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Mortgage Banking & Consumer Financial Products Alert

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HUD HINDERS HAMP

While the Obama Administration, including the Department of Housing and Urban Development ("HUD"), is cajoling loan servicers to modify more loans under the Administration's Home Affordable Modification Program ("HAMP") and to hire more staff to meet the demand, HUD is erecting barriers that undermine the objective. By threatening to require state licensure of loan servicer employees engaged in loss mitigation activities, HUD could effectively halt or at least significantly hinder the efforts of many loan servicers to modify mortgage loans to prevent them from going into foreclosure.[1] Imagine the automated voice mail of servicers whose employees cannot talk to consumers until they have obtained the loan originator licenses they may need: "We would like to help you, but we are in continuing education classes and will return your call in a couple of months when we receive our test results." HAMP will be in a heap of trouble if HUD's threatened action is finalized.

In fairness to HUD, it is implementing its statutory delegation of authority under the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 ("SAFE Act"), which requires all states to license mortgage loan originators based on a minimum federal standard, to be overseen by HUD.[2] HUD recently presaged its interpretation that certain individuals engaged in loan modifications will fall within the definition of "mortgage loan originator," but Congress did not compel that interpretation. HUD's announcement follows the federal banking agencies' proposed regulations to implement the SAFE Act for entities they regulate, in which the agencies similarly consider whether it is appropriate and consistent with the SAFE Act to exclude loss mitigation staff from the definition of "mortgage loan originator."

Some are critical of HUD's announced inclination to license loan modification staff, arguing that the congressional intent of the SAFE Act, along with the plain meaning of the Act, confirm that it was not intended to apply to loss mitigation activities. Even HUD admits "initial uncertainty about whether loan servicers are covered by the SAFE Act." Industry participants will be able to comment formally on the Act's scope when HUD initiates its proposed rulemaking. In the meantime, however, states could not wait around for guidance, as they needed to enact laws compliant with the SAFE Act by July 31, 2009. Thus, hindered by competing federal mandates, states have had to make their best guesses as to who exactly is a "loan originator."

Background

Congress enacted the SAFE Act on July 30, 2008. The SAFE Act provides a dual track for the registration and/or licensing of mortgage loan originators – one track applies to individual loan originators who are employees of depository institutions and certain of their subsidiaries, and the other applies to all other individual loan originators. The SAFE Act requires that the federal banking agencies (the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration, and the Federal Deposit Insurance Corporation), along with the Farm Credit Administration) address the first track, and oversee the registration of loan

originator employees of banks, thrifts, and credit unions, their "owned and controlled" federally regulated subsidiaries, and Farm Credit Administration regulated entities. The SAFE Act requires all states to enact laws, or amend their existing laws, to provide for the licensing and registration for the mortgage loan originators in the second track. Failure of a state to have a mortgage loan originator licensing regime that complies with the SAFE Act by July 31, 2009 will lead HUD to assume responsibility for the licensing of loan originators in that state.

In furtherance of its responsibility to judge whether state laws comply with the SAFE Act, HUD reviewed a model law ("Model State Law") that the Conference of State Bank Supervisors ("CSBS") developed, and announced that the Model State Law satisfies the SAFE Act's minimum requirements.[3] HUD concluded that it will not determine a state law to be noncompliant with the SAFE Act if it follows the Model State Law. Consequently, states that do not enact the Model State Law or a law that similarly meets the SAFE Act's minimum standards run the risk of HUD determining the law is noncompliant. To date, nearly every state and the District of Columbia have enacted SAFE Act implementation legislation, and nearly all follow the Model State Law (although unlike the Model State Law, several address the licensing of loan modification employees in various ways).

Mortgage loan servicers already are subject to a myriad of state licensing requirements, such as loan servicer and collection agency licenses. Some states also have begun to regulate third-party loan modification vendors and foreclosure consultants. However, the SAFE Act question is particularly important, though, because it may mean that individuals engaging in loss mitigation activities themselves must be licensed. Moreover, the new state SAFE Act laws generally do not exempt the many nonprofits involved in helping borrowers obtain loan modifications. Thus, although it appears that Congress and the Treasury Department are pushing loan modifications as good and necessary public policy, HUD may be acting as a hindrance to that policy.

