

**MBA's 2010  
Legal Issues and Regulatory Compliance Conference  
Hotel del Coronado  
San Diego, CA**

**Workshop 3: State Law Developments**

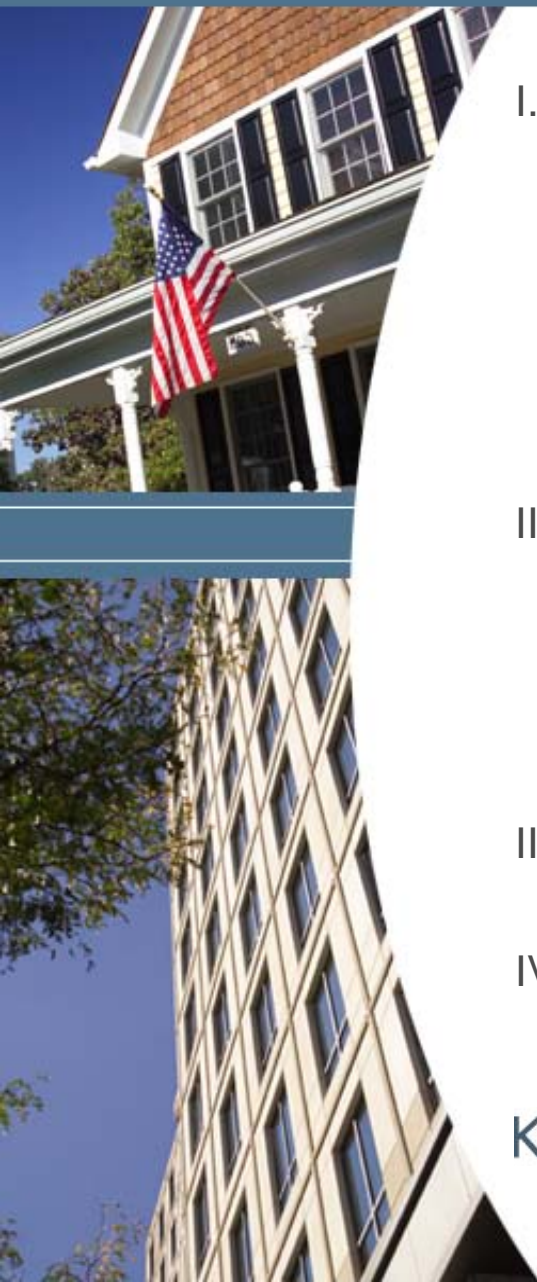
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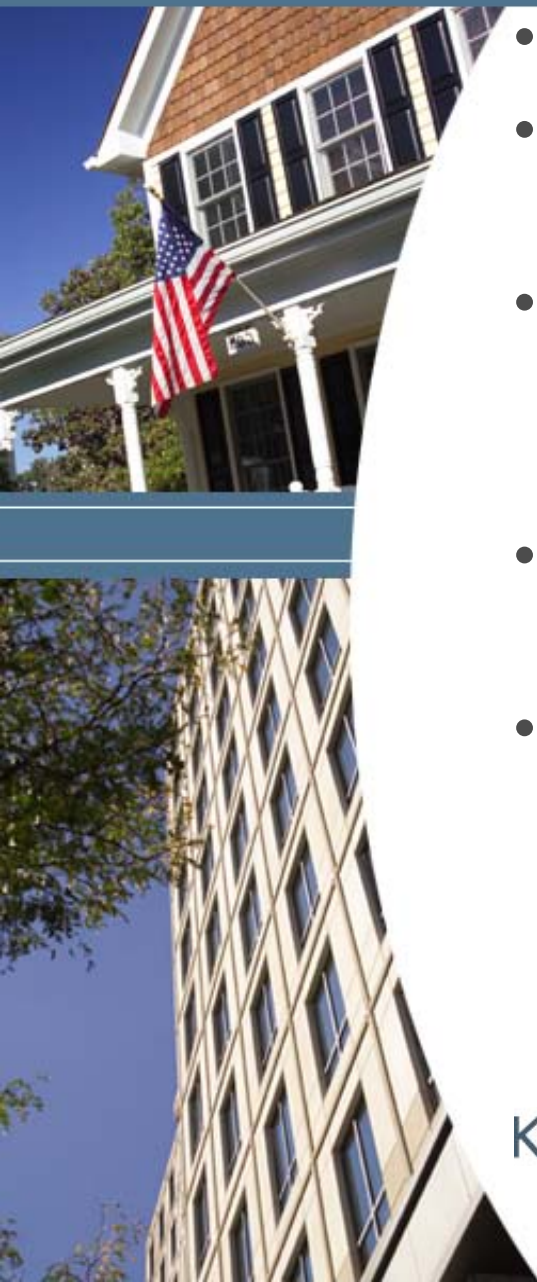
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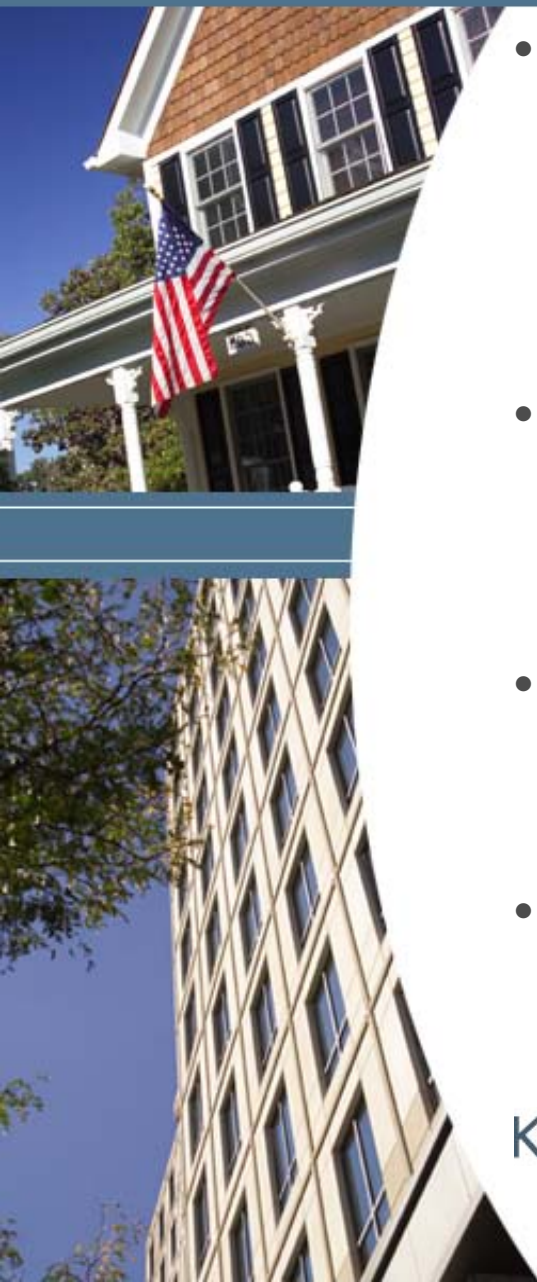


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- I. SAFE Act
    - » Overview
    - » HUD Proposed Rule
    - » FFIEC Proposed Rule
    - » State Differences
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    - » NMLSR Issues / Considerations
  
  - II. Other Licensing Issues
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    - » Foreclosure Rescue / Assistance
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  - III. Predatory Lending Protections
  
  - IV. Servicing Issues / Foreclosure Prevention

# I. SAFE Act – Overview

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- Enacted July 30, 2008.
  - Establishes federal minimum standards for licensing and registration of individual "loan originators."
  - State licensing and registration of state loan originators; federal registration of financial institution loan originators.
  - Nationwide Mortgage Licensing System & Registry (NMLS).
  - Goal: Comprehensive licensing standards, enhanced information for tracking and accountability, streamlined procedures, enhanced consumer protections.

# I. SAFE Act – HUD Proposed Rule

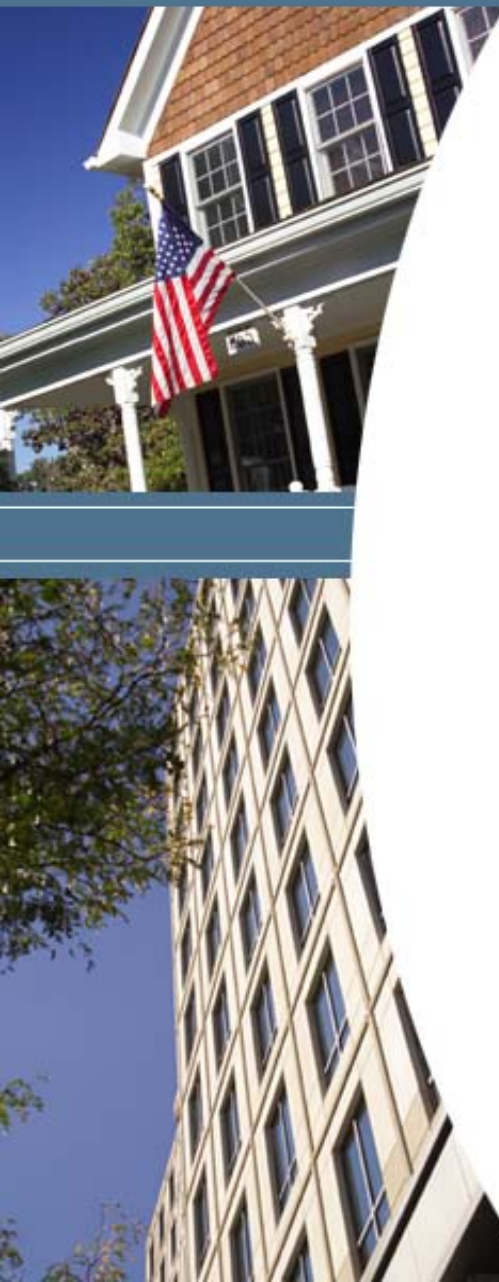
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- SAFE Act requires HUD to determine whether state laws meet SAFE’s minimum requirements for loan originator licensing and to establish a backup to NMLSR.
    - » HUD granted rulemaking authority?
  - HUD states that the Proposed Rule: “Sets forth the minimum standards that the SAFE Act provides States to meet in licensing loan originators.”
  - HUD also proposes to clarify or interpret certain statutory provisions that pertain to the scope of SAFE Act licensing requirements.
  - Does HUD have “overall responsibility for interpretation, implementation and compliance?”
    - » HUD thinks so.

