ABA Staff Analysis: Interagency Final Rule on S.A.F.E. Act Registration for Depository Institutions
Updated September 2010

Final Rule Issued: July 28, 2010

On July 28, 2010, Federal agencies issued final rules to implement the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act). See 75 F.R. 44656. This final regulation effectuates the SAFE Act’s requirement that federal regulatory agencies jointly develop and maintain a system for registering residential mortgage loan originators who are employees of federally regulated institutions, including national and State banks, savings associations, credit unions, Farm Credit System institutions, and certain of their subsidiaries (“Agencies”).

In connection with the federal registration system, the Agencies must ensure that the Registry is furnished with information concerning the mortgage loan originator’s identity, including: (1) fingerprints for submission to the Federal Bureau of Investigation (FBI) and any other relevant governmental agency for a State and national criminal history background check; and (2) personal history and experience, including authorization for the Registry to obtain information related to any administrative, civil, or criminal findings by any governmental jurisdiction.

The rule cites an effective date of October 1, 2010. The Agencies are, however, providing for a 180-day implementation period for initial registrations that will begin on a date to be specified by the Agencies, through public notice, announcing that the Registry is accepting initial registrations. (The Agencies expect the 180-count to begin on or about January 2011.)

Background

Congress enacted the SAFE Act to enhance consumer protection and reduce fraud by encouraging states to establish minimum standards for the licensing and registration of state-licensed mortgage loan originators and for the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) to establish and maintain a nationwide mortgage licensing system and registry for the residential mortgage industry. Under this system, mortgage loan originators must abide by the requirements of the SAFE Act’s licensure system.

Under the Act’s mandates, individuals may not engage in originations of residential mortgage loans unless they obtain, and maintain, a license and/or registration, and obtain a unique identifier. Non-federally regulated institutions would have to be licensed and registered under state systems that operate under the Nationwide Mortgage Licensing System and Registry (NMLSR or Registry), administered through the CSBS and AARMR. The Registry will serve as the repository of, and conduit for, information on those employees who are mortgage loan originators at Agency-regulated institutions.

Mortgage loan originators employed by depository institutions are exempt from state licensing, though they are required to be registered with the NMLSR, pursuant to regulations ordered to be issued jointly by the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, Farm Credit Administration, and National Credit Union Administration.

The Agencies’ Final Rule

Effective Date: The final rule provides for a 180-day period within which to complete initial registrations after the Registry is capable of accepting registrations from employees of Agency-regulated institutions.

- During this period, employees of Agency-regulated institutions would not be subject to sanctions if they originate residential mortgage loans without having completed their registration.
Agencies will make a formal advance announcement regarding the date when the Registry will begin to accept registrations. (The Agencies indicate that, due to various system modifications and enhancements required to make the existing system capable of accepting Federal registrants, the system is not expected to be capable of accepting Federal registrations before January 2011. The 180-day implementation period will not begin until the system is available to accept Federal registrations, and the Agencies provide public notice of availability. With respect to the initial registration process outlined in § 103, institutions are, therefore, afforded an implementation period that is longer than 180 days, as institutions may begin to implement the final rule requirements before the Registry is operational, i.e., develop policies and procedures, train employees, gather information needed for registration, and program and implement system controls.

With respect to § 104, requiring that institutions adopt and follow written policies and procedures designed to assure compliance with the requirements of the rule, some agency staff are advising that institutions will be expected to implement appropriate policies, procedures and management systems to ensure compliance by October 1, 2010. However, only the OCC has expressed this expectation in writing and none of the agencies have adopted SAFE exam procedures to guide examiners when reviewing the rule’s requirements. (ABA is seeking further clarification of supervisory expectations.)

