



FEDERAL REGISTER

Vol. 76

Thursday,

No. 126

June 30, 2011

Part II

Department of Housing and Urban
Development

24 CFR Parts 30 and 3400

SAFE Mortgage Licensing Act: Minimum Licensing Standards and
Oversight Responsibilities; Final Rule

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

24 CFR Parts 30 and 3400

[Docket No. FR-5271-F-03]

RIN 2502-A170

**SAFE Mortgage Licensing Act:
Minimum Licensing Standards and
Oversight Responsibilities**

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This final rule sets forth the minimum standards for the state licensing and registration of residential mortgage loan originators, requirements for operating the Nationwide Mortgage Licensing System and Registry (NMLSR), and HUD's Federal oversight responsibilities pursuant to the Secure and Fair Enforcement Mortgage Licensing Act of 2008 (SAFE Act or Act), to ensure proper monitoring and enforcement of states' compliance with statutory requirements. This 2008 law directs states to adopt loan originator licensing and registration requirements that meet the minimum standards specified in the SAFE Act.

In addition to codifying the minimum licensing standards and HUD's oversight responsibilities under the SAFE Act, this rule also clarifies or interprets certain statutory provisions that pertain to the scope of the SAFE Act's licensing requirements, and other requirements that pertain to the implementation, oversight, and enforcement responsibilities of the states.

DATES: Effective Date: August 29, 2011.

FOR FURTHER INFORMATION CONTACT: Kevin L. Stevens, SAFE Act Office, Office of Housing; Room 3151; telephone number 202-708-6401 (this is not a toll-free number). For legal questions, contact Paul S. Ceja, Assistant General Counsel, or Joan L. Kayagil, Deputy Assistant General Counsel, SAFE-RESPA Division, Room 9262; telephone (202) 708-3137. Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Relay Service at 800-877-8339. The address for the above listed persons is: Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410.

SUPPLEMENTARY INFORMATION:

I. Overview of the SAFE Act

The Housing and Economic Recovery Act of 2008 (Pub. L. 110-289, approved July 30, 2008) (HERA) is comprised of

several significant housing laws that address the dramatic rise in mortgage delinquencies and foreclosures in the residential mortgage market. Included among these new laws is the SAFE Act. The SAFE Act establishes the minimum standards for state licensing of residential mortgage loan originators in order to increase uniformity, improve accountability of loan originators, combat fraud, and enhance consumer protections. The SAFE Act also requires states to participate in the NMLSR. As noted earlier, the SAFE Act encourages CSBS and AARMR to establish and maintain the NMLSR, and these organizations have established such a system, which is being used by states to license and register residential mortgage loan originators. The CSBS and AARMR system is available online,¹ and consumers will soon be able to access free information regarding the status and employment history of all state-licensed and federally loan originators, as well as any disciplinary and enforcement actions against them on an additional Web site.²

The SAFE Act, as enacted in 2008, charged HUD with oversight of states' compliance with the Act. The SAFE Act also charged HUD to establish and maintain a licensing and registration system for a state or territory that does not have a system in place for licensing loan originators that meets the requirements of the SAFE Act, or that fails to participate in the NMLSR. To operate in any state where HUD (or subsequently, the Bureau) has had to establish such a licensing and registration system (a Federal SAFE Act-compliant licensing system), a loan originator would have to comply with the requirements of the Federal SAFE Act-compliant licensing system for that state, as set forth in this final rule, as well as with any applicable state requirements. A license for a loan originator in a particular state issued under a Federal SAFE Act-compliant licensing system would be valid only for that state, even if a Federal SAFE Act-compliant licensing system must be established in several states. Additionally, if a determination is made that the NMLSR is failing to meet the requirements and purposes of the SAFE Act, HUD or the new Bureau must establish a nationwide licensing and registration system that meets the requirements of the Act.

In addition to developing the NMLSR, CSBS and AARMR developed model legislation³ to aid states' compliance

with the requirements of the SAFE Act. CSBS and AARMR requested that HUD review the model legislation, and that HUD advise of the model legislation's sufficiency in meeting the applicable minimum requirements of the SAFE Act. HUD reviewed the model legislation and advised the public that the model legislation offers an approach that meets or exceeds the minimum requirements of the SAFE Act and that states that adopt and implement a state licensing system that follows the provisions of the model legislation, whether by statute or regulation, will be presumed to have met the applicable minimum statutory requirements of the SAFE Act. In advising the public of its assessment of the model legislation, HUD also presented its views and interpretations of certain statutory provisions that required consideration and analysis in determining whether the model legislation meets the minimum requirements of the SAFE Act. These views and interpretations, referred to as HUD's Commentary (or Commentary),⁴ were discussed in HUD's December 2009 proposed rule and are referenced in this final rule, with further elaboration and clarification as determined appropriate and in response to public comment.

The SAFE Act also requires the Office of the Comptroller of the Currency of the Department of the Treasury, the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision of the Department of the Treasury, the Farm Credit Administration (FCA), and the National Credit Union Administration (collectively, the Federal banking agencies), through the Federal Financial Institutions Examination Council (FFIEC) and the FCA, to develop, implement, and maintain a Federal registration system for employees of an institution regulated by one (or more) of the Federal banking agencies. The Federal banking agencies published their final rule to implement this registration system on July 28, 2010 (75 FR 44656; corrected and republished at 75 FR 51623, August 23, 2010). The SAFE Act specifically prohibits, with certain exceptions, an individual employed by an agency-regulated institution from engaging in the business of a residential mortgage loan originator without first obtaining a unique identifier and registering and annually maintaining registration as a

¹ <http://www.stateregulatoryregistry.org>.

² <http://www.nmlsconsumeraccess.org>.

³ <http://www.hud.gov/safe>.

⁴ HUD's Commentary can be found at <http://www.hud.gov/safe>. (See also HUD's **Federal Register** notice published on January 5, 2009, at 74 FR 312, advising of the availability of the model legislation and HUD's Commentary.)

registered mortgage loan originator. The Federal banking agencies published their final rule to implement this registration system on July 28, 2010 (75 FR 44656).

The SAFE Act was amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, approved July 21, 2010) (Dodd-Frank Act), and the authorities and duties delegated to HUD by the SAFE Act will be transferred on July 21, 2011, to the new Consumer Financial Protection Bureau (the Bureau) established by the Dodd-Frank Act. Accordingly, references to HUD's authorities and duties throughout this final rule should be understood to refer to the authorities and responsibilities of the Bureau once the transfer occurs.

II. HUD's December 2009 Proposed Rule

On December 15, 2009, at 74 FR 66548, HUD published a proposed rule to clarify HUD's responsibilities under the SAFE Act and the minimum standards that the SAFE Act provides for states to meet in licensing loan originators. The proposed rule provided proposed clarifications and interpretations of certain statutory provisions that pertain to the scope of the SAFE Act licensing requirements, and other requirements that pertain to the implementation, oversight, and enforcement responsibilities of the states. In addition, the proposed rule provided the procedure that would be used to determine whether a state's licensing and registration system is SAFE Act compliant, the actions that HUD would take if it determined that a state has not established a SAFE Act-compliant licensing and registration system or that the NMLSR established by CSBS and AARMR is not SAFE Act compliant, the minimum requirements for the administration of the NMLSR, and enforcement authority to be utilized in the administration of a Federal licensing and registration system.

Through the proposed rule, HUD solicited public comment and suggestions on the proposed clarifications and regulations. On February 17, 2010, HUD published a notice⁵ extending the public comment period until March 5, 2010, due to severe inclement weather conditions and closures of government and private organizations that may have prevented many members of the public from submitting comments.

A more detailed discussion of HUD's December 15, 2009, proposed rule can be found at 74 FR 66548 through 66562

of the December 15, 2009, edition of the **Federal Register**.

III. Overview of Final Rule—Key Clarifications

After reviewing issues raised by the commenters, which are discussed in Section IV of this preamble, and upon HUD's further consideration of issues related to this final rule, the following highlights key clarifications made by this final rule.

An individual required to be licensed under the SAFE Act is an individual who is engaged in the "business of a loan originator"; that is, an individual who acts as a residential mortgage loan originator with respect to financing that is provided in a commercial context and with some degree of habitualness or repetition. The SAFE Act defines "loan originator" to mean "an individual who takes a residential mortgage loan application; and offers or negotiates the terms of a residential mortgage loan for compensation or gain." Section 1504(a) of the SAFE Act requires licensing of those individuals who "engage in the business" of a loan originator. It is HUD's view that the SAFE Act's distinction between individuals who may meet the definition of "loan originator" (because of the activities they carry out) versus those individuals who "engage in the business" of a loan originator, means that not every individual who acts as a loan originator is necessarily subject to the SAFE Act's licensing and registration requirements. A basic definition of "business" is "a commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain." (See Black's Law Dictionary 211 (8th ed. 2004).) It is HUD's view that to engage in the "business" of a loan originator and be subject to licensing under the SAFE Act, an individual must act or hold oneself out as acting as a loan originator with respect to mortgage loan origination activities that are carried out in a commercial context and with some degree of habitualness or repetition. To act in a commercial context, the individual who acts as a loan originator must do so for the purpose of obtaining profit for an entity or individual for which the individual acts (including, e.g., a sole proprietorship or other entity that includes only the individual), rather than exclusively for public, charitable, or family purposes. The requisite habitualness or repetition of the mortgage loan origination activities may be met if either the individual who acts as a loan originator does so with a degree of habitualness or repetition, or if the source of the prospective

financing provides such financing or performs other phases of originations of residential mortgage loans with a degree of habitualness or repetition. The absence of either a commercial context or a degree of habitualness or repetition means that the activity in which the individual is engaged does not constitute the "business" of a loan originator. This final rule codifies this distinction at § 3400.103(b)(1) and in an appendix and identifies instances where such absence indicates that an individual is not subject to SAFE Act licensing requirements.

An overarching purpose of the SAFE Act is to enhance consumer protection and support anti-fraud measures through establishment of state licensing systems that will ensure that loan originators have the necessary integrity and knowledge needed to perform their functions properly. To accomplish this purpose, the SAFE Act requires, among other things, that an applicant for a state license must provide information demonstrating that he or she will act honestly and fairly, complete courses, and pass a written test on Federal and state laws governing loan origination, ethics, consumer protection, fraud, fair lending, and standards in the nontraditional mortgage product marketplace.

Once licensed, a loan originator is required: (1) To continue to meet the minimum licensing standards; (2) to complete continuing education courses; and (3) to ensure the submission of periodic reports on the loans that he or she originates. The SAFE Act seeks to protect consumers from incompetency, fraud, and other abuses by ensuring that individuals who act as a loan originator with the purpose of obtaining profit for another entity and with respect to financing that is provided with some degree of habitualness have received training on and have demonstrated understanding of the applicable legal and ethical obligations. In contrast, consumers are unlikely to need the protections provided by loan originator licensing when an individual acts as a loan originator in a purely public or charitable context, without the purpose of obtaining profit, or who acts as a loan originator with respect to financing that is provided only once or very rarely.

The SAFE Act's purposes and licensing requirements apply to individuals who act as loan originators with respect to financing that is provided in a commercial context and with some degree of habitualness or repetition. This final rule includes discussion of a number of cases where the requisite commercial context or habitualness may be absent.

⁵ 75 FR 7149.

The SAFE Act does not cover employees of government agencies or housing finance agencies who act as loan originators in accordance with their duties as employees of such agencies. Individuals who act as loan originators as employees of government agencies or of housing finance agencies, as defined⁶ by this rule, are not subject to the licensing and registration requirements of the SAFE Act. Many government agencies and housing finance agencies provide direct housing assistance to low- and moderate-income people through residential mortgage loans with favorable terms. The entities that administer such government housing assistance include Federal, state, and local governments and housing finance agencies.

These government entities are generally granted authority and funding and are overseen by Congress, state legislatures, or municipal councils, and are presumed to carry out their activities for the benefit of the borrowers they serve. Their employees act as loan originators in accordance with strict agency policies and pursuant to highly prescriptive statutory and regulatory requirements that Federal, state, and local government public officials or elected representatives have determined are consistent with the public interest and provide adequate protections for borrowers. An individual's status as an employee of a government agency or housing finance agency ensures that the agency has the power to ensure that all aspects of the individual's conduct are consistent with the public purposes of the agency.

Another key distinction between loan originators covered by the SAFE Act and government employees administering government assistance is the pecuniary purpose for acting as a loan originator. Loan originators working in a commercial context undertake their activities in order to further the financial interests of the entity for which they work. In contrast, government agencies and housing finance agencies that carry out housing finance programs generally do so without the purpose of obtaining profit for any entity.

For these reasons, the requisite commercial context is lacking and, as a result, these individuals do not engage in the "business" of a loan originator.

⁶ "Housing finance agency" means any authority that is chartered by a state to help meet the affordable housing needs of the residents of the state, is supervised directly or indirectly by the state government, is subject to audit and review by the state in which it operates, and whose activities make it eligible to be a member of the National Council of State Housing Agencies.

Consequently, the SAFE Act definition of a loan originator does not encompass governmental employees, and governmental employees are not required to obtain a state license and registration for any loan origination under a government housing assistance program. To ensure that all of the individual's actions in the course of acting as a loan originator are subject to the control of the agency or housing finance agency and are consistent with the agency's public or government mission, the individual must be an employee of the agency.

However, the fact that a prospective residential mortgage loan is to be insured or guaranteed under a government program does not mean that the individual acting as a loan originator with respect to the loan is not covered by the SAFE Act. For example, loan originators working for entities that originate residential mortgage loans under the mortgage insurance programs or loan guarantee programs of the Federal Housing Administration or the Department of Veterans Affairs are generally covered by the licensing and registration requirements of the SAFE Act. While these mortgage insurance and loan guarantee programs were created by Federal statute, and are governed by Federal regulations, the individuals who act as loan originators with respect to these government-insured loans generally do so in the commercial context, in part because they generally do so for the purpose of obtaining profit for the entity for which they work (including, *e.g.*, a sole proprietorship or other entity that includes only the individual). Since these loans are originated in a commercial context, the loan originators are generally subject to state licensing and registration requirements.

The SAFE Act does not cover employees of bona fide nonprofit organizations who act as loan originators with respect to residential mortgage loans outside a commercial context. Individuals who act as loan originators with respect to certain kinds of loans as employees of "bona fide" nonprofit organizations, as defined by this final rule, are not subject to the licensing and registration requirements of the SAFE Act. Under the circumstances defined in this final rule, such individuals are similar to government employees who act as loan originators pursuant to government-funded and regulated housing assistance programs, in that employees of a bona fide nonprofit organization who act as loan originators do so for public or charitable purposes, and not for the profit of another individual or entity.

Employees of bona fide nonprofit organizations who act as loan originators do not act in a commercial context and consequently are not covered by the SAFE Act.

HUD recognizes that the mere fact of an organization's 501(c)(3) status is insufficient to conclude that its employees who act as loan originators necessarily do so for the benefit of the borrower and for public or charitable purposes, rather than for the profit of the organization or another entity or individual. Instead, the organization's activities, purpose, incentive structures, and loan products must be considered in order to determine that its employees who act as loan originators do so outside of a commercial context. Accordingly, this final rule provides that an organization is considered to be a "bona fide" nonprofit organization if the organization demonstrates to the satisfaction of the applicable regulator that the organization:

(1) Maintains tax-exempt status under section 501(c)(3) of the Internal Revenue Code of 1986;

(2) Promotes affordable housing or provides homeownership education, or similar services;

(3) Conducts its activities in a manner that serves public or charitable purposes;

(4) Receives funding and revenue and charges fees in a manner that does not incentivize the organization or its employees to act other than in the best interests of its clients;

(5) Compensates employees in a manner that does not incentivize employees to act other than in the best interests of its clients;

(6) Provides to or identifies for the borrower residential mortgage loans with terms that are favorable to the borrower and comparable to mortgage loans and housing assistance provided under government housing assistance programs; and

(7) Meets such other standards that the state determines appropriate.

With respect to whether particular mortgage terms are favorable to borrowers, the applicable regulator should examine the interest rate that the home loan would carry; the charges that are imposed on the borrower for origination, application, closing and other costs; whether the mortgage includes any predatory characteristics; the borrower's ability to repay the loan; and the term of the mortgage.

Finally, to ensure that all of the individual's actions in the course of acting as a loan originator are subject to the control of the bona fide nonprofit organization and are consistent with the organization's mission and practices,

the individual must be an employee of the organization and must be acting within the scope of his or her employment on behalf of the organization. (Applicability of SAFE Act licensing requirements to volunteers is addressed below under the section of this preamble that addresses “for compensation or gain.”)

An individual selling his or her own residence is not engaged in the business of loan originator. As the foregoing clarifications highlight, the SAFE Act requires licensing of individuals engaged in the “business” of a loan originator, and the statutory phrasing of who is required to be licensed reflects a habitualness and commercial context, both of which are likely absent in the case of a homeowner financing the sale of his or her own residence, whether such residence is the homeowner’s principal residence or a vacation property. As HUD stated in the proposed rule, the frequency with which a particular seller provides financing to a buyer to facilitate the sale of the seller’s own residence is so limited that Congress could not have intended to require such sellers to obtain loan originator licenses. This final rule confirms and more clearly applies this point by adding the concept of habitualness or repetition expressly into the language on “engages in the business of a loan originator” in § 3400.103(b) of the rule.

However, as discussed later in this preamble, a remaining issue with respect to seller financing is when the infrequency with which an owner finances the sale of properties other than his or her residence, along with other factors, indicate that an individual is not “engaged in the business” of a loan originator, either because the transactions’ requisite commercial context or habitualness, or both, are absent. HUD received a large number of public comments suggesting that an individual should be able to provide financing pursuant to the sale of any property the individual owns, regardless of whether property served as the seller’s residence. As further discussed below, some commenters stated that seller financing should be permitted for a limited number of such properties, while others stated that financing the sales of an unlimited number of such properties should be permitted, without subjecting the provider of the financing to SAFE Act licensing requirements.

HUD appreciates the concerns of the commenters and agrees that there may be cases where the seller of a property or properties in which the seller has never lived may provide financing for the sale without the seller’s acts arising

to “engag[ing] in the business” of a loan originator. While the fact that the seller has not lived in the properties makes it more likely that financing is provided in order to obtain a profit, and therefore makes it more likely that a commercial context is present, the infrequency with which a particular seller undertakes such actions, combined with the fact that it is the individual who is providing the financing (rather than a business entity that regularly provides financing), may mean that the requisite habitualness needed to constitute “engage[ing] in the business” of a loan originator is absent. However, HUD is unable to state how often an individual may undertake such transactions before the requisite habitualness is met. Despite the requests of many commenters, HUD has no authority under the SAFE Act to exempt from licensing requirements individuals who engage in the business of a loan originator. For example, HUD has no authority under the SAFE Act to establish a “de minimis” exemption that would shield individuals who do engage in the business of a loan originator from the SAFE Act’s licensing requirements, but who do so infrequently. The SAFE Act expressly provides the Federal banking agencies with such authority but does not provide comparable authority to HUD. Accordingly, although HUD agrees that an individual must act as a loan originator with respect to financing that is provided or other origination activities that are performed with some degree of habitualness in order to engage in the “business” of a loan originator, HUD is unable to state how frequently an individual, including an individual providing financing for the sale of a property, must so act in order to meet the requisite degree of habitualness.

HUD lacks statutory authority to grant exemptions to licensing under the SAFE Act. As also discussed later in this preamble, many commenters sought exemption from licensing under the SAFE Act for various reasons. HUD has no authority under the SAFE Act to exempt individuals engaging in the business of a loan originator.

Removal of activities that are not specified in statute as activities exempt from licensing under the SAFE Act. HUD is removing from § 3400.103(e), which pertains to individuals who do not need to be licensed under the SAFE Act, references to individuals who offer and negotiate terms of a residential mortgage loan with or on behalf of a family member, an individual who only offers or negotiates terms of a residential mortgage loan secured by a dwelling

that serves as the individual’s residence, and a licensed attorney who only negotiates the terms of a residential mortgage loan on behalf of a client as an ancillary matter to the attorney’s representation of a client. HUD’s position remains that these activities do not constitute engaging in the business of a loan originator and are not subject to licensing under the SAFE Act. HUD believes that the inclusion of these activities in the regulation as activities not covered by the SAFE Act triggered the high volume of comments that addressed issues such as how many residences an owner may sell and finance before the owner may need to be licensed under the SAFE Act, and what HUD means by “immediate family member.” Accordingly, a discussion of these activities, which includes examples of activities that do not fall under SAFE Act coverage, as well as activities that serve as examples of activities that do fall under SAFE Act coverage, has been moved to an Appendix of this final rule. This approach is consistent with that of the Federal banking agencies in their SAFE Act final rule, which included an analogous appendix that address activities that do or do not subject an individual to SAFE Act requirements.

Activities, not the label of the transaction or professional title of an individual, determine SAFE Act coverage. As also discussed later in this preamble, many commenters submitted the titles of various professions and asked whether such professions had to be licensed under the SAFE Act. It is the activities that an individual undertakes, not the individual’s title, that determines coverage under the SAFE Act. If one is engaged in the business of a loan originator, then regardless of what other title one may have, the individual is subject to licensing under the SAFE Act.

Deferral to the Bureau for a determination of coverage of individuals involved in material mortgage modifications. The final rule does not include licensing of those individuals engaged in material or significant modifications to residential mortgage loans or those individuals working as third-party loan modification specialists. Although HUD considered licensing of such individuals, and specifically solicited comment on coverage of loan modifications that result in material modifications to homeowners’ mortgages, HUD, in this final rule, does not define “loan originator” or “business of a mortgage loan originator” to include individuals who engage in loan modifications or are third-party loan modification

specialists. HUD leaves to the Bureau the issue of whether such individuals should be licensed under the SAFE Act. HUD notes that the new Bureau has independent authority under the Dodd-Frank Act to regulate loan modification and loan servicing practices.

However, it is important to note that those individuals involved in refinancing transactions are subject to licensing under the SAFE Act. A refinancing results in a new loan, not a modified loan.

Appendix of activities that constitute or do not constitute "engag[ing] in the business of a loan originator." As noted earlier, HUD includes in this final rule an appendix that provides examples of activities that would subject an individual to licensing under the SAFE Act, or that do not fall under coverage of the SAFE Act.

Technical and additional clarifying changes. In addition to the clarifications highlighted above, this final rule also includes technical and minor clarifying changes to certain definitions and provisions. These changes are in response to ambiguities raised by commenters, and are further discussed below in section IV of this preamble. Among them are technical changes to the regulatory provisions clarifying "takes an application," "offers or negotiates," "employee," "state," the requirement to pass a test after a lapse of a loan originator license of five or more years, the requirement to authorize the NMLS to obtain required information, and the full name of the accreditation program for state supervisory authorities. A definition is provided for the term "origination of a residential mortgage loan," which is, in turn, included in the definition of "loan processor or underwriter."

Section 30.69 is also revised to clarify that HUD would not impose civil money penalties for violations of state law, in a state where HUD has established a system for the licensing and registration of loan originators.

IV. Discussion of Public Comments

A. The Comments, Generally

The public comment period on this proposed rule closed on March 5, 2010, and HUD received 5,132 public comments in response to the December 2009 proposed rule. Comments were submitted by individuals; state regulatory agencies; other units of state and local government; industry associations; mortgage-lending institutions; mortgage loan servicers; nonprofit housing counseling, lending, and community development organizations; broker-dealers that

employ financial advisors; manufactured housing retailers, lenders, and community owners; and attorneys and law firms. The overwhelming majority of the comments were directed to various types of residential mortgage loan transactions and asked HUD to clarify whether the individuals involved in those transactions are required to be licensed under the SAFE Act. This Section IV of the preamble sets out significant comments raised by the public commenters and HUD's responses to these comments, and identifies where HUD has made technical changes to the regulations as set forth in the proposed rule.

B. Key Definitions: "Taking an Application," "Offers or Negotiates," "Compensation or Gain," and "Engaging in the Business of a Loan Originator"

Comment: More detailed or revised definitions are needed for key terms that determine whether an individual is covered. Several commenters requested that HUD elaborate on its definitions of "takes an application," "offers or negotiates," and "for compensation or gain." Commenters stated that without further refinement, these terms, as presented in the proposed rule, capture or appear to capture: (1) Activities that are not loan origination activities, or (2) individuals who are not loan originators. A number of commenters asserted that the proposed definition changes the statutory definition of "loan originator," which requires that an individual take a residential mortgage loan application *and* offer or negotiate the terms of a residential mortgage loan for compensation or gain, into an "or" definition, thus requiring satisfaction of only one of the two prongs noted above. Another commenter stated that HUD should not include the provision that an individual engages in the business of a loan originator by representing to the public that such an individual can or will perform the activities of a loan originator.

With respect to the term "takes an application," a commenter stated that the definition of "application" needs to be more precise to clarify that taking an application does not encompass the mere physical handling or transmitting of a completed form to a lender. Another commenter stated that HUD should clarify that the "and" in the proposed definition of "application" is conjunctive; that is, an application consists of both the request for an offer of a loan and the information about a borrower that is customary or necessary. Another commenter stated that deciding whether to extend an offer of credit, or

"influencing" the decision of another, is not part of the origination function and could be viewed as inappropriate for a loan originator. This commenter states that taking an application and collecting information from the applicant that will be used to determine whether or not to grant the mortgage loan should be the only stated factors in proposed § 3400.103(c)(1). Another commenter urged HUD to withdraw its interpretation of the term "application" set forth in the proposed rule, and instead retain the definition of "application" that is found in the Real Estate Settlement Procedures Act (RESPA), Regulation X (24 CFR 3500.2).

