



July 9, 2009

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***Re: Proposed Rule Concerning Registration of Mortgage Loan
Originators
Agency Name: OCC
Docket Number: OCC-2009-0005***

Dear Sir or Madam:

The American Financial Services Association (AFSA) is grateful for the opportunity to comment on the proposed rule implementing the Secure and Fair Enforcement for Mortgage Licensing Act (the S.A.F.E. Act) (the Proposed Rule) as proposed by the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), the Farm Credit Administration (FCA), and the National Credit Union Association (NCUA) (collectively, the Agencies). AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers.

AFSA members recognize the need to enhance consumer protection in the residential mortgage loan origination process, and want to work with the Agencies to develop an effective registration process pursuant to the S.A.F.E. Act. To this end, AFSA members offer the following comments in response to the Agencies' request for comments on specific aspects of the Proposed Rule:

1. *Exclusion for Persons Engaged in Mortgage Loan Modification Activities from "Mortgage Loan Originator."*

AFSA members believe that the definition of "mortgage loan originator" should not cover individuals who modify existing residential mortgage loans. AFSA members are concerned that the definition of "mortgage loan originator" is overly broad and may unintentionally capture individual mortgage servicers who process modifications of existing loans. Therefore, as described below, AFSA members believe that these individuals should be excluded from the definition of "mortgage loan originator." Alternatively, AFSA members believe that these individuals should be excluded from the mortgage loan originator registration requirement.

At first glance, it appears that the definition of "mortgage loan originator" should exclude individuals who engage in servicing activities because it captures only those who take a residential mortgage loan application *and* offer or negotiate terms of a residential mortgage loan for compensation or gain. Based on this definition and because the registration requirements expressly apply to loan "originators," AFSA members do not believe that Congress intended for the registration requirements to apply to loan servicers who process modifications of existing loans.

However, the examples of activities that would constitute "taking an application" in Appendix A to the Proposed Rule are broad enough that the definition of "mortgage loan originator" could be interpreted to include individuals who engage in servicing activities. For example, pursuant to Appendix A, "taking an application" includes "receiving information that is sufficient to determine whether the member qualifies for a loan, even if the employee has had no contact with the member and is not responsible for further verification of information." This example contemplates an individual passively *receiving* information that is sufficient to determine eligibility for a loan. It does not require that the individual use the information to determine loan eligibility or that the individual affirmatively obtain that information. Consequently, this example is overly broad and could be read to capture individuals engaged in loan modifications.

AFSA members believe that an exclusion for individuals engaged in servicing loans, including persons who modify existing residential mortgage loans, would be appropriate. Such an exclusion would not contravene the S.A.F.E. Act's objectives of providing increased accountability and tracking of mortgage loan originators and reducing fraud in the residential mortgage loan origination process.

Because lenders offer only a few modification options, the features available in a loan modification are limited in comparison to the wide range of terms, features, and costs that

are available in the context of a new loan origination. In general, employees engaged in loan modifications do not have the flexibility to choose modification options. Instead, an employee's decision as to what terms may be modified is determined entirely by objective company policies. Individual employees who modify mortgage loans have less discretion than employees who originate mortgage loans. Thus, there is less potential for the fraudulent practices that have caused concern in the mortgage origination context and led to the enactment of the S.A.F.E. Act.

In addition, excluding individuals who offer loan modifications and other loss mitigation treatments including, but not limited to, loan extensions, repayment plans, and deferments (hereinafter "loss mitigation treatments"), from the definition of "mortgage loan originator" under the S.A.F.E. Act, would be consistent with the Truth-in-Lending Act ("TILA"). TILA recognizes that loan modifications (and other loss mitigation treatments) are not transactions that rise to the level of new loan transactions and trigger new disclosure requirements. For example, specifically, focusing on the definition of "refinancing," Section 226.20(a) of Regulation Z indicates that a refinancing occurs under TILA when an existing obligation that was subject to TILA is satisfied and replaced by a new obligation undertaken by the same consumer. This provision clearly illustrates that loss mitigation treatments, including loan modifications, are intended to be excluded from the TILA disclosure requirements.

