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July 9, 2009

Gary K. Van Meter, Deputy Director
Office of Regulatory Policy
Farm Credit Administration
1501 Farm Credit Drive
McLean, Virginia 22102-5090

Mary Rupp, Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
RIN 3064-AD43

Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 2-3
Washington, DC 20219
Docket Number OCC-2009-0005

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Docket No. R-1357

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: OTS-2009-0004

Re: Proposed Rule—Registration of Mortgage Loan Originators to Implement the Secure and Fair Enforcement for Mortgage Licensing Act (SAFE Act), 74 *Federal Register* 27386-422 (June 9, 2009)

Dear Sir or Madam:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on the proposed interagency rules designed to implement provisions of the SAFE Act that would require loan originators employed and supervised by depository institutions to register with a national database.

[1] ABA 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 $13.3 trillion in assets and employ over 2 million men and women.

ABA Position

ABA appreciates the thoughtful approach that the Agencies[2] have taken to implement these requirements, but also has a number of concerns more fully detailed below that we believe need to be addressed to make the program viable. To ensure that mortgage markets are not unnecessarily hampered – a critical need in today's environment – ABA strongly urges the agencies to make these revisions before the rule is finalized.

First, we believe that the rule should be focused on loan originators and not the many other members of a bank staff who may assist with the process but do not actually underwrite or originate a loan. Even more important in the current environment, registration should be designed to capture loan originators and not individuals who are modifying existing loans. Similarly, while processing of data can and should be done at the institution level, ABA strongly urges the agencies not to lose focus on the fact that this is an individual and not an institutional registry program.

ABA also urges the agencies to take appropriate steps to protect the information in the database to avoid unnecessarily compromising individuals who are enrolled. Moreover, because this will be a massive undertaking, ABA recommends that the agencies grant and facilitate batch processing of depository institution employees. Similarly, because this is a major effort when so many other demands have been placed on banks and mortgage originators, ABA urges the agencies to provide sufficient time to transition into this brand new system to avoid unnecessary and costly errors; in other words, quality should not be sacrificed to speed.

Background

The SAFE Act, adopted by Congress on July 30, 2008, creates a mandatory nationwide licensing and registration system for mortgage loan originators. For depository institutions, the SAFE Act requires the Agencies to develop and maintain a registration system by July 29, 2009 for employees of supervised institutions to register as mortgage loan originators with an assigned unique identifier.

The goal underlying this registration system is to provide increased accountability and tracking of mortgage loan originators, enhance consumer protections, reduce fraud in the mortgage loan origination process, and provide consumers with easily accessible information at no charge about the employment history and publicly adjudicated disciplinary and enforcement actions against mortgage loan originators. As background for the publicly-available information, the Agencies must also require information be compiled on loan originators, including fingerprints for submission to the Federal Bureau of Investigation (FBI) or other authorities to assist with background investigations and personal history and experience.

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

The registry is an existing system recently developed by the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulations (AARMR). It was initially launched in January 2008 for use by state authorities and was not designed to support federal registration of Agency-regulated institution employees. To accommodate these changes, substantial changes to the registry system will be needed. In addition, as noted by the Agencies in the preamble to the proposal, the functionality and the ability to handle the massive input of data will have to be addressed, as will issues of data privacy and security.

***De Minimis* Exception**

> *The Agencies solicit comment on whether the proposed exception adequately and appropriately covers circumstances that are truly de minimis and whether any de minimis exception is appropriate. In addition, the Agencies specifically invite comment on: whether the individual and institution-wide limits on the number of residential mortgage loans for which employees may act as a mortgage loan originator without registering and obtaining a unique identifier are appropriate; whether the proposed exception is adequately structured to prevent manipulation or "gaming" of the registration requirements; whether an institution should aggregate its residential mortgage loans with its subsidiaries when calculating the number of mortgage loans originated for purposes of this exception; whether monitoring for compliance with the proposed exception would be unduly burdensome for Agency-regulated institutions, and if so, how such burden could be minimized; and whether the proposed exception is consistent with the consumer protection and fraud prevention purposes of the SAFE Act.*

ABA Response:

The Agencies' proposed *de minimis* exception entails a two part approach where, during the previous 12 months, the employee must have acted as an originator for 5 or fewer residential mortgage loans and the institution as a whole does not originate more than 25 residential mortgage loans. ABA finds this dual-pronged test is fundamentally inconsistent with the underlying premise of the statute and narrows the exception in a way that renders it worthless to most banking institutions.

ABA believes that this test should be revised in a manner more consistent with the intent of the SAFE Act by keeping only that part of the test that measures originations performed by individual originators. The overall thrust of this legislation is aimed at establishing standards and increased tracking mechanisms over individual mortgage originators; it is not intended to serve as a system of registration for institutional actors. As such, it is inappropriate to use aggregate numbers of institutional loans in order to measure *de minimis* thresholds that should apply to individuals. The fundamental rationale for the statutory registration requirement is to ensure that individual mortgage originators can be tracked. In fact, the overall registration scheme is based on individuals and not the institution.

Therefore, ABA recommends that the final rule delete the 25-loan limit applicable to institutions and keep only the 5 or fewer originations test that applies to individual

originators. ABA appreciates the regulators' concerns that the two-prong approach attempts to place controls on unscrupulous lenders that may attempt to evade the law by apportioning originations among staff in a manner that avoids the requirement to register. ABA believes this concern is entirely misplaced with respect to regulated depository institutions. It is implausible that regulated depository institutions will engage in deceitful staff allocations merely to "game the system." Such evasive activity would impose unrealistically high costs and unreasonable regulatory risks for banks, and would not, under any circumstance, be worth the potential gain. If the agencies have concerns, the *de minimis* threshold is not the appropriate means to address the problem.

> *The Agencies also solicit comment on whether an asset-based threshold is appropriate or whether other types of limits or thresholds, or other ways of structuring a de minimis exception, would be more appropriate. For example, should the proposed de minimis exception be applicable only to Agency-regulated institutions with total assets that do not exceed the amount that the Board establishes annually for banks, savings associations, and credit unions as an exception from the Home Mortgage Disclosure Act (HMDA)?*

ABA Response:
As per the views set forth above, ABA believes that it makes little sense to use an institution-based test to establish thresholds that are applicable to individual originators, pursuant to a statute that is meant to impose controls over individual mortgage originators. To remain consistent with the intent of the law, the Agencies should retain the simplicity of an originator-based threshold that does not depend on institutional size or activity—if the originator performs 5 or more originations in a given year, then registration requirements apply. While there may be some appeal to incorporating a separate regulatory threshold to exempt certain originators, ABA believes it is important to emphasize that the focus of the statute is the individual originator and that departing from that premise does not serve Congressional intent.

> *Furthermore, please provide comment on whether alternatively, or in addition to the foregoing, a de minimis exception should be crafted to be event specific. For example, a de minimis exception might provide that the registration requirements would not apply to an employee who does not regularly function as a mortgage loan originator and who originates no more than a small number of loans within a 12-month period during the absence (such as vacation or illness) of the individual that regularly functions as the Agency-regulated institution's mortgage loan originator.*

ABA Response:
ABA appreciates the willingness to accommodate special institutional needs, such as staff illness or vacations. We think that regulatory simplicity is preferable to the addition of special rules and narrow exemptions within an exception and adding any additional qualification or condition only adds to regulatory complexity and burden without any commensurate benefit. In this regard, ABA believes that banking institutions would be able to accommodate special staffing needs with an originator-

based threshold that exempts originators that perform 5 or less originations in a given year.

Definition of "Mortgage Loan Originator"

As proposed, the regulatory definition of a mortgage loan originator would follow the terms articulated in the statute. Under this approach, a mortgage loan originator would be an individual who takes a residential mortgage loan application and offers or negotiates terms of a residential mortgage loan for compensation or gain. The definition would clearly exclude "an individual who performs purely administrative or clerical tasks." A residential mortgage loan would be defined as "any loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling" and includes reverse mortgages, home equity lines of credit, and other first and second liens.

ABA Response:

ABA appreciates the efforts to distinguish between loan underwriters and the many other personnel of a depository institution who assist customers with the loan process. However, ABA also believes that this distinction needs to be better articulated in the final rule. The exclusion needs to encompass the many personnel who take information for a loan application and may work with customers to collect that data but do not make an actual loan decision. If a branch or other bank employee explains various loan options or steps needed to qualify for a particular product, they should clearly be excluded from the definition. Similarly, if the employee is merely conveying information about the loan determination, that should be excluded.

It is extremely important to recognize two key factors that will affect all banking institutions but especially community banks. First, the administrative burdens associated with the registration requirements as proposed will be stifling and costly, compelling many depository institutions to develop and implement procedures that will limit who will be impacted and who will be required to register. In other words, to ensure that the impact and burdens are minimized, banks will take steps to ensure the requirements are not triggered by restricting who can discuss mortgage loans. This will naturally minimize the number of staff available to process mortgage applications. Second, and perhaps more important, this will have a chilling effect on the mortgage process. For consumers with the patience and financial literacy to know how to negotiate the system this might be palatable, but for the great majority of consumers this will mean that they will confront delays in discussing mortgage options.

When making these distinctions about which bank personnel must register, ABA urges the agencies to ensure that appropriate balances are maintained to avoid a chilling effect on the information provided to consumers. While the goal of the SAFE Act is to ensure consumers are protected, an overly broad definition of mortgage loan originator will deter other bank employees from providing helpful

information to consumers about mortgage loan products. A definition with a low threshold will discourage bank employees from providing any information – no matter how useful for consumers – that might trigger the need for registration. That is why the administrative and clerical exclusion is vital to maintain and clearly articulate. Clearly excluded should be activities that merely describe or explain the terms of products or services, those that outline the qualifications necessary for those products or those that merely facilitate the collection and completion of loan applications. Absent this, many institutions are likely to restrict communication and processing to central units within the bank – steps that will reduce the amount of information available to consumers and that will delay the processing of mortgages.

The agencies also need to recognize and incorporate into the final rule a recognition that employees of depository institutions are already subject to standards and requirements. The agencies have in place requirements that set standards for employment in a depository institution that do not need to be mirrored in these requirements. The final rule should recognize the existing standards that apply to bank employees.

Loan Modifications and Refinances

> *To the extent it is within the scope of the SAFE Act, the Agencies are requesting comment on whether the definition of "mortgage loan originator" should cover individuals who modify existing residential mortgage loans. If so, the Agencies seek comment on whether these individuals should be excluded from the definition. For example, the Agencies are considering whether the final rule should exclude from this definition persons who modify an existing residential mortgage loan, pursuant to applicable law, provided this modification does not constitute a refinancing (that is, the satisfaction or extinguishment of the original obligation and replacement by a new obligation) and is completed in accordance with a contract between the parties, including any workout agreement. The Agencies seek comment on whether an exclusion for individuals who modify existing residential mortgage loans would be appropriate in light of the SAFE Act's objectives of providing increased accountability and tracking of the mortgage loan originators, enhancing consumer protection, reducing fraud in the residential mortgage loan origination process, and providing consumers with easily accessible information at no charge regarding the employment history of, and publicly adjudicated disciplinary and enforcement actions against, mortgage loan originators.*

ABA Response:

ABA firmly believes that individuals whose only role within the institution is to modify a loan should be exempt from these requirements. Given current economic conditions, the need for qualified individuals to modify the terms of mortgages to help individual borrowers avoid foreclosure is critical and should not be impeded in any manner. ABA believes it would be a mistake to require those solely engaged in loan modifications to comply with the SAFE Act, which would delay and hamper current loan modifications efforts.

Although ABA strongly supports the establishment of appropriate qualifications for individuals engaged in mortgage servicing activities, we do not believe the SAFE registry system is the appropriate vehicle to address servicer-related concerns. The SAFE legislation was never designed to cover servicers, but rather, designed to establish a nationwide licensing and/or registration system for individual loan originators and mortgage brokers. The substantive requirements of this legislation are geared to originating individuals and not to servicers or their personnel. The Act itself defines a "loan originator" as 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." SAFE also provides that the term originator "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* (emphasis added).

In applying this two-prong test to define an "originator," servicers and staff appointed by institutions to perform loan modifications do not take "applications" as that term is commonly understood, and therefore do not meet the first part of the test. Although they may collect consumer information, that data is not used to originate a new asset, but rather, to mend and repair financial problems that exist in relation to an existing mortgage loan. This activity is fundamentally different than the loan production function of loan originators, where applicants seek to shop among various alternatives and loan officers assist them in navigating among the various options. Moreover, loan servicers and modification specialists do not strictly engage in "negotiation" of loan terms, but rather, engage in a search for solutions that will allow the lender to "salvage" the loan while placing the consumer in a more solid financial position. Again, the modification staff's incentives and motivations are entirely different than those of the origination professional.

Fundamentally, the question comes back to the premise of the statute and the rationale for registration. The goal is to protect consumer borrowers from unscrupulous loan originators. The role of the originator is very different from the role of a servicer or modifier. Where the loan originator is concerned, a consumer has many options before finally closing the loan. With an existing loan, though, the options are limited to the lender with which the borrower has an established relationship. This distinction is further limited to those who are altering or adjusting the terms of an existing loan and not those who are refinancing that loan by replacing it with a new and separate obligation where the borrower has many of the same options that would be available as though he or she were originating a new loan.

The exception for real estate brokerage activities also makes clear that the bill is directed to lenders, mortgage brokers or similar mortgage originators. This adds additional weight to the interpretation that the Act's definitions are restricted to lenders and mortgage brokers who initiate a new mortgage obligation but does not cover servicers or servicing-related activities.

As noted above, subjecting servicers to these new requirements will only hinder and make much more costly the crucial work of servicers today—reaching and assisting millions of borrowers experiencing payment difficulties. Such a result is recognized and predicted by the Agencies in the proposed rule's preamble—classifying loan modification specialists as falling under the purview of the registration requirements would undermine the national efforts to prevent foreclosures and hinder the administration's Making Home Affordable Plan.

In a recent letter dated February 9, 2009, from CSBS and AARMR to the Department of Housing and Urban Development, the organizations expressed the concern that "application of S.A.F.E. 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." We fully endorse and join in the opinion of CSBS and AARMR and urge the Agencies to refrain from covering individuals who modify existing residential mortgage loans in the definition of "mortgage loan originator."

> *Comment is also requested on whether the final rule should delay the registration requirement for individuals engaged in loan modifications for only a specified period in light of current economic conditions and the national importance of encouraging mortgage lenders to engage in foreclosure mitigation activities. Moreover, the Agencies solicit comment on whether individuals who engage in approving mortgage loan assumptions should be excluded from the proposed definition of "mortgage loan originator" and whether such approach is consistent with the SAFE Act's objectives.*

ABA Response:
ABA believes that those whose only activity is servicing or modifying existing loans should be exempt from these requirements. Should the Agencies not agree to altogether exempt modification activities from registration requirements, ABA would urge that there be a moratorium or delay in compliance for individuals solely engaged in loan modification efforts. Without doubt, our economy is traversing a most unusual market disturbance that will require a great concentration of resources towards consumer outreach efforts. As banks fill the necessary staffing needs that are devoted to assisting consumers in distress, they should not be confronted with additional and artificial obstacles.