Scope of Coverage: Under the SAFE Act requirements, mortgage loan originator must be Federally-registered if the individual is an employee of a depository institution, an employee of any subsidiary owned and controlled by a depository institution and regulated by a Federal banking agency, or an employee of an institution regulated by the FCS. The Agencies’ jurisdictions apply as follows—

- **OCC:** Rule applies to national banks, Federal branches and agencies of foreign banks, their operating subsidiaries, and their employees who are mortgage loan originators.
- **FRB:** Rule applies to member banks of the Federal Reserve System (other than national banks), their respective subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act; and branches and agencies of foreign banks (other than Federal branches, Federal agencies and insured State branches of foreign banks) and commercial lending companies owned or controlled by foreign banks and their employees who act as mortgage loan originators.
- **FDIC:** Rule applies to insured State nonmember banks (including State-licensed insured branches of foreign banks) and their subsidiaries (except brokers, dealers, persons providing insurance, investment companies, and investment advisers) and their employees who are mortgage loan originators.
- **OTS:** Rule applies to savings associations and their operating subsidiaries, and their employees who are mortgage loan originators.
- **FCA:** This rule applies to Farm Credit System (FCS or System) institutions that originate residential mortgage loans under sections 1.9(3), 1.11 and 2.4(a)(2) and (b) of the Farm Credit Act of 1971, as amended, 12 U.S.C. 2017(3), 2019, and 2075(a)(2) and (b), and their employees who are mortgage loan originators.
- **NCUA:** Rule applies to federally-insured credit unions and their employees who are mortgage loan originators.

**NOTE** that the definition of “depository institution” does not include bank or savings association holding companies or their non-depository subsidiaries. Employees of these entities who act as mortgage loan originators are not covered by the Federal registration requirement and, therefore, must comply with State registration and licensing requirements.

Persons Covered: The rule, under § 103, sets forth the following definitions that define the reach of the registration requirements—

- “Mortgage Loan Originator” defined as individuals who— (1) take residential mortgage loan applications, and (2) offer or negotiates terms of a residential mortgage loan for compensation or gain.
The term “mortgage loan originator” does not include—

- individuals that perform purely “administrative or clerical tasks” (defined as (1) the receipt, collection, and distribution of information common for the processing or underwriting of a loan in the mortgage industry; and (2) communication with a consumer to obtain information necessary for the processing or underwriting of a residential mortgage loan);
- individuals that perform only real estate brokerage activities and are duly licensed;
- individuals or entities solely involved in extensions of credit related to timeshare plans, as defined in 11 U.S.C. 101(53D));
- employees engaged in loan modifications or assumptions, and
- employees engaged in mortgage loan servicing.

“Compensation or gain” includes salaries, commissions or other incentives, or any combination thereof.

**De-minimis Exception:** Under Section ___.101(c)(2), the registration requirements of this section do not apply to an employee of an Agency-regulated institution who has never been registered or licensed through the Registry as a mortgage loan originator and who has acted as a mortgage loan originator for 5 or fewer residential mortgage loans during the last 12 months.

In order to prevent manipulation of the registration requirement by structuring this exception to apply to multiple employees who each would not meet the exception’s threshold for registration, the final rule prohibits any Agency-regulated institution from engaging in any act or practice to evade the limits of the de minimis exception.

The exception is voluntary, and does not prevent originators from registering if they choose to do so.

**Requirement to Register:** Under § ___.103(a), the final rule imposes registration requirements on individual mortgage loan originators and on institutions.

- **Individuals:** Mortgage loan originators must be Federally-registered if they are employees of a depository institution, employees of any subsidiary owned and controlled by a depository institution and regulated by a Federal banking agency, or employees of an institution regulated by the FCA. Originators must also obtain a “unique identifier” under the system.
  - NMLSR: The Act and rule require registration with the Nationwide Mortgage Licensing System and Registry, defined as the system developed and maintained by the CSBS and the AARMR for the State licensing and registration of State-licensed mortgage loan originators and the registration of mortgage loan originators pursuant to section 5107 of the S.A.F.E. Act. The Registry currently supports the licensing and registration of State mortgage loan originators.
  - Unique Identifier: The proposal defines “unique identifier” to mean a number or other identifier that: (1) permanently identifies a registered mortgage loan originator; (2) is assigned by protocols established by the Registry and the Agencies to facilitate electronic tracking of mortgage loan originators, and uniform identification of, and public access to, the employment history of, and the publicly adjudicated disciplinary and enforcement actions against mortgage loan originators; and (3) must not be used for purposes other than those set forth in the S.A.F.E. Act.

