March 5, 2010

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW, Room 10276
Washington, DC 20410–0500

Re: Comments in Response to Proposed Rule Safe Mortgage Licensing Act: HUD Responsibilities under the SAFE Act Docket No. FR-5271-P-01

Gentlepersons:

The Mortgage Bankers Association[1] (MBA), the American Bankers Association (ABA)[2] and the American Financial Services Association (AFSA)[3] submit this comment along with eleven state mortgage lender associations including the California Mortgage Bankers Association, Colorado Mortgage Lenders Association, Indiana Mortgage Bankers Association, Michigan Mortgage Lenders Association, Missouri Mortgage Bankers Association, Mortgage Bankers Association of Carolinas, Mortgage Bankers Association of Florida, Mortgage Bankers Association of Metropolitan Washington, Ohio Mortgage Bankers Association, Texas Mortgage Bankers Association and Virginia Mortgage Lenders Association.[4]

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[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,400 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

[2] The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $13 trillion in assets and employ over 2 million men and women.

[3] The American Financial Services Association is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members are important sources of credit to the American consumer, providing approximately 20 percent of all consumer credit. AFSA member companies offer credit cards, vehicle financing, personal installment loans and mortgage loans. The Association encourages and maintains ethical business practices and supports financial education for consumers of all ages.

[4] MBA, ABA and AFSA also support the comments of the Financial Services Roundtable (FSR) and the Consumer Mortgage Coalition (CMC).

We appreciate the opportunity to comment on the subject regulations proposed by the United States Department of Housing and Urban Development (HUD) under the Secure and Fair Enforcement for Mortgage Licensing Act (SAFE or the Act)[5] and appreciate HUD's efforts in developing this proposal.

The undersigned have supported robust uniform national standards for licensure and registration of mortgage loan originators. Rigorous uniform standards are needed to achieve the important objectives of ensuring fair and open competition, better serving and protecting consumers, while reducing fraud and unnecessary regulatory burden.

We support provisions of the proposal to provide oversight of the Nationwide Mortgage Licensing System and Registry (NMLSR). We support those provisions that, consistent with SAFE, would exclude a loan processor or underwriter who only performs clerical or support duties from licensure and registration. We also support HUD's position that its regulations will not apply to individuals who are employees of institutions regulated by federal banking agencies under current law.

While the undersigned support aspects of the proposal, we have very serious concerns about others. Specifically, we believe HUD has exceeded its authority under SAFE to establish a backup system and determine whether state laws meet SAFE's minimum requirements for purposes of determining whether imposition of a HUD-developed backup licensing system is required.

Under the proposal, HUD would augment and redefine statutory terms and extend the statute's reach. Although HUD indicates it is continuing to consider the matter of whether to require the states to treat servicer employees engaged in loan modifications as originators, the groundwork is laid by the proposed definitions for just such an outcome.

We, however, have consistently taken the position that there is no basis under SAFE or its history to require that mortgage servicer employees[6] be licensed and/or registered. In these comments, we further detail this position providing several reasons to exclude those engaged in loan modifications and other servicing employees from SAFE coverage.

SAFE establishes two parallel means of qualifying loan originators - one operated by the states and one by federal banking agencies. The states establish licensing and registry requirements for originators employed by state-regulated lenders and mortgage brokers. The federal banking agencies, through the Federal Financial Institutions Examination Council (FFIEC) develop and maintain a system for registering the loan

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[5] SAFE was enacted as part of the Housing and Economic Recovery Act of 2008, Pub. L. No.110-289, Division A, Title V, Sections 1501-1517 (July 30, 2008), *codified at* 12 U.S.C. 5101 – 5116.

[6] Throughout this letter, the reference to "servicing employees," "modification personnel or specialist," or "loss mitigation personnel" relates to employees of mortgage servicers who administer the loans for themselves and others (e.g., investors). The reference would also encompass contractors and agents working under the servicer's direction and oversight and does not include third party for-profit "foreclosure rescue companies".

originator employees of certain depository institutions and their owned and controlled subsidiaries regulated by federal banking agencies or the Farm Credit Administration.[7] Also, SAFE requires that registration of both federally regulated and state-licensed and registered loan originators be accomplished through the same system, the NMLSR.

Recently, the federal banking agencies[8] and the Farm Credit Administration concluded that SAFE's definition of "loan originator" in general excludes employees engaged in loan modifications or assumptions and consequently such employees of institutions regulated by banking agencies and their subsidiaries will not be required to register with the NMLSR.[9] Many states governments also have concluded that servicers and/or those engaged in loan modifications in some form are not covered by SAFE. Others have covered servicers expressly and still others await HUD's advice.

In addition to our concerns about the potential for undue coverage of servicing personnel, we are concerned about the fractured nature of a 50-state approach to licensing and registering loan originators. SAFE was intended to establish a system that would not unduly burden well-qualified originators from being employed by either state or federally regulated mortgage lenders.

Because the states have not implemented uniform licensing requirements and state and federal qualifications are inconsistent, well-qualified mortgage originators confront difficulties in moving among states and between state and federal institutions by virtue of divergent qualifications including those for credit scores, education and testing to name a few. Likewise, state-regulated companies, including smaller enterprises, face a competitive disadvantage in attracting qualified originators. As a result, consumers ultimately suffer from decreased choices and increased costs for sustainable housing finance.

Additional licensure and registration requirements under SAFE for persons engaged in loan modifications or assumptions as proposed by HUD will unnecessarily lessen the availability of loan modification specialists and increase servicing costs. It will also burden the ability of loan modification specialists to move between federal and state-licensed companies, decrease competition and, most importantly, hinder the ability of the industry to address the needs of troubled borrowers facing foreclosure. HUD should withdraw this portion of its proposal and make clear that the term "loan originator" was not intended to and does not encompass servicers including those engaged in loan modifications and assumptions.

We have several other suggestions for improvement of this proposal. Most of all, we believe HUD should do considerably more to achieve SAFE's central objective of

[7] SAFE Sec. 1507 12 U.S.C. 5106.
[8] Under SAFE Sec. 1502,12 U.S.C. 5103, the federal banking agencies include the Board of Governors of the Federal Reserve System (Federal Reserve), the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), the National Credit Union Administration (NCUA) and the Federal Deposit Insurance Corporation (FDIC).
[9] The joint final rule as adopted by the FDIC on November 12, 2009 at http://www.fdic.gov/news/board/2009nov12no8.pdf, pp. 24-25.

establishing uniform standards for loan originators of state-regulated lenders throughout the nation. HUD should work towards this end with federal banking agencies. HUD's efforts should include, for example, clearly providing that the law does not preclude the recognition of out-of-state licenses and provisional licensing of federally registered and other originators pending licensure.

We would appreciate the opportunity to work with HUD to address our concerns before the rule is finalized.

I. Summary of Our Specific Comments

As indicated, we have long supported SAFE's purpose of increasing uniformity and consumer protection while reducing regulatory burden and fraud by establishing better, more consistent licensing and registration requirements for mortgage bankers and brokers (mortgage originators).[10] We offer the following specific comments on the proposal:

1. **We support provisions of the proposal which require financial oversight of the NMLSR and provide that HUD shall collect and make public audited financial statements concerning the NMLSR's operations.**

2. **We support provisions of the proposal which exclude a loan processor or underwriter who only performs clerical or support duties from SAFE's licensing and registration requirements and supports further clarification of those provisions.**

3. **We also support provisions of the proposal which make clear that HUD's proposed SAFE rule will not apply to employees of institutions regulated by federal banking agencies.**

We, nevertheless, are concerned about other parts of the proposal which we believe should be changed before the rule is finalized as follows:

4. **The final rule should be revised so it is consistent with HUD's backup role under SAFE of determining whether a state or the NMLSR meet the minimum requirements under the law. The "purpose" provisions of the rule should expressly state HUD's role of reviewing compliance with minimum standards and should not indicate that HUD has overall responsibility for interpretation, implementation and compliance with SAFE. The definitions in the proposed rule should be revised so that they do not require states to regulate actors other than loan officers for lenders and mortgage brokers.**

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[10] Indeed, MBA's Mortgage Improvement and Regulation Act (MIRA) would go beyond SAFE and establish a new federal regulator for independent mortgage bankers and mortgage brokers. The regulator would establish rigorous uniform national standards for mortgage bankers and mortgage brokers.

5. **If definitions are necessary, they should conform to the statutory definitions, avoid being overly broad, and be consistent with the federal banking agencies' definitions.**

6. **For numerous reasons discussed in section 5 below, the final rule should explicitly exclude employees and contractors involved in servicing, including loss mitigation functions, from the definition of "loan originator." SAFE's rules should only require that true loan originators of state-licensed lenders and mortgage brokers be licensed and registered as intended by Congress.**

7. **The final rule should explicitly exclude from the term "loan originator" individuals who engage in loan assumptions.**

8. **The final rule should also exclude HUD-approved housing counselors from the term "loan originator."**

9. **The final rule should be revised to permit states discretion to determine if an individual is eligible for an originator license where the record of a felony conviction has been expunged.**

10. **The final rule should make clear that while information on the employment history and disciplinary actions of loan originators should be released, the release of personal information of loan originators is not required and raises significant privacy concerns.**

11. **In the final rule and otherwise, HUD should work to achieve uniform licensure and registration standards for loan originators across the nation taking into account the separate federal registration system. The use of credit scores by states is a particular problem.**

II. Background

SAFE's stated purposes are "to increase uniformity, reduce regulatory burden, enhance consumer protection, and reduce fraud."[11] To accomplish these purposes, the law encourages the states through the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) to establish the NMLSR. Congress intended the NMLSR to achieve several objectives including providing uniform application and reporting requirements for state-licensed loan originators and a comprehensive licensing and supervisory database.[12]

The NMLSR database had been developed by CSBS and AARMR prior to SAFE's enactment. SAFE, however, designated the NMLSR for the state licensing and

[11] SAFE Sec. 1502, 12 U.S.C. 5101.
[12] Supra.

registration of state-licensed loan originators and the registration system for registered loan originators of institutions regulated by the federal banking agencies.

As indicated, SAFE actually established two parallel means of qualifying loan originators; one operated by the states and one by federal banking agencies.

Under SAFE, HUD is granted what Congress characterized as "backup authority".[13] If HUD determines, at any time one year after enactment of SAFE,[14] or two years after enactment of SAFE in the case of state legislatures that meet biennially, that a state does not have in place by law or regulation a system for licensing and registering loan originators that meets the minimum requirements of SAFE, or does not participate in the NMLSR, HUD must establish and maintain a system for the licensing and registration of loan originators in that state.

Also, while SAFE recognizes the NMLSR developed and maintained by the CSBS and AARMR, HUD has backup authority respecting the NMLSR, too. If at any time HUD determines that the NMLSR is failing to meet SAFE requirements and purposes for a "comprehensive, licensing, supervisory and tracking system for loan originators,"[15] HUD is charged with establishing and maintaining such a system "to carry out the purposes of [SAFE] and the effective registration and regulation of loan originators."[16]

As indicated, the federal banking agencies, through the FFIEC, are charged with developing and maintaining a system for registering employees of depository institutions and their subsidiaries regulated by a federal banking agency or employees of an institution regulated by a federal banking agency or employees regulated by the Farm Credit Administration.[17]

The banking agencies proposed a joint rule to implement the registration requirements for employees of federally regulated banking agencies and the Farm Credit Administration. The rule is now proceeding through each agency's formal approval process. The Federal Deposit Insurance Corporation (FDIC) was first to approve the final rule and made it public. Some of the other agencies have submitted the rule to the Office of Management and Budget (OMB) for final approval as required.

SAFE prohibits an individual from engaging in the business of residential mortgage loan origination without first obtaining and maintaining annually: (1) a registration as a registered loan originator; or (2) a license and registration as a state-licensed loan originator and, in both cases, obtaining a unique identifier.[18]

[13] SAFE Sec. 1508, 12 U.S.C. 5107.
[14] SAFE was enacted on July 30, 2008 as indicated in footnote 2.
[15] SAFE Sec. 1509, 12 U.S.C. 5108.
[16] Supra.
[17] SAFE Sec. 1507, 12 U.S.C. 5106.
[18] SAFE Sec. 1504, 12 U.S.C. 5103.

HUD's proposed rule is structured in five subparts. The proposal would establish: (1) the scope of the rule and definitions; (2) minimum requirements that states must meet along with procedures that HUD will follow to determine whether a state's licensing and registration system is SAFE compliant; (3) HUD's back-up loan originator licensing system and NMLSR if not SAFE compliant; (4) minimum requirements for administration of the NMLSR; and (5) HUD's enforcement authority if it operates a licensing system.

III. Our Specific Comments Detailed

1. **We support provisions of the proposal which require financial oversight of the NMLSR and provide that HUD shall collect and make public audited financial statements concerning the NMLSR's operations.**

We believe these requirements are wholly appropriate considering HUD's responsibility under SAFE[19] to establish a nationwide registry if the Secretary determines that at any time the NMLSR is failing to meet the requirements and purposes of SAFE for a comprehensive licensing, supervisory, and tracking system for loan originators. We recommend that HUD also require regular reporting, in addition to financial statements, concerning NMLSR's program and its progress in meeting SAFE's objectives. Such reports also should be made public.

2. **We support provisions of the proposal which exclude a loan processor or underwriter who only performs clerical or support duties from SAFE licensing and registration requirements and supports further clarification of that position.**

The regulations provide that loan processors or underwriters who perform only clerical or support duties and do so at the direction of and subject to the supervision and instruction of a licensed or registered loan originator do not need to be licensed by the state.[20]

While we support an exclusion for these individuals, we believe the exception is too narrow and should be clarified further so that a processor or underwriter who does ***not*** work under the direct supervision of a loan originator need not be licensed.

In the mortgage industry today, in response to a range of internal and external concerns, including the Home Valuation Code of Conduct (HVCC), mortgage lenders have erected firewalls between loan originators and underwriters and certain loan processors to keep originators from unduly influencing companies' underwriting decisions. We do not believe that the statute was intended to or requires that implementing regulations frustrate these initiatives by demanding the direct supervision of processors and underwriters by loan originators.

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[19] SAFE Sec. 1509, 12 U.S.C. 1508.

[20] 74 Fed. Reg. 66557 (2009) (to be codified at 24 CFR 3400.103(e)(1)(proposed December 15, 2009).

The model law and several states' laws[21] under SAFE require that a loan originator or processor perform clerical and support functions at the direction and subject to the supervision of a licensed person. However, the term "person" under these state statutes and under the model legislation encompasses an individual natural person or an entity.

To make these rules consistent and to accommodate the important concerns in this area, the preamble and the rule should be revised to clarify that while a loan processor or underwriter must perform its duties in response to the request of a licensed originator, the language does not require that the originator provide day-to-day supervision of the processor or underwriter's activities. The rule should provide that the language means that loan processors and underwriters must support the origination function. Specific direction and supervision may be subject to appropriate company protocols to protect the integrity of the loan process and consumers. The rule should make clear that processors and underwriters who are not directly supervised by individual loan originators but provide clerical or support duties do not need to be licensed and registered.

3. **We also support provisions of the proposal which make clear that HUD's proposed SAFE rule will not apply to employees of institutions regulated by federal banking agencies.**

We appreciate this point in HUD's rules, which is both consistent with the law and the federal banking agencies' rules. The statute is clear that the state-licensed loan originator is a loan originator that is not an employee of a depository institution, a subsidiary that is owned and controlled by a depository institution and regulated by a federal banking institution, or the Farm Credit Administration.[22] HUD should also clarify that contractors of institutions regulated by the federal banking agencies are also outside of the jurisdiction of the HUD rules and state licensure and registration when performing duties on behalf of the regulated institution or subsidiary.