In considering such a moratorium, ABA believes that it would be proper to delay any requirement for modification staff to comply with the registration requirements of SAFE for a period of, at minimum, 18 months. This time-frame constitutes our best estimates of the period of highest demand in the ongoing efforts to assist distressed borrowers.

> *To the extent it is within the scope of the SAFE Act, the Agencies also seek comment on whether individuals who engage in certain refinancing transactions should be excluded from the definition of mortgage loan originator (and, correspondingly whether certain types of*

refinancing transactions should be excluded from the definition of residential mortgage loan). Specifically, should an individual who engages in refinancings that do not involve a cash-out and are with the same lender be excluded from the definition of mortgage loan originator? With respect to these specific types of refinancing transactions, the Agencies request comment on: (1) whether such transactions have similar results for borrowers as loan modifications; (2) whether employees engaged in such refinancing transactions also engage in other mortgage loan origination activities; (3) the types of contact that employees who engage in these types of refinancings have with customers; (4) the extent to which such staff initiate contact with customers; and (5) the extent of the information that is gathered from customers in the context of these types of refinancing transactions. Furthermore, the Agencies seek comment on whether individuals who engage in loan modification and limited refinancing activities should be excluded from the definition of mortgage loan originator only if the transactions meet additional criteria. For example, should an individual who engages only in loan modification activities be excluded from the definition of mortgage loan originator only if the modification meets specific criteria such as a lower interest rate, reduced payment, elimination of an impending adjustment to the rate, or reduction in principal? Comment is requested on criteria that should be considered by the Agencies, if any.

ABA Response:
ABA agrees with the thrust of this question, that individuals who engage in same-lender refinancings that do not involve cash-outs are not potentially subject to the same level of potential fraud and abuse as are other types of loans.

The general role of an individual who is handling a no cash-out refinancing for an institution is essentially performing a function analogous to that of a servicer or loan modifier. The existing obligation is being adjusted to better reflect the needs of the consumer borrower. Existing regulatory requirements support this analysis. For example, under Truth-in-Lending, Regulation Z at 12 CFR 226.23(f), the right of rescission does not apply when there is no new cash extracted from the home's equity.

Again, it is important to stress that the basic premise for this new requirement is to enable supervisory authorities and consumers to identify and track originators. It cannot be stressed strongly enough that a loan originator who is an employee of a strictly regulated and closely supervised depository institution does not present the same concerns and risks as those presented by a freelance lender.

Although banking institutions vary in how they organize their staff and operation, it is not uncommon for banks to have a confined number of "inside" employees who work within consumer lending departments that specialize in handling no cash out refinancing requests. In such operations, "no cash out refinance" applications that enter through branch offices or customer service centers are usually routed to these special units. These employees may receive referrals of all the "no cash out refinance" inquiries or applications that arrive to the bank via Internet or customer telephone calls. These employees are generally not paid on a per-loan basis, but

rather, through a base salary. Finally, our members report that these employees do not generally perform modification-type services, nor do they engage in other types of mortgage origination activities.

An exemption could, therefore, be safely constructed for these employees, as they tend to fit into very distinct operational divisions of the bank's production operations. We submit, however, that should such a carve-out be enacted into regulation, it should be crafted in terms that are as straightforward as possible. Complex carve-outs will add unneeded confusion to compliance efforts. The enumerated questions set forth in the proposal's preamble are an indication that a carve-out of this type is likely to be riddled with provisos and exemptions that would make any resulting provision extremely limited in applicability. For the typical banking institution that offers a full range of services to consumers, the potential benefits of such a limited carve-out would be almost negligible.

In summary, ABA supports a carve-out based on same-lender refinancings that do not involve cash-outs, but we urge that this be done through clear and straightforward formulas that do not engage in sub-exemptions and technical qualifications.

Institutional Requirements and Implementation Date

> *The Agencies seek comment on whether the 180-day implementation period will provide Agency-regulated institutions and their employees with adequate time to complete the initial registration process. The Agencies also inquire as to whether an alternative schedule for implementation and initial registrations would be appropriate, what such an alternative schedule should be, and why it is more appropriate than the implementation period proposed by the Agencies. In addition, the Agencies request comment on whether, and how, a staggered registration process should be developed.*

ABA Response:

ABA urges that Agencies to extend the implementation period to a minimum of 9 months to accommodate the unusually pressing burdens banking and depository institutions are facing at the moment. In fact, it would be preferable to allow up to one-year for the transition. Not only will there be substantial applications and registrations for banks to manage, but the system must be capable of efficiently and expeditiously handling these new registrations. Again, any delay in processing will only hamper the recovery of the mortgage markets and now is not an appropriate time to unnecessarily hinder mortgage lending.

Our members are the most closely regulated entities in the market, and we continue to support efforts at ensuring that the mortgage consumer is properly informed and adequately protected in this most important financial endeavor. We ask, however, that the Agencies become more conscious to the severe burdens being placed upon banking institutions as authorities pile on more legislative and regulatory provisions on an unrelenting basis. We urge that the Agencies begin to closely focus on the colossal regulatory costs and burdens currently being heaped on banks. We note that

the past months have seen the following regulatory additions: the creation of a broad new segment of lending, "higher-priced mortgage loans," that will impose new indices, price measurements, and legal repercussions for banks of all sizes; new rules regarding contacts with real estate appraisal professionals; new rules regarding mortgage servicing practices; new standards regarding the advertisement of mortgage-related products; brand new rules applicable to early mortgage disclosures that affect ability to collect fees in all covered transactions; a complete overhaul of the good faith estimate disclosure requirements; a complete overhaul of mortgage settlement forms; new upfront disclosure items that include comparison charts and term-related written recitations to consumers; new novel fee tolerances that apply at differing levels depending upon the type of service involved.

Although this is only a partial list, we note that each of these fundamental regulatory changes will require significant system changes, and since they are being thrust upon banks simultaneously, institutions are currently engaged in full-scale revamping of their compliance operations, and in some instances, of their business models. For larger institutions, the time, effort and resources required to meet new systems requirements can be extensive, and many suggest that this short turnaround for such major changes would be extremely difficult if not impossible even absent other mandates from regulatory authorities. A longer transition will allow banks to process these changes more accurately and with fewer errors than might be likely if speed trumps quality.

Outside of systems changes, the magnitude of this requirement could also affect the number of players in the market. We observe that various members have advised, in confidence, that they are likely to cease mortgage lending operations in light of the collection of extreme burdens and confusing changes being imposed in the current regulatory climate. This is especially true for many of the nation's community banks which may only offer mortgage loans to customers as an accommodation to serve customer needs and not as a profitable line of business. In fact, these banks currently may only offer these products on a break-even basis or at a small loss as a customer service. Many of these banks, being smaller and handling less loan volume, will wait and reassess, at some future point, whether they will return to mortgage lending activities. Although many other banks have declared no such plans, the significant point is that communities across the United States could lose the most trusted partner that they have in the most important transaction that families enter in their lifetimes. The community banks and depository institutions—entities that were not involved in the excesses of subprime and predatory lending—are going to be very negatively impacted in this rapid and intense push to regulatory reform. We urge, therefore, that the Board accept our request for a longer one-year, or at least nine-month, implementation period in the spirit of our industry's earnest attempt to respond to the ongoing burdens brought on by this national crisis.

Finally, it is imperative that Agencies adhere to their commitment to provide absolute certainty as to when the Registry will become available to start accepting registrations, and that they clearly specify the date that the implementation clock

starts to run. As mentioned in the proposal's preamble, Agencies must provide a "coordinated and simultaneous advance notice" to Agency-regulated institutions of when the Registry will begin accepting Federal registrations. Such notifications should be achieved through various channels simultaneously, including Federal Register publication, Web-site notice, and agency bulletin.

Maintaining Registration

The Agencies specifically request comment on whether the proposed initial registration requirements as well as the requirements for maintaining registration are adequate and feasible for Agency-regulated institutions and their employees who are mortgage loan originators, yet serve the consumer protection purposes enumerated in the SAFE Act.

ABA Response:

ABA views the proposed registration requirements as generally consistent with statutory commands, and appreciates the details provided by the Agencies in these provisions.

However, the proscriptions set forth under the institutional requirements section unnecessarily go beyond statutory bounds and should be amended. Under Section _.103 of the rule, an Agency-regulated institution must require its employees who are mortgage loan originators to register with the Registry, maintain this registration, and obtain a unique identifier in compliance with this subpart. This part is reasonable and consistent with the statute. The proposal goes on, however, to also prohibit an Agency-regulated institution from permitting employees to act as mortgage loan originators unless registered with the Registry in accordance this subpart. This latter provision, though well intended, is not premised on statutory language, and has great potential of creating excessive legal risk for no good reason. Even more problematic, it may be entirely beyond the capability of an institution to enforce.

Under the SAFE Act's provisions, individuals are prohibited from engaging in loan originating activities unless they are licensed and/or registered. The Federal Agencies are then tasked with developing and maintaining the systems required to adequately register qualifying employees of depositories under the NMLSR system. This legislative scheme does not translate to a broad-based order that depository institutions universally guard against any of its employees ever acting as originators without a registration. We accept that a depository institution must ensure that its employees are acting responsibly under the SAFE Act *within their scope of employment.* This proposal goes beyond that, however, and could be interpreted to require that banks serve as a perpetual enforcement agent for all of their employees' activities, whether those activities are in or out of the institution's purview. In short, a plain reading of this proposed provision would render a bank responsible for activities occurring outside of the bank and even beyond the bank's knowledge—such a provision is clearly an overload of precaution, and one that appends excessive, and indeed *unacceptable*, legal risk on banks.

We recommend that the first provision that banks require their originating employees to register is entirely sufficient to ensure that bank employees follow necessary requirements, and that institutions become responsible to ensure that employees follow the law. As supervisors, it is entirely appropriate for a bank to ensure that an employee is properly registered with respect to his or her duties as an employee of the bank. However, since individuals can undertake other activities outside the course of their employment, it is impractical to expect an institution can have full and total oversight or knowledge of an employee's extracurricular activities. The final rule, then, should be restricted to oversight of a loan originator *acting within the scope of his or her employment at the institution.*

Fingerprinting Requirements

> *The Agencies specifically seek comment on whether the three-year age limit for existing fingerprints is appropriate and whether Agency-regulated institutions currently have fingerprints of their employees on file, and if so, whether they are in digital or paper form.*

ABA Response:

Financial institutions currently engage in background checks of potential employees and have developed a great deal of experience in conducting such checks on potential and current employees through reliable and cost-effective channels. The fact that bank employees are subject to background checks in connection with their employment is extremely important for the Agencies to recognize in developing the final rule. In light of existing requirements, many members report that they currently retain fingerprint records of employees on file and such records may be stored in either digital or paper form.

ABA therefore appreciates the proposed rule's allowance for print or digital formats. The preamble states that registrants should submit digital fingerprints to the Registry, if practicable, but if digital fingerprints are not available, the Registry will accept fingerprint cards, and will convert these cards to a digital format. This type of flexibility goes a very long way in facilitating compliance for community banks of all sizes, and greatly encourages the use of digital fingerprints across all market and industry segments.

The preamble to the proposed rule states that the Registry plans to support digital fingerprinting by October 2009 and likely before the initiation of the proposed rule's implementation period. ABA appreciates the speedy establishment of uniform and standardized fingerprinting processes, as this will go a long way towards ensuring efficiencies in the registration process. Although we applaud the Registry's intentions to support this function, ABA recommends that depository institutions be permitted to continue to access existing fingerprint channels long-recognized and supported by existing relations with the Federal Bureau of Investigation (FBI). While we urge that it confine the fingerprinting process to the FBI's established infrastructure for applicant fingerprint processing by using one of the FBI-approved channeling agencies, it need not be limited to one channel.

ABA finds that restricting this function to the Registry alone, as the sole provider of the service for the entire market, is entirely inappropriate. Nothing in SAFE Act requires that such function be reserved only to the Registry and nothing indicates that Congress intended that the system be so restricted. For various reasons, ABA fears that not opening up fingerprint processing to other entities is sure to have detrimental repercussions. First, concentrating the entire function to a single entity has the potential of leading to unnecessary delays and potential back-ups in processing. Second, we believe that concentrating this function into a quasi-governmental entity such as the Registry will greatly hamper innovation and technological exploration in an area that is constantly and quickly evolving. The banking industry must strive towards quick and efficient incorporation of the latest technological standards into all of its security functions—providing the Registry with a virtual cartel to fingerprinting services does not advance the goal of encouraging innovation. Since existing channels already exist, there is no reason to create an inappropriate monopoly.

Finally, the final rule must take appropriate measures to ensure that electronic submissions under this registration system are properly encrypted, authorized and authenticated. ABA urges that the Agencies specifically provide that all electronic submission requirements under this system must employ security measures that, at a minimum, comply with FBI Criminal Justice Information Services Security Policy. In this day and age, data security is critical, especially to protect individuals who are the subject of the data.

ABA considers it important that these proposed regulations incorporate the existing FBI infrastructure for the processing of applicant fingerprint submissions. ABA is willing to work with CSBS and others to assure that we create a system that is able to meet the demands of the law and the diverse needs of our depository institutions.

Employee Data

The Agencies seek comment on the employee data that is proposed to be collected, the employee data that is proposed to be made public, and whether any other additional data should be collected or made public.

ABA Response:

ABA's principal concern in this area is on how widely the required employee data submissions can be disseminated to "public sources" other than the individual applicant. Under the Section __.103(d)(2) of the proposed rule, the employee must authorize the Registry to make available "to the public" the following information: name; other names used; name of current employer(s); current principal business location(s) and business contact information; 10 years of relevant employment history; and publicly adjudicated or pending disciplinary and enforcement actions and arbitrations against the employee.

As currently drafted, the proposal would therefore allow any entity to access the full set of information submitted by originators to the registry. Such entities could

include news organizations, consumer activists, competitors, in short, any person that follows the process to obtain the information, regardless of that petitioner's intent to engage the originator's services for a financial transaction. ABA believes that such wide open exposure to this robust set of personal data will greatly discourage anyone from seeking to become registered as an originator. We consider this to be a critical problem in this rulemaking. Moreover, not only will the wide dissemination of this data have a chilling effect on potential loan originators, ABA is also concerned that the breadth of data could facilitate the theft of the identities of loan originators.

ABA does not believe that such broad public access was intended to apply to registration data submitted by bank employees. Although the SAFE Act does not explicitly define who may have access the registration data, there is strong indication that the legislation does not mean to make such data available to the open "public," as set forth in the proposed rule. There is no language in the Act that specifically requires that such information be opened to "the public" at large without restriction. To the contrary, Section 1502 of the Act, which sets forth the purposes and methods for establishing the mortgage registration system, is very careful in delineating what entities may actually have access to the full set of records generated by a registration or licensure application. First, that section establishes that regulators are to have access to the NMLSR data. Second, under Section 1502(7), the Act states that "consumers" shall have "easily accessible information, offered at no charge" about loan originators.

The term "consumer," however, is not the same as "the public." Although "consumer" is not defined in the statute, the common dictionary definition reveals that the term refers to a person or organization that uses a commodity or service, or "one that consumes, especially one that acquires goods or services for direct use or ownership rather than for resale or use in production and manufacturing." (*The American Heritage Dictionary of the English Language*, Fourth Edition, 2009). This definition is consistent with how that term is otherwise used in other portions of the legislation. Section 1503(3)(B), for example, describes how loan originators assist consumers, and in doing so, specifically refers to the term "consumer" as the individual customer—the one specific person that is being assisted by the loan originator. Section 1503(3)(C) also refers to "communications with a consumer," using that term to mean the specific applicant that is being considered for the loan.