# I. SAFE Act – HUD Proposed Rule

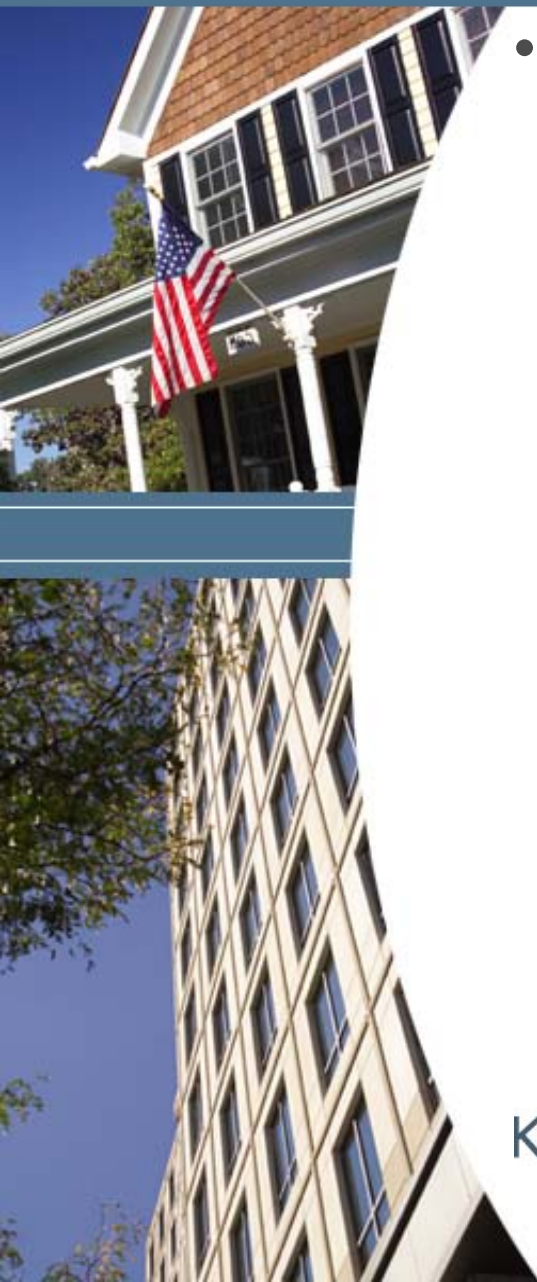
- Key Provisions
  - » Definitions
    - Loan Originator –
      - › take an application and offer or negotiate terms of a loan for compensation or gain; OR
      - › Represent to the public, through advertising or other means (business cards, marketing materials, signs, rate sheets, etc.), that can or will take an application or offer or negotiate terms.
  - Significantly expands definition vs.
    - › SAFE Act - take an application AND offer or negotiate.
    - › FFIEC Proposed Rule - take an application AND offer or negotiate.
    - › Model Act - take an application OR offer or negotiate terms (but without expanding definitions of application and offer or negotiate (see below)).

## » Definitions (continued)

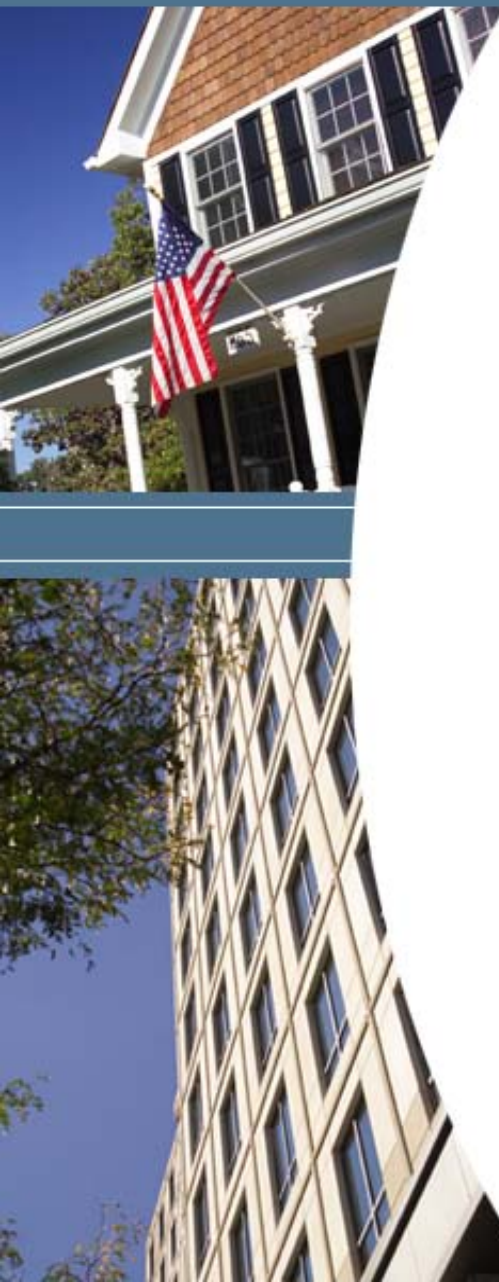
- Application – a request, in any form, for an offer (or a response to a solicitation of an offer) of residential mortgage loan terms and the information about the borrower or prospective borrower that is customary or necessary in a decision on whether to make such an offer.
  - › Not defined in SAFE Act or Model Act.
- Offer or negotiate – includes recommending, referring, or steering a borrower or prospective borrower to a particular lender or set of loan terms per duty or incentive.
  - › Not defined in SAFE Act or Model Act.
- Employee - an individual whose manner and means of performance of work are subject to the right of control of, or are controlled by, a person AND whose compensation is reported on a W-2

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- Key Provisions (continued)
    - » Who is covered?
    - » Independent contractor loan processors and underwriters (even though not providing mortgage origination services).
      - Because independent contractors don't, by definition, perform duties at the direction of and subject to the supervision of a licensed or registered loan originator.
    - » Loan modification / loss mitigation employees of servicers.
      - If offer or negotiate loan terms that are materially different: rate, type, term, principal, prepayment, balloon, obligors.
      - HUD: loss mitigation personnel collect information that is similar to that required for a refinance, and because loss mitigation personnel offer or negotiate loan modification terms, loan modifications are “virtually indistinguishable” from refinance transactions.
    - » “Third party loan modification specialists.”

# I. SAFE Act – HUD Proposed Rule

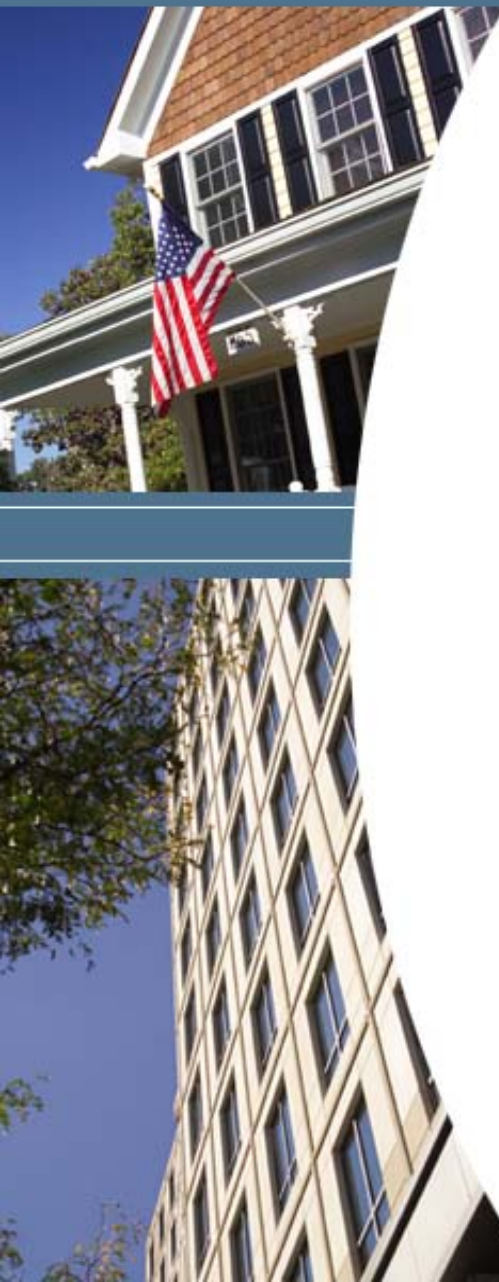
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- Who is not covered?
    - » Real estate brokers, unless compensated by lender, broker or loan originator.
    - » Processors and underwriters who work at the direction of and under supervision of a licensed/registered loan originator.
    - » Loan originators who work only on behalf of immediate family members.
    - » Loan originators in connection with selling home they occupy.
    - » Licensed attorneys, unless compensated by lender, broker or loan originator.
    - » Loss mitigation personnel that modify loans under HAMP.
    - » Non W-2 “employees” of FFIEC regulated entities.