4. **The final rule should be revised so it is consistent with HUD's backup role under SAFE of determining whether a state or the NMLSR meet the minimum requirements under the law. The "purpose" provisions of the rule should expressly state HUD's role of reviewing compliance with minimum standards and should not indicate that HUD has overall responsibility for interpretation, implementation and compliance with SAFE. The definitions in the proposed rule should be revised so that they do not require states to regulate actors other than loan officers for lenders and mortgage brokers.**

SAFE seeks to encourage the states to enact laws and, through CSBS and AARMR, establish a nationwide licensing system and registry.[23] To speed state action, HUD is assigned backup authority. As indicated, the law is clear that HUD is required to

[21] Arizona, Connecticut, Delaware, Georgia, Idaho and Iowa, for example.
[22] SAFE Sec. 1503(11), 12 U.S.C. 5102.
[23] SAFE Sec. 15021, 12 U.S.C. 5101.

establish a system for licensing and registering loan originators. HUD's system may become operational in a state if the state fails to meet the minimum requirements of section 1505, 1506 and 1508(d) of SAFE or does not participate in the NMLSR a year after enactment of SAFE,[24] or two years afterwards where the state's legislature meets biennially. HUD's role, in other words, is one of establishing a "default" system to be implemented in those states where the state fails by law or regulation to establish a system of licensing and registration that meets the minimum requirements of specific provisions of the law.[25]

Sec. 1505 expressly establishes the "minimum requirements" for background checks, minimum requirements for licensing and registration, minimum educational requirements and testing of loan originators.

Sec.1506 establishes the "minimum standards" for license renewal and continuing education for state license renewal for state-licensed originators.

Finally, Sec. 1508 (d) requires that a state must meet the "minimum requirements" of having a state loan originator supervisory authority to: (1) supervise and enforce the law, (2) ensure that all state-licensed loan originators operating in the state are registered with the NMLSR, (3) regularly report violations of state law to the NMLSR, (4) have a process in place for challenging information in the NMLSR, (5) establish a mechanism to assess civil money penalties for individuals without valid licenses or registration, and (6) establish minimum net worth or bonding requirements that reflect the dollar amount of loans originated or establish a recovery fund paid into by originators.

The statute and these provisions could not be clearer that they establish minimum requirements for licensing and registration of state-licensed loan originators as well as their oversight and enforcement. Under the law, in order to avoid HUD involvement under SAFE, a state (or the registry itself) need only meet such minimums.
While nothing in the law precludes a state from exceeding these minimums, there also is no basis under the law for HUD to require states to exceed them. Nonetheless, in the preamble to the rule, HUD states it has "overall responsibility for interpretation, implementation and compliance with SAFE."[26] It indicates that for this reason HUD was asked by CSBS and AARMR to review the state model legislation for implementation of SAFE and advise of its sufficiency in meeting the statute's minimum requirements.

We would respectfully urge, however, that this articulation overstates HUD's role under the statute and may have resulted in the overreach in this rule. While Congress

[24] SAFE Sec. 1508, 12 U.S.C. 5107.
[25] SAFE Sec. 1505, 1506 and 1508(d). Similarly, Sec. 1509 of SAFE provides if at any time HUD determines the NMLSR operated by CSBS and AARMR fails to meet the requirements and purposes of this tile, the Secretary shall establish and maintain such a system to carry out the purposes of this title and the effective registration and regulation of loan originators.
[26] 74 Fed. Reg. 66548, 66549 (proposed December 15, 2009).

routinely confers regulatory power and responsibility on agencies for statutes and sections of statutes, it made no such assignment to HUD under SAFE. Instead, as indicated, SAFE simply required HUD, under section 1508, to determine whether a state fails to meet the minimum requirements of section 1505, 1506 and 1508(d) of the statute or fails to participate in the NMLSR. If such failure(s) occurs, HUD must exercise its backup authority following the prescribed implementation period.

Also, while an agency ordinarily has the latitude to define terms under a statute, the fact that Congress did not also grant HUD authority regarding the definitional section of SAFE, section 1503, makes it reasonable to conclude that HUD is to use the definitions as enacted and that authority to redefine terms is restricted. In any case, however, under this statutory framework, we do not believe HUD is authorized to increase the minimum requirements or to otherwise expand the coverage of the law or override definitions established by the states.

Even assuming HUD had been assigned plenary authority to "implement and oversee" SAFE, we believe HUD's actions in arriving at and presenting HUD's interpretations of the statute did not comply with applicable law. Because of the nature of HUD's role under SAFE, its views have an enormous effect on state legislation and the public. Notwithstanding, HUD issued commentary without regard to the Administrative Procedures Act[27] and HUD's own rules.[28] HUD did not provide an opportunity for public comment before it issued its commentary and it did not articulate any reason for its dispensing with such comment period.

HUD also did not provide an opportunity for public comment before it issued its Frequently Asked Questions (FAQs), notwithstanding that the FAQ document signaled

[27] 5 U.S.C. 553.
[28] 24 C.F.R. 10.1 provides:

> It is the policy of the Department of Housing and Urban Development to provide for public participation in rulemaking with respect to all HUD programs and functions, including matters that relate to public property, loans, grants, benefits, or contracts even though such matters would not otherwise be subject to rulemaking by law or Executive policy. The Department therefore publishes notices of proposed rulemaking in the Federal Register and gives interested persons an opportunity to participate in the rulemaking through submission of written data, views, and arguments with or without opportunity for oral presentation. It is the policy of the Department that its notices of proposed rulemaking are to afford the public not less than sixty days for submission of comments. For some rules the Secretary will employ additional methods of inviting public participation. These methods include, but are not limited to, publishing Advance Notices of Proposed Rulemaking (ANPR), conducting public surveys, and convening public forums or panels. An ANPR will be used to solicit public comment early in the rulemaking process for significant rules unless the Secretary grants an exception based upon legitimate and pressing time constraints. Unless required by statute, notice and public procedure will be omitted if the Department determines in a particular case or class of cases that notice and public procedure are impracticable, unnecessary or contrary to the public interest. In a particular case, the reasons for the determination shall be stated in the rulemaking document. Notice and public procedure may also be omitted with respect to statements of policy, interpretative rules, rules governing the Department's organization or its own internal practices or procedures, or if a statute expressly so authorizes. A final substantive rule will be published not less than 30 days before its effective date, unless it grants or recognizes an exemption or relieves a restriction or unless the rule itself states good cause for taking effect upon publication or less than 30 days thereafter. Statements of policy and interpretative rules will usually be made effective on the date of publication.

that HUD was inclined to require coverage of loan servicers under state law. Notably, association staff requested that the FAQ concerning servicers be removed until official rulemaking commenced due to the undue influence the FAQs had on the state legislative process. HUD did not honor the request.

Considering that HUD's role under SAFE is to establish a licensing system and registry where a state fails to meet SAFE's minimum requirements, we believe that the purpose provisions of the final rule should better describe HUD's responsibilities. The rules should explicitly state that HUD will only evaluate states to determine whether the minimum education, qualifications, registration, enforcement and supervisory requirements under Sec. 1505, 1506 and 1508(b) have been met.

Moreover, we believe HUD should revise its definitions so that the final rules are consistent with SAFE and do not seek to unduly extend the law's coverage. The definitional sections should not require states to regulate actors and activities, beyond the licensure and registration of loan officers for lenders and mortgage brokers as the law provides.

5. **If definitions are necessary, they should conform to the statutory definitions, avoid being overly broad, and be consistent with the federal banking agencies' definitions.**

   a. ***HUD's definition of "loan originator" is inconsistent with SAFE and the federal banking agencies' approach.***

As explained more fully below, SAFE establishes a two-prong test to define a "loan originator." The law provides that a loan originator is an individual who "(i) takes a residential mortgage loan application ***and*** (ii) offers or negotiates terms of a residential mortgage loan for compensation or gain."[29] (Emphasis added.)

Applying this definition along with the statute's exclusions, SAFE covers loan officers for lenders and mortgage brokers. Loan officers both take residential mortgage loan applications *and* negotiate loan terms for compensation or gain. Servicing employees, on the other hand, do not take residential mortgage loan applications[30] and would not satisfy the first prong of the statutory test (but for HUD's very broad expansion of the term "residential mortgage loan application."

The CSBS/AARMR state model law defines a loan originator as meaning "an individual who for compensation or gain -- (A) Takes a residential mortgage loan application; ***or***

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[29] SAFE Sec. 1503(3)(A), 12 U.S.C. 5102.

[30] Although the term "residential mortgage loan application" is central to the statutory definition, HUD apparently has chosen to ignore the common meaning of the term and instead has chosen to reinvent the term "application." The term "residential mortgage loan application" is commonly understood in the mortgage industry to mean the standard form used to make a mortgage loan - the Fannie Mae/Freddie Mac Form 1003. The Supreme Court holds in the absence of a statutory definition, "we construe a statutory term in accordance with its ordinary or natural meaning." FDIC v. Meyer, 510 U.S. 471, 476 (1994).

(B) Offers or negotiates terms of a residential mortgage loan."[31] (Emphasis added.) Notwithstanding the prescriptive nature of the statute's definition of loan originator, when HUD issued its commentary[32] on the state model law it approved this definition of "loan originator" that established a disjunctive test, effectively converting the test into a one-prong test. Under this formulation, an individual such as a servicer employee who offers or negotiates terms to avoid a foreclosure could be treated as a loan originator under SAFE, notwithstanding that he or she does not take residential mortgage loan applications.

Now, in the current proposal, HUD includes the statutory test and adds language. The effect is at least as inclusive as the state model law test. Specifically, the proposed definition states:

> (b) (1) An individual engages in the business of a loan originator if the individual:
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> (i) (A) Takes a residential mortgage loan application; and
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> (B) Offers or negotiates terms of a residential mortgage loan for compensation or gain; or
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> ***(ii) Represents to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationary, brochures, signs, rate lists, or other promotional items), that such individual can or will provide any of the services or perform any of the activities described in paragraph (b)(1)(i) of this section.***[33] (Emphasis added.)

The additional language in (ii) would convert the two-prong test into a one-prong test. If an individual represents to the public that it can or will provide ***any*** of the services identified – either taking an application ***or*** offering or negotiating terms – the test is satisfied. HUD's proposal would not only encompass servicer employees engaged in loss mitigation, but it would bring in an as yet undefined universe of other parties who take applications, take limited financial information to properly route a customer, quote general rates, points or mortgage features, and/or change existing mortgage terms. In light of HUD's proposal, states which have enacted a definition of "loan originator" in accordance with the federal statute would not meet the minimum standards. We do not believe HUD has the authority to make such a change.

HUD's proposed introduction of subsection (ii) "represents to the public" mirrors language in an earlier version of the SAFE bill introduced by Senators Feinstein and Martinez,[34] but the language was not enacted as part of the definition of loan originator in HR 3221. In fact, Congress expressly changed the definition of "mortgage originator" to require a two-prong test and removed subsection (ii), which only made sense if the

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[31] CSBS/AARMR Model State Law for the Implementation of the SAFE Act—MSL Final, 10/24/08. http://www.csbs.org/AM/Template.cfm?Section=SAFE_Act_Regulators&Template=/CM/ContentDisplay.cfm&ContentID=19388.

[32] http://www.hud.gov/offices/hsg/ramh/safe/cmsl.cfm.

[33] 74 Fed. Reg. 66548, 66557 (to be codified at 24 C.F.R. § 3400.103)(proposed December 15, 2009).

[34] S. 2595, 110th Cong., 2d Sess. (2008).

earlier single-prong test had been adopted. It was not. Considering that Congress unambiguously spoke on this issue by deleting the "represents to the public" language in subsection (ii), it would contravene the express intent of Congress to reinsert this very same language in the regulation.

HUD may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law."[35] Although agencies are given deference within certain boundaries to interpret statutes, an "agency, must give effect to the unambiguously expressed intent of Congress."[36] Because the Senate purposely changed the definition of a loan originator from what was introduced and removed virtually identical language from the enacted law, HUD, in our view, cannot add the language back as part of its minimum standards. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."[37] In this case, Congress unambiguously precluded subsection (ii), the "represent to the public" formulation, from consideration in defining a loan originator.

As noted, in contrast to HUD's approach, the federal banking agencies have concluded that SAFE's definition of "mortgage loan originator" generally would not include employees engaged in loan modifications or assumptions because they typically would not meet the two-prong definition of a mortgage originator.

The federal banking agencies have stated:

> "The determining factor in whether the S.A.F.E. Act applies to residential mortgage loan-related transactions is whether the employee engaged in the transaction meets the definition of 'mortgage loan originator.' In general, *neither modifications nor assumptions result in the extinguishment of an existing loan and the replacement by a new loan, but rather the terms of the existing loan are revised or the loan is assumed by a new obligor*. Thus, Agency-regulated institution employees engaged in these activities typically do not take loan applications, within the meaning of the S.A.F.E. Act. Therefore, the Agencies conclude that the S.A.F.E. Act's definition of 'mortgage loan originator' generally would not include employees engaged in loan modifications or assumptions. The substance of a transaction, not the label attached to it, is determinative of whether the Agency-regulated institution employee associated with it is a

[35] ETSI Pipeline Project v. Missouri, 484 U. S. 495, 517 (1988).

[36] Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, 842-843 (1984). Under *Chevron*, a reviewing court must first ask "whether Congress has directly spoken to the precise question at issue." Id., at 842. If Congress has done so, the inquiry is at an end; the court "must give effect to the unambiguously expressed intent of Congress." Id., at 843; see also United States v. Haggar Apparel Co., 526 U. S. 380, 392 (1999); Holly Farms Corp. v. NLRB, 517 U. S. 392, 398 (1996).

[37] INS v Cardoza-Fonseca, 480 U.S. 421, 442-443 (1987) (enactment of the House bill rather than the Senate bill demonstrates that Congress eventually refused to restrict eligibility for asylum only to aliens meeting the stricter standard) quoting Nachman Corp. v. Pension Benefit Guaranty Corporation, 446 U. S. 359, 392-393 (1980) (Stewart, J., dissenting); Gulf Oil Corp. v. Copp Paving Co., 419 U. S. 186, 200 (1974); Russello v. United States, 464 U.S. 16, 23 (1983).

mortgage loan originator for purposes of this rule. For example, the Agencies believe that Agency-regulated institution employees engaged solely in bona fide cost-free loss mitigation efforts which result in reduced and sustainable payments for the borrower generally would not meet the definition of mortgage loan originator."[38]

We believe that the additions to the definition "loan originator" are not permissible. If the rules define this term, the definition should conform to the statute and be consistent with the federal banking agencies' definition of "mortgage loan originator."[39]

b. The definition of "application" should not be reinvented and should not implicate servicers.

MBA believes there is no need for HUD to redefine "application" and "taking an application" and that the definitions set forth in the proposal are overbroad.

HUD proposes to define "application" as:

> "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."[40]

HUD proposes that an individual "takes an application" if:

> "... the individual receives a residential mortgage loan application for the purpose of deciding (or influencing or soliciting the decision of another) 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 a prospective borrower in response to a solicitation), whether the application is received directly or indirectly or prospective borrower."[41]

We do not believe there is any benefit in developing yet another definition of "application." There are a variety of definitions of "application" under various statutes including under HUD's new RESPA rule, below. An additional definition is likely to only cause confusion and unnecessarily increase regulatory burden. Also, the way "application" is proposed to be defined even the most innocuous request to any party inside or outside of a lender could be regarded as an application as long as it met the subjective standard of "customary or necessary."

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[38] The joint final rule as adopted by the FDIC on November 12, 2009 at http://www.fdic.gov/news/board/2009nov12no8.pdf, pp.24-25.

