March 5, 2009

The Honorable Shaun Donovan
Secretary
U.S. Department of Housing and Urban Development
451 Seventh Street, S.W.
Washington, D.C. 20410

Dear Secretary Donovan:

The undersigned organizations representing the financial services industry urgently seek your assistance regarding national housing policy and the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (S.A.F.E.). We are concerned that, absent appropriate guidance from HUD, there is real danger that states will enact a patchwork of new laws requiring mortgage servicers to be licensed and registered under S.A.F.E.

While we support appropriate qualifications for mortgage servicing companies, we do not believe the S.A.F.E. licensing and registry system is the appropriate vehicle to address any servicer-related concerns. S.A.F.E. was never designed to cover servicers. Rather, it 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. Most importantly, making servicers and their 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.

By way of background, Congress enacted S.A.F.E.[1] as part of the Housing and Economic Recovery Act (HERA), to establish a nationwide mortgage licensing system for "loan originators."[2] Notably, it was also intended to streamline the licensing process and reduce the regulatory burden.[3] Generally, states are free to regard the requirements of S.A.F.E. as a floor, not a ceiling, which they may build on, in enacting their own licensing and registration laws. S.A.F.E. encourages the states to establish a Nationwide Mortgage Licensing System and Registry (NMLSR), to be developed and maintained by the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR). While the states must meet the requirements of S.A.F.E., overall responsibility for interpretation, implementation and compliance with S.A.F.E. rests with HUD. HUD must implement and administer its own licensing and registration requirements in those states where a state law does not meet the requirements of S.A.F.E. Accordingly, states and state organizations can be expected to defer to HUD's view.

In this connection, we greatly appreciated the recent letter to you of February 5, 2009, from CSBS and AARMR. In their letter, the organizations expressed the concern that "application of S.A.F.E. licensing requirements to servicer loss mitigation specialists assisting homeowners experiencing problems might seriously curtail such activity at a time of unprecedented numbers of mortgage delinquencies and defaults." The organizations, therefore, requested your interpretation of whether S.A.F.E. covered servicers and suggested a delay until July 31, 2011,

[1] Title V of the Housing and Economic Recovery Act of 2008 (HERA), Pub. Law No. 110-289, 122 Stat. 2654, 2810.
[2] S.A.F.E. Section 1502(1)
[3] S.A.F.E. Section 1502 (7)

or later as approved by the Secretary, for loss mitigation specialists employed by servicers to be covered by S.A.F.E.

While we strongly support CSBS's and AARMR's request for an interpretation, we do not agree that resolution of the issue should be deferred. Rather, we believe an examination of the Congressional intent and the law should result in a definitive opinion at this time, to exclude servicers from S.A.F.E. licensing and registration to avoid unwarranted regulation, undue harm and unnecessary costs to industry and consumers alike.

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."[4] There is no statement in the law or legislative history to indicate that servicers were ever intended to be covered by the legislation.

The Act 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."[5] S.A.F.E. also provides that the term originator "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).[6]

In applying the two-prong test to define an "originator," servicers do not take applications and therefore do not meet the first part of the test. A servicer does and should negotiate the terms of an *existing* loan they service to provide loan workouts and modifications or other solutions such as a loan under the administration's program that is a better option for the borrower. The exception for real estate brokerage activities also makes clear that the bill is directed only to lenders, mortgage brokers or similar mortgage originators. The Act's definitions, therefore, include lenders and mortgage brokers and do not cover servicers.[7]

Beyond statutory interpretation, there are several other reasons why S.A.F.E. should not apply to mortgage servicers. S.A.F.E.'s substantive requirements are geared to mortgage lenders and brokers and not mortgage servicers. For example, the law requires that qualification tests adequately measure a license applicant's knowledge concerning federal law and state law pertaining to mortgage origination, but there is no similar requirement for knowledge of servicing or servicing related matters. 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

[4] Congressional Record-Senate, S6520, July 10, 2008
[5] S.A.F.E, Section 1503(3) (B).
[6] HERA § 1503(3)(A)(i) (emphasis added).
[7] The issue 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 absent HUD guidance.

no requirements specifically relevant to mortgage servicing (e.g. investor requirements or present value analyses). It is therefore fair to say that requiring servicers to meet S.A.F.E. requirements amounts to "pushing square pegs through round holes."

Licensing requirements applied to mortgage servicers under S.A.F.E. would be more burdensome on servicers than on originators. Servicers customarily operate in numerous, if not all, states and under S.A.F.E. their personnel would need a license in each of them. Lenders, on the other hand, except for the largest, tend to be more geographically concentrated, so their originators ordinarily would require licensure in only one or a few states. Additionally, servicing is a very labor-intensive operation, requiring very large numbers of employees and agents. A requirement for individual licensing would result in significant implementation delay and licensing costs.

Finally, in recent weeks, the administration announced its Making Home Affordable Plan, committing a large amount of government resources to provide loan modifications and refinance opportunities for millions of mortgage borrowers. Servicers and the industry will meet these challenges, but layering on additional licensing requirements that are neither well-founded nor warranted will only frustrate and make more costly this important effort.

For all of these reasons, we strongly urge that HUD publicly 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 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 Plan or other options. For these purposes, we suggest defining a servicer as an individual who services a preexisting mortgage loan, which may include explaining the terms of an existing loan or its escrow account, 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. We also request clarification that servicers are exempt from licensing requirements when servicers arrange or assist with loan assumptions under the FHA program in connection with 12 U.S.C. § 1701j-3(b).

We greatly appreciate your consideration of this exceedingly important matter and we would welcome an opportunity to meet with you concerning it at your earliest convenience.

Sincerely,

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
Mortgage Bankers Association

CC: The Honorable Timothy Geithner, Secretary
U. S. Department of the Treasury