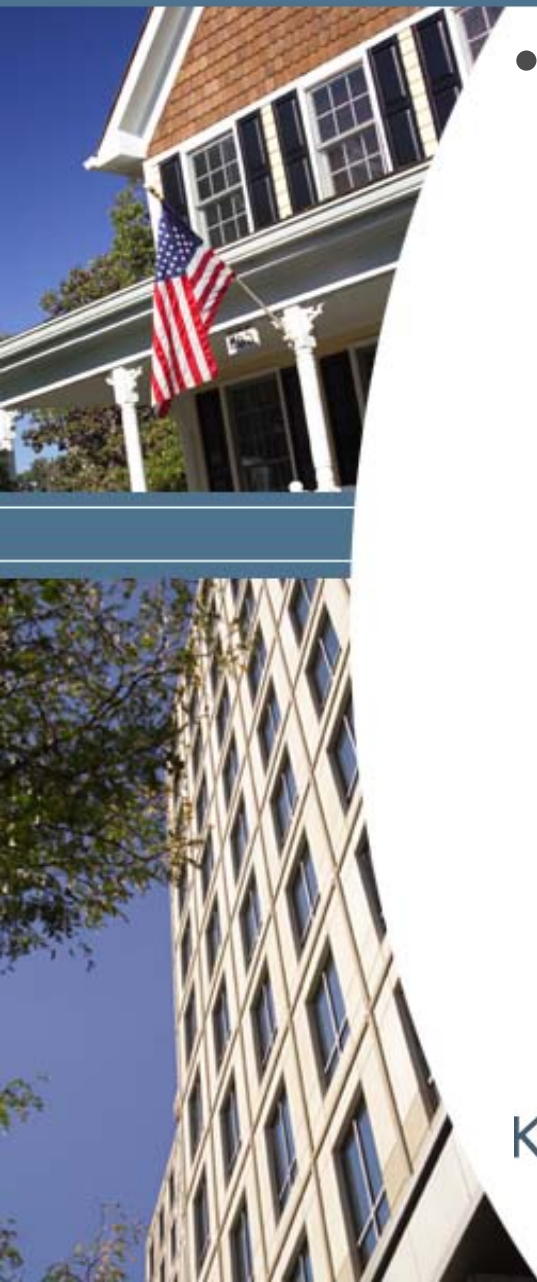
# I. SAFE Act – HUD Proposed Rule

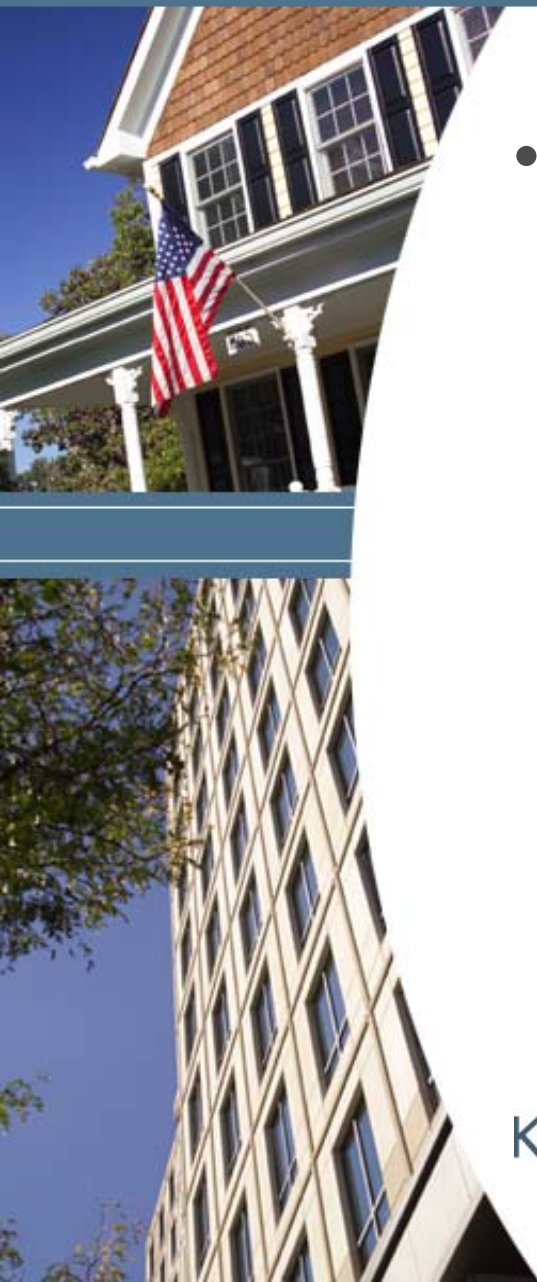


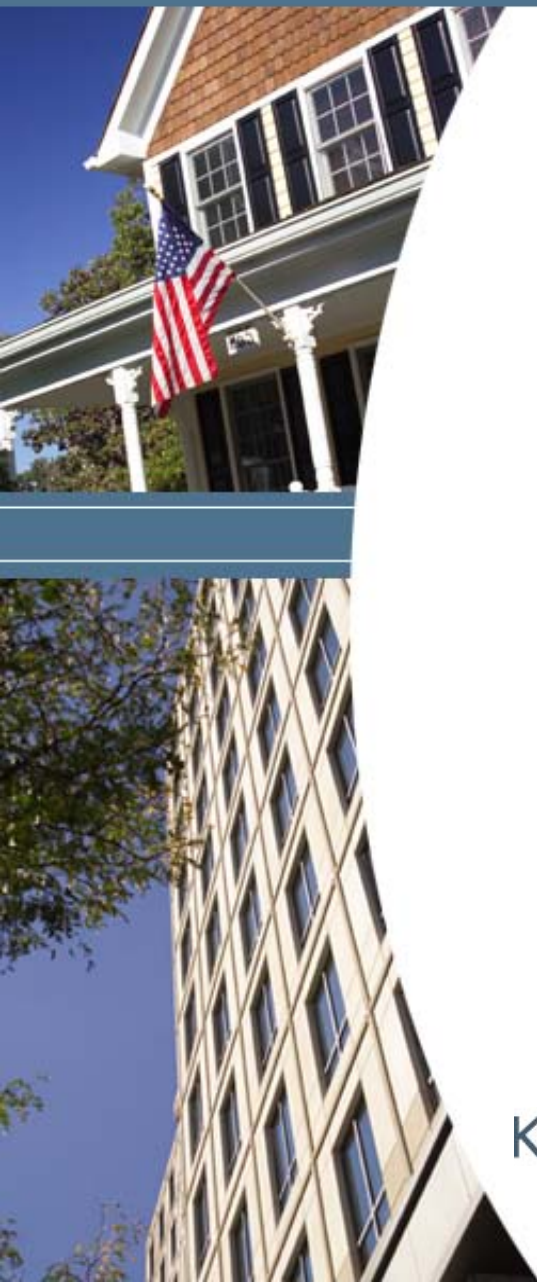
## RECAP - Who is a Loan Originator under the Proposed Rule?

- Anyone who takes an “application,” which includes receiving an indication that a consumer wants to be solicited for a loan.
- Anyone who offers or negotiates terms of a loan, which includes recommending or referring a lender or loan terms.
  - » Lead generators?
  - » Parties to a marketing agreement?
- Independent contractor (i.e., non W-2 employee) loan processors and underwriters.
- W-2 employee loan processors and underwriters who do NOT work at the direction of and subject to the supervision and instruction of a licensed loan originator.
- Servicer loss mitigation personnel (non-HAMP).
- Third party loss mitigation personnel.
- Loan originators in connection with selling homes they own but do not occupy.
- Non W-2 “employees” of FFIEC regulated entities.

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- Key Provisions (continued)
    - » Minimum loan originator license requirements
      - Never had a license revoked.
      - Never convicted of, or pled guilty or nolo contendere to, a felony.
        - › any in 7 years proceeding application
        - › at any time if involves an act of fraud, dishonesty, a breach of trust, or money laundering.
          - State law determines what is a felony.
          - Expunged felonies are subject to this restriction, but pardoned felonies are not.
      - Financial responsibility, character and general fitness.
      - 20 hours pre-licensing education.
      - 75% test score.
      - Net worth or surety bond.
      - Fingerprints/background check.
      - Personal history information, including credit report.

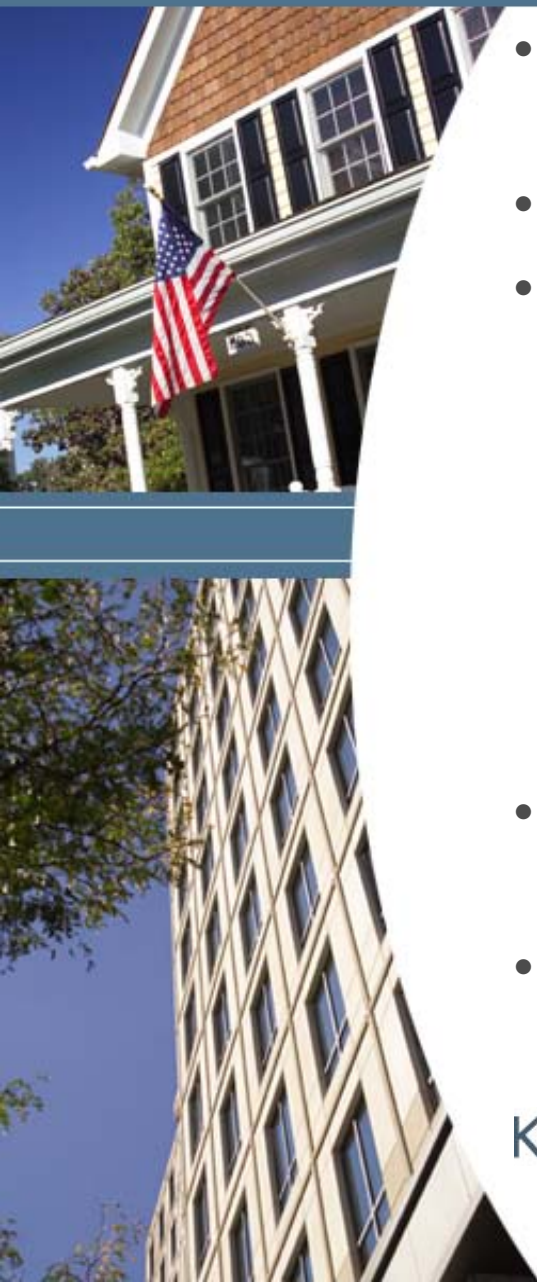
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- Key Provisions (continued)
    - » Effective dates:
      - No later than July 31, 2010.
      - December 31, 2010 if licensed prior to enactment of SAFE Act (state discretion).
      - HAMP exception – until program ends.

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- Other considerations:
    - » HUD reviewed the Model SAFE Act developed by CSBS/AARMR and advised that a state that adopts its provisions “will be presumed to have met the applicable minimum requirements of the SAFE Act.”
    - » But what about the changes, additions, etc. contained in the Proposed Rule?