With respect to the term "offers or negotiates," commenters identified activities that occur in the context of the manufactured housing retail industry or other contexts and asked HUD to clarify that they do not constitute offering or negotiating, such as: (a) The mere sharing of general information about a financing source; (b) acting as a conduit between the homebuyer and the financing source without engaging in specific discussion of financing options from a particular funding source; (c) discussing hypothetical financing options, *i.e.*, options not related to a specific financing source; (d) presenting a spectrum of options; (e) giving the homebuyer a list of available financing sources without recommending any of the sources; (f) discussing a buyer's ability to afford a home; (g) discussing various alternative financing options; (h) presenting or discussing generic facts sheet or generic rate sheets; and (i) closing personal property transactions. The commenters reasoned that these activities are not covered because under HUD's proposed first prong in the provision on "offer[ing] or negotiate[ing]," an individual can present loan terms to a borrower for acceptance only if the terms are capable of being accepted under contract law. The commenters stated that similarly, under HUD's proposed second prong in the provision on "offer[ing] or negotiate[ing]," an individual communicates with a borrower to reach a mutual understanding only if the activity amounts to achieving mutuality under contract law.

Several commenters believed that the proposed provisions clarifying the terms "offer[ing] or negotiate[ing]" left too much ambiguity or risked coverage of activities that the commenters believed should not be covered. Commenters specifically questioned HUD's proposed third prong, which provided that an individual offers or negotiates terms of a residential mortgage loan by referring the prospective borrower to a particular

lender or set of loan terms in accordance with a duty to or incentive from any person other than the prospective borrower. Some commenters worried that under this third proposed prong, licensing requirements could be triggered by a casual conversation in which an individual recommends a lender, by indicating the name of a lender on the individual's business card, or implying generically that a particular lender may be able to meet a prospective borrower's needs. Another commenter stated that HUD's third prong does not cover a manufactured home retailer who forwards an application to a limited number of lenders, and that the duty or incentive refers only to duties to or incentives from a financing source, and not to a commission that the individual may receive as a result of selling the home.

With respect to the term "for compensation or gain," as in the case of the comments submitted on "taking an application," and "offers or negotiates," commenters generally did not offer a definition for this term but offered examples of activities that the commenters believe should fall outside of the scope of "for compensation or gain." Some commenters stated that "for compensation or gain" requires a nexus between the compensation or gain and the "offering or negotiating activity, or should include only a commission that is contingent on the closing of a loan or sale, and not salary. Commenters stated that the following should be clarified as not constituting activities that are undertaken "for compensation or gain" under the SAFE Act: (a) A salesperson's commission for the sale of a manufactured home to the extent that the commission is the same in a cash transaction and in a financed transaction; and (b) any benefit that is the same in a financed transaction as in a cash transaction. Other commenters recommended that the term "for compensation or gain" be defined to exclude an employee of a 501(c)(3) or government organization that will receive no gain or benefit from the transaction.

The majority of commenters who provided suggestions on how these terms should be revised or clarified did so in the context of various categories of professions that should be excluded from coverage under the SAFE Act.

HUD Response: The definitions of "tak[ing] a residential mortgage loan application," "offer[ing] or negotiate[ing] terms of a residential mortgage loan," and "for compensation or gains" largely determine whether or not a particular individual is subject to licensing requirements, and HUD

specifically solicited comment on the definitions provided in the proposed rule.

Takes an application. HUD's proposed rule provided that "application" includes 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. The proposed rule provided that HUD views the phrase "tak[ing] an application" to mean receipt of an application for the purpose of deciding whether or not to extend the requested offer of a loan to the borrower, whether the application is received directly or indirectly from the borrower. HUD stated that it generally would not be possible for an individual to offer or negotiate residential mortgage loan terms without first receiving the request from the borrower, as well as the information typically contained in a borrower's application. Accordingly, the provision retained in § 3400.103(c)(1) of this final rule, which provides that an individual takes an application, whether he or she receives it "directly or indirectly" from the borrower, means that an individual who offers or negotiates residential mortgage loan terms for compensation or gain cannot avoid licensing requirements merely by having another person physically receive the application from the prospective borrower and then pass the application to the individual.

HUD disagrees that this clarification converts the statutory two-pronged "and" definition into an "or" definition that is met by satisfying only one prong. (The commenter may be confusing the Model State Law with HUD's proposed rule.) Instead, the clarification merely prevents subversion of the SAFE Act's licensing regime through use of a "straw man," and recognizes that it is the act of offering or negotiating residential mortgage loan terms for compensation or gain in conjunction with receipt of an application that subjects an individual to licensing requirements. An individual who merely takes an application, but never offers or negotiates loan terms, is not required to be subject to licensing by the SAFE Act. Similarly, a person who makes an offer of loan terms without ever receiving, directly or indirectly, an application from the borrower, is not required to be covered by the SAFE Act.

The proposed rule also provided that HUD interprets the term "takes a residential mortgage loan application" to exclude an individual whose only role with respect to the application is physically handling a completed

application form or transmitting a completed form to a lender on behalf of a prospective borrower. This interpretation is consistent with the definition of "loan originator" in section 1503(3)(A)(ii) of the SAFE Act, and with HUD's above discussion of "takes an application."

Organizational change. The corresponding provision, regarding "administrative or clerical tasks," has been moved to § 3400.103(e)(4) in this final rule for organizational clarity. It is HUD's view that the provisions in the final rule clearly exclude these activities, and that changes requested by some commenters for further clarification are unnecessary.

HUD agrees with a commenter's observation that an application consists of both the request for an offer of loan terms and the information about the borrower, as more specifically provided in the definition. HUD's view is that this is made clear by the definition's use of the word "and." HUD also agrees that a loan originator's duties generally do not include "deciding" whether to offer credit, and that use of the word "influencing" could be read to imply an activity that is generally not appropriate for a loan originator.

Rule clarification. To clarify that this was and is not HUD's intended meaning, § 3400.103(c)(1) is revised slightly to clarify that the application is received for the purpose of "facilitating a decision" whether to extend an offer.

Offers or negotiates. HUD advised in the proposed rule that it views the terms "offers or negotiates" broadly. HUD views these terms as encompassing interactions between an individual and a borrower with respect to prospective loan terms where the individual is likely to seek to further his or her own interests or those of a third party. Accordingly, the proposed rule, in § 3400.103(c)(2), stated that the terms include interactions that are typical between two parties in an arm's length relationship to facilitate the formation of a contract, such as presenting loan terms for acceptance by a prospective borrower and communicating with the borrower for the purpose of reaching an understanding about prospective loan terms. The proposed rule specifically clarified that the third prong of "offers or negotiates" encompasses actions by an individual that make a prospective borrower more likely to accept a particular set of loan terms or an offer from a particular lender, where the individual may be influenced by a duty to or incentive from any party other than the borrower. Such actions may be functionally equivalent to and have the same effect on the borrower's decision

as a direct offer or negotiation, but without the borrower's knowledge or understanding that other options may be available. HUD generally agrees with the commenters' observation that HUD's proposed first prong of the provision clarifying "offers or negotiates," under which an individual presents, for acceptance by a borrower, residential mortgage loan terms, has similarities with an extension of an offer under contract law.

Rule clarification. However, to prevent any confusion that might arise as a result of this analogy, HUD is clarifying in this final rule that the offer need not be capable of acceptance at the time it is presented, as an offer typically would be under contract law.

As the Federal banking agencies clarified in their final rule, the loan terms presented may be conditional or subject to additional verification, and other steps may remain in completing the loan process. (See, e.g., Appendix A to subpart F of Part 34—Examples of Mortgage Loan Originator Activities, paragraph (b), at 75 FR 44687–88.) In addition, the individual typically lacks authority to bind the entity that would provide the prospective loan, which is another distinction from an agent-principal relationship under contract law.

Rule clarification. To clarify these distinctions, this final rule provides at § 3400.103(c)(2)(i)(A) that under the first prong, an individual presents the loan terms for "consideration" rather than for "acceptance" by a borrower. To prevent any misunderstanding that the prong covers an individual who presents merely generic or illustrative loan terms for general consideration by the borrower, this final rule further clarifies that the individual must present "particular" residential mortgage loan terms. Through this change, HUD intends to cover the presentation of loan terms that are identified as being prospectively available from one or more lenders to similarly situated prospective borrowers.

Similarly, HUD generally agrees with the commenters' observation that the proposed second prong of the provision clarifying "offers or negotiates," under which an individual communicates with a borrower for the purpose of reaching an understanding about prospective loan terms, is analogous to communications between parties to a prospective transaction that have the purpose of reaching "mutuality," as under contract law.

Rule clarification. Accordingly, HUD is clarifying at § 3400.103(c)(2)(i)(B) that the purpose of such communications is "mutual understanding." However, the

individual need not have authority to alter the rate in the course of such communications, and this second prong can be satisfied by communicating with the purpose of reaching mutual understanding, even if such understanding is never in fact achieved.

With these clarifications, HUD agrees that in general, the following activities described by the commenter—(a) the mere sharing of general information about a financing source; (c) discussing hypothetical financing options, *i.e.*, options not related to a specific financing source; (e) giving the homebuyer a list of available financing sources without recommending any of the sources; (f) discussing a buyer's ability to afford a home; (h) presenting or discussing generic facts or generic rate sheets; and (i) closing personal property transactions—would not be covered under "offers or negotiates." Whether the commenter's examples of the following activities—(b) acting as a conduit between the homebuyer and a financing source without engaging in specific discussion of financing options from a particular funding source; (d) presenting a spectrum of options; and (g) discussing of various alternative financing options—would be covered would require additional facts and analysis under the provisions, as explained above. For example, "acting as a conduit between the homebuyer and a financing source" could constitute a mere administrative task, if the activity consists of merely physically handling or faxing a document in accordance with the unsolicited request of the borrower or of a licensed loan originator, or it could constitute taking an application or offering or negotiating loan terms, depending on the facts and circumstances.

HUD disagrees with the commenters who characterized as inappropriate the proposed third prong, which provides that an individual offers or negotiates terms of a residential mortgage loan by referring the prospective borrower to a particular lender or set of loan terms in accordance with a duty to or incentive from any person other than the prospective borrower. HUD cautions that each of the prongs clarifying "offers or negotiates" must be read in conjunction with the statutory and regulatory provision that an individual must also "take an application" and that there must be a nexus between the two activities. An individual's generic referral to or recommendation of a particular lender, divorced from any receipt and consideration by the individual of the prospective borrower's application (*i.e.*, his or her request and information that is customary in a

decision on whether to extend an offer of loan terms), would not likely trigger the third prong. Instead, it would be triggered by an individual's referral to a particular lender or set of loan terms in conjunction with the individual's receipt and consideration of the information received from the borrower.

Properly understood in this context, the third prong is simply a specific application of the first prong, under which an individual directly presents for the borrower's consideration particular loan terms that are identified as being available from one or more lenders to similarly situated borrowers. The third prong merely clarifies that, just as with "taking an application," the individual cannot avoid applicability of the SAFE Act by bifurcating the function; *e.g.*, by directing the prospective borrower to another individual or entity that will reveal the details of the terms that the first individual has identified as prospectively available to similarly situated borrowers. However, the third prong is further qualified to provide that it applies only to an individual who performs the described function in accordance with a duty to or incentive from a person other than the prospective borrower. This qualification ensures that it does not inadvertently cover individuals who merely provide advice to prospective borrowers in a wholly charitable or disinterested manner.

Accordingly, coverage of the commenter's example of a manufactured home retailer who forwards an application to a limited number of lenders would require additional facts and analysis. HUD understands that there may be a limited number of such lenders that serve a particular geographical area, and even fewer that provide financing for a particular class of transaction. While HUD disagrees with the commenter's assertion that the referenced "duty to or incentive from" refers only to duties to, or incentives directly from a financing source, the inquiry would not end there. Even if an individual faced the prospect of earning a commission or other incentive in connection with the sale of the home, coverage would depend on whether the range of prospective lenders to whom the individual forwarded the application was shaped by, or was "in accordance with," the commission or other incentive. If the individual forwarded the application to all prospective lenders known to the individual to provide prospective financing, or a fair sampling of them that is not skewed based on such incentives, then the individual would likely not be covered.

For compensation or gain. With respect to the term “for compensation or gain,” the proposed rule defined this term in § 3400.103(c)(2) to include any circumstances in which an individual receives or expects to receive anything of value in connection with offering or negotiating terms of a residential mortgage loan. The term would not be limited to payments that are contingent upon closing a loan. HUD agrees that there must be some nexus between the receipt of money or anything of value and the activity that constitutes offering or negotiating, since HUD has provided that the former must be “in connection with” the latter. However, HUD disagrees that “for compensation or gain” should be defined to cover only those transactions that involve a commission that is contingent on the transaction. HUD construes the term broadly to ensure that consumers receive the full protection of the licensing requirements of the SAFE Act, and HUD notes that the Federal banking agencies have followed the same approach in their final rule. (See, e.g., Appendix A to subpart F of Part 34—Examples of Mortgage Loan Originator Activities, paragraph (c)(1), at 75 FR 44688.) An individual who acts as a loan originator purely as a volunteer, such that the individual does not receive or expect to receive anything of value in connection with offering or negotiating terms of a residential mortgage loan, is not subject to SAFE Act licensing requirements.

Accordingly, the example of a sales commission received by an individual in the manufactured home retail industry would likely meet the definition of “for compensation or gain” if it is received or expected to be received “in connection with” activities that constitute “offering or negotiating.” However, as discussed above, physically handling an application or other documents or engaging in generic discussions do not necessarily constitute offering or negotiating and, accordingly, may not subject the individual to coverage even if they would otherwise be acting for compensation or gain. Similarly, as discussed below, HUD’s analysis of whether employees of certain bona fide nonprofit organizations and government agencies are subject to coverage depends on considerations other than whether they undertake activities “for compensation or gain.”

Rule clarification. For purposes of clarification, HUD adds to § 3400.23 (Definitions), a definition for “for compensation or gain,” which cross-references to the discussion of this term in § 3400.103(c)(2)(ii).

Engaging in the business of a loan originator. HUD disagrees with the commenters who asserted that HUD may not define “engag[ing] in the business of a loan originator” to include representing to the public that an individual can or will perform the services of a loan originator. HUD is aware that a version of a bill that preceded enactment of the SAFE Act contained a similar provision in the definition of “loan originator,” and that the SAFE Act as enacted did not include the provision in the definition of “loan originator.” Congress opted to provide that the test that determines whether an individual is subject to licensing requirements is different from merely whether one meets the definition of a “loan originator.” Rather, one must “engage in the business of a loan originator.”

HUD declines to ignore this distinction and instead construes the statute’s undefined provision in a common-sense manner. As further discussed below, in consideration of applicability of the SAFE Act to government agencies and certain bona fide nonprofit organizations, it is possible for one’s activities to meet the literal definition of a loan originator without amounting to “engag[ing] in the business of” a loan originator. Concomitantly, as is the case in the regulation of other professions such as the practice of law and medicine, this final rule provides that an individual may “engage in the business of a loan originator” by representing to the public that one can provide the services of a loan originator, even if the individual is lying, otherwise fails to provide such services, or has not yet done so. HUD’s position is that the SAFE Act does not require a state supervisory authority to sit idly by until such an individual actually receives all of a prospective borrower’s confidential and financial information, disseminates it, and presents loan terms to the borrower, before the individual becomes subject to licensing or enforcement actions.

Organizational change. Similar to the approach taken by the Federal banking agencies in their rulemaking, this final rule includes an Appendix that provides examples of activities of someone who is engaged in the business of a loan originator.

C. Scope of State Licensing Requirements and the Definition of “Employee”

1. Comment: Community banks should be distinguished from nondepository mortgage lenders. A commenter states that community banks should be distinguished from

nondepository mortgage lenders because community banks are already highly regulated and are more invested in the communities they serve.

HUD Response: The SAFE Act distinguishes between depository institutions and nondepository mortgage lenders. The SAFE Act requires the licensing and registration, or just registration, of anyone who engages in the business of a loan originator. The determination of whether a loan originator falls under the Federal banking agencies rules for registration of loan originators, or the requirements for state licensing and registration of loan originators, is determined by whether or not the individual is an employee of a depository institution or subsidiary of a federally regulated depository institution, as that term is defined in the Act. (See 12 U.S.C. 5102(2), incorporating the definition of “depository institution” from section 3 of the Federal Deposit Insurance Act (FDI Act), and including credit unions.) Therefore if an institution (such as a community bank, as cited by the commenter) meets the definition of a depository institution under the FDI Act, then an individual who meets the definition of a loan originator and is an employee of that institution would be subject to the registration requirements under the final rule recently issued by the Federal banking agencies, rather than the licensing and registration requirements of this final rule.⁷

2. Comment: HUD’s provision of a default definition of “employee” and deference to any definition provided by the Federal banking agencies—support and opposition. The majority of commenters who commented on the definition of “employee” supported HUD’s approach of providing a default definition of “employee” while subjecting the default definition to any binding definition promulgated by the Federal banking agencies for purposes of the SAFE Act. One industry association stated that HUD should not cede authority to the banking agencies to craft any definition they determine appropriate.

Other commenters urged HUD to alter its default definition to provide that an “employee” includes an independent contractor who is a loan originator for a federally regulated depository institution. Some commenters suggested

⁷ HUD notes that some employees of federally regulated institutions may also be subject to the state licensing and registration regime. For example, employees who act as mortgage loan originators for a bank and a nondepository subsidiary of a bank holding company that is not a subsidiary of a depository institution would be subject to both the Federal and state regimes.

that the definition be expanded to include only independent contractors who are exclusive agents of a federally regulated banking institution. One commenter supported the default definition's "right to control" test, but urged HUD to clarify that the W-2 form on which an individual's income must be reported is to be issued by the person with the right to control the individual. Others urged HUD to eliminate the W-2 requirement from its definition. One commenter asserted that because one bank has extensive in-house training for its independent contractor loan originators, who are subject to performance review and discipline by the bank, such state licensing would be unnecessary.

HUD Response: HUD is maintaining, in this final rule, its approach of providing a default definition of employee and then subjecting that definition to any binding definition issued by the Federal banking agencies. HUD's approach ensures that there is no gap or overlap between the jurisdictions of state supervisory authorities or confusion over which jurisdiction governs a loan originator.

Under the terms of this final rule, a state must require an individual who engages in the business of a loan originator to be state licensed, unless the individual meets HUD's definition of an employee of a federally regulated depository institution or of such an institution's federally regulated subsidiary, a credit union, or Farm Credit System institution. The Federal banking agencies final rule states that "Pursuant to section 1503(11) of the SAFE Act, Agency-regulated institutions and their employees who are acting within the scope of their employment with the Agency-regulated institutions are not subject to State licensing or registration requirements for mortgage loan originators."⁸ Should the Federal banking agencies provide a different binding definition, then individuals who meet that definition will be subject to registration as loan originators, and other loan originators will be subject to state licensing. While HUD's default definition reflects HUD's views about how to best define employee and thereby delineate state supervisory authorities' jurisdiction, HUD's view is that it is more important to ensure that there are no gaps, overlap, or confusion concerning which jurisdiction applies to a given individual.

As stated earlier in this preamble, it is HUD's position, as it was for the

Federal banking agencies in their rulemaking, that the common law "right to control" test and the W-2 income reporting requirements are important elements in determining who is and who is not an employee. Use of both elements is common in Federal agency practice, including HUD's practice under other programs. The depository institution's right to control the manner and means of all the loan originators work (not just those activities expressly governed by Federal banking agency regulations) is an important provision in the definition. It ensures that if a federally regulated depository institution does not have the right to control and is not responsible for every aspect of a loan originator's interactions with a consumer, then the consumer whose financial well-being is at stake will be assured that the loan originator has satisfied the more rigorous state licensing requirements, which include character and fitness, education, and testing. The W-2 requirement is important to ensure that state supervisory authorities are able to readily and efficiently determine which loan originators are subject to their state licensing requirements, and which are not, without having to undertake an extensive analysis for each individual under common law doctrine.

Although the Federal banking agencies have not provided a definition of employee in their regulatory text, they stated in the preamble to their final rule (language which HUD cited earlier in this preamble) that they intend "employee" to have the common law meaning that includes the "right to control" test. They also stated that the Internal Revenue Service uses the same test to determine whether an individual is an employee and, accordingly, whether an institution must file a W-2 form for the individual. The Federal banking agencies provide for registration only of loan originators who are employees of the institutions they regulate. If HUD were to follow the suggestion of some commenters by defining "employee" more broadly than the meaning intended by the Federal banking agencies, such as by including independent contractors or exclusive agents, then the anomalous result would be that such individuals would be subject to neither state licensing requirements nor the Federal banking agency registration requirements.

The Federal banking agencies are in a better position than HUD to evaluate whether the activities of an independent contractor working on behalf of a depository institution they regulate are subject to sufficient control and regulation such that consumers would

be as protected as if such an individual is subject to state licensing. In the event they define "employee" to include such individuals, HUD's definition by its own terms defers to such a banking agency definition.

Rule clarification. As also noted earlier, HUD agrees with the commenter's suggested language clarifying that the W-2 form must be provided by the person that has the right to control the individual. The suggested language clarifies HUD's intended meaning, and HUD has made the suggested change in the definition of "employee" in § 3400.23.

3. Comment: Each banking agency may promulgate its own definition. Several commenters asked HUD to clarify that each Federal banking agency retains authority to define the term "employee" for institutions subject to its jurisdiction, rather than jointly through the Federal Financial Institutions Examination Council (FFIEC).

HUD Response: The SAFE Act provides for the Federal banking agencies, jointly through the FFIEC, to develop the rules for registering employees of depository institutions and their federally regulated subsidiaries. Such an approach to promulgating regulations helps ensure for uniformity and clarity regarding which individuals are subject to registration and which are not, and HUD's definition is phrased accordingly. Although HUD defers to the Federal banking agencies to determine whether the SAFE Act permits each agency to promulgate disparate definitions of the term "employee," HUD notes that the Federal banking agencies have affirmed that they all intend "employee" to have the common law meaning that is also used for purposes of W-2 reporting. (See Federal banking agencies final rule at 75 FR 44664.)

D. Individuals Requiring Licensing Under the SAFE Act

1. Comment: Exclude seller financing of several seller-owned properties from SAFE Act mortgage licensing. A significant portion of the comments submitted on HUD's SAFE Act proposed rule pertained to the issue of a property owner selling and financing the sale of his or her own property. Many of the comments were duplicative of one another, making the same or similar point why individuals who provide seller financing should not be subject to licensing under the SAFE Act. The following provides the various issues and situations pertaining to seller financing raised by the commenters, and

⁸ See Federal banking agencies final rule published on July 28, 2010, at 75 FR 44657, column 3, footnote 1.

for which clarification was sought with respect to licensing coverage or noncoverage under the SAFE Act.

Commenters identified special situations where licensing should not be required, including: Retirees selling a limited number of investment properties; heirs selling an inherited property; sales of vacant lots; sales of homes in floodplains; property transfers resulting from divorce and health issues; sales required by natural disasters; the sale of a former residence; the sale of a home of a relative going into assisted care; persons who take back a deferred purchase money mortgage in connection with the sale of residential real property owned by, and titled in the name of, those persons; investors who provide a service to the community by providing a housing option that buyers could not otherwise obtain; home renovators who perform a valuable service by improving homes and making them available to communities; entities whose primary function is the acquisition, improvement, and sale of residences through seller-financed mortgages; and any person or company that originates and services a loan for which that person or company holds the note and does not resell the loan in the open market.

Commenters stated there are negative tax consequences to not being able to finance the sale of investment properties. One commenter stated that section 453 of the Internal Revenue Code allows for the incremental reporting of gain using the installment sale method. The commenters stated that this option may no longer be available for residential investment properties if HUD's proposed rule is not clarified to exclude owner extended financing (of these properties). A commenter stated that in the case of tax foreclosure properties, many banks will not lend on the properties for the first 2 years after the foreclosure sale so that owner financing is the best way to sell them.

Commenters stated that requiring seller-financers to become licensed will hamper the recovery of the housing market or harm the economy. Some commenters stated that there is a high percentage of unsold homes on the market and that many buyers are having difficulty obtaining financing from banks and institutional lenders; some of these commenters specified that an estimated 4.5 percent of Americans own three or more properties, many purchased solely as investment properties, that 40 percent of non-owner occupied residences are mobile homes, which are more difficult to sell with

bank financing, and that approximately 5 percent of homes in the United States are for sale or for lease, stating that seller financing may be key to liquidating this inventory. Commenters stated that approximately 10 percent of home sales are some form of seller financing.

Commenters stated that seller financing could help revitalize declining neighborhoods, and that the liquidity of the investor market depends on seller financing, and that without this exit strategy, distressed properties will not be purchased but will sit and decay, depressing neighborhoods and home values. A commenter stated that the rule will place property owners at risk of prosecution, of financial penalties, and of court revocation of equitable agreements, if they finance the sale of their own property. Some commenters stated that owner financing of nonowner-occupied properties encourages employment for tradesmen to fix the properties, provides an opportunity for older people who may want to move to get equity from their houses, and allows workers who may have to move a way to quickly sell their houses.

Other commenters asked that individuals be allowed to use seller financing without being licensed for some limited number of properties in addition to their personal residence. Commenters proposed limited exceptions to the proposed rule, such as including investment properties (or a limited number of such properties) in the exclusion from licensing; allowing sales of specified numbers of seller-financed properties without licensing, ranging from 5 to 20 properties; exempting sellers who occasionally provide financing, with one commenter mentioning 8 or fewer properties in any 12-month period; and allowing seller financing for a limited period of time, up to 5 years, while some commenters suggested shorter periods such as 6 to 12 months, at the end of which the loan would have to be transferred to a traditional lender; this would give the buyer time to repair credit and arrange bank financing. A commenter stated that there should be an exemption for sellers who provide financing for a vacation home, second home, or rental property even if they never resided in the home, where the financing is provided for the purpose of rehabilitating and flipping the property for resale. As precedents for this proposal, this commenter cited the Truth in Lending Act (TILA) and its implementing Regulation Z, RESPA, and several state laws.

