Secure and Fair Enforcement for Mortgage Licensing Act Examination Procedures for Covered Financial Institutions

Introduction

The Secure and Fair Enforcement for Mortgage Licensing Act of 2008[1] (SAFE Act) was enacted on July 30, 2008, and mandates a nationwide licensing and registration system for residential mortgage loan originators (MLOs).[2]

The SAFE Act prohibits individuals from engaging in the business of residential mortgage loan origination without first obtaining and maintaining annually:
For individuals employed by a covered financial institution, registration as a mortgage loan originator and a unique identifier (federal registration); or
For all other individuals, a state license and registration as a mortgage loan originator, and a unique identifier (state licensing/registration).[3]

The SAFE Act requires that federal registration and state licensing/registration be accomplished through the same online registration system, the Nationwide Mortgage Licensing System and Registry (Registry).

The objectives of the SAFE Act include aggregating and improving the flow of information to and between regulators; providing increased accountability and tracking of MLOs; enhancing consumer protections; supporting anti-fraud measures; and providing consumers with easily accessible information at no charge regarding the employment history of, and publicly adjudicated disciplinary and enforcement actions against MLOs.[4]

On July 28, 2010, the OCC, Board, FDIC, OTS, NCUA, and FCA (collectively the Agencies) published substantively similar regulations implementing the SAFE Act federal registration requirements for covered institutions and their MLO employees (SAFE Act regulation).[5]

On July 21, 2011, Title X of the Dodd-Frank Act transferred rulemaking authority for the SAFE Act to the Consumer Financial Protection Bureau (CFPB).[6] The CFPB published an interim final rule, which recodified the Agencies' SAFE Act regulations as a single regulation, Regulation G, at 12 CFR Part 1007, effective December 30, 2011.[7]

These examination procedures lay out the background and requirements of the SAFE Act and the SAFE Act regulation concerning federal registration.

Definitions

"Annual renewal period" means November 1st through December 31st of each year.

"Administrative or clerical tasks" means the receipt, collection, and distribution of information common for the processing or underwriting of a loan in the residential mortgage industry and communication with a consumer to obtain information necessary for the processing or underwriting of a residential mortgage loan.

"Covered financial institution" means any national bank, Federal branch and agency of a foreign bank, member bank, insured state nonmember bank (including state-licensed insured branches of foreign banks), savings association, or certain of their subsidiaries; branch or agency of a foreign bank or commercial lending company owned or controlled by a foreign bank; Farm Credit System institution; or federally insured credit union, including certain non-federally insured credit unions.[8]

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1 12 USC § 5101-5116, Title V of the Housing and Economic Recovery Act of 2008 (Pub. L. 110–289, 122 Stat. 2654), as amended by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) (Pub. L. No. 111-203, 124 Stat. 1376).

2 More specifically, the SAFE Act required the Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), and National Credit Union Administration (NCUA), with the Farm Credit Administration (FCA), and through the Federal Financial Institutions Examination Council (FFIEC), to develop and maintain a federal system for registering MLOs employed by covered financial institutions.

3 The SAFE Act authorized the U.S. Department of Housing and Urban Development (HUD) to monitor and enforce states' compliance with the statute's requirements for state licensing and registration. On June 30, 2011, HUD published a final rule setting minimum standards for state licensing and registration. 76 Fed. Reg. 38464 (June 30, 2011).

4 12 USC § 5101.

5 75 Fed. Reg. 44656 (July 28, 2010). The interagency Federal Register notice may be found at http://edocket.access.gpo.gov/2010/pdf/2010-18148.pdf. See also the revised Federal Register Preamble (Aug. 23, 2010), available at http://edocket.access.gpo.gov/2010/pdf/C1-2010-18148.pdf (revising footnote numbering from the original release).