In the past, AFSA has suggested that that the Conference of State Bank Supervisors and state regulators consider an exclusion for "an individual servicing a mortgage loan." We provide the suggested definition of "an individual servicing a mortgage loan" here for your consideration:

"An individual servicing a mortgage loan" means a person who on behalf of the note holder, collects or receives payments, including payments of principal, interest, escrow amounts, and other amounts due, on obligations due and owing to the note holder pursuant to a residential mortgage loan, and includes when the borrower is in default, or in reasonably foreseeable likelihood of default, working with the borrower and the note holder to modify or refinance, either temporarily or permanently, the obligations, or otherwise finalizing collection through the foreclosure process.

AFSA believes this definition is a good starting point for an exclusion for individuals engaged in loan modification or other loss mitigation treatments and could easily be modified to address AFSA's concerns. Namely, AFSA believes that this definition could be clarified to include individuals engaged in other loss mitigation treatments beyond loan modifications. As discussed more fully below, AFSA does not support an exclusion from registration for individuals engaged in refinancing activities.

a. Delay in registration requirement for individuals engaged in loan modifications.

AFSA members do not believe that implementing a delayed registration requirement for individuals who modify loans would be a workable alternative. In light of the current

economic crisis and the importance of engaging in foreclosure mitigation activities, it is imperative that mortgage lenders continue to modify loans in a timely and efficient manner. If lenders were required to first determine which of their employees engaged in servicing activities must be registered, and then register each of those employees, loan modification and foreclosure mitigation operations would be significantly disrupted.

While we hope that current economic conditions and the need for foreclosure mitigation activities is temporary and fleeting, we cannot predict the state of either the economy or the mortgage lending industry after any delayed registration period lapses. Moreover, the costs to the mortgage servicing industry with respect to such individual registration or licensing may cause these companies to reduce the financial resources that they would have otherwise directed to legitimate loss mitigation programs and initiatives. In the worst cases, the cost of such registration or licensing may cause these companies to reduce loss mitigation staff.

For the foregoing reasons, we respectfully request that the Agencies grant a permanent exclusion from registration for individuals engaged in loan modification activities. If the Agencies decide to require the registration of loan modification personnel, AFSA members suggest that the Agencies consider extending the implementation period.

2. Exclusion for Persons Engaged in Approving Mortgage Loan Assumptions from “Mortgage Loan Originator.”

AFSA members believe that an exclusion for individuals engaged in approving mortgage loan assumptions also would be appropriate. In assumption transactions, there is no negotiation of loan terms because the existing obligation is assumed by another borrower. Like loan servicing and modifications, this activity does not present the same potential for abuse as mortgage loan origination activities, and requiring registration of individuals who approve assumptions does not further the stated purposes of the S.A.F.E. Act.

3. Exclusion for Persons Engaged in Mortgage Loan Refinancings from “Mortgage Loan Originator.”

AFSA members do not believe that an exclusion for individuals engaged in refinancing transactions would be appropriate. Moreover, AFSA members suggest that the Agencies clearly delineate which transactions would be considered modification transactions, as opposed to refinancing transactions.

Refinancing transactions typically are considered new loan transactions requiring the negotiation of new loan terms. As such, refinancing transactions involve true mortgage loan origination activities. Therefore, requiring registration of individuals who refinance mortgage loan transactions would further the purposes of the S.A.F.E. Act and protect consumers from the same types of abuses present in mortgage loan originations. Even where a refinance transaction does not include cash-out or is with the original lender, it seems appropriate to require individuals who refinance mortgage loans to register as mortgage loan originators.

Loan originations, including refinances and purchase money transactions, are separate and distinct from loan modifications. While loan modifications generally are limited to the outstanding balance and, in some cases, to taxes and insurance advanced by the servicer on behalf of the borrower, loan refinancings often include amounts that are not associated with the existing mortgage loan obligation (e.g. unsecured debts, etc.). Moreover, loan modifications are generally limited to borrowers who are delinquent. Customers who receive loan modifications are generally not eligible to qualify for a refinancing transaction.

In addition, there typically is no overlap between employees engaged in loan refinancings and those engaged in loan modifications. The functions often are separately staffed and managed. Employees who offer and negotiate loan refinancings also have the capability to offer other loan origination products (e.g. purchase money loans). However, such individuals do not have the ability to offer loan modifications. Accordingly, there is no need for an exclusion for employees engaged in refinancings.

