

DEPARTMENT OF THE TREASURY
Office of the Comptroller of the Currency
12 CFR Part 34
Docket ID OCC-2009-0005
RIN 1557-AD23

FEDERAL RESERVE SYSTEM
12 CFR Part 208
Docket No. R-1357

FEDERAL DEPOSIT INSURANCE CORPORATION
12 CFR Part 365
RIN 3064-AD43

DEPARTMENT OF THE TREASURY
Office of Thrift Supervision
12 CFR Part 563
Docket No. 2009 - 0004
RIN 1550-AC33

FARM CREDIT ADMINISTRATION
12 CFR Part 610
RIN 3052-AC52

NATIONAL CREDIT UNION ADMINISTRATION
12 CFR Part 761
RIN 3133-AD59

Registration of Mortgage Loan Originators

AGENCIES: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision, Treasury (OTS); Farm Credit Administration (FCA); and National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The OCC, Board, FDIC, OTS, FCA, and NCUA (collectively, the Agencies) are adopting final rules to implement the Secure and Fair Enforcement for Mortgage Licensing Act (the S.A.F.E. Act). The S.A.F.E. Act requires an employee of a bank, savings association, credit union or Farm Credit System (FCS) institution and certain of their subsidiaries that are regulated by a Federal banking agency or the FCA (collectively, Agency-regulated institutions) who acts as a residential mortgage loan originator to register with the Nationwide Mortgage Licensing System and Registry, obtain a unique identifier, and maintain this registration. The final rule further provides that Agency-regulated institutions must: (1) require their employees who act as residential mortgage loan originators to comply with the S.A.F.E. Act's requirements to register and obtain a unique identifier, and (2) adopt and follow written policies and procedures designed to assure compliance with these requirements.

DATES:

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. BACKGROUND

A. Statutory Requirements

The S.A.F.E. Act,¹ enacted on July 30, 2008, mandates a nationwide licensing and registration system for mortgage loan originators. Specifically, the Act requires all States to provide for a licensing regime for mortgage loan originators regulated by a State within one year of enactment (or two years for States whose legislatures meet biennially). In addition, the S.A.F.E. Act requires the OCC, Board, FDIC, OTS and NCUA,² through the Federal Financial Institutions Examination Council (FFIEC), and the FCA to develop and maintain a system for registering mortgage loan originators employed by Agency-regulated institutions. The S.A.F.E. Act specifically prohibits an individual from engaging in the business of residential mortgage loan origination without first obtaining and maintaining annually, 1) a registration as a registered mortgage loan originator and obtaining a unique identifier if employed by an Agency-regulated institution (Federal registration), or 2) a license and registration as a state-licensed loan originator and obtaining a unique identifier.³ The S.A.F.E. Act requires that Federal registration and State licensing and registration must be accomplished through the same online registration system, the Nationwide Mortgage Licensing System and Registry (Registry).

In connection with the Federal registration, the Agencies at a minimum must ensure that the Registry is furnished with information concerning the mortgage loan originator's identity,

¹ The S.A.F.E. Act was enacted as part of the Housing and Economic Recovery Act of 2008, Pub. L. 110-289, Division A, Title V, sections 1501 – 1517, 122 Stat. 2654, 2810 – 2824 (July 30, 2008), codified at 12 U.S.C. 5101- 5116. Citations in this Supplementary Information section are to the “S.A.F.E. Act” by section number in the public law.

² The OCC, Board, FDIC, OTS, and NCUA are referred to both in the S.A.F.E. Act and in this rulemaking as the “Federal banking agencies.”

³ If the Secretary of Housing and Urban Development (HUD) determines that any State fails, within the statutorily prescribed timeframe, to establish a licensing regime that meets the requirements of the S.A.F.E. Act, the Secretary is required to establish a system for the licensing and registration of mortgage loan originators in that State. S.A.F.E. Act at section 1508. HUD has reviewed the model legislation developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators to assist States in meeting the minimum requirements of the S.A.F.E. Act and found it to meet these requirements. See 74 FR 312 (Jan. 5, 2009) and <http://www.hud.gov/offices/hsg/ramh/safe/cmsl.cfm>.

including: (1) fingerprints for submission to the Federal Bureau of Investigation (FBI) and any other relevant governmental agency for a State and national criminal history background check; and (2) personal history and experience, including authorization for the Registry to obtain information related to any administrative, civil, or criminal findings by any governmental jurisdiction.⁴ On June 9, 2009, the Agencies issued a notice of proposed rulemaking to implement these requirements for Agency-regulated institutions.⁵

B. Implementing the Requirements for Federal Registration

The Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) have developed and maintain a Web-based system, the Nationwide Mortgage Licensing System (NMLS), for the State licensing of mortgage loan originators in participating States.⁶ Mortgage loan originators in these States electronically complete a single uniform form (the MU4 form). The data provided on the form is stored electronically in a centralized repository available to State regulators of mortgage companies, who use it to process license applications and to authorize individuals to engage in mortgage loan origination, as well as for other supervisory purposes.

The Federal banking agencies, through the FFIEC, and the FCA are working with CSBS to modify the NMLS so that it can accept registrations from mortgage loan originators employed by Agency-regulated institutions. This modified registry will be renamed the Nationwide

⁴ S.A.F.E. Act at section 1507(a) (12 U.S.C. 5106(a)).

⁵ 74 FR 27386 (June 9, 2009).

⁶ As of the date of this final rule, 36 States and territories use the NMLS to manage the processing of their mortgage licenses. This system is owned and operated by the State Regulatory Registry LLC (SRR), which is a limited-liability company established by CSBS and the American Association of Residential Mortgage Regulators as a subsidiary of CSBS to develop and operate nationwide systems for State regulators in the financial services industry. SRR has contracted with the Financial Industry Regulatory Authority (FINRA) to build and maintain the system. FINRA operates similar systems in the securities industry. More information about this system is available at <http://www.stateregulatoryregistry.org>.

Mortgage Licensing System and Registry. The existing NMLS was not designed to support the Federal registration of Agency-regulated institution employees, who are not required to obtain additional authorization from the appropriate Federal agency to engage in mortgage loan origination activities that are permissible for the Agency-regulated institution. Accordingly, the system must be modified to accommodate the differences between the requirements for State licensing/registration and Federal registration. It also must be modified to accommodate the migration of an individual between the State licensing/registration and the Federal registration regimes or the dual employment of an individual by both an Agency-regulated and non-Agency-regulated institution.⁷ Furthermore, the S.A.F.E. Act requires new enhancements to the current system, such as the processing of fingerprints and public access to certain mortgage loan originator data. These modifications and enhancements require careful analysis and raise complex legal and system development issues that the Agencies are addressing through both this rulemaking and through consultation with the CSBS and the SRR. The OCC, on behalf of the Agencies, [has entered into] an agreement with the SRR that will provide for appropriate consultation between the Agencies and the Registry concerning Federal registrant information requirements and fees, system functionality and security, and other operational matters. The issuance of this final rule establishing the requirements for Federal registrants will enable the Agencies and SRR to complete modifications that will enable the system to accept Federal registrations. As described in the Supplementary Information section of the proposed rule, the Agencies will publicly announce the date on which the Registry will begin accepting registrations, which will mark the beginning of the period during which employees of Agency-

⁷The Agencies note that some employees of Agency-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 would be subject to both the Federal and State regimes.

regulated institutions complete the initial registration process.⁸ When fully operational, mortgage loan originators and their Agency-regulated institution employers are expected to have access to the Registry, seven days a week, to establish and maintain their registrations.

II. OVERVIEW OF THE PROPOSAL AND PUBLIC COMMENTS

The proposed rule required individuals employed by Agency-regulated institutions who act as mortgage loan originators and who do not qualify for the de minimis exception set forth in the proposal to register with the Registry, obtain unique identifiers, and maintain their registrations through updates and renewals. The proposal also directed Agency-regulated institutions to require compliance with these requirements, and to adopt and follow written policies and procedures to assure such compliance. The S.A.F.E. Act does not require the Registry to screen or approve registrations received from employees of Agency-regulated institutions and the Registry will not do so. Instead, the Registry will be the repository of, and conduit for, information on those employees who are mortgage loan originators at Agency-regulated institutions. Pursuant to § ____.104(d) and (h) of the proposed rule, it would be the responsibility of each Agency-regulated institution to establish reasonable procedures for confirming the adequacy and accuracy of employee registrations as well as to establish a process for reviewing any criminal history background reports received from the Registry.

The proposal provided for a 180-day period within which to complete initial registrations after the Registry is capable of accepting registrations from employees of Agency-regulated institutions. During this period, employees of Agency-regulated institutions would not be

⁸Pursuant to section 1503(11) of the S.A.F.E. Act (12 U.S.C. 5102(11)), 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.

subject to sanctions if they originate residential mortgage loans without having completed their registration.

The Agencies received a total of 140 different comment letters from financial institutions and holding companies, trade associations, Federal government agencies, a training company, and individuals. A number of Agency-regulated institutions objected to the registration requirement in general, suggesting that the registration requirement should not be applied to them because they were not involved in the abuses that led to the enactment of the S.A.F.E. Act. In addition, many of these commenters found the registration requirement overly burdensome, especially as they are subject to regular examinations by the Agencies and they already closely supervise the activities of their employees.

Many commenters raised concerns related to the proposed de minimis exception from the registration requirement. Under the proposed de minimis exception, a mortgage loan originator would not have to register if he or she acted as a mortgage loan originator for five or fewer loans and the Agency-regulated institution employs mortgage loan originators who, while excepted from registration pursuant to the individual exception, in the aggregate acted as mortgage loan originators in connection with 25 or fewer residential mortgage loans. Commenters suggested raising the mortgage loan originator and institution loan limits or eliminating one of the limits. Community bank trade associations were particularly concerned that the narrowness of the exception would exclude most community banks. Some commenters suggested that the exception should be tied to an asset-based threshold in the range of \$250 million to \$1 billion.

Most commenters objected to having employees who engage in loan modifications or assumptions register under the rule, noting that these activities are fundamentally different than the mortgage loan origination process in that loan modifications and assumptions: (1) are loss

mitigation activities, not loan originations; (2) provide loan modification or assumption personnel little to no discretion in negotiating the terms and conditions of any changes; and (3) are outside of the Congressional intent and the plain language of the S.A.F.E. Act.

While some commenters found the 180-day initial registration period adequate, a number of commenters suggested alternative periods ranging up to one year. Some trade associations and institutions supported staggering registration periods in order to reduce system demands and to tailor an implementation schedule to the particular capacities of an institution or group of institutions, as long as the implementation period would still be 180 days for each institution.

A number of commenters also raised issues related to the provision of fingerprints to the Registry. Commenters asserted that it was not appropriate to have an age limit on fingerprints as they tend not to change; that the Registry should be able to accept fingerprints in a variety of formats, such as paper and scanned digital prints; and that Agency-regulated institutions should be permitted to use existing channels to process fingerprints.

Many commenters expressed privacy and security concerns regarding the types of personal information that mortgage loan originators would have to provide to the Registry and the ability of the public to have Internet access to such information.

Trade associations and large Agency-regulated institutions overwhelmingly requested that the Registry accommodate batch processing of registrations in order to reduce the costs and burden of data input, reduce errors, and efficiently register bank employees.

The Agencies have modified the proposal to take into account many of these comments. A detailed discussion of these comment letters and the Agencies' responses to them appears in the section-by-section description of the final rule that follows.⁹

III. SECTION-BY-SECTION DESCRIPTION OF THE FINAL RULE

Section ____ .101 – Authority, purpose, and scope

The Agencies adopt paragraphs (a) and (b) of § ____ .101 as proposed.¹⁰ Paragraph (a) identifies the authority for this rule as the S.A.F.E. Act.¹¹ Paragraph (b) states that this rule implements the S.A.F.E. Act's Federal registration requirements, which apply to individuals who originate residential mortgage loans. This provision also describes the objectives of the S.A.F.E. Act, which are derived from section 1502 of the Act (12 U.S.C. 5101).

As in the proposal, paragraph (c)(1) of § ____ .101 of the final rule identifies the specific entities that employ individual mortgage loan originators – entities referred to in this Supplementary Information section as Agency-regulated institutions – and that also are covered by this rule. Under the S.A.F.E. Act, a mortgage loan originator must be Federally-registered if that individual is an employee of a depository institution, an employee of any subsidiary owned and controlled by a depository institution and regulated by a Federal banking agency, or an employee of an institution regulated by the FCA.¹² Section 1503(2) of the S.A.F.E. Act (12

⁹In addition to the changes described in this Supplementary Information section, the Agencies have replaced the cites in the proposed rule to sections of the S.A.F.E. Act with cites to the relevant provisions in the U.S. Code.

¹⁰Because each Agency's proposed rule will amend a different part of the Code of Federal Regulations, but will have similar numbering, relevant sections are cited as "§ ____." followed by a number, unless otherwise noted.

¹¹ The Board notes that the authority in paragraph (a) of its rule supplements its authority to implement the S.A.F.E. Act, for example, Section 11 of the Federal Reserve Act (12 U.S.C. 248(a)).

¹²Agency-regulated institutions and their employees acting within the scope of their employment are subject only to the Federal registration requirements of the S.A.F.E. Act as implemented by the Agencies through this rulemaking. In consultation with the Agencies, CSBS/SRR are modifying the Registry so that it can accept

U.S.C. 5102(2)) provides that “depository institution” has the same meaning as in section 3 of the Federal Deposit Insurance Act (FDI Act),¹³ and includes any credit union. As we noted in the proposal, the definition of “depository institution” in the FDI Act and in the S.A.F.E. Act does not include bank or savings association holding companies or their non-depository subsidiaries. Employees of these entities who act as mortgage loan originators are not covered by the Federal registration requirement and, therefore, must comply with State licensing and registration requirements.

With respect to the OCC, this rule applies to national banks, Federal branches and agencies of foreign banks, their operating subsidiaries, and their employees who are mortgage loan originators.¹⁴ For the Board, this rule applies to member banks of the Federal Reserve System (other than national banks), their respective subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act, as amended (12 U.S.C. 1844(c)(5));¹⁵ and branches and agencies of foreign banks (other than Federal

registrations from employees of Agency-regulated institutions. An employee of an Agency-regulated institution may be engaged in activities outside the scope of his or her employment at an Agency-regulated institution that subject that employee to State licensing and registration requirements, such as dual employment at a non-Agency-regulated institution.

¹³ Section 3 of the FDI Act defines “depository institution” as any bank or savings association. The term “bank” in section 3 of the FDI Act means any national bank, State bank, Federal branch, and insured branch and includes any former savings association. The term “savings association” means any Federal savings association, state savings association, and any corporation other than a bank that the FDIC and the OTS jointly determine to be operating in substantially the same manner as a savings association. 12 U.S.C. 1813.