6 On July 21, 2011, pursuant to the Dodd-Frank Act the CFPB assumed: (1) responsibility for developing and maintaining the federal registration system (including rulemaking authority); (2) supervisory and enforcement authority for SAFE Act compliance for entities under the CFPB's jurisdiction; and (3) HUD's SAFE Act authority to oversee state compliance with SAFE Act requirements that had previously been under HUD's authority. Refer to Dodd-Frank Act Sections 1025, 1061 and 1100. In addition, the Dodd-Frank Act merged functions of the OTS into the OCC, FDIC, and Board.

7 See 76 Fed. Reg. 78483 (Dec. 19, 2011), available at http://www.gpo.gov/fdsys/pkg/FR-2011-12-19/pdf/2011-31730.pdf. In the preamble to the interim final rule, the CFPB stated that "[t]he interim final rule substantially duplicates the Federal registry agencies' largely identical coordinated rules as the Bureau's new Regulation G, 12 CFR part 1007, making only certain nonsubstantive, technical, formatting, and stylistic changes."

8 12 CFR Secs. 1007.101(c), 1007.102.

"Employee" is not defined in the SAFE Act or SAFE Act regulation. However, the original regulation's preamble explains that the meaning of "employee" under the SAFE Act regulation is consistent with the common law right-to-control test. For example, the results of this test generally determine whether an institution files an Internal Revenue Service Form W-2 or Form 1099 for an individual.[9]

"Mortgage loan originator or MLO" means an individual who: (1) takes a residential mortgage loan application *and* (2) offers or negotiates terms of a residential mortgage loan for compensation or gain.[10] The term *mortgage loan originator* does not include:

- An individual who performs purely administrative or clerical tasks on behalf of an individual who is an MLO;
- An individual who only performs real estate brokerage activities (as defined in 12 USC Section 5102(3)(D)) and is licensed or registered as a real estate broker in accordance with applicable state law, unless the individual is compensated by a lender, a mortgage broker, or other MLO or by any agent of such lender, mortgage broker, or other MLO, and meets the MLO definition; or
- An individual or entity solely involved in extensions of credit related to timeshare plans, as that term is defined in 11 USC Section 101(53D).

Appendix A to the SAFE Act regulation provides examples of activities of taking a loan application, and offering or negotiating loan terms, that fall within or outside of the definition of MLO for federal registration purposes.

"Registry" means the Nationwide Mortgage Licensing System and Registry, or NMLS, developed and maintained by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators for the state licensing and registration of state-licensed MLOs, and through which federal MLO registrations must be accomplished.[11]

"Registered mortgage loan originator"* or *"registrant" means any individual who: (1) meets the MLO definition; (2) is an employee of a covered financial institution; (3) is registered pursuant to the regulation with the Registry; and (4) maintains a unique identifier through the Registry.

"Residential mortgage loan" means 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 (as defined in Section 103(v) of the Truth in Lending Act, 15 USC Section 1602(v)) or residential real estate upon which is constructed or intended to be constructed a dwelling (including manufactured homes) and includes refinancings, reverse mortgages, home equity lines of credit, and other first and additional lien loans.

"Unique identifier" means a number or other identifier that: (1) permanently identifies a registered MLO; (2) is assigned by protocols established by the Registry and the Bureau to facilitate electronic tracking of MLOs, as well as uniform identification of, and public access to, the employment history of and the publicly adjudicated disciplinary and enforcement actions against MLOs; and (3) must not be used for purposes other than those set forth under the SAFE Act.

De Minimis Exception

The SAFE Act regulation provides an exception to the MLO registration requirements for any employee of a covered financial institution who has never been registered or licensed through the Registry as an MLO if during the past 12 months the employee acted as an MLO for five or fewer residential mortgage loans.

When an institution relies on the *de minimis* exception in lieu of registration, the MLO employee must register prior to originating the sixth residential mortgage loan within the past 12 months. Covered financial institutions are prohibited from engaging in any acts or practices to evade the registration requirement.