SAFE Act: Congressional Intent

Did Congress intend to require the licensing of loss mitigation specialists pursuant to the SAFE Act? For starters, the Act addresses loan "originators," evoking the creation of a new mortgage loan, and not the modification of terms on an existing mortgage loan.[4] According to the legislative history, Senator Christopher Dodd, chairman of the Senate Committee on Banking, Housing and Urban Affairs, characterized the SAFE Act as necessary "to address the many abuses of the mortgage process perpetrated by brokers."[5] Generally speaking, brokers are involved in the placement of loan applications with lenders for the extension of new credit, and not in the modification of existing credit.

Further, the underlying policy justifications for the enactment of the SAFE Act may not support the licensing of loan servicing employees. The SAFE Act has the stated objective of providing increased accountability and tracking of mortgage loan originators and reducing fraud in the residential mortgage loan origination process. Loss mitigation personnel of a mortgage loan servicer are not like individual loan brokers and originators who may peddle several loan products, sell to multiple lenders, move quickly from company to company, and be paid based on the terms of the loan. Loss mitigation staff of servicers generally have limited discretionary authority to obtain information from borrowers in order to evaluate their eligibility for a defined set of loss mitigation alternatives. Further, the SAFE Act was a reaction to the subprime crisis, which Congress believed was fostered by unregulated individuals who steered borrowers into loans that they could not afford. The SAFE Act was intended to ensure that those individual loan originators who are largely responsible for determining the type of loans a borrower receives are qualified, accountable, and identifiable. Servicing employees do not determine the types of loans borrowers receive, and they generally lack discretionary authority in connection with the modification terms borrowers receive. Thus, the risk of fraud in the loan modification context involving those employees is substantially less than in the origination context.

More recent congressional activity helps inform the inquiry into what Congress intended. The House passed a mortgage reform bill in May, House Bill 1728, that among other things would impose a duty of care on "mortgage originators," defined similarly to mortgage "loan originators" under the SAFE Act.[6] (House Bill 1728 has its roots in last year's House Bill 3915, from which Congress extracted the SAFE Act, amended it slightly, and added it to the Homeownership and Economic Recovery Act of 2008.[7]) House Bill 1728 would expressly exclude servicers engaged in loan modifications from the definition of "mortgage originators."[8] While not dispositive on congressional intent with respect to the SAFE Act, the House indicates in House Bill 1728 that servicers and their employees, agents, and contractors engaging in loan modifications should not be subject to additional restrictions, potential liability, and licensing requirements.

SAFE Act: Plain Meaning of Loan Originator

Congress did not expressly articulate whether loan modification efforts were within the SAFE Act, either by expressly including or excluding those individuals. Thus, while one can ponder congressional intent, one must look to the SAFE Act's actual definition of "loan originator" to discern whether loss mitigation employees are subject to the Act. The SAFE Act defines a "loan originator" as an individual who takes a residential mortgage loan application and offers or negotiates terms of a residential mortgage loan for compensation or gain. Unlike the SAFE Act, the Model State Law replaces the "and" with an "or," meaning that if a state adopted the Model State Law's definition of "loan originator" (and most did), an individual who performs either act (takes an application or offers/negotiates loan terms) would be subject to a licensing obligation (unless an exemption or exclusion otherwise applies). Thus, the scope of licensable activities for mortgage loan originators under the Model State Law approved by HUD (and enacted by many states) is broader than that under the SAFE Act itself.

Regardless of the version of the definition, the triggering of licensing under the SAFE Act or the Model State Law will turn on the interpretation of what it means to "take a residential mortgage loan application" or to "offer or negotiate the terms of the loan for compensation or gain."[9] There is no definitional guidance (in the SAFE Act or the Model State Law) to determine what constitutes taking an application or offering or negotiating loan terms. Thus, the states (under HUD's scrutiny) and the federal banking agencies are left to assess and implement Congress' intent, in accordance (one would hope) with a consistent voice on consumer protection policy.