In light of the rather clear usage of the term in this statute, it would be entirely erroneous to expand the word "consumer" to mean the entire "public" sphere. As used by the statute, the term "consumer" means the specific applicant that is seeking out the services of that originator. There is nothing else in the statute that specifically grants the Registry or the Agencies with the order or permission to so greatly expand the access to sensitive private information relating to loan originating professionals.

ABA submits that this is an extremely sensitive interpretive issue that the Agencies must reconsider on the basis of the actual language used in the legislation. As written, the legislation would allow registry data access to—(1) regulators, and (2) the specific consumer that places an application with the loan officer. The Agencies would go astray of the statute if they authorize all members of the public—in short, the universe—with unobstructed access to this sensitive data set.

ABA appreciates the desire for the agencies to allow easy access to information about the person who will be assisting consumers with what is arguably one of their most major financial transactions. However, ABA does not believe that individual consumers should have unrestricted access to the entire panoply of information about a loan originator. The goal is to ensure a consumer can verify that the individual loan originator is properly licensed, meets the regulatory requirements, and does not have any outstanding complaints or sanctions. Broader access to details about a loan originator violates his or her right to privacy. While some have suggested that the system parallels the same mechanisms used for securities brokers, the relationship between a consumer and an investment broker or advisor is different, primarily because it is ongoing. ABA strongly urges the agencies to institute appropriate restrictions to that the general public does not have access to the entire set of data in the database. Information should be restricted to a "need-to-know" basis, and should also be restricted to that information that is needed to make an informed decision about whether a loan originator is legitimate. Broad access to a person's data, as contemplated by the rule, does not further the purpose of the statute but does have the potential to compromise individual loan originator's privacy along with facilitating identity theft. Further access to information should be limited to supervisory authorities with a need for access to the information.

Required Institution Information

> *The Agencies seek comment on batch processing and welcome suggestions for workable alternative approaches that could mitigate the initial registration burden on Agency-regulated institutions and their employees. Comment is also sought on the appropriateness of having one employee input registration information into the Registry on another employee's behalf.*

ABA Response:

There is no doubt that batch registration would be beneficial to all stake-holders in the mortgage finance system. For financial institutions, batch registration would simplify the process, create huge cost savings, and make submissions generally easier to handle and manage. For the Registry, the submissions of the various institutions would be shorter, simpler, and categorized or grouped in whatever way it deems preferable. Consumers would benefit from the general cost savings that these efficiencies would produce. It is therefore essential that the final regulations provide for an effective method to facilitate batch registrations.

A first step that the Agencies could take in improving any batch registration process is to observe ABA's comments regarding fingerprinting, above. We feel it is

imperative that the registration system be open to as much private sector participation and competitions as possible.

Further, we note that the proposed rule's preamble is correct in observing that institutions are likely to select one or more individuals to submit the required employee information on behalf of each of their mortgage loan originators to facilitate this registration process. They will do so for various reasons. First, and most important, the law will affirmatively mandate that institutions require its employees who are mortgage loan originators to register and obtain a unique identifier. This requirement makes it unlikely that the institution will leave this function to the unguarded volition of individual employees. Most bank members report that they will establish formal procedures to require employees to submit information to a central location which will then be collected for submission, on an aggregated institution-wide manner, to the Registry. Second, it is expected that the complexities of data submissions will mean that centralized submission systems are likely to become a valued service or benefit for the originating employees. These two elements are likely to make batch processing the appropriate standard for the mortgage lending community.

ABA applauds, therefore, the Agencies' openness to permitting "batch" processing for Agency-regulated institutions. We recognize, and accept, that batch processing cannot entirely eliminate an individual employee's role in the registration process, as well as the employee's responsibility to attest to the accuracy of the data submitted on the employee's behalf. In light of these restrictions, it is of keen importance that the final rules contain two elements of clarification. First, they must explicitly acknowledge that batch processing is permitted under the system, and that institutions are allowed to make the required data submissions without running afoul of the SAFE requirements. Second, as suggested in the preamble, the final rule must state that it is appropriate to identify employee(s) or agent(s) to input the required registration information into the Registry on behalf of other employees.

These two clarifications will allow industry participants to advance with confidence and figure out how to best achieve compliance through the most useful method and with the best third-party vendor partner that can assist in the endeavor. In the interests of efficiency and burden reduction, though, ABA strongly supports steps that will support and encourage a batch-processing system as vital to the success of the program.

Conclusion

ABA commends the Agencies for their efforts but strongly encourages revisions to the proposal before the rule is finalized. These steps are critical to avoid unduly compromising the privacy of individuals, to avoid unnecessarily hampering the mortgage markets and to avoid stifling the availability of consumer information.

In summary, we believe the most important issues for the Agencies to resolve are:

- To avoid handicapping the mortgage markets, the final rule must explicitly exempt individuals from registration where their only role within a banking institution is to modify existing mortgage loans.

- Agencies should extend the implementation period to a minimum of 9 months if not longer once the registration system is operational to allow banks time to adjust and adapt systems and procedures. This is especially critical to accommodate the unusually heavy burdens that banking and depository institutions are facing at the moment. In fact, it would be preferable to allow up to one-year for the transition.

- The final rule should eliminate the overbroad requirement that depository institutions prohibit its employees from "acting as mortgage loan originators" without a registration. The restrictions should be limited to activities within the scope of an employee's employment.

- Agencies must open the fingerprint process to any entity that is duly authorized by the FBI to perform such functions.

- To protect individual's privacy and to minimize the threat of identity theft, the final rule must limit access to registry data to consumers, i.e., specific applicants seeking services from a particular originator. The rule should not broadly expand access to this sensitive private information relating to loan originating professionals to the entire "public" sphere. Publicly available information should also be limited to information that will assist consumer's decisions to use the services of a loan originator and not to provide access to any and all information about that individual.

- Finally, the Agencies must preserve the ability for "batch processing" of registrations by specifically articulating, though the final rule, that "batch submissions" are permitted under the system, and by stating that it is appropriate to identify one employee or agent to input the required registration information into the Registry on an employee's behalf.

Once again, ABA appreciates the opportunity to comment on the very important issues associated with this rulemaking. We believe that policymakers and the banking industry are being presented with an extremely unique opportunity to create a system that can truly protect the public and augment informational access to consumers and regulators alike. If you have any questions or would like additional information, please contact Rod Alba by telephone at 202-663-5592 or by e-mail at ralba@aba.com.

Sincerely,

Robert R. Davis

CONSUMER MORTGAGE COALITION

July 7, 2009

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Re: Proposed Regulation on Registration of Mortgage Loan Originators

Dear Sir or Madam:

The Consumer Mortgage Coalition (the CMC), a trade association of national residential mortgage lenders, servicers, and service-providers, appreciates the opportunity to submit these comments on the proposed regulation on Registration of Mortgage Loan Originators.

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I. Background

Congress enacted the Safe and Fair Enforcement for Mortgage Licensing Act of 2008 (the SAFE Act)[1] to increase uniformity, reduce regulatory burden, enhance consumer protection, and reduce fraud. The SAFE Act requires mortgage loan originators employed by federally regulated institutions to be registered, and other loan originators to be state-licensed and registered.

The SAFE Act requires the Board of Governors of the Federal Reserve System, Farm Credit Administration, Federal Deposit Insurance Corporation, National Credit Union Administration, Office of the Comptroller of the Currency, and the Office of Thrift Supervision (collectively, the Agencies) to develop and maintain a system for the registration of mortgage loan originators employed by institutions that the Agencies regulate (Agency-regulated institutions). This registration must be through the Nationwide Mortgage Licensing System and Registry (Registry). The Agencies are required to coordinate with the Registry to establish protocols for assigning a unique identifier to each registered loan originator for electronic tracking, uniform identification of, and public access to, the employment history and publicly adjudicated disciplinary and enforcement actions against each registered loan originator. The Agencies are also required to coordinate with the Registry to develop and operate the registration functionality and data requirements for mortgage loan originators. The present rulemaking will implement SAFE Act registration for loan originators at Agency-regulated institutions.

II. Definition of Loan Originator

The Agencies request comment on whether the definition of mortgage loan originator should cover individuals who modify existing residential mortgage loans, to the extent this is within the scope of the SAFE Act.

We do not believe servicers who process existing loan modifications should be subject to SAFE Act licensing or registration. Congress was clear about the SAFE Act's applicability to mortgage loan "originators" – that is, those who originate loans. Those who only process loan modifications do not "originate" new loans.

Moreover, the SAFE Act's registration process is intended to provide borrowers with information that may help them choose competent loan originators. This is much different from the situation with loan modifications, where the consumer has no such choice. The servicer is the only person responsible for dealing with the borrower's existing loan, and is the only person the borrower may contact for a loan modification. Moreover, the servicer is likely reaching out to the borrower because the borrower is already delinquent or at imminent risk of default, and is recommending a loan modification as a foreclosure-avoidance strategy to help the borrower stay in his or her home. This is a far cry from a typical loan origination scenario.

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[1] Title V of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, §§ 1501-1517, 122 Stat. 2810 – 2824.

Finally, as a practical matter, the variables in a loan modification are much more limited than the wide range of terms, features, and costs that are present in a new loan origination. Loan originators can and do affect the terms of a loan, and recent experience has shown that sometimes loan originators have affected the terms of a loan in ways that were harmful to consumers. But those who work with borrowers on loan modifications generally do not have the same discretion to select the modification terms, as discussed below. Registration of those who modify but do not originate loans would therefore not offer or create any significant consumer protection, and any benefit that might be realized is far outweighed by the costs, including the cost to consumers in terms of delayed modifications that could imperil efforts to prevent foreclosure. In addition, loan modifications by definition are a borrower benefit because they are designed to prevent foreclosure. Based on this fact alone, there is much less need to impose a costly registration process on modifications.

To the extent there is need for improvement of loan modification practices, there is an effective method of making improvement, through the Treasury Department's loan modification guidelines. Those guidelines were significantly strengthened by a "servicer safe harbor" law Congress recently enacted, so that any change to the guidelines will have an industry-wide impact, as discussed below.

A. Congress Enacted a Specific Definition of Loan "Originator"

Congress enacted the SAFE Act to address a specific problem, loan origination incompetence and abuse. Its principal tool for loan originators working for depository institutions is the collection of information on the originators in the Registry, which can be accessed by the public, and background checks. In this law, Congress included a very clear definition of loan "originator" who must register or be licensed.

> (A) IN GENERAL.—The term ''loan **originator**''—
> (i) means an individual who—
> (I) takes a residential mortgage loan **application**;[2]
> **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[.][3]

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[2] We request a more precise definition of "application." For example, does a person take an application by sending an application form to a customer, at the customer's request, and then forwarding the completed application to the processing/underwriting staff, without review or discussion with the customer about terms? What if someone occasionally discusses terms with customers and provides the transmission function described above (which is commonly done by wealth management employees of banks)? We believe the definition of application should be clarified to make clear that it must involve a request for a new loan or for a renewal of an existing loan at maturity, and does not arise in connection with modification of an existing closed end mortgage before maturity.

[3] Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 1503, 122 Stat. 2811 (emphasis added).

By using the word "originator" emphasized above, Congress clearly meant those who originate loans. The word "originate" has a well-known definition. It means to bring into being, or to create. It is not logically possible to "originate" a loan that already exists. Loan modifications differ from loan originations on this point – loan modifications involve loans that already exist. Therefore, modifications cannot be loan originations, and individuals who process modifications cannot, by these actions, originate loans.

Moreover, by using the word "and" emphasized above, Congress clearly meant "and" and not "or." Congress meant to require licensing or registration of individuals who both take loan applications **and** offer or negotiate terms of residential mortgage loans for compensation or gain. Clearly, a loan modification does not have an "application" for a loan because the loan already exists. A borrower may request a loan modification, but it is not the same as an application for a new loan.

Extending the reach of the SAFE Act beyond loan originators to those who process modifications and do not originate loans would require ignoring the word "originator" and ignoring the word "application" in the statute, and would require construing the word "and" to mean "or." This would be inconsistent with Congressional intent as evidenced by the plain language of the SAFE Act, and inappropriate.[4]

We believe following Congressional language is required. We note that the Agencies did so in other aspects of their proposed regulation. For example, the SAFE Act requires loan originator applicants for state licenses to authorize the Registry to obtain the applicant's credit report and to meet certain educational requirements, while it does not impose these requirements on registered loan originators. The Agencies followed this aspect of Congressional design, which we support. Depository institutions commonly obtain credit histories of new employees, and routinely train their employees in relevant laws.

We are aware that the Department of Housing and Urban Development (HUD) has said that it "is generally inclined to provide in a rulemaking that the SAFE Act's definition of loan originator covers an individual who performs a residential mortgage loan modification that involves offering or negotiating of loan terms that are materially different from the original loan, and that such individuals are subject to the licensing and registration

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[4] The Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) drafted model state legislation (State Model Legislation) to implement the SAFE Act. In the State Model Legislation, they changed the "and" to "or" in the definition of loan originator, and that the Department of Housing and Urban Development did not disapprove that change for the State Model Legislation. Because of this change, the authors of the State Model Legislation had to request that its effectiveness be delayed as to those working on foreclosure mitigation efforts but not on loan originations, at least until July 31, 2011. As they explained in the attached letter, "Concerns have been raised that immediate application of the 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 delinquincies and defaults."

Regardless of state law, there can be no dispute that the language of the SAFE Act that Congress enacted, that the President signed, and the Agencies administer, requires that an individual both take an application **and** offer or negotiate terms to be considered a loan originator.

requirements of the SAFE Act."[5] HUD does not discuss how this is consistent with Congressional language and intent. As discussed above, it is inconsistent with the SAFE Act.

Not only does HUD not suggest any cost-benefit analysis of such a proposal, it does not suggest any benefit that could be created by requiring registration of those who work with consumers on loan modifications.

We believe HUD's position may be based on a misunderstanding of the loan modification process. HUD has said:

> Since it generally would not be possible for an individual to offer to or negotiate residential mortgage loan terms with a borrower without first receiving the request from the borrower (including a positive response to a solicitation of an offer) as well as the information typically contained in a borrower's application, HUD considers the definition of loan originator to encompass any individual who, for compensation or gain, offers or negotiates pursuant to a request from and based on the information provided by the borrower.[6]

HUD believes it is generally "not [ ] possible" for an individual to offer or negotiate loan terms without a borrower request and without obtaining information typical of mortgage loan applications. This is not true. Servicers can and do offer borrowers modifications without borrower request and without obtaining application information. One common practice, for example, is for servicers to review their information to identify adjustable-rate loans on which the interest rate is about to rise, and, when consistent with investor requirements, unilaterally notify the borrower that the rate will not rise. This does amend the loan's terms, yet it requires no borrower request and requires no borrower information. Requiring individuals to register would not make any difference to consumers in this case.

Another common practice, which the Department of the Treasury is encouraging in its Home Affordable Modification Program (HMP), is for servicers to identify consumers who are eligible for the modification program based on information that is no more than 90 days old, and simply send the borrowers papers soliciting them for the program, including a Trial Period Plan.[7] A new loan application is not required for this process, a borrower request is not required, and no negotiations with the consumer take place. The servicers may use information they already have, or they may obtain information from the borrower. If HUD were to impose a registration requirement in this circumstance, it is not clear to whom it would apply.