¹⁴ The S.A.F.E. Act's definition of depository institution includes Federal branches of foreign banks but not Federal agencies of foreign banks. Federal agencies are authorized by sections 1(b)(1) and 4(b) of the International Banking Act of 1978 (12 U.S.C. 3101(b)(1) and 3102(b)) and 12 CFR 28.11(g) and 28.13(a)(1) of the OCC's regulations to lend money, which would include originating mortgage loans, subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply to a national bank. Thus, the Federal registration requirements apply to Federal agencies of foreign banks to the extent the registration requirements apply to national banks.

¹⁵ The S.A.F.E. Act, by its terms, applies the Federal registration requirements to employees of a subsidiary that is owned and controlled by a State member bank and regulated by the Board. For purposes of the scope of the Board's rules, these subsidiaries are described as those that are not functionally regulated within the meaning of

branches, Federal agencies and insured State branches of foreign banks) and commercial lending companies owned or controlled by foreign banks¹⁶ and their employees who act as mortgage loan originators. For the FDIC, this rule applies to insured State nonmember banks (including state-licensed insured branches of foreign banks), their subsidiaries (except brokers, dealers, persons providing insurance, investment companies, and investment advisers), and employees of such banks or subsidiaries who act as mortgage loan originators. For the OTS, this rule applies to savings associations and their operating subsidiaries, and their employees who are mortgage loan originators. For the FCA, this rule applies to FCS institutions that originate residential mortgage loans under sections 1.9(3), 1.11 and 2.4(a)(2) and (b) of the Farm Credit Act of 1971, as amended (12 U.S.C. 2017(3), 2019, and 2075(a)(2) and (b)), and their employees who are mortgage loan originators.¹⁷ For the NCUA, this rule applies to credit unions and their employees who are mortgage loan originators.

section 5(c)(5) of the Bank Holding Company Act. Subsidiary has the meaning given that term in section 2 of the Bank Holding Company Act (12 U.S.C. 1841), as applied to State member banks.

¹⁶ The Board notes that its final rule covers branches and agencies of foreign banks (other than Federal branches, Federal agencies and insured State branches of foreign banks); and commercial lending companies owned or controlled by foreign banks pursuant to its authority under the International Banking Act (IBA) (Chapter 32 of Title 12) to issue such rules it deems necessary in order to perform its respective duties and functions under the chapter and to administer and carry out the provisions and purposes of the chapter and prevent evasions thereof. 12 U.S.C. 3108(a). The Board notes that the IBA provides, in relevant part, that the above entities shall conduct their operations in the United States in full compliance with provisions of any law of the United States which impose requirements that protect the rights of consumers in financial transactions, to the extent that the branch, agency, or commercial lending company engages in activities that are subject to such laws, and apply to State-chartered banks, doing business in the State in which such branch or agency or commercial lending company, as the case may be, is doing business. 12 U.S.C. 3106a(b)(1). Under the Board's final rule, the above entities would be subject to the same Federal registration requirements as Federal branches, Federal agencies and insured State branches of foreign banks, which are covered in the OCC and FDIC rules, respectively.

¹⁷ Some FCS associations may not exercise their statutory authority to make residential mortgage loans, and FCS banks no longer engage in residential mortgage origination activities because they have transferred their direct lending authority to their affiliated associations. The FCA emphasizes that employees of FCS banks and associations that do not engage in residential mortgage loan origination activities are not subject to the registration requirements of the S.A.F.E. Act and these regulations. The Federal Agricultural Mortgage Corporation (Farmer Mac) is an FCS institution that among other activities operates a secondary market for rural residential mortgage loans. The FCA determines that Farmer Mac employees are not subject to the registration requirements of the S.A.F.E. Act and these implementing regulations because Farmer Mac does not engage in mortgage loan origination

As discussed in Section II, a number of commenters objected to the application of this registration requirement to employees of Agency-regulated depository institutions because, in general, they are subject to regular examinations, would be overly burdened by the registration requirement, and already closely supervise the activities of their employees. Some commenters noted that this registration requirement would penalize them for the inappropriate actions of other lenders that led to the enactment of the S.A.F.E. Act.

The Agencies note that the registration of mortgage loan originators employed by Agency-regulated institutions is explicitly required by the S.A.F.E. Act. The statute imposes a registration requirement, rather than a licensing requirement, on the employees of Agency-regulated institutions. The Agencies note that such institutions already are subject to a Federal regime of examination and supervision. The S.A.F.E. Act does not authorize the Agencies to create exceptions to the registration requirement other than the de minimis exception described below.

Some credit union-related commenters discussed whether the final rule should apply to credit union service organizations (CUSOs). The NCUA notes that it answered these questions in a public legal opinion letter 08-0843, dated October 8, 2008, available on NCUA's Web site, www.ncua.gov. The S.A.F.E. Act treats employees of depository institution subsidiaries the same as employees of the depository institution, if the subsidiary is owned and controlled by the depository institution and regulated by a Federal banking agency.¹⁸ In the case of CUSOs, however, NCUA does not have direct regulatory oversight or enforcement authority. Instead, NCUA regulation permits federal credit unions to invest in or lend only to CUSOs that conform

activities for rural residents. The Farmer Mac secondary market is modeled after Fannie Mae and Freddie Mac, and the provisions of the S.A.F.E. Act do not expressly apply to employees at Fannie Mae and Freddie Mac.

to the limits specified in the CUSO rule, 12 CFR Part 712.¹⁹ NCUA has not, historically, asserted that CUSOs or their employees are exempt from applicable State licensing regimes, and the S.A.F.E. Act does not alter that approach. Nor do NCUA regulations have any applicability to CUSOs owned by State-chartered credit unions.²⁰ Accordingly, individuals employed by CUSOs that engage in residential mortgage loan origination activities, whether the CUSO is owned by a State or a federal credit union, would need to be licensed in accordance with applicable State requirements.

Some commenters also asked whether privately insured credit unions must register with the Registry. NCUA's proposed rule applied to federally insured credit unions and their employees who are mortgage loan originators but commenters requested NCUA include privately insured credit unions and their employees who are mortgage loan originators in the scope of NCUA's final rule. The S.A.F.E. Act requires the Agencies to develop and maintain a system for registering employees of a depository institution, defined to include "any credit union."²¹ Consistent with the S.A.F.E. Act and in response to comments, NCUA's final rule applies to any credit union and its employees who are mortgage loan originators. Therefore, privately insured credit unions' employees who are mortgage loan originators may be eligible for Federal registration provided certain conditions are met and formal agreements reached.

¹⁸ Section 1503(7)(A)(ii) of the S.A.F.E. Act (12 U.S.C. 5102(7)(A)(ii)).

¹⁹ 12 CFR Part 712.

²⁰ In April 2008, the NCUA Board issued a proposed rule that would extend some provisions of the CUSO rule to state chartered institutions. See 73 FR 23982 (May 1, 2008). The proposal has not yet been finalized.

²¹ Sections 1507(a)(1) and 1503(1) and (2) of the S.A.F.E. Act (12 U.S.C. 5106(a)(1) and 5102(1) and (2)).

With the exception of privately insured credit unions, entities covered by the Federal registration system are subject to Federal oversight. Entities subject to the Federal registration system are labeled throughout the rule as “Agency-regulated institutions.” Privately insured credit unions are not federally insured and not subject to NCUA’s oversight. In order for privately insured credit unions and their employees who are mortgage loan originators to qualify for Federal registration, they must be subject to oversight for purposes of compliance with NCUA’s rule. Therefore, NCUA will work with the appropriate State supervisory authorities to implement an oversight program in those States with privately insured credit unions.

The oversight program will require the appropriate State supervisory authorities to enter into a memorandum of understanding (MOU) with NCUA. The MOU will need to address various requirements such as, but not limited to: the requirement for an applicable State supervisory authority to maintain such an MOU to allow privately insured credit unions and their employees in its State to have continuous access to, and use of, the registry; examination of the privately insured credit unions’ compliance with the rule by either the State supervisory authority or NCUA; privately insured credit unions’ payment of examination fees and payment for any necessary Registry modifications; and enforcement authority and penalties for privately insured credit unions for noncompliance. Any information provided by the Registry to the public about privately insured credit unions and their employees must include a clear and conspicuous statement that the privately insured credit union is not insured by the National Credit Union Share Insurance Fund. If any State supervisory authority where privately insured credit unions are located fails to enter into or maintain an agreement with NCUA for this registration process and oversight, the privately insured credit unions and their employees in that State cannot register under the Federal system. They instead must use the appropriate State licensing and

registration system, or if the State does not have such a system, the licensing and registration system established by the Department of Housing and Urban Department (HUD) for mortgage loan originators and their employees.

Section 1507 of the S.A.F.E. Act (12 U.S.C. 5106) requires the Federal banking agencies to make such de minimis exceptions “as may be appropriate” to the Act’s registration requirements.²² Paragraph (c)(2) of § ____ .101 of the proposed rule provided a de minimis exception based on an individual’s and, in the aggregate, an institution’s total number of residential mortgage loans originated in a rolling 12-month period. Specifically, the proposal provided that the registration requirements would not apply to an employee of an Agency-regulated institution if, during the last 12 months: (1) the employee acted as a mortgage loan originator for 5 or fewer residential mortgage loans; and (2) the Agency-regulated institution employs mortgage loan originators who, while excepted from registration pursuant to this section, in the aggregate, acted as a mortgage loan originator in connection with 25 or fewer residential mortgage loans.

The Agencies received many, and varied, comments on this de minimis exception. Most commenters supported an exception to the rule’s requirements. However, a majority of the commenters did not agree with the proposal’s formulation of this exception, nor did they agree on an alternative. Specifically, some commenters requested that the Agencies raise the threshold

²² See S.A.F.E. Act at sections 1507(c) (12 U.S.C. 5106(c)) (de minimis exceptions), 1504(a)(1)(A) (12 U.S.C. 5103(a)(1)(A)) (requirement to register), 1504(a)(2) (12 U.S.C. 5103(a)(2)) (requirement to obtain a unique identifier). As discussed in the Supplementary Information section of the proposed rule, the FCA has authority under section 5.17(a)(11) of the Farm Credit Act of 1971, as amended, 12 U.S.C. 2252(a)(11), to apply the de minimis exception to FCS institutions. Section 5.17(a)(11) of the Farm Credit Act authorizes the FCA to “exercise such incidental powers as may be necessary or appropriate to fulfill its duties” In this case, the FCA is exercising its incidental powers to fulfill the requirement in the S.A.F.E. Act that it work together with the Federal banking agencies to develop and maintain a system for registering residential mortgage loan originators at Agency-regulated institutions with the Registry. A coordinated and uniform approach to the de minimis exception among the Agencies is appropriate because it best fulfills the objectives of the S.A.F.E. Act.

number of loans originated by an individual mortgage loan originator and/or the institution so that more low-volume originators would qualify for the exception. These commenters indicated that, because of its narrowness, too few institutions would be able to use the exception as proposed and others would unnecessarily register employees solely to avoid accidental non-compliance with the rule. Some, however, thought that the proposed threshold numbers were too high, and could cause an institution to spread its originations over numerous employees to avoid registration. Still others said that the proposed de minimis exception would be fairer, and much easier to apply, if the threshold limitation applied only to the employee or to the institution, but not both. A Federal government agency commenter found that the proposed definition of de minimis would make the rule unduly burdensome on small community banks.

A number of commenters also suggested that the final rule base a de minimis exception on a percentage of total loans or the total loan volume made at each institution, instead of the number of loans. Some trade associations and smaller institutions requested that the de minimis exception be based on an institution's asset-size, with suggestions ranging from the Home Mortgage Disclosure Act²³ threshold for institutions regulated by a Federal banking agency, currently set by the Board at \$39 million in assets,²⁴ to \$1 billion, which would be consistent with exceptions for small institutions in other provisions of law. Other commenters opposed an asset-based approach, with larger Agency-regulated institutions noting that the exceptions should not be structured to benefit only small institutions.

Other commenters wanted the exception to be applied to institutions with no prior history of mortgage origination fraud or to institutions with good performance histories from previous supervisory examinations, regardless of the number of loans originated. Some commenters also

²³ 12 U.S.C. 2801 et seq.

suggested that the exception should apply only to individuals who do not regularly or principally function as a mortgage loan originator. Some commenters noted that the exception could instead be based on the percentage of time an employee spends engaged in the origination of residential mortgage loans.

The Agencies also received conflicting comments on whether to aggregate a subsidiary's loans with the parent institution for determining de minimis qualification. One commenter opposed such aggregation, while another stated that an institution should be required to aggregate its loan data with that of its subsidiaries so that institutions could not “game” the system by creating new subsidiaries each time a subsidiary approaches the de minimis limit. Still other commenters pointed out that it would be very time consuming and burdensome to game the de minimis limit – rendering gaming opportunities essentially unrealistic.

Many commenters noted the complexity of the proposed exception. One commenter stated that the de minimis exception would not have any significant effect because the complexity of complying with it would outweigh its benefits. Others noted that the proposed exception would be difficult for an institution to monitor and maintain. Some commenters appeared to misinterpret the proposed aggregate exception.

The Agencies agree that the de minimis exception should be simplified, and, in particular, that it should be structured so that it may be utilized by an individual who does not regularly or principally function as a mortgage loan originator employed by any Agency-regulated institution, regardless of the size or loan volume of the institution. Therefore, the final rule eliminates the aggregate exception and includes only the first prong of the proposed de minimis exception,

²⁴ See 12 CFR 203.2 (Regulation C).

which applies only to individuals. The final rule also provides that this exception only applies if the employee has never before been registered or licensed through the Registry.

Final § ____ 101(c)(2) thus provides that the registration requirements of this section do not apply to an employee of an Agency-regulated institution who has never been registered or licensed through the Registry as a mortgage loan originator and who has acted as a mortgage loan originator for 5 or fewer residential mortgage loans during the last 12 months. In order to prevent manipulation of the registration requirement by structuring this exception to apply to multiple employees who each would not meet the exception's threshold for registration, the final rule prohibits any Agency-regulated institution from engaging in any act or practice to evade the limits of the de minimis exception. The Agencies believe that replacing the proposed institution limit with this anti-evasion prohibition is appropriate and will discourage circumvention of registration requirements without increasing an institution's administrative burden.

Monitoring compliance with the exception as revised should be less burdensome for Agency-regulated institutions. In addition, in the Agencies' view, this revised exception better balances the usefulness of the exception to Agency-regulated institutions and their mortgage loan originators with the consumer protection and fraud prevention purposes of the S.A.F.E. Act. Although the final rule specifically applies this anti-evasion provision to the de minimis exception, Agency-regulated institutions must not engage in any act or practice to evade any other requirement of the S.A.F.E. Act or this final rule.