Other commenters suggested that seller financing should be allowed, but

with safeguards for the buyer, such as an interest rate ceiling, a clear summary of payment terms and totals, training materials on mortgage loans, or a summary of best practices, that would be required to be provided to the borrower. A commenter stated that instead of this regulation, HUD should create a grievance committee for buyers who have been defrauded and punish individuals and reverse bad contracts. A commenter stated that HUD should set legal guidelines for all residential mortgages, whether institutional or not, to ensure that the mortgage contract and the buyer meet the same criteria institutional lenders must follow, with some "wiggle room" for a seller that institutions will not handle because of their internal guidelines. A commenter suggested that the rule should require a half-day class on the pros and cons of seller financing. Another commenter stated that there should be a full disclosure of the nature of the loan in all origination documents, and litigation against predatory or negligent lenders should be a "black and white issue" so that lenders are forced to disclose their full intentions and expected outcomes with complete transparency.

HUD Response: As an initial statement, HUD confirms the commenters' observation that a "residential mortgage loan" includes an installment sales contract, which the commenters advise is frequently involved in seller financing. "Residential mortgage loans," as defined by section 1503(8) of the SAFE Act, refers to typical financing mechanisms such as mortgages and deeds of trusts. In addition, the SAFE Act definition also includes "other equivalent consensual security interest on a dwelling (as the term 'dwelling' is defined by section 103(v) of TILA) or residential real estate upon which is constructed or intended to be constructed a dwelling," which has the potential for including a broad range of other financing mechanisms. For the purposes of this rule, "equivalent consensual security interests" specifically include installment sales contracts, consistent with the treatment by many states of such contracts in the same manner as mortgages and purchase money mortgages offered by sellers of residential real estate. While there is no formal recorded lien held by the provider of financing, the fact that the seller holds title to the property until the contract has been paid in full is the practical equivalent of a lien for purposes of the SAFE Act and its purposes and is comparable to the status of a mortgage in a state that follows title

theory under mortgage law. Inclusion of installment sales contracts in the scope of the definition of “residential mortgage loan” is also consistent with section 103(w) of TILA and 12 CFR 226.2(a)(24) of the Federal Reserve Board’s implementing regulations (Regulation Z), both of which include in the definition of “residential mortgage transaction,” a purchase money security interest arising under an installment sales contract.

As a second matter, HUD notes that nothing in the SAFE Act prohibits an individual property owner from financing the sale of his or her own property, nor does the SAFE Act require an individual to become a licensed loan originator in order to provide financing in the sale of his or her property. It is equally important to note that who owns a property and who is selling a property is not determinative in deciding who is subject to licensing by the SAFE Act and who is not. The SAFE Act requires that an individual who engages in the business of a loan originator with respect to the financing be licensed. Accordingly, it is the individual who has the described interaction with the borrower or prospective borrower in regard to the financing who is subject to licensing, not the funding source, that is subject to SAFE Act licensing. A seller financing the sale of his or her own property completely avoids the issue of licensing by retaining the services of a licensed loan originator and having that individual carry out the functions that constitute engaging in the business of a loan originator.

While the SAFE Act does not exclude from licensing sellers who finance the sale of properties they own, it is HUD’s position, as stated earlier in this preamble, that, absent evidence to the contrary, the sale and financing of one’s own residence, vacation home or property, or inherited property, such as through an installment sales contract, does not constitute engaging in “the business of a loan originator” and therefore generally would not require licensure under the SAFE Act. As HUD stated in the proposed rule, the frequency with which a particular seller provides financing to a buyer to facilitate the sale of the seller’s own residence is so limited that Congress could not have intended to require such sellers to obtain loan originator licenses. The final rule affirms this point by adding the concept of habitualness or repetition expressly into § 3400.103(b) of the rule. HUD recognizes, as stated earlier in this preamble, that the difficulty for states is with a situation raised by many commenters where a

property owner is providing seller financing in conjunction with sales of his or her own properties in such numbers and perhaps at such frequency that the owner appears to be engaged in the business of a loan originator. While the fact that the seller has not lived in the properties being sold would make it more likely that financing is provided in order to obtain a profit, and would therefore make it more likely that a commercial context is present, the infrequency with which a particular seller undertakes such actions, combined with the fact that it is the individual who is providing the financing (rather than a business entity that regularly provides financing), may mean that the requisite habitualness needed to constitute engag[ing] in the “business” of a loan originator is absent. On the other hand, for example, a builder who repeatedly acts as a loan originator in the course of selling homes he or she has constructed would almost certainly satisfy the requirements of a commercial context and habitualness or repetition and, accordingly, would be subject to SAFE Act licensing requirements.

Rule change and clarification. HUD removes from § 3400.103(e) (which pertains to individuals not required to be licensed by states) reference to individuals who offer or negotiate terms of a residential mortgage loan only on behalf of an immediate family member of the individual and reference to an individual who only offers or negotiates terms of a residential mortgage loan that is secured by a dwelling that served as the individual’s residence. HUD will move reference to individuals engaged in these activities to the Appendix that is being added to this final rule, which provides examples of individuals who should and should not be licensed under the SAFE Act.

With respect to the issue of favorable tax treatment, the fact that a loan originator must be licensed does not, as far as HUD is aware, prevent anyone from taking advantage of favorable tax treatment, as suggested by a commenter. An individual who wants to sell using the installment sale method, if allowed under state law, may become licensed or work with a licensed loan originator. As far as foreclosure properties are concerned, states can take such situations into account when determining, for example, fees for licensing.

With respect to the suggestions to establish borrower safeguards in lieu of loan origination licensing, nothing in the SAFE Act suggests that Congress intended to substitute borrower safeguards for licensing of loan

originators. Additionally, HUD notes that the SAFE Act is designed to establish the minimum requirement for the licensing of individuals, not entities. Therefore, licensing requirements for entities are outside of the scope of the SAFE Act.

2. Comment: Exclude financing of mobile/manufactured homes, recreational vehicles, and house boats from SAFE Act mortgage licensing. Some commenters cited mobile home, house boat, and recreational vehicle sales as a special category of transactions that, because of the difficulties of obtaining bank financing in that industry, should be exempt from any requirement for individual sellers offering financing to be licensed. Commenters stated that mobile home sellers should not be included in licensing requirements, because many state laws treat these loans as chattel mortgages and traditional mortgage requirements do not apply, the manufactured home industry is in decline and requiring licensing would hurt it more, many manufactured home sellers do a minimal amount of business, and many manufactured home sellers do nothing more than transmit paperwork between the buyer and lender.

Other commenters suggested that there should be an exception for sales in small manufactured housing communities because it is difficult to obtain institutional loans, because such communities often deal in very few sales per year, and because the staff often has to discuss loan terms with buyers. A commenter stated that sometimes the manufactured housing community itself acquires title to a manufactured home and needs to be able to carry back a chattel mortgage in order to be able to resell it.

Another commenter stated, to the contrary of the preceding comments, that there should be no exemption in the manufactured housing context, because the financing available to manufactured home purchasers today is through “captive” loan programs offered by home dealers or community owners. The commenter further stated that since these homes are not considered real property in most states, no RESPA disclosures are required, no appraisal based on comparables takes place, and no realtor advises the buyer, and that these factors underscore the importance of buyers dealing with licensed and trained professionals.

Other commenters stated that originating five or fewer manufactured home loans per year should be exempt; one of these noted that the Federal banking agency rule exempts five or

fewer originations per year. Some commenters stated that an individual “infrequently” helping consumer obtain a home loan should be exempt from SAFE Act coverage.

HUD Response: As noted in a response to an earlier comment, the SAFE Act defines the term “residential mortgage loan” to mean “any loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling (as defined in section 103(v) of the TILA) or residential real estate upon which is constructed or intended to be constructed a dwelling (as so defined).” (See section 1503(8) of the SAFE Act.) Section 103(v) of TILA defines the term “dwelling” as follows: “a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives.” Section 103(v) of TILA is implemented in Regulation Z, at 12 CFR 226.2(a)(19), which states as follows: “Dwelling means a residential structure that contains 1 to 4 units, whether or not that structure is attached to property. The term includes an individual condominium unit, cooperative unit, mobile home, and trailer, if it is used as a residence.” HUD does not have authority to alter the meaning of “dwelling” in section 103(v) and its implementing regulations. Accordingly, an individual engaging in the business of a loan originator with respect to a loan that is to be secured by a manufactured home, mobile home, recreational vehicle, house boat, or trailer that is to be used as a residence is subject to licensing under the SAFE Act. Even if a state categorizes loans secured by such residential structures as chattel mortgages, the SAFE Act covers these loans and such states must ensure that individuals engaging in the business of a loan originator with respect to these loans are licensed under the SAFE Act. As discussed above under Section B, “Key Definitions: ‘Taking an Application,’ ‘Offers or Negotiates,’ ‘Compensation or Gain,’ and ‘Engaging in the Business of a Loan Originator,’ the determination of whether an individual involved in the sale of a manufactured home is covered by the SAFE Act depends upon the particular activities of the individual.

In regard to the request for a de minimis exemption for manufactured home loans, as noted in HUD’s response to the earlier comments on seller financing, HUD has no authority to establish a de minimis exemption for individuals who are engaged in the business of a loan originator. Unlike the

provisions of the SAFE Act applicable to the Federal banking agencies, section 1505 of the SAFE Act, which involves state registration and licensing, makes no allowance for any de minimis exception.

3. *Comment: Individuals involved in loan modification do not engage in the business of a loan originator under the SAFE Act.* HUD specifically requested comment on whether individuals who perform loan modifications that involve offering or negotiating loan terms that are materially different from the original loan require licensing under the SAFE Act. The Federal banking agencies, in their proposed rule, also specifically requested comment on whether the definition of “mortgage loan originator” should cover individuals who modify existing residential mortgage loans, engage in approving loan assumptions, or engage in refinancing transactions and, if so, whether these individuals should be excluded from the definition.

While a few commenters submitted that individuals engaged in mortgage loan modification and assumption transactions should be subject to SAFE Act mortgage licensing, the majority of commenters on this issue stated that these individuals should not, and do not, fall under SAFE Act coverage. In general, they stated that mortgage loan modifications and assumptions are very different from mortgage loan originations, and that employees engaged in these transactions do not meet the SAFE Act’s definition of mortgage loan originator. Specifically, several commenters indicated that these employees do not take residential mortgage loan applications because, the commenters asserted, an “application” implies a new loan. Some commenters argued that they do not negotiate the terms of a new residential mortgage loan, because the institution or investor sets the parameters for permissible modifications and the individual has no authority to alter the terms of permitted modifications. Similarly, commenters stated that modification programs, including the Administration’s Home Affordable Modification Program (HAMP), are highly prescriptive and that terms are derived by using a set percentage of gross income that applies to every borrower. Some commenters stated that in a modification the terms of a mortgage loan are not negotiated but are merely adjusted based on calculations that accommodate the borrower and mitigate the investor’s losses. Other commenters stated that in a modification, an existing loan is renegotiated with the goals of mitigating any loss to the institution and, in the case of modifications, providing the

borrower with a more affordable payment option or other type of modification or, in the case of assumptions, replacing the party responsible for repaying the mortgage loan.

Some commenters stated that some form of safeguard needs to be in place to protect homeowners seeking modifications, but that licensing is excessive. Commenters stated that if servicers and loss mitigation specialists had to be licensed, the costs would be high. Commenters stated that the cost to license one person in all 50 states, according to the American Financial Services Association, would be approximately \$27,000. The cost of compliance for a company with 500 employees would therefore be approximately \$13.5 million. Licensure would also alter the organization of loan modification activity (e.g., first-available agent), requiring that the company direct individuals to employees licensed in the state of the individual seeking the modification. Commenters also stated that the courses and examinations required to be licensed have little relevance to the tasks associated with loan modification.

Commenters indicated that their employees who engage in modifications and assumptions do not ever originate mortgage loans, and that modifications and assumptions are performed in different departments of the institution. Commenters also noted that applying the SAFE Act’s requirements to employees engaged in loan modifications and assumptions could significantly hamper loan modification efforts.

HUD Response: HUD appreciates the many comments submitted on this issue. HUD recognizes the competing concerns raised by this issue—the need to ensure that homeowners undergoing material modifications to their mortgages (i.e., generally modifications that can include a change in interest, principal, and term of loan) are assisted by individuals of integrity, experience, and competency, and the need to avoid burdening such individuals and possibly deterring assistance to troubled homeowners by placing additional requirements on loan modifiers at the very time their assistance to provide material modifications to troubled homeowners is in significant demand.

HUD therefore has determined not to address this issue in this final rule, but to defer to the Bureau. If the Bureau determines that individuals engaged in modifications of loans should be required by states to be licensed under the SAFE Act, the Bureau may determine that it has authority to

impose such licensing requirements. As noted earlier in this preamble, the Bureau also has independent authority under the Dodd-Frank Act to regulate individuals who engage in loan modifications and loan servicing. States may also determine that such individuals are required to be licensed under the terms of state legislation.

The decision to defer the issue of licensing of mortgage modifications and assumptions to the Bureau does not affect HUD's determination that refinances are covered by the SAFE Act. The Federal banking agencies, in their final rule, also provide that refinance transactions are covered by the SAFE Act.

4. Comment: Exclude from SAFE Act coverage third-party loan modification specialists. In the preamble to HUD's proposed rule, HUD also sought comment on whether third-party loan modification specialists, who offer to act as intermediaries between borrowers and their existing lenders to negotiate modifications to existing loan terms, should be required to be licensed under the SAFE Act. While several commenters expressed support for licensing of third-party loan modification specialists, others were opposed to these proposals. Some commenters argued that third-party loan modification specialists should be covered if they receive compensation directly from the borrower or if they are employed by for-profit entities, but not if they are employed by nonprofit, HUD-approved housing counseling agencies.

HUD Response: HUD appreciates the many comments submitted on this issue of coverage of third-party loan modification specialists. As with loan modifications generally, HUD is leaving to the Bureau to decide whether such individuals are covered by the SAFE Act and should be licensed under the SAFE Act.

5. Comment: Clarify whether certain financial advisors are subject to SAFE Act loan originator licensing.

Commenters representing securities broker-dealer companies urged HUD to withdraw the third prong defining what is included in "offers or negotiates" (*i.e.*, referring or steering a borrower to a particular lender or set of terms) because, combined with some states' "or" definition of loan originator, it would arguably subject some companies' financial advisors to the SAFE Act's requirements. The commenters stated that financial advisors, as part of their employment, routinely refer clients to mortgage lenders affiliated with the advisors' companies, though the advisors do not take applications. The commenters state

that licensing of financial analysts who undertake the described activities goes well beyond the intent of the SAFE Act and would bring no benefit, because financial advisors are already licensed and required to pass tests that are directly relevant to their work. The likely result is that securities brokerage firms would cease their limited marketing activity of informing their customers of the availability of home financing options. Commenters stated that financial advisors who merely make their customers aware of (or refer to) a lender should not be considered loan originators under the SAFE Act.

HUD Response: As explained in the above discussion of comments on the meaning of "offers or negotiates," HUD declines to withdraw the third prong of its proposed definition. However, as also discussed above, HUD cautions that each of the prongs clarifying "offers or negotiates" must be read in conjunction with the statutory and regulatory provision that an individual must also "take an application." An individual's generic referral to or recommendation of a particular lender, divorced from any receipt and consideration by the individual of the prospective borrower's application (*i.e.*, his or her request for an offer of loan terms and information that is customary in a decision on whether to extend an offer of loan terms), would not likely trigger the third prong. Determination of whether the SAFE Act requires licensing of individuals described by the commenter would depend, in part, on whether the individual takes an application, either directly or indirectly, from the borrower or prospective borrower in conjunction with making the referral.

HUD reiterates that this final rule interprets and implements the SAFE Act. HUD does not purport to interpret state laws, which may exceed the requirements of the SAFE Act, even if the state law uses language identical to that found in the SAFE Act. Accordingly, HUD cannot issue a blanket statement that all financial advisors are subject or are not subject to licensing under the SAFE Act. The activities of the individual financial advisor would need to be examined to determine whether the individual is engaged in the business of a loan originator, as a loan originator is defined in the SAFE Act and this rule.

6. Comment: Clarify the exclusion of real estate brokerage activities. A commenter asked whether a licensed real estate practitioner, who would otherwise be exempt from licensing, but receives a real estate commission from a lender selling property owned due to foreclosure or otherwise, loses the

exemption from the loan originator registration requirements. Other commenters asked whether HUD's discussion of loan modifications, which may involve a write-down of principal, means that short sales would be covered.

HUD Response: Section 1503(3)(A)(iii) of the SAFE Act definition of loan originator exempts individuals performing real estate brokerage activities "unless the person or entity is compensated by a lender, a mortgage broker, or other loan originator or by any agent of such lender, mortgage broker, or other loan originator; * * *." Without additional information, it is difficult for HUD to provide a definitive response to this question. However, the scenario described by the commenter would appear to be one in which "the person or entity is compensated by a lender," and thus not included in the exemption for real estate brokerage activities. The fact that the lender is the owner of the property being sold and financed is not sufficient to fall under the exception for real estate brokerage activities provided by the SAFE Act.

Nonetheless, even if an individual does not meet the requirements of the exemption for real estate brokerage activities, as a result of receiving compensation from the lender, it must still be determined whether the individual meets the definition of engaging in the business of a loan originator. In particular, it would have to be determined whether the individual ever "takes an application" and "offers or negotiates terms of a residential mortgage loan" (as opposed to the terms of a sale) within the meaning of the SAFE Act.

7. Comment: Government employees working in mortgage loan-related areas should be exempt from SAFE Act coverage. Commenters stated that there should be an exemption for employees of state and Federal agencies who provide mortgage loans to consumers from resources appropriated by the Federal or state government (including housing finance agencies (HFAs)), or who engage in loan origination as part of their government employment. A commenter stated that individuals employed by or under the direct supervision of state or local government agencies that deliver consumer programs, including affordable mortgages, closing cost assistance, down payment loans, and home equity loans, should not be covered. Commenters stated that Federal employees administering Federal housing loan programs and public housing homeownership programs should be exempt.

Commenters stated that HUD should clarify in its final rule that municipal employees originating loans with Community Development Block Grant (CDBG) or HOME Investment Partnership (HOME) funds are not covered under the SAFE Act, and cited either the government source of the money or the existing extensive regulations in these programs. Some commenters stated that whenever an entity funds residential mortgage loans with government funds, that activity should be exempt.

Several commenters stated that, in the governmental context, "compensation or gain" under the SAFE Act should not include repayment of administrative costs paid by Federal, state, or local governmental agencies to offset costs incurred by grantees or contractors in carrying out government-funded affordable housing programs. Other commenters stated that "compensation or gain" should not include wages or hourly compensation of government workers administering housing programs. A state housing and community development agency recommended that HUD clarify the terms "compensation or gain" to exclude administrative costs paid out by Federal, state, or local governmental agencies to offset costs incurred by grantees or contractors in carrying out government-funded affordable housing programs. Some commenters stated that the definition of "compensation or gain" should exclude anything of value, including reasonable administrative fees retained by government agencies, costs to reimburse for the provision of services, or that future servicing income be excluded from the definition of "compensation or gain." A commenter stated that such exclusion should apply to all foreclosure prevention, downpayment assistance, and property improvement financing activities.

Another commenter suggested that an element of the definition of "takes a residential mortgage loan application" in § 3400.103(c)(2)(i)(A) be revised to "Presents for acceptance by a borrower or prospective borrower residential mortgage loan terms of a non-governmental residential mortgage."

HUD Response: As discussed earlier in this preamble, HUD agrees that employees of Federal, state, and local governments and HFAs providing various forms of housing assistance do not "engage in the business" of a loan originator, because they do not act in a commercial context. Rather, these employees act in a public or government context, and are not covered by the SAFE Act.

HUD's determination is based on the distinction that even if an individual's activities are those described in the SAFE Act's definition "loan originator," they may nonetheless not constitute "engag[ing] in the business of a loan originator," which is the statutory standard for activities that a state is required to subject to state licensing. Specifically, the activities may not arise to "engage[ing] in the business" of a loan originator if they take place in a wholly public or government context, rather than in a commercial context. To ensure that all of the individual's actions in the course of acting as a loan originator are subject to the control of the agency or housing finance agency and are consistent with the agency's public or government mission, the individual must be an employee of the agency. Furthermore, if the employee acts as a loan originator in a commercial context in addition to his or her activities undertaken as an employee of the governmental agency or housing finance agency, the individual must be licensed under the SAFE Act.

Some commenters have suggested that HUD's determination of whether the SAFE Act covers governmental employees should turn on the meaning of "for compensation or gain," and sought to exclude the receipt of certain kinds of remuneration from the meaning of "for compensation or gain." However, as discussed above, HUD construes "for compensation or gain" broadly and does not view as relevant distinctions about how payments or prospective payments are described or characterized by the payor or payee. HUD's determination that the SAFE Act applies to individuals who act as loan originators in a commercial context makes the distinction requested by the commenters unnecessary. In addition, it is HUD's position that the "for compensation or gain" test under the definition of "loan originator" plainly includes compensation or gain received (or expected to be received) by an individual. Accordingly, characterizations of payments made by a borrower or by a government entity to the individual's employer are not dispositive of whether the individual offers or negotiates residential mortgage loan terms for compensation or gain.

8. Comment: Exclude from coverage individuals who undertake loan origination for nonprofit organizations. Commenters stated that 501(c)(3) nonprofit organizations that help low- and moderate-income individuals obtain financing to purchase homes would not be able to continue to provide such assistance if their loan originators had to be licensed under the

SAFE Act. Commenters stated that such nonprofit organizations cannot utilize third-party brokers to originate their loans due to liability issues and that any training required to be provided to loan originators will not address the special financial and planning needs of low-income borrowers. Commenters asserted that the SAFE Act's licensing requirements are onerous and threaten the ability of nonprofit organizations to engage in loan modification and mortgage brokering, thus depriving low-income people of these services.

Commenters requested that HUD exempt all nonprofit organizations engaged in loan origination for low-income individuals and families that do not receive compensation for originating loans, and therefore, that such organizations be excluded from the definition of "mortgage loan originator" according to HUD's own interpretation of the SAFE Act. Commenters stated that these organizations have a fundamentally different mission than the commercial residential mortgage industry that the SAFE Act was meant to regulate. The commenters stated that these organizations produce affordable housing with limited resources and that compliance with the SAFE Act would be unduly burdensome. Other commenters suggested that organizations that act in the borrower's best interest to originate home loans for low-income households be exempt from SAFE Act's provisions, which would impose additional burdens on these lenders. Another commenter stated that HUD's discussion in the Commentary about noncommercial activities also applies to the lending activities of bona fide nonprofit organizations that fulfill a public, rather than commercial, purpose. The commenter suggested factors that HUD may consider in distinguishing nonprofit organizations that truly perform a public service from those that may have a commercial interest and have a commercial context to their loan origination transactions: section 501(c)(3) status, loan terms and rates offered to a borrower, compensation structure of the organization's employees, whether fees are charged to a borrower, whether the organization in fact earns a profit, whether financial literacy programs are provided along with loans, whether employees are trained, and whether the organization's primary purpose is to serve the public by helping low- to moderate-income borrowers.

HUD Response: As stated earlier in this preamble, HUD has determined that employees of a bona fide nonprofit organization are outside of the range of individuals that the SAFE Act requires

states to subject to licensing requirements. The regulatory text provides a definition of bona fide nonprofit organization that adopts many of the factors suggested by the commenters to distinguish a bona fide nonprofit organization from other organizations. HUD's determination is based on the distinction that even if an individual's activities are equivalent to those in the SAFE Act's definition "loan originator," they may nonetheless not meet the statutory requirement that one must "engage in the business" of a loan originator, in order for a state to be required to subject the individual to state licensing. Specifically, the activities may not arise to "engage[ing] in the business" of a loan originator if they take place in a wholly public or charitable context, rather than in a commercial context, as is the case with employees of government organizations and bona fide nonprofit organizations.

Regulatory change. Accordingly, this final rule adds a definition of "bona fide nonprofit organization" that provides that a state supervisory authority may determine that an organization is a bona fide nonprofit organization, under criteria specified in the definition. The criteria include an examination of the mortgage terms offered to the borrower by an employee of a bona fide nonprofit organization and whether such terms are favorable to borrowers.

If the nonprofit organization meets the criteria in HUD's definition, then the organization's employees who act as loan originators would not be engaging in the "business" of a loan originator, and therefore would not be subject to state licensing. HUD's definition of "loan originator" provides that in determining whether a nonprofit organization is a bona fide nonprofit organization, a state supervisory authority must consider, at a minimum, the following: Federal tax exempt status, purpose, incentive structure, manner of operation, and loan products offered.

Finally, HUD reiterates that individuals, not entities, are subject to licensure under the SAFE Act. Therefore, any requirement in state law for the licensure of entities involved in loan origination is outside the scope of and not affected by the SAFE Act and this final rule.

9. Comment: Exclude housing counselors from SAFE Act coverage. Many commenters requested that HUD exempt from coverage of the SAFE Act individuals engaged in housing counseling activities. One commenter stated that there should be a definition distinguishing the roles of loan originators and housing counselors. Other commenters expressed concern

about HUD's discussion in the proposed rule of the applicability of SAFE Act licensing to third-party loan modification specialists. These commenters worried that the result would be that a housing counselor could not contact the existing lender on behalf of a troubled borrower in order to pursue or follow up on a loan modification.