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[5] *Frequently Asked Questions and Answers,* published by HUD, available here: http://www.hud.gov/offices/hsg/ramh/safe/SAFEactFAQ.pdf

[6] *Commentary on Model State Law,* published by HUD and available here: http://www.hud.gov/offices/hsg/ramh/safe/cmsl.cfm

[7] HMP uses a Trial Period Plan to document one part of its modification process. The program uses a trial period, typically lasting three months, during which payments are lowered. If the borrower makes timely payments at the lower level throughout the trial period, and otherwise remains eligible, the loan is formally modified.

It is possible that HUD believes that loan modifications are routinely negotiated with individual borrowers. This would be a misunderstanding. Modifications are conducted only in accordance with the requirements set by those who own the loans. Under the nationwide standard for modifications, HMP, the terms of modifications as well as the qualifications for modifications are not determined or influenced by the individuals who communicate with borrowers, as discussed below. For this reason, registration of those who communicate with borrowers would be of no benefit to consumers.

B. Registration of Those Who Only Take Personal Information Would Not Benefit Consumers

It is possible that HUD is considering requiring registration of those who work with consumers on modifications because HUD believes that the act of taking personal information is a risk to consumers, and that registration of those who take the information will protect consumers in some manner. How these risks would arise is not clear, because every financial institution in this country, defined very broadly, is subject to specific consumer financial privacy laws that protect personal information from disclosure.[8] Moreover, taking a loan application, as defined in the proposed Appendix to the Agencies' SAFE Act regulation, can be automated and not involve a person.

Nevertheless, if HUD is concerned that loan applications present risks, there is a far more effective method to affect the loan application process. The effective solution would be to amend the Uniform Residential Loan Application that Fannie Mae and Freddie Mac use. This approach would not contradict the plain meaning of the SAFE Act, it would reach most residential mortgage loans made in the country, and it could be implemented very quickly.

C. Loan Origination and Loan Modification Are Different Functions That Do Not Overlap

Imposing registration requirements on loan servicers that process modifications would be treating servicers as if they were originators. But mortgage loan origination is a very separate function from mortgage loan modification. Loan modifications are a servicing function, not an origination function.

Originators and servicers operate separately. It is very common for mortgage lenders to be able to originate loans but not to be equipped to service them, because origination and servicing are quite different. Some firms have both lending units and servicing units, but they operate separately because servicing is a highly specialized operation. Even if they are under the same corporate umbrella, origination and servicing operations have different staffs, their staffs report through different management channels, and the staffs use and have access to separate information systems. Different consumer protection laws apply to originations than to servicing, so origination and servicing staffs are trained in and audited for compliance with separate laws.

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[8] 15 U.S.C. §§ 6801 – 6805.

Loan originators are involved in the marketing of new loans to borrowers. They try to have the borrower select them among other competing loan originators. Once the borrower decides to apply with them, they work with the borrower to determine which loan terms the borrower will select for the new loan, to determine whether the borrower will finance closing costs or pay them upfront, and to arrange the loan closing. Loan originators process loan applications, including refinance applications. While loan servicers may be required to collect certain information to determine whether a borrower qualifies for a loan modification within strict parameters, they do not perform these origination functions.

Servicers act as intermediaries between borrowers and mortgage investors. Servicers process payments from borrowers to investors, manage escrow accounts, manage property taxes and insurance payments, send annual IRS notices, and handle defaults in accordance with investor requirements. One of servicers' default functions is avoiding unnecessary foreclosures, such as by modifying loans. Loan modifications are a specialized foreclosure avoidance function, within the servicing function of handling defaulted loans. Loan originators perform none of these servicing or default or foreclosure avoidance functions.

Foreclosure avoidance staffs do not generally have the ability to originate loans, to refinance loans, or to add new borrowers to existing loans. If a foreclosure-avoidance strategy involves the origination of a new loan, the loan is generally forwarded to a loan originator who performs the loan origination function. [9]

D. Loan Originators Can Influence Loan Terms, While Those Who Work With Borrowers on Modifications Cannot Influence The Terms of a Modification

In loan originations, very many terms of the loan are negotiable, and subject to the borrower's choice. The loan originator is involved in each step of the negotiations, and often has significant influence on the options presented to the borrower and the manner in which they are presented. Many loan originations benefit borrowers, but sadly, in the hands of a poorly trained mortgage loan originator or, worse, one who is simply unethical, some originations do not benefit borrowers. By contrast, modifications affect only one or a very few loan terms, the terms that do change are not negotiated by the servicer in discussions with the borrower, what changes may be made in a modification is tightly constrained, often within investor limitations, and modifications *always* are designed to put the borrower in a better position than the status quo.

At loan origination, a borrower works with a loan originator to discuss and to select a variety of loan terms. Should the loan have a fixed or adjustable interest rate? Should the borrower pay more points at closing and get a lowered interest rate, or do the opposite?

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[9] Most subprime loans and most prime fixed-rate loans do not by their terms permit a new borrower to assume the loans. Prime adjustable-rate loans often do permit new borrowers to assume them. When a new borrower asks to assume an existing loan that has terms permitting assumption, the new borrower is underwritten as any borrower on a new loan. Foreclosure avoidance staffs do not underwrite these borrowers and do not work with them on the loan assumptions. Lenders are prohibited from exercising due-on-sale clauses in certain cases, generally family-related circumstances. *See* 12 U.S.C. § 1701j-3 and 12 C.F.R. §§ 591.1 – 591.6. Foreclosure avoidance staffs do not handle loans in these circumstances.

Should the loan have a 30-year term or a 15-year term? Should the loan permit negative amortization? Should the borrower agree to a prepayment penalty?

Modifications, however, are designed for the purpose of avoiding foreclosure. The HMP program, under guidelines that the Treasury Department sets, and as administered by Fannie Mae and Freddie Mac, sets a target loan payment of 31% of the borrower's income. This program uses a "waterfall" process to reach the target. This process reduces the interest rate on a loan to reach the target. If rate reduction alone is not enough to reach the target, the next step extends the loan term. If a rate reduction and term extension together are not enough to reach the target, the next step is principal forbearance.

The individual at the servicer who works with the borrower on a modification follows the strict parameters of the modification process established by the investor. There is little discretion exercised. Because the industry standard modification process has now been established by the HMP, this person generally does not negotiate the modification, does not select the target payment level, does not select the steps the modification goes through, and does not select the order in which the waterfall steps are taken. The tasks the person must fulfill are to make sure the borrower understands the modification, and to verify the borrower's debt and income. With that information in hand, the servicer's information systems apply the modification formula and the servicer communicates the result to the borrower.

E. Consumer Disclosure Laws Distinguish Between Originations and Modifications

Consumer disclosure laws recognize that the risks to consumers in loan origination are greater than the risks that arise in a modification after a loan has been originated.

The Truth in Lending Act (TILA) and its implementing Regulation Z require disclosures about loan terms before a consumer agrees to a loan. They require these disclosures when a new consumer mortgage loan is originated, and they treat a refinanced loan as a new loan origination.

Sometimes loan terms change after the loan has been originated, such as with a loan modification. TILA and Regulation Z do not require any new disclosures when the loan is modified, so long as the existing note is not extinguished and replaced by a new note.

That is, TILA and Regulation Z require disclosures for originations and for refinances, but not for loan modifications. TILA recognizes that modifications that occur after a loan is originated are much different than a loan origination.

F. SAFE Act Registration Can Protect Against Risks in Loan Origination But Would Not Protect or Affect Modifications

Congress has made clear that SAFE Act registration is appropriate for loan originators. Providing consumers with information on the loan originators' credentials is helpful because loan originators have the ability to influence the terms of loans that consumers obtain at origination, and consumers have the choice of using a competing originator.

The same is not true of those who work with borrowers on loan modifications. One of the biggest challenges servicers face in preventing inappropriate foreclosures is reaching the borrower. It is common, and understandable, for defaulting borrowers to fear talking to their servicer. There are a number of ways to address this obstacle, but providing consumer access to a database of the servicer's employees' credentials would not be helpful. In fact it would be largely irrelevant. The borrower has no choice but to deal with the servicer if a modification is to be processed.

After a servicer and defaulting borrower are in communication, the next limiting factors in preventing inappropriate foreclosure are what loan payments the borrower can afford and what lowered payments the modification program will permit. Providing consumer access to a database of the servicer's credentials would affect neither what the borrower can afford nor what modification terms are available.

G. Any Modification Problems Would Be Best Addressed Through the Modification Program Standards

If the Agencies see some risk to consumers in loan modifications, it would be best to address that risk directly. Requiring expensive registration of thousands of employees at loan servicers would not implement or follow Congressional intent, would not help consumers, would offer little to no consumer protection, and would only result in delays in loan modifications.

Additionally, servicers' modification functions are housed within their loss mitigation departments, which are in their default departments. Due to the stresses of these positions, employee turnover can be high, resulting in frequent resignations and new hiring. Registration would increase the burdens on these functions. As noted above, because those working with consumers on modifications do not influence the terms of modifications, there does not appear to be any significant consumer protection benefits to justify such a substantial regulatory burden.

The Agencies, with the Treasury Department and Fannie Mae and Freddie Mac, can affect loan modifications directly. If there is some aspect of loan modifications that needs improvement, we suggest that the effective approach would be to address modifications through the Treasury Department's HMP. HMP is today the nationwide modification standard.

The HMP modification program had covered the great majority of loan modifications in the country. Due to a new law, the HMP modification guidelines now reach even farther. The new law, Preventing Mortgage Foreclosures and Enhancing Mortgage Credit, was enacted May 20. It contains a "servicer safe harbor" that shields servicers from liability to mortgage investors based on loan modifications. [10]

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[10] "(a) IN GENERAL.—Notwithstanding any other provision of law, whenever a servicer of residential mortgages agrees to enter into a qualified loss mitigation plan with respect to 1 or more residential mortgages originated before the date of enactment of the Helping Families Save Their Homes Act of 2009, including mortgages held in a securitization or other investment vehicle—

To qualify for the protection from liability, servicers must implement a "qualified loss mitigation plan," meaning the HMP plan. The protection from servicer liability to investors is important to servicers. The effect of this servicer safe harbor is to make servicers use the HMP guidelines for at least a great majority of loan modifications.

To the extent the Agencies can identify a problem with modifications under their program, they can resolve it by amending the HMP program. For example, if the Agencies are concerned that too few borrowers receive modifications, the concern could be fully addressed simply by amending the HMP target payment level.

H. Modifications Cannot Be Interrupted

Servicers today are making every effort and are using all available staff, and hiring new staff, to avoid foreclosures through loan modifications. An expensive registration requirement for loan servicer employees who work on modifications would be a major disruption that would directly hurt struggling borrowers. Just at a time when government officials are announcing significant progress with HMP modifications, requiring SAFE Act registration for all employees processing modifications would be a major and unnecessary setback. Modifications would surely slow down and many cases would be put on hold. This result is not in consumers' interest.

Given that Congress plainly did not intend to cover loan servicers of preexisting loans in the definition of loan "originator," given that registration of servicers would not be of any significant benefit to borrowers seeking loan modifications, and given that the modifications can be changed through the Treasury Department's HMP modifications

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"(1) to the extent that the servicer owes a duty to investors or other parties to maximize the net present value of such mortgages, the duty shall be construed to apply to all such investors and parties, and not to any individual party or group of parties; and

"(2) the servicer shall be deemed to have satisfied the duty set forth in paragraph (1) if, before December 31, 2012, the servicer implements a qualified loss mitigation plan that meets the following criteria:

"(A) Default on the payment of such mortgage has occurred, is imminent, or is reasonably foreseeable, as such terms are defined by guidelines issued by the Secretary of the Treasury or his designee under the Emergency Economic Stabilization Act of 2008.

"(B) The mortgagor occupies the property securing the mortgage as his or her principal residence.

"(C) The servicer reasonably determined, consistent with the guidelines issued by the Secretary of the Treasury or his designee, that the application of such qualified loss mitigation plan to a mortgage or class of mortgages will likely provide an anticipated recovery on the outstanding principal mortgage debt that will exceed the anticipated recovery through foreclosures.

"(b) NO LIABILITY.—A servicer that is deemed to be acting in the best interests of all investors or other parties under this section shall not be liable to any party who is owed a duty under subsection (a)(1), and shall not be subject to any injunction, stay, or other equitable relief to such party, based solely upon the implementation by the servicer of a qualified loss mitigation plan.

"(c) STANDARD INDUSTRY PRACTICE.—The qualified loss mitigation plan guidelines issued by the Secretary of the Treasury under the Emergency Economic Stabilization Act of 2008 shall constitute standard industry practice for purposes of all Federal and State laws.

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).

guidelines, we believe it would be a mistake to require SAFE Act registration of servicers who do not originate new loans.

If the Agencies were to decide otherwise, we believe it would be important to minimize the disruption to foreclosure prevention measures. Even the CSBS and AARMR, whose State Model Legislation proposed registration of those who work with consumers on modifications, believe a delay to at least July 31, 2011 is necessary. We believe a delay in the registration requirement for loan servicers who only work with preexisting loans, at least until the current foreclosure crisis is abated, would be necessary to prevent disruptions to modifications.

I. Reimbursements to Servicers Should Not Require Registration

The proposed regulation could inadvertently reach one activity in which mortgage loan servicers engage. Servicers must pay property taxes or other items, such as water bills, when borrowers fail to pay them as required. The servicer then seeks reimbursement from the consumer. Although the loan agreement permits the servicer to demand immediate reimbursement, in practice servicers may accept repayment over a period of months. 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 are excluded. We request clarification that individuals who work with a borrower concerning reimbursement to the servicer for unpaid taxes and other costs are not, by that activity, subject to SAFE Act registration, even if the individuals request or receive information from the consumer and discuss the repayment schedule with the consumer.

J. Loan Assumptions

The Agencies have requested comment on whether those who work with consumers on loan assumptions should be required to register.

When rates have risen after a loan was originated, a homebuyer may elect to assume the existing loan on the property rather than obtain a new loan. The consumer would elect to assume an existing loan because the loan has some benefit, such as a better interest rate, that the consumer wants.

Loan assumptions do not change any terms of the loan. The interest rate, loan amount, loan maturity date, monthly payment, all remain unchanged. Those who work with consumers on loan assumptions do not have any ability to alter or affect any term on the loan. For this reason, and that fact that consumers elect to assume a loan rather than originate a new loan, we do not believe there can be any benefit to consumers from requiring registration of those who work with them to process assumptions.

III. Registration Procedures

We support making the registration process effective, and making it as efficient as possible. We have the following comments on the registration process.

A. Initial Registration

The CSBS and AARMR developed the Registry in January 2008, before Congress passed the SAFE Act, to handle state licensing and registration rather than federal registration. The Registry was not originally designed for registration of hundreds of thousands of mortgage loan originators employed by Agency-regulated institutions, so it needs certain modifications for this registration to occur.

