes is reported or required to be reported, on a W-2 form issued by the controlling person. [12 CFR §1008.23.]

Applying this SAFE Act defining rule to DRE licensing of MLOs means that licensed real estate brokers and salespersons having MLO endorsement must be W-2 employed by a sponsoring DRE licensed real estate broker engaging in residential mortgage business, or be self-employed and operating under the authority of a DRE real estate broker license to conduct residential mortgage business. Due to the SAFE Act's single sponsor restriction, the individual cannot serve in both roles simultaneously and conduct residential mortgage business in California.

I further note that while the SAFE Act's Regulation H does grant limited exemption from state MLO licensing for individuals who perform real estate brokerage activities, that exemption does not extend to CADRE licensed real estate brokers and their loan officers engaging in residential mortgage business. Regulation H's exemption from state licensing is removed once "the individual is compensated directly or indirectly by a lender, mortgage broker, or other loan originator or by an agent of such lender, mortgage broker or other loan originator." [12 CFR §1008.103(e)(1).]

Thank you, Melissa!

The Knowledge Coop's President/Founder Ken Perry opined, "This 1099 question continues to persist. I am not an attorney but I can tell you there is no way in the world I would ever pay, or be paid, 1099 as a loan originator. Go check out the wage and hour laws in addition to [HUD's requirements, federal and state licensing laws](#). I cannot find one area that allows for this. It is true that the Realtor lobby carved out a sweet exemption for them but there isn't one for mortgage originators. It just isn't safe."

Running the risk of potential conflict with Federal rules, or agreeing with those rules, states also address the issue. For example, in [Georgia](#), "The only way to be paid on a 1099 is for a licensed company to get paid on a 1099 in the company's name, or an individual licensed as a broker or lender to get paid on a 1099 in the individual's name. All other work as an "independent contractor" is prohibited from being compensated via 1099."

The [FDIC](#) tells us that "Employee" is not defined in the SAFE Act or SAFE Act regulation. However, the original regulation's preamble explains that the meaning of "employee" under the SAFE Act regulation is consistent with [the common law right-to-control test](#). For example, the results of this test generally determine whether an institution files an Internal Revenue Service Form W-2 or Form 1099 for an individual.

Every lender that cares, and every one should, should consult a lawyer on anything centering on independent contractor issues (especially in California where the law has recently changed). But as noted above, it would seem the vast majority of lenders pay using a W-2, and if any don't, well, they should be aware of the risks at the federal and state levels of that policy.

Capital Markets

U.S. Treasuries ended last week on rallying in slight curve-flattening fashion after an underwhelming release of the Employment Situation report for December. It wasn't a terrible report, but **nonfarm payrolls missed expectations, as did average hourly earnings growth.**

This week includes a relatively **heavy Fed speaker circuit ahead of next week's blackout period** with the FOMC meeting on January 28-29. Seven Fed presidents in addition to Board members Quarles and Bowman are currently scheduled to speak, including Boston Fed President Rosengren and Atlanta Fed President Bostic today. In addition, kicking off the weekly calendar later this morning is the Employment Trends Index for December.

That will be the only economic news of note before things pick up tomorrow with the December NFIB Small Business Optimism Index, December CPI, and December Core CPI. Wednesday brings PPI figures, January Empire State Manufacturing, and the January Fed Beige Book before Thursday's heavy calendar includes December Retail Sales, January Philadelphia Fed Index, December import/export prices, November Business Inventories, and January NAHB Housing Market Index. **The week closes with December Housing Starts and Building Permits**, December Industrial Production and Capacity Utilization, and Preliminary January Michigan Consumer Sentiment. With regards to MBS, respective Classes B and C 48-hour notifications are tomorrow and Thursday while the Desk will release the four-week MBS reinvestment estimate along with a new two-week FedTrade schedule tomorrow. We begin today with Agency MBS prices worse nearly .125 but the 10-year unchanged yielding 1.83 percent.

Jobs and Transitions

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Solidifi Title & Closing, LLC announced that Suzanne Singer joined as SVP, Capital Markets Sales, responsible for supporting due diligence firms, asset managers, GSEs, servicers, and other institutional clients. She will report to Bob Smith, President.

And SimpleNexus has announced it has filled roles in five senior leadership positions: Chuck Staib (Chief Sales Officer), John Aslanian (SVP of Sales), Anna Ratanawan (VP of People Operations), Pam Faulkner (Director, Mortgage Solutions), and Sol Klein (Director of Implementation).

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