MORTGAGE BANKERS ASSOCIATION
Investing in communities

July 9, 2009

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

Dear Ms. Johnson:

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

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

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

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

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[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,400 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.
[2] S.A.F.E. was enacted as part of the Housing and Economic Recovery Act of 2008, Public Law 110-289, Division A, Title V, Sections 1501-1517 (July 30, 2008), *codified at* 12 U.S.C. 5101 – 5116.

Background

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

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

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

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

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

Overarching Comment

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

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

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

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

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

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

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

I. <u>Summary of MBA's Comments Relative to Specific Sections of the Proposed Rule</u>

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

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

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

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

II. MBA’s Specific Comments Detailed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Based on a review of the statutory language and legislative history, servicers are not "loan originators" and were not intended to be considered within the registration and licensing requirements. S.A.F.E. was designed to establish a nationwide licensing and registration system for individual loan originators, lenders and mortgage brokers. S.A.F.E.'s substantive requirements are geared to these individuals and not servicers or their personnel.

Although Congress did not issue a conference report on the legislation, the floor statement by Senator Christopher Dodd, Chairman of the U.S. Senate Banking, Housing and Urban Affairs Committee, made clear what Congress meant by "loan originators" covered by the bill. Chairman Dodd characterized S.A.F.E. as a "new mortgage broker and lender licensing requirement that was added by Senator Martinez and supported by Senator Feinstein from California. That will begin to address many of the abuses of the mortgage process that have been perpetrated by mortgage brokers."[7] There is no statement in the law or legislative history to indicate that servicers were ever intended to be covered by the legislation.

Remarks by Senator Feinstein upon introduction and then passage of S.A.F.E. also make clear that the definition of mortgage originator was for those individuals making mortgages, not those who administer existing loans. Specifically, the Senator repeatedly refers to "lenders," "loan officers" and "mortgage brokers" and refers to fraudulent lending practices of "steering people into loans they clearly cannot afford." There was no mention of servicers. Servicers do not lend or arrange loans and since the borrower is already legally bound by his or her contract terms, servicers do not "steer." Senator Feinstein also talks about "mortgage brokers…preying upon people and walking off with tens of thousands of dollars of cash." Servicing staff certainly do not fit that characterization. Clearly the concern was with individuals who earn significant commissions from creating a mortgage loan, not a loss mitigation expert that is paid a salary to perform typical loan servicing functions.

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

S.A.F.E. itself defines a "loan originator" as an individual who "(i) takes a residential mortgage loan application; ***and*** (ii) offers or negotiates terms of a residential mortgage loan for compensation or gain."[8] [9] S.A.F.E. also provides that the term originator "does not include any individual who performs purely administrative or clerical tasks on behalf of a [loan originator]" and does not include "a person or entity that only performs real estate brokerage activities and is licensed or registered in accordance with applicable state law *unless the person or entity is compensated by a lender, a mortgage broker, or other loan originator or by an agent of such lender, mortgage broker, or other loan originator* (emphasis supplied)."[10] The exception for real estate brokerage activities also makes clear that the bill is directed only to lenders, mortgage brokers or similar mortgage originators.

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

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

The surety and net worth requirements found in section 1508(d)(6) also do not fit the servicing or loss mitigation function. These provisions require states to establish "minimum net worth or surety bonding requirements that reflect the dollar amount of *loans originated* by a residential mortgage loan originator" (emphasis added). In the context of servicing, this provision does not make sense. It is common knowledge that many mortgage servicers do not originate loans and do not have the capacity to do so. As a result, we believe this language provides further evidence that servicers were excepted from coverage.