The Registry will collect and maintain a large database of information about individuals, including background information, and permit public access to portions of the database. Data security and data integrity are therefore among the challenges involved in modifying the Registry to accept registration of mortgage loan originators employed at Agency-regulated institutions. Other concerns are consistent data requirements for registration of mortgage loan originators employed at Agency-regulated institutions and for state-licensed mortgage loan originators. The CSBS plans to phase in system enhancements to provide consumers access to information on both state-licensed and federally registered mortgage loan originators.

The Registry is not yet fully developed. The Agencies therefore propose a 180-day initial registration period after the Registry is capable of accepting registration of mortgage loan originators from employees of Agency-regulated institutions. The Registry, in consultation with the Agencies, is considering a staggered registration process for some of the larger Agency-regulated institutions to spread out the registration of loan originators throughout an implementation period. The Agencies seek comment on whether 180 days is sufficient time to complete the registration process.

We support a phased in implementation that allows time for the initial registrations to be processed. Once the Registry is operational, a period of time to register is necessary because there will at first be an enormous number of new registrations to process.

Registration would be faster, simpler, more efficient, and less costly if the Registry could accept registrations in an electronic batch process, including digital fingerprints. Batch processing and digital fingerprints would be so much more efficient than processing loan originators manually one at a time that we suggest that the registration process not be required, and the 180-day period not begin, until the Registry is fully able to handle batch processing and to accept digital fingerprints. Otherwise, 180 days would not be sufficient time to complete the initial registration processing.

Again, if the Agencies will require registration by the thousands of individuals at servicers who work with borrowers on loan modifications, a postponement of any such requirement, at least until the current foreclosure crisis is abated, would be necessary to prevent disruptions to the urgent modification efforts.

A staggered registration process to avoid bottlenecks is probably necessary. We support a staggered registration process if it would give all registrants 180 days to complete registration from the time they can begin registering. If loan originators at one company are directed to register at a later time to stagger registrations, these loan originators should still have the same length of time to complete their process as those who are permitted to register earlier. Larger institutions have more information systems to access for registration information than do some of the smaller institutions. Larger institutions also have higher numbers of loan originators to register. For these reasons, larger institutions should not be required to complete their registrations in a shorter time after they may begin than is permitted to smaller institutions.

B. Employer Information Comparisons

The proposed regulation, at § __.104(d), would require employers to "[e]stablish reasonable procedures for confirming the adequacy and accuracy of employee registrations, including updates and renewals, by comparisons with its own records[.]" We request clarification of what this is intended to accomplish and what records employers would be required to check. Employers obtain background information on employees, but in much less detail than the Agencies will require loan originators to submit during registration. Employers do not normally, for example, require employees to disclose *every* address, *every* employment, and *every* "other business" in which a person was involved in any way. Employers simply do not have the ability to verify or to attest to the accuracy of all of the information contained in registrations that their employees prepare.

Further, an employer may retain information on its employees in many different departments, and there may be wide variations in the information available for different employees. This is especially true for existing employees, who will have been hired at different times and often by different entities that had historically used different record keeping policies that were later merged, acquired, or reorganized into the current employer. Ferreting out all of the potential locations where information on a particular employee might be stored to compare it to that employee's registration information would be a monumental task of quite limited benefit.

Even if an employer could collect all its information quickly and uniformly, to the extent that the employer does have information about an employee's background, the employer's source of that information will be the same source that the Registry will use – the employee. We are not clear what the intent is behind having employers verify that what an employee disclosed to the employer is the same as what the employee submits during registration.

We understand that the Agencies wish registrations to be based on accurate information. We suggest that the Agencies use a cost-benefit analysis in requiring employers to verify the accuracy of employee registrations. The cost of full verification is prohibitively high, requiring extensive, laborious checks of ancient human resources files, that may no longer exist, and that will certainly not be sufficiently complete. Meanwhile the benefits of this expensive records check are minimal at best. Fraudsters know to keep their stories straight.

We suggest that the final rule clearly articulate which pieces of data employers must verify, and that this list be limited to a loan originator's current name, social security number, current office address, and business phone. In cases where an Agency has reason to believe wrongdoing may have occurred, or has a different reason why more information would be useful, the Agency can certainly require more detailed information.

This approach would very substantially reduce the regulatory burden of registration but would not make much difference in the quality of registration information.

C. Merger, Acquisition, or Reorganization Transactions Require a Grace Period

The Agencies seek comment on whether a sixty-day grace period is appropriate for compliance with registration requirements when a registered loan originator becomes an employee of an Agency-regulated institution as a result of an acquisition, merger, or reorganization transaction. We believe this is appropriate because it would prevent harm to consumers while fully implementing the purpose of the SAFE Act.

Individual loan originators often do not know about pending mergers, acquisitions, or reorganization transactions until after they occur or until just shortly before they occur. When they do occur, a registered loan originator affected by the transaction will be required to update a preexisting registration, which will necessarily take time.

The registered loan originator may well have been processing multiple consumer loan applications at the time the update suddenly becomes required. It would be most unfair to require these applicants to wait while the loan originator completes a registration update.

If the lender has loan originators on staff who do not need to update their registrations, the consumer could simply change loan originators, assuming the new loan originators have the capacity to take on new applications. But this would defeat one of the purposes of the SAFE Act. One of the most important purposes of the registration requirement is to create and maintain a database about individual loan originators so that consumers can check the employment history and history of any disciplinary or enforcement actions involving the loan officer. If consumers must transfer their loan applications while in process, they would need to suspend the application while they search the backgrounds of new loan originators to make use of the benefit of the SAFE Act.

The consumer could cancel the application and find a new lender, but this would require delay for the same reason. Also, the consumer may have already shopped for lenders and selected the best one, and should not then be required to select another. The new lender may, for example, require new or higher fees, or the consumer may lose the benefit of a previously locked interest rate. Moreover, the new lender would obtain another credit history, which could impact the consumer's credit score.

Most importantly, the consumer protection purposes of the SAFE Act will have been met before any merger, acquisition, or reorganization transaction is announced. When the loan officer's employer merges, is acquired or is reorganized, the background information will not change, only the employer's identity will change, so the consumer will still have ready

access to the same background information. The consumer protection, the Registry, will still remain fully available to the consumer.

Because the consumers will still have full access to the Registry that is for their protection, and because delaying loans in process while an update is in process would hurt consumers, it is important to incorporate a reasonable grace period to prevent delays in loans in process in the case of a merger, acquisition, or reorganization transaction.

We request one clarification about whether an employer may submit updated information on behalf of its employees after a merger, acquisition, or reorganization transaction. The proposed regulation, at § __.103(a)(4)(ii), states that in this case, that the bank or employer "and employees" must comply with the registration update requirements. It would be far more efficient for the employer to submit one update concerning all affected employees that it would be for each affected employee to submit what is largely identical information. Also, in this way the employer could be certain the information is submitted timely and accurately.

D. Effective Date of Registration

The proposed regulation, at § __.103(a)(3), requires initial registration within 180 days of the Agencies' public notice that the Registry is accepting registrations. The proposed regulation, at § __.103(c)(1), would make an initial registration effective on the date the registrant receives notification form the Registry that all required information has been submitted and that registration is complete. We request confirmation that, for initial registrations when the Registry first begins accepting applications, this notification to registrants will be based on an automated check for completeness of a submission, and will not be delayed for the time it takes to process fingerprints and for a background check. Processing fingerprints and background checks can take time, and especially when the Registry is new, we do not know how much time will be necessary. Loan originators need to be able to function without interruption when registration begins.

E. Emergency Extensions

The Agencies are considering whether the rule should provide for a method in which the registration requirements should be temporarily waived, or the initial registration or renewal period extended, in case of emergency, systems malfunction, or other event beyond the control of the Agency-related institution or the mortgage loan originator. We believe the rule should be able to accommodate emergencies, narrowly drawn so as not to create a loophole in the registration requirement but sufficient to prevent problems for consumers. Mortgage loan origination involves a number of steps, and can be very time-sensitive. There are a number of reasons why a consumer will want a loan to close quickly. For example, a consumer may have a contract to buy a house, conditional on closing before a certain date. That consumer will need the loan to close in time to avoid losing the house and possibly losing an earnest money deposit. Or, a consumer may be trying to close a loan during a period of rising interest rates, so that any delay in closing could be expensive for the consumer. It would be a disservice to delay that consumer unnecessarily.

Emergencies, such as power failures or system malfunctions are inevitable in the information age. We believe there should be flexibility in the rule to prevent consumer delays in the event the registration process suffers some emergency or unusual slowdown or failure. The Agencies should be able to temporarily extend registration deadlines for good cause in these events. We believe each Agency should designate an official who has authority to designate an emergency deadline extension for good cause for temporary periods. Preventing disruptions to consumers' loan timing should be an important consideration in any such emergency actions.

F. Review of Criminal History Reports

Proposed § __.104(h) says that institutions must have a process for reviewing criminal history background reports received from the Registry including "taking appropriate action consistent with applicable law and rules." However, the proposal does not indicate what those applicable laws and rules are. The SAFE Act differs slightly from § 19(a) of the Federal Deposit Insurance Act (FDIA),[11] so clarification would be welcome.

The SAFE Act itself does not appear to define what criminal history would disqualify an individual from being a federal registered loan originator. Under § 1505 (b)(2) of the SAFE Act, the minimum standards for a state-licensed loan originator include that the applicant has not been convicted of or pled guilty or nolo contendere to, a felony in a domestic, foreign, or military court (a) during the 7-year period preceding the date of the application for licensing and registration; or (b) at any time preceding such date of application, if such felony involved an act of fraud, dishonesty, or a breach of trust, or money laundering. Section 19 of the FDIA prohibits, without the prior written consent of the FDIC, a person convicted of, or who has entered into a pretrial diversion or similar program in connection with, any criminal offense involving dishonesty, or a breach of trust, or money laundering from becoming an employee or other institution-affiliated party of an insured depository institution. Section 19 also requires depository institutions to make a reasonable inquiry regarding an individual's history. Although § 19 does not explicitly require fingerprints, most depository institutions do obtain fingerprints to conduct a background check.

Section 19 appears to generally be more stringent than the SAFE Act requirements applicable to state-licensed mortgage loan originators because it applies not just to felonies, but to all criminal offenses, subject to a de minimus exception for offenses punishable by imprisonment for a term of less than one year and/or a fine of less than $1,000 (additionally, the individual must not have served time in jail, this must be the only conviction, the conviction must be at least 5 years old, and the conviction must not have involved an insured depository institution or insured credit union). However, the SAFE Act requirements applicable to state-licensed mortgage loan originators appear to be more stringent if there is a felony during the 7-year period prior to application, because the type of felony does not have to involve an act of fraud, dishonesty, breach of trust or money laundering. Although the FDIC has previously indicated that Section 19 does not apply to operating subsidiaries, most operating subsidiaries conduct § 19 background checks as a matter of good policy and because employees often move between the parent and the

[11] 12 U.S.C. § 1829(a).

subsidiary. Because neither § 19 of the FDIA nor § 1505(b)(2) of the SAFE Act explicitly apply to employees of operating subsidiaries, the proposed regulation's reference to "applicable laws and regulations" is not clear in this context.

We therefore recommend that the regulation clarify that the review by an operating subsidiary should be conducted according to the standards of § 19 of the FDI Act. Specifically, if the employment of an individual by a bank or thrift complies with FDIA § 19 and the employee's fingerprints have been submitted in conjunction with that background check, the individual may be employed and registered as a mortgage loan originator. Similarly, if a bank or thrift operating subsidiary submits the individual's fingerprints in conjunction with a review of the individual's criminal history in a manner consistent with § 19, the individual may be employed and registered as a mortgage loan originator.

We also request clarification about the appropriate treatment of offenses by juveniles under sealed records, and of expunged convictions.

G. Redundant Background Checks

We also recommend removing the requirement for a new background check for employees who have already undergone background checks. Many banks, thrifts, and operating subsidiaries require a background check when they hire employees, and those background checks include the submission of fingerprints and a review under FDIA § 19 as stringent as that required by the proposed regulation. We note that the proposed regulation does not require updated background checks after the initial registration, so it is not clear why an updated background check is required after a different preexisting background check. The requirement for a new background check should be removed for existing employees where the employer has previously obtained the employee's fingerprints and conducted a background check under standards as stringent as will be required for new registrants.

H. Fingerprints Do Not Become Obsolete

The proposed regulation would not permit the submission of fingerprints that are older than 3 years. Fingerprints do not change, and the cost of new fingerprints is significant. Unless experience has shown that a high proportion of older fingerprints are not suitable for comparison against fingerprint records, it should be permissible to submit older fingerprints. Furthermore, even if there have been operational issues using older fingerprint cards in the past, digital fingerprints should not present such operational issues and there should be no limits on the age of digital fingerprints.

I. De Minimis Exception

The Agencies invite comment on appropriate de minimis exceptions to registration requirements. We do not believe any *de minimis* exception would have any significant effect because the complexity of complying with it would outweigh its benefits. Loan originators would not rely on an exception because of the difficulty of determining whether an exception would actually be available. Additionally, secondary mortgage market

investors would not recognize an exception because they are unable to determine when it would apply, and could incur litigation risk should they rely on it erroneously.

However, we do believe a *de minimis* exception should be in a final regulation. An exception would reduce the litigation risk or penalties for technical violations that occur despite good faith compliance efforts.

We make two technical points about a *de minimis* exception. First, measuring the exception by the number of loans made during a period of time would not be as protective to consumers as a measure based on a percentage of total loans a lender made. A measure based on a *de minimis* percentage of total loans made would impose on lenders an incentive to register all their loan originators, even if they are comparatively small lenders.

Second, institutions should be required to aggregate their loan originations with those of their subsidiaries when calculating whether they have met the *de minimis* exception to prevent evasions of the registration requirement.

IV. Conclusion

We support the purposes of the SAFE Act registration requirements in enabling consumers to select qualified loan originators. This will help consumers select competent loan originators with a good record of compliance.

We believe that registration should be required of loan originators, as Congress directed. We do not believe Congress intended registration of those individuals who only work with consumers to process loan modifications, and there is no identified reason to impose such a requirement. Unlike loan originators, those who work with consumers to process modifications do not set or influence any loan terms. Registration of those who only process modifications would not serve any purpose of the SAFE Act. Modifications are beneficial to consumers, and should not be saddled with unnecessary regulatory burden that would serve only to unduly delay modifications.

Sincerely,

Anne C. Canfield
Executive Director

Attachment

July 9, 2009

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal
Reserve System
20th Street & Constitution Ave., NW
Washington, DC 20551
Docket No. R-1357

Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 2-3
Washington, DC 20219
Docket Number OCC-2009-0005

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
FDIC RIN 3064-AD43

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: OTS-2009-0004

Ms. Mary F. Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314-3428
RIN 3133-AD59

Mr. Gary K. Van Meter
Deputy Director
Office of Regulatory Policy
Farm Credit Administration
1501 Farm Credit Drive
McLean, Virginia 22102-5090

Re: Comments of Freddie Mac and Fannie Mae on the Registration of Mortgage Loan Originators; Proposed Rule Published on June 9, 2009

Dear Messrs. and Mesdames:

Freddie Mac and Fannie Mae request the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration and the Farm Credit Administration (collectively, the Agencies) exclude from the Agencies' interpretation of the term "loan originator" any loss mitigation specialists who engage in activities such as modifying existing residential mortgage loans and approving mortgage loan assumptions. For the reasons described below, these individuals should not be subject to the registration requirements in the Secure and Fair Enforcement for Mortgage for Mortgage Licensing Act of 2008 (the SAFE Act).