[39] Supra at Sec. 365.102 (b)(1), p.87, Mortgage loan originator means an individual who:
   (i) Takes a residential mortgage loan application; and
   (ii) Offers or negotiates terms of a residential mortgage loan for compensation or gain.

[40] 74 Fed. Reg. 66548, 66556 (to be codified at 24 C.F.R. § 3400.23) (proposed December 15, 2009).

[41] Supra, p. 66557 (to be codified at 24 C.F.R. § 3400.103(c)(1)).

Under RESPA, the term "application" is more precisely defined to mean:

> "the submission of a borrower's financial information in anticipation of a credit decision relating to a federally related mortgage loan, which shall include the borrower's name, the borrower's monthly income, the borrower's social security number to obtain a credit report, the property address, an estimate of the value of the property, the mortgage loan amount sought, and any other information deemed necessary by the loan originator. An application may either be in writing or electronically submitted, including a written record of an oral application."[42]

We are particularly concerned that the proposed definition includes "a request in any form, for an offer ... of residential mortgage loan terms and the information about *the borrower or prospective borrower* that is customary ..."[43] (Emphasis added.) By using both terms, absent additional language expressly excepting servicer employees including those involved in loan modifications, this definition will likely encompass their actions respecting current borrowers resulting in SAFE coverage. While a servicer may receive a request from a borrower and collect information to evaluate the possibility of borrowers' alternatives to foreclosure, this is not the same as taking an application for a new extension of credit.

Were the RESPA definition used, along with clear guidance, consistent with the federal banking agencies rule that the term "application" does not apply to existing loans, the SAFE definition would at least be consistent with HUD's other existing rules.

Nevertheless, the more relevant term for purposes of SAFE is not "application" but "residential mortgage loan application." That term is commonly used to refer to the Fannie Mae/Freddie Mac Form 1003. If HUD believes a definition of "residential mortgage loan application" is needed, it should define the term as a "Fannie Mae/Freddie Mac Form 1003 or other form for the purpose of seeking a new extension of credit." Again, consistent with the banking agencies' formulation, any new definition should make clear that information gathered for modification of an existing loan does not comprise a "residential mortgage loan application."

While it is not necessary that HUD define the term "taking an application," if it does, we believe it should simply define "taking an application" as "receiving a residential mortgage loan application as defined under this section."

Again, none of these definitions should oblige states to cover more actors and activities than the law requires. We, therefore, recommend as a general matter that HUD adopt the statutory definitions or the definitions that the federal banking agencies adopted and forego expansive definitions of "taking an application" or "application."

[42] 24 C.F.R. 3500.2(b) (2009).
[43] 74 Fed. Reg. 66548, 66556 (to be codified at 24 C.F.R. § 3400.23) (proposed December 15, 2009).

c. The definition of "offers and negotiates" is far too broad and could require licensure of those who refer customers to true originators as well as loss mitigation and other servicing personnel. If HUD believes it is necessary to define "offer and negotiate," any definition should cover only true origination functions and be consistent with HUD's own analysis in the preamble and exclude servicing.

HUD proposes to provide that an individual "offers or negotiates loan terms" if the individual either:

> "(A) Presents for acceptance by a borrower or prospective borrower residential mortgage loan terms;
>
> (B) Communicates directly or indirectly with a borrower or prospective borrower for the purpose of reaching an 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[.]"[44]

We do not believe that a definition of "offer or negotiates terms" is needed. However, if HUD chooses to go forward with such a definition, subsection (C) is particularly problematic because of the wide net it casts. Specifically, it makes individuals who refer borrowers to a lender subject to licensure.

As explained further, the act of adjusting existing contractual terms to help a borrower cure or avoid a delinquency should not be within the scope of "offers or negotiates". Such coverage risks chilling this and other borrower-beneficial activities. Also, the payment of a salary or other compensation that is tangential to the transaction should not trigger SAFE.

(1) Mere referral of a borrower to a lender should not require licensure.

It is commonplace among a very wide range of businesses, including financial services companies, to cross market products. A person who works at a bank affiliate, in a diversified financial institution, but who does not work with residential mortgage loans, frequently has customers ask about the availability of mortgage loans. In such cases, the employee normally makes the customer aware of the products and services offered by affiliated companies. Doing so provides consumers with more choice and serves to increase the availability and affordability of financial products. In many cases, bank affiliate employees will refer customers to a banking organization's mortgage lending unit.

[44] 74 Fed. Reg. 66548, 66556 (to be codified at 24 C.F.R. § 3400.103(c)(2)(i)) (proposed December 15, 2009).

The proposed regulation is so broadly written, however, that these innocuous acts may require licensure. An employee that "[r]ecommends, refers, or steers a borrower or prospective borrower to a particular lender...in accordance with a duty to or incentive from any person other than the borrower or prospective borrower" would be regarded as offering or negotiating terms triggering SAFE coverage.[45] Moreover, merely designating your financial company on a business card or implying in casual conversation that the banking organization can meet all of a customer's financial needs also could trigger the licensure requirement.[46]

In fact, however, referring a consumer to a particular lender, whether for compensation or otherwise, is not "offering or negotiating loan terms." In the example discussed, the referring employee would have no idea what terms the consumer would or could receive, and the employee would have no ability to influence the terms. Also, the "referrer" has, at this stage, not even collected a loan application, and cannot be deemed to have started the origination process. We can imagine no reason why the mere mention of a mortgage lender's existence and telephone number should require licensure.

Through the years, under its RESPA rules, HUD has considered the permissibility of various referral activities under Section 8 of that Act. Notably, Regulation X, at 24 CFR 3500.14(g)(1)(vii), specifically exempts from the definition of "referral" "an employer's payment to its own employees for any referral activities." The proposed provision, at §3400.103(c)(2)(i)(C), however, would make such activities require licensure under SAFE notwithstanding their permissibility under RESPA.

Finally, it is worth mentioning that this certain reduction in consumer choice comes with no offsetting consumer protection benefits. Subjecting these activities to SAFE can be expected to result in a sharp drop in activities to inform consumers of available financial products without additional benefits.

Again, we urge HUD to require both prongs of the statutory test for a "loan originator." Referral to a lender is not one of the prongs, and referrals in the absence of both required prongs should not be defined as loan origination. Simply using the definition under SAFE will ensure that an originator receiving applications and negotiating terms is properly licensed as the law intended.

> ***(2) While the act of adjusting existing contractual terms to help a borrower cure or avoid a delinquency should not be within the scope of "offers or negotiates" the definition currently risks chilling these and other borrower beneficial activities.***

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[45] Supra, Proposed 24 C.F.R. § 3400.103(b)(1)(ii).
[46] 74 Fed. Reg. 66548, 66557 (to be codified at 24 C.F.R. § 3400.103;)(proposed December 15, 2009).

As currently proposed, HUD's broad definition of "offers or negotiates terms of a residential mortgage loan for compensation or gain" threatens the continuation of several common servicing activities that benefit borrowers.

First, while it is clear that HUD's proposed test of "loan originator" seeks to include loan modification specialists, the definition of "offers or negotiates" is ambiguous as to whether these individuals are covered. We oppose coverage of servicers and loss mitigation specialists. If HUD goes forward with these definitions, the definitions should exclude these activities as the preamble seems to suggest.

Notably, under modification programs such as HAMP, the modification terms themselves are derived by using a target percentage of gross income that applies to every borrower regardless of their credit score, loan balance, or other property or borrower related characteristic that may contribute to the actual valuation of the loan. Thus, by definition, the modification process is not a negotiated transaction, but rather, a well-circumscribed one. The borrower is not presented an offer that can be countered or shopped for potentially better terms. Rather, the borrower is presented with a relaxation of the creditor's rights and a possibility of resolving his or her current financial difficulties.

Likewise, forbearance plans that allow the borrower to reduce or postpone payments should not be construed as an "offer or negotiation of terms." Under these arrangements, the lender is merely postponing enforcement of existing contractual terms. While these arrangements are often reduced to writing, this is done for the benefit of both the servicer and the borrower so there is a record and understanding of the servicer's rights. However, assuming HUD goes forward with this definition, without a clear exclusion of forbearance plans, the purposely broad definition of "offers or negotiates" could be construed to include servicing personnel that perform or execute forbearance plans.

The current definition of "offer and negotiates" also has the potential to cover other discretionary activities of servicers although they do not actually involve offering or negotiating terms. For example, when a borrower fails to pay real estate taxes or insurance premiums, servicers will pay them and then seek reimbursement from the consumer. RESPA generally governs how those payments may then be collected and paid over time. As a result, the lender would not be making an offer and would not be negotiating terms when following RESPA. While RESPA dictates how escrow shortages and deficiencies will be repaid, if these advances are large and threaten the borrower's ability to stay current, the servicer will sometimes allow the borrower to repay them over a longer period, usually exceeding one year. Following RESPA and/or establishing a repayment schedule that is more liberal than RESPA should not trigger SAFE. Unfortunately, given the breadth of the current definitions, it is not clear that individuals who provide these services to borrowers would be excluded from this definition.

If these activities are not specifically excluded from coverage in SAFE, we are concerned that institutions that are otherwise licensed by states will be unable to offer these borrower-friendly options.

Our request to specifically exclude loss mitigation, escrow reimbursement practices, and other administrative functions from the scope of the law is supported by the discussion of "offers or negotiates" in the preamble which expresses the intent of the rule to apply to the origination of a loan. The preamble states:

> "... 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 interest or those of a third party. Accordingly the rule would clarify in §3400.103(c)(2) that the terms include interaction that are typical between two parties in an *arm's length relationship prior to entering into a contract,* such as 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, this proposed rule proposes to clarify that "offers or negotiates" includes actions by an individual that make a *prospective borrower more likely to accept a particular set of loan terms or an offer from a particular lender,* where the individual may be influenced by a duty to or incentive from any party other than the borrower. Such actions may have the same effect on the borrower decision as overt negotiations ..." (Emphasis added.)"[47]

HUD's preamble description of "offers or negotiates" relates to the origination of a loan rather than to revision of an existing loan and its contractual terms. For example, the reference to the borrower and lender having an "arm's length transaction" is true for most new originations. In the case of servicing transactions, however, the parties are not operating at arm's length, or independently of each other. The borrower is already obligated under the loan and the servicer has contractual remedies that it may impose. Any change to the terms in the case of a modification is a relinquishment of the servicers' remedies, not the extension of new or optional credit terms. Likewise, the borrower is not a "prospective" borrower.

While we believe that the definition of "offers or negotiates" is not necessary and ideally should be removed, if HUD goes forward nonetheless to define these terms, in the interest of borrowers going forward, we request explicit exemption of loss mitigation and escrow repayment offers or similar agreements from being classified as "offers or negotiates" within the purview of SAFE.

> ***(3) The payment of a salary or other compensation that is tangential to the transaction should not trigger SAFE.***

[47] 74 Fed. Reg. 66548-49 (preamble of proposed rule, December 15, 2009).

The Department also proposes to define the meaning of "compensation or gain."[48] The preamble states that the terms "offers or negotiates terms of a residential mortgage loan for compensation or gain" would include:

> "(ii) 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." (Emphasis added.)[49]

While not explicitly stated, the proposal and preamble imply a specific nexus between the compensation and the offering or negotiating of terms of a particular residential mortgage (i.e., "in connection with"). Processors, underwriters, clerical, administrative and servicing personnel are not usually compensated on a per transaction basis, but rather receive a salary that is not tied to a particular loan modification or specific action taken or attempted.

Accordingly, defining "compensation or gain" to include all forms of payment to employees is overly broad. Such a formulation would effectively include anyone who is employed by a lender or servicer. If HUD decides to define "for compensation or gain," we urge HUD to expressly state that a nexus between the compensation and the negotiation or offer is required for each loan (whether or not the loan is closed). We also believe it would be important to provide that the compensation or gain must be to an individual as distinguished from a company or corporation. Any so-called "incentive payment" for completing loss mitigation paid by an investor, insurer or even the federal government to the servicing corporation (as part of Home Affordable Modification Program or other loss mitigation program), should not trigger SAFE. These payments are made to servicers to partially offset the overhead and other direct costs of performing labor-intensive loss mitigation.

6. **For numerous reasons discussed here, the final rule should explicitly exclude employees and contractors involved in servicing, including loss mitigation functions, from the definition of "loan originator." SAFE's rules should only require true originators and mortgage brokers of state-licensed lenders be licensed and registered as intended by Congress.**

   a. ***Generally***

As discussed, in the preamble to this proposal, HUD signals its predisposition to include within the definition of "loan originator" any individual who modifies an existing

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[48] 74 Fed. Reg. 66548, 6657 ("An individual 'offers and negotiates terms of a residential mortgage loan for compensation or gain' if the individual...(ii) receives or expects to receive payment of money or anything of value in connection with the activities described in paragraph (c)(2)(i) of this section or as a result of any residential mortgage loan terms entered into as a result of such activities." (to be codified at 24 C.F.R. 3400.103(c)(2)(ii)).

[49] 74 Fed. Reg. 66548, 66551 (preamble to proposed rule); See also 74 Fed. Reg. at 66557 (to be codified at 24 C.F.R. § 3400.103(c)(2)(i))(proposed December 15, 2009).

residential mortgage loan[50] and to require their coverage under SAFE. As detailed here, we strongly object to including servicing staff that perform modifications and other loan administration functions within the definition of "loan originator." Such inclusion is not supported by the law or its legislative history, appears to be based on misperceptions by HUD, and stands to drastically undermine the success of loss mitigation efforts by state-licensed institutions. It would unnecessarily increase the costs of loan modifications and entangle them in red tape. We have consistently expressed our opposition to coverage of mortgage servicers under SAFE on several occasions in letters to and meetings with HUD, the CSBS and AARMR as well as OMB.[51]

b. The legislative history does not support treatment of servicer employees including those engaged in loan modifications as "loan originators."

Based on a review of the legislative history of SAFE and the plain meaning of the statute, servicers who perform modifications are not "loan originators" and were not intended to be considered within the registration and licensing requirements of the law. SAFE was designed to establish a nationwide licensing and registration system for individual loan originators of lenders and mortgage brokers. SAFE's substantive requirements are geared to these individuals and not servicers or their personnel.

Although Congress did not issue a conference report on the legislation, the floor statement by Senator Christopher Dodd, Chairman of the U.S. Senate Banking, Housing and Urban Affairs Committee, made clear what Congress meant by "loan originators" covered by the bill. Chairman Dodd characterized SAFE as a

> "new mortgage broker and lender licensing requirement that was added by Senator Martinez and supported by Senator Feinstein from California. That will begin to address many of the abuses of the mortgage process that have been perpetrated by mortgage brokers."[52]

There is no similar statement in the law or legislative history to indicate that servicers or their personnel were ever intended to be covered by the legislation. In fact the reference to brokers, by definition excludes servicers because brokers do not service loans. Remarks by Senator Feinstein upon introduction of the bill and then passage of SAFE also make clear that the definition of mortgage originator was for those individuals making mortgages, not those who administer existing loans. Specifically, the Senator repeatedly refers to "lenders," "loan officers" and "mortgage brokers" and refers to fraudulent lending practices of "steering people into loans they clearly cannot afford."

[50] Supra.
[51] Examples include Letter to Shaun Donovan dated March 5, 2009; Meeting at Office of Management and Budget with OMB and HUD staff, Oct 1, 2009.
[52] 154 Cong. Rec. S6520 (daily ed. July 10, 2008) (statement of Sen. Dodd).