Commenters recommended that the definition of loan originator explicitly exclude a counselor assisting a borrower in filling out an application, or an educator providing general information about loan applications, including helping borrowers understand their credit report. A commenter also recommended that the definition exclude lender personnel who address a homebuyer education class about how applications are reviewed and evaluated. Other commenters stated that individuals who are employed by a nonprofit and tax-exempt credit counseling organization that is approved or seeking approval for housing counseling by HUD (under 24 CFR part 214) are not covered, while individuals such as foreclosure consultants or individuals working for for-profit debt relief service providers should be covered.

Commenters expressed concern that even though the housing counselors do not take applications or offer or negotiate mortgage terms, state agencies use highly fact-based and unpredictable analyses and may determine that they are covered, absent a statement to the contrary by HUD. A commenter asked HUD to clarify that a lender contributing to a homebuyer education class sponsored by a HUD counseling agency are not direct contributions to "loan originator" but rather to the education of future borrowers.

HUD Response: HUD reiterates its lack of authority under the SAFE Act to exempt individuals engaged in the business of a loan originator. However, an individual engaging solely in traditional housing counseling services generally does not "take a residential mortgage application and offer or negotiate terms of a residential mortgage loan for compensation or gain" within the meaning of the SAFE Act, and this final rule and therefore would not have to be licensed under the SAFE Act.

HUD has emphasized that it is the substance of an individual's activities, and not the label, profession, or job title of the individual that determines whether an individual is engaged in the business of a loan originator. Therefore, if a housing counselor is in fact engaged in the business of a loan originator, then despite the individual's professional

label as a housing counselor, the individual must be state licensed.

In general, traditional housing counseling activities, such as those described in 24 CFR part 214, do not involve either taking a residential mortgage loan application or offering or negotiating residential mortgage loan terms for compensation or gain within the meaning of the SAFE Act and this final rule. For example, 24 CFR 214.3 describes the provision of counseling or advice to individual clients on how to overcome specific obstacles to achieving a housing goal, as well as educational classes on the home-buying process and other topics. In addition, 24 CFR 214.300 describes referrals to local, state, and Federal resources.

On the other hand, it is possible that some housing counselors engage in additional activities that could subject the housing counselor to SAFE Act licensing requirements. For example, the activities of a housing counselor who acts as an intermediary between a borrower or prospective borrower and a financing source, or who presents to a prospective borrower particular loan terms identified as being prospectively available from one or more lenders to similarly situated prospective borrowers, may in some circumstances constitute taking a residential mortgage loan application or offering and negotiating terms of a residential mortgage loan. (See Section B of this preamble, Key Definitions: "Taking an Application," "Offers or Negotiates," "Compensation or Gain," and "Engaging in the Business of a Loan Originator," above.) As further discussed in Section B, merely advising or assisting a prospective borrower to properly complete a loan application, faxing documentation upon a borrower's request, or following up to ensure documentation has been received would not amount to taking an application. Similarly, a mere referral to another provider of resources would not likely amount to offering or negotiating, absent other factors as provided in this final rule. Furthermore, even if the activities of a housing counselor constitute taking a residential mortgage loan application and offering or negotiating residential mortgage loan terms for compensation or gain within the meaning of the SAFE Act and this final rule, a state may determine that the housing counselor's employer is a bona fide nonprofit organization, as discussed above in this preamble under Section D.8. Alternatively, the housing counselor's employer may be a government agency or housing finance agency. If so, the individual would not be "engaging in the business" of a loan originator and,

accordingly, a state would not have to require licensing of the individual.

Finally, in accordance with HUD's decision to defer to the Bureau on whether modifications of existing loans should be covered under the SAFE Act or otherwise, this final rule would not affect a housing counselor who contacts an existing lender on a behalf of a borrower in connection with the modification of an existing loan.

10. *Comment: Clarify exclusion of attorneys from SAFE Act coverage.* A commenter requested that HUD expand upon and clarify the proposed rule's provision pertaining to the SAFE Act's inapplicability to "a licensed attorney who only negotiates the terms of a residential mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client * * *". The commenter requested a definition of the term "ancillary," especially with respect to attorneys' representation of clients in loan modification matters. The commenter stated that it appears that such attorneys would need to be licensed as loan originators. An additional clarification is requested for "licensed attorney," as well as a discussion of whether employees working under an attorney's supervision are exempt from the licensing requirement.

Another commenter stated that the "carve out" for attorneys is not broad enough. The commenter stated that often an attorney will be in the negotiation process in ways that are more than "ancillary" to the representation of a client. In fact, the negotiation of the loan may be the primary reason for the involvement of the attorney. Both commenters recommended that attorneys be completely exempt from licensing under the SAFE Act.

Other commenters stated that licensed attorneys and those acting under their direction to provide effective legal representation to their clients in connection with the negotiation or modification of residential mortgage loans (regardless of whether the representation is ancillary or central to the transaction) should be exempt from SAFE Act coverage. Another commenter stated that a lawyer owes the same fiduciary and confidentiality duties to the client whether or not the attorney's representation is "central" or "ancillary," and argued that the narrow exemption proposed by HUD will adversely affect many lawyers and their ability to represent their clients effectively. Another commenter submitted that the definition of "loan originator," which includes someone who negotiates terms of a mortgage for

gain, would allow HUD and state agencies to regulate legal advice and other core legal services.

HUD Response: HUD's proposed rule did not provide an exemption for attorneys who engage in loan origination activities, but rather recognized that the core functions of an attorney, such as providing legal advice and drafting legal documents, do not typically include acting as a loan originator. The proposed provision sought to recognize, however, that attorneys may from time to time negotiate the terms of a residential mortgage loan with a prospective lender on behalf of a client as an ancillary matter to the attorney's representation of the client. HUD stated that, for example, an attorney might assist a client in the origination of a new or refinance loan, or loan modification, as an ancillary matter to the attorney's representation of the client in a divorce. HUD emphasized that the attorney's duties to the client require the attorney to further only the client's interest and that an attorney's activities in such cases would normally be distinguishable from those of a loan originator.

HUD recognizes that state authorities traditionally regulate the practice of law, rather than actions by the Federal Government. *Leis v. Flynt*, 439 U.S. 438, 442 (1979). The issue of whether a Federal statute may be interpreted as extending to activities that have traditionally been regulated by the states rather than the Federal Government (including the general practice of law by attorneys) has been the subject of significant legal controversy, especially when the statute does not expressly provide for extending Federal regulation into the traditionally state-regulated field. (See, e.g., *Milavetz, Gallop, & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1332–33 (2010); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 543 (1994); *Will v. Mich. Dep't. of State Police*, 491 U.S. 58, 65 (1989); *American Bar Association v. Federal Trade Commission*, 430 F.3d 457, 471–72 (DC Cir. 2005). In requiring the licensing of individuals who "engage in the business" of a loan originator, Congress did not state an intention to regulate activities that constitute the practice of law by a licensed attorney. HUD is concerned that construing "engaging in the business of a loan originator" to encompass activities that constitute the practice of law could have negative consequences, such as interfering with regulation of the practice of law by state supreme courts, undermining important aspects of the attorney-client relationship, including the attorney-client privilege, and hindering

consumers from being able to obtain legal representation in residential mortgage loan transactions.⁹

Accordingly, doing so would undermine the statutory purposes of the SAFE Act, which include enhancement of consumer protections and reduction of regulatory burden. However, HUD is equally concerned about individuals who engage in the business of a loan originator escaping SAFE Act licensing requirements simply because they happen to be licensed as an attorney or work for a licensed attorney. The referenced provision in the proposed rule was HUD's initial approach to balancing these competing concerns, but HUD has determined that identification of an attorney's activity as "ancillary" to a representation is unnecessary, so long as the attorney's activity is in fact regulated by the state supreme court or other state authority as part of the practice of law.¹⁰ Therefore, as explained in Appendix D of the rule, to the extent a licensed attorney undertakes activities that are covered by the statutory definition of "loan originator," such activities do not constitute "engage[ing] in the business of a loan originator," provided that: (1) Such activities are considered by the state's court of last resort (or other state governing body responsible for regulating the practice of law) to be part of the authorized practice of law within the state, (2) such activities are carried out within an attorney-client relationship, and (3) the attorney carries them out in compliance with all applicable laws, rules, ethics, and standards.

Rule change and clarification. HUD removes from § 3400.103(e) (which pertains to individuals not required to be licensed by states) reference to a

⁹ Congress identified very similar concerns in setting forth the Consumer Financial Protection Bureau's authorities, which will include implementation of the SAFE Act, when it enacted the Dodd-Frank Act. (See 156 Cong. Rec. E1347–49 (July 15, 2010).) In enacting the Dodd-Frank Act, however, Congress declined to provide any further clarity as to whether or not the SAFE Act is intended to apply to attorneys engaged in the practice of law. Section 1027(e) of the Dodd-Frank Act prohibits the Bureau from exercising any supervisory or enforcement authority with respect to any activity engaged in by an attorney as part of the practice of law, but also provides that this limitation on the Bureau does not apply "to the extent that an attorney is otherwise subject" to certain existing consumer laws, including the SAFE Act.

¹⁰ The legislative history of the Dodd-Frank Act reflects a desire to achieve a similar balance in emphasizing a determination "to avoid any possible overlap between the Bureau's authority and the practice of law," but also clarifying that activities of an attorney or an individual working for an attorney that fall outside the practice of law must not be shielded from regulation by the new Bureau. 156 Cong. Rec. E1347–49.

licensed attorney. In light of the considerations discussed above, HUD will move reference to licensed attorneys to the Appendix that is being added to this final rule. Accordingly, further elaboration or clarification of "ancillary matters" engaged in by a licensed attorney is no longer necessary.

11. Comment: Other requested exclusions from coverage. Commenters stated that there should be exclusions from coverage for the following: Individuals originating loans to buyers who lack capacity to meet institutional lender criteria; small, nondepository lenders who have good legal compliance records; FHA direct endorsement lenders; wholesale account executives who are not acting as loan originators; mortgage insurers; and Spanish-speaking loan originators in Puerto Rico, because many applicable legal concepts do not apply in Puerto Rico and because the loan originator exam is given in English only. One commenter said that states should be allowed to develop an expedited process for individuals who possessed a valid loan originator license or equivalent license prior to enactment of the SAFE Act.

A local government agency stated that there should be additional exemptions under the SAFE Act for the following persons, who are exempt under state mortgage licensing law: persons acting as fiduciaries with Internal Revenue Code-qualified employee pension-benefit plans, persons acting in a fiduciary capacity conferred by authority of a court of competent jurisdiction, and employees of corporate instrumentalities of the Federal Government who are not required to be registered.

In contrast to these comments, a commenter stated that the target of the regulation should be private escrow officers who often do not have the requisite training or experience and who are not insured or bonded.

HUD Response: The SAFE Act requires licensing and registration of any individual who engages in the business of a loan originator as defined in the Act, and, as HUD has already noted, HUD does not have authority to grant exemptions for individuals covered by the SAFE Act. The fact that a buyer may lack capacity does not render his or her loan originator exempt from licensing requirements of the SAFE Act.

With respect to a Spanish loan originator exam for use in Puerto Rico, nothing in the SAFE Act or HUD's regulation precludes Puerto Rico from using such an exam, provided it is approved by the NMLSR. With respect to an expedited process, states can

expedite or otherwise reduce the burdensomeness of the process for individuals registered under a predecessor loan originator licensing law, so long as a state supervisory authority finds that there is sufficient evidence that all of the requirements for licensing and registration, including the educational requirements, of the SAFE Act are met. However, nothing in the SAFE Act would allow for any exception to the basic statutory requirements of the Act.

With respect to exclusions for various fiduciaries, HUD reiterates that it has no authority to exempt covered individuals, but urges states to apply the statutory criteria, as clarified by this rule, to determine whether the cited individuals are in fact engaged in the business of a loan originator.

In the case of employees of a federally chartered corporation that does not meet the definition of a housing finance agency, loan origination activities would be covered by the SAFE Act. With respect to escrow officers, the issue, again, is whether such individuals are engaged in the business of a loan originator as defined in the SAFE Act. Coverage is determined by the activities rather than by the professional title of the individual involved.

12. Comment: De minimis exemption requested. A commenter encouraged HUD to follow the recommendation of the Federal banking agencies and consider a de minimis exception. The commenter noted that the Federal banking agencies, in their draft final rule, provide that a person who does not regularly or principally function as a loan originator, for example has acted as a loan originator for five or fewer residential mortgage loans in the past 12 months, is not subject to the SAFE Act. HUD should also consider exempting small manufactured housing communities that may take very few applications in a 12-month period.

HUD Response: As discussed above, the SAFE Act authorized the Federal banking agencies to provide a de minimis exemption for individuals engaged in the business of a loan originator, but did not grant such authority to HUD.

E. Other Definitions

1. Comment: Revise the definition of "State." A commenter stated that the definition of "State" should be revised by removing the reference to the Trust Territory of the Pacific Islands.

HUD Response: Although the term "State" is defined in the SAFE Act to include the "Trust Territory of the Pacific Islands," HUD has removed

reference to the Trust Territory of the Pacific Islands since this is no longer a U.S. territory or jurisdiction and HUD therefore has no jurisdiction to enforce compliance with the SAFE Act.

2. Comment: Expand definition of "family." A commenter stated that the term "immediate family member" in § 3400.103(e)(4) should be revised to state simply "family member" and be defined to include an individual's spouse, child, child's spouse, parent, sibling, grandparent, grandchild, or grandchild's spouse. The commenter stated that the result of such a change would be to expand the category of relatives to whom, or on whose behalf, an individual may offer or negotiate loan terms without having to be subject to state licensing requirements.

HUD Response: Since HUD is no longer including in § 3400.103(e) reference to individuals who are not statutorily exempt from licensing under the SAFE Act, there is no longer a need to define "family."

F. License Eligibility: Felonies

1. Comment: Felony conviction within 7 years limits employment opportunities. Several commenters stated that the prohibition on issuing licenses to individuals who have been convicted of felonies within the preceding 7 years, even felonies that are unrelated to fraud, may significantly limit employment opportunity.

HUD Response: Section 1505(b)(2) of the SAFE Act explicitly prohibits the issuance of a license to an applicant who has been convicted of a felony within 7 years prior to submission of an application. This limitation is a statutory restriction, so elimination of the requirement is beyond the scope of HUD's authority.

2. Comment: Pardoned convictions are not generally treated as legal nullities. A commenter disagreed with HUD's assertion that pardoned convictions are generally treated as legal nullities. The commenter states that this is a misunderstanding, citing case law, and asserts that a pardon merely relieves legal disabilities and stigma that result from convictions. The commenter also notes that other Federal agencies have taken an approach to state relief that differs from HUD's, and questions the policy implications of limiting HUD relief to pardons. The commenter recommends that HUD withdraw § 3400.105(b)(2)(ii) of the proposed rule, or that it expand it to include other forms of state relief, similar to the provision in the Federal Firearms Act, 18 U.S.C. 921(a)(20). Other commenters suggested that § 3400.105(b)(2)(i) be removed and the effect of expungement

of a felony should be determined by the states. Several industry associations state that HUD should simply repeat the minimum requirements and leave it to the states to determine how they are to treat expungements. However, HUD could urge uniform treatment. Other commenters suggested that due to significant state oversight of the expungement process, expungements should receive the same treatment as pardons under the Act. A commenter states that in many states, an expungement is viewed to completely eliminate the occurrence of the criminal incident, as well as any punishment incurred as a result of the act. As raised by one commenter, in some states the submission of an expunged conviction could cause the individual to incur state sanctions. The commenter urged HUD to adopt FDIC's policy with regard to expunged and juvenile convictions as provided in the FDIC Statement of Policy for Section 19 of the FDIC Act, 63 FR 66177 (Dec. 1, 1998).

HUD Response: The case law cited by the commenter provides that a pardon relieves the convicted from punishment for the conviction rather than eliminating any issue of guilt for the underlying conduct. The case law further states that the pardoning of a conviction does not prohibit a state from evaluating whether the conduct that led to the conviction renders the individual unfit for the profession in question, so long as denial is not based on the mere fact of a conviction alone. Section 3400.105(b)(2)(ii) has been revised to provide that in the case of a pardoned conviction, the fact of the conviction alone does not automatically disqualify the individual under the SAFE Act's felony provisions at 12 U.S.C. 5104(b)(2). A state supervisory authority, however, may still consider the conduct underlying the conviction when it makes the required determination of financial responsibility, character, and general fitness. Therefore, under HUD's final rule, a state will not be required to provide that a pardoned conviction renders an individual ineligible for licensing. HUD leaves that determination to the states.

Additionally, HUD will not consider an expunged conviction to render an individual ineligible to be licensed under the SAFE Act. In general, an expungement is viewed to completely eliminate the conviction in the eyes of the law and to prevent further legal consequences of the conviction. As raised by one commenter, in some states the submission of an expunged conviction could cause the individual to incur state sanctions. Section

3400.105(b)(2) is revised accordingly. As in the case of pardoned convictions, the revised regulatory provision does not prohibit a state that becomes aware of the conduct that led to the conviction from evaluating whether the conduct renders the individual unfit for the profession in question.

Rule change. To reflect this distinction, § 3400.105(b)(2) is revised to provide that pardoned and expunged convictions do not "in themselves" render an individual ineligible.

3. Comment: Question of authority to create any exemption for disqualification of individuals with felony convictions. A commenter questioned HUD's authority to create any exemption under section 1505 regarding the categorical disqualification of individuals with felony convictions. The commenter noted that the SAFE Act does not provide authority to HUD to create an exemption to the unambiguous ban in section 1505(b)(2), and HUD does not claim any inherent authority to create one. Some commenters suggested that the exemption section should either be removed from the rule or modified in some way, such as by seeking authority for a legislative waiver to be triggered by an application from a state licensing board.

HUD Response: HUD is not exercising any exemption authority, but rather seeks to clarify meaning to terms used in the SAFE Act to ensure that the type of licensing contemplated by the SAFE Act is instituted as uniformly as possible across the states. Expunged and pardoned convictions are often not considered to be disqualifying convictions or convictions of record under analogous requirements governing other professional licensing and consumer protection regimes. As stated in response to an earlier comment, HUD's position is that pardoned and expunged convictions do not "in themselves" render an individual ineligible.

G. License Eligibility: Credit Reports, Credit Scores, Financial Responsibility, and Character and Fitness

1. Comment: Authorize NMLS to obtain credit report. A commenter stated that the proposed rule should be revised at the final rule stage to allow applicants to authorize NMLS to obtain a credit report and information on administrative, civil, or criminal findings.

HUD Response: Rule change. In the final rule, HUD has revised § 3400.105(h) to allow applicants to submit authorizations for NMLS to obtain credit reports and records of

administrative, civil, and criminal findings. This revision reflects the specific requirements of section 1505(a) of the SAFE Act.

2. Comment: Credit scores should not be a licensing requirement. Some commenters stated that credit scores should not be a requirement for licensing, or should not be determinative of license eligibility.

HUD Response: The SAFE Act requires license applicants to authorize the NMLS to obtain an independent credit report of the applicant. The final rule reflects this requirement. If a credit report includes a credit score, a state supervisory authority may decide that it is appropriate to consider the score and other information in the credit report as factors in its overall character and fitness determination.

3. Comment: Public release of credit reports will subject individuals to identity theft. One commenter expressed concern that if credit reports are made public, individuals could be vulnerable to identity theft.

HUD Response: HUD is maintaining its approach to confidentiality of information in the final rule, in § 3400.3. This approach is consistent with section 1512 of the SAFE Act, which addresses the applicability of state and Federal privacy laws to materials submitted to state regulators and the NMLSR. The SAFE Act does not provide for public disclosure of an individual's credit report or credit score. The information that the SAFE Act requires to be made available to the public includes employment history and publicly adjudicated disciplinary and enforcement actions.

4. Comment: Testing requirements need to be clarified. One commenter stated that proposed rule's description of testing requirements is ambiguous. First, the commenter noted that the number of times an individual may retake a licensing test is unclear. Second, the commenter indicated that language covering retesting for loan originators with lapsed licenses is ambiguous, in that an individual with a lapsed license is not a "state licensed loan originator," but rather a "formerly" state licensed loan originator.

HUD Response: HUD is maintaining the restrictions on the timing of retests in the final rule. HUD agrees that the SAFE Act is confusing on this point, in that it states under "Initial Retests" that an individual may "retake a test three consecutive times," with each consecutive test occurring at least 30 days after the preceding test, but then under "Subsequent retests" states that after failing three consecutive "tests," the individual must wait 6 months

before retaking the test. HUD resolved this confusion in the proposed rule by providing in § 3400.105(e)(2) that an individual may take a test three times (*i.e.*, the first taking plus two retests), with each retest occurring at least 30-days after the preceding test. If the individual fails three consecutive tests, the individual must wait 6 months before taking the test again. (That is, the third “retake” must satisfy both the individual 30 day waiting period of SAFE Act section 1505(d)(3)(B) and the 6-month waiting period of section 1505(d)(3)(C), which is to say it cannot occur until after a 6-month waiting period.) HUD believes that the rule is clear on the number of times a test can be taken.

Rule change. To address the second comment, HUD has modified the language covering retesting for loan originators with lapsed licenses. Additionally, the regulatory text of the proposed rule inadvertently omitted reference to time spent as a registered loan originator and the final rule inserts such reference. In the final rule, § 3400.105(e)(3) provides that if a “formerly” state licensed loan originator fails to maintain a valid license for 5 years or longer, and not taking into account any time during which the individual is a registered loan originator, the individual must retake the test and achieve a test score of not less than 75 percent correct answers.

5. Comment: Provide flexibility with respect to credit for continuing education courses. A commenter stated that the final rule should authorize state officials to allow continuing education courses to be credited for the previous year when an applicant seeks to renew his or her license during an authorized license reinstatement period. The commenter notes that this would match provisions in the CSBS/AARMR Model State Law.

HUD Response: In order to avoid any confusion that may have arisen from the phrasing of the subject provision in the proposed rule, HUD is revising the language in the final rule to include the statutory language and then provide additional clarifying language.

Rule change. Accordingly, § 3400.107(b) now provides that a state must provide that “a state-licensed loan originator may only receive credit for a continuing education course in the year in which the course is taken.” HUD understands the statutory provision to mean that a state-licensed loan originator who fails to meet the continuing education requirements before the expiration of his or license may not renew his or her license until he or she meets the requirement. That

is, the loan originator cannot renew his or her license based on a promise to take the required classes in a future year, on the theory that it does not matter when the classes are taken, so long as they are taken at some point. Similarly, the provision means that an individual cannot claim that excess classes taken in a past year relieve the individual of having to take classes required for a future year.

Rule clarification. Accordingly, § 3400.107(b) now also clarifies that “a state-licensed loan originator may not apply credits for education courses taken in one year to meet the continuing education requirements of subsequent years.” Provided that a state does not permit an individual to renew his or her license prior to taking the required continuing education classes, HUD does not believe the provision prohibits a state from allowing an individual to make up a deficiency from a past year by taking classes in a present or future year.

H. Reciprocity and Promoting Uniformity

Comment: Permit or require recognition of other state licensing of loan originators. Several commenters suggested that HUD should permit or require recognition of the licensure of other states to facilitate competition and ultimately lower consumer costs, without compromising the standards demanded under the SAFE Act. Commenters also noted that HUD should call for uniformity in its rules and require in the rules a regular process of consultation with trade associations and state and Federal regulators to develop solutions where uniformity is lacking.

HUD Response: HUD’s final rule does not require reciprocity, given the current variability in state laws. The SAFE Act sets the minimum requirements for the licensing of “loan originators” and does not allow HUD to preempt any state law requirements or to establish a maximum requirement. This final rule provides that a state must require an individual to obtain and maintain a license from that state in order to engage in the business of a loan originator with respect to any dwelling or residential real estate in that state. This final rule further provides that in order to grant a license to an individual, the state might find that the individual has satisfied the minimum eligibility requirements. HUD believes this approach is consistent with the SAFE Act’s preference that states implement their respective licensing regimes and the SAFE Act’s establishment of minimum, rather than preemptive and

uniform requirements. The approach also avoids incentivizing a “race to the bottom” among states. However, this final rule does not limit the extent to which a state may take into consideration or rely upon the findings made by another state in determining whether an individual is eligible under its own laws.

HUD will seek to promote uniform minimum standards in accordance with its overall responsibility for interpretation, implementation, and compliance with the SAFE Act. However, the SAFE Act’s preference that states implement and enforce licensing, combined with the absence of preemptive authority over states that opt to exceed the minimum requirements, means that there will inevitably be a diversity of approaches among states. HUD has worked extensively with the CSBS and AARMR in this process, and will remain accessible to state regulators, other Federal regulators, and trade associations.

I. State Agency Performance Standards and Other Minimum Requirements

1. Comment: Not all state authorities will be able to participate in the NMLSR. Commenters stated that not all states or state authorities that oversee mortgage lending participate in the NMLSR. Therefore, § 3400.113(a)(1) should be revised to reference “applicable supervisory authorities,” or to require that all authorities participate in the NMLSR. One commenter suggested that HUD consider a system that could be tracked by Freddie Mac/Fannie Mae and individual lenders using CHUMS and SAR ID numbers given to underwriters by FHA and the Department of Veterans Affairs and tied to individual’s Social Security Numbers and tracked through Neighborhood Watch for default trends, etc.