The Agencies note that, as with the proposal, an employee must register with the Registry prior to engaging in mortgage loan origination activity that exceeds the exception limit. In addition, the Agencies note that the de minimis exception contained in the final rule is voluntary; it does not prevent a mortgage loan originator who meets the criteria for the exception from

registering with the Registry if the originator chooses to do so or if his or her employer requires registration.

The Agencies note that the Federal Housing Finance Agency (FHFA) has directed Fannie Mae and Freddie Mac to require all mortgage loan applications taken on and after July 1, 2010, to include the mortgage loan originator's unique identifier.²⁵ Agency-regulated institutions should be aware of this requirement and any future guidance that FHFA may issue to address the Agencies' implementation of the Federal registration process, including the de minimis exception.

The Agencies received a comment from one large financial institution requesting that we clarify whether the failure of a mortgage loan originator to register pursuant to this rulemaking has any substantive impact on a mortgage loan made by an institution that employs that originator. Neither the S.A.F.E. Act nor this subpart provides that a mortgage loan originator's failure to register as required affects the validity or enforceability of any mortgage loan contract made by the institution that employs the originator.

A few commenters suggested that in addition to the registration requirements, the final rule should impose educational and testing requirements on mortgage loan originators, as the S.A.F.E. Act does for State-licensed originators. The Agencies decline to impose such requirements. The S.A.F.E. Act does not include educational or testing requirements for mortgage loan originators employed by Agency-regulated institutions. In addition, as noted previously, the statute imposes different requirements on mortgage loan originators employed by Agency-regulated institutions. The Agencies note that these institutions already are subject to

²⁵ See FNMA LL 02-2009: New Mortgage Loan Data Requirements (02/13/09). The Agencies, however, expect that FHFA will provide some flexibility with this deadline, and perhaps establish a transition period to reflect the readiness of the Registry to begin accepting Federal registrations and this final rule's initial registration period.

extensive Federal oversight, including regular on-site examination of their mortgage lending activities.

Section ____.102 - Definitions

Section ____.102 defines the terms used in the final rule. If a term is defined in the S.A.F.E. Act, the Agencies generally have incorporated the same definition in the final rule. The final rule also includes other definitions currently used by the NMLS in order to promote consistency and comparability, insofar as is feasible, between Federal registration requirements and the States' licensing requirements.

Annual renewal period. Proposed § ____.102(a) required that a mortgage loan originator renew his or her registration annually during the annual renewal period and defined this period as November 1 through December 31 of each year. This is the same annual renewal period currently provided by the NMLS to mortgage loan originators regulated by a State.

This time period for renewals generated many comments. A few commenters suggested that the renewal period for Agency-regulated institutions should be at a different time of year than for originators regulated by a State. Others stated that the renewal period should be based upon the original registration date or original hire date, noting that a staggered registration process would be less burdensome for the Registry. Another commenter suggested that the employing institution determine its own renewal period for its employees. Still other commenters requested that this renewal period be lengthened from 60 to 90 days.

The Agencies decline to change the dates for the annual renewal period. As indicated above, the current system for originators regulated by a State is configured for an annual renewal period from November 1 through December 31. A different renewal period for originators employed by Agency-regulated institutions would involve functionality changes to the existing

system, adding costs and lengthening the implementation time. In addition, the Agencies note that different renewal periods could cause confusion and added burden to those originators who may work for both a State-regulated and Agency-regulated institution or who may switch from a State-regulated institution to an Agency-regulated institution during the year, and to employers of such originators, as well as for institutions that control both State- and Agency-regulated institutions. For these same reasons, the Agencies also decline to increase the renewal period from 60 to 90 days. Therefore, the final rule retains the proposed renewal period of November 1 through December 31 of each year.

Mortgage loan originator. The proposed definition of “mortgage loan originator” was based on the definition of the term “loan originator” included in the S.A.F.E. Act at section 1503(3) (12 U.S.C. 5102(3)). As defined by the S.A.F.E. Act, this term means an individual who takes a residential mortgage loan application and offers or negotiates terms of a residential mortgage loan for compensation or gain. The term does not include an individual who is not a mortgage loan originator and: (1) performs purely administrative or clerical tasks on behalf of an individual who is a mortgage loan originator; (2) performs only real estate brokerage activities (as defined in section 1503(3)(D) of the S.A.F.E. Act (12 U.S.C. 5102(3)(D))²⁶ and is licensed or registered as a real estate broker in accordance with applicable State law, unless the individual is compensated by a lender, a mortgage broker, or other loan originator or by any agent of such

²⁶ The S.A.F.E. Act defines “real estate brokerage activity” to mean any activity that involves offering or providing real estate brokerage services to the public, including: (i) acting as a real estate agent or real estate broker for a buyer, seller, lessor, or lessee of real property; (ii) bringing together parties interested in the sale, purchase, lease, rental, or exchange of real property; (iii) 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); (iv) engaging in any activity for which a person engaged in the activity is required to be registered or licensed as a real estate agent or real estate broker under any applicable law; and (v) offering to engage in any activity, or act in any capacity, described in clause (i), (ii), (iii), or (iv), above. S.A.F.E. Act at section 1503(3)(D) (12 U.S.C. 5102(3)(D)) Nothing in this rule would constitute an authorization for Agency-regulated institutions to engage in real estate brokerage, or any other activity, for which the institution does not have independent authority pursuant to Federal or State law, as applicable.

lender, mortgage broker, or other mortgage loan originator; or (3) is solely involved in extensions of credit related to timeshare plans, as that term is defined in 11 U.S.C. 101(53D).²⁷

For purposes of the definition of mortgage loan originator, section 1503(3)(C) of the S.A.F.E. Act (12 U.S.C. 5102(3)(C)) defines “administrative or clerical tasks” to mean: (1) the receipt, collection, and distribution of information common for the processing or underwriting of a loan in the mortgage industry; and (2) communication with a consumer to obtain information necessary for the processing or underwriting of a residential mortgage loan. The proposal included this definition as well, with one nonsubstantive difference – the proposal used the phrase “residential mortgage industry” instead of “loan in the mortgage industry” in the first prong of the definition.

The Agencies included an appendix to the proposal that listed examples of the types of activities the Agencies consider to be both within and outside the scope of residential mortgage loan origination activities. The final rule retains this appendix with certain changes as discussed in this Supplementary Information section. Individuals who receive “compensation or gain” as used in the definition of mortgage loan originator and described in this appendix include individuals who earn salaries, commissions or other incentive, or any combination thereof.

The Agencies 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

²⁷ “Timeshare plan” is defined in 11 U.S.C. 101(53D) as an interest purchased in any arrangement, plan, scheme, or similar device, but not including exchange programs, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, right to use agreement, or by any other means, whereby a purchaser, in exchange for consideration, receives a right to use accommodations, facilities, or recreational sites, whether improved or unimproved, for a specific period of time less than a full year during any given year, but not necessarily for consecutive years, and which extends for a period of more than three years. A “timeshare interest” is

these individuals should be excluded from the definition. While a few commenters believed the Agencies should cover individuals engaged in such transactions, the majority of commenters on this issue stated that this rulemaking should not cover these individuals. In general, they indicated that mortgage loan modifications and assumptions are very different from mortgage loan originations, and that employees engaged in these transactions do not meet the S.A.F.E. Act's definition of mortgage loan originator. Specifically, commenters indicated that these employees neither accept residential mortgage loan applications nor negotiate the terms of a new residential mortgage loan. Instead, they renegotiate an existing loan 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. Many 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. Many commenters also noted that applying the S.A.F.E. Act's registration requirements to employees engaged in loan modifications and assumptions could significantly hamper loan modification efforts.

The determining factor in whether the S.A.F.E. Act applies to residential mortgage loan-related transactions is whether the employee engaged in the transaction meets the definition of "mortgage loan originator." In general, neither modifications nor assumptions result in the extinguishment of an existing loan and the replacement by a new loan, but rather the terms of an existing loan are revised or the loan is assumed by a new obligor. Thus, Agency-regulated institution employees engaged in these activities typically do not take loan applications, within

that interest purchased in a timeshare plan which grants the purchaser the right to use and occupy accommodations,

the meaning of the S.A.F.E. Act. Therefore, the Agencies conclude that the S.A.F.E. Act's definition of "mortgage loan originator" generally would not include employees engaged in loan modifications or assumptions because they typically would not meet the two-prong test of this definition. However, if an employee engaged in a transaction labeled a loan "modification" or "assumption" can be found to meet the definition of "mortgage loan originator," due to the nature of the specific transaction in question, he or she would be subject to the S.A.F.E. Act and this final rule. The substance of a transaction, not the label attached to it, is determinative of whether the Agency-regulated institution employee associated with it is a mortgage loan originator for purposes of this rule. For example, the Agencies believe that Agency-regulated institution employees engaged solely in bona fide cost-free loss mitigation efforts which result in reduced and sustainable payments for the borrower generally would not meet the definition of "mortgage loan originator." In this regard, it should be noted that third parties involved in foreclosure prevention activities for compensation or gain, although outside the scope of this rulemaking, may be subject to licensing and registration pursuant to state law.

The Agencies sought comment on whether the individuals who engage in certain refinancing transactions, specifically cash-out refinancing with the same lender, should be excluded from the definition of residential mortgage loan originator. Some industry commenters did not believe that such an exclusion was appropriate primarily because of the nature of a refinancing as a new loan and the potential for consumer abuse in these transactions. Other commenters also requested that we exclude individuals engaged in refinancings from the final rule's definition of mortgage loan originator, and that refinancings be excluded from the final rule's definition of residential mortgage loan, if the refinancing involves the same lender and the

facilities, or recreational sites, whether improved or unimproved, pursuant to a timeshare plan.

borrower obtained no cash proceeds. We decline to make this change. Refinancings are new loans, regardless of the lender, the loan terms, or proceeds, that involve a new application and an offer or negotiation of new loan terms. If an individual engaged in a refinancing transaction of a residential mortgage loan meets the two prongs of the definition of mortgage loan originator, he or she must comply with the requirements of the S.A.F.E. Act and this final rule.²⁸

Other commenters suggested that the Agencies exclude loan servicing personnel from the requirements of this rulemaking. We decline to take this suggested approach because the S.A.F.E. Act definition is based on the activities of mortgage loan origination, rather than the job classification of the individual. An individual, regardless of job title, is a mortgage loan originator if he or she engages in the activities of mortgage loan origination within the meaning of the S.A.F.E. Act. For example, if a loan servicing employee of an Agency-regulated institution mainly performs loan servicing activities but also occasionally engages in residential mortgage loan origination, that person is a mortgage loan originator, regardless of whether he or she is called “servicing personnel.” On the other hand, for example, as discussed above in connection with loan modifications, a loan servicing employee engaged solely in bona fide cost-free loss mitigation efforts which result in reduced and sustainable payments for the borrower generally would not meet the definition of “mortgage loan originator.” Loan servicing employees of Agency-regulated institutions must comply with the registration requirements of the final rule if they meet both prongs of the definition of “mortgage loan originator,” unless they qualify for the de minimis exception under § ____.101(c)(2) of the final rule. Some commenters requested clarification that, when a servicing employee of an Agency-regulated institution works

²⁸ Some commenters noted that the Agencies should require only one mortgage loan originator for each mortgage loan. The Agencies decline to take this approach because the S.A.F.E. Act defines a mortgage loan originator according to the two-prong test set forth in the statute.

with a borrower to collect unpaid taxes or other costs pursuant to a repayment or collection plan, the employee is not acting as a mortgage loan originator under the Agencies' rules. The Agencies agree that such activities would generally not meet the two-prong test of this definition.

Some commenters asked the Agencies to explain whether the S.A.F.E. Act and this rule applied to residential mortgage loan originations made through an automated underwriting system, whereby an applicant inquires about, applies for, and/or receives a decision on an application electronically through an institution's Web site.²⁹ Although some institutions may choose to establish an automated system to collect application information and make an initial decision on a loan application, from a risk management and compliance perspective, an institution is expected to set the system parameters and monitor system output for compliance with various laws, regulations, and guidance on an ongoing basis. Such institutions are expected to register employees involved in that process who meet the definition of "mortgage loan originator," as appropriate. The Agencies note, as indicated above, that the FHFA has directed Fannie Mae and Freddie Mac to require all mortgage loan applications taken on and after July 1, 2010, to include the mortgage loan originator's unique identifier.³⁰ Institutions should keep apprised of any future guidance FHFA may issue to address this requirement.

For the reasons discussed above, the final rule includes the definition of "mortgage loan originator" as proposed, with one technical change to the definition of "administrative or clerical

²⁹ Section 107(5)(A)(x) of the Federal Credit Union Act (12 U.S.C. 1757(5)(A)(x)) requires all loans to be approved by a credit committee or loan officer. For all federal credit unions, and to the extent state chartered credit unions operate under a similar State law or regulation, the statutory and regulatory definition of mortgage loan originator is met and the S.A.F.E Act does apply.

³⁰ See FNMA LL 02-2009: New Mortgage Loan Data Requirements (02/13/09). The Agencies, however, expect that FHFA will provide some flexibility with this deadline, and perhaps establish a transition period to reflect the readiness of the Registry to begin accepting Federal registrations and this final rule's initial registration period.

tasks” to make it identical to the definition of this term in section 1503(3)(C) of the S.A.F.E. Act (12 U.S.C. 5102(3)(C)).

Nationwide Mortgage Licensing System and Registry or Registry. Section ____ .102(c) of the proposed rule’s definition of these terms is based on the definition included in section 1503(5) of the S.A.F.E. Act (12 U.S.C. 5102(5)). Specifically, these terms mean the system developed and maintained by CSBS and the AARMR for the State licensing and registration of State-licensed mortgage loan originators and the registration of mortgage loan originators pursuant to section 1507 of the S.A.F.E. Act (12 U.S.C. § 5106). As explained above, CSBS and the AARMR have established an online system, NMLS, that currently supports the licensing and registration of mortgage loan originators regulated by a State. The Agencies are working with CSBS to modify the NMLS to support the registration of mortgage loan originators employed by Agency-regulated institutions, and will rename this system the Nationwide Mortgage Licensing System and Registry. The Agencies received no comments on this definition and adopt it as proposed.

Registered mortgage loan originator. Pursuant to section 1503(7) of the S.A.F.E. Act (12 U.S.C. 5102(7)), the proposed rule defined this term to mean any individual who meets the definition of mortgage loan originator, is an employee of an Agency-regulated institution, and is registered pursuant to the requirements of this rule with, and maintains a unique identifier through, the Registry. This definition is the same as that included in the S.A.F.E. Act, except that the Agencies have modified it to apply only to individuals registered pursuant to regulations issued by the Agencies. The Agencies received no comments on this definition and adopt it as proposed.