Mortgage Loan Originator (MLO) Registration Requirements

Each MLO employed by a covered financial institution must register with the Registry;[12] obtain a "unique identifier;" maintain the registration by updating certain information within 30 days of specified changes; and renew the registration each year during the annual renewal period.

Initial Registration

Each employee of a federally regulated institution who is an MLO must submit to the Registry the following:

[9] See 75 Fed. Reg. at 44664 for a discussion of the meaning of "employee" as used in the original SAFE Act regulation.

[10] By contrast, the Model State Law defines an MLO for state licensing and registration purposes as an individual who takes a residential mortgage loan application or offers or negotiates terms for compensation or gain. See, e.g., the Model State Law at: http://mortgage.nationwidelicensingsystem.org/SAFE/NMLS%20Document%20Library/MSL-Final.pdf.

[11] See the Nationwide Mortgage and Licensing System and Registry Web site at: http://mortgage.nationwidelicensingsystem.org/fedreg/Pages/default.aspx. System information on federal registration can be found under the Federal Registration tab at that site.

[12] The SAFE Act rule implementing federal registration took effect on October 1, 2010. It provided a registration period from January 31, 2011, to July 29, 2011, for MLOs who are employees of covered financial institutions to register. After July 29, 2011, those employees must meet the registration requirements before they may originate residential mortgage loans.

- Identifying information, including name, home address, social security number, gender, date of birth, and principal business location;
- Financial-services-related employment history for the prior 10 years;
- Disclosure of specified criminal, civil judicial, or state, federal, or foreign financial authority regulatory actions against the employee; and
- Fingerprints, for purposes of a Federal Bureau of Investigation background check.

The employee must attest to the correctness of the information submitted to the Registry; must authorize the Registry and the institution to obtain information related to any administrative, civil, or criminal action to which the employee is a party; and must authorize the Registry to make certain information available to the public.

Maintaining Registration

Renewal

An MLO must renew his or her registration during the annual renewal period by confirming and updating his or her registration records. This requirement does not apply to an MLO who completed his or her initial registration less than six months prior to the end of the annual renewal period. Any registration that is not renewed during this period will become inactive, and the individual cannot act as an MLO at a covered financial institution until the registration requirements are met. Individuals who fail to update their registrations during this two-month renewal period may renew their registration at any time and need not wait until the start of the next annual renewal period.

Updates to Registration

An MLO must update his or her registration within 30 days for specified significant changes, including name changes, employment termination, and reportable changes to legal or regulatory actions.

Previously Registered Employees – Change of Employment

The regulations provide streamlined registration requirements for an MLO employee previously registered or licensed through the Registry who maintained this registration or license and who changes employment. Such an employee must update certain information, provide the required attestation and authorizations, and submit new fingerprints unless the employee has fingerprints on file with the Registry that are less than three years old. There is no grace period in this situation. An employee must update his or her Registry record before acting as a loan originator for the new employer.

Previously Registered Employees – Mergers, Acquisitions or Reorganizations

A registered or licensed MLO whose employment changes as the result of a merger, acquisition, or reorganization has 60 days from the effective date of a merger, acquisition, or reorganization to update information in the Registry.

Covered Financial Institution Requirements for MLO Registration, Renewal, and Changes to Information

Required Covered Financial Institution Information

In connection with the registration of one or more MLOs, covered financial institutions must submit certain required information to the Registry, including: contact information; Employer Tax Identification Number; Research Statistics Supervision and Discount (RSSD) number issued by the Board; primary Federal regulator; primary point of contact for the Registry; individuals with authority to enter information into the Registry; and, if a subsidiary of a financial institution, indication of that fact and the RSSD number of the parent institution, as applicable. Once registered, the institution will receive an NMLS identification number for the institution to use in attesting to MLO employment and for other Safe Act related purposes.