- **Institutions:** The rule provides that an Agency-regulated institution must require its mortgage originating employees to register with the Registry, maintain this registration, and obtain a unique identifier in compliance with this subpart. This provision also prohibits an Agency-regulated institution from permitting its employees to act as mortgage loan originators for the bank unless registered with the Registry pursuant to this subpart.

**Annual Renewals:** Under § ___.103(b)(1)(i), the rule requires that originators renew registrations annually during the “annual renewal period.”
Annual renewal period would extend from November 1 through December 31 of each calendar year, and registered originators would be required to renew during this period regardless of the date of the initial registration.

To renew, employees must confirm that the information previously submitted to the registry remains accurate and complete, or update where necessary.

Any registration that is not renewed during this period will become inactive, and the individual will be prohibited from acting as a mortgage loan originator at an Agency-regulated institution until such time as the registration requirements are met.

Re-registrations: Under § ___.103(a)(4), properly registered or licensed originators will not have to re-register when they change employment. If a new employee of an Agency-regulated institution is already registered and has maintained that registration (or license, if previously employed by a State-regulated entity), the registration requirements of this subpart are deemed to be met, provided that: (1) the employee’s employment information in the Registry is updated, and the employee completes the required authorizations and attestation; (2) new fingerprints of the employee are provided to the Registry for a new background check (unless employee has fingerprints on file with Registry that are less than 3 years old, and except in the case of mergers, acquisitions or reorganizations); (3) information concerning the new employing institution is provided to the Registry; and (4) the registration is properly maintained as of the date the employee becomes employed by the institution.

- The final rule provides a 60-day grace period to comply with these requirements when a registered mortgage loan originator becomes an employee of an Agency-regulated institution as a result of an acquisition, merger, or reorganization.
- The registration of an originator who leaves any employer will be inactive until he or she is hired by a new institution, his or her record is updated in accordance with the final rule’s requirements, and the new employer acknowledges employing the mortgage loan originator through the Registry.
- Other required updates: In addition to the annual renewal, a registration must be updated within 30 days of any of the following events: (1) change in employee’s name, (2) registrant ceases to be employee of the institution; or (3) any of the employee’s responses to the information required for registration become inaccurate. (§ ___.103(b)(ii))

Effective Dates of Registration: § ___.103(c) defines the effective dates for registrations in the system. Under the regulation, a registration is effective on the date the Registry transmits notification to the registrant that the registrant is registered. A renewal or update pursuant to paragraph (b) of this section is likewise effective on the date the Registry transmits notification to the registrant that registration has been renewed or updated.

- Through the preamble, Agencies warn that employee must not engage in residential mortgage loan origination activity if his or her registration is not yet effective or has not been renewed or updated pursuant to this rule.
- The final regulations do not impose a requirement for the processing of fingerprints or the completion of a background check before a registration becomes effective. Nor is the effectiveness of a registration contingent on Agency or Registry review or approval of the information submitted to the Registry.
- Agencies anticipate that the Registry will charge fees for registration, though amounts have not yet been established.

Required Employee Information: Items that originators must submit (or that banks must submit on behalf of originating employees) to the Registry are delineated under § ___.103(d) of the rule. The following items of information are required to be submitted to the registry—

- Information concerning identity of employee, including the employee’s: name and any other names used; home address and contact information; address of the employee’s principal business location and business contact information; social security number; gender; and date and place of birth;