Senator Feinstein also talked about "curbing the abusive lending practices which contributed to the subprime mortgage crisis."[53] She further states, "[w]hile the majority of lenders and brokers offered these mortgages in a responsible fashion, many others relied upon predatory lending tactics to place unsuspecting borrowers in mortgages they could not afford. Competitive pressures and lax oversight resulted in loans of increasingly poor quality being written."[54] There is no mention of servicers or employees of servicers in this history because servicers do not lend or arrange loans. Servicers are not loan originators. When servicing begins on a loan, the borrower is already legally bound by his or her contract terms. Servicers also cannot "steer" borrowers.

Notably, as indicated, Congress designated the NMLSR as the licensing and registry system under the law at the time CSBS/AARMR's system had begun operations in several states. Servicer employees were not included in the system at the time the law was enacted and we know of no description of the system that specified such coverage. This aspect of the legislative history should also be considered in concluding that SAFE does not apply to servicing employees.

c. SAFE's definition of "loan originator" does not apply to servicers.

As stated throughout, SAFE expressly establishes a two-prong test for a loan originator.[55] If an individual takes a residential mortgage loan application and negotiates offers or terms for a residential mortgage loan for compensation or gain, they are covered under the law.[56] Servicers do not receive residential mortgage loan applications and today their efforts are circumscribed and are compensated such that they may not be regarded as offering or negotiating terms for "compensation or gain" in any real sense. Most importantly, their activities do not fall within the plain meaning of "origination." As recognized by the federal banking agencies "neither modifications nor assumptions result in the extinguishment of an existing loan and the replacement by a new loan, but rather the terms of the existing loan are revised or the loan is assumed by a new obligor."[57]

A cardinal rule of statutory construction is that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes.[58]

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[53] 154 Cong. Rec. S734 (daily ed. February 6, 2008) (statement of Sen. Feinstein).
[54] Supra.
[55] SAFE Section 1503(3, 12 U.S.C. 5102.
[56] As indicated, the correct language has been confused by a model law developed by CSBS and AARMR. Unlike the statute, the model law sets forth a disjunctive two-prong test which provides that an originator is covered if it either (A) Takes a residential mortgage loan application; ***or*** (B) Offers or negotiates terms of a residential mortgage loan. Considering the fact that servicers negotiate terms, this formulation has made it more likely that states may adopt laws covering mortgage servicers.
[57] The joint final rule as adopted by the FDIC on November 12, 2009 at http://www.fdic.gov/news/board/2009nov12no8.pdf , pp. 24.
[58] United Savings Ass'n v. Timbers of Inwood Forest Association, 484 U.S. 365, 371 (1988).

In this connection, SAFE also provides that the term originator "does not include any individual who performs purely administrative or clerical tasks on behalf of a [loan originator]" and does not include "a person or entity that only performs real estate brokerage activities and is licensed or registered in accordance with applicable state law unless the person or entity is compensated by a lender, a mortgage broker, or other loan originator or by an agent of such lender, mortgage broker, or other loan originator."[59] The exception for real estate brokerage activities also makes clear that the statute is directed only to lenders, mortgage brokers or similar mortgage originators. It excludes real estate brokerage activities from coverage "unless the person or entity is compensated by a lender, a mortgage broker, or other loan originator or by any agent of such lender, mortgage broker *or other loan originator*." (Emphasis added.) In a similar vein, the provisions of the statute regarding required education, discussed below, make no mention of servicing.[60]

The servicer's work is one of due diligence to determine alternatives to foreclosure under an existing loan while seeking to avoid redefault, greater losses and to satisfy the applicable pooling and servicing agreement requirements. If HUD maintains its position, servicer employees in both loss mitigation and customer-contact positions will require licensure. These employees talk to borrowers about their financial condition and take financial information over the phone for purposes of determining which loss mitigation paths are appropriate. They may also present modifications to borrowers and answer questions borrowers have about modification terms. If these employees require licensure, servicers will be left without any other option but to change their existing processes, no matter how efficient and effective they may be in addressing borrowers' needs.

The undersigned believe it is incongruous that Congress would pass, the President would sign and HUD would implement a measure that would so directly undermine the administration's efforts toward increased loan modifications. If Congress intended to include servicers in the common industry definition of "mortgage originator," it would have expressly done so. We respectfully urge that, consistent with the statutory language and legislative history, HUD should make clear that servicers and modification staff are outside SAFE's scope.

d. Other provisions of SAFE do not apply to servicers.

Other provisions of SAFE are inapposite to the mortgage servicing function. For example, the law requires that qualification tests for state licensing adequately measure a license applicant's knowledge concerning federal and state laws relevant to mortgage origination. While the law specifically requires education in federal law and regulations, ethics and fraud, fair lending and lending standards for the subprime mortgage market, there are no requirements whatsoever that are relevant to mortgage servicing (e.g. borrower relief programs, such as Making Home Affordable (MHA) and other borrower

[59] SAFE Sec.1503(3)(A)(i), 12 U.S.C. 5102.
[60] SAFE Sec. 1505, 12 U.S.C. 5104.

modification programs, or investor requirements). If servicers were intended to be covered, the educational requirements would have been appropriately geared to them.

Similarly, the surety and net worth requirements under SAFE also do not fit the servicing or loss mitigation function. These provisions require states to establish "minimum net worth or surety bonding requirements that reflect the dollar amount of *loans originated* by a residential mortgage loan originator."[61] (Emphasis added.) In the context of servicing, this provision simply makes no sense. This language provides further evidence that the statute cannot be fairly read together as encompassing servicers. These and other provisions bring to mind the old saying that requiring servicers to meet SAFE requirements amounts to "pushing square pegs through round holes."

e. *HUD's inclination to cover servicers appears to be based on several misperceptions.*

The preamble's discussion of whether servicers are included or excluded from the law's coverage, talks less about SAFE and its history and more about perceptions of modification types and volume. The preamble states:

> "HUD's consideration of this issue is based on HUD's recognition that servicers are increasingly taking applications for and negotiating the terms of a loan modification that materially alter the terms of existing mortgage loans. These types of loan servicing activities are often very different from what the industry and the public viewed as typical loan servicing activities only a few years ago. Today's loan modification may include an increase or decrease in the interest rate, a change to the type of interest rate (e.g. fixed rate versus adjustable rate), and extension of the loan term, an increase or write down of the principal, the addition of collateral, changes to provisions for prepayment penalties and balloon payments, and even a change in the party to the loan through assumption or the addition of a co-signer. The activities of a loan servicer that result in modification of the terms of a residential mortgage loan can be virtually indistinguishable from the performance of a refinancing, which is unambiguously covered by the SAFE Act."[62]

We, however, take issue with the accuracy of HUD's statement that modifications are virtually indistinguishable from refinances. Modifications, especially in the context of loss mitigation, are completely different. In the case of a refinance, the existing loan is extinguished and replaced with a new loan. A loan modification does not extinguish the loan and the borrower remains obligated to the existing mortgagee. The borrower is already obligated to pay the debt and, therefore, the so-called "risk to the borrower" asserted to be present in an origination is not the same.

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[61] SAFE 1508(6), 12 U.S.C. 5107.
[62] 74 Fed. Reg. 66548, 66553 (Preamble to proposed rule, December 15, 2009).

In the case of a refinance, the borrower seeks credit at more favorable terms or to get cash out. The borrower has the freedom to shop around for the best rate and terms for his or her particular circumstances. Borrowers, however, cannot shop for a loan modification and cannot get cash out from a modification. In the case of a modification, the servicer/investor alters existing terms in an effort to mitigate its losses, not to grant new or additional credit to the borrower. The servicer gives up--at least temporarily--one or more of its remedies under the mortgage or note. No such relinquishment of rights occurs in the context of granting a refinance.

Also, the statement that loan modifications involve a "new" servicing activity that was not offered a few years ago is simply incorrect. Modifications have been a loss mitigation tool for decades. In fact, both FHA's current Servicing Handbook, published in 1994, and the previous Servicing Handbook from 1984 allowed and provided guidance on modifications.[63]

Perhaps HUD's view that modifications are a more recent phenomenon is shaped by the fact that modifications were secondary to the assignment program. However, once the assignment program was terminated in 1996, servicers began using modifications and other loss mitigation tools exclusively.

In either case, modifications are not new to FHA servicers or to servicers of other programs. For example, Fannie Mae and Freddie Mac Servicing Guides from 1996 and 1997 respectively[64] also permit modifications. By design, the servicing of subprime loans always relied heavily on modifications and other loss mitigation tools due to the expected higher delinquency rates for those loans. Clearly, modifications are not a new phenomenon; nor are the types of modifications listed in the preamble.

Additionally, we take issue with HUD's reference to the evaluation of a borrower's financial condition for loss mitigation as a taking of an "application." As stated earlier, "residential mortgage loan application" has a common meaning and understanding within the industry. A stakeholder's collection of information to determine whether to alter terms of an existing contract is far different than an application for credit. Certainly any stakeholder should be able to exercise its common law right to mitigate its losses without having to be licensed or registered as a "loan originator."

f. SAFE coverage of loan modification personnel will hinder borrower assistance and make servicing more expensive.

HUD's inclusion of servicing employees performing loan modifications within the scope of SAFE will unnecessarily hinder and make much more expensive the crucial work

[63] Handbook 4330.1 Rev 5, September 29, 1994, Chapter 8, HUD Approved Relief Provision, Paragraph 8-6; Administration of Insured Home Mortgages Handbook 4300.1, November 1984.

[64] Fannie Mae Single Family, Servicing Guide, Part VII, Chapter 4; 401 Mortgage Modifications (September 30, 1996). Freddie Mac Single Family, Seller/Servicer Guide, Volume 2, Chapter B65 Workout Options/Loan Modification (January 2, 1997). The undersigned do not have access to older guides.

these employees perform today – reaching and assisting millions of borrowers experiencing payment difficulties.

Servicing personnel tend to work from central locations, frequently in call centers or consolidated servicing sites. Servicers achieve economies of scale and other savings in this manner because loan administration is generally homogenous across regions and product types. Efficiencies are created by having large groups of people performing the same task regardless of the location of the borrower or property.

Accordingly, while current business models do not require that loan officers operate with customers in all 50 states, servicing models do. Most servicers manage personnel based on function not region. The benefit of this approach is that a borrower is able to contact the servicer from any state and be helped without delay or without having to be redirected to personnel dedicated to a particular state or region. The impact of HUD's rule is that these business models could not be sustained financially by most state financial institutions.

According to data gathered by the AFSA, the cost to license one "loan originator" in all 50 states is approximately $27,072. Although we do not have industry data on the number of loss mitigators employed by non-depository institutions, an overly broad rule would likely be used by debtors' counsel to bring unwarranted suits against more than just those individuals that arrange modifications, but anyone who communicates terms with the borrower or collects information about the borrower. This would likely include thousands of employees.[65]

State-licensed servicers simply will not have the financial capacity to pay for a large number of their employees to be licensed in all 50 states or even in several states. The result will be a significant reduction in the number of employees who can perform important functions including modifications, loss mitigation, customer care, assumptions, and other loan administration services. Additionally, the time that it will take to educate and achieve licensure of servicing employees will remove needed staff from the front lines for a substantial period of time. Finally, considering that SAFE training is unlikely to be germane to their experience, servicing staff will require more training and time to complete their educational requirements, straining servicers' and lenders' capacity to perform vital functions even more. The end result of SAFE coverage of servicers will be increased costs, a bottleneck that could take years to clear and a decline in customer service.

All of these effects will converge to undermine the administration's Making Home Affordable (MHA) program which has received an unprecedented amount of government resources to provide loan modifications and refinance opportunities for

[65] Servicer-only companies express concern that although they do not originate loans, coverage of servicing personnel within the definition of "loan originator" may trigger state laws requiring their corporations to obtain state "mortgage banker or broker licenses." Under current requirements, mortgage servicers only need a corporate "mortgage servicing license." The cost and timing of such licenses may hinder servicing operations and loss mitigation activities.

millions of mortgage borrowers. The proposed requirement will also impact HUD's own modification program, not to mention private modification programs and programs of other agencies including the Department of Veteran Affairs (VA), Fannie Mae and Freddie Mac.

Servicers and the mortgage industry have been striving to help troubled borrowers in partnership with the administration. Layering on additional regulatory requirements that are neither well founded nor warranted will only frustrate and add unnecessary costs to this important work.

g. Any delayed effective date for servicer compliance should cover more than employees working on MHA modifications.

While the undersigned urge that loan modification personnel should be excluded from SAFE's coverage, we appreciate HUD's request for comment on whether states should be allowed to extend the deadline for compliance for individuals who perform or facilitate modifications or refinancings under the federal government's MHA program. Providing an extension of the deadline for SAFE compliance only for those individuals performing modifications under the MHA program, however, would not satisfactorily address the problems that coverage of servicers would create. The MHA program has produced 902,602 trial Home Affordable Modification Program (HAMP) modifications and 112,521 permanent HAMP modifications as of December, 2009.[66] In addition, the industry has also performed more than 2.2 million permanent modifications outside of HAMP from July 2007 through October 2009.[67]

If only MHA actions are subject to a delayed effective date, borrowers ineligible for HAMP or those that fail to comply with the MHA program will have fewer opportunities for help. FHA and VA borrowers also would be disadvantaged since modifications under these government programs are not part of HAMP. Even new programs that are titled "FHA HAMP" and "VA HAMP" appear not to conform to HAMP and thus may not qualify for this exemption.

The undersigned trust HUD would not wish to promote disparate treatment among borrowers with some of the greatest harm falling on those with government-insured or guaranteed loans. Again, however, if only individual servicer employees engaged in HAMP modifications are subject to a delayed effective date for licensure, borrowers eager to receive assistance through non-HAMP modifications will be harmed. The costs and burdens that attend licensure of servicer employees for non-HAMP programs will remain.

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[66] Making Home Affordable Program, Servicer Performance Report Through December 2009, U.S. Department of Treasury.
[67] HOPE Now, December 2, 2009, Press Release.

The undersigned note that the comment letter submitted by CSBS and AARMR[68] for this rulemaking urges that if HUD determines SAFE requires licensure of loss mitigation employees of servicers, implementation should be delayed until the current foreclosure crisis ends, through 2012. For this purpose, those organizations make no distinction between MHA and other loan modifications.

While the undersigned greatly appreciate these comments, we would urge that if licensure can and should be postponed to avoid diverting resources while loss mitigation activities are at record levels and employees most needed, then it follows that when loss mitigation returns to lower, more normal volumes and less employees are assigned to these tasks, those employees also should not be diverted unnecessarily.

Consistent with CSBS and AARMR's position, if HUD concludes that performing modifications or other traditional servicing activities renders an employee a "loan originator," HUD should provide that states are required to delay implementation of coverage for all individuals engaged in servicing activities. In our view, the delay should extend for at least three years to avoid undue hardship on borrowers and servicers alike. We would also support a separate exemption or, if necessary, a similar delay for personnel performing assumptions and certain refinances as discussed in section 7 below.

h. Exclusion of servicing personnel involved in loan modifications by HUD should be consistent with the federal banking agencies approach.

As indicated in section 4 above, exclusion of servicing personnel involved in loan modifications and assumptions would be consistent with the FFEIC's draft final rules that were adopted by the FDIC and many state laws that exempt servicers. Moreover, such an approach would comport with HUD's responsibility to assure conformity with the *minimum requirements* for compliance with SAFE also as discussed above.