HUD's Interpretation of the SAFE Act

HUD's Application of "Loan Originator" Definition to Loan Servicers/Loss Mitigation Employees

HUD recently provided Frequently Asked Questions and Answers ("FAQs") on its webpage devoted to providing guidance on SAFE Act implementation.[10] In those FAQs, HUD articulates its position that certain individuals engaged in loan modifications should be licensed under the SAFE Act. According to the FAQs, the SAFE Act's definition of a loan originator covers an individual engaged in loan modification activities "that involve offering or negotiating of loan terms that are materially different from the original loan." HUD plans to institute a notice-and-comment rulemaking that will address the contours of the licensing requirements for those engaged in loss mitigation activities. Nevertheless, HUD adds that it "is inclined to clarify through rulemaking that at least some individuals who engage in loan modification activities are subject to the requirements of the SAFE Act."

HUD notes that "loan servicers involved in traditional loan servicing activities are likely not covered by the SAFE Act." However, HUD articulates that loan modifications that "substantially alter the terms of existing mortgage loans" (e.g., change in rate, change to type of rate (e.g., fixed versus ARM), extension of loan term, change in principal, addition of collateral, changes to prepayment penalties or balloon payments, and change in parties through assumption or addition of cosigner) are different from typical loan servicing activities. HUD did not indicate how many of these changes must be present to distinguish traditional servicing from what it sees as "substantial modification" (which as HUD sees it apparently morphs into "origination"). While even HUD

would surely admit that at least a certain level of modification activity constitutes "traditional" servicing, HUD does not indicate what it thinks that level would be. Further, HUD does not indicate whether the implementation of a qualified loan modification plan under HAMP substantially alters the terms of the existing mortgage loans, but it would appear that the answer is a resounding yes.

In its FAQs, HUD seems to conclude that a licensing obligation is triggered in the loan modification context because: (1) the information the loan servicer requests from the borrower to determine eligibility for loan modification is similar to information it receives in an application to refinance a mortgage; and (2) the loan servicer offers or negotiates the loan terms of the modification with the borrower based on the information provided. HUD thinks that these loan modification activities can be "virtually indistinguishable from the performance of a refinancing, which is unambiguously covered by the SAFE Act."

Responses to HUD's Position

Some have challenged HUD's position by arguing that those engaged in loan modification neither "take a loan application" nor "offer or negotiate loan terms." They reason that processing a loan modification does not include taking an "application" for a loan, since the loan already exists. HUD construes the term "application" broadly to include a request by the borrower for different loan terms, along with information received from the borrower that is typically required in order to make an offer of loan terms. Even when expressed in such terms, however, servicers engaged in loan modification may not be considered to be "taking a loan application." For example, under the HAMP program, a servicer may identify consumers who are eligible for the program based on information the servicer already has, and may solicit them for the program, all without a request by the borrower, or without the receipt from the borrower of information typically needed to make a new loan.

Others argue that loan modification activities are different from refinancing activities. While it is true that employees engaged in loss mitigation may collect certain information to determine whether a borrower is eligible for a loan modification, the circumstances in which a servicer uses the information in considering a loan modification is distinguishable from the circumstances of a refinancing, as is the legal significance of the two approaches. A refinancing is a new loan transaction under which a borrower may be presented with a range of products and even (at least historically) an additional extension of new money. For that reason, the Truth in Lending Act ("TILA") requires it to be treated like a new transaction by requiring the full slate of origination disclosures.

In the refinancing context, similar to the origination of a new loan, many of the terms of the loan are negotiable and subject to the borrower's choice. Through the origination process, loan originators often have significant influence on the options presented to the borrower and the manner in which they are presented. However, those engaged in loan modifications have little leeway to set the loan terms. They are constrained by investor limitations, modification program guidelines (such as those under HAMP), and the challenge to provide more affordable loan terms. Servicer employees performing loan modifications, while highly skilled and qualified, are not free to work with borrowers to suggest a range of loan terms or even loan providers. Thus, some argue that servicers engaged in loan modification do not "negotiate" loan terms, as the SAFE Act uses that term.

Additionally, as mentioned above, consumer disclosure laws also distinguish between origination and modification, as TILA and its Regulation Z require disclosures for origination and for refinancings, and not generally for closed-end mortgage loan modifications. Under TILA and Regulation Z, the disclosure obligations in connection with those loans are generally triggered when a new consumer mortgage loan is originated, and not when the loan is modified (subject to certain exceptions), as the existing obligation is not extinguished and replaced by a new one. Thus, arguably, federal law recognizes that the risks for consumers associated with loan originations are greater than the risks associated with loan modifications. Industry participants will use the opportunity to persuade HUD of this distinction in its forthcoming rulemaking.