HUD Response: The SAFE Act provides in section 1508 that, in a case where “the Secretary determines that a state does not have in place by law or regulation a system for licensing and registering loan originators that meets the requirements of sections 1505 and 1506 and subsection (d) of this section, or does not participate in the Nationwide Mortgage Licensing System and Registry,” HUD shall provide for a system of licensing and registration of loan originators operating in the state. Thus, the statute requires the use of the NMLSR or a HUD-established backup system for loan originator licensing and registration, rather than miscellaneous local authorities. In addition, section 1508(d) of the SAFE Act establishes the minimum requirements that a state licensing law must meet. Because HUD

must implement the SAFE Act as enacted, HUD declines to adopt the commenters' alternate suggestions. In regard to the use of the term "applicable supervisory authority," HUD notes that the SAFE Act uses the term "a state loan originator supervisory authority." HUD does not construe this statutory term to mean that a state may have only one supervisory authority, or that if it has multiple such supervisory authorities supervising various categories of loan originators, only one supervisory authority must comply with the SAFE Act.

2. Comment: HUD should recognize that examinations on the level of the mortgage company may satisfy the requirement to examine and investigate loan originator licensees. A commenter states that many states conduct examinations on a company level and that such examinations include examinations of the company's loan originators. HUD should recognize that this approach satisfies the requirement to examine loan originators at § 3400.113(a)(4).

HUD Response: HUD agrees that nothing in the SAFE Act or this final rule requires dual or separate examinations of loan originators, if a state already examines loan originators in the course of examining companies, provided that the state's approach ensures that no loan originators are systematically left out of the scope of examinations.

3. Comment: Reports of condition may be submitted at the company level. A commenter observed that the SAFE Act requires "licensees" to submit reports of condition (call reports), rather than "loan originators." Since "licensee" is not defined in the SAFE Act, the commenter states that it should be understood to refer to companies and asks HUD to recognize that call reports may be submitted at the company level.

HUD Response: HUD understands that reports of condition, or "call reports," are customarily produced and submitted to regulators at the company level. The only persons who are subject to licensing under the SAFE Act are individuals, not companies. Accordingly, this final rule requires states to require licensed loan originators (*i.e.*, the only "licensees" under the SAFE Act) to ensure that loans that close as a result of the loan originator's activities "are included" in the reports of condition that "are submitted" to the NMLSR. HUD believes this language permits and even anticipates that the reports are submitted by a person other than the loan originator, such as at the company level. The regulatory provision at

§ 3400.111(f) requires states to impose responsibility for inclusion of loans in the report on the individual loan originator, but it does not prohibit a state from imposing concurrent or even primary responsibility for the inclusion and submission on a company, provided that the state's approach ensures that no loan originator's closed loans are systematically left out of the reporting requirement.

J. Delayed Effective Date or Moratorium on Enforcement

Comment: Provide for significant delayed effective date for regulations. Commenters asked HUD to delay the effective date of the proposed regulations or to approve a temporary moratorium on enforcement. Some commenters requested moratoriums for specific industries on a national basis. As justifications for a delay or moratorium, commenters referenced the timing of HUD's regulations, the barriers to compliance facing particular industries, and the need to amend state laws. Some commenters requested expanding proposed rule § 3400.109(d), which allows states to delay the effective date for persons solely performing certain loan modifications, to include persons conducting loan modifications outside the Making Home Affordable program.

HUD Response: HUD is maintaining the proposed rule's approach to the approval of delays in the effective date of state requirements. Under the proposed rule, a state may request a later effective date by demonstrating that a substantial number of loan originators, or a particular class of loan originators, will face unusual hardship. HUD believes this process will appropriately address hardships faced by the concerned industries. The process is also consistent with the SAFE Act's goal of establishing state-based mortgage licensing systems.

However, HUD recognizes there has been uncertainty regarding the meaning of certain terms that affect the scope of the SAFE Act's coverage, and that coverage of certain classes of individuals may not have been determinable prior to the issuance of this final rule. To the extent this final rule clarifies coverage of individuals who previously did not have a reasonable basis for determining whether they were covered, HUD will work with states to establish reasonable time frames for implementing coverage of such individuals, and for such individuals to meet eligibility

requirements.¹¹ Section 3400.109(c) of this final rule provides a method for states to request extensions for such individuals or classes of individuals. As stated above, a state may request a delayed effective date by demonstrating that a substantial number of loan originators, or a particular class of loan originators, will face unusual hardship in meeting SAFE Act requirements. Additionally, HUD's ability to grant extensions for good-faith efforts to comply with SAFE Act requirements may have applicability.

Rule change. HUD is withdrawing the proposed delayed effective date for loan originators participating in the Home Affordable Modification Program (HAMP). That delay was proposed in combination with HUD's inclination to cover material modifications of existing residential mortgage loans. In accordance with HUD's decision to defer to the new Bureau on the question of covering material modifications, the delayed effective date for loan originators participating in the HAMP program is unnecessary. In addition, the proposed rule's dates by which states were to require individuals to obtain licenses have since passed. Accordingly, the dates for such compliance in § 3400.109(a) and (b) have been replaced with the effective date of this final rule. As discussed above, however, § 3400.109(c) provides for the possibility of extended compliance dates for individuals who could not reasonably have anticipated that they would be covered until publication of this final rule.

K. HUD's Regulation and Review of States for Compliance

1. Comment: HUD must prohibit states from exceeding the SAFE Act's minimum requirements. Some commenters asked HUD to ensure that states not overreach their SAFE authority by, for example, imposing licensing requirements that go beyond the SAFE Act's minimum requirements by using credit reports to make licensing decisions.

HUD Response: As discussed previously, the SAFE Act establishes minimum standards for licensing of loan originators, and does not prohibit states from exceeding these requirements.

2. Comment: Expand enforcement procedures for states' noncompliance. A commenter suggested that HUD expand the proposed regulations to include

¹¹ See HUD's Frequently Asked Questions on this issue at <http://hud.gov/offices/hsg/rmra/safe/sfacimpdel.pdf>.

additional informal and formal procedures for states in noncompliance.

HUD Response: HUD's regulation at § 3400.115 provides many procedural safeguards, including notification to a state if it is in noncompliance, publication in the **Federal Register** of the initial finding of noncompliance, and an opportunity for comment of a period of no less than 30 days. Any state, like other members of the public, would have the chance to submit written comments and could request a meeting as well. In addition, HUD's final determination of noncompliance would include the rationale for its determination in response to issues raised in the comments.

Finally, the absence of a provision for an informal procedure in the regulations does not mean that HUD would simply follow the formal procedure upon any suggestion of noncompliance. On the contrary, HUD anticipates that it would make reasonable attempts to work with a state to help bring it into compliance before proceeding with the formal procedures. The absence of regulations governing such an informal approach maximizes flexibility for the state and HUD in attempting to bring about full compliance. For example, such procedures could include informal telephone communications, meetings, letters, or other approaches.

3. Comment: Revise § 3400.101 pertaining to HUD's determination of a state's compliance with the SAFE Act. A commenter stated that the phrasing of § 3400.101 makes it appear to be a foregone conclusion that HUD will determine that a state's licensing system does not meet the minimum standards. The commenter recommended that this section be rephrased to "procedures HUD will follow to determine whether or not "a state has in place a system."

HUD Response: HUD has not adopted the suggested rephrasing of § 3400.101. It is not HUD's intent to imply that it presumes state systems are not in compliance. Rather, the language comports with the statutory provision that HUD is authorized to act when it determines that a state is not in compliance. The SAFE Act does not provide for HUD to make formal, affirmative determinations of compliance.

4. Comment: Good-faith effort to meet compliance may be satisfied by a state commitment to make a good-faith effort. A commenter urged HUD to revise § 3400.115(d) to provide that HUD may grant a state a 24-month period to come into compliance upon a state's commitment to make a good-faith effort, in addition to HUD's finding that the

state is in fact making a good-faith effort to come into compliance.

HUD Response: HUD declines to make the suggested change, in part because it is difficult to predict the range of circumstances under which a state supervisory authority, legislative committee chair person, other legislator, or other state official might purport to be making a commitment on behalf of a state. However, this decision does not mean that a commitment alone will never constitute a good-faith effort. HUD understands that in some cases compliance may be achieved through administrative means by the state supervisory authority, while in other cases compliance may require that steps be taken by multiple actors in the state's executive, legislative, and even judicial branches. HUD will consider a commitment made by a state official along with all the facts and circumstances to determine whether such a commitment and any steps already taken amount to a good-faith effort to comply.

5. Comment: HUD's authority to regulate states under the SAFE Act is limited. A number of commenters state that HUD's authority over states is limited to specific sections of the SAFE Act. Several commenters state that HUD's review of state compliance is limited to sections 5104 (licensing and registration requirement), 5105 (state application and issuance procedures), and 5107(d) [*sic*] of SAFE. Other commenters identified the three sections as 5105, 5106 (standards for state license renewal), and 5108(d) (state licensing law requirements). These commenters state that, as a result, HUD does not have authority to approve or deny state definitions of loan originators or exclusions for individuals traditionally regulated by the states, and that HUD does not have authority to preempt states in this area. States have the right to interpret the SAFE Act to create their own exceptions and exclusions.

One commenter states that HUD's authority with regard to loan originator licensing would not be triggered until such time as a state failed to comply within the afforded timeline, and such authority would be limited to the scope of these three sections of the SAFE Act. Accordingly, the commenter, along with others, stated that HUD does not have authority to define the scope of state provisions regarding loan originator licensing or to deny exclusions from such provisions as set forth by the states.

Several commenters, including banking trade associations, stated that HUD may only: (1) Provide a backup

licensing and registration system if a state fails to do so, (2) establish a backup tracking system if the NMLSR fails to do so, and (3) determine whether a particular state's system meets the minimum SAFE Act requirements. The "purpose" provisions of the rule should expressly state HUD's role of reviewing compliance with minimum standards and should not indicate that HUD has overall responsibility for interpretation, implementation, and compliance with the SAFE Act. The rule should also state that HUD will only evaluate states to determine whether the minimum statutory requirements have been met.

Some commenters stated that HUD violated the Administrative Procedure Act and its own rules on rulemaking, in that the agency did not provide an opportunity for public comment before it issued its own Commentary and Frequently Asked Questions (FAQs).

HUD Response: HUD disagrees with the assertion that it may not enforce, interpret, or issue regulations clarifying, for example, terms that are defined outside of 12 U.S.C. 5103, 5104, and 5107(d) (*i.e.*, SAFE Act sections 1504, 1505, and 1508(d)). If the assertion were true, it would mean that a state could, for example, interpret the definition of "loan originator" (which is used in section 1504 in the course of providing which individuals are subject to licensing requirements) so narrowly that no individual would be covered. Under the commenter's theory, HUD would be powerless to act in such a situation, or to issue regulations in advance clarifying the meaning of ambiguous terms that HUD must rely on in carrying out its statutory obligations under the SAFE Act.

HUD also disagrees that it violated the Administrative Procedure Act in posting the Commentary and Frequently Asked Questions, without following prior notice and comment procedures. The Commentary and Frequently Asked Questions provided guidance on HUD's interpretations and tentative views at the time, in anticipation of approaching deadlines. Notice and comment procedures apply to legislative rules. The Commentary and Frequently Asked Questions were not legislative rules.

L. NMLSR Requirements

Comment: Consider alternative systems to NMLSR or additional systems. A commenter recommended that HUD consider a system that could be tracked by Freddie Mac and Fannie Mae and individual lenders using CHUMS and SAR ID numbers given to underwriters by FHA and the Department of Veterans Affairs and tied to individual's Social Security Numbers

and tracked through Neighborhood Watch for default trends, etc.

Other commenters cited concerns with the NMLSR with respect to the manufactured housing industry. The commenters stated that in the manufactured housing industry, at least three types of entities must employ loan originators: Personal property-only finance lenders, retail sellers of manufactured homes, and owners of manufactured housing communities. These entities typically hold sales finance company licenses, installment loan licenses, or retail seller licenses. The commenters stated that because NMLSR does not include these licenses in its system, these entities are unable to sponsor their employees. Commenters encouraged HUD to address the NMLSR flaw by creating an exempt status to allow these personal property finance lenders, retail sellers, and community owners to sponsor their loan originator employees. The commenters state that this is a fatal flaw in the NMLSR.

Another commenter stated that one of the concerns with the NMLSR is that under this system, only originators involved with real property mortgages are able to register. The commenter states that HUD should expressly confirm that all originators, including chattel-only lenders, will be able to register within the NMLSR.

Other commenters expressed concern with the privacy offered by the NMLSR. The commenters stated that HUD's final rule should clarify that the SAFE Act does not require the release of home address, Social Security Number, or other private information on originators. Commenters stated that the requirement for this information could lead to identity theft and harassment of loan originators. HUD should make it clear that those who misuse or fail to safeguard this data will be subject to severe penalties.

These commenters also supported HUD's proposed rule requiring financial oversight of the NMLSR and HUD's collection, and making public audited financial statements concerning the NMLSR's operations. Another commenter encouraged HUD to consider establishing a mortgage origination standards board, comprised of members from the various segments of the industry that are engaged in loan origination, to establish standards for the NMLSR's approval of education courses and other licensing requirements. The commenter also suggested that HUD require an independent review of the design and effectiveness of the NMLSR Web site and its user interface to ensure that the

system is intuitive and easily navigable by all users.

HUD Response: HUD believes it is too early in the implementation of the SAFE Act to consider an alternative system to the NMLSR. States and CSBS and AARMR are all at a point or near the point of commencing full implementation of the requirements of the SAFE Act. More time is needed to evaluate how the NMLSR works before consideration should be given to alternative systems.

With respect to the types of licenses that the NMLSR includes, the SAFE Act charges that NMLSR track "loan originators." If an individual is licensed by the state in which he or she engages in the business of a loan originator, then the individual will be entered in the NMLSR. With respect to the concern that the NMLSR only accepts loan originators working for certain categories of companies, HUD notes that some states have created designations in the NMLSR for "exempt company" registrations, so that companies that are not required to be licensed under state law may nonetheless sponsor its loan originators in the system.

On the issue of confidentiality, the SAFE Act establishes a high bar to maintain the confidentiality of information that is in the NMLSR. The SAFE Act provides that except as otherwise provided in the SAFE Act, any requirement under Federal or state law regarding the privacy or confidentiality of any information or material provided to NMLSR, and any privilege arising under Federal or state law (including the rules of any Federal or state court) with respect to such information or material, shall continue to apply to such information or material after the information or material has been disclosed to the system. The SAFE Act further provides that such information that is subject to privilege or confidentiality shall not be subject to disclosure under any Federal or state law governing the disclosure to the public of information held by an officer or agency of the Federal Government or the respective state agency, nor shall the information be subject to subpoena or discovery or admission into evidence, except where such information is subject only to privilege held by NMLSR or HUD. Finally the SAFE Act provides that any state law, including any state open record law, relating to disclosure of confidential supervisory information or any information that is of the type entered in NMLSR, shall be superseded by section 1512 of the SAFE Act to the extent that the SAFE Act provides less confidentiality or a weaker privilege.

Rule change. However, with respect to confidentiality, and specifically data security, which is addressed in § 3400.305, HUD revises the regulatory language that states that if there is a reasonable belief that a security breach of the NMLSR has occurred, notification of such breach must be provided as soon as practicable, rather than in a reasonable amount of time as the proposed rule stated.

Additionally, the proposed rule, in the regulatory text, inadvertently omitted reference to AARMR in § 3400.305 and § 3400.307, and the final rule inserts such reference.

With respect to the issue of establishing an NMLSR oversight board, HUD believes there is value in establishing such a board but defers to the Bureau on this matter.

M. Loan Processors and Underwriters

Comment: More specificity is needed regarding supervision of loan processors and underwriters. Commenters asked HUD to clarify the SAFE Act's requirement that loan processors or underwriters be supervised by a state-licensed loan originator or a registered loan originator. Commenters stated that the SAFE Act is ambiguous with respect to individuals who do not act as originators as defined in the statute, but who supervise loan processors and underwriters. Commenters stated that the rule should clarify that the statutory requirement is met if company procedures provide that licensed or registered loan originators supervise and instruct loan processors on the individual loans the loan originator is involved with, even though the loan processors and underwriters may report to their own administrative supervisors, who do not engage in loan origination activities and are not licensed or registered loan originators.

Other commenters stated that the rule should clarify that, under § 3400.23 of the proposed rule, as long as the state-licensed loan originator directs, supervises, and instructs the loan processor, he or she is not required to be the loan processor's immediate or direct supervisor. Another commenter questioned how this provision, if not clarified, would affect contractors, because contractors would be employees as to the loan originator but under contract to the broker or lender. The commenter stated that requiring "direct supervision" in the case of a contract processor would be detrimental to the processor's ability to provide an arms' length transaction. The loan originator could direct the processor to do things that the SAFE Act would prevent the loan originator from doing.

Another commenter states that the direct supervision requirement could conflict with some state laws.

Commenters stated that, as a result of this requirement, jurisdictions are requiring processing companies, underwriting companies, and staffing companies that provide these services to become licensed brokers. The commenters expressed concern that contract processors may close down because of the expense of becoming licensed in multiple jurisdictions; furthermore, if an individual obtains a loan originator license under a sponsoring broker, the individual is limited to working only with that broker, which defeats the purpose of working as a contract processor. A similar concern was expressed by a commenter about small processing companies that may be forced out of the business because of the cost of meeting licensing requirements.

Other commenters concurred with HUD's proposal that loan processors or underwriters who perform only clerical or support duties and do so at the direction of and subject to the supervision and instruction of a licensed or registered loan originator do not need to be licensed. The commenters stated that the rule should also make clear that processors and underwriters who are not directly supervised by individual loan originators but provide clerical or support duties do not need to be licensed and registered. They stated that this exclusion should be extended to processors or underwriters who do not work under the direct supervision of a loan originator, *i.e.*, contractors, because the Home Valuation Code of Conduct (HVCC) and business practices require that firewalls should be established with these processors to prohibit undue influence on processors. They stated that, for clarity purposes, the rule should provide that the language means that "loan processors and underwriters must support the origination function. Specific direction and supervision may be subject to appropriate company protocols to protect the integrity of the loan process and consumers."

A commenter stated that it is unclear from the statute and regulation whether an individual salesperson who gathers information from a potential customer (thereby meeting the definition of "loan processor or underwriter") would be required to be licensed or have his or her supervisor become licensed. Another commenter asked that HUD clarify how the direct supervision requirement would apply to contract companies or lenders that use overseas labor to process and underwrite loans.

Another commenter suggested that HUD expand the definition of "clerical and support duties to include submitting to automated electronic loan origination programs information common for the processing of underwriting or a residential mortgage loan and communicating to potential borrowers the results of the automated electronic loan origination programs." The commenter also recommended that HUD clarify in the definition of independent contractor, that an individual performs his or her duties "at the direction of and subject to the instruction of an individual who is * * * exempt under § 3400.103(e)(7)" when such individual is required to and does hold himself or herself out as a representative of a Federal agency-regulated lender that must follow the loan origination guidelines of such institution.

One commenter supported the requirement for contract processors and underwriters to be licensed because the requirement that such third parties be supervised by loan originators, rather than licensed themselves, can "create a potentially treacherous environment for consumers and subjects the institution itself to questionable practices." The commenter stated that all mortgage-related activities should be under the supervision of the regulator. The commenter also asked that HUD clarify that the phrase "the origination of a residential mortgage loan" in the definition of "loan processor or underwriter" means "all residential mortgage loan related activities from the taking of a residential mortgage loan application through the completion of all requires loan closing documents and funding of the loan."

HUD Response: HUD does not have authority to subject to licensing those activities not subject to licensing under the SAFE Act nor to exempt from licensing those activities clearly subject to licensing under the SAFE Act. Loan processors and underwriters are clearly not covered by licensing under the SAFE Act when such individuals perform clerical or support duties at the direction of and subject to the supervision and instruction of either a state-licensed loan originator or a registered loan originator. The SAFE Act defines what constitutes clerical or support duties and makes clear that the principal factor that distinguishes them from "administrative or clerical tasks" (the performance of which, alone, does not subject an individual to licensing requirements) is whether the individual performs any analysis at all of the information for the purpose of either processing or underwriting the loan.

HUD believes that the definition of clerical or support duties is thorough and sufficient and does not require elaboration. Nothing in the definition of "clerical or support" duties excludes the performance of these duties electronically.

The major issue raised by the commenters pertains to the issue of supervision. Nothing in the SAFE Act or this final rule requires that the requisite licensed or registered loan originator be the loan processor or underwriter's direct or immediate supervisor. At the same time, the SAFE Act's usage of functional terms (*i.e.*, "at the direction of and subject to the supervision and instruction of [a loan originator]") make clear that there must be an actual nexus between the licensed or registered loan originator's direction, supervision, and instruction and the loan processor or underwriter's performance, as opposed to a mere nominal relationship on an organizational chart.

Under the SAFE Act, a loan processor or underwriter is not subject to licensing requirements if he or she performs his or her duties at the direction of and subject to the supervision and instruction of "a" state-licensed loan originator or registered loan originator. Even with respect to states that require processing or underwriting companies to be licensed or independent contractor licensees to be associated with a single company, the SAFE Act deals only with licensing of individuals. In the case of loan processors or underwriters, the SAFE Act requires supervision by an individual who holds a SAFE Act-compliant loan originator license or who is a registered loan originator. An individual who performs only clerical or support duties and is an employee of a company that provides processing or underwriting services is not required to be licensed so long as he or she is supervised by a licensed or registered loan originator from that company. Any state requirement for such a company to hold a license, or for a loan processor or underwriter to have a relationship with only one company licensee, is beyond the scope of the SAFE Act and this final rule. A single licensed or registered loan originator may be able to effectively direct, supervise, and instruct multiple loan processors or underwriters, possibly even those in overseas locations, depending upon all of the facts and circumstances. HUD believes state supervisory authorities are well suited to evaluate operations and organizational structures to determine whether the SAFE Act's functional requirement for a licensed or registered loan originator's direction, supervision,

and instruction of a loan processor or underwriter is met.

HUD finds the statutory and regulatory language with respect to loan processors and underwriters is clear. Although HUD believes it should be clear that “origination of a residential mortgage loan” in the final rule’s definition of “loan processor or underwriter” includes all phases in a loan origination, through the closing and funding of the loan, HUD has added a definition of “origination of a residential mortgage loan” to ensure there is no confusion. In addition, HUD has included a discussion in Appendix C of when loan processors or underwriters may be required to be licensed under the SAFE Act.

Rule change: In § 3400.23 (Definitions), HUD adds the following definition: “*Origination of a residential mortgage loan*, for purposes of the definition of *loan processor or underwriter*, means all residential mortgage loan-related activities from the taking of a residential mortgage loan application through the completion of all required loan closing documents and funding of the residential mortgage loan.”

Rule change: In addition, consistent with HUD’s determination that individuals providing origination services in certain charitable or government transactions do not engage in the “business” of a loan originator, HUD is clarifying that individuals who act only as loan processors or underwriters and only with respect to these same transactions are not subject to the SAFE Act’s licensing requirements. The clarification is provided in § 3400.103(e)(3)(ii).

N. Other Definitions and Issues

1. Comment: Establish Web site for housing counselors. A commenter suggested that there should be one national certification and a Web site for counselors to reference various state regulations.

HUD Response: HUD is charged with implementing the SAFE Act with respect to individual loan originators. In that respect, a national certification or Web site for housing counselors is outside HUD’s authority under the SAFE Act and beyond the scope of this rule.

2. Comment: Preempt duplicative state laws. Because of the SAFE Act, many states have amended their definition of “mortgage loan” in state mortgage lending laws to include personal property finance transactions. As a result, individuals and entities that provide such financing are now subject to dual regulation, both under laws that

target sales finance and installment loans (e.g., where, for example, a state views manufactured housing as personal property and a state requires licensing for personal property transactions in addition to licensing as a mortgage loan originator under the SAFE Act). Commenters asserted that dual regulation is unfair and leads to duplication and inconsistency between charges and disclosures required under the two regimes. In addition, commenters stated that HUD should guide states to reconsider the application of their amended laws to focus on individuals, not entities, in accordance with the intent of the SAFE Act.

HUD Response: Under the SAFE Act, individuals acting as loan originators must meet its licensing and registration requirements, even if they are also subject to other laws, such as state or local laws regulating personal property finance transactions. The SAFE Act establishes only the minimum standards for licensing individuals engaged in the business of a loan originator. It does not address licensing of individuals or entities under other laws. The licensing or dual regulation of the individual or entity is an issue of state law and not subject to HUD’s rules under the SAFE Act.

3. Comment: HUD’s rule does not address federalism implications. A commenter stated that under the section on Executive Order 13132, “Federalism,” HUD did not sufficiently address the federalism issues raised by the proposed rule. The commenter stated that specifically, the proposed rule, without justification or explanation, restricts states’ ability to legislate and enact laws that are not inconsistent with the U.S. Constitution or existing Federal law. The commenter stated that it is the responsibility of each individual state to implement a system of licensing and registering loan originators that complies with the letter and spirit of the SAFE Act without directly conflicting with or impeding the achievement of congressional objectives or intent in enacting the legislation. The commenter stated that because HUD failed to comply with Executive Order 13132 in issuing the proposed rule, HUD should withdraw this rule.

HUD Response: HUD disagrees with the commenter’s characterization of the rule. The licensing requirements in HUD’s rule are those established by the SAFE Act. As required by the SAFE Act, the regulation simply sets minimum standards for the licensing and registration of loan originators, and has no additional federalism implications.

4. Comment: HUD’s rule triggers an unfunded mandate. A commenter stated that HUD’s proposed rule, under the section discussing the Unfunded Mandates Reform Act (UMRA), states that Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. In issuing the proposed rule, the commenter stated that HUD failed to comply with the requirements of Title II of the Unfunded Mandates Reform Act. The commenter stated that no mention was made of the significant impact that will be felt by state agencies that are forced to re-process and re-license current loan originator licensees in order to be in compliance with the proposed rule. Additionally, the commenter stated that the proposed rule failed to account for the impact that will be felt within the competitive market for mortgage loans and among small businesses when states are unable to process applications for new loan originator licenses quickly enough, and when long-time originators are forced to suspend their business activities.