On the other hand, the opposite tack would disadvantage state-licensed servicers and their borrowers. In this connection, we note that a very significant number of nonprime

[68] "State regulators believe that requiring the licensure of loss mitigation employees of mortgage servicers in the near term would be counterproductive to the pressing and immediate need for servicers to increase staffing to meet loss mitigation needs.
As state regulators noted in our February 5, 2009 letter to HUD, we believe that if HUD determines that the SAFE Act requires loss mitigation employees of servicers to obtain a mortgage loan originator license, such licensure requirement should not be implemented until the current foreclosure crisis has ended. We continue to support this position today.
Based on current estimates of foreclosure trends, we encourage a delay of any licensure requirement on such individuals until through 2012. The Proposed Rule recommends such a delay – but only for individuals providing or facilitating mortgage loan modifications and refinancing under the Department of the Treasury's Making Home Affordable Program. We believe that this time extension should not be limited to a specific program, but should cast as wide a net as possible to help facilitate all legitimate loss mitigation activities." CSBS/AARMOR Comment Letter to HUD, dated February 24, 2010, Re: Docket No. FR-5271-P-01, p. 5.

borrowers' loans are serviced by state-licensed servicers.[69] These borrowers' opportunities for assistance will be lessened by SAFE coverage of servicer employees.

i. HUD should make clear which activities are inside and outside the scope of any final SAFE rule.

Regardless of whether HUD excludes servicers from the definition of loan originator, HUD should precisely describe which activities are inside and outside the coverage of HUD's rule. While HUD's preamble talks of modifications, litigators will use broad wording in the codified portion of the regulation and the ambiguous state laws (drafted pursuant to CSBS/AARMR's model bill) to argue that a wide array of actions, including offering partial claims, short sales, deeds in lieu, repayment plans, collection of borrower's financial or other information by call center staff, collection activities and more require licensure. The results of any such litigation could be devastating and severely increase costs to borrowers.

To the extent that HUD reconsiders its position and excludes servicers, we suggest that a "servicer" be defined as "an individual, employed by a company which owns the loans or services the loans for others, who administers an existing mortgage loan, which may include but is not limited to explaining the terms of the loan or its escrow account, negotiating, amending or waiving the terms of an existing loan, and taking other actions including the collection of borrower information designed to prevent or avoid default or foreclosure in connection with an existing loan." This definition should specifically encompass agents or contractors employed by the servicer who are performing servicing functions on behalf of and under the supervision of the servicer. The inclusion of agents or contractors of a servicer is critical since many servicers have out-sourced data collection and other functions to specialists in order to provide better customer service and response times on loss mitigation.

j. Consider delaying implementation of SAFE for individuals who engage in streamline refinances.

HUD requests comment on whether it should delay implementation of the rule for individuals who perform refinances under the Home Affordable Refinance Program (HARP). HARP is essentially a streamline refinance program available to Fannie Mae and Freddie Mac borrowers.

HUD was the first to have a similar program and it has proven extremely successful. While all refinances involve the creation of a new loan and extinguishment of the existing loan, streamlined, no-cash out refinances are particularly effective options to serve many borrowers. Under most streamline refinance programs it is not necessary to re-qualify the homeowner or require a new appraisal because the lien holder already

[69] Data published by Mortgagestats.com in a chart entitled "Top Subprime Services at 9/30/09," shows that as of September 2009 five of the top ten subprime servicers were state regulated and these firms serviced approximately one-third of the outstanding subprime mortgages..

retains the current credit and property risk and is the entity refinancing an existing customer. Streamline refinances benefit the homeowner by lowering the interest rate and extending the maturity date without significant re-underwriting that may otherwise disqualify the borrower.

Consumer laws also distinguish no-cash out refinances from other refinances. For example, Truth-in-Lending, Regulation Z at 12 CFR 226.23(f), does not provide for a right of rescission if cash is not extracted from the transaction.

According to our members, some institutions have staff that specialize in these streamlined, no cash-out refinances. These individuals usually take refinance inquiries and applications that come through a call center or the institution's Web site. The employees are generally paid a salary rather than a commission per loan. Given the difficulties borrowers are experiencing today, we would support a delay in implementation for all streamline refinance programs, including FHA's, where the debt is refinanced, there is no cash out, and the loan decision is made irrespective of the value of the property.

7. The final rule should explicitly exclude from the term "loan originator" individuals who engage in simple loan assumptions.

Although HUD has not requested this information, we believe that HUD should exclude from the term "mortgage originator" an individual who engages in administering certain mortgage loan assumptions.

Assumptions involve the assignment of the unpaid balance of a mortgage obligation to another person. This can happen as a result of a sale of the mortgaged property or a life event. The original borrower (seller) continues to remain liable for the obligation unless released from liability by the mortgagee.

Generally, mortgages guaranteed by VA and insured by FHA are assumable provided the applicable guidelines are met and the assumptions are approved by the mortgagees. Fannie Mae[70] and Freddie Mac[71] also allow certain mortgages to be assumed, but not all. Their policies vary based on the type of ownership interest, the type of mortgage product, the location of the property, whether the loan is in portfolio or securitized, and the type of transaction. We highly recommend referring to the applicable agencies' or government sponsored enterprises' guidelines for specific information. Moreover, to the extent the loan comes with mortgage insurance, the mortgage insurer may also have to approve the assumption and/or release of liability for the original debtor.

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[70] Fannie Mae Single Family, 2006 Servicing Guide, Part III, Chapter 4, Transfers of Ownership.
[71] Freddie Mac Single Family, Seller/Servicer Guide, Volume 1, Chs. 8-D15, Chapter 8, General Purchase Program Requirements and Characteristics.

Mortgage companies typically handle assumption requests within their servicing departments, but some handle assumptions within loan production or through specialty units. The choice of which division handles assumptions is a function of workload demands and does not provide any real insight as to whether such employees are "loan originators."

According to our members, a minority of assumptions involve the purchase and sale of a property by an unrelated individual seeking to assume a loan. A title transfer between such unrelated parties would trigger the due-on-sale clause and the need to credit-qualify the new borrower, refinance the loan, or pay-off the debt.

Rather, the vast majority of assumptions occur among related individuals as a result of deed transfers due to life events, such as a marriage, death of a family member, or parent to child title transfer. Such transfers do not trigger the due-on-sale clause or the need to assume, refinance, or pay-off the debt because of the protections afforded under the Garn-St. Germain Act.[72] Yet, in some cases, these protected individuals do request to be added to the note. These cases are called simple assumptions. Generally, no true application is taken, the new debtor is not credit-qualified and terms are not negotiated since they already exist.

A growing number of assumptions today are used as loss mitigation tools for borrowers who are otherwise unable to keep their homes due to financial hardship. These assumptions usually do not involve credit qualifying the new debtor and thus the approval process is similar to the process for simple assumptions.

Moreover, the prospective debtor almost certainly approaches the mortgagee with full knowledge of the pre-existing terms and without any solicitation, offer or contact by the mortgage company. As a result, it is questionable whether the individual offers any terms to the prospective debtor.[73] The mortgage company or employee cannot steer the prospective debtor in any manner because the debt already exists and the prospective debtor cannot shop around for a more favorable assumption or assume a different loan for that property. Generally, mortgage companies do not charge a fee for these types of assumptions although they may pass through third party costs to facilitate execution of the request.

In sum, the undersigned do not believe that individuals who approve simple assumptions and certain loss mitigation assumptions meet either statutory prong of the definition of "mortgage loan originator."

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[72] The Garn-St. Germain Act 12 U.S.C. 1701j-3 authorizes the enforcement of a due-on-sale clause notwithstanding any state law to the contrary. It further provides that a lender may not exercise its option pursuant to a due-on-sale clause upon certain enumerated circumstances of which one is "a transfer where the spouse or children of the borrower became an owner of the property."

[73] Every contract has an offer and acceptance of terms. The mere presence of a contract cannot subsume the entire second prong of the definition. Some other affirmative action must be contemplated.

The federal banking agencies' draft final rule recognizes that these assumptions are different from loans originations:

> "In general, neither modifications nor assumptions result in the extinguishment of an existing loan and the replacement by a new loan, but rather the terms of an existing loan are revised or the loan is assumed by a new obligor. Thus, Agency-regulated institution employees engaged in these activities typically do not take loan applications, within the meaning of the SAFE Act. Therefore, the Agencies conclude that the SAFE Act's definition of "mortgage loan originator" generally would not include employees engaged in loan modifications or assumptions because they typically would not meet the two-prong test of this definition."[74]

We highly recommend HUD adopt the federal banking agencies' language and concept.

8. The final rule should also exclude HUD-approved housing counselors from the term "loan originator."

HUD requests comment on whether third-party loan modification specialists should be covered by the definition of "loan originator" and subject to the licensing and registration requirements of SAFE. HUD states further its predisposition to include third-party modification specialists within the definition of loan originator.

We interpret HUD's question to be mainly directed to third parties other than those employed by the lender or servicer, who hold themselves out as modifying loans for borrowers for profit. In our view, the statute does not explicitly require the coverage of these parties unless they take applications, offer or negotiate terms for compensation or gain or otherwise meet the statute's definition. As a general matter, we favor regulation of for-profit foreclosure rescue companies if they receive compensation directly from the borrower and such compensation has a nexus to the particular transaction (i.e., compensation per transaction versus a salary). However, we believe any definitions and regulations should be carefully constructed to exclude from SAFE HUD-approved counselors and third party loss mitigation vendor under the control and supervision of the servicer, investor or insurer/guarantor (addressed above).

There are substantial differences between HUD approved counselors and loan originators (and to some degree for-profit foreclosure rescue companies):

1) The HUD-approved counselor is not being compensated by the borrower in any form. Rather, the servicer, non-profit organization or even the government pays counseling organizations for their services.

2) Any payment for counseling services does not come from a loan originator (if servicers and companies are appropriately excluded from the rule). HUD-approved counselors are, therefore, similar in nature to real estate brokers.

[74] FFIEC Draft Final Rule on "Registration of Mortgage Loan Originators" p. 24-25.

expungements. We would not object, however, to HUD's urging uniform treatment (see 10 below), but that is of course different than reinterpreting and supplementing the law's minimum requirements as proposed here.

10. The final rule should make clear that while information on the employment history and disciplinary actions of loan originators should be released, the release of personal information of loan originators is not required and raises significant concerns.

Section 1502(7) of SAFE provides that "consumers" shall have "easily accessible information, offered at no charge ... regarding the employment history of, and publicly adjudicated disciplinary and enforcement actions against loan originators."[77] While we support release of such information, we are concerned about the effect that the public exposure of other personal material will have on individual originators' privacy. We are particularly concerned that such exposure may facilitate identity theft and hamper state-regulated lenders in recruiting qualified individuals to serve as mortgage originators.

Considering the very real concerns about wide dissemination of this data and the rather limited statutory instruction in this area, we suggest that the rules address this issue. The rules should provide that while the states are to provide information, at no charge, on employment history and publicly adjudicated disciplinary and enforcement actions, SAFE does not require the release of home address, social security number and other private personal information on originators and that such release raises significant concerns in the nature described above.

11. In the final rule and otherwise, HUD should work to achieve uniform licensure and registration standards for loan originators across the nation taking into account the separate federal registration system. The use of credit scores by states is a particular problem.

The undersigned particularly appreciated that portion of HUD's commentary on the state model law which said in part:

> "States may not, however, enact legislation, promulgate regulations, or otherwise impose requirements that would frustrate the objectives of the SAFE Act, keeping in mind that the SAFE Act's primary objectives include provision of a comprehensive licensing and supervisory system with uniform application and reporting requirements."[78]

We believe a key role for HUD under the statute should be to encourage uniformity, not just in licensing and registration, but for all loan originator requirements. The statute is

[77] SAFE Sec. 1502 (7), 12 U.S.C. 5101.
[78] Noted in U.S. Department of Housing and Urban Development Commentary on Model State Law, October 31, 2009.

clear that uniformity is a primarily purpose and accordingly language regarding uniformity should be part of HUD's rules.

Lenders subject to state regulation, including small businesses, that seek to serve borrowers in more than one state report unnecessary, duplicative state requirements that are causing needless effort and unreasonable costs that are ultimately borne by consumers. As examples, some states are requiring their own sets of fingerprints from originators even though originators have been fingerprinted to be licensed in another state. Similarly, states are pulling credit reports for originators even though the same reports have been sought by other states.

a. The use of credit scores by states are a particular problem that HUD should address with the states.

While SAFE authorizes states to pull credit reports, we do not believe it authorizes the use of credit scores as the basis for licensing decisions. We are concerned that some states are interpreting the ability to pull credit reports as authorization to base their licensing decisions solely on these reports.

Use of credit scores in this manner is unwarranted. Credit scores are designed to assist lenders in making credit decisions, not to measure the suitability of a person for a position as a loan originator. We know of no empirical evidence correlating an individual's credit score with that individual's suitability to be licensed as a mortgage loan originator. Several factors unrelated to job performance impact a person's credit score, including age and citizenship status.

We do not believe that Congress intended SAFE to require a credit score as a condition of licensing. We urge HUD to become involved in this important matter. In any event, variations among states respecting credit scores run counter to the objective of uniformity.

b. Recognition of out-of state licenses is also an important issue.

At the same time, states have not been granting recognition to licensees of other states as meeting the state's requirements. And some states have not granted provisional licenses to those experienced originators working for a depository institution, while he or she meets state licensing requirements.

HUD should work to address all of these concerns and should explicitly state in the rules that reciprocity and provisional licensing is in no way precluded, but rather is encouraged. Recognition of the licensure of other states along with rational provisional licensing would facilitate competition and ultimately lower consumer costs, without compromising the standards demanded under SAFE. Similarly, it would ensure that consumers are not deprived of the services of a registered originator under the Act,

while he or she meets applicable state licensing requirements within a reasonable period of time.

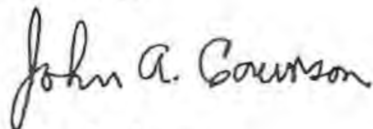
We strongly suggest that HUD not only call for uniformity in its rules but that the rules require a regular process of consultation with CSBS and AARMR, the federal banking agencies, and stakeholders such as MBA to identify areas where uniformity is lacking and to develop solutions to address such areas. MBA would like to meet with HUD at its earliest convenience to help initiate this effort.

IV. Conclusion

While the undersigned appreciate HUD's work in implementing this important law, it is particularly concerned about the undue expansion of SAFE's requirements through this rulemaking. It is also concerned that the process of serving troubled borrowers could be hampered by ill-founded registration and licensing requirements. Finally, we believe our other concerns merit attention as well. We look forward to assisting HUD in developing final regulations.

For questions or further information, please do not hesitate to contact Ken Markison, at MBA at kmarkison@mortgagebankers.org or at (202) 557-2930 Vicki Vidal, MBA at vvidal@mortgagebankers.org or at (202) 557-2861, Bill Himpler at AFSA at bhimpler@afsamail.org or at (202) 466-8616, or Rod Alba of ABA at ralba@aba.com or at (202) 663-5592.

Sincerely,



John A. Courson
President and Chief Executive Officer
Mortgage Bankers Association

Edward L. Yingling
President and Chief Executive Officer
American Bankers Association

Chris Stinebert
President and Chief Executive Officer
American Financial Services Association

California Mortgage Bankers Association

Colorado Mortgage Lenders Association

Indiana Mortgage Bankers Association

Michigan Mortgage Lenders Association

Missouri Mortgage Bankers Association

Mortgage Bankers Association of the Carolinas

Mortgage Bankers Association of Florida

Mortgage Bankers Association of Metropolitan Washington

Ohio Mortgage Bankers Association

Texas Mortgage Bankers Association

Virginia Mortgage Lenders Association

CONSUMER MORTGAGE COALITION

March 5, 2010

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, S.W., Room 10276
Washington, DC 20410-0500

Re: SAFE Mortgage Licensing Act: HUD Responsibilities Under the SAFE Act
Docket No. FR-5271-P-01

Dear Sir or Madam:

The Consumer Mortgage Coalition (CMC), a trade association of national consumer mortgage lenders, servicers, and service providers, appreciates the opportunity to submit these comments on the proposal by the Department of Housing and Urban Development (HUD) to implement certain provisions of the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the SAFE Act).[1]

The CMC has for many years advocated for licensure and registration requirements for loan originators, including through testimony on Capitol Hill and in various communications with HUD during several Administrations. CMC believes well crafted, streamlined licensure or registration requirements can assist consumers find and be sure they are dealing with qualified loan originators, and can also help the mortgage industry maintain appropriate lending standards. Consumers need reputable loan originators because consumers face a number of financially significant decisions during loan origination. Lenders also need to ensure that the individuals with whom they have business relationships are reputable. For consumers, loan decisions can be complex, and they vary by individual circumstances. A qualified loan originator can assist each consumer with each decision, resulting in loan terms that are the most appropriate for each individual's circumstances.