Attestation

An individual with authority to enter information in the Registry must verify his or her identity and attest that he or she has that authority, that the information is correct, and that the institution will keep the information current.[13]

Registration

A covered financial institution must require an MLO employee to register with the Registry, maintain this registration, and obtain a unique identifier. A covered financial institution must also confirm each MLO's employment status once the MLO submits registration information to the Registry and before the registration is activated.

Within 30 days of the date an MLO ceases to be an employee of the institution, the institution must notify the Registry of that fact along with the date the MLO ceased being an employee, so that consumers searching for an MLO in the publicly available consumer access portal will know that the MLO no longer has a relationship with the institution.

[13] A covered financial institution may designate one or more individuals to serve as the system administrator(s) who may submit required information to the Registry on behalf of employees, and attest to their authority to submit information, the accuracy of information submitted, and that the institution will keep information current and submit updates on a timely basis. System administrators generally may not be MLOs; however, an institution is exempt from this regulatory requirement if it has 10 or fewer full-time employees and is not a subsidiary.

Renewal and Updates

A covered financial institution must update the information it submitted to the Registry during the annual registration renewal period and must confirm the registration information provided by MLO employees during this period.

A covered financial institution must update the required institution information provided to the Registry within 30 days of any change in such information.

Policies and Procedures

Covered financial institutions that employ one or more MLOs must adopt and follow written policies and procedures to carry out their SAFE Act responsibilities.[14] The requirement to adopt and follow policies and procedures applies to all covered financial institutions that employ individual MLOs, where MLOs act within the scope of their employment, and regardless of the application of any *de minimis* exception to their employees. In addition, covered financial institutions must conduct annual independent compliance tests to ensure compliance with the regulation. The policies and procedures must be appropriate to the nature, size, complexity, and scope of the institution's mortgage lending activities, and apply only to those employees acting within the scope of their employment at the institution. The policies and procedures must:

- Establish a process for identifying which employees of covered financial institutions must be registered;
- Require that all employees who are MLOs be informed of the registration requirements of the SAFE Act and SAFE Act regulation, and instructed on how to comply;
- Establish procedures to comply with the SAFE Act regulation's unique identifier requirements;
- Establish reasonable procedures for confirming the adequacy and accuracy of MLO employee registrations, including updates and renewals, by comparisons with its own records;
- Establish reasonable procedures and tracking systems for monitoring compliance with registration and renewal requirements and procedures;
- Provide for annual independent testing for compliance with the SAFE Act regulation by institution personnel or an outside party;
- Provide for appropriate action if an employee fails to comply with the registration requirements of the SAFE Act regulations or the institution's related policies and procedures, including prohibiting such employees from acting as MLOs or other appropriate disciplinary actions;
- Establish a process for reviewing employee criminal history background reports received pursuant to the regulation, taking appropriate action consistent with applicable federal law[15] and implementing regulations with respect to the reports, and maintaining records of the reports and actions taken with respect to applicable employees;[16] and
- Establish procedures designed to ensure that any third party with which the institution has arrangements related to mortgage loan origination has policies and procedures to comply with the SAFE Act and SAFE Act regulation, including appropriate licensing and/or registration of individuals acting as MLOs.[17]

Unique Identifier

When an MLO registers with the Registry, he or she receives a unique identifier – a series of numeric characters assigned for the life of the MLO. The unique identifiers allow MLOs to be tracked if they move between state and federal jurisdictions and/or change employers, and help consumers to find certain information about a particular MLO when they search on the Registry's consumer access portal. The MLO information that is publicly available on the consumer access portal will ultimately include federal and state registrations and licenses held, the MLO's employment history, and publicly adjudicated disciplinary and enforcement actions, if any.

To make sure that consumers have access to an MLO's unique identifier before committing to a mortgage loan transaction, an MLO must provide the unique identifier upon request (orally or in writing), before acting as an MLO (orally or in writing), and in any initial written communication (paper or electronic) from the MLO to the consumer (such as a commitment letter, good faith estimate, or disclosure statement). MLO unique identifiers may be used on written materials or promotional

[14] Neither the Registry nor the CFPB screen or approve registrations received from employees of covered financial institutions.