HUD Response: The Unfunded Mandates Reform Act (UMRA) of 1995 requires agencies to “assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).” (Emphasis added.) Since HUD’s SAFE Act regulation simply implement requirements “specifically set forth in law,” the assessment of effects by the agency is not required. Although this rule does not have the effects on State, local, and tribal governments within the meaning of UMRA, the SAFE Act statutory provisions do have such effects. HUD addresses the impacts of the statutory provisions of the SAFE Act in its statement on Executive Order 12866 that appears later in this preamble, and in addressing the designation of the rule as being economically significant. As HUD notes in its Executive Order 12866 statement, notwithstanding a determination by HUD and OMB that it is the statute, not HUD’s rule, which has a significant economic impact, the rule is designated economically significant because the rule, in codifying the provisions of the SAFE Act in regulation, reflects the economic significance of the statute and should have a designation reflective of the impact of the statute on the economy.

5. Comment: Additional time for public comment should have been

provided. A commenter stated that additional time for public comments should be allowed.

HUD Response: HUD's regulations on rulemaking at 24 CFR 10.1 specify that it is the policy of HUD to allow not less than 60 days for public comment. In the case of this rulemaking, the proposed rule was published on December 15, 2009 (74 FR 66548), and the original 60-day deadline ended on February 16, 2010. On February 17, 2010, at 75 FR 7149, HUD published a notice extending the public comment until March 5, 2010. During the public comment period, more than 5,000 comments were received. HUD believes that the public has had adequate opportunity to comment on the rule and has done so.

IV. Findings and Certifications

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866 (entitled, "Regulatory Planning and Review"). OMB determined this rule to be an "economically significant regulatory action" under section 3(f)(1) of the Order, based on the costs of compliance with requirements imposed directly by the SAFE Act, and based on costs that have already been incurred and would be incurred notwithstanding issuance of any rule by HUD. Neither HUD nor OMB determined that this rule adds to these statutory requirements, to the cost of compliance with these statutory requirements, or to any costs or effects on the economy (including costs to consumers, industries, government agencies, or regions, or effects on competition, employment, investment, productivity, innovation, or competitiveness) of the statutory requirements. Notwithstanding a determination by HUD and OMB that it is the statute, not this rule, which has a significant economic impact, OMB designates the rule economically significant because the rule, in codifying the provisions of the SAFE Act in regulation, reflects the economic significance of the statute, and should bear a designation reflective of the impact that the SAFE Act has on the economy.

Executive Order 12866 provides for agencies to assess the potential costs and benefits of regulatory actions reviewed by OMB under the executive order. However, as just noted, this rule does not add to the effects of the SAFE Act on any person or entity, and in itself therefore imposes no costs, nor creates any benefits, nor causes any transfers. As HUD has previously stated, this

rulemaking was not required to implement the licensing requirements of the SAFE Act. The SAFE Act contained no mandate for HUD to issue regulations, or any indication that states must wait for HUD regulations before commencing compliance with the statutory licensing requirements of the SAFE Act.¹² The SAFE Act licensing requirements imposed on states were self-executing requirements.

Section 1508 of the SAFE Act directs states to comply with its licensing requirements no later than one year after the date of enactment of the SAFE Act, or 2 years in the case of a state whose legislature meets only biennially. The SAFE Act allowed HUD to extend the deadline for states making good-faith efforts to achieve compliance with the SAFE Act. In addition, the SAFE Act imposed on HUD certain duties, including to oversee and enforce states' compliance with the SAFE Act, and to assure that the NMLSR continues to meet its purposes of the SAFE Act. Additionally, section 1508 of the SAFE Act provides for HUD to establish a SAFE Act licensing and registration system (a backup system) in any state that fails to establish and maintain a SAFE Act licensing and registration system. Accordingly, HUD initiated rulemaking to clarify certain statutory terms and provisions to assist states in complying with the SAFE Act, and to establish the minimum licensing standards that HUD would apply if HUD had to establish a backup system in any state. HUD did not propose, through this rulemaking, to implement a backup system that would exceed the minimum standards of the SAFE Act.

All 50 states, the District of Columbia, the Virgin Islands, Puerto Rico, and Guam have now enacted SAFE Act licensing laws.¹³ At this time, HUD does not expect to have to enforce the SAFE Act by establishing a backup licensing system in any state. Nor does this regulation impose any requirements on

¹² In contrast, see section 1507 of the SAFE Act, which required the Federal banking agencies to jointly, through the Federal Financial Institutions Examination Council, and together with the Farm Credit Administration, develop and maintain a system for registering employees of a depository institution, employees of a subsidiary that is owned and controlled by a depository institution and regulated by a Federal banking agency, or employees of an institution regulated by the FCA as registered loan originators with the NMLSR. These Federal agencies were mandated to develop and implement such a system one year from the date of enactment of the SAFE Act.

¹³ See the Web site of the Conference of State Bank Supervisors, reporting on the status of compliance by states with the SAFE Act at <http://www.csbs.org/news/press-releases/pr2010/Documents/pr-060110.pdf>. In addition, HUD is continuing to work with the remaining jurisdictions to achieve full compliance with the SAFE Act.

covered individuals beyond those requirements imposed by the statute. This regulation is thus not expected to alter the affects of the SAFE Act on any person or entity, so HUD is not imposing any costs or creating any benefits or transfers through this regulation. In the unlikely event that a state fails to enforce its SAFE Act licensing system, HUD (or the successor agency) will have to assume that state's responsibilities, in which case costs, benefits, and transfers will result from this rule, because a state's failure to enforce a SAFE Act licensing system will have caused HUD to undertake enforcement responsibilities.

The principal benefits of the SAFE Act include the enhanced protection of consumers and of the housing finance system as a whole by ensuring that covered loan originators meet minimum standards for integrity and competence nationwide. Standards for integrity include the requirement that individuals not have committed certain crimes and that they must be found to have demonstrated financial responsibility, character, and fitness. Standards for competence include the requirement that individuals must complete educational requirements and pass a test on mortgage origination and consumer protection laws, as well as other topics. One benefit of these standards is expected to be a reduction in the incidence of loan originators misrepresenting or mischaracterizing the features and obligations of residential mortgage loans that they offer to prospective borrowers. Such a reduction is one measure that is important in reducing the likelihood of borrowers accepting loans with predatory features or with obligations that they do not understand or cannot afford, which, in turn, can be expected to reduce the likelihood of future loan defaults and foreclosures. The SAFE Act requires accountability at the level of the individual loan originator, to ensure that problematic loan originators cannot escape all consequences for their actions simply by moving on to another brokerage or lending entity, whether in the same state or in another state. For example, loan originators whose actions result in revocation of their licenses in a given state become ineligible for licensure in all states.

Another benefit of the SAFE Act is that its minimum standards increase uniformity among states (compared with the range of state regulatory frameworks prior to the enactment of the SAFE Act) and establishes a nationwide registry with standardized unique identifiers and procedures, while at the same time maintaining regulation of loan

originators at the state level and permitting states to exceed the minimum requirements as they deem appropriate. This rule enhances the benefits of the SAFE Act by providing increased clarity to statutory terms that many states and public commenters have found to be ambiguous, and that largely determine which individuals are required to be subject to state licensing. This increased clarity is expected to reduce the likelihood that individuals who are not in fact required by the SAFE Act to be licensed will unnecessarily undergo the process and expense of seeking licensure, and that states will unnecessarily take enforcement actions against individuals who are not required by the SAFE Act to be licensed.

Although this rule has no economic impact on regulated parties, in accordance with OMB's direction and the provisions of OMB Circular A-4 on Regulatory Analysis, HUD is providing an analysis of the estimated costs of the SAFE Act against a "pre-statutory baseline" in an effort to bring transparency and more fully inform the public about the costs of the requirements imposed by the statute. As discussed above, this rule does not add any requirements or increase costs of compliance beyond those imposed by the statute. While the SAFE Act sets minimum licensing standards for loan originators, states may establish standards that are higher than the statutory minimum. Additionally, states establish their own fees to cover the costs of maintaining the licensing and registration system. HUD does not set, guide, or regulate the fees imposed by states in connection with a SAFE Act licensing and registration system.

Therefore, given the variation in state standards, the variation in fees that states may set for licensing, and the number of loan originators that may be doing business in each state, it is not possible for HUD to currently estimate what the costs of the SAFE Act, as actually implemented by the several states, would be. Therefore, to comply with OMB's direction and OMB Circular A-4, HUD provides below an analysis of the counterfactual situation where "no" state or territory implemented SAFE Act-compliant licensing requirements for loan originators (and/or repealed pre-existing statutes that met the SAFE Act requirements), and HUD (or its successor agency, the Consumer Financial Protection Bureau) was responsible for enforcing the minimum requirements in the SAFE Act, as codified by this rule, for the entire country.

Estimate of Costs if HUD Were Required To Establish a Backup SAFE Act Licensing System. The Congressional Budget Office (CBO) provided an estimate of the costs of implementation and compliance with the SAFE Act, prior to its passage, on both the individual residential mortgage loan originators and on the states that were required to establish SAFE Act-compliant laws. CBO's analysis assumes a uniform application of the minimum requirements of the SAFE Act as would be the case if HUD's rule were found necessary to implement because states did not establish SAFE Act-compliant registration systems. In its June 8, 2008, cost estimate report on the SAFE Act, under the heading of "Changes in Revenues and Direct Spending," CBO stated in relevant part as follows with respect to the SAFE Act.

Nationwide Registry for Licensing Fees and Spending. Since 2004, the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) have developed a nationwide licensing system for the residential mortgage industry. The system began operations in January 2008 and currently includes participation by agencies in eight states; the registry is expected to be available to the public sometime during 2009. As of May 2008, agencies in 40 states and in Puerto Rico and the District of Columbia have signed statements of intent to participate in the nationwide system. Both the CSBS and AARMR anticipate that agencies in the remaining 10 states will eventually commit to participating in the system.

Assuming that all the states participate and meet the minimum standards that would be established by this legislation, CBO does not expect HUD to develop its own national registry, though HUD would conduct some monitoring and oversight of the emerging voluntary system.

Enacting this legislation would impose a new requirement on loan originators to register with a nationwide registry and would authorize the assessment of fees for the cost of that registration. Although private entities are currently developing and maintaining a registry, participation in that system is voluntary. Under this legislation, participation by loan originators would become mandatory (that is, a loan originator would have to register to be state-licensed), and HUD would have the authority to enforce that requirement. Thus, CBO expects that the NMLSR would be acting as an agent of the Federal government; consequently, the cash flows associated with the NMLSR's regulatory and assessment authorities should be recorded in the Federal budget. Because the fees paid to NMLSR by loan originators would be approximately equal to the amounts some loan originators are currently paying or would pay the registry overseen by CSBS and AARMR under current law, taxable incomes of the loan originators and other entities in the economy would not change significantly under the bill.

The legislation would increase Federal revenues by authorizing the NMLSR to collect assessments from loan originators (that is, individual loan officers, branches of lending institutions, and lending companies). Based on information from the CSBS, CBO estimates that those individuals and entities would likely be charged an initial fee and an annual fee. Moreover, fees could be reduced over time as expenses decrease and more loan originators register with the system.

Based on fee schedules for similar activities and assuming that more than 300,000 entities and individuals would register with the NMLSR over the next five years, CBO estimates that \$137 million in fees would be collected by the NMLSR over the 2009-2018 period. (Emphasis added.)

Funds collected through such assessments would be spent without further appropriation to develop and maintain the registry system, and thus, the expenditures would be classified as direct spending. CBO estimates that the NMLSR would spend about \$120 million over the 2009-2018 period. (See http://www.cbo.gov/ftpdocs/93xx/doc9366/Senate_Housing.pdf at pages 13-14.)

With respect to cost to the private sector, in CBO's report, under the heading of "Estimated Intergovernmental and Private-Sector Impact," CBO stated in relevant part as follows:

Registry of Originators of Mortgage Loans. The bill also would impose a mandate on the mortgage finance industry by requiring originators of mortgage loans to register with a national registration system and authorizing the assessment of fees for the cost of that registration. Private entities are currently developing and maintaining a voluntary registration system. CBO estimates that about \$70 million in fees would be collected over the 2009-2013 period under the bill. However, the direct cost to register with a nationwide registry for some loan originators would be approximately equal to the amounts they are currently paying under the voluntary registration system. Therefore, CBO expects that the incremental cost of complying with the mandate would be small. (See http://www.cbo.gov/ftpdocs/93xx/doc9366/Senate_Housing.pdf at page 17.)

Finally, CBO's report refers to a previous CBO cost estimate report, issued November 9, 2007, on H.R. 3915, the Mortgage Reform and Anti-Predatory Lending Act of 2007, which was the legislation on which the SAFE Act was based. In its June 2008 report, CBO states that "Both H.R. 3915 and the Senate legislation [that corresponded to H.R. 3915] include nearly identical provisions that would establish a nationwide licensing system for the residential mortgage industry. As a result, the cost estimates associated with the proposed system are identical." (See http://www.cbo.gov/ftpdocs/93xx/doc9366/Senate_Housing.pdf at page 18.) CBO's November 9, 2007, report can

be found at <http://www.cbo.gov/ftpdocs/88xx/doc8804/hr3915.pdf>.

HUD uses the 5-year cost estimate of the national registration system directly above, and one-half of the 10-year estimates cited previously to produce a range of estimates for the economic cost of producing and maintaining the national registration system for 5 years (although the lack of detail prevents HUD from applying separate discount rates to these estimates): \$60 million to \$70 million.

As noted above, the CBO report estimated that 300,000 entities and individuals would register with the NMLSR over the next 5 years, meaning that such entities and individuals would be licensed or registered under the SAFE Act licensing law in the state or states in which such individuals or entities engage in the residential mortgage loan business. CSBS and AARMR, which submit an annual report to Congress, stated in their June 10, 2010, report to Congress, which described SAFE Act licensing activities and results as of the end of Calendar Year 2009, stated that NMLS reported 134,731 state licenses from 33 participating states. Since all states have now enacted SAFE Act licensing laws, that number is expected to be higher when CSBS and AARMR issue their report on 2010 activities and results to Congress in the summer of 2011. (See "States Report to Congress" at <http://www.aarmr.org/>.) The number of 134,731 individual licenses as of the end of Calendar Year 2009 reflects only a partial total of all potential SAFE Act registrants, but also may reflect reductions in total employment of loan originators associated with the recent economic crisis and changes in the loan origination industry. For the remainder of this analysis, HUD will assume a range of theoretically affected loan originators eventually registered under the SAFE Act of 150,000 to 300,000 nationwide.

Integrity Mortgage Licensing, a mortgage licensing service that assist mortgage companies with meeting national and state licensing requirements, provides, on its Web site,¹⁴ an overview of the requirements of the SAFE Act, as implemented by the states and, with respect to fees and costs that an individual residential mortgage loan originator may be required to pay, provides in relevant part as follows:

Twenty (20) hours of education is one of the major requirements [of the SAFE Act]. In order to get a license, a mortgage loan

originator must complete 20 hours of pre-licensing education that is offered by an approved education provider. * * * *The course will usually cost around \$299 to \$399.* (Emphasis added.) * * *

Also, eight (8) hours of continuing education is required each year to renew your license. * * *

The SAFE Act also requires that MLOs complete a test to obtain a mortgage loan originator license. To comply with this requirement, the states have worked together to make a National Test component that covers Federal laws and regulations for mortgage origination. This test is only required to be passed once for all states. However, each state has also developed its own state-specific test component. So the National Test component and the State Test component must be completed to obtain a license. Any states where you have done previous testing to obtain a loan originator license prior to these new requirements may allow you to certify those past tests to meet this new requirement. The National Test component would still be required, but you could be exempt from having to take the state test. *The National Test component costs \$92 and the State Test components cost \$69 each.* The components only need to be passed once to obtain the license and never need to be taken again. And make sure to study for the tests. Only Sixty-Seven Percent (67%) of applicants are passing the National test component. (Emphasis added.)

Each state is required under the SAFE Act to complete a criminal background check on MLO License applicants. To implement this there is a Federal fingerprinting that can be paid for when you submit an MLO License application. When fingerprints are taken, they are sent to the FBI and the FBI reviews them and puts together a report of any criminal convictions that match your record. These criminal background check reports are then sent to the state to review. Because the Federal fingerprinting only checks the FBI database, some states have decided to also require their own fingerprinting that would check their state criminal database. So you will definitely have to complete the Federal Fingerprinting once, but you also may have to complete a state fingerprinting requirement in some states. *The Federal fingerprinting costs \$39 and the state fingerprinting ranges from \$25 to \$60.* (Emphasis added.)

While the SAFE Act clearly establishes a minimum training and licensing requirement for mortgage loan originators, what is less clear is the extent to which this minimum requirement goes beyond what may have been required by states prior to the SAFE Act, or to the extent it comes in addition to education requirements the industry imposes on itself to ensure that employees are competent to originate mortgage loans. The training required by the SAFE Act is to ensure that mortgage loan originators operate ethically, competently, and in compliance with other Federal (and state) regulations. Such training would be needed with or

without enactment of the SAFE Act, so the question is whether the minimum SAFE Act training requirements exceed those the market finds necessary to produce ethical and competent loan originators knowledgeable of the regulatory environment in which they operate. CBO's report, in fact, stated that many loan originators were already subject to licensing and training fees by their states, and therefore the transition to the requirements imposed by the SAFE Act, and the costs associated with complying with its requirements would not be significantly different from licensing fees and training costs already in place in the states. For purposes of this analysis, HUD assumes that the incremental training requirements that would be imposed if HUD's rule imposing minimum SAFE Act requirements was binding in all states range from 0 to 20 hours for initial licensing, and from 0 to 8 hours for annual continuing education requirements. Since no estimates are available for the cost of the 8-hour annual refresher course, HUD estimates that they will cost about half the price of the 20-hour initial registration course as cited by Integrity Mortgage Licensing (\$150 to \$200).

If HUD were required to establish a licensing system, in accordance with this rule, because no state implemented a SAFE Act-compliant licensing statute, the educational course that Integrity Mortgage Licensing estimates at \$299 to \$399 would apply, as would the national test fees reported estimated at \$92. According to the NMLS Activity Report, the average number of state registrations per mortgage loan originator is 1.8.¹⁵ If HUD were required to establish a licensing system, it would need to account for variations among state laws, and for certifying loan originators' knowledge of state mortgage lending laws. To the extent that states could be grouped according to common legal structures and a single test would qualify a mortgage loan originator in all of the states in the group, a HUD-run national registration system would have a lower average number of separate state registrations per mortgage loan originator. HUD therefore demonstrates the costs of and average of: One state test for the low estimate (state test cost of \$69, total national and state test costs of \$161); 1.8 state tests for the high estimate (\$124, total \$216); and 1.4 state tests for the primary estimate (\$97, total \$189).

HUD assumes that the national fingerprinting and background check

¹⁴ See <http://www.integritymortgagelicensing.com/mortgage-licensing-news/the-safe-mortgage-licensing-act/>.

¹⁵ NMLS Activity Report, March 26, 2011: 99,787 unique individuals hold 181,157 state licenses.

cost estimated by Integrity Mortgage Licensing would apply (\$39), but that separate state fingerprinting and background check costs would not be present if HUD were the sole SAFE Act registrar.

HUD has no basis for estimate of the total time spent by loan originators to prepare for and take the national and state tests, and submit fingerprints. For purposes of this analysis, HUD demonstrates the costs for a loan originator candidate taking only one state exam at 12 hours, that these time costs rise with the number of state tests required proportionally to the total fees

for testing and fingerprinting, and that time in such activities is valued at \$75 per hour.¹⁶ HUD assumes the failure rate on the national test found by Integrity Mortgage Licensing of 33 percent applies and that anyone who fails their tests does not retake the training or the tests.

HUD has no basis for estimating the rate of turnover among mortgage loan originators. For purposes of this analysis, HUD demonstrates the costs for annual new licensing rates of 5, 10, and 15 percent at a constant steady state number of mortgage loan originators. Turnover has an impact on continuing

education estimates because new entrants will not require refresher training during the year that they enter the profession.

The table below presents low, primary, and high estimates of the cost of complying with the minimum SAFE Act statutory requirements in the counterfactual case of no state implementing any SAFE Act-compliant licensing requirements for mortgage loan originators, and HUD being charged with enforcing the minimum SAFE Act requirements as codified by this rule.

COSTS OF MINIMUM SAFE ACT REQUIREMENTS

Cost item	Low estimate	Primary estimate	High estimate
A. Registration System: Set-up and 5-year Maintenance	\$60,000,000	\$68,200,000	\$70,000,000
B. Mortgage Loan Originators Licensed	150,000	225,000	300,000
C. Mortgage Loan Originator License Applicants (= B/0.67)	223,881	335,821	447,761
D. SAFE-Certified 20-hour Training Course	\$299	\$349	\$399
E. Incremental Licensing Training Time Requirement Relative to Market (hours)	0	10	20
F. Opportunity Cost of Incremental Training (E hours @ \$75 per hour)	\$0	\$750	\$1,500
G. National and State Licensing Test	\$161	\$189	\$216
H. National Fingerprinting and Background Check	\$39	\$39	\$39
I. Opportunity Cost of Time for Test Preparation, Test Taking, and Fingerprinting (increasing with state test requirements @ \$75 per hour)	\$900	\$1,026	\$1,148
J. Total Cost to Loan Originators of Initial Registration = C*(D+F+G+H+I)	\$313,209,519	\$790,186,813	\$1,478,282,942
K. SAFE Certified 8-hour Refresher Training	\$150	\$175	\$200
L. Incremental Refresher Training Time Requirement Relative to Market (hours)	0	4	8
M. Opportunity Cost of Incremental Training (L hours @ \$75 per hour)	\$0	\$300	\$600
N. Total Annual Cost to Loan Originators of Refresher Training = B*(1-Q)*(K+M)	\$21,375,000	\$96,187,500	\$204,000,000
O. 5 Years Refresher Training Discounted at 7%	\$87,641,720	\$394,387,741	\$836,440,277
P. 5 Years Refresher Training Discounted at 3%	\$97,891,241	\$440,510,585	\$934,260,266
Q. Annual Replacement Rate of Loan Originators	5%	10%	15%
R. Annual New Licensing Attempts = B*Q/0.67	11,194	33,582	67,164
S. Annual Cost of New Licensing Attempts = R*(D+F+G+H+I)	\$15,660,406	\$79,018,446	\$221,741,946
T. 5 Years Annual New Licensing Attempts Discounted at 7%	\$64,210,757	\$323,991,230	\$909,185,758
U. 5 Years Annual New Licensing Attempts Discounted at 3%	\$71,720,074	\$361,881,345	\$1,015,513,184
V. Total 5-Year Cost of SAFE Act Discounted at 7% = A+J+O+T	\$525,061,996	\$1,576,765,784	\$3,293,908,977
W. Total 5-Year Cost of SAFE Act Discounted at 3% = A+J+P+U	\$542,820,834	\$1,660,778,743	\$3,498,056,392
X. Annualized Cost over 5 Years at 7%	\$128,057,735	\$384,558,502	\$803,353,748
Y. Annualized Cost over 5 Years at 3%	\$118,527,411	\$362,638,631	\$763,816,604

It is reiterated here that the above table is not an estimate of the costs of this rule, and should in no way be construed as such. Rather, the above estimates are for the costs that would be imposed by HUD to fulfill the statutory requirements of the SAFE Act if no state implemented any SAFE Act-compliant statute (or repealed pre-existing statutes that met the SAFE Act's requirements). As stated previously all 50 states, the District of Columbia, the Virgin Islands, Puerto Rico, and Guam have enacted SAFE Act licensing laws. Individual state requirements may exceed those that would be in place under HUD's rule if states had not implemented SAFE Act-compliant mortgage loan originator registration systems, but an estimate of

the actual cost of the SAFE Act as implemented by the several states is beyond the scope of this analysis.

However, section 1516 of the SAFE Act requires an annual report to Congress on the effectiveness of the SAFE Act's provisions, including legislative recommendations, if any, for strengthening consumer protections, enhancing examination standards, streamlining communication among all stakeholders involved in residential mortgage loan origination and processing, and establishing performance-based bonding requirements for mortgage originators or institutions that employ such brokers. The annual reports to be submitted to Congress this year, and more

importantly, in the succeeding years, after the SAFE Act licensing system is in full implementation across the country, will yield better information about the costs, as well as benefits of this nationwide statutory licensing system.

The docket file for this rule is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410-0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at

¹⁶ Harold Bunce, Alastair McFarlane, William J. Reid, and Kurt Usowski, "The Impact of Mortgage

Disclosure Reform under RESPA," *Cityscape*, 11 (2): 117-136. The figure used in the analysis for 2008

was \$72 per hour, which has the same purchasing power as \$74.73 in 2011.

202-708-3055 (this is not a toll-free number). Persons with hearing or speech impairments may access the above telephone number via TTY by calling the toll-free Federal Relay Service at 800-877-8339.

Congressional Review of Final Rules

As provided in HUD's statement under Executive Order 12866 (Regulatory Planning and Review), OMB determined that this rule is an economically significant rule and therefore also a "major rule" as defined in Chapter 8 of 5 U.S.C., based on the cost of compliance with requirements that were already imposed by Congress in the SAFE Act statute prior to the issuance of this rule. This rule therefore provides for a 60-day delayed effective date and will be submitted for congressional review in accordance with this chapter.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SAFE Act, which establishes minimum licensing requirements for loan originators, is largely directed to individuals who are loan originators as defined by the SAFE Act. The SAFE Act requires each individual to be licensed and registered under its requirements. With respect to the SAFE Act licensing standards, HUD is not, through this rule, establishing or implementing these licensing requirements, because the SAFE Act made these requirements self-implementing. Rather, through this rule, HUD codifies, in regulation, the SAFE Act minimum licensing standards, and to codify those clarifications and interpretations that HUD already has issued through Web site postings. HUD is, however, establishing regulations reflecting its oversight responsibilities under the SAFE Act. The codification of the licensing standards, together with HUD's oversight regulations, will provide a convenient location for regulated parties and interested individuals to reference SAFE Act requirements. Because the SAFE Act is not directed to entities, large or small, but to individuals, and because this rule is directed to HUD's oversight responsibilities, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

This rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act (42 U.S.C. 4321).