In this rulemaking, we note our support for HUD's position on "the importance of promoting loan modifications as a means of avoiding foreclosure[.]"[2] We share the same important goal, and our comments note ways in which HUD can increase rather than hinder modifications and other foreclosure alternatives with this rulemaking.

[1] Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, §§ 1501 – 1517, 122 Stat. 2654, 2810 – 2824 (to be codified at 12 U.S.C. §§ 5101 – 5116).
[2] 74 Fed. Reg. 66548, 66549 (December 15, 2009).

101 Constitution Ave., NW, 9th Floor West; Washington, DC 20001
TEL: (202) 742-4366 FAX: (202) 403-3926

I. Background – Congress Limited HUD's SAFE Act Role

The SAFE Act requires individuals who originate residential mortgage loans to be either registered or to be licensed and registered. The difference between the two requirements is based on whether an individual loan originator is employed by an entity regulated by one of six federal agencies[3] or is state-regulated. The SAFE Act carefully constructs two parallel systems, one federal and one state.

Those six federal agencies developed and maintained the federal SAFE Act registration system,[4] which is limited to federally-regulated loan originators.[5] Those agencies proposed a joint SAFE Act rule,[6] and one of them, the Federal Deposit Insurance Corporation (FDIC), has approved a final SAFE Act rule. Other agencies have submitted the joint rule to the Office of Management and Budget (OMB) for review because it is a significant regulatory action. The FDIC approved the final rule, to be issued jointly with the other agencies after OMB's review.[7]

State-regulated loan originators are subject to the state licensure and registration systems.[8] It is important to note that Congress did not delegate to HUD the duty to establish the state systems. Rather, Congress anticipated, rightly so, that the states would do so.

Nor did Congress dictate to the states precisely how they must license or register state-regulated loan originators. Congress left this matter to the discretion of the states. The SAFE Act provides:

> [T]he States, through the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators, are hereby encouraged to establish a Nationwide Mortgage Licensing System and Registry for the residential mortgage industry[.][9]

The SAFE Act sets out minimum standards for state licensure and registration, but neither requires states to adopt the standards, nor prevents the states from adopting

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[3] The six agencies are the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Farm Credit Administration, and the National Credit Union Administration.

[4] HERA § 1507(a).

[5] HERA § 1504(a)(1) requires either registration or a license and registration. Registration without licensure is limited to those who are registered loan originators, meaning those employed by one of the six federal agencies. HERA § 1504(3)(7).

[6] 74 Fed. Reg. 27386 (June 9, 2009).

[7] The FDIC's draft final rule, to be issued jointly, is available here:
http://www.fdic.gov/news/board/2009nov12no8.pdf
A recording of the November 12, 2009 FDIC board meeting at which the rule was approved is available here:
http://www.vodium.com/MediapodLibrary/index.asp?library=pn100472_fdic_boardmeetings&SessionArgs=0A1U0100000100000101

[8] HERA § 1504(a)(1)(B).

[9] HERA § 1502.

different or additional standards.[10]

The SAFE Act tasks HUD with three very limited roles, none of which involve determining what the substantive state licensure or registration requirements should be. One HUD role is to provide a backup licensing and registration system in an individual state only in the limited circumstance that the particular state fails to do so:

> If . . . a State does not have in place by law or regulation a system for licensing and registering loan originators that meets the requirements of sections 1505 and 1506 and subsection (d) of this section, or does not participate in the Nationwide Mortgage Licensing System and Registry, the Secretary shall provide for the establishment and maintenance of a system for the licensing and registration by the Secretary of loan originators operating in such State as State-licensed loan originators.[11]

Were HUD to implement a backup system for a state, it would have examination and enforcement authority for the backup system it would establish.[12] But HUD's authority to establish a back-up system only can become effective if a state were to fail to establish a sufficient system. In this event, HUD's backup system would only be effective in "such State" in the singular, not in every state.

A second HUD role is to establish a backup tracking system if the Nationwide Mortgage Licensing System and Registry (NMLSR) were to fail to do so:

> If at any time the Secretary determines that the Nationwide Mortgage Licensing System and Registry is failing to meet the requirements and purposes of this title for a comprehensive licensing, supervisory, and tracking system for loan originators, the Secretary shall establish and maintain such a system to carry out the purposes of this title and the effective registration and regulation of loan originators.[13]

Again, this aspect of HUD's authority only can become effective if the NMLSR were to fail to adequately register and track loan originators. In this event, HUD's authority would be limited to establishing and maintaining "such a system[,]" and would not extend to determining what the substantive state licensure or registration requirements should be.

Finally, HUD's third role is to determine whether a particular state system meets the minimum SAFE Act requirements:

> [T]he law in effect in a State meets the requirements of this subsection if the Secretary determines the law satisfies the following [specified]

[10] HERA §§ 1505, 1506.
[11] HERA § 1508(a).
[12] HERA § 1514.
[13] HERA § 1509.

minimum requirements[.][14]

Under this authority, HUD may determine whether the system of "a State[,]" in the singular, meets specified "minimum" requirements. In other words, the states, and not HUD, design and put into effect state licensure systems. HUD's role is merely to determine whether a state system meets the SAFE Act "minimum" requirements. If a state's system does meet the "minimum" SAFE Act requirements, HUD has no SAFE Act authority in that state.

A state is not prohibited from exceeding the SAFE Act requirements. However, HUD has no authority to require states to do so, or to dictate to states how they must do so.

HUD does not have any additional SAFE Act roles. Congress did not designate to HUD authority to expand or modify the SAFE act provisions.

> *Congress assigned to HUD a very limited SAFE Act role only when states or the NMLSR do not establish sufficient systems. HUD has no authority to expand SAFE Act requirements, to rewrite SAFE Act terms, or to require states to exceed SAFE Act requirements.*

II. HUD Proposes To Overreach Its Limited Authority

In the present rulemaking, HUD proposes, among other things, to clarify or interpret SAFE act provisions, including the scope of the definition of "loan originator." In particular, HUD is "inclined to require the licensing of individuals who perform loan modifications for servicers."[15]

At the outset, it is important to determine whether this proposal to expand the SAFE Act is part of any of the three roles that Congress assigned to HUD. HUD relies on its SAFE Act authority for its present rulemaking.

- ***Sources of HUD's Authority For The Present Rulemaking***

HUD specifies its authority for the present rulemaking.[16] HUD cites as its authority 12 U.S.C. §§ 5101 – 5113, which is HERA §§ 1501 – 1514, or most of the SAFE Act. This seems illogical because only §§ 1508, 1509, 1510, and 1514 (and arguably § 1512) of HERA give HUD any SAFE Act authority at all.[17]

For example, HUD relies on "authority" in HERA § 1503, which consists merely of

[14] HERA § 1508(d).
[15] 74 Fed. Reg. 66548, 66549 (December 15, 2009).
[16] 74 Fed. Reg. 66548, 66555 (December 15, 2009).
[17] HERA §§ 1516 and 1517, neither of which HUD relies on as authority for the present rulemaking, task HUD with making certain reports to Congress but do not provide HUD with authority to set licensure requirements.

definitions. Nothing in that section confers any authority on any regulator. Quite the opposite – it restricts those who do have SAFE Act authority. The section begins, "For purposes of this title, the following definitions **shall** apply" (emphasis added). Thus, any regulator with SAFE Act authority "shall apply" the § 1503 definitions. HUD seems to take the rather curious position that § 1503, which only restricts and does not empower HUD, is "authority" for HUD to rewrite one of those very definitions, the definition of loan originator. By this logic, no law would have any meaning.

HUD also cites 42 U.S.C. § 3535(d), which authorizes HUD to write necessary rules to carry out its "functions, powers, and duties." This rulewriting authority is limited to "functions, powers, and duties" that HUD otherwise has because the cited provision does not confer upon HUD any new functions, powers, or duties, such as creating new state licensure requirements. This letter does not question HUD's authority to write a rule, rather it examines HUD's authority to exercise "functions, powers, and duties" to expand the reach of the SAFE Act, as HUD proposes.

For these reasons, if the substance of the proposed rule exceeds HUD's limited SAFE Act functions, powers, duties, or authorities, it exceeds HUD's statutory authority. We next examine this question.

- ***HUD Does Not Act Under Its Authority To Establish A Backup System For A State That Does Not Have A Sufficient System***

One HUD SAFE Act role is to provide a backup licensing and registration system when a state "does not have in place . . . a system . . . that meets the [SAFE Act] requirements . . . or does not participate in the Nationwide Mortgage Licensing System and Registry."[18]

HUD can only provide such a backup licensing system if a state fails to establish a sufficient licensing and registration system or does not participate in the NMLSR. HUD has not identified any such state, and HUD does not describe any process by which it has surveyed the systems of any state or states. Moreover, HUD does not propose to establish a system for a particular state, rather, it proposes to impose a new requirement on every state.

For these reasons, HUD cannot be relying, in setting licensure requirements for all states, on its authority to establish a backup system for a state that does not have a sufficient system.

- ***HUD Does Not Act Under Its Authority To Back Up the NMLSR***

HUD's second SAFE Act role is to establish a backup system when the NMLSR "is failing to meet the requirements and purposes of" the SAFE Act.[19] HUD does not mention or suggest any deficiency in the NMLSR, and does not does not describe any process by which it has examined or even considered the sufficiency of the NMLSR. Nor

[18] HERA § 1508(a).
[19] HERA § 1509.

does HUD propose any backup or fix for any deficiency at the NMLSR.

For these reasons, HUD cannot be relying, in setting licensure requirements for all states, on its authority to provide a backup to the NMLSR.

- ***HUD Does Not Act Under Its Authority To Determine Whether A State System Meets SAFE Act Minimum Requirements***

HUD's third and final SAFE Act role is to determine whether law in effect in a particular state meets the SAFE Act minimum requirements.[20]

Again, HUD does not do so or propose to do so in this rulemaking. HUD does not describe any review it undertook of any state law to determine whether "the law satisfies" the SAFE Act requirements that Congress specified.[21] HUD undertakes no comparison of any state law to the SAFE Act. HUD does not identify any state law that it has reviewed or plans to review. HUD does not identify what deficiencies it found in any state law, or how the state may cure those deficiencies. Without a review of whether "the law satisfies" the SAFE Act, it is not possible for HUD to determine whether "a State meets the requirements" of the SAFE Act.[22]

For these reasons, HUD cannot be relying, in setting licensure requirements for all states, on its authority to determine whether a state system meets SAFE Act minimum requirements.

- ***HUD Exceeds Its SAFE Act Role By Usurping Authority Congress Left to the States***

Rather than work under the system of dual federal-state regulation that Congress carefully crafted, HUD proposes to usurp authority Congress left to the states, and proposes to dictate to states that they must exceed SAFE Act minimum requirements. This far exceeds any HUD authority.

We believe HUD should do as Congress directed, which is to permit the states to design and implement their systems. HUD should then review individual state systems to determine whether each meets SAFE Act "minimum" standards. In each state that meets the SAFE Act "minimum" standards, HUD should not exert any SAFE Act authority because it has no such authority.

III. Definition of Loan Originator – Congress Requires A Two-Prong Test

Congress included in the SAFE Act a two-prong definition of loan "originator," those who must register or be licensed.

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[20] HERA § 1508(d).
[21] HERA § 1508(d).
[22] HERA § 1508(d).

(A) IN GENERAL.—The term "loan originator"—
(i) means an individual who—
(I) takes a residential mortgage loan application;
and
(II) offers or negotiates terms of a residential mortgage loan for compensation or gain;
(ii) does not include any individual who is not otherwise described in clause (i) and who performs purely administrative or clerical tasks on behalf of a person who is described in any such clause[.][23]

By using the word "and" in bold above, Congress very clearly requires registration or licensure of a loan originator that meets *both* prongs of this test.

The Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) drafted model state legislation based on the SAFE Act,[24] but the model legislation changed the word "and" in bold above to "or," so that a person would be a loan originator by meeting either prong. The change of "and" to "or" includes within the definition of loan "originator" not only those who work with consumers in originating loans, but also those who work with consumers to modify an existing loan. On January 5, 2009, HUD published a notice stating that it "found [the model legislation] to be compliant with the SAFE Act[.]"[25]

A month later, the CSBS and AARMR, upon realizing that its amendment to the two-prong test would interfere with loan modifications, wrote to HUD asking for a delay in state licensure requirements:

> Concerns have been raised that immediate application of SAFE licensing requirements to servicer loss mitigation specialists assisting homeowners experiencing problems might seriously curtail such activity at a time of unprecedented numbers of mortgage delinquencies and defaults. . . . [F]ull implementation of all SAFE requirements on loss mitigation specialists in the midst of a significant need for loan modifications could delay assistance to homeowners who are in trouble.[26]

The FDIC's draft final rule, unlike the model state legislation, uses the word "and" rather than "or" in the two-prong definition, consistent with the language Congress enacted, and thereby does not reach all those who work on modifications. The agencies explain:

> In general, neither modifications nor assumptions result in the extinguishment of an existing loan and the replacement by a new loan, but rather the terms of an existing loan are revised or the loan is assumed by a

[23] HERA § 1503 (emphasis added).
[24] Available here: http://www.hud.gov/offices/hsg/ramh/mps/modellaw.pdf
[25] 74 Fed. Reg. 312, 313 (January 5, 2009).
[26] The letter is available here:
http://mortgage.nationwidelicensingsystem.org/SAFE/NMLS%20Document%20Library/csbs-aarmr-letter-to-hud-on-safe-act-2-5-09.pdf

new obligor. Thus, Agency-regulated institution employees engaged in these activities typically do not take loan applications, within the meaning of the S.A.F.E. Act. Therefore, the Agencies conclude that the S.A.F.E. Act's definition of "mortgage loan originator" generally would not include employees engaged in loan modifications or assumptions because they typically would not meet the two-prong test of this definition.[27]

IV. Congress Considered And Rejected An "Either–Or" Test

Early in the legislative process, Congress did consider using an "either–or" test in the definition of loan originator. In February 2008, the Senate considered a bill that contained the following language:

> (A) IN GENERAL.—The term ''loan originator''—
> (i) means an individual who—
> (I) takes a residential mortgage loan application;
> (II) assists a consumer in obtaining or applying to obtain a residential mortgage loan; **or**
> (III) offers or negotiates terms of a residential mortgage loan, for direct or indirect compensation or gain, or in the expectation of direct or indirect compensation or gain;
> (ii) includes any individual who represents 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 provide or perform any of the activities described in clause (i);
> (iii) does not include any individual who is not otherwise described in clause (i) or (ii) and who performs purely administrative or clerical tasks on behalf of a person who is described in any such clause.
> (iv) does not include a person or entity that only performs real estate brokerage activities and is licensed or registered in accordance with applicable State law, unless the person or entity is compensated by a lender, a mortgage broker, or other loan originator or by any agent of such lender, mortgage broker, or other loan originator.[28]

This was very different than what Congress enacted several months later. The changes are illustrated below:

> (A) IN GENERAL.—The term "loan originator"—
> (i) means an individual who—
> (I) takes a residential mortgage loan application; <u>and</u>
> (II) ~~assists a consumer in obtaining or applying to obtain a residential loan; or~~
> ~~(III)~~ offers or negotiates terms of a residential mortgage loan~~,~~ for ~~direct or~~

[27] Section-By-Section Description of the Final Rule, pp. 24-25.

