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.

[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**''—
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> (i) means an individual who—
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> (I) takes a residential mortgage loan **application**;[2]
> **and**
> (II) offers or negotiates terms of a residential mortgage loan for compensation or gain;
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> (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]

[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]

[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
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> ''(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:
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>> ''(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

February 5, 2009

The Honorable Shaun Donovan
Secretary
U.S. Department of Housing and Urban Development
451 7th Street, S.W.
Washington, DC 20410

Dear Secretary Donovan:

The S.A.F.E. Mortgage Licensing Act of 2008 (SAFE), signed into law on July 30, 2008, establishes federal minimum standards of licensing or registration for individuals meeting the definition of loan originator or registered loan originator. SAFE provided that States have a period of time to update their laws to meet the new federal standards, and allocated responsibility to HUD to determine if a state meets the minimum requirements.

The Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) supported the passage of SAFE and shared Congress' desire to set minimum standards that would apply nationwide. CSBS and AARMR developed a model state act to provide states with a template to update their mortgage legislation as soon as possible in a uniform fashion and in a manner consistent with SAFE. CSBS and AARMR have appreciated HUD's rapid consideration of the CSBS/AARMR model state law and HUD's December 24, 2008 interpretation of SAFE as it would apply to the model state law. This collaboration has enabled states to begin legislative efforts to update their laws and implement SAFE requirements.

CSBS and AARMR are committed to meaningful loss mitigation efforts to assist homeowners in modifying the terms of their existing mortgages. States have been leading advocates in the area of home loss prevention, calling for aggressive action by servicers, and more focused attention by regulators at both the state and federal level.

Concerns have been raised that immediate application of SAFE licensing requirements to servicer loss mitigation specialists assisting homeowners experiencing problems might seriously curtail such activity at a time of unprecedented numbers of mortgage delinquencies and defaults. In response, some states are finding it necessary to address this situation through their SAFE legislation. CSBS and AARMR are concerned that in these attempts, state exemptions from SAFE may inadvertently violate SAFE requirements and put states in non-compliance with the federal law. Therefore, we request greater clarification of your interpretation of SAFE and request a reasonable delay in the licensing requirements for certain individuals.

The passage of SAFE was made possible under the Housing and Economic Recovery Act of 2008 (HERA). SAFE and HERA together were designed to provide consumer protection while fostering recovery of the nation's housing market. These goals are not mutually exclusive, however full implementation of all SAFE requirements on loss mitigation specialists in the midst of a significant need for loan modifications could delay assistance to homeowners who are in trouble.

The consumer protection gains achieved through licensing or registering loan originators specializing in foreclosure mitigation efforts would be offset in this time of crisis by the potential loss of capacity of servicers to conduct loan workouts. The need to resolve this conflict presents itself to not only State licensing agencies, but Federal registering agencies as well.

Pursuant to HUD's December 24, 2008 interpretive letter, <u>Section D. Delayed Effective Date of Requirement to Obtain and Maintain a License</u>, "HUD may approve a later date only upon a state's demonstration that substantial numbers of loan originators (or of a class of loan originators) who require a state license face unusual hardship, through no fault of their own or of the state government, in complying with the standards required by the SAFE Act to be in the state legislation and in obtaining state licenses within one year." Based on this interpretation, CSBS and AARMR propose an effective licensing date of July 31, 2011, or such later date as approved by the Secretary of HUD, for loss mitigation specialists employed by servicers.

CSBS and AARMR appreciate HUD's efforts to date in providing guidance for states in implementing the SAFE Act. We thank you for your consideration of this request and look forward to working with HUD in the coming year to further the goals of consumer protection and improved supervision.

Sincerely,

Neil Milner
President and CEO
Conference of State Bank Supervisors

David Bleicken
President
American Association of Residential
Mortgage Regulators