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• Financial services-related employment history for 10 years prior to date of registration or renewal, including the date the employee became an employee of the bank;
• Convictions of any criminal offense involving dishonesty, breach of trust, or money laundering, or agreements to enter into a pretrial diversion or similar program in connection with the prosecution for such offense, against the employee or organizations controlled by the employee;
• Civil judicial actions against employee in connection with financial services related activities, dismissals with settlements, or judicial findings that the employee violated financial services-related statutes or regulations, except for actions dismissed without settlement agreement;
• Actions or orders by a State or Federal regulatory agency or foreign financial regulatory authority that:
  o Found the employee to have made a false, dishonest, unfair/unethical statement; to have been involved in a violation of a financial services-related regulation or statute; or to have been a cause of a financial services-related business having denied, lost, or suspended its authorization to do business;
  o Are entered against the employee in connection with a financial services-related activity;
  o Denied, suspended, or revoked the employee’s registration or license to engage in a financial services-related activity; disciplined the employee or otherwise by order prevented the employee from associating with a financial services-related business or restricted the employee’s activities; or
  o Barred the employee from association with an entity or officers regulated by the agency or authority or from engaging in a financial services-related business;
• Final orders issued by a State or Federal regulatory agency or foreign financial regulatory authority based on violations of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct;
• Revocation or suspension of the employee’s authorization to act as an attorney, accountant, or State or Federal contractor;
• Customer-initiated financial services-related arbitration or civil action against employee that required action, including settlements, or which resulted in a judgment; and
• Fingerprints of the employee, in digital form if practicable, and any appropriate identifying information for submission to the Federal Bureau of Investigation and any governmental agency or entity authorized to receive such information in connection with a State and national criminal history background check; however, fingerprints provided to the Registry that are less than 3 years old may be used to satisfy this requirement.
  o Agencies have amended §___.103(d)(1)(ix) to provide that fingerprints that are less than three years old may be used to satisfy the requirement to furnish fingerprints to the Registry.
  o CSBS and SRR are currently modifying the NMLS to act as a channeler for fingerprints of State license applicants, pursuant to the S.A.F.E. Act, and Federal registrants may use this same fingerprinting process when the NMLS is modified to accept Federal registrations.

Employee authorization and attestation: In the final rule, under §____.103(d) and (e), institutions may assume responsibility for providing the employee information required under this section, to the Registry, or they may require the employee to provide the information directly to the Registry. Agency-regulated institutions may select one or more individuals to submit the employee information required by this paragraph to the Registry on behalf of each of their mortgage loan originators to facilitate the registration process. (Person selected cannot act as a mortgage loan originator, as per §____.103(e)(1)(i)(F).) In either case, the registering employee must—
  o Attest to the correctness of all information submitted to the Registry, and provide authorization for the Registry to obtain information related to any administrative, civil or criminal findings to which the employee is a party.
  o Authorize Registry to make available to the public the originator’s name, current employer, current principal business location and contact, 10 years of relevant employment history, and
criminal convictions and cases where employee was found to have committed acts of dishonesty, fraud, dishonesty, as well as suspension and revocations of licenses and permits.

**Required Institution-Related Information:** The final regulations require covered institutions to submit specified information to the Registry as a “base record” in connection with the initial registration of loan originators. (§ ___.103(e)).

- **Institutional Information:** Agency-regulated institution must provide
  - name,
  - main office address,
  - primary Federal regulator,
  - Employer Identification Number (EIN) issued by the Internal Revenue Service,
  - primary point of contact information,
  - contact information for “system administrators,” and
  - if institution is a subsidiary, indicate that it is a subsidiary and provide name of parent institution.

- **RSSD:** Agency-regulated institutions must provide its Research Statistics Supervision Discount (RSSD) number. The RSSD database is maintained by the Board.

- **Updates:** Institutions must update information submitted within 30 days of the date that the information becomes inaccurate.

- **Information on Originators:** Institutions must provide information to Registry for each employee who acts as a mortgage loan originator. (§ ___.103(e)(2)). Institutions must: (1) confirm that it employs the registrant; and (2) within 30 days of the date the registrant ceases to be an employee of the institution, provide notification that it no longer employs the registrant, and the date registrant ceased being an employee.

- **“System administrators”** have the authority to enter required data on the Registry and will be responsible for upkeep of institution information and lists of employees registered with Registry.
  - These individuals may not act as mortgage loan originators.
    - Regulation provides exemption to this prohibition, for institutions with 10 or fewer full time equivalent employees. However, this exemption does not apply to subsidiary of Agency-regulated institution as the staff at the parent institution could perform this function.
  - System administrators are allowed to delegate authority and assign as many additional system users as necessary to comply with the registration requirements of the S.A.F.E. Act and the final rule.