The loan refinance staff may communicate with potential applicants via letters, outbound phone call campaigns, emails, etc. The loan refinancing employees typically work with the applicant to assist in determining the most appropriate loan option and to obtain the necessary information from the applicant in order to qualify the borrower and property for the refinancing. The loan refinancing employees obtain the necessary information from the borrower in order to qualify the borrower (e.g. tax returns, pay stubs) and property (e.g. property appraisal) under the lender's credit policies.

Because individuals engaged in refinancing activities perform true mortgage loan originations, AFSA members believe that such individuals should be subject to registration, regardless of whether the transaction meets certain criteria.

4. 180-Day Implementation Period.

AFSA members believe the initial 180-day implementation grace period provides adequate time for lenders to complete the initial registration process, provided that:

- Persons engaged in loan modification and loss mitigation treatments are not required to register;
- The National Mortgage Licensing System Registry (the "Registry") will be able to accept batch registrations and digital fingerprints;
- The employer's obligation to confirm the adequacy and accuracy of the information of its employees is limited to specified fields of information likely to be contained in an institution's automated human resources systems, such as name and employment date; and
- The Registry will immediately provide notification that the registration is effective upon submission by the employee and the employer of the required

information, with no delay for the results of the background check.

5. *60-Day Grace Period.*

AFSA members believe the 60-day grace period for mortgage loan originators who become employees of an Agency-regulated institution as a result of an acquisition, merger, or reorganization transaction are appropriate. However, AFSA members note that the Proposed Rule does not specifically address or provide a grace period for mortgage loan originators who become employees of an Agency-regulated institution by reason other than an acquisition, merger, or re-organization transaction.

Specifically, the Proposed Rule does not expressly provide for a grace period in the following three scenarios:

- (1) A previously registered mortgage loan originator voluntarily changes employment and becomes an employee of a different Agency-regulated institution;
- (2) A mortgage loan originator licensed under state law and employed by a state-licensed mortgage lender voluntarily changes employment and becomes an employee of an Agency-regulated institution; and
- (3) A previously unlicensed person becomes employed by an Agency-regulated institution.

AFSA members request that the Agencies clarify that that the registration will become effective immediately upon submission of a registrant's information, and will not be delayed for fingerprinting or a background check, when the change in employment is not due to an acquisition, merger or re-organization.

6. *Fingerprinting.*

With respect to the age limit for existing fingerprints, AFSA members believe that the three-year limit is not appropriate because fingerprints do not change. Unless experience has shown that older fingerprint cards are often degraded and not acceptable for running the background checks, AFSA members suggest that there should be no limit on the age of fingerprints. This is particularly true where digital fingerprints are available because digital fingerprints are not subject to degradation.

7. *Information Privacy.*

AFSA members are concerned that the data proposed to be collected for mortgage loan originators employed by Agency-regulated institutions is unnecessarily extensive. Specifically, AFSA members believe that for employees of Agency-regulated institutions, information beyond the employee's name, unique identifier, name of current employer, and any publically adjudicated disciplinary or enforcement actions, should not be collected or made public because, unlike state-licensed mortgage loan originators,

registrants employed by Agency-regulated institutions are not subject to any approval process in connection with registration.

The MU4 form requires additional information beyond that described above (e.g., financial services-related employment history and financial information for the 10 years prior to the date of registration or renewal constituting a history of any personal bankruptcy). Because such additional information is not required to comply with the S.A.F.E. Act's registration requirement, AFSA members suggest that the Agencies require the creation of a new one-page form separate from the MU4 form to be used in connection with registered mortgage loan originators employed by Agency-regulated institutions. The one-page form would serve the S.A.F.E. Act's stated purpose of tracking loan originators by capturing each loan originator in the Registry. Also, use of the one-page form would permit consumers to verify the originator's employer.

AFSA members are uncertain as to what information in the MU4 form will be publically available through the NMLS. AFSA members request that the Agencies require the NMLS to limit access to information beyond the employee's name, unique identifier, name of current employer, and any publically adjudicated disciplinary or enforcement actions for all registered loan originators. Limiting the information in this way for all registered loan originators will serve the Agencies' stated purpose of permitting consumers to review similar information on mortgage loan originators regardless of the originator's regulator.

As an alternative, to satisfy the Agencies' stated purpose of reducing the regulatory burden on mortgage loan originators who move between institutions with differing charters and regulators, AFSA members suggest collecting the data required by the MU4 form for all loan originators, but keeping any information beyond the originator's name, unique identifier, name of current employer, and any publically adjudicated disciplinary or enforcement actions for loan originators employed by Agency-regulated institutions.