Even a refinancing under HAMP could be construed to be more like a modification than a traditional

refinancing. HAMP requires that every borrower be considered first for his or her eligibility under the FHA's Hope for Homeowners Program. This is quite different from exploring with a borrower a range of loan products, loan features and loan terms for consideration. Rather, FHA has fixed the product type and loan features under that program, and the only question is whether the borrower is eligible. If the test for licensing under the SAFE Act turns on whether a refinancing is offered and HAMP requires every borrower to be evaluated for a HOPE for Homeowners refinancing, then every loan servicing employee who communicates with a consumer will be required to be licensed as a mortgage loan originator.

HUD Rulemaking

While HUD's FAQs announce its inclination to require certain employees of loan servicers to obtain licenses, it intends to flesh out the scope of the licensing obligation in a forthcoming rulemaking. In the meantime, HUD has asked for input on what, if any, characteristics of a modification should be used to distinguish it from a loan origination. HUD also seeks guidance on whether it should provide for an extension of the licensing deadline for individuals performing modifications only under HAMP. However, HUD has already received input from industry participants about how licensing loss mitigation specialists could hinder loan modification efforts. On March 5, 2009, certain industry trade associations[11] issued a joint letter to HUD urging it to declare that servicers who work with consumers concerning existing loans are not subject to the SAFE Act.[12] Even state regulators appear generally to agree that imposing a licensing obligation would hurt loan modification efforts. In an earlier letter on February 5, 2009, CSBS warned HUD about the serious dearth of qualified loss mitigation specialists and the standstill in loan modification efforts that would result from requiring those specialists to get licensed or registered.[13] CSBS proposed an effective licensing date of July 31, 2011, or a later date as approved by HUD, for loss mitigation specialists employed by servicers.[14] Thus, one would believe that HUD has received valuable input on this topic already.

Questions Raised by Rulemaking

Clearly, HUD's impending rulemaking raises interesting questions. Since the SAFE Act implementation date has arrived, and most states have enacted legislation, will HUD provide those states flexibility to amend their laws to comply with HUD's subsequent interpretations, without declaring that it is taking over the licensing of loan originators in those states? What if a state has modified the definition of "loan originator" from that under the Model State Law or has interpreted the components of the term differently (although arguably still within the scope of the SAFE Act)? Another possible wrinkle is that many states do not currently license mortgage loan servicers. If a loss mitigation specialist engaged in loan modification activities is required to be licensed, will a mortgage loan servicing company also need to be licensed in the state (with mortgage brokering authority) before its loss mitigation specialists can be so licensed?

The FAQs shed light on how HUD would react to a state that provides licensing exemptions. Specifically, the FAQs provide that a state may not exempt nonemployee agents of an institution overseen by a federal banking agency. They also indicate that HUD would not allow an exemption for nonprofit organizations (nor presumably for the individual employees of those organizations). That statement will likely affect the Texas law implementing the SAFE Act, which in spite of the fact that SAFE Act licensing applies to <u>individuals</u>, attempts to exempt certain nonprofit organizations originating self-help housing loans.[15] Similarly, many state statutes exempt nonprofit organizations from licensing requirements applicable to mortgage brokers or mortgage lenders. Thus, similar to individuals engaging in loan modification efforts like HAMP, a requirement for licensing of nonprofit employees may result in additional costs and delays, impeding them from pursuing their public missions.

Federal Banking Agencies' Interpretations

The federal banking agencies are in the early stages of implementing the SAFE Act for employees of their regulated institutions. While the HUD FAQs state that HUD believes at least some servicers should be subject to state licensing as loan originators, the federal banking agencies are still considering whether loss mitigation staff should be excluded from the federal registration requirements. Based on the questions the federal banking agencies pose in their proposed rule, it appears that they may

be more willing to consider the exclusion of loan modification employees from the purview of the registration obligation, so long as the agencies are comfortable that those employees do not otherwise act as loan originators, or process a refinancing of a loan.[16]

If the federal banking agencies exempt a servicer's employees from the registration obligation as a loan originator, but HUD decides to subject similar individuals to licensing at the state level, those regulated by the federal banking agencies will appear to be at a competitive advantage. (An imbalance, however, may dissolve if the Administration's proposal to reform the regulation of the financial services industry is enacted by Congress.[17]) Further, this conflict also raises the question of whether servicing employees of federally regulated institutions (that cannot rely on preemption) could then be subject to a state's licensing regime for loan originators, since they would (i) meet the state's definition of "loan originator," but (ii) would not be registered under the federal regime, and so (iii) would not come within the state's typical exemption for registered mortgage loan originators.