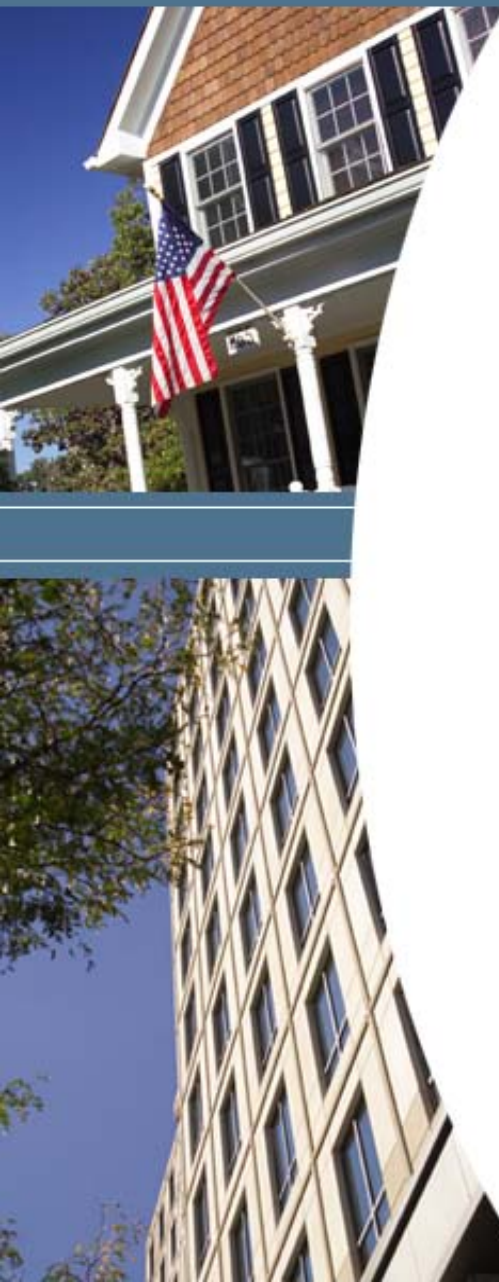
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- » Federal Banking Agencies: Required to develop system for registering with NMLS the employees of:
    - Depository institutions
    - Owned-and-controlled subsidiaries
    - FCA-regulated institutions.
  
  - » Joint Proposed Rule in July 2009.
    - FDIC approved draft final rule in November 2009

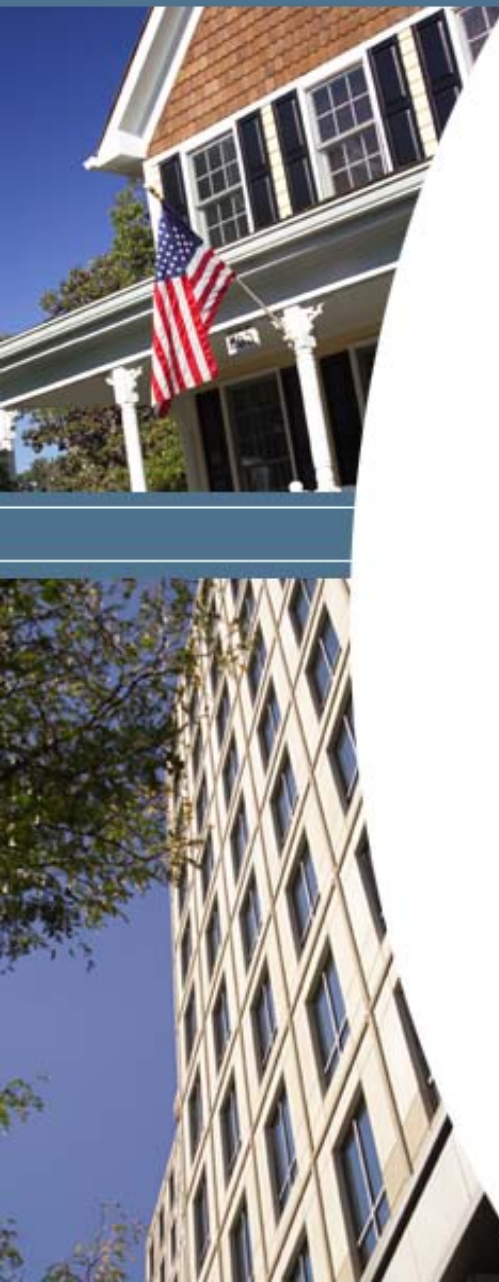
- Definition of “Loan Originator” – “and”
- Definition of “Employee”
  - » Draft final rule: common law agency doctrine’s right-to-control test, IRS rules for determining W-2/1099.
- Grace Period – 180 after NMLS functionality
- De Minimus Exemption
  - » Proposed: Based on both LO’s volume (5/fewer) and employer’s volume (25/fewer) during the last 12 months
  - » Draft final rule: Based only on LO’s volume, but prohibits engaging in act/practice to evade the limits.
- Servicing/Modification Individuals
  - » Draft final rule: Excludes employees engaged “solely in bona fide cost-free loss mitigation efforts which result in reduced and sustainable payments for the borrower.”

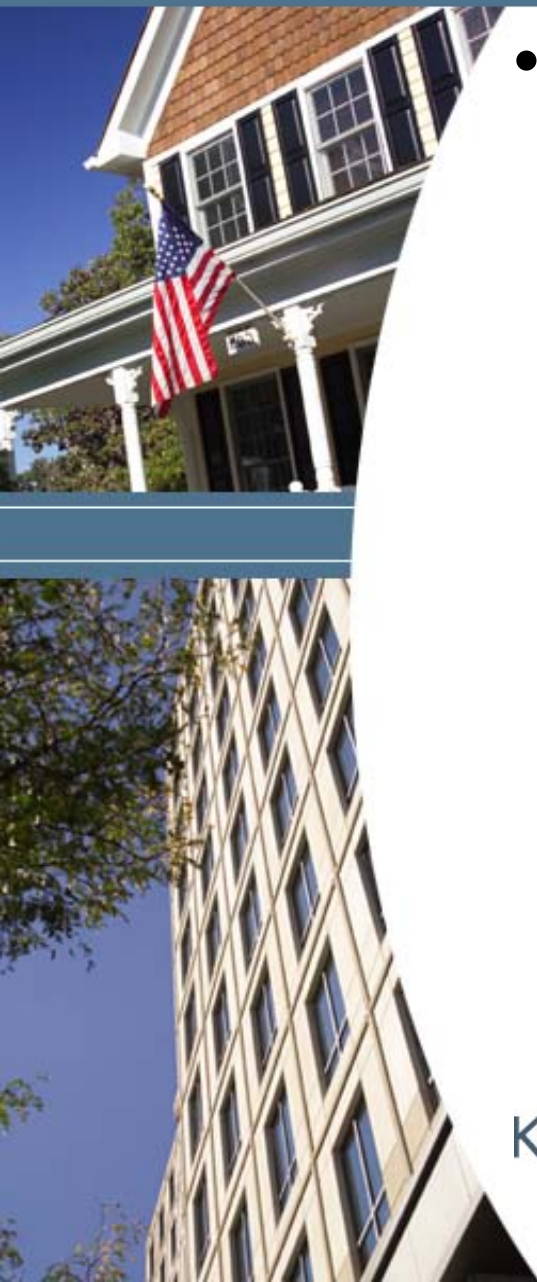
# I. SAFE Act – State Differences

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- 49 states and the District of Columbia passed legislation implementing the SAFE Act (legislation pending in MN).
  - Many states followed Model State Law.
  - Approximately 14 states provide unique definition of “loan originator.”
    - » Some also include any individual who “solicits” loans or applications.
    - » Some also include any individual who “assists” a borrower in obtaining or applying for loan (e.g., NH – by, among other things, preparing loan packages or collecting information on behalf of the consumer).
  - Approximately 15 states provide an exemption for loan modification or servicer personnel.
  - Not a single national license – must get license in each state.

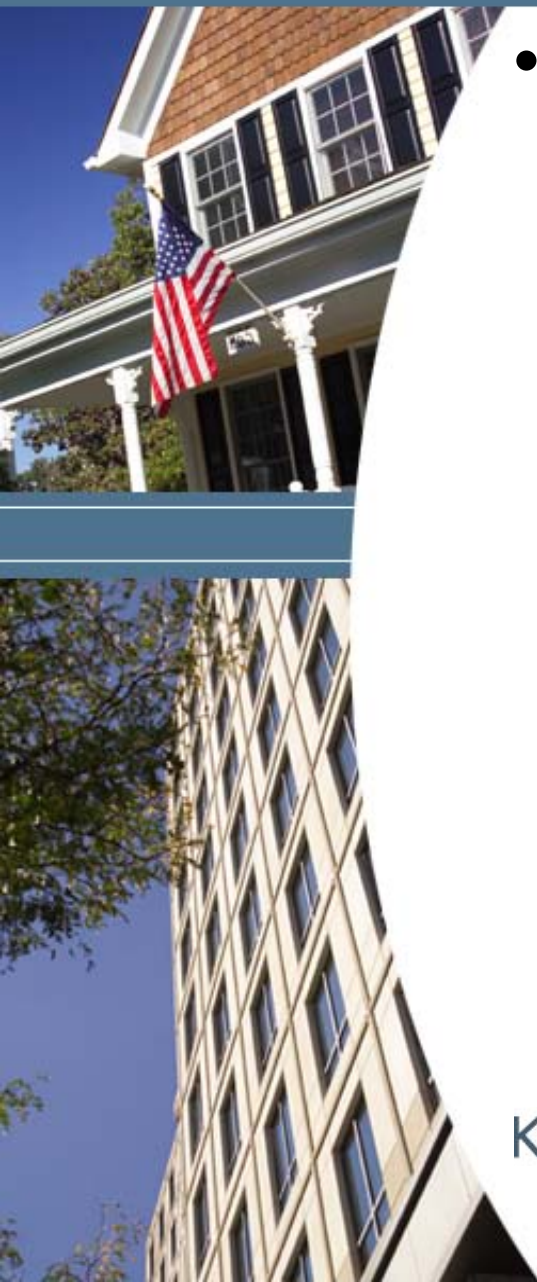
# I. SAFE Act – Deeper Dive: Advertising

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- Model SAFE Act includes the following:
    - » The NMLS Unique Identifier of any person originating a residential loan shall be clearly shown on all residential mortgage loan applications, forms, solicitations or advertisements, including business cards or website, and any other documents as established by rule, regulation or order of the [Commissioner].
    - » Most states have adopted verbatim.
    - » Others have tweaked.
      - A number require the entity NMLS ID#.
      - Maryland – “...clearly displayed as required by the Commissioner...”
    - » New Hampshire – requires Unique Identifier for all N.H. licensed MLOs to be listed on web site.
    - » Idaho – deceptive ad if fail to provide Unique Identifier clearly and conspicuously.