Residential mortgage loan. As in section 1503(8) of the S.A.F.E. Act, (12 U.S.C. 5102(8)), the proposal defined “residential mortgage loan” as 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 (TILA) (15 U.S.C. 1602(v))³¹ or residential real estate upon which is constructed or intended to be constructed a dwelling. In addition, the proposal specifically included refinancings, reverse mortgages, home equity lines of credit and other first and second lien loans secured by a dwelling in this definition in order to clarify that originators of these types of loans are covered by the rule’s requirements.

One commenter suggested that ancillary liens on an underlying mortgage loan or liens taken to provide consumers with potential tax advantages should not be considered residential mortgage loans. In addition, another commenter asked that the definition of residential mortgage loan include an exception to exclude seller-sponsored financing of the sale of lender-owned property. The Agencies decline to adopt these exclusions to the definition of “residential mortgage loan” and adopt this definition as proposed. These types of loans clearly fall within the statutory definition of “residential mortgage loans,” and the S.A.F.E. Act makes no exceptions for these two situations. We do clarify, however, that this definition does not include loans for business, commercial, or agricultural purposes that use as collateral property that meets the definition of a “dwelling.”

³¹ TILA defines “dwelling” as a residential structure or mobile home which contains one-to-four family housing units, or individual units of condominiums or cooperatives. 15 U.S.C. 1602(v). Board regulations and commentary include in this definition any residential structure that contains one to four units, whether or not that structure is attached to real property, and includes an individual condominium unit, cooperative unit, mobile home, and trailer, if it is used as a residence. See 12 CFR 226.2(a)(19) (Regulation Z).

As indicated in the Supplementary Information section to the proposed rule, the FCA emphasizes that section 1503(8) of the S.A.F.E. Act (12 U.S.C. 5102(8)) and § ____.102(e) do not amend or supersede sections 1.11(b) and 2.4(b) of the Farm Credit Act of 1971, as amended (12 U.S.C. 2019(b) and 2075(b)), and their implementing regulation, 12 CFR 613.3030(c), which establish the purposes for which FCS institutions may originate residential mortgage loans for eligible rural home borrowers.

Unique Identifier. The proposed rule's definition of this term was almost identical to that in section 1503(12) of the S.A.F.E. Act (12 U.S.C. 5102(12)). The Agencies received no comments on this definition and adopt it as proposed. Specifically, the final rule defines "unique identifier" to mean a number or other identifier that: (1) permanently identifies a registered mortgage loan originator; (2) is assigned by protocols established by the Registry and the Agencies to facilitate electronic tracking of mortgage loan originators, and uniform identification of, and public access to, the employment history of and the publicly adjudicated disciplinary and enforcement actions against mortgage loan originators; and (3) must not be used for purposes other than those set forth in the S.A.F.E. Act.

Other terms. The Agencies note that § ____.103(d) of the proposed and final rule uses the terms "control" and "financial services-related" in the descriptions of the information that is required of an employee who is a mortgage loan originator. These terms are currently defined in the Web-based MU4 form collecting information on State-licensed mortgage loan originators. In order to promote consistency of the information collected for Agency-regulated and State-licensed mortgage loan originators, the Agencies reiterate that the MU4 form's definitions of

those two terms will also be used in the Web-based form collecting information on Agency-regulated mortgage loan originators and, therefore have not defined them in this rulemaking.³²

A number of commenters requested that the Agencies define “employee” for purposes of this rulemaking to provide more clarity regarding the individuals covered by the rule. Agency-regulated institutions must have a process for identifying which employees of the institution are required to be registered mortgage loan originators.³³ As the Supreme Court has explained, “where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms In the past, when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”³⁴ Section 7.07(3)(a) of the Restatement (Third) of Agency explains that “an employee is an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work.”³⁵ The Agencies thus intend that the meaning of employee under the

³² The Registry currently defines “control” as the power, directly or indirectly, to direct the management or policies of a company or business, whether through ownership of securities, by contract, or otherwise. Any person who is a general partner or executive officer, including Chief Executive Officer, Chief Financial Officer, Chief Operations Officer, Chief Legal Officer, Chief Compliance Officer, Director and individuals with similar status or functions; directly or indirectly has the right to vote 10 percent or more of a class of a voting security or has the power to sell or direct the sale of 10 percent or more of a class of voting securities; or, in the case of a partnership, has the right to receive upon dissolution, or has contributed, 10 percent or more of the capital, is presumed to control that company. The Agencies have requested that this definition be revised to include “Chief Credit Officer.” The Registry’s current definition of “Financial services-related” means pertaining to securities, commodities, banking, insurance, consumer lending, or real estate (including, but not limited to, acting or being associated with a bank or savings association, credit union, mortgage lender, mortgage broker, real estate salesperson or agent, closing agent, title company, or escrow agent). The Agencies have requested that this definition be revised to include “Farm Credit System institution” and “appraiser.” These changes are planned to take effect in January 2010.

³³ See § ____ .104(a).

³⁴ Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992) (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989) (other citations omitted).

³⁵ RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006).

S.A.F.E. Act and this rule is consistent with the right-to-control test under the common law agency doctrine. The Agencies note in this regard that the IRS uses the common law right-to-control test as its basis for classification of workers as employees.³⁶ The result of this test generally determines whether an institution files a W-2 or a 1099 for an individual. The Agencies therefore expect an Agency-regulated institution would identify a mortgage loan originator as an individual subject to this final rule if, following consideration of the relevant facts, the institution determines that the individual is an employee of the Agency-regulated institution.³⁷

Section __.103 – Registration of mortgage loan originators

Section 1504(a) of the S.A.F.E. Act (12 U.S.C. 5103(a)) prohibits an individual who is an employee of an Agency-regulated institution from engaging in the business of a loan originator without registering as a loan originator with the Registry, maintaining annually such registration, and obtaining a unique identifier through the Registry. As in the proposal and described more specifically below, § __.103 of the final rule imposes the responsibility for complying with these requirements on both the individual employee and the employing institution. In addition, both the employee and the employing institution must submit information to the Registry for each registration to be complete. The Agencies note that an employee of an Agency-regulated institution who is not actively engaged in residential mortgage loan activity is not prohibited from registering with the Registry.

³⁶IRS Publication 1779; see also Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding.

³⁷Agency-regulated institutions that are credit unions sometimes rely upon volunteers to originate mortgage loans. The right-to-control test under the common law agency doctrine likewise applies to these credit unions. Credit union management establishes the policies, procedures, and practices that volunteers use in performing their functions. Therefore, these volunteers qualify as employees of the Agency-regulated institution for purposes of the S.A.F.E. Act and this rule.

Employee registration requirement. In general, § ____ .103(a)(1) of the proposed rule required an employee of an Agency-regulated institution who acts as a mortgage loan originator to register with the Registry, obtain a unique identifier, and maintain his or her registration. This section further provided that any employee who is not in compliance with the registration and unique identifier requirements set forth in the proposed rule is in violation of the S.A.F.E. Act and this rule.³⁸ The Agencies note that this registration requirement would not apply if the employee qualifies for the de minimis exception.

The Agencies did not receive substantive comments specifically on this section and therefore adopt it as proposed.

Institution requirement. Proposed paragraph (a)(2) of § ____ .103 provided that an Agency-regulated institution must require its employees who are mortgage loan originators to register with the Registry, maintain this registration, and obtain a unique identifier in compliance with this subpart. This provision also prohibited an Agency-regulated institution from permitting its employees to act as mortgage loan originators unless registered with the Registry pursuant to this subpart, after the applicable implementation periods specified in §§ ____ .103(a)(3) and (a)(4)(ii) expire.

One commenter objected to this requirement as not being based on statutory language. Although the S.A.F.E. Act does not contain the same express prohibition as in the Agencies' proposed rule, determining the scope of mortgage loan origination activities that subject an

³⁸ The OCC, Board, FDIC, and OTS have the authority to take enforcement actions against their respective Agency-regulated institutions and individual employees of those institutions who violate the S.A.F.E. Act and this final rule, pursuant to 12 U.S.C. 1818. The FCA has authority to take enforcement actions against Farm Credit System institutions and individual employees who violate the S.A.F.E. Act and this final rule pursuant to Title V, Part C of the Farm Credit Act of 1971, as amended, 12 U.S.C. 2261 et seq. The NCUA has the authority to take enforcement actions against federally-insured credit unions and their employees who violate the S.A.F.E. Act and this final rule under 12 U.S.C. 1786. For privately insured credit unions, memoranda of understanding between NCUA and applicable State supervisory authorities will establish enforcement authority.

individual or institution to the Act's requirements is well within the Agencies' authority to implement the statute. The imposition of this requirement on Agency-regulated institutions implements the purposes of the S.A.F.E. Act and ensures Agency-regulated institutions and their employees comply with all applicable laws. This commenter also stated that this requirement would be difficult to enforce because an employing institution may not know of the activities of its employees outside of their scope of employment at that institution. We agree with this commenter that the language in § __103.(a)(2)(ii) should be clarified so that an institution's oversight of a mortgage loan originator applies only to the extent the originator is acting within the scope of his or her employment at that institution. We therefore adopt § __.103(a)(2) with this one change.

Implementation period for initial registrations. Proposed § __.103(a)(3) provided a 180-day implementation period for initial registrations beginning on the date the Agencies provide public notice that the Registry is accepting initial registrations. The Agencies have adopted this provision as proposed with one minor change to clarify that the implementation period begins on the date that the Agencies provide in their public notice, not the actual date of the public notice. Pursuant to the proposal, an employee could continue to originate residential mortgage loans without complying with the rule's registration requirement before and during this 180-day period. After this 180-day period expires, any existing employee or newly-hired employee of an Agency-regulated institution who is subject to the registration requirements would be prohibited from originating residential mortgage loans without first meeting such requirements.

The Agencies specifically requested comment on whether this 180-day implementation period would provide Agency-regulated institutions and their employees with adequate time to

complete the initial registration process. The Agencies also inquired as to whether an alternative schedule for implementation and initial registrations would be appropriate, what such an alternative schedule should be, and whether, and how, a staggered registration process should be developed.

The Agencies received many comments on this implementation period. Some commenters supported a 180-day period. Others supported the proposed 180-day implementation period provided that certain conditions are met, such as excluding loan modification and mitigation employees from the registration requirements, allowing batch processing, simplifying the employer verification requirements, and immediate confirmation of registration without delay for fingerprint or background check results.

Other commenters, however, stated that the proposed 180-day implementation period would not provide sufficient time to register the large number of employees subject to the registration requirement, properly train all employees, develop compliance policies, and program and implement system controls. Many noted that a longer period would prevent the Registry from being overwhelmed with registrations. Two commenters, including one Federal agency, stated that additional time will particularly benefit smaller financial institutions. Another commenter indicated that the time, effort, and resources required to meet new systems requirements can be extensive, and that a 180-day implementation period for such major changes would be extremely difficult for larger institutions. These commenters suggested an implementation period of nine months to one year. One commenter stated that each Agency should have the flexibility to grant additional time to register in the event the Registry becomes backlogged or inundated with a large volume of registrations. No commenter requested a shorter implementation period.

The Agencies understand that Agency-regulated institutions and their mortgage loan originator employees will face certain implementation issues in complying with the registration requirements established by this rulemaking. However, as indicated above, due to various system modifications and enhancements required to make the existing system capable of accepting Federal registrants, the system is not expected to be available to accept Federal registrations until sometime in 2010. The 180-day implementation period will not begin until the system is available to accept Federal registrations. This in effect provides institutions with an implementation period longer than 180 days as institutions and their employees can begin to implement the final rule's requirements before the Registry is operational, *i.e.*, develop policies and procedures, train employees, gather information needed for registration, and program and implement system controls. In addition, CSBS and SRR will provide information to, and assist Agency-regulated institutions in preparation for, registration during this period. The Agencies believe that this additional time will provide mortgage loan originators, and the Agency-regulated institutions that employ them, adequate opportunity to prepare for the registration requirements. Any extension of the 180-day implementation period provided in the final rule will only further delay the registration of residential mortgage loan originators and, as a result, the consumer protection benefits of the S.A.F.E. Act. In addition, as described below, batch processing of at least some information likely will be available, which should make the registration process more efficient for both the institution and the registering employee. For these reasons, the Agencies decline to provide an implementation period longer than the proposed 180 days.

Many commenters indicated support for a staggered implementation period. Some noted that this could be based on institution size, loan origination volume, or employee qualifiers (such

as birth date or last name). Some of these commenters, however, noted that they would support a staggered schedule only if it would provide a registration period of equal length for all registrants. Other commenters supported a staggered process that would give smaller institutions or institutions that do not originate many residential mortgage loans the greatest amount of time to comply with the requirements.

The Agencies agree that a staggered implementation process for those institutions that prefer one would be useful. Such a process would allow institutions to register their employees within specific time periods during the implementation period with the assistance of dedicated staff. Staggered registration would limit the number of originators registering at any one time and spread the registration of originators throughout the implementation period. Although such a schedule mostly would benefit those institutions with the largest number of mortgage loan originators, it also should enable the Registry to accommodate all registrations in a more timely and efficient manner, thereby benefiting all institutions. Accordingly, the Agencies will work with CSBS and SRR to develop a staggered registration schedule for institutions, in particular those that are estimated to have a large number of mortgage loan originators subject to Federal registration, that request such a schedule. This staggered process would occur within the 180-day implementation period in order not to delay the registration of mortgage loan originators and the ability of consumers to fully utilize the Registry. Because institutions that request a staggered registration process would have a dedicated period during which to register within the 180-day period, registration burdens may be eased for these institutions, lessening their need for the full 180-day registration period. Details on this staggered approach will be provided to applicable institutions when they have been finalized and may include the availability of this dedicated staff prior to the start of the registration period.

Special rule for previously registered employees. Under paragraph (a)(4) of § ____.103 of the proposed and final rule, properly registered or licensed mortgage loan originators would not have to register again with the Registry when they change employment by moving from one Agency-regulated institution to another or from a State-regulated institution to an Agency-regulated institution, regardless of whether the change in employment is made voluntarily, through an acquisition or merger of the employee's prior employer, or through a reorganization where previously State-licensed mortgage loan originators become subject to the registration requirements of Agency-regulated institutions. Instead, the employee and employing institution need only update information in the Registry and complete the required authorizations and attestation.