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

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[8] S.A.F.E, Section 1503(3) (B).
[9] The correct language has been confused by a model law developed by CSBS and AARMR. Unlike the statute, the model law sets forth a disjunctive two-prong test which provides that an originator is covered if it either (A) Takes a residential mortgage loan application; ***or*** (B) Offers or negotiates terms of a residential mortgage loan. Considering the fact that servicers negotiate terms, this formulation has made it more likely that states may adopt laws covering mortgage servicers.
[10] HERA § 1503(3)(A)(i) (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

MBA believes that no-cash out refinances made with the same lender do not pose the same level of potential fraud and abuse as do other types of loans. While all refinances involve the creation of a new loan and extinguishment of the existing loan, these loans do not pose the same risk to the borrower. To the contrary, it is commonplace for the lender not to re-qualify the homeowner or require a new appraisal because the lien holder already retains the current credit and property risk. Streamline refinances benefit the homeowner by lowering the interest rate and extending the maturity date without significant re-underwriting that may otherwise disqualify the borrower.

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

According to MBA members, some institutions have staff that specialize in no-cash out or streamline refinances. These individuals usually take refinance inquires and applications that come through a call center or the institution's internet site. These employees are generally paid a salary rather than a commission per loan. As a result, we believe an exemption could be crafted for these employees that would not violate the spirit and the objective of the law.

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

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

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

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

Generally, mortgages guaranteed by the Department of Veterans Affairs and insured by the Federal Housing Administration are assumable provided their guidelines are met and the assumptions are approved by the mortgagees. Fannie Mae[12] and Freddie Mac[13] also allow certain mortgages to be assumed, but not all. Their policies vary based on the type of ownership interest, the type of mortgage product, the location of the property, whether the loan is in portfolio or securitized, and the type of transaction. We highly recommend referring to their guidelines for specific information. Moreover, to the extent the loan has mortgage insurance, the mortgage insurer may also have to approve the assumption and/or release of liability for the original debtor.

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

According to MBA members, the vast majority of assumptions do not involve the purchase and sale of a property by an unrelated individual seeking to assume a loan. A title transfer between such unrelated parties would trigger the due-on-sale clause and the need to credit-qualify the new borrower, refinance the loan, or pay-off the debt.

Rather, the vast majority of assumptions occur among related individuals as a result of deed transfers due to life events, such as a marriage, death of a family member, or parent to child title transfer. Such transfers do not trigger the due-on-sale clause or the need to assume, refinance, or pay-off the debt because of the protections afforded under the Garn-St. Germain Act.[14] Yet, in some cases, these protected individuals do request to be added to the note. These cases are called simple assumptions. Generally no true application is taken, the new debtor is not credit-qualified and terms are not negotiated since they already exist.

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

[12] Fannie Mae Single Family, 2006 Servicing Guide, Part III, Chapter 4, Transfers of Ownership.
[13] Freddie Mac Single Family Seller/Servicer Guide, Volume 1, Chs. 8-D15, Chapter 8, General Purchase Program Requirements and Characteristics.
[14] The Garn-St. Germain Act 12 USC §1701j- authorizes the enforcement of a due-on-sale clause notwithstanding any state law to the contrary. It further provides that a lender may not exercise its option pursuant to a due on sale clause upon certain enumerated circumstances of which one is "a transfer where the spouse or children of the borrower became an owner of the property."

prospective debtor.[15] The mortgage company or employee cannot steer the prospective debtor in any manner because the debt already exists and the prospective debtor cannot shop around for a more "competent" employee or assume a different loan. Generally, mortgage companies do not charge a fee for these types of assumptions although they may pass through third party costs to facilitate execution of the request.

In sum, MBA does not believe that simple assumptions meet either prong of the definition of "loan originator" and we suggest they be excluded from the rules' definition of "loan originator."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Conclusion

While MBA appreciates the Agencies' efforts, it is particularly concerned about the relationship between these proposed rules and laws that are being enacted by the states. It is also particularly concerned that the process of serving troubled borrowers not be hampered by ill-founded registration and licensing requirements. We hope our comments on these and other matters are useful and we look forward to assisting the Agencies in implementing final regulations.

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

Sincerely,

John A. Courson

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President and Chief Executive Officer
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