Freddie Mac and Fannie Mae play a key role in sustaining homeownership and supporting the Obama Administration's Making Home Affordable program. We recently announced two new initiatives – Home Affordable Refinance and Home Affordable Modification – available to our servicers and through them to borrowers. These two initiatives are designed to expand significantly the number of borrowers who can refinance or modify their mortgages to a payment that is affordable, thereby allowing

them to keep their homes. During the first quarter of this year, Freddie Mac and Fannie Mae have modified nearly 37,000 loans and expect to increase that pace throughout the year in response to the increase in mortgage delinquencies, thereby preventing foreclosures in most cases. The Making Home Affordable program and our other loss mitigation efforts are important initiatives in restoring stability and affordability to the residential housing market.

The language of the SAFE Act is consistent with the conclusion that it does not apply to servicers or loss mitigation specialists. The Act requires registration of "loan originators", defined as individuals who —

(i) take residential mortgage loan applications; and
(ii) offer or negotiate terms of residential mortgage loans for compensation or gain. 12 U.S.C. 5102(3)(A).

Loss mitigation specialists do not meet the statutory definition because they do not accept residential mortgage loan applications.

The legislative history confirms that the SAFE Act's licensing and registration requirements were designed to apply only to "loan originators." When Senator Feinstein introduced the S.A.F.E. Licensing Act of 2008 (S.2595), which was later incorporated into the Housing and Economic Recovery Act, she stated that the legislation "would create a comprehensive database of all residential mortgage loan originators. This includes mortgage brokers and lenders, as well as loan officers of national banks and their subsidiaries." Congressional Record-Senate, 734 (February 6, 2008). Similarly, in a floor statement in July 2008, Senator Dodd made clear that the provisions of the bill were intended to cover only "loan originators." Congressional Record-Senate, S6520 (July 10, 2008). The legislative history does not support an interpretation that covers loss mitigation specialists.

The substantive requirements in the SAFE Act further evidence that loss mitigation specialists were not intended to be covered. The law requires that qualification tests measure a license applicant's knowledge concerning federal and state law pertaining to mortgage origination, but there is no similar requirement for knowledge of servicing related matters, thus leading to the reasonable conclusion that loss mitigation specialists are not, and should not, be considered the same as loan originators.

The SAFE Act states that the purposes for establishing a mortgage licensing system and registry include reduction of regulatory burden and increasing consumer protection. 12 U.S.C. 5101(5), (6). We believe that subjecting loss mitigation specialists to the SAFE Act will instead make it more difficult for consumers to take advantage of federal initiatives such as the Administration's Making Home Affordable program, without benefit such as increasing their protections.

If loss mitigation specialists who are employees of financial institutions were required to register under the SAFE Act, they must submit information for a personal background investigation, including fingerprints for an FBI check and an authorization for the state registry to make additional inquiries, such as examining their employment history; the time required for inquiries could also prevent prompt action on applications for modification or refinance under federal programs. More importantly, this registration would do nothing to enhance consumer safety, since these modifications and refinances

offer the borrower better terms than the original loan, including reduced interest rates or more favorable payment terms, often enabling borrowers to escape abusive loans originated by those the Act is designed to keep out of the business. In addition, the modification terms are largely determined by the Department of the Treasury, leaving little discretion to loss mitigation specialists.

Lenders and servicers are beginning to implement the Making Home Affordable program now and are working diligently to process borrower applications, but they are experiencing difficulty in meeting borrower demand. Freddie Mac and Fannie Mae are working closely with our Seller/Servicers to help them prepare the systems and processes that they will need to handle the terms of the refinance and modification initiatives. A requirement for individual registration would delay the implementation of these initiatives without increasing safety for consumers.

We have reviewed the enclosed letter from the American Bankers Association, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, Housing Policy Council of the Financial Services Roundtable, Independent Community Bankers of America, and the Mortgage Bankers Association sent to the Secretary of HUD on March 5, 2009 and believe the points set forth in that letter support our views.

We appreciate your consideration of this matter.

Sincerely,

Robert E. Bostrom
General Counsel
Freddie Mac

Timothy J. Mayopoulos
General Counsel
Fannie Mae

cc: Federal Housing Finance Agency
Alfred Pollard, General Counsel
Chris Dickerson, Deputy Director for Enterprise Regulation

Enclosure

July 9, 2009

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Dear Ms. Johnson:

Re: Comments in Response to the Joint Notice of Proposed Rulemaking Proposing Amendments to Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Farm Credit Administration, Office of the Comptroller of the Currency, and the Office of Thrift Supervision Notice of Proposed Rulemaking to Implement the Secure and Fair Enforcement for Mortgage Licensing Act (S.A.F.E.), Docket No. R-1357

The Mortgage Bankers Association[1] (MBA) appreciates the opportunity to comment on the proposed regulations implementing the Secure and Fair Enforcement for Mortgage Licensing Act (S.A.F.E.), [2] applicable to institutions regulated by the Board of Governors of the Federal Reserve System (Board), Farm Credit Administration (FCA), Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), Office of the Comptroller of the Currency (OCC), and the Office of Thrift Supervision (OTS) (collectively "the Agencies").

MBA submits these comments to the Board to distribute to the other Agencies as provided in the Notice of Proposed Rulemaking (NPR).

While MBA appreciates the thoughtful efforts of the Agencies in developing these rules, it has concerns about the relationship between these proposed rules, which would apply to employees of Agency-regulated institutions, and to laws that are being enacted by the states, which may also (but were not intended to) apply to these employees. For this reason, MBA suggests several changes as explained below.

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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 over 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] S.A.F.E. was enacted as part of the Housing and Economic Recovery Act of 2008, Public Law 110-289, Division A, Title V, Sections 1501-1517 (July 30, 2008), *codified at* 12 U.S.C. 5101 – 5116.

Background

S.A.F.E.[3] requires the Agencies to jointly develop and maintain a system for registering employees of depository institutions they regulate, employees of subsidiaries owned and controlled by such depository institutions, or employees of institutions regulated by the Farm Credit Administration, as registered loan originators with the Nationwide Mortgage Licensing System and Registry (Registry). S.A.F.E., at the same time, requires the states to establish both licensing and registration requirements for loan originators that are not employees of Agency-regulated institutions.

In the event the Secretary of Housing and Urban Development (HUD) determines a year after enactment of S.A.F.E., or two years afterwards where a state legislature meets biennially, that a state does not have in place a system for licensing and registering loan originators, by law or regulation, that meets the requirements of S.A.F.E., the Secretary must provide for the establishment and maintenance of a system for the licensing and registration of loan originators in such state.

Considering that both Agency-regulated and state-regulated originators are to be registered in the Registry, the Agencies are required to coordinate with the Registry to establish protocols for assigning a unique identifier to each registered loan originator for electronic tracking, uniform identification of, and public access to, the employment history and publicly adjudicated disciplinary and enforcement actions against each registered loan originator. The Agencies are also required to coordinate with the Registry to develop and operate the registration functionality and data requirements for loan originators.

Notably, the proposed rule implements S.A.F.E.'s requirements only with respect to Agency-regulated institutions. It requires individuals employed by these institutions who act as mortgage loan originators to register with the Registry, obtain unique identifiers, and maintain their registrations. The proposal also directs Agency-regulated institutions to require compliance with these requirements and to adopt and follow written policies and procedures to assure such compliance.

The Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) established the Registry prior to S.A.F.E.'s enactment and have proposed a model state law which differs from these rules. Nearly all of the states have initiated legislation to establish licensing and registration requirements.

Overarching Comment

While MBA appreciates the thoughtfulness of the Agencies' proposed rules and the fact that through numerous questions, the Agencies are seeking to develop a workable system for Agency-regulated registration, it is concerned that these rules must be clarified to assure that the purposes of S.A.F.E. are carried out. Specifically, MBA is concerned that unless the Agencies are clear that their rules exclusively cover employees of Agency-regulated institutions under S.A.F.E., various provisions may open the door to state regulation of Agency-regulated institution employees. Such an outcome would result in a patchwork of requirements for these employees inconsistent with S.A.F.E.'s design.

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[3] Section 1507 of S.A.F.E.

MBA has long supported S.A.F.E.'s purposes: to increase uniformity, reduce regulatory burden, enhance consumer protection and reduce fraud by establishing better licensing requirements for state-regulated mortgage bankers and brokers (mortgage originators) and requiring registration of both Agency-regulated and state-regulated mortgage originators.[4]

S.A.F.E. was designed so that Agency-regulated institution mortgage originators would be required to be registered and that state-regulated mortgage originators would be subject to both improved state licensure and registry. Such a scheme recognizes the need for higher standards nationwide and the fact that currently Agency-regulated financial institutions and their mortgage originators are more consistently regulated than mortgage originators regulated by the states.

Notwithstanding the differing Agency and state regulatory schemes, without clear language in any final rules, a *de minimis* exception from registration for certain Agency-regulated institution employees could subject those excepted from Federal registration to state regulation. Similarly, while MBA believes there is no legal or policy basis to treat Agency-regulated servicer employees involved in loss mitigation as mortgage originators for purposes of S.A.F.E., as explained below, if loss mitigation experts are not carefully excepted from federal registration requirements under these rules, they too will be subject to state regulation, given the state laws being enacted. A misinterpretation of the definition of the term "loan originator" and what we believe is an ill-founded comment from HUD exacerbates our concern respecting mortgage servicers. Therefore, MBA requests the Agencies make clear, for the reasons explained below, that servicers are excepted from registration rather than simply excluded from Agency coverage.

Further, even the best intentioned provisions for measured implementation of the rules' requirements could result in state coverage if not properly addressed.

Accordingly, in these comments, MBA suggests changes that could help address these concerns including, but not limited to, new language in the purpose provisions of the rule and a clear definition of "employee" as well as suggestions for the *de minimis*, servicer and implementation provisions.

I. Summary of MBA's Comments Relative to Specific Sections of the Proposed Rule

For the reasons discussed in these comments, it is MBA's view that final rules should:

1. Revise the "purpose" provisions of the rule to make clear that the rule exclusively covers employees of Agency-regulated institutions.
2. Revise the *de minimis* exceptions in the final rule to avoid unnecessary coverage of loan originators that do not ordinarily originate mortgage loans along with the establishment of the new purpose provision at 1 above and new definitional sections below.
3. Define the term "employee" to include all employees, agents and contractors of Agency-regulated institutions.

[4] Indeed, MBA's Mortgage Improvement and Regulation Act would go beyond S.A.F.E and establish a new federal regulator for mortgage bankers and mortgage brokers. The regulator would establish rigorous uniform national standards for mortgage bankers and mortgage brokers.

4. Define the term "mortgage originator" to explicitly exclude employees involved in servicing functions. Consistent with the plain language of S.A.F.E. and sound public policy, the Agencies' S.A.F.E. rules should only require true originators to register and not mortgage servicers engaged in modifications or other loss mitigation activities, subject to establishment of new purpose and employee provisions.
5. Exclude from the term "mortgage originator" individuals who engage in certain no-cash out refinances.
6. Exclude from the term "mortgage originator" individuals who engage in simple loan assumptions.
7. Define "offer" and "application" to ensure proper application of the exemption for administrative or clerical tasks.
8. Revise requirements to better facilitate an orderly implementation as necessary subject to establishment of new purpose and employee provisions.
9. Maintain and liberalize provisions facilitating movement of registered employees to prevent unnecessary interruption of mortgage origination activity and adverse effects on consumers subject to the establishment of new purpose and employee provisions.
10. Avoid duplicative fingerprinting and other requirements that may increase costs unnecessarily.
11. Avoid unwarranted invasion of privacy. The Agencies should carefully implement provisions balancing the need for consumer review of information on originators with the duty to protect against abuses and unwarranted invasions of privacy.

II. MBA's Specific Comments Detailed

1. Revise the purpose provisions of the rule to make clear that the rule exclusively covers employees of Agency-regulated institutions.

Section __.101 as proposed provides in part that the rule implements S.A.F.E.'s federal registration requirements, which apply to individuals who originate residential mortgage loans, and describes the objectives of S.A.F.E.'s registration. Considering, however, that the Agencies' authority under S.A.F.E. extends to the employees of Agency-regulated institutions, MBA believes the rule should explicitly state that its purpose is to exclusively establish the registration requirements under S.A.F.E. for employees of such institutions. Under such a formulation, even if the rule exempts particular employees from registration, they are still subject to the rule. With these changes, the proposed rules are less likely to be misconstrued to permit regulation of Agency-regulated institution employees for purposes of registration and licensing by the states.

2. Revise the *de minimis* exceptions in the final rule to avoid unnecessary coverage of loan originators that do not ordinarily originate mortgage loans along with the establishment of the new purpose provision at 1 above and new definitional sections below.

Pursuant to S.A.F.E.[5], which requires the Agencies to establish a *de minimis* exception, the rule at 101(c) states that the registration requirements do not apply to an employee of an Agency-regulated institution if during the last 12 months: (1) the employee acted as a mortgage loan originator for five or fewer residential mortgage loans; and (2) the Agency-regulated institution

[5] Section 1507(c) of S.A.F.E.

employs mortgage loan originators, who while excepted from registration pursuant to this section, in the aggregate, acted as a mortgage loan originator in connection with 25 or fewer residential mortgage loans. The rules also provide that an employee must register with the Registry prior to engaging in mortgage loan origination activity that exceeds either the individual or aggregate limit.

MBA supports establishment of a *de minimis* exception to relieve unnecessary burden[6] and to serve both the imperatives of efficiency and consistency with the provisions of S.A.F.E. MBA believes a *de minimis* exception permits an Agency-regulated institution to serve consumers' needs where the consumer seeks service and is particularly helpful in a "pinch" where a registered employee may not be available. MBA believes such flexibility, particularly in the context of well regulated institutions, presents little risk and is consistent with S.A.F.E.'s consumer protection and fraud prevention purposes.

While MBA believes the five loan threshold chosen by the Agencies for the individual *de minimis* limit is somewhat low, it could be a reasonable marker. At the same time, however, MBA believes the limit on 25 loans per institution should be removed or at least adjusted so that the ceiling increases in line with the volume of the institution's business. For example, the Agencies could establish three or four limit sizes depending on volume. These limit sizes would also more accurately reflect the institutions' wide variations in mortgage lending volume.

While MBA recognizes that the requirement for an institution limit may be intended to limit the possibility of "gaming the system," we do not believe the risk of gaming is great among Agency-regulated institutions that are subject to extensive audit and examination. An institutional limit also will require extensive tracking procedures and make the proposed exemption unduly burdensome for an institution's use.

MBA would oppose establishment of an additional requirement that an institution must aggregate its residential mortgage loans with its subsidiaries when calculating the number of mortgage loans originated for purposes of this exception. Such a rule would only worsen the regulatory burden.

MBA supports the voluntary nature of the *de minimis* exception. In most cases, institutions will seek to ensure that employees who act as originators are registered to avoid unnecessary regulatory concern. Furthermore, it is essential that to make the *de minimis* exception workable, both the new purpose provision (Comment 1 above) and the definition of employee (Comment 3 below) also must be included in the final rule along with the *de minimis* exception.