[28] 154 Cong. Rec. S735 (daily ed. Feb. 6, 2008) (§ 3(3) of what was then S. 2595) (emphasis added).

~~indirect~~ compensation or gain~~, or in the expectation of direct or indirect compensation or gain~~;

(ii) ~~includes any individual who represents 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 provide or perform any of the activities described in clause (i);~~

~~(iii)~~ does not include any individual who is not otherwise described in clause (i) ~~or (ii)~~ and who performs purely administrative or clerical tasks on behalf of a person who is described in any such clause~~.~~;

~~(iv~~iii) does not include a person or entity that only performs real estate brokerage activities and is licensed or registered in accordance with applicable State law, unless the person or entity is compensated by a lender, a mortgage broker, or other loan originator or by any agent of such lender, mortgage broker, or other loan originator; and

(iv) does not include a person or entity solely involved in extensions of credit relating to timeshare plans, as that term is defined in section 101(53D) of title 11, United States Code.

Congress considered a bill that had an "or" separating the prongs, but rejected it and replaced it with the word "and."

> ***Congress clearly requires that the definition of "loan originator" must meet both prongs of the test.***

V. HUD's Proposal for Loan Modification Activities is Not Consistent With The SAFE Act

- ***HUD Proposes to Use Either Prong Rather Than Both As Required***

In the present rulemaking, HUD proposes to define loan "originator" using the word "and" in two-prong test, as the SAFE Act directs. However, HUD also proposes to alter the statutory definition by adding new language that would reach persons who meet "any" of the two prongs:

(b) (1) An individual engages in the business of a loan originator if the individual:

(i) (A) Takes a residential mortgage loan application; and

(B) Offers or negotiates terms of a residential mortgage loan for compensation or gain; or

(ii) Represents to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationary, brochures, signs, rate lists, or other promotional items), that such individual can or will provide **any** of the services or perform **any** of the activities

described in paragraph (b)(1)(i) of this section.[29]

This proposed addition to the definition of loan originator directly counters the express and clear definition Congress enacted, because the proposal effectively converts "and" to "or" in the two-prong test.

HUD's proposal inappropriately takes one SAFE Act provision, § 1504(b)(1), which clarifies that supervised loan processors and underwriters do not need to be licensed, and incorporates it into another provision, § 1503(3), the definition of loan originator. The purpose of § 1504(b)(1) is to clarify that licensure is not required for those individuals who, under the supervision of another, perform some functions involved in loan origination but who do not advertise that they "perform any of the activities" of a loan originator.

HUD's proposal would take this to mean anyone who does advertise the ability to perform either of the two prongs is thereby a loan originator. This contradicts the statute. Congress in § 1504(b)(1) *narrowed* the licensure requirement, yet HUD's proposal would use the same language to *expand* the requirement.

Only loan "originators" must be licensed. Congress defines loan "originators" to include only those who meet both prongs of the two-prong test. Congress also, in § 1504(b)(1), clarified that certain individuals who do not advertise that they perform either of the two prongs do not need to be licensed. Congress did not thereby *expand* the definition of loan originator to mean that anyone who does advertise that they perform either of the two prongs is a loan originator. Congress clearly defined loan originator to mean those who meet *both* prongs of the test.

Had Congress intended the result HUD proposes, Congress would have written the statute that way.

Not only did Congress not write the statute as HUD seems to infer, Congress specifically considered and removed that language from the definition of loan originator. As illustrated in the redlined language above, Congress originally had in a proposed definition of loan originator the following language:

> represents to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationary, brochures, signs, rate lists, or other promotional items), that such individual can or will provide any of the services or perform any of the activities described in . . .

As illustrated above, Congress later *removed* that language from the definition of loan originator. The language, largely intact, is today in § 1504(b)(1), and is used to *narrow* the definition of loan originator.

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[29] Proposed 24 C.F.R. § 3400.103 (emphasis added).

That is:

- Congress defined loan originator to include only those who *both* take loan applications and offer or negotiate loan terms.
- Congress considered and rejected the notion of defining loan originator to include those who represent that they can either take an application or offer or negotiate loan terms.
- Congress enacted an exemption from the definition of loan originator for those who do not represent that they can take an application or offer or negotiate loan terms.
- HUD proposes to define a loan originator to include those who represent that they can either take an application or offer or negotiate loan terms.

HUD's proposal is well beyond what Congress enacted, and is exactly what Congress *rejected*. This proposed definition is well beyond HUD's statutory authority.

Any interpretation that requires only one of the two statutory prongs in the definition of loan originator would exceed the scope of authority Congress granted to HUD for two reasons. First, HUD does not have authority to increase the "minimum" SAFE Act standards, as described above. HUD may determine whether a state meets the minimum standards, and if so, HUD has no additional SAFE Act authority as to that state.

Second, HUD does not have authority to put into the SAFE Act definition of loan originator language that Congress expressly decided *not* to include.

We believe HUD has no choice but to withdraw its proposed definition of loan originator.

➢ ***Loan Modifications Differ From Both Loan Refinances and Loan Originations***

HUD states that it is inclined to include within the definition of loan originator those who perform loan modifications in addition to those who perform loan originations. In explaining why it proposes to overrule Congressional intent, HUD states:

> The activities of a loan servicer that result in modification of the terms of a residential mortgage loan can be virtually indistinguishable from the performance of a refinancing, which is unambiguously covered by the SAFE Act.[30]

We must respectfully disagree. As noted above and as explained in the FDIC draft final rule quoted above, employees engaged in loan modifications do not take loan applications within the meaning of the SAFE Act because modifications do not result in the extinguishment of an existing loan and the replacement by a new loan, but merely revise one or a few terms of an existing loan.

[30] 74 Fed. Reg. 66548, 66553 (December 15, 2009).

This is evident from examining the functional activities of a servicer that result in modification of the terms of a residential mortgage loan as compared to the completely different activities involved in a refinancing. Refinancing a loan is different than modifying a loan, both in terms of effects on the borrower, and in terms of the lender's or servicer's activities.

Congress enacted the SAFE Act to "enhance consumer protection,"[31] not to regulate what HUD terms "the activities of a loan servicer[.]"[32] What an originator does is important under the SAFE Act only because it may affect consumer risks and consumer protection. Therefore, in this consumer protection rulemaking, in analyzing whether loan modifications are equivalent to loan refinances, the focus must be on the differences in risks and protections to consumers between loans that are modified and refinanced.

In a refinance, the borrower has a number of significant decisions to make:

- Is it more or less expensive to pay the transaction costs of refinancing in exchange for a better loan?
- Over what time span should that question be analyzed?
- Would it be better to pay more origination points and get a lower interest rate, or would it be better to do the opposite?
- Would it be better to make a large principal down payment and get a lower rate, or make a small down payment and pay a higher rate?
- Would it be better to get a fixed rate or an adjustable rate that, at least now, is lower?
- Would it be better to get a 30-year term, or a 15-year term at a lower rate?
- Would it be better to agree to pay a prepayment penalty in exchange for a lower interest rate, or have no penalty and pay a higher interest rate?
- Is it better to take out cash, and if so, how much?
- How much shopping for settlement services is appropriate?
- Is it better to select a settlement service provider from the loan originator's "written list" or select another?
- Is it better to lock an interest rate right away or let the rate float? If it is better to let the rate float, float for how long?

A loan originator works with the borrower through each of these significant questions. Licensure of loan originators may reasonably be expected to protect consumers as they make this large number of important decisions. Licensure would not promote borrower protection in modifications as it would in originations for three reasons.

First, in a modification the borrower faces no significant or difficult questions. Modifications are designed to help a borrower meet the original loan obligation, with one or a few loan terms changed to the benefit of the borrower. Modifications do not present a number of significant questions to answer, so the risk of an inappropriate decision is very small.

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[31] HERA § 1502.

[32] 74 Fed, Reg, 66548, 66553 (Dec. 15, 2009).

Second, modifications are designed for the purpose of benefitting borrowers, such as by avoiding an unnecessary foreclosure. Borrowers do not need protection from modification programs that are designed to benefit them.

Third, even for the few loan terms that may change in a modification, the servicers who work with the borrower do not have the flexibility that a loan originator does to alter the resulting loan terms. Modification requirements and rules are set by several parties, but not by the borrower and not by the person working on the modification with the borrower. The Treasury Department has been instrumental in creating the Home Affordability Modification Program (HAMP) program. HAMP sets out specific modification requirements and terms, which servicers cannot modify. Private investors also set modification parameters and the employer of the person working on a loan modification sets additional modification standards and requirements for non-HAMP modifications. Regardless of whether a loan is modified within HAMP, the people who work with consumers on modifications do not have discretion to select modification terms, or to cause the borrower to select modification terms. The servicer working with a borrower on a modification cannot influence the final loan terms, so licensure would not offer consumer protection.

In a modification, the borrower updates income and debt information that the servicer already has, the servicer verifies the information update, applies it to the modification limitations, and arrives at a yes or no answer – either the borrower does or does not qualify for a modification. If the answer is yes, the modification limitations dictate precisely what the modified terms will be. Unlike in a refinance, in a modification there are no terms for the borrower to negotiate.

The distinction between modifications and originations has long been recognized in other loan origination laws. The Truth in Lending Act and the Real Estate Settlement Practices Act require, and have long required, a number of significant consumer disclosures for loan refinances that are not required in modifications. This is because modifications simply do not present the risks to consumers that a refinance may present.

- ***Mere Referral of a Borrower to a Lender Should Not Require Licensure***

HUD's proposal would include within the term "offers or negotiates terms of a residential mortgage loan for compensation or gain" an individual who:

> 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[.][33]

A person who works at a lender's affiliate but does not work with residential mortgage loans may have a customer ask about a mortgage loan, or may make a customer generally

[33] Proposed 24 C.F.R. § 3400.103(c)(2)(i)(C).

aware that an affiliate can make mortgage loans. It is common practice for diversified financial institutions to make consumers aware of the products and services that their affiliated companies offer. Doing so provides consumers with more choice and increased availability of financial products. As is entirely appropriate, the affiliate's employee will refer the customer to the lender's mortgage lending affiliate. In this case, the employee "recommends or refers" this customer to a "particular lender," in accordance with a "duty" to the affiliate's ultimate parent company.

The proposed regulation is so broadly written that this innocuous act would require the employee to be licensed if the employee received or expected to receive compensation in connection with that activity, such as a salary. As the proposed rule is written, this could be the case even if the referral were to go to a federally-regulated depository institution to which HUD's rule does not apply. We believe HUD should clarify that its rule does not apply to those who make referrals to affiliates or to institutions not subject to HUD's rule.

Most importantly, however, there is simply nothing in the SAFE Act that in any manner suggests that Congress intended such an all-encompassing definition of the phrase "offers or negotiates terms of a residential mortgage loan." This is an overly broad licensure requirement, and is an overly broad interpretation of one of the two required prongs in the definition of loan origination. Referring a consumer to a particular lender, whether for compensation or otherwise, is not offering or negotiating loan terms. In the example above, the referring employee would have no idea what terms the consumer would or could receive, and the employee would have no ability to influence the terms. We can imagine no reason why the mere mention of a mortgage lender's existence and telephone number should require licensure.

This is especially so because Congress plainly required offering or negotiation loan terms *and* taking a loan application before licensure may be required. In this instance, HUD would require licensure where a person meets the plain meaning of *neither* of the two required prongs.

Further making unnecessary a licensure requirement for referrals to an affiliate is a different law, in which Congress and HUD both expressly permit such referrals.

> Section 8 of RESPA permits . . . an employer's payment to its own employees for any referral activities.[34]

Congress and HUD have long recognized that referrals to an affiliate are appropriate. Adding a licensure requirement would therefore be an inappropriate regulatory burden with no countervailing benefits in consumer protection. Restricting referrals to a lender's affiliate would restrict consumer choice but would add no consumer benefits. The mortgage lender to whom the consumer is referred would be subject to the full panoply of ethical, professional, and educational requirements of the SAFE Act. Requiring licensure of one who merely makes a referral to a SAFE Act-regulated lender would be duplicative and would offer no consumer protection.

[34] 24 C.F.R. § 3500.14(g)(1)(vii).

For these reasons, we urge HUD to require both of the two required prongs of the test in its definition of loan originator. Referral to a lender is not one of the prongs, and referrals in the absence of both required prongs should not be defined as loan origination.

VI. Loan Modifications Benefit Consumers

HUD is of the view that modifications may involve an increase in the loan's interest rate, or an increase in the loan principal.[35] The purpose of modifying loans is to prevent unnecessary foreclosures. There would be no reason for a struggling borrower to agree to disadvantageous loan modification terms.

It may be that HUD has in mind a case where a borrower is behind on payments due to temporarily reduced income or extra expenses, and seeks relief from a servicer. A servicer may agree to capitalize the amounts past due over the remaining term of the loan, reamortize the loan, and give the borrower a clean start. This permits the borrower to start anew without having to come up with the cash for the missed payments all at one time. In this event, the borrower has the advantage of not having to make payments for a number of months, and of spreading those skipped payments over the remaining years of the loan term. The remaining monthly payment will increase when the loan is reamortized. (The borrower does not take out cash.) The amounts that are spread out over the remaining years are amounts that the borrower *already owed*. The modification merely postpones the payment due date for one or several payments. This is unambiguously a borrower benefit. If it were not, the borrower would simply decline the option to spread past due payments over time.

Modifications are intended solely to avoid foreclosure, and when a borrower avoids foreclosure, all would agree, the borrower benefits. Borrower benefit is the entire purpose of modifications and there simply is no reason to require consumer "protections" through SAFE Act licensure to protect consumers from options they prefer and need.

Rather, requiring the regulatory burden of licensure of those who provide such consumer benefits would severely impair the ability to offer these benefits or even cause the benefits to disappear.

VII. HUD's Proposal for Loan Modification Activities is Not Consistent with the Objectives of the SAFE Act

HUD proposes to define the two prongs of the loan originator test in a way that demonstrates that those who work on loan modifications do not increase risks to consumers.

- ***Taking An Application***

HUD proposes to define taking an application to mean receipt of:

[35] 74 Fed. Reg. 66548, 66553 (December 15, 2009).

> a residential mortgage loan application for the purpose of deciding (or influencing or soliciting the decision of another) whether to extend an offer of residential mortgage loan terms to a borrower or prospective borrower[.][36]

By definition, there is no mortgage loan application in a modification, but we presume that HUD proposes to reach those who receive information for the purpose of making or soliciting a modification decision.

In fact, investors do not look at individual loan files in deciding which loans to modify. Rather, investors determine ahead of time the parameters for the types of modifications to make, and delegate to servicers the function of meeting investor requirements. Servicers do not have discretion to deviate from investor requirements. Servicers apply investor requirements without communicating with investors on individual loans. Therefore, there is no servicer "deciding" or "soliciting the decision" in a modification, so servicers do not take an application within this proposed definition.

We note that HUD neither requires nor proposes to require state licensure of translators or loan counselors. We believe this is appropriate because neither translators nor counselors are in a position to make decisions for borrowers, they merely explain and educate. Servicers likewise are not in a position to make modification decisions for borrowers. As there is no reason for translators and counselors to be licensed, there is no need for servicers to be licensed.