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of Section 6 of the Executive Order are met. This rule merely implements the statutory requirements of the SAFE Act and does not have federalism implications beyond those in the Act. This rule does not itself impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Section 201 of Title II limits the assessment to enforceable duties imposed by the regulation and excludes duties that "incorporate requirements specifically set forth in law." This rule does not add to the duties of states or individuals set forth in the SAFE Act statute, but instead clarifies classes of activities and individuals that are subject to the SAFE Act's statutory requirements. Accordingly, the costs identified by HUD above under the section "Executive Order 12866, Regulatory Planning and Review" are the costs of HUD's and individuals' compliance with the SAFE Act's statutory requirements in the counterfactual situation in which HUD were to implement licensing systems in all 50 states. Because this final rule does not add to the incorporated requirements specifically set forth in

law, it is not subject to the requirements of UMRA.

List of Subjects

24 CFR Part 30

Administrative practice and procedure, Grant programs—housing and community development, Loan programs—housing and community development, Mortgages, and Penalties.

24 CFR Part 3400

Licensing, Mortgages, Registration, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, HUD amends 24 CFR part 30 and adds a new 24 CFR part 3400, as follows:

PART 30—CIVIL MONEY PENALTIES: CERTAIN PROHIBITED CONDUCT

■ 1. The authority citation for part 30 continues to read as follows:

Authority: 12 U.S.C. 1701q-1, 1703, 1723i, 1735f-14, and 1735f-15; 15 U.S.C. 1717a; 28 U.S.C. 2461 note; 42 U.S.C. 1437z-1 and 3535(d).

■ 2. Add § 30.69 to subpart B to read as follows:

§ 30.69 SAFE Mortgage Licensing violations.

(a) *General.* HUD may impose a civil penalty on a loan originator operating in any state that is subject to a licensing system established by HUD under 12 U.S.C. 5107 and in accordance with subpart C of 24 CFR part 3400, if HUD finds that such loan originator has violated or failed to comply with any requirement of the SAFE Act, the provisions of 24 CFR part 3400, or an order issued under the authority of 12 U.S.C. 5113(c).

(b) *Maximum amount of penalty.* The maximum amount of penalty for each act or omission described in paragraph (a) of this section shall be \$25,000.

■ 3. Add part 3400, to read as follows:

PART 3400—SAFE MORTGAGE LICENSING ACT

Sec.

3400.1 Purpose.

3400.3 Confidentiality of information.

Subpart A—General

3400.20 Scope of this subpart.

3400.23 Definitions.

Subpart B—Determination of State Compliance With the SAFE Act

3400.101 Scope of this subpart.

3400.103 Individuals required to be licensed by states.

3400.105 Minimum loan originator license requirements.

- 3400.107 Minimum annual license renewal requirements.
 3400.109 Effective date of state requirements imposed on individuals.
 3400.111 Other minimum requirements for state licensing systems.
 3400.113 Performance standards.
 3400.115 Determination of noncompliance.

Subpart C—HUD's Loan Originator Licensing System and HUD's Nationwide Mortgage Licensing and Registry System

- 3400.201 Scope of this subpart.
 3400.203 HUD's establishment of loan originator licensing system.
 3400.205 HUD's establishment of nationwide mortgage licensing system and registry.

Subpart D—Minimum Requirements for Administration of the NMLSR

- 3400.301 Scope of this subpart.
 3400.303 Financial reporting.
 3400.305 Data security.
 3400.307 Fees.
 3400.309 Absence of liability for good-faith administration.

Subpart E—Enforcement of HUD Licensing System

- 3400.401 HUD's authority to examine loan originator records.
 3400.403 Enforcement proceedings.
 3400.405 Civil money penalties.
 Appendix A to Part 3400—Examples of Mortgage Loan Originator Activities
 Appendix B to Part 3400—Engaging in the Business of a Loan Originator: Commercial Context and Habitualness
 Appendix C to Part 3400—Independent Contractors and Loan Processor and Underwriter Activities That Require a State Mortgage Loan Originator License
 Appendix D to Part 3400—Attorneys: Circumstances That Require a State Mortgage Loan Originator License

Authority: 12 U.S.C. 5101–5116; 42 U.S.C. 3535(d).

§ 3400.1 Purpose.

(a) This part implements HUD's responsibilities under the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act) (12 U.S.C. 5101–5116). The SAFE Act strives to enhance consumer protection and reduce fraud by directing states to adopt minimum uniform standards for the licensing and registration of residential mortgage loan originators and to participate in a nationwide mortgage licensing system and registry database of residential mortgage loan originators. Under the SAFE Act, if HUD determines that a state's loan origination licensing system does not meet the minimum requirements of the SAFE Act, HUD is charged with establishing and implementing a system for all loan originators in that state. Additionally, if at any time HUD determines that the nationwide mortgage licensing system and registry is failing to meet the SAFE Act's requirements, HUD is charged

with establishing and maintaining a licensing and registry database for loan originators.

(b) Subpart A establishes the definitions applicable to this part. Subpart B provides the minimum standards that a state must meet in licensing loan originators, including standards for whom a state must require to be licensed, and sets forth HUD's procedure for determining a state's compliance with the minimum standards. Subpart C provides the requirements that HUD will apply in any state that HUD determines has not established a licensing and registration system in compliance with the minimum standards of the SAFE Act. Subpart D provides minimum requirements for the administration of the Nationwide Mortgage Licensing System and Registry. Subpart E clarifies HUD's enforcement authority in states in which it operates a state licensing system.

§ 3400.3 Confidentiality of information.

(a) Except as otherwise provided in this part, any requirement under Federal or state law regarding the privacy or confidentiality of any information or material provided to the Nationwide Mortgage Licensing System and Registry or a system established by the Secretary under this part, and any privilege arising under Federal or state law (including the rules of any Federal or state court) with respect to such information or material, shall continue to apply to such information or material after the information or material has been disclosed to the system. Such information and material may be shared with all state and Federal regulatory officials with mortgage industry oversight authority without the loss of privilege or the loss of confidentiality protections provided by Federal and state laws.

(b) Information or material that is subject to a privilege or confidentiality under paragraph (a) of this section shall not be subject to:

(1) Disclosure under any Federal or state law governing the disclosure to the public of information held by an officer or an agency of the Federal Government or the respective state; or

(2) Subpoena or discovery, or admission into evidence, in any private civil action or administrative process, unless with respect to any privilege held by the Nationwide Mortgage Licensing System and Registry or by the Secretary with respect to such information or material, the person to whom such information or material pertains, waives, in whole or in part, in the discretion of such person, that privilege.

(c) Any state law, including any state open record law, relating to the disclosure of confidential supervisory information or any information or material described in paragraph (a) of this section that is inconsistent with paragraph (a), shall be superseded by the requirements of such provision to the extent that state law provides less confidentiality or a weaker privilege.

(d) This section shall not apply with respect to the information or material relating to the employment history of, and publicly adjudicated disciplinary and enforcement actions against, loan originators that is included in the Nationwide Mortgage Licensing System and Registry for access by the public.

Subpart A—General

§ 3400.20 Scope of this subpart.

This subpart provides the definitions applicable to this part, and other general requirements applicable to this part.

§ 3400.23 Definitions.

Terms that are defined in the SAFE Act and used in this part have the same meaning as in the SAFE Act, unless otherwise provided in this section.

Administrative or clerical tasks means the receipt, collection, and distribution of information common for the processing or underwriting of a loan in the mortgage industry and communication with a consumer to obtain information necessary for the processing or underwriting of a residential mortgage loan.

American Association of Residential Mortgage Regulators is the national association of executives and employees of the various states who are charged with the responsibility for administration and regulation of residential mortgage lending, servicing, and brokering, and dedicated to the goals described at <http://www.aarmr.org>.

Application means 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.

Clerical or support duties:

(1) Include:

(i) The receipt, collection, distribution, and analysis of information common for the processing or underwriting of a residential mortgage loan; and

(ii) Communicating with a consumer to obtain the information necessary for the processing or underwriting of a loan, to the extent that such communication

does not include offering or negotiating loan rates or terms, or counseling consumers about residential mortgage loan rates or terms; and

(2) Does not include:

(i) Taking a residential mortgage loan application; or

(ii) Offering or negotiating terms of a residential mortgage loan.

Conference of State Bank Supervisors (CSBS) is the national organization composed of state bank supervisors dedicated to maintaining the state banking system and state regulation of financial services in accordance with the CSBS statement of principles described at <http://www.csbs.org>.

Employee:

(1) Subject to paragraph (2) of this definition, means:

(i) An individual:

(A) Whose manner and means of performance of work are subject to the right of control of, or are controlled by, a person, and

(B) Whose compensation for Federal income tax purposes is reported, or required to be reported, on a W-2 form issued by the controlling person.

(2) Has such binding definition as may be issued by the Federal banking agencies in connection with their implementation of their responsibilities under the SAFE Act.

Farm Credit Administration means the independent Federal agency, authorized by the Farm Credit Act of 1971, to examine and regulate the Farm Credit System.

Federal banking agencies means the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the National Credit Union Administration, and the Federal Deposit Insurance Corporation.

For compensation or gain. See

§ 3400.103(c)(2)(ii).

Independent contractor means an individual who performs his or her duties other than at the direction of and subject to the supervision and instruction of an individual who is licensed and registered in accordance with § 3400.103(a), or is not required to be licensed, in accordance with § 3400.103(e)(5), (e)(6), or (e)(7).

Loan originator. See § 3400.103.

Loan processor or underwriter, for purposes of this part, means an individual who, with respect to the origination of a residential mortgage loan, performs clerical or support duties at the direction of and subject to the supervision and instruction of:

(1) A state-licensed loan originator; or

(2) A registered loan originator.

Nationwide Mortgage Licensing System and Registry or NMLSR means

the mortgage licensing system developed and maintained by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators for the licensing and registration of loan originators and the registration of registered loan originators or any system established by the Secretary of HUD, as provided in subpart D of this part.

Nontraditional mortgage product means any mortgage product other than a 30-year fixed-rate mortgage.

Origination of a residential mortgage loan, for purposes of the definition of *loan processor or underwriter*, means all residential mortgage loan-related activities from the taking of a residential mortgage loan application through the completion of all required loan closing documents and funding of the residential mortgage loan.

Real estate brokerage activities mean any activity that involves offering or providing real estate brokerage services to the public including—

(1) Acting as a real estate agent or real estate broker for a buyer, seller, lessor, or lessee of real property;

(2) Bringing together parties interested in the sale, purchase, lease, rental, or exchange of real property;

(3) Negotiating, on behalf of any party, any portion of a contract relating to the sale, purchase, lease, rental, or exchange of real property (other than in connection with providing financing with respect to any such transaction);

(4) Engaging in any activity for which a person engaged in the activity is required to be registered as a real estate agent or real estate broker under any applicable law; and

(5) Offering to engage in any activity, or act in any capacity, described in paragraphs (1), (2), (3), or (4) of this definition.

Residential mortgage loan means any loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling (as defined in section 103(v) of the Truth in Lending Act) or residential real estate upon which is constructed or intended to be constructed a dwelling (as so defined).

Secretary means the Secretary of Housing and Urban Development.

State means any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

Unique identifier means a number or other identifier that:

(1) Permanently identifies a loan originator;

(2) Is assigned by protocols established by the Nationwide Mortgage Licensing System and Registry and the Federal banking agencies to facilitate electronic tracking of loan originators and uniform identification of, and public access to, the employment history of and the publicly adjudicated disciplinary and enforcement actions against loan originators; and

(3) Shall not be used for purposes other than those set forth under the SAFE Act.

Subpart B—Determination of State Compliance with the SAFE Act

§ 3400.101 Scope of this subpart.

This subpart describes the minimum standards of the SAFE Act that apply to a state's licensing and registering of loan originators. This subpart also provides the procedures that HUD follows to determine that a state does not have in place a system for licensing and registering mortgage loan originators that complies with the minimum standards. Upon making such a determination, HUD will impose the requirements and exercise the enforcement authorities described in subparts C and E of this part.

§ 3400.103 Individuals required to be licensed by states.

(a) Except as provided in paragraph (e) of this section, in order to operate a SAFE-compliant program, a state must prohibit an individual from engaging in the business of a loan originator with respect to any dwelling or residential real estate in the state, unless the individual first:

(1) Registers as a loan originator through and obtains a unique identifier from the NMLSR, and

(2) Obtains and maintains a valid loan originator license from the state.

(b) An individual engages in the business of a loan originator if the individual, in a commercial context and habitually or repeatedly:

(1)(i) Takes a residential mortgage loan application; and

(ii) Offers or negotiates terms of a residential mortgage loan for compensation or gain; or

(2) Represents to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationery, brochures, signs, rate lists, or other promotional items), that such individual can or will perform the activities described in paragraph (b)(1) of this section.

(c)(1) An individual "takes a residential mortgage loan application" if the individual receives a residential

mortgage loan application for the purpose of facilitating a decision whether to extend an offer of residential mortgage loan terms to a borrower or prospective borrower (or to accept the terms offered by a borrower or prospective borrower in response to a solicitation), whether the application is received directly or indirectly from the borrower or prospective borrower.

(2) An individual “offers or negotiates terms of a residential mortgage loan for compensation or gain” if the individual:

(i)(A) Presents for consideration by a borrower or prospective borrower particular residential mortgage loan terms;

(B) Communicates directly or indirectly with a borrower, or prospective borrower for the purpose of reaching a mutual understanding about prospective residential mortgage loan terms; or

(C) Recommends, refers, or steers a borrower or prospective borrower to a particular lender or set of residential mortgage loan terms, in accordance with a duty to or incentive from any person other than the borrower or prospective borrower; and

(ii) Receives or expects to receive payment of money or anything of value in connection with the activities described in paragraph (c)(2)(i) of this section or as a result of any residential mortgage loan terms entered into as a result of such activities.

(d)(1) Except as provided in paragraph (e) of this section, a state must prohibit an individual who is an independent contractor from engaging in residential mortgage loan origination activities as a loan processor or underwriter with respect to any dwelling or residential real estate in the state, unless the individual first:

(i) Registers as a loan originator through and obtains a unique identifier from the NMLSR, and

(ii) Obtains and maintains a valid loan originator license from the state.

(2) An individual “engages in residential mortgage loan origination activities as a loan processor or underwriter” if, with respect to a residential mortgage loan application, the individual performs clerical or support duties.

(e) A state is not required to impose the prohibitions required under paragraphs (a) and (d) of this section on the following individuals:

(1) An individual who performs only real estate brokerage activities and is licensed or registered in accordance with applicable state law, unless the individual is compensated directly or indirectly by a lender, mortgage broker, or other loan originator or by an agent

of such lender, mortgage broker, or other loan originator;

(2) An individual who is involved only in extensions of credit relating to timeshare plans, as that term is defined in 11 U.S.C. 101(53D);

(3) An individual who performs only clerical or support duties and:

(i) Who does so at the direction of and subject to the supervision and instruction of an individual who:

(A) Is licensed and registered in accordance with paragraph (a) of this section, or

(B) Is not required to be licensed in accordance with paragraph (e)(5); or

(ii) Who performs such duties solely with respect to transactions for which the individual who acts as a loan originator is not required to be licensed, in accordance with paragraph (e)(2), (e)(6), or (e)(7) of this section;

(4) An individual who performs only purely administrative or clerical tasks on behalf of a loan originator;

(5) An individual who is lawfully registered with, and maintains a unique identifier through, the Nationwide Mortgage Licensing System and Registry, and who is an employee of

(i) A depository institution;

(ii) A subsidiary that is:

(A) Owned and controlled by a depository institution; and

(B) Regulated by a Federal banking agency; or

(iii) An institution regulated by the Farm Credit Administration;

(6)(i) An individual who is an employee of a Federal, state, or local government agency or housing finance agency and who acts as a loan originator only pursuant to his or her official duties as an employee of the Federal, state, or local government agency or housing finance agency.

(ii) For purposes of this paragraph (e)(6), the term “employee” has the meaning provided in paragraph (1) of the definition of employee in § 3400.23 and excludes the meaning provided in paragraph (2) of the definition.

(iii) For purposes of this paragraph (e)(6), the term “housing finance agency” means any authority:

(A) That is chartered by a state to help meet the affordable housing needs of the residents of the state;

(B) That is supervised directly or indirectly by the state government;

(C) That is subject to audit and review by the state in which it operates; and

(D) Whose activities make it eligible to be a member of the National Council of State Housing Agencies.

(7)(i) An employee of a bona fide nonprofit organization who acts as a loan originator only with respect to his or her work duties to the bona fide

nonprofit organization, and who acts as a loan originator only with respect to residential mortgage loans with terms that are favorable to the borrower.

(ii) For an organization to be considered a bona fide nonprofit organization under this paragraph, a state supervisory authority that opts not to require licensing of the employee must determine, under criteria and pursuant to processes established by the state, that the organization:

(A) Has the status of a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986;

(B) Promotes affordable housing or provides homeownership education, or similar services;

(C) Conducts its activities in a manner that serves public or charitable purposes, rather than commercial purposes;

(D) Receives funding and revenue and charges fees in a manner that does not incentivize it or its employees to act other than in the best interests of its clients;

(E) Compensates its employees in a manner that does not incentivize employees to act other than in the best interests of its clients;

(F) Provides or identifies for the borrower residential mortgage loans with terms favorable to the borrower and comparable to mortgage loans and housing assistance provided under government housing assistance programs; and

(G) Meets other standards that the state determines are appropriate.

(iii) A state must periodically examine the books and activities of an organization it determines is a bona fide nonprofit organization and revoke its status as a bona fide nonprofit organization if it does not continue to meet the criteria under paragraph (e)(ii) of this section;

(iv) For residential mortgage loans to have terms that are favorable to the borrower, a state must determine that the terms are consistent with loan origination in a public or charitable context, rather than a commercial context.

(f) A state must require an individual licensed in accordance with paragraphs (a) or (d) of this section to renew the loan originator license no less often than annually.

§ 3400.105 Minimum loan originator license requirements.

For an individual to be eligible for a loan originator license required under § 3400.103(a) and (d), a state must require and find, at a minimum, that an individual:

(a) Has never had a loan originator license revoked in any governmental

jurisdiction, except that a formally vacated revocation shall not be deemed a revocation;

(b)(1) Has never been convicted of, or pled guilty or *nolo contendere* to, a felony in a domestic, foreign, or military court;

(i) During the 7-year period preceding the date of the application for licensing; or

(ii) At any time preceding such date of application, if such felony involved an act of fraud, dishonesty, a breach of trust, or money laundering.

(2) For purposes of this paragraph (b):

(i) Expunged convictions and pardoned convictions do not, in themselves affect the eligibility of the individual; and

(ii) Whether a particular crime is classified as a felony is determined by the law of the jurisdiction in which an individual is convicted.

(c) Has demonstrated financial responsibility, character, and general fitness, such as to command the confidence of the community and to warrant a determination that the loan originator will operate honestly, fairly, and efficiently, under reasonable standards established by the individual state.

(d) Completed at least 20 hours of pre-licensing education that has been reviewed and approved by the Nationwide Mortgage Licensing System and Registry. The pre-licensing education completed by the individual must include at least:

(1) 3 hours of Federal law and regulations;

(2) 3 hours of ethics, which must include instruction on fraud, consumer protection, and fair lending issues; and

(3) 2 hours of training on lending standards for the nontraditional mortgage product marketplace.

(e)(1) Achieved a test score of not less than 75 percent correct answers on a written test developed by the NMLSR in accordance with 12 U.S.C. 5105(d).

(2) To satisfy the requirement under paragraph (e)(1) of this section, an individual may take a test three consecutive times, with each retest occurring at least 30 days after the preceding test. If an individual fails three consecutive tests, the individual must wait at least 6 months before taking the test again.

(3) If a formerly state-licensed loan originator fails to maintain a valid license for 5 years or longer, not taking into account any time during which such individual is a registered loan originator, the individual must retake the test and achieve a test score of not less than 75 percent correct answers.

(f) Be covered by either a net worth or surety bond requirement, or pays into a state fund, as required by the state loan originator supervisory authority.

(g) Has submitted to the NMLSR fingerprints for submission to the Federal Bureau of Investigation and to any government agency for a state and national criminal history background check; and

(h) Has submitted to the NMLSR personal history and experience, which must include authorization for the NMLSR to obtain:

(1) Information related to any administrative, civil, or criminal findings by any governmental jurisdiction; and

(2) An independent credit report.

§ 3400.107 Minimum annual license renewal requirements.

For an individual to be eligible to renew a loan originator license as required under § 3400.103(f), a state must require the individual:

(a)(1) To continue to meet the minimum standards for license issuance provided in § 3400.105; and

(2) To satisfy annual continuing education requirements, which must include at least 8 hours of education approved by the NMLSR. The 8 hours of annual continuing education must include at least:

(i) 3 hours of Federal law and regulations;

(ii) 2 hours of ethics (including instruction on fraud, consumer protection, and fair lending issues); and

(iii) 2 hours of training related to lending standards for the nontraditional mortgage product marketplace.

(b) A state must provide that a state-licensed loan originator may only receive credit for a continuing education course in the year in which the course is taken, and that a state-licensed loan originator may not apply credits for education courses taken in one year to meet the continuing education requirements of subsequent years. A state must provide that an individual may not meet the annual requirements for continuing education by taking an approved course more than one time in the same year or in successive years.

(c) An individual who is an instructor of an approved continuing education course may receive credit for the individual's own annual continuing education requirement at the rate of 2 hours credit for every one hour taught.

§ 3400.109 Effective date of state requirements imposed on individuals.

(a) Except as provided in paragraphs (b) and (c) of this section, a state must provide that the effective date for

requirements it imposes in accordance with §§ 3400.103, 3400.105, and 3400.107 is no later than August 29, 2011.

(b) For an individual who was permitted to perform residential mortgage loan originations under state legislation or regulations enacted or promulgated prior to the state's enactment or promulgation of a licensing system that complies with this subpart, a state may delay the effective date for requirements it imposes in accordance with §§ 3400.103, 3400.105, and 3400.107 to no later than August 29, 2011. For purposes of this paragraph (b), an individual was permitted to perform residential mortgage loan originations only if prior state law required the individual to be licensed, authorized, registered, or otherwise granted a form of affirmative and revocable government permission for individuals as a condition of performing residential mortgage loan originations.

(c) HUD may approve a later effective 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 and in obtaining state licenses within one year.

§ 3400.111 Other minimum requirements for state licensing systems.

(a) *General.* A state must maintain a loan originator licensing, supervisory, and oversight authority (supervisory authority) that provides effective supervision and enforcement, in accordance with the minimum standards provided in this section and in § 3400.113.

(b) *Authorities.* A supervisory authority must have the legal authority and mechanisms:

(1) To examine any books, papers, records, or other data of any loan originator operating in the state;

(2) To summon any loan originator operating in the state, or any person having possession, custody, or care of the reports and records relating to such a loan originator, to appear before the supervisory authority at a time and place named in the summons and to produce such books, papers, records, or other data, and to give testimony, under oath, as may be relevant or material to an investigation of such loan originator for compliance with the requirements of the SAFE Act;

(3) To administer oaths and affirmations and examine and take and preserve testimony under oath as to any

matter in respect to the affairs of any such loan originator;

(4) To enter an order requiring any individual or person that is, was, or would be a cause of a violation of the SAFE Act as implemented by the state, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same requirement;

(5) To suspend, terminate, and refuse renewal of a loan originator license for violation of state or Federal law; and

(6) To impose civil money penalties for individuals acting as loan originators, or representing themselves to the public as loan originators, in the state without a valid license or registration.

(c) A supervisory authority must have established processes in place to verify that individuals subject to the requirement described in § 3400.103(a)(1) and (d)(1) are registered with the NMLSR.

(d) The supervisory authority must be required under state law to regularly report violations of such law, as well as enforcement actions and other relevant information, to the NMLSR.

(e) The supervisory authority must have a process in place for challenging information contained in the NMLSR.

(f) The supervisory authority must require a loan originator to ensure that all residential mortgage loans that close as a result of the loan originator engaging in activities described in § 3400.103(b)(1) are included in reports of condition submitted to the NMLSR. Such reports of condition shall be in such form, shall contain such information, and shall be submitted with such frequency and by such dates as the NMLSR may reasonably require.

§ 3400.113 Performance standards.

(a) For HUD to determine that a state is providing effective supervision and enforcement, a supervisory authority must meet the following performance standards:

(1) The supervisory authority must participate in the NMLSR;

(2) The supervisory authority must approve or deny loan originator license applications and must renew or refuse to renew existing loan originator licenses for violations of state or Federal law;

(3) The supervisory authority must discipline loan originator licensees with appropriate enforcement actions, such as license suspensions or revocations, cease-and-desist orders, civil money penalties, and consumer refunds for violations of state or Federal law;

(4) The supervisory authority must examine or investigate loan originator licensees in a systematic manner based on identified risk factors or on a periodic schedule.

(b) A supervisory authority that is accredited under the Conference of State Bank Supervisors-American Association of Residential Mortgage Regulators Mortgage Accreditation Program will be presumed by HUD to be compliant with the requirements of this section.