[15] Including Section 19 of the Federal Deposit Insurance Act (FDI Act); (12 USC 1829); Section 5.65(d) of the Farm Credit Act of 1971 (12 USC 2277a-14(d)); or Section 206 of the Federal Credit Union Act (12 USC 1786(i)).

[16] Section 19 of the FDI Act (12 USC 1829) prohibits, without the prior written consent of the FDIC, insured depository institutions from employing a person who has been convicted of any criminal offense involving dishonesty, breach of trust or money laundering, or has entered into a pretrial diversion or similar program in connection with a prosecution for such offense. See the FDIC Statement of Policy for Section 19 of the FDI Act, 63 Fed. Reg. 66184 (Dec. 1, 1998; amended May 10, 2011), available at: http://www.fdic.gov/regulations/laws/rules/5000-1300.html.

[17] See FFIEC Statement on Risk Management of Outsourced Technology Service (Nov. 28, 2000) for guidance on the assessment, selection, contract review, and monitoring of a third party that provides services to a regulated institution. See also FDIC Guidance for Managing Third-Party Risk (FIL-44-08); OCC Bulletin 2001-47, Third-Party Relationships (Nov. 1, 2001); OTS Thrift Bulletin 82a, Third Party Arrangements (Sept. 1, 2004); NCUA Letter to Credit Unions: 01-CU-20, Due Diligence Over Third Party Service Providers (Nov. 2001), 07-CU-13, Supervisory Letter-Evaluating Third Party Relationships (December 2007), 08-CU-09, Evaluating Third Party Relationships Questionnaire (Apr. 2008).

items distributed by the institution for general use, for example on loan program descriptions, advertisements, business cards, stationery, notepads, and similar materials; the SAFE Act regulation does not prohibit such use.

The regulation also requires covered financial institutions to make MLO unique identifiers available to consumers in a practicable way. This could be achieved, for example by:

- Directing consumers to a listing of registered MLOs and corresponding unique identifiers on the institution's Web site;
- Posting the information prominently in a publicly accessible place, such as a branch office lobby or lending office reception area; and/or
- Establishing a process to ensure that institution personnel provide MLO unique identifiers when requested by consumers from employees other than the MLO.

Relation to Other Laws

TILA, GSE and HUD Requirements

Title XIV, Section 1402 of the Dodd-Frank Act amended the Truth in Lending Act (TILA) to require: (1) MLOs to include on all loan documents any unique identifier of the MLO provided by the NMLS, and (2) the CFPB to issue implementing regulations requiring covered financial institutions to establish and maintain procedures reasonably designed to assure and monitor compliance with the SAFE Act's federal registration requirements.[18]

In 2009, the Federal Housing Finance Agency directed government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac to require mortgage loan applications to include the MLO's unique identifier.[19] The GSEs announced that for federally regulated institutions, the unique identifier information is required for all applications on or after July 29, 2011.[20]
On January 5, 2011, HUD issued a mortgagee letter requiring the collection of NMLS unique identifiers for all individuals and entities participating in the origination of Federal Housing Administration (FHA) loans.[21] The mortgagee letter also requires all FHA-approved mortgagees and their employees to comply with the NMLS registration requirements and "entities with jurisdiction over their activities" must register in accordance with the guidance set forth by NMLS.

Examination Objectives

- To determine whether the covered financial institution has adopted written policies and procedures designed to assure compliance with the SAFE Act regulation.
- To determine whether the annual independent testing of the institution's policies and procedures for assuring compliance with the SAFE Act regulation has been conducted.
- To determine whether any violations or deficiencies identified during the independent testing have been corrected and that steps have been taken to ensure they do not recur.