Specifically, proposed paragraph (a)(4) of § ____.103 provided that if a new employee of an Agency-regulated institution had previously registered with, and obtained a unique identifier from, the Registry prior to becoming an employee of that institution and has maintained that registration (or license, if previously employed by a non-Agency-regulated institution), the registration requirements of this subpart are deemed to be met provided that: (1) the employee's employment information in the Registry is updated and the employee has completed the required authorizations and attestation; (2) new fingerprints of the employee are provided to the Registry for a background check, except in the case of mergers, acquisitions or reorganizations; (3) information concerning the new employing institution is provided to the Registry pursuant to § ____.103(e)(1)(i), to the extent the institution has not previously met these requirements, and § ____.103(e)(2)(i);³⁹ and (4) the registration is maintained pursuant to the requirements of

³⁹ These provisions require: the institution's name; main office address; IRS Employer Tax Identification Number; Research Statistics Supervision Discount (RSSD) number; identification of the institution's primary Federal regulator; contact information for individuals at the institution for Registry purposes; applicable subsidiary

paragraphs § ____.103(b) and (e)(1)(ii) of this section as of the date that the employee becomes employed by the institution.

Some commenters requested that the Agencies reduce these requirements in order to further facilitate the movement of employees from one institution to another and prevent unnecessary interruption of mortgage origination activity. However, the Agencies believe that the current provision adequately reduces regulatory burden on Agency-regulated institutions as well as the residential mortgage industry when registered mortgage loan originators change employers and will allow a mortgage origination transaction in process at the time of the employment change to proceed smoothly. It requires less than what would be needed to complete a new registration and requires only that information necessary to update the employee's registration and confirm the identity of the originator and the employer, thereby preventing fraudulent information from being submitted to the Registry. However, we have amended § ____.103(a)(4)(i)(B) to provide that new fingerprints are not required to be submitted, pursuant to § ____.103(d)(1)(ix), if the registered loan originator has fingerprints on file with the Registry that are less than three years old. The Registry will use these existing prints for purposes of the background check. This three-year age limit is consistent with the procedures to be used by SRR for mortgage loan originators licensed by a State. We note that, as proposed, the final rule does not require fingerprints or a new background check when the change in employers is due to an acquisition, merger, or reorganization because these transactions carry a lower risk of fraud and identity theft. The Agencies note that institutions should still conduct prudent screening of prospective employees to confirm their identities.

information, and confirmation that it employs the registrant. Information regarding an institution's RSSD number is available from the Board.

In response to a comment, the Agencies note that paragraph (a)(4) of § ____.103 applies when an employee of an Agency-regulated institution becomes an employee of another Agency-regulated institution, regardless of whether the entities are affiliated. Similarly, when an employee of a subsidiary of an Agency-regulated institution becomes an employee of the institution, the requirements of the § ____.103 apply.

In order to reduce regulatory burden and to prevent an interruption in mortgage origination activity, the proposed § ____.103(a)(4)(ii) provided a 60-day grace period to comply with the § ____.103(a)(4)(i) requirements when a registered mortgage loan originator becomes an employee of an Agency-regulated institution as a result of an acquisition, merger, or reorganization. Some commenters agreed that this 60-day grace period is appropriate and provides the proper balance between implementing the purpose of the S.A.F.E. Act and protecting consumers. Other commenters, however, requested that this period be extended to 90 or 180 days due to the complexity and protracted nature of the merger and acquisition process. Some commenters also requested that a 60-day grace period apply to all changes in employment, regardless of whether the change is the result of a merger or acquisition transaction.

Final § ____.103(a)(4)(ii) retains the proposed 60-day grace period for a change in employers due to acquisitions, mergers or reorganizations. The Agencies find that 60 days is an adequate time for institutions and their employees to update registrations in the case of these transactions and agree with the commenters who stated that this time period balances the purposes of the S.A.F.E. Act and consumer protection.

Additionally, the Agencies find that a grace period is not necessary when a mortgage loan originator changes employers for other reasons. This situation does not raise the same compliance burden as does an acquisition, merger, or reorganization, in which a large number of

employees are switching employers at the same time. Therefore, as proposed, the final rule requires that these registered mortgage loan originators comply with the requirements of § __.103(a)(4) before they may originate residential mortgage loans for their new employer.

Another commenter requested that the Agencies permit an employer to submit one update concerning all affected employees in the case of an acquisition, merger, or reorganization, rather than having each individual employee submit what is largely identical information about their change in employer. The Agencies agree that this approach would reduce burden for the employee, institution, and the Registry. We specifically have instructed CSBS and SRR to develop a process for these transactions that would allow the bulk transfer of business location and contact information for all mortgage loan originators from one institution to another. However, each individual employee still must complete the authorization and attestation for their own updated registration record.

The Agencies adopt proposed § __.103(a)(4) with the addition of the language discussed above related to fingerprints in § __.103(a)(4)(i)(B). The Agencies also have modified § __.103(a)(4) to clarify that an employee of a bank who has been properly registered or licensed as a mortgage loan originator need only update information in the Registry, and complete the required authorizations and attestation, whether that employee is a new employee of the Agency-regulated institution or becomes subject to this subpart while an employee of the institution.

The Agencies note that the registration of a mortgage loan originator who leaves any employer will be recorded as inactive in the Registry until he or she is hired by another entity, his or her record is updated in accordance with the final rule's requirements, and the new employer acknowledges employing the mortgage loan originator through the Registry. The

individual will be prohibited from acting as a mortgage loan originator at an Agency-regulated institution until such time as the registration is reactivated, unless covered by the 60-day grace period for acquisitions, mergers, and reorganizations.

Maintaining Registration. Under proposed § ____.103(b)(1)(i), a registered mortgage loan originator must renew his or her registration with the Registry during the annual renewal period, November 1 through December 31 of each year. To renew, the employee must confirm that the information previously submitted to the Registry remains accurate and complete, updating any information as appropriate. Any registration that is not renewed during this period will become inactive, and the individual will be prohibited from acting as a mortgage loan originator at an Agency-regulated institution until such time as the registration requirements are met. However, an individual who fails to update information during this period may renew his or her registration at any time and does not need to wait until the start of the next annual renewal period. Inactive mortgage loan originators will not be assigned a new unique identifier if they reactivate their registration.

Some commenters opposed the requirement to renew registrations annually as overly burdensome and unnecessary. Some suggested alternatively that a registration remain valid until there is a change in employment status or other change that requires an update of database information. Others recommended that the renewal be every two, three, or five years, or based on the experience of the originator. The Agencies understand that an annual renewal process requires an expenditure of time and resources by individual originators and their employing Agency-regulated institutions. However, section 1504 of the S.A.F.E. Act (12 U.S.C. 5103), requires that mortgage loan originators maintain their registration annually. Therefore, the Agencies can not eliminate, or lengthen the time between, renewals. For this reason, the

Agencies adopt § ____.103(b)(1)(i) as proposed without revision. We note that the automated processing of annual renewals, as more fully described below, could lessen the impact on the resources needed for these renewals.

One commenter suggested that the final rule not require a mortgage loan originator to renew his or her registration during this annual renewal period if registration was made less than six months prior to the end of the renewal period. The Agencies believe this change is reasonable and within the scope of the S.A.F.E. Act. We have amended the final rule accordingly by adding new paragraph (b)(3) to final § ____.103. However, a mortgage loan originator still is required to update his or her registration during this six month period if any information provided to the Registry at the time of registration changes, pursuant to § ____.103(b)(1)(ii), described below.

In addition to the annual renewal, proposed § ____.103(b)(1)(ii) provided that a registration must be updated within 30 days of the occurrence of any of the following events: (1) a change in the employee's name; (2) the registrant ceases to be an employee of the institution; or (3) any of the employee's responses to the information required for registration pursuant to paragraphs (d)(1)(iii) through (viii) of § ____.103 become inaccurate.

A few commenters requested that the Agencies increase this 30-day period for updates to 60 or 90 days. The Agencies believe that the Registry should be updated as soon as possible and therefore have not adopted this requested change. Updates are needed on only a case-by-case basis and therefore, unlike in the case of mergers and acquisitions, should not be burdensome to registrants or employing institutions. In addition, the 30-day updating period is consistent with what is required currently for State-licensed mortgage loan originators. Therefore, final § ____.103(b)(1)(ii) includes a 30-day update requirement, as proposed.

Proposed § ____.103(b) also requires any employee who registers with the Registry to maintain his or her registration unless the employee is no longer a mortgage loan originator. As a result of this provision, once an employee registers as a loan originator with the Registry, the employee will be required to continue this registration until he or she is no longer engaged in the activity of a mortgage loan originator, even if, in any subsequent 12-month period, the employee originates fewer mortgage loans than the number specified in the de minimis exception provision. The purpose of this requirement is to prevent the creation of a timing loophole that could allow mortgage loan originators to avoid registration requirements.

As indicated in the proposal's Supplementary Information section (74 FR 27391), the Agencies have considered whether the rule should provide for a temporary waiver of the rule's registration requirements or for extension of the initial registration or renewal period, in case of emergency, system malfunction, or other event beyond the control of the Agency-regulated institution or the mortgage loan originator. One commenter expressed support for this concept but noted that such an exception should be narrowly drawn so as not to create a loophole in the registration requirement and suggested that each Agency select an official who has authority to designate an emergency deadline extension for good cause. Another commenter also supported a waiver when events beyond the institution's control made timely registration impossible.

The Agencies agree that on rare occasions there may be exigent circumstances or situations when the Agencies may deem it appropriate to temporarily waive or suspend the requirements of this rule or extend the initial registration or renewal periods. The Agencies do not believe, however, that the final rule must include specific language to effectuate such waivers, suspensions, or extensions. As is the Agencies' practice in other supervisory contexts, if a situation arises that warrants such an action, such as a serious interruption of communication,

computer, or fingerprint collection systems at one or more institution(s) caused by circumstances beyond the institution's control, or an extended interruption of Registry service, the Agencies will announce the availability of waivers, suspensions, or extensions of time. In addition, Agency-regulated institutions may contact their regulators to discuss possible relief on a case-by-case basis.

Effective date of registrations and renewals. Proposed § ____.103(c) provided that a registration is effective on the date that the registrant receives notification from the Registry that all employee and institution information required by paragraphs (d) and (e) of § ____.103 has been submitted and the registration is complete, and that a renewal or update of a registration is effective on the date the registrant receives notification from the Registry that all applicable information required by paragraphs (b) and (e) of § ____.103 has been submitted and the renewal or update is complete.

We have made two changes to this provision in the final rule. Because the Registry is not technically capable of determining when a registrant actually receives its notification that the registration is complete, we have amended this provision to indicate that a registration is effective when the Registry transmits notification to the registrant that the registrant is registered. In addition, we have streamlined this provision to clarify that this notification of registration completes the registration process. We have made similar changes to § ____.103(c)(2) regarding renewals and updates.

We note that, except as provided by the 180-day implementation period in § ____.103(a)(3) or the 60-day grace period provided in § ____.103(a)(4), an employee must not engage in residential mortgage loan origination activity if his or her registration is not yet effective or has not been renewed or updated pursuant to this rule.

A number of commenters requested further clarification of this effective date, and specifically requested that the effectiveness of the registration not be delayed for the processing of a registrant's fingerprints or receipt of a criminal background check. The Agencies did not intend to delay the effective date for fingerprint or criminal background check processing. There is no requirement for the processing of these fingerprints or the completion of a background check before a registration becomes effective. Nor, as indicated previously in this Supplementary Information section, is the effectiveness of a registration contingent on Agency or Registry review or approval of the information submitted to the Registry. Pursuant to the rule, in order to register, the information required by §__.103(d) and (e) must be submitted, and, in order to renew or update a registration, the information required by §__.103(b) must be submitted. The Registry will conduct a completeness check of the information submitted by or on behalf of the registrant. At the time the Registry determines all required information has been submitted and all Registry requirements have been met, such as payment of applicable fees charged by the Registry, it will transmit notification electronically to the registrant that he or she is registered or that his or her registration is renewed or updated, as applicable. The employing institution will be responsible for reviewing the criminal history background report once it is completed, and taking any necessary action based on the findings of this report, pursuant to the institution's policies and procedures, as required by this final rule. We note that the registrant will obtain a unique identifier during the registration process and not when the registration is complete.

Section 1510 of the S.A.F.E. Act (12 U.S.C. 5109), expressly authorizes the Registry to “charge reasonable fees to cover the costs of maintaining and providing access to information from the [Registry], to the extent that such fees are not charged to consumers for access to such

[Registry].” We anticipate that the Registry will charge fees for registration, change in employment, renewal, and fingerprint processing and background checks. Although some commenters specifically requested information on the anticipated costs associated with registering with the Registry, the Agencies are at this time unable to provide this information as the fees have yet to be established by CSBS and SRR. The Agencies are consulting with the CSBS and SRR regarding the fees that the Registry expects to impose. One commenter specifically asked the Agencies to grant Agency-regulated institutions the opportunity to comment on fees. CSBS has indicated that it intends to provide an opportunity for the public to comment on these fees, and any future adjustments to such fees, before their imposition on Federal registrants and/or their employing institutions.⁴⁰

Required employee information. Section 1507(a)(2) of the S.A.F.E. Act (12 U.S.C. 5106(a)(2) specifically requires, in connection with the registration of a mortgage loan originator, the Agencies to furnish, or cause to be furnished, information concerning an employee’s identity, including fingerprints and personal history and experience, to the Registry. Final § ____ .103(d) implements this requirement and lists the categories of information that mortgage loan originators, or the employing Agency-regulated institution on behalf of the mortgage loan originator, will be required to submit to the Registry. Agency-regulated institutions may select one or more individuals to submit the employee information required by this paragraph to the Registry on behalf of each of their mortgage loan originators to facilitate the registration process. At the request of commenters, we have added a new paragraph (d)(3) to the final rule that specifically permits institutions to select such individuals to submit employee

⁴⁰ The agencies note that the NMLS currently charges fees for the licensing of State originators; however, fees for Federal registrants and their employing Agency-regulated institutions may differ from those currently imposed on State licensees. See the NMLS Web site at <http://www.stateregulatoryregistry.org> for information regarding fees imposed on State originators.

information on behalf of mortgage loan originators employed by the institution. The final rule specifically prohibits these selected individuals from acting as mortgage loan originators. We note that regardless of the manner that the information is provided to the Registry, the registering employee, and not the employing institution or other employees, must complete the authorizations and attestation required by § ____.103(d)(2), and described below, for the registration to be complete.

Under proposed § ____.103.(d), the employing Agency-regulated institution would have been required to have its registering employees submit, or to submit on behalf of its employees, information regarding the employee's identity (name and former names, social security number, gender, and date and place of birth) and home and business contact information; date the employee became an employee of the Agency-regulated institution; financial services-related employment and financial history for the past 10 years; criminal history involving certain felonies and misdemeanors; history of financial services-related civil actions, arbitrations and regulatory and disciplinary actions or orders; financial services-related professional license revocations or suspensions; voluntary or involuntary employment terminations based on violations of law or industry standards of conduct; and certain actions listed above that are pending against the employee. This information is similar to that required by the current NMLS data collection form for mortgage loan originators regulated by a State, form MU4. The information applies to employees but includes responsive information prior to their employment at the Agency-regulated institution.