- 
- Basic Policy
    - » Under the SAFE Act, state laws must require all licensees to submit a Mortgage Call Report to the NMLS.
    - » NMLS must determine form and content of the report.
    - » Two parts: Financial Information & Mortgage Loan Activity.
    - » Goal – uniform financial and activity reporting requirements among the states.
    - » NMLS issued Request for Public Comments on March 15, 2010; comments due May 14, 2010  
<http://mortgage.nationwidelicensingsystem.org/news/Pages/ProposalsforComment.aspx>

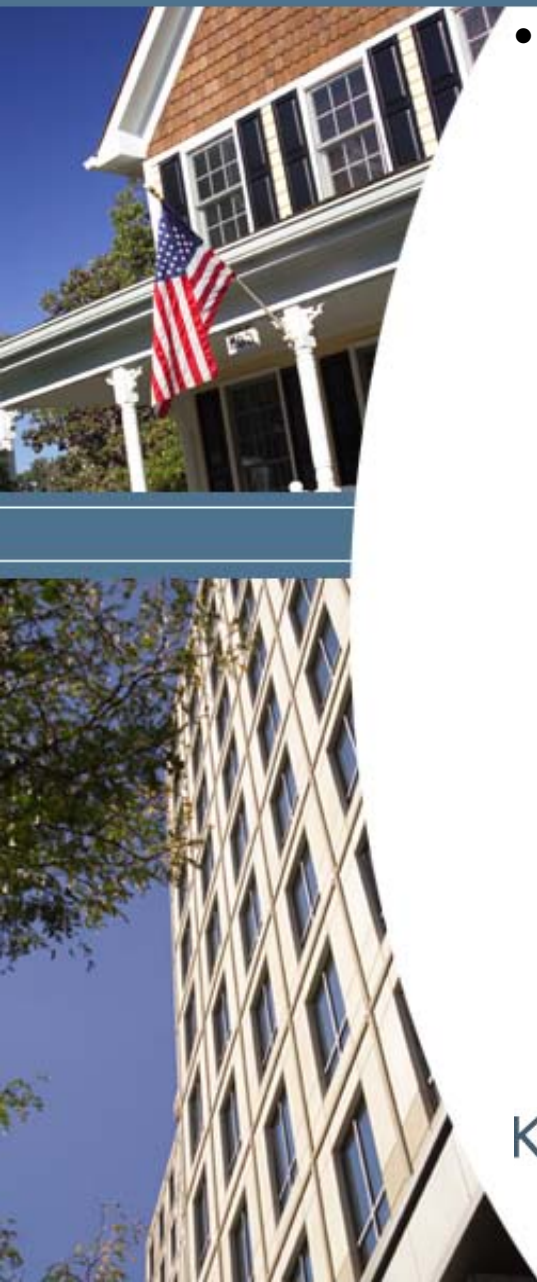
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- Objectives
    - » Provide enough information for mortgage regulators to effectively supervise licensees:
      - monitor compliance.
      - determine exam schedules.
      - calculate assessments.
      - compile statewide reports on mortgage activity.
    - » Reduce or replace individual state annual report requirements.
    - » Automate collection and sharing of information.
    - » Operate in conjunction with existing NMLS financial statement functionality.

- Standards
  - » Filing at company level.
  - » Licensed and registered companies will report MLO activity.
  - » Companies will file activity reporting for each state where they had activity in the reporting period.
  - » Reports due within 45 dates after each calendar quarter.
  - » Delinquent reports will result in deficiencies on company licenses.
  - » Financial statements are for the licensed entity – not consolidated with parent companies.
  - » Financial statements in the report are in addition to any state financial statement requirement.
  - » Individual company information is confidential, but available to regulators.
  - » Information compiled for states, regions, or nationally is considered public information.

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- Financial Condition Report
    - » For entity licensee:
      - Balance Sheet
        - › Breakout warehouse lines of credit
      - Income Statement
      - Cash Flow Statement

- Residential Mortgage Loan Activity Report
  - » For entity Licensee (in each state where licensed).
    - Forward / Reverse / Non RE dwelling.
    - Applications processed.
    - Loans made / Loans brokered.
      - › Purpose
      - › Federally insured
      - › Additional disclosure loans
      - › First lien / subordinate lien categories
    - Outside sources / recipients of originations and applications.
    - Loans modified for third parties.
    - Loans delinquent, modified, foreclosed - owned / serviced.

# I. SAFE Act – Deeper Dive: Misc. Issues

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- In connection with enacting SAFE Act-required changes, a number of states took the opportunity to make other changes to their laws, including:
    - » Eliminating exemptions.
      - Missouri – FHA
    - » Eliminating in-state office requirements.
      - New Jersey
    - » Changing (i.e., increasing) licensing fees.
    - » Narrowing scope of licensing statute to exclude non-owner occupied residential loans made for a business purpose:
      - Arkansas, DC, Kentucky, Mississippi, New Jersey, New Mexico, Ohio, Oklahoma, Wisconsin.

# I. SAFE Act – NMLSR: Overview

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- SAFE Act requires state and federal agencies to participate in the NMLSR.
  - Proposed Rule requires loan originators to obtain a Unique Identifier issued by the NMLSR.
  - NMLSR predates SAFE Act.
  - Launched in Jan. 2008.
  - Owned & operated by State Regulatory Registry, LLC.
  - Modeled after registration of securities / investment advisors.
  - Reduce regulatory burden on multi-state companies.
  - Uniform data (MU Forms).
  - Improve communication among regulators.
  - More efficient use of resources.

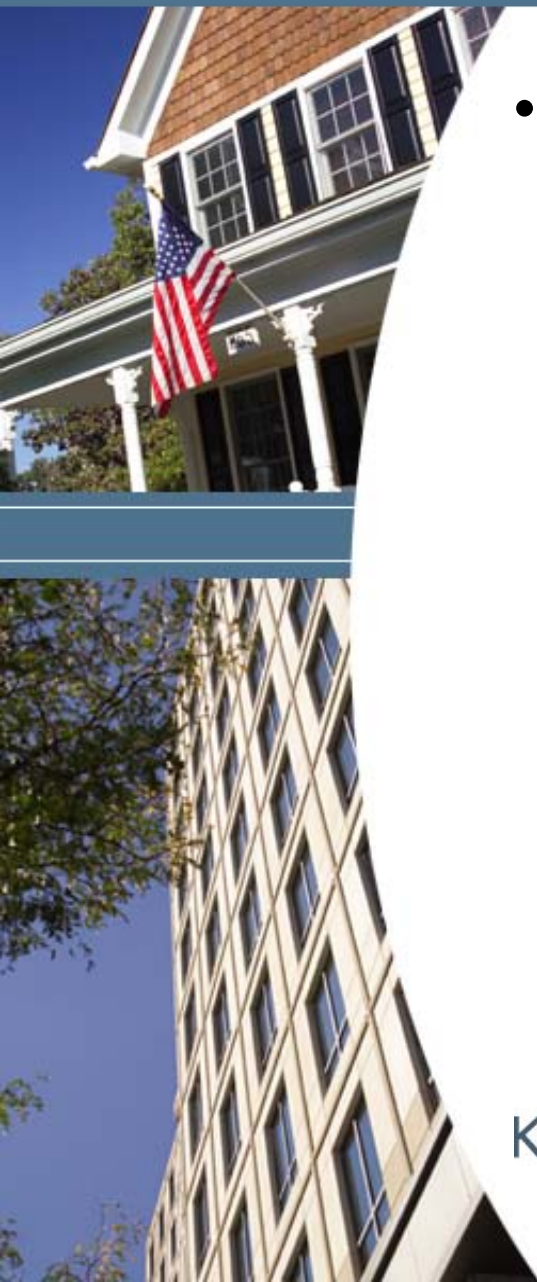
- SAFE Act requires a public access component of NMLSR.
  - » Purpose is to provide consumers with easily accessible information, offered at no charge, utilizing electronic media (including the Internet) regarding the employment history of, and publicly adjudicated disciplinary and enforcement actions against, loan originators.