8. *Batch Processing.*

AFSA members feel that some form of "batch" processing of employee registration applications is necessary. AFSA members suggest that the Agencies require the Registry to implement a system that allows Agency-regulated institutions to automatically upload their employee registration information.

The Proposed Rule requires Agency-regulated institutions to provide information to the Registry for each employee who acts as a mortgage loan originator. Specifically, the Agency-regulated institution must:

- (1) After an employee registrant submits all of the required information to the Registry, confirm that it employs the registrant;
- (2) Confirm the adequacy and accuracy of the employee's registrations by comparisons with the institution's own records; and

- (3) Within 30 days of the date the registrant ceases to be an employee of the institution, provide notification that it no longer employs the registrant and the date the registrant ceased being an employee.

The Registry requires each employee registrant to manually submit registration information. To comply with the Proposed Rule, Agency-regulated institutions must then manually confirm the registration information submitted by each of their employees.

AFSA members are concerned that the manual submission of individual employee information and the back-end requirement that Agency-regulated institutions must then confirm each employee's information will create inefficiency. Such inefficiency will exist in any system that requires manual submission of individual employee information, regardless of whether individual employees submit their own information or whether one or more individuals submit information on each employee's behalf.

To alleviate the inefficiency, AFSA members recommend that the Registry be modified to permit a "batch" process, under which Agency-regulated institutions are permitted to automatically upload their employee information in bulk. Not only would such a process reduce the amount of time required to submit a high volume of employee registration information, but batch processing would also likely result in the initial submission of more accurate employee information. In addition, if an Agency-regulated institution has control over submitting information for its employees, batch processing would reduce the time the institution must spend on the back-end confirming that it employs each registrant. Finally, because individual employees are required to attest to the accuracy of any data submitted on the employee's behalf, any information that the Agency-regulated institution automatically uploads will be subject to a final review for accuracy by the individual employees.

The Agencies noted in the discussion of "batch" processing the possibility of specifying a limited set of standard data elements that are likely to be contained in an institution's automated human resources systems. AFSA members believe that whether or not registrations are submitted manually or by a batch process, the obligation of an institution to verify the adequacy and accuracy of its employees' information should be limited to specified data elements that are likely to be contained in an institution's automated human resources systems, such as name and employment date. If the obligation to verify is not limited in this manner, then every registration could involve an intensive manual review of many different potential sources of information, including the review of imaged and hard copy documents both with Human Resources and other departments. The cost and time needed to complete the verification process would expand greatly, and in most cases would add little value because the original source of such information in the records would be often be the employee.

9. Examples of the Definition of Mortgage Loan Originator.

As discussed above in response to question 2 regarding the definition of “mortgage loan originator,” AFSA members believe that the first example of an activity that constitutes taking a loan application is overly broad. Specifically, Appendix A provides that “taking an application” includes “receiving information that is sufficient to determine whether the member qualifies for a loan, even if the employee has had no contact with the member and is not responsible for further verification of information.” This example contemplates an individual passively *receiving* information that is sufficient to determine eligibility for a loan. It does not require that the individual use the information to determine loan eligibility or that the individual affirmatively obtain that information. Consequently, this language could be read broadly to capture employees engaged in loan servicing.

Increasingly a consumer may choose a loan product and terms and apply for a loan over the internet. There would be no mortgage loan originator for such loans, and there is no reason to artificially assign such an application to a mortgage loan originator. Where there is no mortgage loan originator, the concerns that led to the S.A.F.E. Act’s registration requirements do not exist.

10. Miscellaneous

AFSA members are concerned that the Proposed Rule’s requirement that Agency-regulated institutions must establish a process for reviewing employee criminal background reports and take appropriate action “consistent with applicable law and rules” is unclear. The Proposed Rule does not specify what the “applicable law and rules” are. The S.A.F.E. Act specifies the minimum requirements for state registrants, but not for federal registrants. AFSA members request that the Agencies clarify that a background check with fingerprints meeting the requirements of Section 19 of the Federal Depository Insurance Act is sufficient.

We appreciate the opportunity to offer comments on the Proposed Rule. If you have any questions or require any additional information, please contact Danielle Fagre Arlowe, AFSA’s State Government Affairs Senior Vice President at 952-922-6500 or dfagre@afsamail.org.

Sincerely yours,



Christopher Stinebert
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