**Batch Processing:** The final rule specifically permits institutions to “batch process,” pursuant to § ___.103(d)(3). Under this section, institutions are allowed to submit a portion of the information required for multiple originators in bulk, to the extent such batch processing is made available through the registry.

- According to the rule preamble, the Agencies, CSBS, and SRR are in the process of specifying the details and means of this batch processing. Batch processing should be available for institutions at the start of the initial registration period, and we will provide further information on batch processing prior to that time.

**Use of Unique Identifiers:** The final rules require an Agency-regulated institution to make the unique identifier(s) of its registered originator(s) available to consumers in a manner and method practicable to the institution (such as a website or other publicly accessible place or medium). In addition, rule requires a registered loan originator to provide the unique identifier to a consumer upon request, before acting as a mortgage loan originator, and through the originator’s initial written communication with a consumer, if any.

- Agencies clarify that requirement to provide unique identifier to consumer through initial written communication, if any, applies whether that communication is provided in writing on paper or through electronic means.
- Unique identifier may be provided orally, except pursuant to (b)(3) under which the unique identifier would be provided with the written or electronic communication.

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• Institutions are not required to include the unique identifier on loan program descriptions, advertisements, business cards, stationary, notepads, and other similar materials (although they are not prohibited from doing so).

Policies and Procedures: § ____.104 requires that institutions that employ mortgage loan originators adopt and follow written policies and procedures designed to assure compliance with the requirements of the rule. This requirement applies regardless of any de minimis exception applicable to employees. Policies and procedures must be appropriate to the nature, size, complexity and scope of the institution’s mortgage lending activities and must at a minimum include the following eight items—

• A process for identifying which employees are required to be registered mortgage loan originators.

• Require that all employees of the institution who are mortgage loan originators be informed of the registration requirements of the S.A.F.E. Act, and be instructed on how to comply with these requirements and procedures.

• Establish procedures to comply with the unique identifier requirements.

• Establish reasonable procedures for confirming the adequacy and accuracy of employee registrations, including updates and renewals, by comparison with the institution’s records.
  o The Agencies clarify that they will consider an institution to have reasonable procedures if it confirms the information supplied to the Registry that is in the institution’s personnel files. Typically this information includes employee’s identifying information, such as employee’s name; home and business address; social security number; gender; date and place of birth; and financial services-related civil actions, arbitrations and regulatory actions taken against the institution’s employee, if any.

• Establish reasonable procedures and tracking systems for monitoring compliance with registration requirements and procedures.

• Provide for periodic independent testing of institution’s policies and procedures for compliance with the S.A.F.E. Act and the final rule, including registration and renewal requirements, and for such testing to be conducted by institution personnel or by an outside party.
  o Auditing must be done on annual basis.

• Provide for appropriate disciplinary action in the case of any employee who fails to comply with the registration requirements of the S.A.F.E. Act, this rule, or related policies and procedures of the institution.

• Establish process for reviewing the criminal background history reports on employees received from the FBI through the Registry and taking appropriate action consistent with applicable law and rules with respect to these reports.

• Establish procedures to ensure that any third party with which bank has arrangements related to mortgage loan origination has policies and procedures to comply with the S.A.F.E. Act, including appropriate licensing and/or registration of individuals acting as mortgage loan originators. (This provision will ensure that individuals acting as mortgage loan originators on behalf of an Agency-regulated institution are either State licensed and registered and/or Federally registered.

Enforcement: The OCC, Board, FDIC, and OTS have the authority to take enforcement actions against their respective Agency-regulated institutions and individual employees of those institutions who violate the S.A.F.E. Act and the final rule, pursuant to 12 U.S.C. 1818. The FCA has authority to take enforcement actions against Farm Credit System institutions and individual employees who violate the S.A.F.E. Act and the final rule pursuant to title V, Part C of the Farm Credit Act of 1971, as amended, 12 U.S.C. 2261 et seq. The NCUA has the authority to take enforcement actions against federally-insured credit unions and their employees who violate the S.A.F.E. Act and the final rule under 12 U.S.C. 1786.

Questions? Contact Rod Alba for more information.

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