§ 3400.115 Determination of noncompliance.

(a) *Evidence of compliance.* Any time a state enacts legislation that affects its compliance with the SAFE Act, it must notify HUD. Upon request from HUD, a state must provide evidence that it is in compliance with the requirements of the SAFE Act and this part, including citations to applicable state law, and regulations; descriptions of processes followed by the state's supervisory authority; and data concerning examination, investigation, and enforcement actions.

(b) *Initial determination of noncompliance.* If HUD makes an initial determination that a state is not in compliance with the SAFE Act, HUD will notify the state and will publish, in the *Federal Register*, a notice providing HUD's initial determination and presenting the opportunity for public comment for a period of no less than 30 days. This public comment period will allow the residents of the state and other interested members of the public to comment on HUD's initial determination.

(c) *Final determination of noncompliance.* In making a final determination of noncompliance, HUD will review additional information that may be offered by a state and the comments submitted during the public comment period described in paragraph (b) of this section. If HUD makes a final determination that a state does not have in place by law or regulation a system that complies with the minimum requirements of the SAFE Act, as described in this part, HUD will publish that final determination in the **Federal Register**.

(d) *Good-faith effort to comply.* If HUD makes the final determination described in paragraph (c) of this section, but HUD finds that the state is making a good-faith effort to meet the requirements of 12 U.S.C. 5104, 5105, 5107(d), and this subpart, HUD may grant the state a period of not more than 24 months to comply with these requirements. If an extension is granted to the state in accordance with this paragraph (d), then HUD will provide an

additional initial and final determination process before it determines that the state is not in compliance and is subject to subparts C and E of this part.

(e) *Effective date of subparts C and E.* The provisions of subparts C and E of this part will become effective with respect to a state for which a final determination of noncompliance has been made upon:

(1) The effective date of HUD's final determination with respect to the state, pursuant to paragraph (c) of this section, unless an extension had been granted to the state in accordance with paragraph (d) of this section; or

(2) If an extension had been granted to the state in accordance with paragraph (d) of this section, the effective date of HUD's subsequent final determination with respect to the state following the expiration of the period of time granted pursuant to paragraph (d) of this section.

Subpart C—HUD's Loan Originator Licensing System and Nationwide Mortgage Licensing and Registry System

§ 3400.201 Scope of this subpart.

The SAFE Act provides HUD with "backup authority" to establish a loan originator licensing system for any state that is determined by HUD not to be in compliance with the minimum standards of the SAFE Act. The provisions of this subpart become applicable to individuals in a state as provided in § 3400.115(e). The SAFE Act also authorizes HUD to establish and maintain a nationwide mortgage licensing system and registry if HUD determines that the NMLSR is failing to meet the purposes and requirements of the SAFE Act for a comprehensive licensing, supervisory, and tracking system for loan originators.

§ 3400.203 HUD's establishment of loan originator licensing system.

If HUD determines, in accordance with § 3400.115(e), that a state has not established a licensing and registration system in compliance with the minimum standards of the SAFE Act, HUD shall apply to individuals in that state the minimum standards of the SAFE Act, as specified in subpart B, which provides the minimum requirements that a state must meet to be in compliance with the SAFE Act, and as may be further specified in this part.

§ 3400.205 HUD's establishment of nationwide mortgage licensing system and registry.

If HUD determines that the NMLSR established by CSBS and AARMR does not meet the minimum requirements of subpart D of this part, HUD will establish and maintain a nationwide mortgage licensing system and registry.

Subpart D—Minimum Requirements for Administration of the NMLSR

§ 3400.301 Scope of this subpart.

This subpart establishes minimum requirements that apply to administration of the NMLSR by the Conference of State Bank Supervisors or by HUD. The NMLSR must accomplish the following objectives:

(a) Provides uniform license applications and reporting requirements for state-licensed loan originators.

(b) Provides a comprehensive licensing and supervisory database.

(c) Aggregates and improves the flow of information to and between regulators.

(d) Provides increased accountability and tracking of loan originators.

(e) Streamlines the licensing process and reduces the regulatory burden.

(f) Enhances consumer protections and supports anti-fraud measures.

(g) Provides 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.

(h) Establishes a means by which residential mortgage loan originators would, to the greatest extent possible, be required to act in the best interests of the consumer.

(i) Facilitates responsible behavior in the mortgage marketplace and provides comprehensive training and examination requirements related to mortgage lending.

(j) Facilitates the collection and disbursement of consumer complaints on behalf of state and Federal mortgage regulators.

§ 3400.303 Financial reporting.

To the extent that CSBS maintains the NMLSR, CSBS must annually provide to HUD, and HUD will annually collect and make available to the public, NMLSR financial statements, audited in accordance with Generally Accepted Accounting Principles (GAAP) promulgated by the Federal Accounting Standards Advisory Board, and other data. These financial statements and other data shall include, but not be

limited to, the level and categories of funds received in relation to the NMLSR and how such funds are spent, including the aggregate total of funds paid for system development and improvements, the aggregate total of salaries and bonuses paid, the aggregate total of other administrative costs, and detail on other money spent, including money and interest paid to reimburse system investors or lenders, and a report of each state's activity with respect to the NMLSR, including the number of licensees, the state's financial commitment to the system, and the fees collected by the state through the NMLSR.

§ 3400.305 Data security.

(a) To the extent that CSBS, AARMR, or their successors, maintain the NMLSR, CSBS, AARMR, and their successors, as applicable, must complete a background check on their employees, contractors, or other persons who have access to loan originators' Social Security Numbers, fingerprints, or any credit reports collected by the system.

(b) To the extent that CSBS, AARMR, or their successors, maintain the NMLSR, CSBS, AARMR, and their successors as applicable, must keep and adhere to an appropriate information security and privacy policy. If the NMLSR forms a reasonable belief that a security breach has occurred, it shall notify affected parties, as soon as practicable, including HUD, any loan originators or registrants whose data may have been compromised, and the employer of the loan originator or registrant, if such employer is also licensed through the system.

§ 3400.307 Fees.

CSBS, AARMR, or HUD, as applicable, may charge reasonable fees to cover the costs of maintaining and providing access to information from the Nationwide Mortgage Licensing System and Registry. Fees shall not be charged to consumers for access to such system and registry. If HUD determines to charge fees, the fees to be charged shall be issued by notice with the opportunity for comment prior to any fees being charged.

§ 3400.309 Absence of liability for good-faith administration.

HUD or any organization serving as the administrator of the Nationwide Mortgage Licensing System and Registry or a system established by HUD under 12 U.S.C. 5108 and in accordance with subpart C, or any officer or employee of HUD or HUD's designee, shall not be subject to any civil action or proceeding

for monetary damages by reason of the good-faith action or omission of any officer or employee of any such entity, while acting within the scope of office or employment, relating to the collection, furnishing, or dissemination of information concerning persons who are loan originators or are applying for licensing or registration as loan originators.

Subpart E—Enforcement of HUD Licensing System

§ 3400.401 HUD's authority to examine loan originator records.

(a) *Summons authority.* HUD may:

(1) Examine any books, papers, records, or other data of any loan originator operating in any state which is subject to a licensing system established by HUD under subpart C of this part; and

(2) Summon any loan originator referred to in paragraph (a)(1) of this section or any person having possession, custody, or care of the reports and records relating to such loan originator, to appear before a HUD representative at a time and place named in the summons and to produce such books, papers, records, or other data, and to give testimony, under oath, as may be relevant or material to an investigation of such loan originator for compliance with the requirements of the SAFE Act.

(b) *Examination authority*—(1) *In general.* If HUD establishes a licensing system under 12 U.S.C. 5107 and in accordance with subpart C of this part for any state, HUD shall appoint examiners for the purposes of ensuring the appropriate administration of the HUD licensing system.

(2) *Power to examine.* Any examiner appointed under paragraph (b)(1) of this section shall have power, on behalf of HUD, to make any examination of any loan originator operating in any state which is subject to a licensing system established by HUD under 12 U.S.C. 5107 and in accordance with subpart C of this part, whenever HUD determines that an examination of any loan originator is necessary to determine the compliance by the originator with minimum requirements of the SAFE Act.

(3) *Report of examination.* Each HUD examiner appointed under paragraph (b)(1) of this section shall make a full and detailed report to HUD of examination of any loan originator examined under this section.

(4) *Administration of oaths and affirmations; evidence.* In connection with examinations of loan originators operating in any state which is subject

to a licensing system established by HUD under 12 U.S.C. 5107, and in accordance with subpart C of this part, or with other types of investigations to determine compliance with applicable law and regulations, HUD and the examiners appointed by HUD may administer oaths and affirmations and examine and take and preserve testimony under oath as to any matter in respect to the affairs of any such loan originator.

(5) *Assessments.* The cost of conducting any examination of any loan originator operating in any state which is subject to a licensing system established by HUD under 12 U.S.C. 5107 and in accordance with subpart C of this part shall be assessed by HUD against the loan originator to meet the Secretary's expenses in carrying out such examination.

§ 3400.403 Enforcement proceedings.

(a) *Cease and desist proceeding.* (1) If HUD finds, after notice and opportunity for hearing in accordance with subpart A of part 26, that any person is violating, has violated, or is about to violate any provision of the SAFE Act, the provisions of this part, or a provision of state law enacted or promulgated under the SAFE Act, to which the person is subject and with respect to a state that is subject to a licensing system established by HUD under 12 U.S.C. 5107 and in accordance with subpart C of this part, HUD may publish such findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation.

(2) The order authorized by paragraph (a)(1) of this section may, in addition to requiring a person to cease and desist from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision or regulation, upon such terms and conditions and within such time as HUD may specify in such order.

(3) Any order issued under paragraph (a)(1) of this section may, as HUD determines appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as HUD may specify, with such provision or regulation with respect to any loan originator.

(b) *Hearing.* The notice instituting proceedings in accordance with paragraph (a) of this section shall

establish a hearing date not earlier than 30 days nor later than 60 days after the date of service of the notice unless an earlier or a later date is set by HUD with the consent of any respondent so served.

(c) *Temporary order—(1) Issuance of a temporary order.* Whenever HUD determines that the alleged violation or threatened violation specified in the notice instituting proceedings in accordance with paragraph (a) of this section, or the continuation thereof, is likely to result in significant dissipation or conversion of assets, significant harm to consumers, or substantial harm to the public interest prior to the completion of the proceedings, HUD may enter a temporary order requiring the respondent to cease and desist from the violation or threatened violation and to take such action to prevent the violation or threatened violation and to prevent dissipation or conversion of assets, significant harm to consumers, or substantial harm to the public interest as HUD determines appropriate pending completion of such proceedings.

(i) The order authorized by paragraph (c)(1) of this section shall be entered only after notice and opportunity for a hearing, unless HUD determines that notice and hearing prior to entry would be impracticable or contrary to the public interest.

(ii) The temporary order authorized by paragraph (c)(1) of this section shall become effective upon the date of service upon the respondent and, unless set aside, limited, or suspended by HUD or a court of competent jurisdiction, shall remain effective and enforceable pending the completion of the proceedings.

(2) *Review of temporary orders—(i) Review by HUD.* At any time after the respondent has been served with a temporary cease-and-desist order pursuant to paragraph (c)(1) of this section, the respondent may apply to HUD to have the order set aside, limited, or suspended. If the respondent has been served with a temporary cease-and-desist order entered without a prior hearing before HUD, the respondent may, within 10 days after the date on which the order was served, request a hearing on such application, and HUD shall hold a hearing and render a decision on such application at the earliest possible time.

(ii) *Judicial review.* (A) Within 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior hearing before HUD or within 10 days after HUD renders a decision on an application and hearing under paragraph (b) of this section, with respect to any temporary cease-and-desist order entered without a

prior hearing before HUD, the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order.

(B) A respondent served with a temporary cease-and-desist order entered without a prior hearing before the Secretary may not apply to the court, except after a hearing and decision by HUD on the respondent's application under paragraph (c)(2)(i) of this section.

(C) The commencement of proceedings under paragraph (b) of this section shall not, unless specifically ordered by the court, operate as a stay of HUD's order.

(d) *Authority of the secretary to prohibit persons from serving as loan originators.* In any cease-and-desist proceeding under this section, HUD may issue an order to prohibit, conditionally or unconditionally, and permanently or for such period of time as HUD shall determine, any person who has violated this title or regulations thereunder, from acting as a loan originator if the conduct of that person demonstrates unfitness to serve as a loan originator.

§ 3400.405 Civil money penalties.

HUD may impose civil money penalties on a loan originator operating in any state which is subject to a licensing system established by HUD under 12 U.S.C. 5107 and in accordance with subpart C of this part, as provided in 24 CFR 30.69.

Appendix A to 24 CFR Part 3400

Examples of Mortgage Loan Originator Activities

This Appendix provides examples to aid in the understanding of activities that would cause an individual to fall within or outside the definition of a mortgage loan originator under this part 3400. The examples in this Appendix are not all inclusive. They illustrate only the issue described and do not illustrate any other issues that may arise. For purposes of the examples below, the term "loan" refers to a residential mortgage loan as defined in § 3400.23 of this part.

Taking a Loan Application. Taking a residential mortgage loan application within the meaning of § 3400.103(c)(1) means receipt by an individual, for the purpose of facilitating a decision whether to extend an offer of loan terms to a borrower or prospective borrower, of an application as defined in § 3400.23 (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 whether to make such an offer).

(a) The following are examples to illustrate when an individual takes, or does not take, a loan application:

(1) An individual “takes a residential mortgage loan application” even if the individual:

(i) Has received the borrower or prospective borrower’s request or information indirectly. Section 3400.103(c)(1) provides that an individual takes an application, whether he or she receives it “directly or indirectly” from the borrower or prospective borrower. This means that an individual who offers or negotiates residential mortgage loan terms for compensation or gain cannot avoid licensing requirements simply by having another person physically receive the application from the prospective borrower and then pass the application to the individual;

(ii) Is not responsible for verifying information. The fact that an individual who takes application information from a borrower or prospective borrower is not responsible for verifying that information—for example, the individual is a mortgage broker who collects and sends that information to a lender—does not mean that the individual is not taking an application;

(iii) Only inputs the information into an online application or other automated system; or

(iv) Is not involved in approval of the loan, including determining whether the consumer qualifies for the loan. Similar to an individual who is not responsible for verification, an individual can still “take a residential mortgage loan application” even if he or she is not ultimately responsible for approving the loan. A mortgage broker, for example, can take a residential mortgage loan application even though it is passed on to a lender for a decision on whether the borrower qualifies for the loan and for the ultimate loan approval.

(2) An individual does not take a loan application merely because the individual performs any of the following actions:

(i) Receives a loan application through the mail and forwards it, without review, to loan approval personnel. HUD interprets the term “takes a residential mortgage loan application” to exclude an individual whose only role with respect to the application is physically handling a completed application form or transmitting a completed form to a lender on behalf of a borrower or prospective borrower. This interpretation is consistent with the definition of “loan originator” in section 1503(3) of the SAFE Act.

(ii) Assists a borrower or prospective borrower who is filling out an application by explaining the contents of the application and where particular borrower information is to be provided on the application;

(iii) Generally describes for a borrower or prospective borrower the loan application process without a discussion of particular loan products; or

(iv) In response to an inquiry regarding a prequalified offer that a borrower or prospective borrower has received from a lender, collects only basic identifying

information about the borrower or prospective borrower on behalf of that lender.

Offering or Negotiating Terms of a Loan.

The following examples are designed to illustrate when an individual offers or negotiates terms of a loan within the meaning of § 3400.103(c)(2) and, conversely, what does not constitute offering or negotiating terms of a loan:

(a) Offering or negotiating the terms of a loan includes:

(1) Presenting for consideration by a borrower or prospective borrower particular loan terms, whether verbally, in writing, or otherwise, even if:

(i) Further verification of information is necessary;

(ii) The offer is conditional;

(iii) Other individuals must complete the loan process;

(iv) The individual lacks authority to negotiate the interest rate or other loan terms; or

(v) The individual lacks authority to bind the person that is the source of the prospective financing.

(2) Communicating directly or indirectly with a borrower or prospective borrower for the purpose of reaching a mutual understanding about prospective residential mortgage loan terms, including responding to a borrower or prospective borrower’s request for a different rate or different fees on a pending loan application by presenting to the borrower or prospective borrower a revised loan offer, even if a mutual understanding is not subsequently achieved.

(b) Offering or negotiating terms of a loan does not include any of the following activities:

(1) Providing general explanations or descriptions in response to consumer queries, such as explaining loan terminology (e.g., debt-to-income ratio) or lending policies (e.g., the loan-to-value ratio policy of the lender), or describing product-related services;

(2) Arranging the loan closing or other aspects of the loan process, including by communicating with a borrower or prospective borrower about those arrangements, provided that any communication that includes a discussion about loan terms only verifies terms already agreed to by the borrower or prospective borrower;

(3) Providing a borrower or prospective borrower with information unrelated to loan terms, such as the best days of the month for scheduling loan closings at the bank;

(4) Making an underwriting decision about whether the borrower or prospective borrower qualifies for a loan;

(5) Explaining or describing the steps that a borrower or prospective borrower would need to take in order to obtain a loan offer, including providing general guidance about qualifications or criteria that would need to be met that is not specific to that borrower or prospective borrower’s circumstances;

(6) Communicating on behalf of a mortgage loan originator that a written offer has been sent to a borrower or prospective borrower without providing any details of that offer; or

(7) Offering or negotiating loan terms solely through a third-party licensed loan

originator, so long as the nonlicensed individual does not represent to the public that he or she can or will perform covered activities and does not communicate with the borrower or potential borrower. For example:

(i) A seller who provides financing to a purchaser of a dwelling owned by that seller in which the offer and negotiation of loan terms with the borrower or prospective borrower is conducted exclusively by a third-party licensed loan originator;

(ii) An individual who works solely for a lender, when the individual offers loan terms exclusively to third-party licensed loan originators and not to borrowers or potential borrowers.

For Compensation or Gain.

(a) An individual acts “for compensation or gain” within the meaning of § 3400.103(c)(2)(ii) if the individual receives or expects to receive in connection with the individual’s activities anything of value, including, but not limited to, payment of a salary, bonus, or commission. The concept “anything of value” is interpreted broadly and is not limited only to payments that are contingent upon the closing of a loan.

(b) An individual does not act “for compensation or gain” if the individual acts as a volunteer without receiving or expecting to receive anything of value in connection with the individual’s activities.

Appendix B to 24 CFR Part 3400

Engaging in the Business of a Loan Originator: Commercial Context and Habitualness

An individual who acts (or holds himself or herself out as acting) as a loan originator in a commercial context and with some degree of habitualness or repetition is considered to be “engaged in the business of a loan originator.” An individual who acts as a loan originator does so in a commercial context if the individual acts for the purpose of obtaining anything of value for himself or herself, or for an entity or individual for which the individual acts, rather than exclusively for public, charitable, or family purposes. The habitualness or repetition of the origination activities that is needed to “engage[e] in the business of a loan originator” may be met either if the individual who acts as a loan originator does so with a degree of habitualness or repetition, or if the source of the prospective financing provides mortgage financing or performs other origination activities with a degree of habitualness or repetition. This Appendix provides examples to aid in the understanding of activities that would not constitute engaging in the business of a loan originator, such that an individual is not required to obtain and maintain a state mortgage loan originator license. The examples in this Appendix are not all inclusive. They illustrate only the issue described and do not illustrate any other issues that may arise under part 3400. For purposes of the examples below, the term “loan” refers to a “residential mortgage loan” as defined in § 3400.23 of this part.

Not Engaged in the Business of a Mortgage Loan Originator. The following examples illustrate when an individual generally does

not “engage in the business of a loan originator”:

(a) An individual who acts as a loan originator in providing financing for the sale of that individual’s own residence, provided that the individual does not act as a loan originator or provide financing for such sales so frequently and under such circumstances that it constitutes a habitual and commercial activity.

(b) An individual who acts as a loan originator in providing financing for the sale of a property owned by that individual, provided that such individual does not engage in such activity with habitualness.

(c) A parent who acts as a loan originator in providing loan financing to his or her child.

(d) An employee of a government entity who acts as a loan originator only pursuant to his or her official duties as an employee of that government entity, if all applicable conditions in § 3400.103(e)(6) of this part are met.

(e) If all applicable conditions in § 3400.103(e)(7) of this part are met, an employee of a nonprofit organization that has been determined to be a bona fide nonprofit organization by the state supervisory authority, when the employee acts as a loan originator pursuant to his or her duties as an employee of that organization.

(f) An individual who does not act as a loan originator habitually or repeatedly, provided that the source of prospective financing does not provide mortgage financing or perform other loan origination activities habitually or repeatedly.

Appendix C to 24 CFR Part 3400

Independent Contractors and Loan Processor and Underwriter Activities That Require a State Mortgage Loan Originator License

The examples below are designed to aid in the understanding of loan processing or underwriting activities for which an individual is required to obtain a SAFE Act-compliant mortgage loan originator license. The examples in this Appendix are not all inclusive. They illustrate only the issue described and do not illustrate any other issues that may arise under this part 3400. For purposes of the examples below, the term “loan” refers to a residential mortgage loan as defined in § 3400.23 of this part.

(a) An individual who is a loan processor or underwriter who must obtain and maintain a state loan originator license includes:

(1) Any individual who engages in the business of a loan originator, as defined in § 3400.103 of this part;

(2) Any individual who performs clerical or support duties and who is an independent contractor, as those terms are defined in § 3400.23;

(3) Any individual who collects, receives, distributes, or analyzes information in connection with the making of a credit

decision and who is an independent contractor, as that term is defined in § 3400.23; and

(4) Any individual who communicates with a consumer to obtain information necessary for making a credit decision and who is an independent contractor, as that term is defined in § 3400.23.

(b) A state is not required to impose SAFE Act licensing requirements on any individual loan processor or underwriter who, for example:

(1) Performs only clerical or support duties (*i.e.*, the loan processor’s or underwriter’s activities do not include, *e.g.*, offering or negotiating loan rates or terms, or counseling borrowers or prospective borrowers about loan rates or terms), and who performs those clerical or support duties at the direction of and subject to the supervision and instruction of an individual who either: Is licensed and registered in accordance with § 3400.103(a) (State licensing of loan originators); or is not required to be licensed because he or she is excluded from the licensing requirement pursuant to §§ 3400.103(e)(2) (time-share exclusion), (e)(5) (federally registered loan originator), (e)(6) (government employees exclusion), or (e)(7) (nonprofit exclusion).

(2) Performs only clerical or support duties as an employee of a mortgage lender or mortgage brokerage firm, and who performs those duties at the direction of and subject to the supervision and instruction of an individual who is employed by the same employer and who is licensed in accordance with § 3400.103(a) (State licensing of loan originators).

(3) Is an employee of a loan processing or underwriting company that provides loan processing or underwriting services to one or more mortgage lenders or mortgage brokerage firms under a contract between the loan processing or underwriting company and the mortgage lenders or mortgage brokerage firms, provided the employee performs only clerical or support duties and performs those duties only at the direction of and subject to the supervision and instruction of a licensed loan originator employee of the same loan processing and underwriting company.

(4) Is an individual who does not otherwise perform the activities of a loan originator and is not involved in the receipt, collection, distribution, or analysis of information common for the processing or underwriting of a residential mortgage loan, nor is in communication with the consumer to obtain such information.

(c) In order to conclude that an individual who performs clerical or support duties is doing so at the direction of and subject to the supervision and instruction of a loan originator who is licensed or registered in accordance with § 3400.103 (or, as applicable, an individual who is excluded from the licensing and registration requirements under § 3400.103(e)(2), (e)(6), or (e)(7)), there must be an actual nexus between the licensed or registered loan

originator’s (or excluded individual’s) direction, supervision, and instruction and the loan processor or underwriter’s activities. This actual nexus must be more than a nominal relationship on an organizational chart. For example, there is an actual nexus when:

(1) The supervisory licensed or registered loan originator assigns, authorizes, and monitors the loan processor or underwriter employee’s performance of clerical and support duties.

(2) The supervisory licensed or registered loan originator exercises traditional supervisory responsibilities, including, but not limited to, the training, mentoring, and evaluation of the loan processor or underwriter employee.

Appendix D to 24 CFR Part 3400

Attorneys: Circumstances that Require a State Mortgage Loan Originator License

This Appendix D clarifies the circumstances in which the SAFE Act requires a licensed attorney who engages in loan origination activities to obtain a state loan originator license and registration. This special category recognizes limited, heavily regulated activities that meet strict criteria that are different from the criteria for specific exemptions from the SAFE Act requirements and the exclusions set forth in the regulations and illustrated in other appendices of part 3400.

SAFE Act-Compliant Licensing Required: An individual who is engaged in the business of a loan originator as defined in § 3400.103 of this part and who happens to be a licensed attorney, but whose loan origination activities are not all of the following: (1) Considered by the state’s court of last resort (or other state governing body responsible for regulating the practice of law) to be part of the authorized practice of law within the state; (2) carried out within an attorney-client relationship; and (3) accomplished by the attorney in compliance with all applicable laws, rules, ethics, and standards.

SAFE Act-Compliant Licensing Not Required: A licensed attorney performing activities that come within the definition of a loan originator, provided that such activities are: (1) Considered by the state’s court of last resort (or other state governing body responsible for regulating the practice of law) to be part of the authorized practice of law within the state; (2) carried out within an attorney-client relationship; and (3) accomplished by the attorney in compliance with all applicable laws, rules, ethics, and standards

Dated: June 17, 2011.

Robert C. Ryan,

*Acting Assistant Secretary for Housing—
Federal Housing Commissioner.*

[FR Doc. 2011–15672 Filed 6–29–11; 8:45 am]

BILLING CODE 4120–67–P