State Implementation

States were under a lot of pressure to fulfill Congress' mandate to enact legislation to license mortgage loan originators by the July 31, 2009 deadline. They could not wait for HUD to issue formal guidance. Unfortunately (and untenably), HUD with its backup authority has threatened to take a position contrary to reasonable interpretations by states (with primary authority to implement the SAFE Act for their loan originators). However, with HUD's approval of the Model State Law and its issuance of FAQs (both without the time-honored benefit of notice-and-comment rulemaking), it is directing the process in a way that arguably was not intended, and holds a tin ear to the states' federal statutory deadline.

Of those states that have enacted legislation to implement the SAFE Act, nearly all have implemented language significantly mirroring the Model State Law, while almost half have addressed the extent to which the licensing obligation applies to individuals processing loan modifications. For example, the SAFE Act laws of Illinois,[18] Michigan,[19] and Washington[20] implicitly impose a licensing obligation on those individuals, by providing for a delayed effective date for licensing them. On the other hand, the SAFE Act implementation laws of numerous states, such as Colorado,[21] Connecticut,[22] Iowa,[23] Maryland,[24] and Virginia[25], expressly exclude from the loan originator licensing obligation loss mitigation employees of loan servicers. While Connecticut and Maryland's exemption for loss mitigation employees is contingent upon the interpretations of HUD, the Colorado, Iowa, and Virginia laws do not provide that backstop. Thus, it appears that the Colorado, Iowa, and Virginia laws may be at risk for being found inconsistent with HUD's FAQs. Others, like Arizona,[26] New York,[27] and North Carolina,[28] have taken the position that loss mitigation specialists will be subject to licensing as loan originators only if HUD issues a guideline, rule, regulation, or interpretative letter making such a determination. With almost half the states asserting a position on the licensing of loss mitigation employees, it will be interesting to see whether states challenge the validity of HUD's pronouncement, or whether the states will amend their statutes to strictly conform to HUD's interpretations (depending of course on what HUD decides).

Conclusion

Industry participants and others generally proclaim that servicing employees engaged in loan modification should be excluded from the obligations under the SAFE Act, and they have argued this position to HUD and in their public comments to the federal banking agencies' proposed rule. They attest that a registration or licensing requirement will frustrate servicers' ability to offer loss mitigation, as servicers already face difficulty in finding loss mitigation staff to perform the large number of loan modifications underway, including those made pursuant to HAMP. If these servicing employees are required to be licensed or registered before they can reach out to borrowers, servicers' capacity may be further significantly constricted. Given the national interest in stabilizing the housing market by keeping borrowers in their homes through sustainable loss mitigation efforts without delay (as exemplified not only through the Administration's programs but by Congress, which recently passed legislation providing that servicers

performing qualified loan modifications are deemed to be acting in investors' best interests),[29] it is critical to the success of these efforts that there be enough loss mitigation staff available to provide homeowners at risk of foreclosure access to sustainable mortgages.

Congress even more recently recognized that servicer capacity may be affecting their ability to assist homeowners. On June 24, 2009, 20 senators sent a letter to the Secretary of Treasury urging him to use the full measure of his authority to ensure that the government's mortgage loan modification initiatives translate into relief for homeowners. With respect to ensuring that servicers respond more quickly and effectively to homeowners seeking assistance, they expressly asked: "To the extent that the problem lies with servicer capacity, what specific strategies are you implementing to encourage capacity expansion?" Thus, Treasury's admonishment to encourage expansion of servicers' capacity seems at odds with HUD's interpretation that servicing employees should be licensed. If servicer capacity is threatened so that it frustrates their ability to provide borrowers with sustainable mortgages, will Congress intercede to articulate a position about the scope of the SAFE Act?