The Agencies received many comments on this provision. Although some supported the proposed list of information to be submitted to the Registry, many others requested that the

Agencies narrow this list, stating that the extent of personal information required by the proposal is overbroad, intrusive, and burdensome. Commenters also requested that we clarify the information that is required to be submitted.

Based on the comments received, the Agencies have carefully reviewed this list and agree that some of this information is more relevant for licensing purposes than for registration. In particular, we found that the collection of some of this information, which would not be publicly available to consumers, is not necessary to implement the purposes and requirements set forth in section 1502 of the S.A.F.E. Act (12 U.S.C. 5101).

Based on this review, we have deleted proposed § ____.103(d)(1)(iii) from the final rule, which would have required submission of the registrant's financial history information (such as bankruptcies, unsatisfied judgments, liens, paid-out bonds, etc.). This information would not be available to consumers under this rulemaking and is not required for registration by the statute. It therefore does not further the objectives of the S.A.F.E. Act.

In addition, the submission of employment termination information to the Registry is more appropriate for the purpose of licensing, as a State regulator would use this information to make a decision on licensure, conducting further inquiry, if appropriate. Because this sensitive information would not be made public, we have deleted proposed § ____.103(d)(1)(x), which required submission of information regarding employment terminations to the Registry, from the final rule.

We also have not included in the final rule the requirement to provide information on pending matters. Because these matters are not final actions, requiring this information would effectively penalize mortgage loan originators before a decision had been rendered. We note that

if a pending action does become final, it must be reported to the Registry and made publicly available within 30 days, pursuant to § ____.103(b)(1)(ii).

The Agencies also have revised the requirement in proposed § ____.103(d)(1)(iv) to provide information on the mortgage loan originator's felony and misdemeanor criminal history. The proposal provided that the registrant supply information regarding felony convictions or other final criminal actions involving a felony against the employee or organizations controlled by the employee; or misdemeanor convictions or other final misdemeanor actions against the employee or organizations controlled by the employee involving financial services, a financial services-related business, dishonesty, or breach of trust. After further review, the Agencies found the proposal's language too broad, and as a result, would have required the registrant to disclose convictions that are not directly relevant to his or her work as a mortgage loan originator. As such, this information is not necessary to meet the purposes or requirements of the S.A.F.E. Act.

Final and redesignated § ____.103(d)(1)(iii) removes the distinction between felonies and misdemeanors and narrows the category of final actions an employee must disclose to the Registry to final criminal actions that involve dishonesty or breach of trust or money laundering. In addition, to fully encompass all relevant final criminal actions, the final rule amends this category of information to include an agreement to enter into a pretrial diversion or similar program in connection with the prosecution for such offense.⁴¹ This language derives from section 19(a)(1) of the FDI Act (12 U.S.C. 1829), which, in general, prohibits the participation of individuals convicted of such offenses from participating in the affairs of an insured depository

⁴¹ An agreement to enter into a pretrial diversion or similar program is defined by the FDIC as a suspension or eventual dismissal of charges or criminal prosecution upon agreement of the accused to treatment, rehabilitation, restitution, or other noncriminal or nonpunative alternatives. FDIC Statement of Policy for Section 19 of the FDIC Act, 63 FR 66177 (Dec. 1, 1998).

institution. The Agencies intend to rely on FDIC rules and guidance interpreting section 19(a)(1) of the FDI Act with respect to the interpretation of criminal offenses covered under section 19 of the FDI Act.⁴² Therefore, amending the proposal to include this language in the final rule provides clearer guidance to originators and their Agency-regulated institution employers of the types of criminal offenses required to be disclosed. For example, the FDIC excludes expunged, sealed and juvenile offenses and, therefore, the Agencies would not expect this information to be provided to the Registry.⁴³ The final rule also would not require acquittals to be reported.

The Agencies find the remaining information required by the proposal to be submitted to the Registry relevant to the registration process and the purposes and requirements of the S.A.F.E. Act. Section 1507(a)(2) of the S.A.F.E. Act (12 U.S.C. 5106(a)(2)) specifically requires that information regarding the registrant's identity, including personal history and experience, be furnished to the Registry. Identifying information, such as name (and any other names used, such as a nickname, full legal name or maiden name), home address, address of principal business location and business contact information (business phone number and email address) and the registrant's prior financial services-related employment history (not all of which will be made public) is necessary to meet this requirement. In addition to this information, the registrant's social security number, gender, and date and place of birth are necessary to conduct the criminal history background check required by section 1507(a)(2)(A) of the S.A.F.E. Act (12 U.S.C. 5106(a)(2)(A)). Likewise, the required information concerning final criminal actions (as amended), financial services-related civil judicial actions, publicly-adjudicated regulatory and disciplinary actions or orders, financial services-related professional license revocations or

⁴² See Id. and 12 CFR 303.220 - 223.

⁴³ Id.

suspensions, and financial services-related customer-initiated arbitration and civil actions will be made public on the Registry, and, therefore, further the purpose of the S.A.F.E. Act to provide consumers with easily accessible information on disciplinary and enforcement actions against the originator. The Agencies therefore adopt the final rule with the requirement to provide this information to the Registry.

Pursuant to section 1507(a)(2)(A) of the S.A.F.E. Act (12 U.S.C. 5106(a)(2)(A)), proposed § ____.103(d)(xii) (redesignated as § ____.103(d)(ix) in the final rule) also required employees to provide fingerprints, in digital form if practicable, to the Registry for submission to the FBI and any governmental agency or entity authorized to receive such information for a State and national criminal history background check. The proposal permitted the use of fingerprints currently on file with the employing Agency-regulated institution if taken less than three years prior to the employee's registration with the Registry.

This requirement elicited many comments. Some commenters requested that the Agencies permit institutions to continue accessing existing fingerprint channels recognized and supported by existing relations with the FBI. Some commenters also suggested that the final rule should deem background checks conducted by the institution during the hiring process as compliant with the S.A.F.E. Act's fingerprint and background check requirement. Commenters also requested that the final rule permit the submission of fingerprints collected 10 or 15 years prior to registration. Many of the commenters argued that an age limit is unnecessary as fingerprints do not change over time. In addition, commenters noted that allowing the use of existing fingerprints, no matter when collected, will reduce registration costs and delays.

The S.A.F.E. Act specifically requires fingerprints to be furnished to the Registry for purposes of submission to the FBI, and any governmental agency or entity authorized to receive such information for a State and national criminal history background check.⁴⁴ The S.A.F.E. Act does not specifically require certain persons or entities to furnish these fingerprints, nor prohibit other entities from furnishing fingerprints to the Registry. However, the FBI will only accept fingerprints from entities authorized as channelers of this information.

In order to ensure that fingerprints are up-to-date, we have amended the redesignated § ____ .103(d)(1)(ix) to provide that fingerprints that are less than three years old may be used to satisfy the requirement to furnish fingerprints to the Registry. As indicated previously, this three-year age limit is consistent with the procedures to be used by SRR for mortgage loan originators licensed by a State. Institutions should consult their existing channelers regarding the furnishing of fingerprints that are less than three years old to the Registry.

CSBS and SRR are currently modifying the NMLS to act as a channeler for fingerprints of State license applicants, pursuant to the S.A.F.E. Act, and Federal registrants may use this same fingerprinting process when the NMLS is modified to accept Federal registrations.⁴⁵ The Agencies anticipate that CSBS and SRR will provide guidance to Agency-regulated institutions and their mortgage loan originators on the availability and details of this fingerprint process.

⁴⁴ Section 1507(a)(2)(A) of the S.A.F.E. Act (12 U.S.C. 5106(a)(2)(A)). The Agencies note that, in the event that a mortgage loan originator is unable to provide fingerprints due to a physical condition, he or she should provide identifying information to the Registry consistent with FBI protocols.

⁴⁵ Further information on the Registry's fingerprint and background check procedures can be found on the Registry's Web site at www.stateregulatoryregistry.org/NMLS/.

CSBS and SRR intend that this fingerprinting process will be convenient and efficient for both State licensees and Federal registrants.⁴⁶

Some commenters asked the Agencies to clarify whether the Registry may collect fingerprints and submit a request for a background check before the Agency-regulated institution employs a mortgage loan originator rather than waiting until after that individual is hired to submit fingerprints to the Registry. The Agencies have no objection to the Registry processing a background check just prior to the employment of a mortgage loan originator, should the Registry provide this service, and believe this could satisfy the requirements of the rule.

Some commenters also expressed the view that the Registry should have the capability to accept fingerprints in both paper and digital form. As in the proposed rule, the final rule does not require digital fingerprints, but does encourage the use of digital fingerprint submissions. If digital fingerprints are not available the Registry will accept fingerprint cards, and will convert these cards to a digital format. The Agencies note that the rule's authorization to submit fingerprints in paper form is intended to assist smaller institutions for which compliance with a digital fingerprint requirement may not be feasible.

Employee authorization and attestation. Paragraph (d)(2)(i) of § ____.103 requires the employee to provide authorization for the Registry and the employing Agency-regulated institution to obtain information related to sanctions or findings in any administrative, civil or criminal action to which the employee is a party, and, in paragraph (d)(2)(ii) of this section, to attest to the correctness of all information submitted to the Registry pursuant to paragraph (d) of this section.

⁴⁶ SRR plans to contract with a nationwide vendor to take the fingerprints and forward them to the Registry, which will then obtain the criminal history background check based on these fingerprints. According to plans, this vendor will have locations throughout the country, may be made available on-site at institutions, and will provide a mail-in option for mortgage loan originators unable to provide their fingerprints in person.

In order to provide relevant information to consumers and to implement the purposes of the S.A.F.E. Act, paragraph (d)(2)(iii) requires the employee to authorize the Registry to make available to the public the information required to be submitted to the Registry pursuant to § ____.103(d)(1)(i)(A) and (C), (d)(1)(ii), and (iii) – (viii) (his or her name; other names used; name of current employer(s); current principal business location(s) and business contact information; 10 years of relevant employment history; and publicly adjudicated disciplinary and enforcement actions and arbitrations against the employee).

Although this rulemaking permits the employing institution or other institution employees to submit the information required by § ____.103(d)(1) to the Registry on behalf of the registering employee, the employee, and not the employing institution or its other employees, must complete the attestation and authorizations required by § ____.103(d)(2) for the registration to be complete. This task may not be delegated because it is necessary for the Registry to authenticate the employee's information.

The Registry plans to make this information available to the public in two phases. The first phase, implemented at the time the Registry begins accepting Federal registrations, would provide for public accessibility of the employee's name; other names used; name of current employer(s); current principal business location(s) and business contact information; and employment history. The remaining categories of information (publicly adjudicated disciplinary and enforcement actions and arbitrations against the employee) would be made public at a later date, once the Registry, in consultation with the Agencies, has designed and implemented a system through which the registrant may provide additional explanatory information to accompany a positive response to any of the disclosure questions regarding criminal history or

the other information requested in paragraphs (d)(1)(iii) through (viii). The Agencies note that once the Registry makes this enhancement, registered mortgage loan originators will be able to provide this explanatory information at any time, including during the annual renewal process, and that this explanatory language may be made public. Relevant nonpublic information submitted to the Registry will only be accessible to the Agencies and State regulators of mortgage originators, as appropriate.

The Agencies received many comments on the public availability of personal information, particularly on how the Registry will store and prevent the unauthorized use of this personal information, and how nonpublic personal information will be appropriately protected. One commenter specifically stated that the final rule should take appropriate measures to ensure that the electronic submissions to the Registry are properly encrypted, authorized, and authenticated, and that the Registry complies with the FBI Criminal Justice Information Services Security Policy (CJIS Security Policy).⁴⁷

The Agencies are well aware of the security concerns associated with providing personal information to the Registry and are contracting with SRR to ensure appropriate data protection elements are incorporated within the Registry to ensure compliance with the requirements of the Federal Information Security Management Act (FISMA) of 2002, PL 107-347; the CJIS Security Policy; and the related Security and Management Control Outsourcing Standard.⁴⁸ FISMA requires each Federal agency to develop, document, and implement an agency-wide program to provide information security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency,

⁴⁷ CJISD-ITS-DOC-08140-4.5, December 2008.

⁴⁸ See http://www.fbi.gov/hq/cjisd/web%20page/pdf/05132009_outsourcing_standard.pdf.

contractor, or other source. Specifically, FISMA directed the promulgation of Federal standards for: (1) the security categorization of Federal information and information systems based on the objectives of providing appropriate levels of information security according to a range of risk levels; and (2) minimum security requirements for information and information systems in each such category.⁴⁹

As a channeler and outsourcer of fingerprints, the FBI requires the Registry to comply with its CJIS Security Policy. The CJIS provides the minimum level of information technology security requirements determined acceptable for the transmission, processing, and storage of the nation's criminal justice information systems data. The purpose of this policy is to establish uniformity and consistency in safeguarding criminal justice information security data which is accessed via networks throughout the Federal, State, and local user community. However, this policy does not prohibit more stringent security policies.

The requirements for protecting the privacy and security of the personal information obtained from employees of Agency-regulated institutions, and the confidential information obtained from the institutions themselves, are essentially similar whether a particular mortgage loan originator is State licensed or Federally registered. SRR and CSBS have instituted security protocols to protect the privacy and security of such information.

⁴⁹ See the National Institute of Standards and Technology (NIST) publications FIPS Pub 200, Minimum Security Requirements for Federal Information and Information Systems, March 2006 and NIST Special Publication 800-53, Recommended Security Controls for Federal Information Systems, as amended. These standards specify minimum management, operational, and technical safeguards in 17 security-related areas needed to protect the confidentiality, integrity, and availability of Federal information systems and the information processed, stored, and transmitted by those systems. These security-related areas are: (1) access control; (2) awareness and training; (3) audit and accountability; (4) certification, accreditation, and security assessments; (5) configuration management; (6) contingency planning; (7) identification and authentication; (8) incident response; (9) maintenance; (10) media protection; (11) physical and environmental protection; (12) planning; (13) personnel security; (14) risk assessment; (15) systems and services acquisition; (16) system and communications protection; and (17) system and information integrity.

The Agencies adopt § ____.103(d)(2) as proposed, with one conforming and one clarifying change. First, we have removed pending disciplinary and enforcement actions and arbitrations against the employee from the list of information the employee must authorize the Registry to make available to the public to conform with our amendment to § ____.103(d)(1). Second, we have added language to clarify that neither the employing institution, nor any of its other employees, may fulfill these attestation and authorization requirements on behalf of the registering employee.