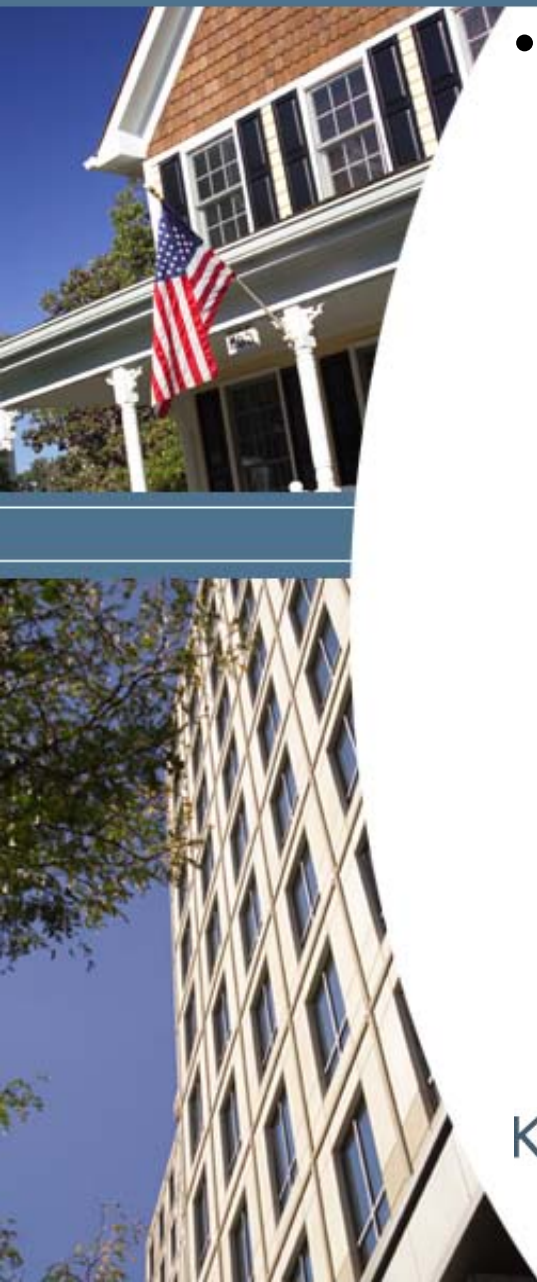
<http://www.nmlsconsumeraccess.org/>

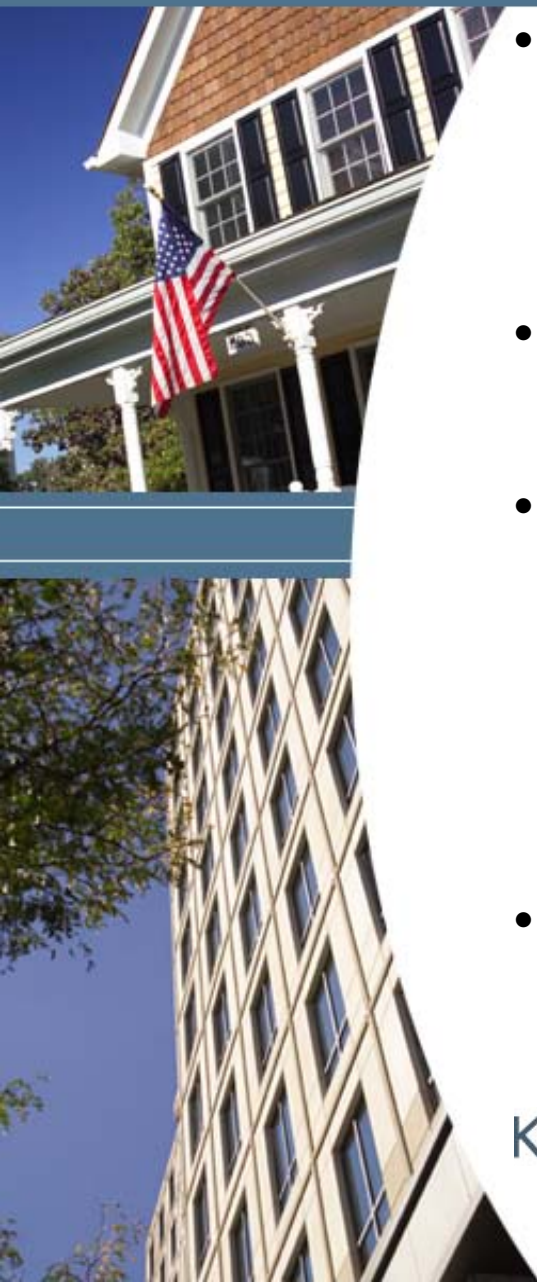
- ***Licensed Individual Record***

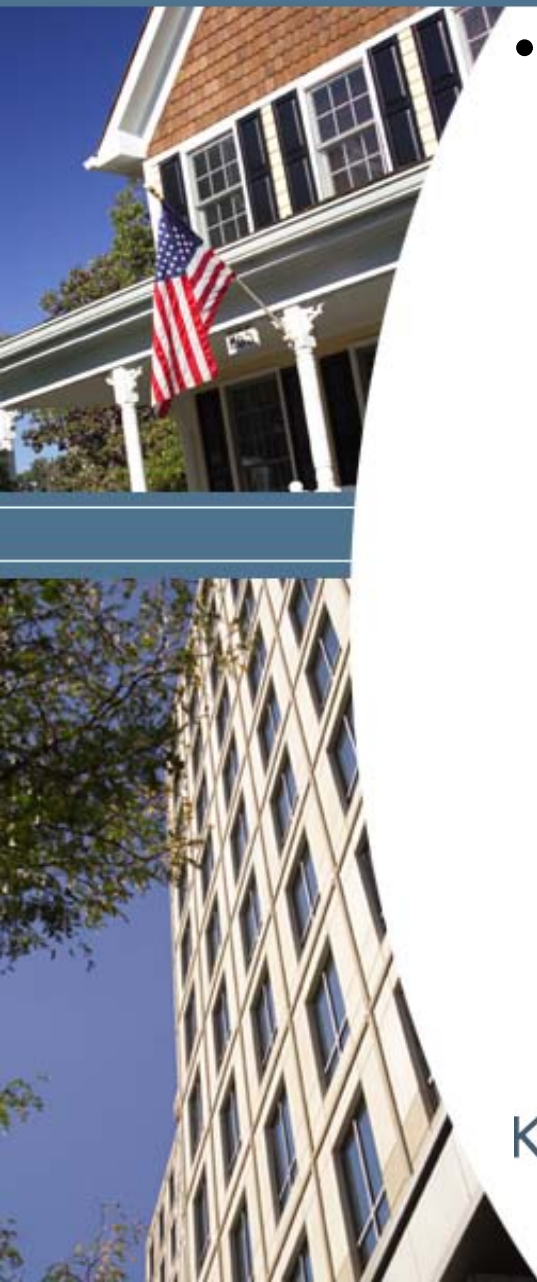
- » NMLS Unique ID
- » Name (First, Middle, Last, suffix)
- » Business Phone/Fax
- » If individual is engaged in other business
- » Other Names
- » Employment History
- » License # by jurisdiction
- » License name by jurisdiction
- » License status by jurisdiction
- » Sponsorship for License
- » Branch location(s)

- **Licensed Company Record**
  - » NMLS Unique ID
  - » License # by jurisdiction
  - » License name and license status by jurisdiction
  - » Name
  - » Main Address (City, State, Zip)
  - » Business Phone, Toll Free Phone, Fax
  - » Business Email Address
  - » Mailing Address if different from Main Address
  - » Indication whether conduct business in branches
  - » Other business names (prior, dba, fictitious)
  - » Web Address
  - » Legal Status (FY End, Formation State, Date of Formation, Stock Symbol)
  - » Entity type: Corporation, LLC, Partnership, Sole Prop. or other

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- ***Reporting of State Regulatory Actions***
    - » Publicly adjudicated disciplinary and enforcement actions taken by state regulators against companies and individuals.
    - » NMLS currently designing functionality, process, and content.
      - Name
      - NMLS ID/License Number
      - Regulatory Action (Type of Order)
      - Case Name/Docket #/Link to Order
      - Additional description (regulator only)

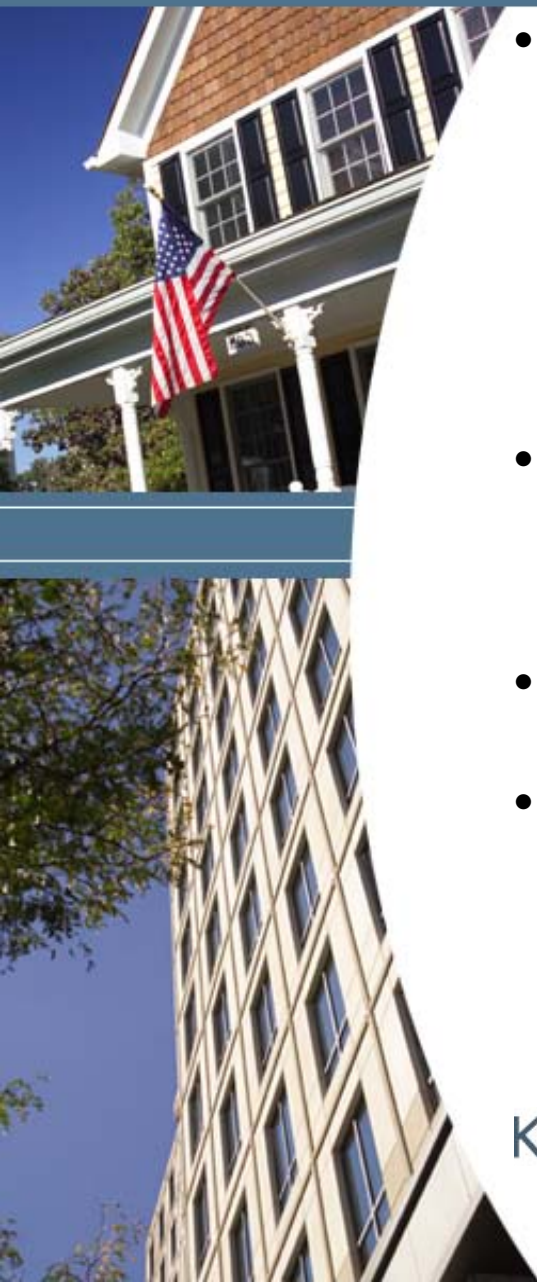
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- The NMLS imposes an affirmative obligation that Licensees, including Mortgage Loan Originators, maintain a complete and accurate record.
    - » Licensees that submit information that is not accurate risk punitive action by regulatory agencies.
      - Few agencies have taken action against licensees with respect to incorrect information, in part because agencies understand that there is a learning curve.
      - As licensees have more time to become familiar with the NMLS, regulatory agencies will expect that licensees understand and meet their obligations under the NMLS.
      - Anticipate heightened scrutiny of licensees, including on their NMLS records.

- 
- January 25, 2010 update to NMLS brought increased functionality, including criminal background check functionality. Updates also included modification to various disclosure questions.
  - Disclosure questions were modified in consideration of the SAFE Act's requirements.
  - Updated questions do not eliminate a licensee's need to perform due diligence on its employees.
    - » For example, the new questions request that individuals identify whether they have ever been convicted of a felony. Companies will need to review and screen the affirmative responses by licensees for compliance with the SAFE Act.
  - Use the recent update to evaluate your company's NMLS record. Is your record accurate, particularly when considering information in the NMLS Policy Guidebook?

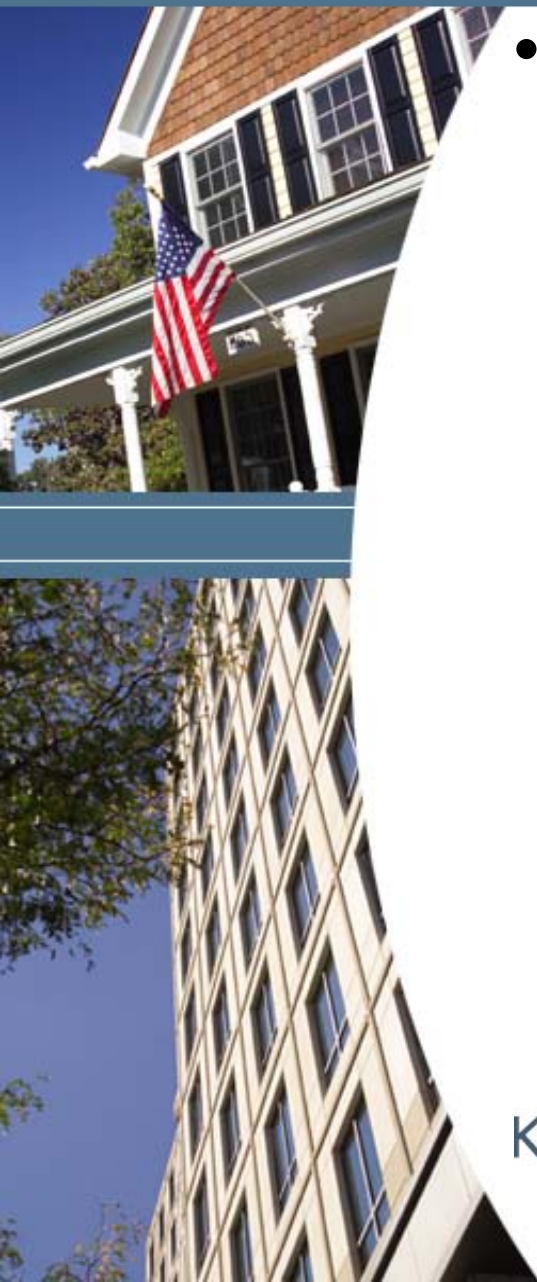
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- Use of the Unique Identifier by Regulatory Agencies
    - » The Unique Identifier is a tool that allows regulatory agencies to trace the activities of Mortgage Loan Originators.
      - State Examinations will utilize software to target loan files with compliance deficiencies.
      - Examiners will be able to cull data to determine whether loans originated by individuals with particular Unique Identifiers demonstrate consistent errors or issues.
      - Targeted Examinations, facilitated by the NMLS and the Unique Identifier, will require increased attention to compliance.