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[1] *See* Laurence E. Platt and Kerri M. Smith, The Mod Squad: Modifications, Refinancings and Cram Downs, Mortgage Banking Alert, March 12, 2009, available at http://www.klgates.com/newsstand/Detail.aspx?publication=5389.

[2] Part of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289; *see also* Costas A. Avrakotos, Kristie D. Kully, and David L. Beam, SAFE Mortgage Licensing Act, HUD Blesses the Model State Law, CSBS and AARMR Petition for a Later Effective Date for Loss Mitigation Specialists, Mortgage Banking Alert, Feb. 25, 2009, available athttp://www.klgates.com/newsstand/Detail.aspx?publication=5329.

[3] *See* S.A.F.E. (SAFE) Mortgage Licensing Act; Notification of Availability of Model Legislation, 74 Fed. Reg. 312 (Jan. 5, 2009).

[4] *See* "originate," *Dictionary.com Unabridged (v. 1.1)*; Random House, Inc. http://dictionary.reference.com/browse/originate (accessed July 30, 2009) ("to give origin or rise to; initiate; invent").

[5] Cong. Rec. Senate, S6520, July 10, 2008.

[6] Under House Bill 1728, the term "mortgage originator" is similar but broader than the definition of "loan originator" under the SAFE Act and even the Model State Law, in that it adds an additional activity that would trigger a licensing requirement. House Bill 1728 would define the term "mortgage originator" as any person who, for direct or indirect compensation or gain, or in the expectation of direct or indirect compensation or gain: (i) takes a residential mortgage loan application; (ii) assists a consumer in obtaining or applying to obtain a residential mortgage loan; or (iii) offers or negotiates terms of a residential mortgage loan.

[7] The term "loan originator" in last year's House Bill 3915 contained the three-prong definition that now appears in House Bill 1728.

[8] Specifically, House Bill 1728 provides that the term "mortgage originator" does not include a "servicer or servicer employees, agents and contractors, including but not limited to those who offer or negotiate terms of a residential mortgage loan for purposes of renegotiating, modifying, replacing and subordinating principal of existing mortgages where borrowers are behind in their payments, in default or have a reasonable likelihood of being in default or falling behind."

[9] In the Commentary HUD issued regarding the Model State Law, and in spite of the SAFE Act's lack of definitional guidance, HUD indicates that it interprets "application" to include "any request from a borrower, however communicated, for an offer (or in response to a solicitation of an offer) of residential mortgage loan terms, as well as the information from the borrower that is typically required in order to make such an offer." HUD also indicates that it interprets "taking" an application to mean receipt of an application for the purpose of deciding whether or not to extend the requested offer of loan terms to the borrower, whether the application is received directly or indirectly from the borrower. Based on the above definitions, HUD concludes in its Commentary that "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. Such an individual would be included in the definition of loan originator, regardless of whether the individual takes the request from the borrower for an offer (or positive response to an offer) of residential mortgage loan terms directly or indirectly from the borrower." *See* http://www.hud.gov/offices/hsg/ramh/safe/smlicact.cfm. HUD relies on these interpretations in its reasoning of why those engaged in loan modification are subject to the SAFE Act's licensing requirements.

[10] *See* SAFE Mortgage Licensing Act; Frequently Asked Questions and Answers, available at http://www.hud.gov/offices/hsg/ramh/safe/sfea.cfm.

[11] The industry trade associations providing input to HUD included the American Bankers Association, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, Housing Policy Council of the Financial Services Roundtable, Independent Community Bankers of America, and the Mortgage Bankers Association.

[12] *See* http://www.aba.com/NR/rdonlyres/DC65CE12-B1C7-11D4-AB4A-00508B95258D/58570/ letter_to_HUDonSAFEACT.pdf.

[13] The letter states: "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." *See* http://www.csbs.org/AM/Template.cfm?Section=SAFE_Act&Template=/CM/ContentDisplay.cfm&ContentID=21129.

[14] According to HUD's December 24, 2008 Interpretive Letter, under the Heading "Delayed Effective Date of Requirements to Obtain and Maintain a License," "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 proposed an effective licensing date of July 31, 2011, or a later date as approved by HUD, for loss mitigation specialists employed by servicers.