3. Define the term "employee" to include all employees, agents and contractors of Agency-regulated institutions.

Considering that the authority of the Agencies extends to employees for purposes of S.A.F.E., MBA strongly believes that a precise definition of "employee" is essential to the rule. MBA suggests that the definition should include employees, agents and contractors under the control of regulated institutions to carry out functions of such institutions. While use of a tax-related or W-2 type definition of employee is far preferable to no definition at all, loan originators in

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[6] Section 1507 of S.A.F.E. requires the Agencies to "make such *de minimis* exceptions as may be appropriate to the Act's requirements to register and obtain a unique identifier.

particular may be both W-2 and independent contractors. For this reason, MBA believes a definition that is more expansive than simply covering W-2 employees is appropriate coupled with appropriate exceptions from registration as recommended in this comment.

4. **Define the term "mortgage originator" to explicitly exclude employees involved in servicing functions. Consistent with the plain language of S.A.F.E. and sound public policy, the Agencies' S.A.F.E. rules should only require true originators to register and not mortgage servicers engaged in modifications or other loss mitigation activity subject to establishment of new purpose and employee provisions.**

The Agencies request comments on whether the definition of "mortgage originator" should cover individuals who modify existing residential mortgage loans and if so, whether these individuals should be excluded from the definition. Comment is also requested on whether the final rule should merely delay the registration requirement for individuals engaged in loan modifications for a specified period in light of current economic conditions.

MBA strongly urges the Agencies to exclude servicers who modify existing residential mortgage and perform other related activities from the definition of loan originator. This exception is appropriate given S.A.F.E.'s stated objectives.

Based on a review of the statutory language and legislative history, servicers are not "loan originators" and were not intended to be considered within the registration and licensing requirements. S.A.F.E. was designed to establish a nationwide licensing and registration system for individual loan originators, lenders and mortgage brokers. S.A.F.E.'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 S.A.F.E. 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."[7] There is no statement in the law or legislative history to indicate that servicers were ever intended to be covered by the legislation.

Remarks by Senator Feinstein upon introduction and then passage of S.A.F.E. 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." There was no mention of servicers. Servicers do not lend or arrange loans and since the borrower is already legally bound by his or her contract terms, servicers do not "steer." Senator Feinstein also talks about "mortgage brokers...preying upon people and walking off with tens of thousands of dollars of cash." Servicing staff certainly do not fit that characterization. Clearly the concern was with individuals who earn significant commissions from creating a mortgage loan, not a loss mitigation expert that is paid a salary to perform typical loan servicing functions.

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[7] Congressional Record-Senate, S6520, July 10, 2008

S.A.F.E. itself defines a "loan originator" as 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."[8] [9] S.A.F.E. 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* (emphasis supplied)."[10] The exception for real estate brokerage activities also makes clear that the bill is directed only to lenders, mortgage brokers or similar mortgage originators.

In applying the two-prong test to define a "loan originator," servicers do not take what is commonly known as an applications and, therefore, do not meet the first prong of the test. The term application must be considered in the context of S.A.F.E., which again relates to mortgage origination functions. The mere fact that a servicer may collect information to evaluate a foreclosure alternative is not the same as taking an application for the extension of credit. The servicer's work is a due diligence effort to determine appropriate steps to avoid foreclosure, redefault and greater losses and to satisfy pooling and servicing agreement requirements.

Other provisions of S.A.F.E. also 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 law and state law pertaining to mortgage origination. The law requires education in federal law and regulations, ethics and fraud, fair lending and lending standards for the subprime mortgage market, but there are no requirements specifically relevant to mortgage servicing (e.g. investor requirements or net present value analyses). If servicers were intended to be covered, the educational requirements would have been appropriately tailored. It is, therefore, fair to say that requiring servicers to meet S.A.F.E. requirements amounts to "pushing square pegs through round holes."

The surety and net worth requirements found in section 1508(d)(6) 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" (emphasis added). In the context of servicing, this provision does not make sense. It is common knowledge that many mortgage servicers do not originate loans and do not have the capacity to do so. As a result, we believe this language provides further evidence that servicers were excepted from coverage.

Additionally, making certain servicing employees subject to these new requirements will only serve to hinder and make much more costly the crucial work of servicers today – reaching and assisting millions of borrowers experiencing payment difficulties. Such a result would undermine the administration's Making Home Affordable Plan, which is committing an unprecedented amount of government resources to provide loan modifications and refinance

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[8] S.A.F.E, Section 1503(3) (B).

[9] 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.

[10] HERA § 1503(3)(A)(i) (emphasis added).

opportunities for millions of mortgage borrowers. Servicers and the industry will meet these challenges, but layering on additional requirements that are neither well-founded nor warranted will only frustrate and make more costly this important effort.

Despite the evidence that loss mitigation staff do not meet the definition of "loan originator" and were not the intended focus of S.A.F.E., problematic developments have occurred which MBA believes need to be factored into the Agencies' final rule. Specifically, CSBS, HUD, and some states have determined that servicing staff who perform modifications may be "loan originators." MBA believes these interpretations are faulty and contrary to the law. Nonetheless, these developments could potentially diminish the Agencies' regulatory jurisdiction over Agency-regulated financial institution employees.

The CSBS/AARMR's model state law, as indicated, is inconsistent with the federal statute because the model law changes the definition of a "loan originator" to include an individual who takes an application ***or*** offers to or negotiates the terms of a residential mortgage loan. This change from "and" to "or" expands the states' authority over loss mitigation staff. Not surprisingly, several states have adopted the model language "as is." Others exclude servicers from the definition or exclude servicers provided HUD's final rules do so as well.

Recently, HUD issued a "Frequently Asked Questions" document which states:

> "Given the extent of loan modifications being undertaken, HUD is generally inclined to provide in rulemaking that the SAFE Act's definition of a loan originator covers an individual who performs a residential mortgage loan modification that involves offering or negotiating of loan terms that are materially different from the original loan, and that such individuals are subject to the licensing and registration requirements of the SAFE Act."[11]

While we believe the reasons for reaching this conclusion are faulty and over broad, if HUD publishes this interpretation as a final rule, states that have expressly chosen to exclude servicers for fear of interfering with loss mitigation activity or for other reasons, may be deemed by HUD to have failed to meet the minimum requirements of S.A.F.E. To avoid state law being applied to employees of federal financial institutions, the Agencies must make clear that the statute directs the Agencies to establish the exclusive rules for all Agency-regulated institution employees as suggested. The exception of a group of employees, such as servicers or other appropriate staff, must not subject such employees to state licensing and registration laws or HUD's rules.

In sum, both law and public policy support exclusion of servicers and loss mitigation/ modification staff from having to be licensed and registered under S.A.F.E. MBA strongly urges that the Agencies take the position that servicers, who work with consumers concerning *existing* loans, are not subject to S.A.F.E. and should not be subject to state licensing requirements or state or federal registration requirements under S.A.F.E. This should be so even if the servicer negotiates and amends the terms of a loan or helps the borrower into one of the programs under the Making Home Affordable Modification Plan or other loss mitigation options. We also request that the term "servicer" be defined as an individual who administers an existing mortgage loan, which may include explaining the terms of the loan or its escrow account,

[11] http://www.hud.gov/offices/hsg/ramh/safe/sfea.cfm.

negotiating, amending or waiving the terms of an existing loan, and taking other actions designed to prevent or avoid default or foreclosure in connection with an existing loan.

At the same time, the Agencies must make clear that where servicers are "employees" of Agency--regulated institutions, they are covered within the scope of the Agencies' jurisdiction and authority to except them from the registration (and state licensing) requirements. It is imperative that, to the extent the Agencies conclude that servicers do not meet the definition of loan originators or are otherwise excepted from registering under the federal regime, those employees do not default to state law or HUD requirements.

Finally, MBA believes that servicers should be permanently excluded from the definition of "mortgage originator" rather than merely delay their inclusion. However, if the Agencies conclude that performing modifications renders an employee a "loan originator," the Agencies should delay implementation for at least two to three years to avoid undue interference with their important work.

5. **Exclude from the term "mortgage originator" individuals who engage in certain no-cash out refinances.**

The Agencies request comment on whether individuals who engage in refinances that do not involve cash-outs and are made with the same lender should be excluded from the definition of mortgage loan originator.

MBA believes that no-cash out refinances made with the same lender do not pose the same level of potential fraud and abuse as do other types of loans. While all refinances involve the creation of a new loan and extinguishment of the existing loan, these loans do not pose the same risk to the borrower. To the contrary, it is commonplace for the lender not to re-qualify the homeowner or require a new appraisal because the lien holder already retains the current credit and property risk. 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 MBA members, some institutions have staff that specialize in no-cash out or streamline refinances. These individuals usually take refinance inquires and applications that come through a call center or the institution's internet site. These employees are generally paid a salary rather than a commission per loan. As a result, we believe an exemption could be crafted for these employees that would not violate the spirit and the objective of the law.

6. **Exclude from the term "mortgage originator" individuals who engage in simple loan assumptions.**

The Agencies solicit comment on whether individuals who engage in approving mortgage loan assumptions should be excluded from the proposed definition of "loan originator" and whether such approach is consistent with S.A.F.E. The Agencies also request commenters to describe:

(1) whether the loan transactions offered by your institution are typically assumable; (2) the types of assumptions that are permitted, if any; (3) the type of contact between the employee and the new borrower; and (4) differences, if any, between underwriting practices for a loan assumption transaction and a new loan origination.

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 the Department of Veterans Affairs and insured by the Federal Housing Administration are assumable provided their guidelines are met and the assumptions are approved by the mortgagees. Fannie Mae[12] and Freddie Mac[13] 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 their guidelines for specific information. Moreover, to the extent the loan has mortgage insurance, the mortgage insurer may also have to approve the assumption and/or release of liability for the original debtor.

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 depends on the flow of work and does not provide any real insight as to whether such employees are "loan originators."

According to MBA members, the vast majority of assumptions do not 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.[14] 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.

Moreover, the prospective debtor almost certainly approaches the mortgagee with full knowledge of the pre-existing terms and without any solicitation or contact by the mortgage company. As a result, it is questionable whether the mortgagee offers any terms to the

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[12] Fannie Mae Single Family, 2006 Servicing Guide, Part III, Chapter 4, Transfers of Ownership.
[13] Freddie Mac Single Family Seller/Servicer Guide, Volume 1, Chs. 8-D15, Chapter 8, General Purchase Program Requirements and Characteristics.
[14] The Garn-St. Germain Act 12 USC §1701j- 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."

prospective debtor.[15] 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 "competent" employee or assume a different loan. 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, MBA does not believe that simple assumptions meet either prong of the definition of "loan originator" and we suggest they be excluded from the rules' definition of "loan originator."

7. **Define "offer" and "application" to ensure proper application of the exemption for administrative or clerical tasks.**

MBA believes it would be helpful to define "offer" and "application" for purposes of further clarifying how the rule applies to various staff in general, as well as, contractors and agents.

We believe it is important to specifically state that an "offer" does not include the mere delivery of terms or pre-existence of a contract (in the case of assumptions). Similarly, we believe the Agencies should define "application" to include more than any collection of borrower information and more than an update of information already in its possession or information used to underwrite the existing credit. As stated above, given the context for the term, an "application" should be defined as an application or collection of information for the purpose of originating a mortgage. Failure to clearly define these terms could result in a host of employees and contractors/agents being covered by the rules, including those who reach out to no-contact delinquent borrowers, collect information on behalf of the servicer or deliver loss mitigation offers and other third parties that may help process the information. While we are aware of the exemption for administrative and clerical staff, that exemption is not particularly helpful without defining who is and is not a "loan originator." The benefit of defining these terms we hope will also influence the states and HUD in developing their own definitions.

8. **Revise requirements to better facilitate an orderly implementation as necessary subject to establishment of new purpose and employee provisions.**

S.A.F.E. specifically prohibits an individual who is an employee of an Agency-regulated institution from engaging in the business of a loan originator without registering as a loan originator with the Registry, maintaining such registration annually, and obtaining a unique identifier through the Registry. Both the individual employee and the employing institution are responsible for complying with these requirements.

The proposed rules provide a grace period for initial registrations of employees. Pursuant to Section __.103(a)(3) of the proposed rule, an employee is not required to register, and, therefore, can continue to originate residential mortgage loans without complying with the rules' registration requirement, for 180 days from the date the Agencies provide public notice that the Registry is accepting initial registrations. Also, the Registry, in consultation with the Agencies, is considering a staggered registration process for some of the larger Agency-regulated institutions and their employees in order to spread out the registration of mortgage loan originators throughout this implementation period.

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[15] 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.

Agencies seek comment on whether the 180-day implementation period will provide Agency-regulated institutions and their employees with adequate time to complete the initial registration process and whether the staggered registration process should be developed. The Agencies also seek comment on batch processing and welcome suggestions for workable alternative approaches that could mitigate the initial registration burden on Agency-regulated institutions and their employees.

MBA appreciates the Agencies' efforts to develop reasonable implementation provisions to make the process of registration as efficient as possible. As the Agencies are aware, CSBS and AARMR developed the Registry prior to passage of S.A.F.E. to handle state licensing and registration. The Registry was not originally designed for registration of hundreds of thousands of mortgage loan originators employed by Agency-regulated institutions. MBA understands system modifications are underway to accommodate these additions, but requests that the implementation of the rules be deferred until the modifications are complete.

MBA believes registration would be faster, simpler, more efficient, and less costly if the Registry could accept registrations in an electronic batch process, including digital fingerprints rather than processing loan originators manually one at a time. For this reason, we suggest that the registration process not be required until the Registry is fully able to handle batch processing and to accept digital fingerprints.

We also concur that a staggered registration process is more orderly and helps avoid technical glitches. If loan originators at one company are directed to register at a later time due to staggered registrations, these loan originators should have the same length of time to complete the registration process as those who are required to register earlier. Accordingly, we believe all institutions and registrants should be given 180 days to complete registration from the time their staggered start date arrives.

These points imply that closer to a year of implementation will be necessary. A shorter schedule will likely prove counterproductive and unduly burden the mortgage industry and hamper the recovery of the mortgage markets.

It is also important that the Agencies provide absolute certainty as to when the Registry will become available to start accepting registrations, and that they clearly specify the date that the implementation clock starts to run. As mentioned in the proposed rules' preamble, Agencies must provide a "coordinated and simultaneous advance notice" to Agency-regulated institutions of when the Registry will begin accepting federal registrations.[16] MBA believes such notifications should be achieved through various channels simultaneously, including Federal Register publication, Web-site notice, and agency bulletins.

Moreover, while we strongly oppose registry of servicers, as indicated above, if the Agencies require registration of the many thousands of employees who work on loan modifications, at least a two- or three-year postponement of any such requirement is necessary to prevent disruptions to ongoing loan modification efforts.

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[16] 74 Fed. Reg. 27393 (June 9, 2009).

Finally, while we appreciate efforts for reasonable implementation, it is essential that both the new "purpose" provision make clear that these rules cover all Agency-regulated institution employees exclusively (comment 1 above) and the definition of employee (comment 3 above) also be included in the final rule along with the implementation provisions.