## II. Other Licensing Developments

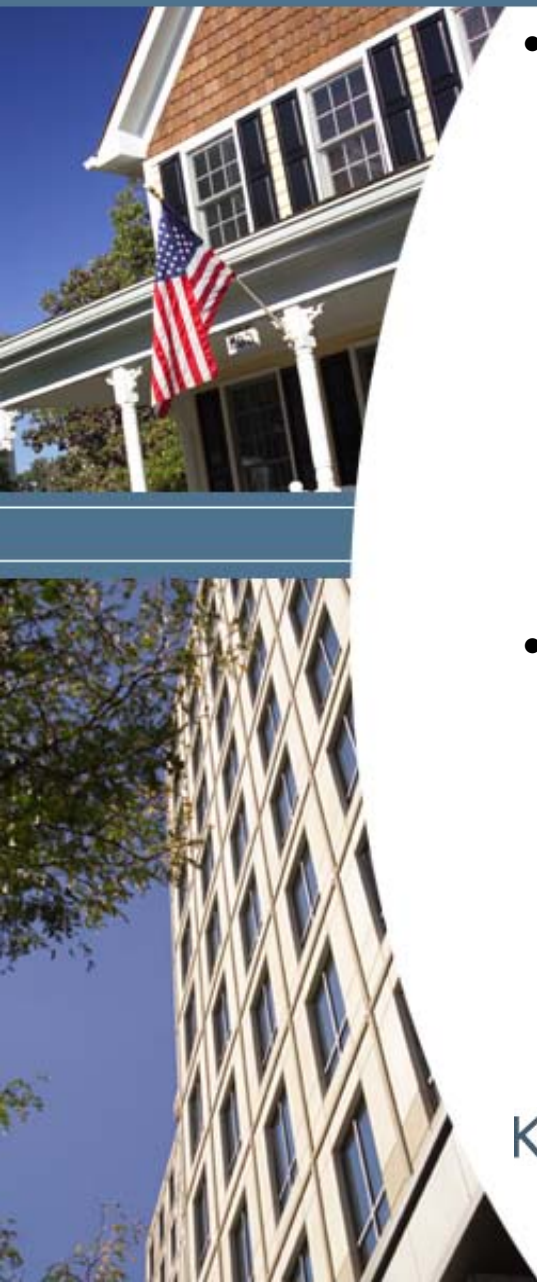
- Loan Modification
- Foreclosure Rescue / Assistance (consumers)
- Short Sale Assistance (lenders)
- Appraisal Management Companies

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- A number of states require third party loan modification companies to be licensed as lender/broker, debt management company, etc.:
    - » Alabama, Arizona, California (DRE), Colorado, Connecticut, Florida, Idaho, Georgia, Maryland, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Rhode Island, Texas, Utah, Virginia, Washington.
  - State regulators actively pursuing “Loan Modsters.”
    - » States have enacted laws aimed at preventing abuses
      - Prohibit advance fees (e.g., CA)
  - HUD Proposed Rule – individuals to be licensed.
  - Watch out for broad definitions of MLO under revised state law:
    - » Virginia – MLO excludes “Individual Loan Servicer”
      - work on behalf of note holder with borrower to modify or refinance, either temporarily or permanently, in order to avoid foreclosure.

- States are starting to enact licensing laws aimed at regulating companies that provide foreclosure-related assistance to consumers.
  - » **Nevada-** Foreclosure Consultants, Foreclosure Purchasers, Loan Modification Consultants and Persons Performing Covered Services For Compensation (Nev. Rev. Stat. § 645F.300 *et seq.*)
    - Covered Services
      - › Contacting a creditor on behalf of a homeowner.
      - › Arranging or attempting to arrange for an extension of the period within which a homeowner may cure a default and reinstate an obligation pursuant to a note, mortgage or deed of trust.
      - › Arranging or attempting to arrange for any delay or postponement of the time of a foreclosure sale.
      - › Giving any advice, explanation or instruction to a homeowner which in any manner relates to the cure of a default in or the reinstatement of an obligation secured by a mortgage on the residence in foreclosure, the full satisfaction of the obligation, or the postponement or avoidance of a foreclosure sale.

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- **Connecticut** – Debt Negotiation (Ct. Stat. § 36a-671 *et seq.*)
    - » Debt negotiation – for, or with the expectation of, a fee, commission or other valuable consideration:
      - assisting a debtor in negotiating or attempting to negotiate the terms of a debtor’s obligations with one or more mortgagees or creditors.
      - negotiating short sales of residential property or foreclosure rescue services.

## II. Other Licensing Developments – Short Sale Assistance

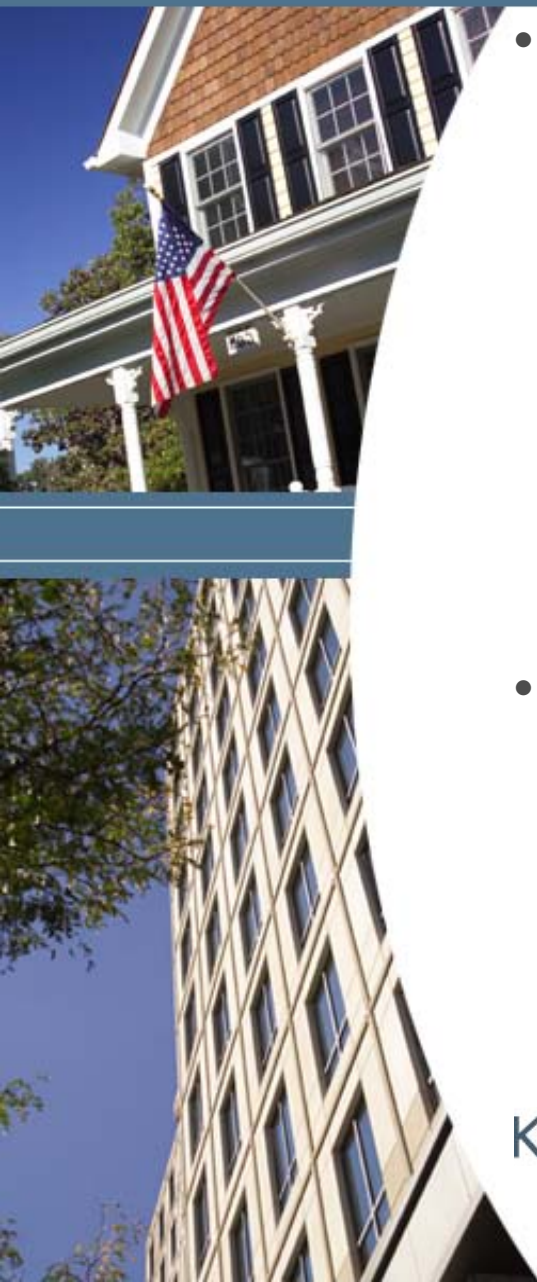
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- Do you provide assistance to lenders/servicers in connection with short sales?
    - » Communicate with borrowers re: options?
    - » Collect information or documentation from borrowers?
    - » Identify potential buyers?
  - Consider the following types of licenses:
    - » Collection Agency/Debt Collection.
    - » Real Estate Broker.
    - » Foreclosure Rescue / Foreclosure Consultant.

## II. Other Licensing Developments – Appraisal Management Company

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- Appraisal Management Company:
    - » recruit, qualify, verify licensing or certification, and negotiate fees and service level expectations.
    - » receive an order for an appraisal and deliver the order to an appraiser.
    - » track and determine status of orders for appraisals.
    - » conduct quality control prior to delivery.
    - » provide completed appraisal.
  - Arkansas, California, Louisiana, Nevada, New Mexico & Utah currently require licensing/registration.
  - Appraisal trade groups have drafted Appraisal Management Company Registration & Regulation Model Act.
  - Legislation pending in approx. 25 other states (generally tracks Model Act).

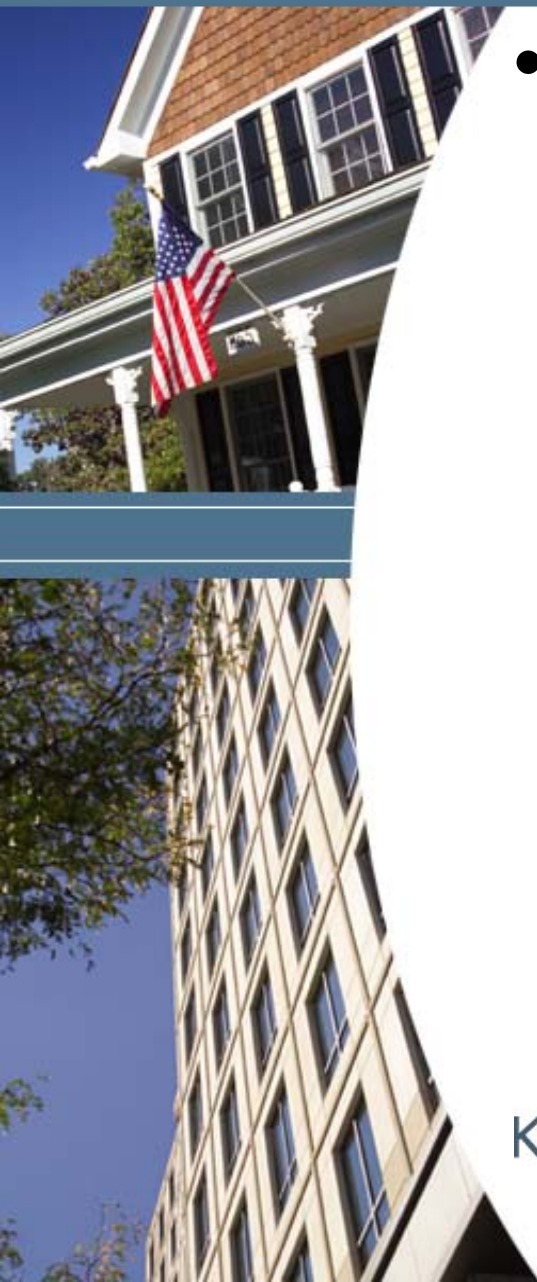
## II. Other Licensing Developments – Appraisal Management Company

- Model Act Provisions
  - » Registration of Appraisal Management Company.
    - in-house exempt.
    - de minimus (10) exemption.
  - » Prohibits ownership if any principal has had an appraisal license denied, refused, cancelled or revoked.
  - » Requires identification of controlling person.
  - » Requires demonstration that systems in place to ensure that only licensed appraisers are used and comply with USPAP.
  - » Prohibits coercion or inappropriate influence.
  - » Sets out mechanism for disputes between AMC and appraisers.