- ***Offer Or Negotiate Loan Terms***

HUD proposes to define the SAFE Act term "offers or negotiates" loan terms as met when an individual does any of three things:

> (A) Presents for acceptance by a borrower or prospective borrower residential mortgage loan terms;
> (B) Communicates directly or indirectly with a borrower or prospective borrower for the purpose of reaching an 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[.][37]

This definition would mean that a person who "presents" loan terms to a borrower also "offers" or "negotiates" the terms. The Postal Service "presents" loan terms by delivering them in the mail. Surely HUD does not intend the word "presents" to mean simply "sends" or "delivers."

[36] Proposed 24 C.F.R. § 3400.103(c)(1).
[37] Proposed 24 C.F.R. § 3400.103(c)(2)(i).

Communicating with a borrower to reach an understanding about loan terms is part of offering or negotiating loan terms. However, many people, servicers and others, communicate with a borrower to reach an understanding about loan terms. Loan counselors routinely do so. Translators also routinely do so. This does not mean that counselors or translators offer or negotiate loan terms. They assist borrowers in understanding what the loan terms mean, but do not select the terms. A licensure requirement for servicers would not alter the modification terms consumers receive.

VIII. Licensure of Servicers Would Be Inappropriate Policy

In addition to examining the Congressional directive that loan "originators" meet both prongs of a two-prong test, it is important to look at the policy implications of requiring state licensure of state-regulated loan servicers.

A state licensure requirement would entail a regulatory cost and burden. HUD notes there would be costs, but rather than attempt to weigh the costs against the benefits, HUD merely asserts that benefits will be "balanced against these costs[.]"[38]

- ***Licensure Requirement Would Hinder Foreclosure Avoidance Activities***

Requiring state licensure of each person who works on loan modifications or other foreclosure avoidance activities for a state chartered servicer would impose a cost as well as an operational burden in the servicing industry. The mortgage servicing industry today is struggling to handle the number of defaults that are occurring and will continue to occur. Were state-chartered servicers burdened with a licensure requirement, the resources available for foreclosure avoidance would be reduced. This is the reason the CSBS and AARMR took the unusual step of backing away from their model state legislation and instead asking HUD not to interfere with modifications through a state licensure requirement for servicers who work on modifications.

For servicers who operate interstate, which is common, a state licensure requirement would be particularly disruptive because individuals at servicers today work on freely across state lines to avoid foreclosures. With a licensure requirement, staffs would need to be segregated by who is licensed in which state for as long as it takes to get fully licensed in each state. This would certainly disrupt the flow of foreclosure avoidance activities, at a time when disruption would be quite harmful and counterproductive.

HUD appears to recognize that a state licensure requirement would disrupt foreclosure avoidance activities. HUD proposes to permit states to delay licensure requirements for those who work on certain modifications and refinances.

> For an individual who engages in the business of a loan originator solely by providing or facilitating residential mortgage loan modifications and refinancing under the Department of the Treasury's Making Home

[38] 74 Fed. Reg. 66548, 66554 (December 15, 2009).

> Affordable program, a State may delay the effective date for requirements it imposes in accordance with §§ 3400.103, 3400.105, and 3400.107 until the date such program is terminated.[39]

We agree with HUD that a state licensure requirement would interfere with modifications and refinances under the Treasury's Making Home Affordable program. For the same reasons, a state licensure requirement would also interfere with modifications and refinances under any other programs. If delay in licensure requirements is necessary for some, it is likewise necessary for all foreclosure avoidance programs.

Foreclosure avoidance actions are not limited to modifications and refinances. They also include deeds-in-lieu of foreclosure and short sales.

We share HUD's important goal of promoting loan modifications and refinances as a means of avoiding foreclosure. To achieve this, we urge HUD not to require the states to require licensure of servicer employees, and we urge HUD not to require states to require licensure of those who work to avoid foreclosures.

➤ ***Licensure Would Not Remedy An Identified Problem***

We are unaware of any benefit HUD has identified that licensure of those who work on modifications could address. HUD describes the question in its proposed rule:

> One of the questions asked concerned the applicability of the definition of loan originator to individuals who modify existing residential mortgage loans. As HUD's response to this question reflects, given the extent to which today's loan modifications can be virtually indistinguishable from refinances, HUD sees the reasonableness of covering these individuals under the definition of loan originator and has advised that it is inclined to require the licensing of individuals who perform loan modifications for servicers.[40]

HUD "sees the reasonableness" of requiring licensure of servicers who work on loan modifications, but does not address its lack of authority to do so. Nor does identify any potential problem that licensure of servicers working to avoid foreclosure would address. HUD does not, for example, identify abuses in loan modifications that licensure of people working at servicers could address.

There have been modification abuses by people *not* employed at servicers, such as parties who charge an upfront fee for promised foreclosure relief that does not materialize. HUD is one of the many agencies fighting such abuses, in no small part by steering borrowers to HAMP modifications rather than other foreclosure "rescue" deals.[41] But licensure of servicers, who are *not* involved in such abuses, could never address this problem.

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[39] Proposed 24 C.F.R. § 3400.109(d),

[40] 74 Fed. Reg. 66548, 66549 (December 15, 2009).

[41] For just one of a great many possible examples, *see* http://www.hud.gov/news/release.cfm?content=pr09-033.cfm

- ***HAMP Can Address Potential Modification Problems Most Effectively***

Many loan modifications programs are federally designed and federally operated. A great number of modifications today are made under, or are modeled after, the Treasury Department's HAMP. Under HAMP and other modification programs, each borrower and each loan must meet predetermined eligibility standards; the loan is put through a "waterfall" process of modifying different loan terms, in a predetermined order, in predetermined amounts, until the loan payment reaches a predetermined level of borrower affordability. This modification process is mechanical rather than discretionary, and it is the same virtually nationwide. In a modification, the borrower does not have the option of selecting between different loan terms as a borrower does in a refinance.

Fannie Mae and Freddie Mac operate the HAMP program, which is designed with the Treasury Department. The Federal Housing Administration (FHA) has a substantially similar modification program. All are designed based on the FDIC's earlier "mod-in-a-box" program.

While it is possible for modifications to be made outside of the federal programs, servicers have an extremely strong incentive to apply the federal program. Congress enacted a "servicer safe harbor" that shields servicers from liability to mortgage investors for inappropriate modifications when the servicer implements a "qualified loss mitigation plan," meaning the HAMP plan.[42] The protection from servicer liability to investors is important to servicers.

If HUD were to identify some problem that needs to be addressed, the most effective remedy would be to solve the problem through the federal modification program. If, for example, HUD were to identify lack of training as a problem in modifications, it could, with the other federal agencies, require servicers to provide more training. If HUD were to identify lack of uniform reporting requirements, the agencies could likewise amend their reporting requirements. Similarly, if HUD is of the view that too few borrowers receive modifications, that concern could be addressed simply by amending the HAMP target payment level.

Addressing any modification problems through HAMP would be the most effective remedy because HAMP changes can be made quickly. This would be the far more effective remedy than state licensure of some but not all loan servicers. It also would be faster and would entail substantially less regulatory burden.

- ***Licensure Would Threaten Specific Consumer Benefits***

Servicers today regularly offer certain consumer benefits that a licensure requirement could threaten.

[42] Preventing Mortgage Foreclosures and Enhancing Mortgage Credit, Pub. L. No. 110-22, § 201(b), 123 Stat. 1632, 1638 (to be codified at 15 U.S.C. § 1639a).

Servicers must pay property taxes, water bills, or other items when borrowers fail to pay them as required. The servicer then seeks reimbursement from the consumer. Servicers commonly permit the borrower months or years to repay the servicer. In economic effect, this is a loan from a servicer to a borrower. This should not be treated as a new loan for SAFE Act purposes because it is part of the existing loan agreement, and is pursuant to the terms of that agreement. Under the proposed definition of mortgage loan originator, it is not clear that individuals who participate in this practice would be excluded.

Another consumer benefit concerns loan assumptions, which do not change any loan terms. Those who work with consumers on loan assumptions do not have any ability to alter or affect any term on the loan. Consumers elect to assume loans rather than to take out a newly originated loan because assumptions can offer benefits, such as a lower interest rate than would otherwise be available. Servicers may elect to permit borrowers to assume a loan even if not required to do so.

If a licensure requirement were to make the offering of these consumer benefits not cost-effective for servicers, the benefits could be reduced or disappear. These should be recognized as important consumer benefits, and should not be threatened in the name of consumer protection.

- ***Licensure of Servicing Staffs Would Apply Inappropriate Education Requirements***

One aspect of a licensing requirement is an education requirement, which entails initial as well as continuing education. States have education requirements designed for loan originations, but not necessarily for loan modifications. The education requirements relating to loan origination cover many topics that do not arise in a modification, such as the many aspects of closing costs, broker compensation issues, mandatory waiting periods before loan consummation, and others.

If HUD were to require states to require licensure of servicers, states would need to redesign their education programs and requirements to cover loan modifications. This would require the states to redesign their educational programs, which would take some time. In all likelihood, the intense modification drive would be near its end by the time the appropriate education system would be in place. In the interim, a licensure requirement for servicers would require them to receive training that they would not use. This would be an unnecessary regulatory burden with no apparent benefit.

IX. Servicer Modification Operations

We provide here information in response to HUD's request for comment on the operations of servicers as they modify loans.

Servicing staff that work on modifications and other foreclosure avoidance efforts are separate and separated from loan origination staff. Servicers working to avoid

foreclosure are not able work on, and do not have the access to the technology necessary for, loan originations. Likewise, loan originators are not able to work on, and do not have access to the technology necessary for, loan modifications. Servicing and origination groups report through separate management channels.

Servicers use multiple methods to reach modification candidates, including mail, website and telephone availability, and telephone and e-mail outreach.

Servicer employees who will work on foreclosure avoidance are thoroughly trained in the several tasks they will perform. They are trained in the types of foreclosure avoidance methods, such as modification. They are fully trained in each step necessary for a modification, such as the HAMP trial period, which has specific requirements. They are equipped and trained to explain the steps to borrowers, and to explain what is necessary to complete each step. Should a borrower during a modification process switch to a refinance, that borrower would need to be transferred to the origination line of business, and would need to work with different people.

The information servicers collect from borrowers for a modification is updated and verified information about the borrower's income and debts, and a hardship affidavit, in accordance with the HAMP or other modification program requirements. The individual working with a borrower on a modification does not have discretion to alter modification qualification standards or to alter verification procedures.

X. Uniform Requirements Are Most Appropriate

Congress stated that "increas[ing] uniformity" is one of the many important purposes of the SAFE Act's licensure and registration systems.[43] HUD likewise states that "uniform license applications and reporting requirements" is a SAFE Act benefit. We certainly agree that uniform requirements are appropriate. From a consumer's perspective, mortgage loans are the same in each state. If the rules are uniform across state lines, they will be easier for consumers to understand.

To this end, we recommend two ways that HUD can promote uniform SAFE Act rules.

- ***HUD's Rule Should Be Consistent With The Interagency Rule***

We believe HUD should adopt a rule jointly or consistently with the interagency federal SAFE Act rule. At a minimum, HUD's rule should not *contradict* the interagency rule by stretching the SAFE Act's terms to reach loan servicers while the other agencies recognize and follow the statutory two-prong test.

The difference between being subject to the interagency federal SAFE Act rule and comparable state rules is based on the form of charter for the mortgage lender or servicer. This charter difference is unrelated to consumer protection. Modification of a consumer mortgage loan is the same regardless of the form of the servicer's charter. We can see no

[43] HERA § 1502.

benefit to having HUD require the states to require licensure of servicer employees working on loan modifications if the servicer happens to have a state charter, while similar employees of a federally-regulated servicer would not need to be licensed or registered. This would create a significant regulatory burden to state chartered servicers because of their state charter, and would be inconsistent with the legislative intent of the SAFE Act that there be "uniform"[44] requirements as to this issue.

Congress intended a level playing field. Given that the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Farm Credit Administration, and the National Credit Union Administration jointly agree that registration of servicers working on modifications is not required for the protection of consumers, we do not see a reasonable basis for HUD to impose such a burden on servicers who happen to be state-regulated.

There is another area where HUD's proposal is slightly different than the interagency federal rule where we believe consistency is appropriate. HUD proposes, appropriately, that persons convicted of certain crimes are not eligible for licensure,[45] but that expungement of a conviction "does not affect the ineligibility of the convicted individual."[46] This is a problem because a lender, despite full due diligence, may be unable to discover an expunged, sealed, or juvenile conviction.

The interagency federal rule approaches this problem by requiring registrants or their employers to report information to the NMLSR, including, among other things, convictions of any criminal offense involving dishonesty, breach of trust, or money laundering.[47] Section 19 of the Federal Deposit Insurance Act prohibits individuals who have been convicted of such crimes from participation in the affairs of insured depository institutions.[48] The agencies explain:

> The Agencies intend to rely on FDIC rules and guidance interpreting section 19(a)(1) of the FDI Act with respect to the interpretation of criminal offenses covered under section 19 of the FDI Act. Therefore, amending the proposal to include this language in the final rule provides clearer guidance to originators and their Agency-regulated institution employers of the types of criminal offenses required to be disclosed. For example, the FDIC excludes expunged, sealed and juvenile offenses and, therefore, the Agencies would not expect this information to be provided to the [NMLSR]. The final rule also would not require acquittals to be reported.[49]

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[44] *Id.*
[45] Proposed 24 C.F.R. § 3400.105(b).
[46] Proposed 24 C.F.R. § 3400.105(b)(2)(i).
[47] 12 C.F.R. § 365.103(d)(1)(iii) of the joint rule, pp. 92 – 93, available here: http://www.fdic.gov/news/board/2009nov12no8.pdf
[48] 12 U.S.C. § 1829. The FDIC rules implementing this provision are at 12 C.F.R. §§ 330.220 – 223.
[49] Section-by-Section Analysis of the joint rule at p. 50 (footnotes omitted).

We believe the treatment of expunged, sealed, and juvenile offenses should be the same under both state and federal rules because the fact that a lender has a state or federal charter is irrelevant to this issue. We therefore urge HUD to delete proposed § 3400.105(b)(2)(i) and exempt expunged, sealed, and juvenile offenses from proposed § 3400.105(b)(1). Otherwise, state-chartered lenders would be unable to protect against inadvertently hiring inappropriately licensed loan originators, putting them at a disadvantage to federally-chartered lenders.

The protections of the SAFE Act are just as important for consumers regardless of a lender's charter. We believe HUD should encourage states to maintain a level playing field, and should minimize differences between state laws and the federal SAFE Act rules.

- ***HUD Should Take The Lead In Implementing Seamless, Uniform State Rules***

Another way in which HUD can promote uniform rules would be to take the lead in establishing one set of uniform rules for the states, and encouraging the states to conform their rules to the uniform rules.

In particular, HUD is uniquely in a position to lead the states to adopt reciprocity rules, by which a loan originator licensed or registered in one state may originate loans in another state without duplicating the licensing or registration process. This would have a number of benefits, including that it would make it easier for loan originators to originate loans in a new state without having to wait while repeating a registration or licensing process. It would still ensure that the loan originator meets the uniform requirements, as necessary for consumer protection. Reciprocity would reduce regulatory burden and would reduce the cost of mortgage credit, without weakening consumer protections.

XI. Conclusion

For all the reasons discussed, we urge HUD to conform its rule to the SAFE Act and to the interagency SAFE Act rule, by clarifying that employees of state chartered servicers who work on loan modifications and foreclosure prevention are not subject to state licensure requirements. We further urge HUD to take the lead in encouraging the states to adopt uniform rules that conform to the interagency rules and to the SAFE Act, and that permit reciprocity of licenses and registrations.

Finally, we would like to note that the CMC supports the comments being filed by the Mortgage Bankers Association in the present rulemaking.

Sincerely,

Anne C. Canfield

Executive Director