We have also added a new paragraph (d)(3) to clarify that an Agency-regulated institution may identify an employee or employees of the bank who may submit the employee information required by paragraph (d)(1)(i) to the Registry on behalf of the institution's employees, provided that this individual, and any employee delegated this authority, does not act as a mortgage loan originator, consistent with § ____.103(e)(1)(F). In addition, as more fully explained below, this new paragraph specifically authorizes an institution to submit to the Registry some or all of the employee information required by paragraph (d)(1)(i) and the institution's information required by § ____.103(e)(2) for multiple employees in bulk through batch processing in a format to be specified by the Registry, to the extent such batch processing is made available by the Registry.

Required Agency-regulated institution information. The Agencies adopt proposed § ____.103 (e)(1) with the following amendments, discussed below.

Paragraph (e)(1) of § ____.103 of the final rule requires the employing Agency-regulated institution to submit certain information to the Registry as a base record in connection with the registration of one or more mortgage loan originators. Specifically, the Agency-regulated institution must provide its name; main office address; business contact information, such as

business phone number or email address (not required by the proposed rule); primary Federal regulator; Employer Tax Identification Number (EIN) issued by the Internal Revenue Service; primary point of contact information; and contact information for “system administrators.”

System administrators will have the authority to enter data required in paragraph (e) of this section on the Registry and will be responsible for keeping institution information and the list of employees registered with the Registry current. These individuals, however, may not act as mortgage loan originators. The Agencies recognize that some small institutions may not be able to comply with this latter requirement because all of their staff may be registered mortgage loan originators. Therefore, we have amended this provision to exempt institutions with 10 or fewer full time equivalent employees from the requirement that system administrators do not act as mortgage loan originators. However, this exemption does not apply to a subsidiary of an Agency-regulated institution as the staff at the parent institution could perform this function. In the Agencies’ experience, institutions with more than 10 full time equivalent employees generally have sufficient staff resources to support the segregation of these functions. The system administrators may delegate their authority and assign as many additional system users as necessary to comply with the registration requirements of the S.A.F.E. Act and the final rule, provided the delegated administrators meet this paragraph’s requirements. While the primary point of contact also can be one of the institution’s system administrators, the institution’s management is responsible for ensuring proper oversight of the system administrator’s activities.

In addition, paragraph (e)(1)(i)(C) of § ____.103 requires an Agency-regulated institution to provide its Research Statistics Supervision Discount (RSSD) number as identifying data for validating the base record. The RSSD database is maintained by the Board. The Agencies will provide the Registry with an extract of the Board's database, indexed by RSSD number, to

facilitate an Agency-regulated institution's authorized access to the Registry and its establishment of a new base record. Upon receiving the information for a new base record from an Agency-regulated institution, the Registry will confirm the information by comparing the application with RSSD data supplied by the Agencies. The Agencies will establish a mechanism by which Agency-regulated institutions that do not have an RSSD number will be added to the RSSD database.

If the institution is a subsidiary of an Agency-regulated institution, the final rule requires the subsidiary to indicate that it is a subsidiary of the parent and to provide its parent institution's RSSD number in addition to its own RSSD number, if it has one. It is not required to obtain its own RSSD number. The proposal had required that the subsidiary provide its parent's name. We have revised this provision in the final rule to require the subsidiary instead to provide its parent's RSSD number, which is a more accurate method of identifying the parent institution than by name.

Some Farm Credit System-affiliated commenters requested that the Agencies consider using the FCA's existing identification system as an alternative for the RSSD number for FCS institutions. The Agencies decline to make this modification. Validation of Agency-regulated institutions will be most efficient and complete if all institutions can be identified through a single identification system. The FCA will provide FCS institutions with information on how to obtain an RSSD number for the purposes of this rulemaking. The Agencies received no other significant comments on § __.103(e).

We also have amended proposed § __.103(e)(1) to require system administrators to follow NMLS protocols to verify their own identity and to attest that they have the authority to enter data on behalf of the Agency-regulated institution, that the information submitted pursuant

to paragraph (e) is correct, and that the Agency-regulated institution will keep the information required by paragraph (e) current and will file accurate supplementary information on a timely basis. In addition, we have amended this paragraph to require institutions to renew the information they have submitted to the Registry pursuant to § ____.103(e) on an annual basis. We have added these two requirements to conform to system protocols identified by CSBS and SRR.

As in the proposal, renumbered paragraph (e)(1)(iii) of § ____.103 requires an Agency-regulated institution to update any information it has submitted within 30 days of the date that the information becomes inaccurate.

As proposed, paragraph § ____.103(e)(2) of the final rule requires an Agency-regulated institution to provide information to the Registry for each employee who acts as a mortgage loan originator. The Agency-regulated institution must: (1) confirm that it employs the registrant, after all the information required by paragraph (d) of this section has been submitted to the Registry; and (2) within 30 days of the date the registrant ceases to be an employee of the institution, provide notification that it no longer employs the registrant and the date the registrant ceased being an employee. This information will link the registering mortgage loan originator to the Agency-regulated institution in order to confirm that the registration of the employee is valid and legitimate. The Agencies note that the Registry's system protocols will not permit the Agency-regulated institution to confirm that it employs the registrant unless all of the employee's information required by paragraph (d) of this section has been submitted to the Registry and the employee has attested to the accuracy of the information. As indicated below, batch processing of certain information for multiple employees will likely be available to facilitate compliance with this provision.

Batch Processing of Registrations. The Supplementary Information section of the proposed rule sought comment on whether to permit a “batch” process for Agency-regulated institutions to submit to the Registry, in bulk, some or all of the required employee and institution information as a way to mitigate the initial and ongoing registration burden on Agency-regulated institutions and their employees. Commenters overwhelmingly supported the concept of batch processing, indicating that such a capability would make registration faster, simpler, more efficient, and less costly. They also stated that it would enable them to better control and manage the registration process, pursuant to the policies and procedures required by this rulemaking.

The Agencies agree that some form of batch processing would be helpful for the registration process to run smoothly and efficiently and for all initial registrations to be completed within the 180-day initial registration period. Batch processing would be especially beneficial to larger institutions who must register tens of thousands of employees. The Agencies therefore are working with CSBS and SRR to ensure that the Registry supports the batch processing of large numbers of registrations by Agency-regulated institutions. As indicated above, we have added a new paragraph § ____.103(d)(3) to specifically permit institutions to submit a portion of the information required by paragraphs (d)(1)(i) and (e)(2) of § ____.103 for multiple employees in bulk through batch processing, to the extent such batch processing is made available by the Registry.

Specifically, it is our intent that the Registry will be able to provide Agency-regulated institutions the capability to submit batch registration of a portion of the information for multiple mortgage loan originators and to electronically notify the originators of the need to complete the registration. The Agencies expect the batch file to contain at least enough information to

establish a mortgage loan originator record (such as the institution's name and RSSD number and employee name, SSN, and email address). We also expect that the Registry will provide the capability for an Agency-regulated institution to confirm its relationship with mortgage loan originators either individually or in bulk. The Agencies, CSBS, and SRR are in the process of specifying the details and means of this batch processing. Batch processing should be available for institutions at the start of the initial registration period, and we will provide further information on batch processing prior to that time.

Section ____ .104 - Policies and procedures

Proposed § ____ .104 required Agency-regulated institutions that employ mortgage loan originators to adopt and follow written policies and procedures designed to ensure compliance with the requirements of the final rule. The proposal stated that the policies and procedures must be appropriate to the nature, size, complexity, and scope of the mortgage lending activities of the Agency-regulated institution and must, at a minimum, include eight specified provisions.

The Agencies received many comments on these required policies and procedures. Although some supported them, others found the requirement to have detailed written plans for how to comply with the final rule unnecessary and overly burdensome, especially in light of other regulatory requirements imposed on financial institutions. A few commenters suggested that the Agencies develop model guidelines for, or samples of, these policies and procedures to reduce implementation and compliance costs for Agency-regulated institutions and to reduce burden on examiners in monitoring compliance. Commenters also requested further clarification of specific provisions and an explanation as to the reason for the provision.

The Agencies continue to believe that requiring Agency-regulated institutions to establish policies and procedures is an appropriate way to ensure and monitor compliance with this final

rule. Appropriate policies and procedures provide an institution and its employees with the expectations of the institution's board and include the specific implementing guidance that is applicable to the activities of that institution. Furthermore, such policies and procedures are necessary to enable Agency examiners to evaluate the effectiveness of institutions' implementation of the S.A.F.E. Act requirements that apply to them. Institutions have the responsibility to adopt policies and procedures appropriate to their operations. The final rule therefore includes a policies and procedures requirement. Comments on specific provisions are addressed below.

First, proposed § ____.104(a) required policies and procedures to establish a process for identifying which employees of the institution are required to be registered mortgage loan originators. This provision highlights a basic and necessary action each institution must take to comply with the rulemaking. We did not receive specific substantive comments on this requirement and therefore adopt § ____.104(a) as proposed.

Second, proposed § ____.104(b) required policies and procedures to require that all employees of the institution who are mortgage loan originators be informed of the registration requirements of the S.A.F.E. Act and the proposed rule and be instructed on how to comply with these requirements and procedures, including registering as a mortgage loan originator prior to engaging in any mortgage loan origination activity. As with the first provision, this action is necessary for Agency-regulated institutions to comply with the rule and facilitates employee compliance. We did not receive substantive comments addressing this requirement and therefore adopt § ____.104(b) as proposed.

Third, proposed § ____.104(c) required that policies and procedures must establish procedures to comply with the unique identifier requirements in § ____.105. Once again, this

provision merely reiterates that Agency-regulated institutions must ensure compliance with a requirement of the rulemaking. We received no specific comments on this requirement and therefore adopt it as proposed.

Fourth, proposed § ____.104(d) required policies and procedures to establish reasonable procedures for confirming the adequacy and accuracy of employee registrations, including updates and renewals, by comparison with the institution's records. We adopt this provision as proposed. However, to address the many comments on this requirement, the Agencies clarify that they will consider an institution to have reasonable procedures if it confirms the information supplied to the Registry that is in the institution's personnel files. Typically this information would include the employee's identifying information, such as the employee's name; home address; business address and contact information; social security number; gender; date and place of birth; and financial services-related civil actions, arbitrations and regulatory actions taken against the institution's employee, if any. As noted in the Supplementary Information section of the proposed rule, to comply with this requirement, institutions need only compare the information supplied by the employee to the Registry with the information contained in the institution's own records. We do not expect Agency-regulated institutions to obtain private database searches on their employees to confirm employee registration information.

Fifth, proposed § ____.104(e) required institutions to establish reasonable procedures and tracking systems for monitoring compliance with registration requirements and procedures. Under this regulatory provision, Agency-regulated institutions will be expected to demonstrate compliance with the registration and renewal requirements of this final rule, such as by maintaining appropriate records. The action required by this provision is one that an institution must take to ensure compliance with the rule and may be done in a number of different ways.

Having received no substantive comments on this requirement, the Agencies adopt it as proposed.

Sixth, proposed § ____.104(f) required policies and procedures that provide for periodic independent testing of the Agency-regulated institution's policies and procedures for compliance with the S.A.F.E. Act and the final rule and for such testing to be conducted by institution personnel or by an outside party. This auditing provision is standard procedure for Agency-regulated institutions as part of their internal controls, and we adopt it as proposed with one change. We have clarified that this auditing must be done on an annual basis, a necessary internal audit interval.

Seventh, proposed § ____.104(g) required policies and procedures to provide for appropriate disciplinary action against any employee who fails to comply with the registration requirements of the S.A.F.E. Act, this rule, or the related policies and procedures of the institution, including prohibiting such employees from acting as mortgage loan originators or other appropriate disciplinary actions. The action required by this provision is one that an institution would need to take to ensure compliance with the rule. Having received no substantive comments on this requirement, we adopt it as proposed.

Finally, proposed § ____.104(h) required policies and procedures to establish a process for reviewing the criminal history background reports on employees received from the FBI through the Registry, taking appropriate action consistent with applicable law and rules with respect to these reports, maintaining records of these reports, and documenting any action taken with respect to such employees consistent with applicable recordkeeping requirements, if any. A few commenters requested clarification on this requirement. As noted by other commenters, section 19 of the FDI Act (12 U.S.C. 1829), in general, prohibits insured depository institutions from

employing a person who has been convicted of any criminal offense involving dishonesty or a breach of trust or money laundering or has entered into a pretrial diversion or similar program in connection with a prosecution for such offense. Similarly, section 5.65(d) of the Farm Credit Act (12 U.S.C. 2277a-14 (d)), states “[e]xcept with the prior written consent of the Farm Credit Administration, it shall be unlawful for any person convicted of any criminal offense involving dishonesty or a breach of trust to serve as a director, officer, or employee of any System institution.” For credit unions, NCUA intends to rely upon 12 U.S.C. 1786(i) and 12 CFR 741.3(c). We have revised this provision of the final rule to include references to the appropriate statutory provision.

The Agencies have added a new provision to clarify the responsibilities of Agency-regulated institutions regarding their contracts relating to mortgage loan originations. Institutions must establish procedures designed to ensure that any third party with which it has arrangements related to mortgage loan origination has policies and procedures to comply with the S.A.F.E. Act, including appropriate licensing and/or registration of individuals acting as mortgage loan originators. Agency-regulated institutions should monitor third party entities’ compliance with these policies and procedures. This provision will ensure that individuals acting as mortgage loan originators on behalf of an Agency-regulated institution are either State licensed and registered and/or Federally registered.

One commenter requested that the final rule limit an institution’s oversight of its employees’ compliance with this rulemaking only to those activities of the employee that are within the scope of his or her employment at the institution. It is not our intention to require the institution to enforce the final rule’s requirements with respect to activities of its employees that

are conducted outside of the employee's scope of employment with that institution and beyond the institution's control, and we have added language to § ____.104 to clarify this.

This final rule's requirement to adopt these policies and procedures applies to all Agency-regulated institutions that employ individuals who act as mortgage loan originators, regardless of the application of any de minimis exception to their employees. These policies and procedures should be in place at an institution prior to the registration of its employees pursuant to this rule.

Furthermore, the Agencies note that, consistent with the S.A.F.E. Act, the Registry will not screen or approve registrations received from employees of Agency-regulated institutions. Instead, it will be the repository of, and conduit for, information on those employees who are mortgage loan originators at Agency-regulated institutions. Pursuant to § ____.104(d) and (h) of the final rule, it will be the responsibility of the Agency-regulated institution to establish reasonable procedures for confirming the adequacy and accuracy of employee registrations as well as to establish a process for reviewing any criminal history background reports received from the Registry.

Section ____.105 - Use of unique identifier

The Agencies proposed in § ____.105(a) to require an Agency-regulated institution to make the unique identifier(s) of its registered mortgage loan originator(s) available to consumers in a manner and method practicable to the institution. Proposed § ____.105(b) required a registered mortgage loan originator to provide the originator's unique identifier to a consumer upon request, before acting as a mortgage loan originator, and through the originator's initial written communication with a consumer, if any.