[15] Texas House Bill 10, sec. 1, enacted June 19, 2009 (*to be codified at* Tex. Fin. Code § 180.003).

[16] The agencies expressly seek comment on information such as: (i) how loan modification activities are staffed and managed separately from loan origination activities within the institution, (ii) the number of employees who engage in loan modifications but do not otherwise act as mortgage loan originators, (iii) whether loan modification staff ever process loan refinancings, (iv) the extent of the information that is gathered from customers in the context of the loan modifications, (v) what staff would handle the transaction if the modification process becomes a refinancing of a loan or if a new borrower is added in addition to the original borrower (*i.e.*, adding a cosigner). *See* Registration of Mortgage Loan Originators; Proposed Rule; 74 Fed. Reg. 27386 (June 9, 2009).

[17] According to the Administration's proposal announced on June 17, 2009, a new federal agency, the Consumer Financial Protection Agency, would be created to, among other things, administer the SAFE Act for all institutions.

[18] In Illinois, the SAFE Act implementation law provides that the operability date for loss mitigation specialists employed by servicers will be July 31, 2011, or any date approved by HUD. Illinois House Bill 4011, enacted July 31, 2009 (*to be codified at* 205 Ill. Comp. Stat. Ann. 635/7-1A(b)(3)).

[19] In Michigan, the SAFE Act implementation law provides that an individual who is employed exclusively by a mortgage servicer is not required to obtain a license under the Act until July 31, 2011, so long as that individual is authorized to perform loan modification activities concerning existing residential mortgage loans, and not to originate new residential mortgage loans or perform any other activities of a mortgage loan originator, and so long as the extension of time is not inconsistent with any HUD guideline, rule, regulation, or interpretative letter. Michigan Senate Bill 462, enacted July 28, 2009.

[20] In Washington, a SAFE Act implementation law provides that the loan originator licensing obligation "does not apply to an individual servicing a mortgage loan before July 1, 2011." Washington House Bill 1621, enacted April 17, 2009 (*to be codified at* Wash. Rev. Code § 31.04.015(15)(c)).

[21] In Colorado, the SAFE Act implementation law defines "mortgage loan originator" to exclude "an individual servicing a mortgage loan." Colorado House Bill 1085, enacted May 21, 2009 (*to be codified at* Colo. Rev. Stat. § 12-61-902(6)(a)(IV)).

[22] In Connecticut, the SAFE Act implementation law defines "mortgage loan originator" to exclude "individual who solely renegotiates terms for existing mortgage loans and who does not otherwise act as a mortgage loan originator," unless HUD or a court determines otherwise. Connecticut Senate Bill 948, enacted July 9, 2009 (*to be codified at* Conn. Gen. Stat. Ann. § 36a-485(15)).

[23] In Iowa, the SAFE Act implementation law defines "mortgage loan originator" to exclude "an individual employed by a residential mortgage loan servicer if the individual is involved solely in loss mitigation efforts." Iowa Senate Bill 355, enacted April 15, 2009.

[24] In Maryland, the SAFE Act implementation law provides that "individual loan servicers" are exempt from the mortgage loan originator licensing and other provisions, although that exemption is subject to modification to be consistent with any written interpretations by HUD. Maryland Senate Bill 269, enacted April 14, 2009.

[25] In Virginia's SAFE Act implementation law, the definition of "mortgage loan originator'" excludes any individual acting as an "individual loan servicer." Virginia House Bill 2031/Senate Bill 1171, enacted March 27, 2009.

[26] *See* Ariz. Rev. Stat. § 6.991.01(10) (as amended by Arizona House Bill 2143, enacted on July 17, 2009).

[27] *See* N.Y. Banking Law art. 12-E, § 599-C(3) (as amended by New York Assembly Bill 6924, enacted July 11, 2009).

[28] *See* N.C. Stat. Ann. § 53-244.030(21)(b) (as amended by North Carolina House Bill 1523, enacted July 31, 2009).

[29] *See* Helping Families Save Their Homes Act of 2009, Sec. 201 (Pub. L. No. 111-22; enacted May 20, 2009) (*to be codified at* Section 129A of the Truth in Lending Act, 15 U.S.C. § 1639a).

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