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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