Examination Procedures[22]

1. Determine whether the financial institution, or any of its subsidiaries, employs one or more MLOs. For those institutions without any MLO employees, these examination procedures do not need to be completed. (12 CFR 1007.103(a)(2))

2. Determine for covered financial institutions with MLO employees whether the institution has adopted written policies and procedures and conducts annual independent compliance tests to assure compliance with the SAFE Act regulation. If the institution has failed to adopt policies and procedures and to perform annual independent compliance tests, the examiners should address the violation in the examination report and require corrective action. (12 CFR 1007.104)

3. Review the covered financial institution's written policies and procedures and the annual independent compliance tests to determine whether the institution has taken appropriate steps to assure compliance with the SAFE Act that at a minimum:

    a. Establish a process for identifying which employees of the covered financial institution are required to be registered MLOs; (12 CFR 1007.104(a))

    b. Require that all employees of the covered financial institution who are MLOs be informed of the registration requirements of the SAFE Act and the SAFE Act regulation and be instructed on how to comply with such requirements and procedures; (12 CFR 1007.104(b))

[18] See Pub. L. No. 111-203 (July 21, 2010), available at http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf(p. 2139).

[19] See the FHFA news release at http://www.fhfa.gov/webfiles/400/LoanOrigIDS11509.pdf

[20] See Fannie Mae and Freddie Mac Frequently Asked Questions at https://www.efanniemae.com/sf/guides/ssg/relatedsellinginfo/pdf/mortgageloandelreqsfaqs.pdf and http://www.freddiemac.com/sell/secmktg/loan_level_faq.html.

[21] See Mortgagee Letter 2011-4 at http://portal.hud.gov/hudportal/documents/huddoc?id=11-04ml.pdf.

[22] These reflect the interagency examination procedures in their entirety.

c. Establish procedures to comply with the unique identifier requirements in Section 105 of the SAFE Act regulation; (12 CFR 1007.104(c))

d. Establish reasonable procedures for confirming the adequacy and accuracy of employee registrations, including updates and renewals, by comparisons with its own records; (12 CFR 1007.104(d))

e. Establish procedures and tracking systems for monitoring compliance with registration and renewal requirements and procedures; (12 CFR 1007.104(e))

f. Provide for independent testing for compliance with the SAFE Act regulation conducted annually by institution personnel or by an outside party; (12 CFR 1007.104(f))

g. Provide for appropriate action in the case of an employee who fails to comply with the registration requirements of the SAFE Act, the SAFE Act regulation, or the covered financial institution's policies and procedures, including prohibiting such employees from acting as an MLO or other appropriate disciplinary actions; (12 CFR 1007.104(g))

h. Establish a process for reviewing employee criminal history background reports received pursuant to the SAFE Act regulation, taking appropriate action consistent with applicable federal law, including Section 19 of the Federal Deposit Insurance Act (12 USC Section 1829) and implementing regulations with respect to these reports, and maintaining records of these reports and actions taken with respect to applicable employees; (12 CFR 1007.104(h)) and

i. Establish procedures designed to ensure that any third party with which the institution has arrangements related to mortgage loan origination has policies and procedures to comply with the SAFE Act, including appropriate licensing and/or registration of individuals acting as MLOs. (12 CFR 1007.104(i))

4. Any significant deficiencies in the institution's SAFE Act regulation policies and procedures or independent compliance tests should be documented in the workpapers and discussed in the examination report together with corrective actions taken.

References

12 USC 5101 et seq. Secure and Fair Enforcement for Mortgage Licensing Act of 2008, amended by Dodd-Frank Act Section 1100

12 CFR Part 1007 S.A.F.E. Mortgage Licensing Act (Regulation G)

SAFE Act FAQs for FDIC Compliance Examiners June 30, 2011

FIL 43-2010: Secure and Fair Enforcement for Mortgage Licensing Act of 2008 Notice of Joint Final Rule: Registration of Residential Mortgage Loan Originators