9. **Maintain and liberalize provisions facilitating movement of registered employees to prevent unnecessary interruption of mortgage origination activity and adverse affects on consumers subject to the establishment of new purpose and employee provisions.**

MBA supports provisions of the proposed rules that would allow a properly registered or licensed mortgage originator not to have to re-register when a registered employee moves from one Agency-regulated institution to another or from a State regulated institution to an agency regulated institution. The proposed rules provide that if the employee had previously registered and received a unique identifier, prior to becoming an employee of that institution and maintained that registration or license, the registration requirements are deemed met if (1) the employee's employment information in the Registry are updated; (2) new fingerprints of the employee are provided for a new background check, except in the case of mergers, acquisitions and reorganizations; (3) information concerning the new institution is provided to the registry; and (4) the registration is maintained. In order to reduce regulatory burden, the proposed rules also provide a special sixty-day grace period for compliance with these requirements when a registered mortgage originator becomes an employee of ann Agency-regulated institution as a result of an acquisition, merger or reorganization.

MBA supports provisions to facilitate movement of qualified mortgage originators within the industry in general and specifically supports provisions of the rule to provide loan originators a grace period to complete the registration when the loan originator changes employment when the individual was already in the registration database, albeit affiliated with a different company.

Consumers are better served if the movement and availability of qualified originators is not unduly hampered. In this vein, by letter to CSBS and AARMR (attached) MBA asked their support of an interpretation of the MSL and, where necessary, amendatory state legislation to make clear that duly registered originators from federally licensed institutions should be hired and continue to function as loan originators subject to their completion of applicable state education and licensing requirements.[17]

Additionally, MBA believes the exclusion of the requirement for new fingerprints in the case of mergers and acquisitions is appropriate. We also believe consideration should be given to removing the requirement for fingerprints and background checks in these cases altogether. The proposed rules do not require updated background checks after the initial registration, so it is unclear why an updated background check is required when a previously registered employee joins a new firm.

Once again, while we appreciate efforts to facilitate movement by registered loan originators, it is essential that both the new "purpose" provision make clear that these rules cover all Agency-

[17] Letter of April 7, 2009 from John Courson, President and Chief Executive Officer to AARMR and CSBS (Attached)

regulated institution employees exclusively (comment 1 above) and the definition of employee (comment 3 above) also be included in the final rule along with the implementation provisions.

10. Avoid duplicative fingerprinting and other requirements that may increase costs unnecessarily.

The proposed rules would prohibit the submission of fingerprints that are older than three years to the Registry. MBA believes the regulators should carefully reexamine these and similar requirements in the interest of reducing unnecessary costs. Fingerprints are undoubtedly unique and do not change. For example, the compliance cost of requiring new fingerprints every three years is significant. Submission of fingerprints older than three years should be acceptable. Unless experience has shown that a high proportion of older fingerprints are not suitable for comparison against fingerprint records, it should be permissible to submit older fingerprints.

11. Avoid unwarranted invasion of privacy. The Agencies should carefully implement provisions balancing the need for consumer review of information on originators with the duty to protect against abuses and unwarranted invasions of privacy.

Section __.103 (d)(2) of the proposed rules requires an Agency-regulated institution employee to authorize the Registry to make available "to the public" the following information: name; other names used; name of current employer(s); current principal business location(s) and business contact information; 10 years of relevant employment history; and publicly adjudicated or pending disciplinary and enforcement actions and arbitrations against the employee.

MBA is concerned about the effect that the public exposure of all of this material will have on individual originator's privacy, whether such exposure may facilitate identity theft and hamper institutions in recruiting qualified individuals to serve as mortgage originators.

Although the S.A.F.E. Act does not explicitly define who may have access to Registry data, S.A.F.E. does not require that the information be made public, as such. Section 1502 of S.A.F.E. provides that regulators are to have access to the NMLSR data and Section 1502(7) states "consumers" shall have "easily accessible information, offered at no charge" about loan originators.

Considering the very real concerns about wide dissemination of this data and the rather limited statutory instruction, MBA believes the regulators should carefully reconsider this issue to protect against abuses and unwarranted invasions of personal privacy. One possibility is to limit the set of data made publicly available to information on final disciplinary actions only. In addition, consideration should be given to limiting the system's availability to *bona fide* mortgage shoppers during the shopping process and employers rather than others without a need to know including data miners and vendors. MBA would welcome an opportunity to work with the agencies on these and other options.

III. Conclusion

While MBA appreciates the Agencies' efforts, it is particularly concerned about the relationship between these proposed rules and laws that are being enacted by the states. It is also particularly concerned that the process of serving troubled borrowers not be hampered by ill-

founded registration and licensing requirements. We hope our comments on these and other matters are useful and we look forward to assisting the Agencies in implementing final regulations.

For questions or further information, please do not hesitate to contact Ken Markison, MBA Associate Vice President and Regulatory Counsel at kmarkison@mortgagebankers.org or at (202) 557-2930, Vicki Vidal, MBA Associate Vice President at vvidal@mortgagebankers.org or at (202) 557-2861 or Joseph Silvia, MBA Senior Public Policy Specialist at jsilvia@mortgagebankers.org or at (202) 557-2858.

Sincerely,

John A. Courson

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

CONSUMER MORTGAGE COALITION

March 13, 2009

Mr. Paul Sanford
Executive Secretary
Federal Financial Institutions Examination Council
L. William Seidman Center
Mail Stop D 8073a
3501 Fairfax Drive
Arlington, VA 22226-3550

Re: SAFE Act Registration Requirements

Dear Mr. Sanford:

Thank you very much for taking time today to visit with me this past Wednesday concerning the SAFE Act registration requirement for mortgage loan originators. This letter follows up our conversation, with concerns that lenders have about the registration requirements.

Lenders are interested in helping to make the registration process go smoothly. Once the new system is established, a large number of registrants will crowd the system, and this start-up registration volume could cause delays in what would otherwise be an orderly process. We are therefore interested in finding steps lenders can take now to prevent an undue initial bottleneck. Lenders have two main concerns – identifying who will be required to register, and whether there is information lenders can begin to collect now, even before the formal registration process begins.

Who will be required to register?

The SAFE Act requires registration of "loan originators" who are employees of depository institutions, of subsidiaries of depository institutions regulated by a Federal banking agency, or of an institution regulated by the Farm Credit Administration.[1] Under the SAFE Act, the term loan originator:

(i) means an individual who—
(I) takes a residential mortgage loan application; and

[1] Housing and Economic Recovery Act (HERA) § 1507(a) 122 Stat. 2654, 2817.

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(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[.][2]

Depository institution lenders will need guidance to know which of their employees will fall into this definition. There is an exemption form the definition of loan originator for individuals who perform only administrative or clerical tasks on behalf of loan originators. How the regulators construe the terms "loan originator" and "administrative or clerical tasks" could have a significant effect on which individuals must register.

The American Association of Residential Mortgage Regulators (AARMR) and the Conference of State Bank Supervisors (CSBS) drafted model legislation for state adoption that would require state licensing, of loan originators who are not employees of depository institutions, if the individuals *either* take loan applications *or* offer or negotiate loan terms for compensation or gain. Depository institutions are concerned that they will be required to register far more people than they had anticipated. In particular, the AARMB / CSBS construction of the SAFE Act would require registration of a large number of depository institution employees who *service* existing, rather than *originate* new, loans.

In today's environment, servicers are modifying a large number of existing loans. The modification process does involve offering or negotiating loan terms, but it does not involve taking a loan application because the loan has already been originated. Loan servicers, even when not modifying loans, often perform many functions that could be construed to involve offering or negotiating loan terms on existing loans. We do not believe Congress intended the SAFE Act to require the registration of the many loan servicing employees of depository institutions.

Loan servicers today are modifying an unprecedented number of mortgage loans nationwide. A new registration requirement that could reach a large number of loan servicers all at once could present an operational bottleneck on the urgent modification efforts.

Lenders would appreciate guidance on who will be required to register so they can begin preparing for registrations.

Steps lenders can take now to begin the registration process

Lenders are interested in beginning the process of collecting information that will be necessary to register loan originators. Although the actual registration requirements are not final, lenders would be able to begin collecting and assembling the information with guidance on what will be required.

For example, fingerprints and background information will be required. If lenders already have fingerprints of loan originators, will they be sufficient?

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[2] HERA § 1503, 122 Stat. 2654, 2811.

Lenders are considering whether it would be appropriate to begin collecting information that individuals use to register with the Nationwide Mortgage Licensing System, on a Uniform Individual Mortgage License / Registration and Consent Form (Form MU4). It is considerably less burdensome to collect information from large numbers of individuals in one request, rather than having to make multiple requests for similar information from the same people. With some guidance from the FFIEC, lenders would be able to begin the collection process.

We would very much like to meet, either in person or by conference call, with you and the FFIEC/Farm Credit Administration Working Group to review these issues and suggest solutions. Any guidance that can be provided to lenders so that they can begin to prepare for registration would be most welcome.

Again, thank you.

Sincerely,

Anne C. Canfield
Executive Director

March 5, 2009

The Honorable Shaun Donovan
Secretary
U.S. Department of Housing and Urban Development
451 Seventh Street, S.W.
Washington, D.C. 20410

Dear Secretary Donovan:

The undersigned organizations representing the financial services industry urgently seek your assistance regarding national housing policy and the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (S.A.F.E.). We are concerned that, absent appropriate guidance from HUD, there is real danger that states will enact a patchwork of new laws requiring mortgage servicers to be licensed and registered under S.A.F.E.

While we support appropriate qualifications for mortgage servicing companies, we do not believe the S.A.F.E. licensing and registry system is the appropriate vehicle to address any servicer-related concerns. S.A.F.E. was never designed to cover servicers. Rather, it was designed to establish a nationwide licensing and registration system for individual loan originators, lenders and mortgage brokers. S.A.F.E.'s substantive requirements are geared to these individuals and not servicers or their personnel. Most importantly, making servicers and their employees subject to these new requirements will only serve to hinder and make much more costly the crucial work of servicers today – reaching and assisting millions of borrowers experiencing payment difficulties. Such a result would undermine the administration's Making Home Affordable Plan.

By way of background, Congress enacted S.A.F.E.[1] as part of the Housing and Economic Recovery Act (HERA), to establish a nationwide mortgage licensing system for "loan originators."[2] Notably, it was also intended to streamline the licensing process and reduce the regulatory burden.[3] Generally, states are free to regard the requirements of S.A.F.E. as a floor, not a ceiling, which they may build on, in enacting their own licensing and registration laws. S.A.F.E. encourages the states to establish a Nationwide Mortgage Licensing System and Registry (NMLSR), to be developed and maintained by the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR). While the states must meet the requirements of S.A.F.E., overall responsibility for interpretation, implementation and compliance with S.A.F.E. rests with HUD. HUD must implement and administer its own licensing and registration requirements in those states where a state law does not meet the requirements of S.A.F.E. Accordingly, states and state organizations can be expected to defer to HUD's view.

In this connection, we greatly appreciated the recent letter to you of February 5, 2009, from CSBS and AARMR. In their letter, the organizations expressed the concern that "application of S.A.F.E. 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." The organizations, therefore, requested your interpretation of whether S.A.F.E. covered servicers and suggested a delay until July 31, 2011,

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[1] Title V of the Housing and Economic Recovery Act of 2008 (HERA), Pub. Law No. 110-289, 122 Stat. 2654, 2810.
[2] S.A.F.E. Section 1502(1)
[3] S.A.F.E. Section 1502 (7)

or later as approved by the Secretary, for loss mitigation specialists employed by servicers to be covered by S.A.F.E.

While we strongly support CSBS's and AARMR's request for an interpretation, we do not agree that resolution of the issue should be deferred. Rather, we believe an examination of the Congressional intent and the law should result in a definitive opinion at this time, to exclude servicers from S.A.F.E. licensing and registration to avoid unwarranted regulation, undue harm and unnecessary costs to industry and consumers alike.

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 S.A.F.E. 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."[4] There is no statement in the law or legislative history to indicate that servicers were ever intended to be covered by the legislation.

The Act itself defines a "loan originator" as 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."[5] S.A.F.E. also provides that the term originator "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* (emphasis supplied).[6]

In applying the two-prong test to define an "originator," servicers do not take applications and therefore do not meet the first part of the test. A servicer does and should negotiate the terms of an *existing* loan they service to provide loan workouts and modifications or other solutions such as a loan under the administration's program that is a better option for the borrower. The exception for real estate brokerage activities also makes clear that the bill is directed only to lenders, mortgage brokers or similar mortgage originators. The Act's definitions, therefore, include lenders and mortgage brokers and do not cover servicers.[7]

Beyond statutory interpretation, there are several other reasons why S.A.F.E. should not apply to mortgage servicers. S.A.F.E.'s substantive requirements are geared to mortgage lenders and brokers and not mortgage servicers. For example, the law requires that qualification tests adequately measure a license applicant's knowledge concerning federal law and state law pertaining to mortgage origination, but there is no similar requirement for knowledge of servicing or servicing related matters. The law requires education in federal law and regulations, ethics and fraud, fair lending and lending standards for the subprime mortgage market, but there are

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[4] Congressional Record-Senate, S6520, July 10, 2008
[5] S.A.F.E, Section 1503(3) (B).
[6] HERA § 1503(3)(A)(i) (emphasis added).
[7] The issue 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 absent HUD guidance.

no requirements specifically relevant to mortgage servicing (e.g. investor requirements or present value analyses). It is therefore fair to say that requiring servicers to meet S.A.F.E. requirements amounts to "pushing square pegs through round holes."

Licensing requirements applied to mortgage servicers under S.A.F.E. would be more burdensome on servicers than on originators. Servicers customarily operate in numerous, if not all, states and under S.A.F.E. their personnel would need a license in each of them. Lenders, on the other hand, except for the largest, tend to be more geographically concentrated, so their originators ordinarily would require licensure in only one or a few states. Additionally, servicing is a very labor-intensive operation, requiring very large numbers of employees and agents. A requirement for individual licensing would result in significant implementation delay and licensing costs.

Finally, in recent weeks, the administration announced its Making Home Affordable Plan, committing a large amount of government resources to provide loan modifications and refinance opportunities for millions of mortgage borrowers. Servicers and the industry will meet these challenges, but layering on additional licensing requirements that are neither well-founded nor warranted will only frustrate and make more costly this important effort.

For all of these reasons, we strongly urge that HUD publicly take the position that servicers, who work with consumers concerning *existing* loans, are not subject to S.A.F.E. and should not be subject to state licensing requirements under S.A.F.E. This should be so even if the servicer negotiates and amends the terms of a loan or helps the borrower into one of the programs under the Making Home Affordable Plan or other options. For these purposes, we suggest defining a servicer as an individual who services a preexisting mortgage loan, which may include explaining the terms of an existing loan or its escrow account, negotiating, amending or waiving the terms of an existing loan, and taking other actions designed to prevent or avoid default or foreclosure in connection with an existing loan. We also request clarification that servicers are exempt from licensing requirements when servicers arrange or assist with loan assumptions under the FHA program in connection with 12 U.S.C. § 1701j-3(b).

We greatly appreciate your consideration of this exceedingly important matter and we would welcome an opportunity to meet with you concerning it at your earliest convenience.

Sincerely,

American Bankers Association
American Financial Services Association
Consumer Bankers Association
Consumer Mortgage Coalition
Housing Policy Council of the Financial Services Roundtable
Independent Community Bankers of America
Mortgage Bankers Association

CC: The Honorable Timothy Geithner, Secretary
U. S. Department of the Treasury