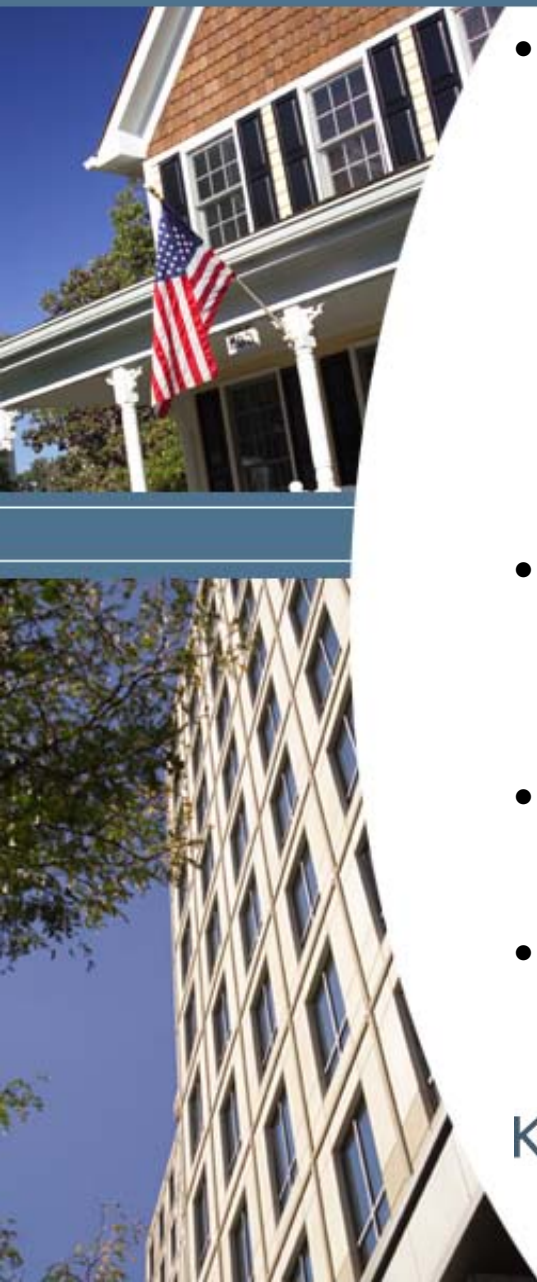
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- Ability to Repay
    - » CO (implements “reasonable inquiry” and “duty to recommend” requirements for LOs in determining tangible net benefit)
    - » IL (SAFE – LOs must not fail to consider)
    - » ME (Advisory Rulings making clarifications)
    - » NM (“totality of facts and circumstances,” demonstrated through “reasonably reliable” documentation)
    - » WA (standards for underwriting policy for conventional loans)
  - “Higher-Priced Mortgage Loans” – Generally to conform with federal TILA/HOEPA
    - » CT (use of avg. prime offer rate and addition of prohibited terms for “non-prime”; also added new prohibitions)
    - » OK
    - » Proposed regs in MA

- Recognition of “fully indexed rates” for ARM loans:
  - » NY – redefines “subprime loan” with reference to the higher of either the initial interest rate or the fully indexed rate
  - » NY – also requires use of fully indexed rate in ability to repay determination.
- Updates of dollar amounts
  - » Adjusting points-and-fees trigger (IL)
  - » Many loan amounts stayed the same for 2010
    - NJ (loan amount)
    - IN (for points and fees threshold)


- Attorney General Enforcement
  - » CT – AG/DOB sued several mortgage companies and individuals alleged to be involved in a statewide predatory lending scheme targeting Hispanic consumers. Accused of:
    - Luring Hispanic consumers, many unable to speak English, into unaffordable (stated-income) mortgages.
    - Colluding to mislead consumers (and lenders) by falsifying loan applications (accountant’s letters)
    - One individual entered guilty plea
  - » MA – AG settled with a lender/servicer of residential mortgage loans (i.e., stated income, interest-only, option ARMs) that the AG deemed “unfair,” asserting the lender knew or had reason to know the borrowers did not have the ability to repay the loans.
    - Settlement requires servicer to modify, imposes a foreclosure moratorium, requires waiver of prepayment/late fees, and requires relocation and foreclosure relief payments.

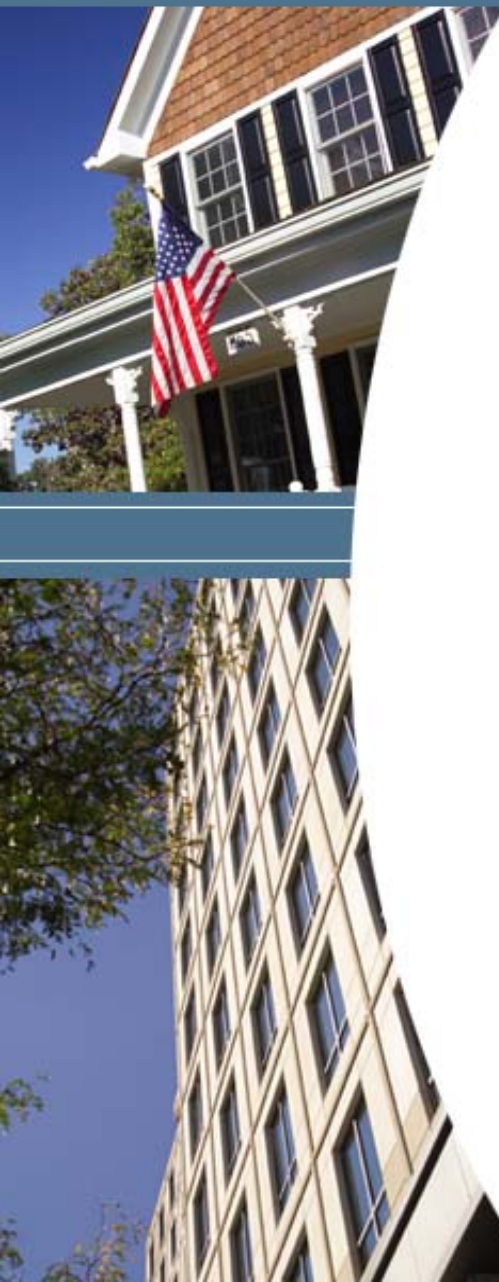
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- New(ish) / Proposed Requirements
    - » New York Mortgage Servicer Registration (Jan. 2009).
    - » Missouri Mortgage Broker License – FHA exemption eliminated (July 2009).
    - » Nevada Loan Servicer Registration (Oct. 2009).
    - » South Carolina Mortgage Servicer License (Jan. 2010).
    - » Washington - Consumer Loan License required to service loans (July 2010).
    - » Hawaii – Mortgage Servicer License (July 2010).

- New(ish) / Proposed Requirements
  - » North Carolina –Regulations (June 2010):
    - Rule 702 – Loss Mitigation Communications
      - › Acknowledge in writing loss mitigation request w/in 10 business days; identify any information needed from the borrower.
      - › Respond to loss mitigation request w/in 30 business days after complete loss mitigation “application” received.
      - › Denial must include reason, contact information for person with authority to reconsider, and contact information for NCCOB.
    - Rule 703 – Cessation of Foreclosure Activity
      - › Must not initiate or further foreclosure proceeding or impose charge while loss mitigation request is pending; certain exceptions.
  - » Nevada – Proposed Regulations impose significant duties on servicers.



- Additional Foreclosure Procedures/Delays
  - » Requiring mortgage servicers to provide certain additional notices to defaulted borrowers prior to commencing foreclosure actions (e.g., CA, CO, IN, MD, ME, NJ, NC, OR, RI).
  - » Extending the notice period (e.g., ME, RI).
  - » Courts have required completion of assignments prior to initiating foreclosure (e.g., MA).
- Allow borrower/tenant to “stay” foreclosure proceeding for period of time (e.g., two years) so long as they reside in property (pending in MN).
- Additional preforeclosure notices of counseling availability or foreclosure prevention services (e.g., CO, IN, RI).
- Right to postpone if, e.g., receiving unemployment benefits, or if surviving spouse of service member.

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- **Mediation or Counseling**
    - » Enacted or pending in many states (CA, CO, CT, DC, IL, MD, MN, VT, etc.)
    - » Offered upon notice of delinquency
    - » Requirement often sunsets within 1 – 3 yrs.
    - » Often one-shot opportunity
  
  - **Protection for Tenants in Foreclosed Properties**
    - » Enacted or pending in many states (MA, MN, NJ, OR, RI, UT)
    - » Notification of tenant rights
    - » May include restrictions on eviction (only for “cause”).



- **Maintenance of Abandoned or Foreclosed Properties**
  - » Municipality may impose lien against abandoned property to ensure, e.g., removal of garbage or pest control, enforceable upon sale (e.g., IL)
- **Foreclosure Reporting Requirements**
  - » Requires periodic or case-by-case reporting of foreclosure proceedings (e.g., NJ).
- **Anti-Deficiency Statutes**
  - » Expanding prohibition against actions for deficiency (e.g., AZ, OR)



Thank you.

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