Although a mortgage loan originator may change his or her name, change employment, or move, the unique identifier assigned to the originator by the Registry at the originator's original registration will remain the same. Once public access to the Registry is fully functional, the unique identifier will enable consumer access to an individual mortgage loan originator's profile stored in the Registry, including the mortgage loan originator's publicly available registration information, any State mortgage licenses held (active or inactive), employment history and publicly adjudicated disciplinary and enforcement actions. If a mortgage loan originator is simultaneously employed by more than one State or Agency-regulated institution, that information also will be readily visible to the consumer.

We received a number of comments on this requirement – some noting that it is cumbersome and of limited benefit to the consumer. However, the S.A.F.E. Act requires each mortgage loan originator to obtain a unique identifier to facilitate the electronic tracking of loan originators, and the uniform identification of, and public access to, the employment history and publicly adjudicated disciplinary and enforcement actions against a mortgage loan originator. In order to effectuate this requirement, a mortgage loan originator and the employing institution must ensure that the consumer has access to the originator's unique identifier. This access must be made available early enough in the relationship with the originator to enable the consumer to access the Registry before the consumer commits to the mortgage loan transaction. Because a consumer may not be aware of the Registry, it is important that both the institution and originator make this information available to the consumer, and not only just upon the consumer's request, as suggested by a number of commenters. Therefore, we adopt this requirement as proposed, with one clarifying change described below.

As noted in the Supplementary Information section of the proposed rule, an Agency-regulated institution may comply with the § ____.105(a) requirement in a number of ways. For example, the institution may choose to direct consumers to a listing of registered mortgage loan originators and their unique identifiers on its Web site; post this information prominently in a publicly accessible place, such as a branch office lobby or lending office reception area; and/or establish a process to ensure that institution personnel provide the unique identifier of a registered mortgage loan originator to consumers who request it from employees other than the mortgage loan originator. Furthermore, the Agencies intend § ____.105(b)(3) of the rule to cover written communication from the originator specifically for his or her customers, such as a commitment letter, good faith estimate or disclosure statement, and not written materials or promotional items distributed by the Agency-regulated institution for general use by its customers. While, this provision does not require institutions to include the unique identifier on loan program descriptions, advertisements, business cards, stationary, notepads and other similar materials, institutions are not prohibited from doing so. We also clarify that the requirement to provide the unique identifier to the consumer through the originator's initial written communication, if any, applies whether that communication is provided in writing on paper or through electronic means. We have clarified this requirement in the final rule. The Agencies also clarify that the unique identifier may be provided orally, except pursuant to (b)(3) under which the unique identifier would be provided with the written or electronic communication.

We note that the Board has proposed amendments to 12 CFR 226 (Regulation Z) that would require disclosure of the unique identifier as part of TILA disclosures, which generally must be provided to a borrower within three business days of the residential mortgage loan application and seven business days before consummation of the transaction. In addition, as

indicated above, FHFA has directed Fannie Mae and Freddie Mac to require all mortgage loan applications taken on loans originated for, or sold to, Fannie Mae or Freddie Mac and on or after July 1, 2010, to include the mortgage loan originator's unique identifier.⁵⁰ We therefore believe that providing consumers with the originator's unique identifier will not be difficult or burdensome.

Appendix - Examples of Mortgage Loan Originators

The proposed Appendix included a nonexclusive list of examples of activities that fall within or outside the S.A.F.E. Act's definition of a mortgage loan originator. Specifically, the Appendix provided examples of activities that are, and are not, illustrative of taking an application, and offering or negotiating terms of a mortgage loan for compensation or gain. The Agencies note that an employee of an Agency-regulated institution is only subject to the S.A.F.E. Act to the extent that both prongs of the two-part test for acting as a mortgage loan originator are met, and that employees who take applications but do not offer or negotiate terms of a mortgage loan, or vice versa, do not meet the definition. Commenters generally asked the Agencies to provide more detail to the examples and to address whether specific activities of Agency-regulated institution employees would be covered by the two-prong test of a mortgage loan originator.

The Agencies have made several modifications to the examples of taking an application. The modified examples clarify that taking an application occurs when the mortgage loan originator receives information in connection with a request for a mortgage loan that will be used to determine whether the consumer qualifies for a loan. The Agencies note that the information may be provided by another person on behalf of the consumer.

⁵⁰ See FNMA LL 02-2009: New Mortgage Loan Data Requirements (02/13/09).

Some commenters questioned whether an employee takes an application if that employee only collects limited data about the consumer or does not decide what data to collect. Another commenter suggested that when an employee collects the limited information about the consumer that is required by an automated loan approval system and quotes interest rates and fees for a specific mortgage loan product as generated by the system, that employee should not be considered to be engaged in taking an application. The Agencies disagree, as the limited information described by the commenter is sufficient to qualify the consumer for a specific mortgage product and terms. The example of taking an application was revised to address the receipt of information to be used to determine whether the consumer qualifies for a mortgage loan, which includes situations where there are limitations on the data collected or on the employee's discretion, as described by the commenter.

Similarly, these commenters also requested clarification as to whether an employee takes an application when the employee enters information into an online application in the process of receiving information from the consumer. The Agencies have provided clarification that the example of taking an application applies even if the employee is inputting information into an online or other automated approval system on behalf of the consumer. The Agencies do not intend this example to address employees who are engaged in the clerical act of inputting information from a loan application into an automated approval system on behalf of a loan officer. Furthermore, contrary to the suggestions of some commenters, the Agencies have clarified that an employee may take an application even if the employee is not engaged in approval of the mortgage loan. An employee also may take an application even if the employee does not take an application fee.

The Agencies have also clarified that, contrary to the suggestion of some commenters, an employee may take an application even if the employee has received the consumer's information indirectly in order to make an offer or negotiate terms of a mortgage loan. An employee may receive the consumer's information indirectly, for example, through another employee, a broker, or an automated system.

The Agencies have also provided further detail regarding the examples of activities that do not constitute taking an application. In response to questions raised by commenters, the Agencies have further clarified that the following activities would not constitute taking an application: (1) assisting a consumer who is filling out an application by explaining the qualifications or criteria necessary to obtain a mortgage loan product, (2) describing the steps that a consumer would need to take to provide information to be used to determine whether the consumer qualifies for a mortgage loan or otherwise explaining the mortgage loan application process, and (3) responding to an inquiry regarding a prequalified offer that a consumer has received from an Agency-regulated institution, collecting only basic identifying information about the consumer and forwarding the consumer to a mortgage loan originator.

The Agencies have also revised the examples of offering or negotiating terms of a mortgage loan in response to the comments. The Agencies have revised one example to clarify that providing a disclosure of the mortgage loan terms after application pursuant to the Truth in Lending Act is included in presenting a mortgage loan offer. A number of commenters asked the Agencies to modify the examples to carve out employees who are limited in their ability to negotiate or finalize the terms of a mortgage loan. Some commenters posited that employees should be excluded if they only offer the loan rate to a consumer but are not permitted to negotiate the rate, or only quote a rate approved by an automated online system. Similarly, a

commenter expressed the view that an employee would not offer or negotiate terms of a mortgage loan if involvement of a loan officer was also necessary to finalize the loan terms or otherwise conclude the mortgage loan approval process. The Agencies believe that many of these situations discussed by the commenters would involve an offer or a negotiation of a loan. Thus the revised examples clarify that presenting a mortgage loan offer to a consumer for acceptance, either verbally or in writing, is offering or negotiating terms of a mortgage loan even if other individuals must complete the mortgage loan process or if only the rate approved by the Agency-regulated institution's loan approval mechanism function for a specific loan product is communicated without authority to negotiate the rate. Similarly, one commenter suggested that an employee does not offer or negotiate terms of a mortgage loan if the employee does not lock the rate. The Agencies do not agree and declined to address this particular activity in the general example of offering or negotiating terms of a mortgage loan.

The Agencies have also modified and added to the examples of activities that are not offering or negotiating terms of a mortgage loan. Some commenters noted that the S.A.F.E. Act excludes employees who are engaged in administrative and clerical activities. The Agencies have considered this exclusion in formulating the examples of mortgage loan origination. Specifically, with respect to offering and negotiating terms of a mortgage loan, the Agencies have added an example that an employee who communicates on behalf of a mortgage loan originator that a written offer has been sent to a consumer, without providing details of that offer, is not offering or negotiating a loan.

In addition, in response to commenters' requests for more detail, the Agencies have clarified that providing descriptions, in addition to explanations, in response to consumer queries regarding qualification for a specific mortgage loan product or product-related service does not

constitute offering or negotiating terms of a mortgage loan. In response to the suggestion of another commenter, the Agencies have provided another new example, specifying that “offer or negotiate” does not include explaining or describing the steps or process that a consumer would need to take in order to obtain a loan offer, including qualifications or criteria that would need to be met without providing guidance specific to the consumer’s circumstances.

Some commenters asked whether employees engaged solely in making underwriting decisions with respect to mortgage loans are offering terms of a mortgage loan. These employees, although they do not typically communicate directly with consumers, would appear to fall within the definition of taking an application. The Agencies have added, as an example of an activity that is not offering or negotiating terms of a mortgage loan, making an underwriting decision about whether the consumer qualifies for a loan. An employee engaged solely in this activity would not offer or negotiate terms of a loan, and would not, therefore, meet the two-prong test for acting as a loan originator.

The Agencies, as described previously, understand from many commenters that numerous employees of Agency-regulated institutions are engaged solely in modifying loans, such as those which result in reduced and sustainable payments for a borrower who is in default. The Agencies have provided, as a new example of an activity that is not taking an application, receiving information in connection with a modification to the terms of an existing loan to a borrower as part of the institution’s loss mitigation efforts, when the borrower is reasonably likely to default. An employee engaged solely in this activity does not receive a residential mortgage loan application, and would not, therefore, meet the two-prong test for acting as a loan originator. The Agencies note that modifying the terms of an existing loan to a borrower as part of the institution’s loss mitigation efforts generally would not constitute acting as a mortgage

loan originator for purposes of the S.A.F.E. Act. In addition, one commenter requested that the Agencies clarify that an employee acts as a mortgage loan originator when the employee renews an existing loan at maturity, thereby replacing the old loan with a new loan. The Agencies agree with this commenter.

Finally, one commenter queried whether registration requirements apply to Agency-regulated institution employees who, in addition to a variety of customer service duties, only at times act as a mortgage loan originator and only with respect to a limited number of mortgage loan products. The Agencies note that an employee who meets the two-prong test is acting as a mortgage loan originator, even if that activity is not their primary job duty or the employee may only act as a mortgage loan originator for a limited number of products. As described previously, the Agencies have provided a de minimis exception to address employees who act as a mortgage loan originator with respect to a small number of mortgage loans. In this light, the Agencies received comments that suggested that an employee would be engaged in offering the terms of a loan only if the employee's compensation was based on the number of loans closed or the employee's engagement in mortgage lending. The Agencies do not agree with this suggestion and have finalized the examples relating to compensation as proposed. Therefore, an employee offers or negotiates terms of a loan for compensation or gain even if the employee does not receive a referral fee or commission or other special compensation for the mortgage loan.

IV. REGULATORY ANALYSIS:

A. Regulatory Flexibility Act

FDIC: In accordance with the RFA, 5 U.S.C. 601-612 (RFA), an agency must publish a final regulatory flexibility analysis with its final rule, unless the agency certifies that the rule will

not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include banks with less than \$175 million in assets). The FDIC hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Approximately 3,116 FDIC-supervised banks are small entities. In the RFA analysis for the proposed rule, the FDIC determined that approximately 2,255 of those small entities would incur only those costs related to adopting and following appropriate policies and procedures, not registration-related expenses, because they originate 25 or fewer residential mortgage loans annually and therefore would not have qualified for the aggregate institution limit of the proposed rule's de minimis exception. Since the aggregate institution limit has been eliminated in the final rule, the exception will apply to a greater number of employees than under the proposed rule. However, because it is difficult to estimate how many more employees would be covered by the revised de minimis exception, a more conservative approach would be to assume that at least as many small entities would not incur registration-related expenses under the final rule as under the proposed rule (*i.e.*, 2,255 small entities). For those 2,255 small entities, the set up costs are estimated to be about 0.5% of total non-interest expense and annual costs are estimated to be about 0.2% of total non-interest expenses (based on a mean non-interest expense of \$2.5 million reported by the 3,116 FDIC-supervised small entities for fourth quarter 2008).

Given the foregoing assumptions, only approximately 861 small entities supervised by the FDIC – about 28% of FDIC-supervised small entities – will be subject to all of the requirements of the final rule. For those 861 small entities, the estimated initial costs for complying with the final rule would represent, on average, approximately 0.7% of total non-interest expenses, and the annual compliance costs would represent, on average, approximately

0.3% of total non-interest expenses (based on the aforementioned mean non-interest expense of \$2.5 million).

For the 861 FDIC supervised small entities that will be subject to all of the requirements of the final rule, the SAFE Act requirements will cost \$17,395 for set up and \$7,436 annually (based on an estimated 350 hours for set up, 113 hours for annual compliance, 11.435 mortgage loan originators per entity, and a weighted average labor cost of \$49.70 per hour). For the 2,255 FDIC supervised small entities that will incur only those costs related to adopting and following appropriate policies and procedures, the SAFE Act requirements will cost \$12,922 for set up (based on an estimated 260 labor hours and the aforementioned labor cost) and \$4,473 annually (based on an estimated 90 labor hours and the aforementioned labor cost).

OCC:

Board:

OTS:

FCA: Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), FCA hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Each of the banks in the Farm Credit System, considered together with its affiliated associations, has assets and annual income in excess of the amounts that would qualify them as small entities. Therefore, System institutions are not “small entities” as defined in the Regulatory Flexibility Act.

NCUA: In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601–612 (RFA), an agency must publish a regulatory flexibility analysis with its final rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include federally insured credit unions with

less than \$10 million in assets). NCUA hereby certifies that the final rule would not have a significant economic impact on a substantial number of small entities. Approximately 3,231 federally insured credit unions are small entities. However, the final rule would not apply to approximately 3,190 of those small entities because they originate either few or no residential mortgage loans annually and therefore would qualify for the de minimis exception. NCUA estimates only approximately 41 small federally insured credit unions, about 1.3% of small entities, would be subject to the requirements of the final rule.

B. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995, the agencies may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The information collection requirements contained in this joint final rule have been submitted by the OCC, FDIC, OTS, and NCUA to and pre-approved by OMB under section 3506 of the PRA and §1320.11 of OMB's implementing regulations (5 CFR Part 1320). The FCA collects information from Farm Credit System institutions, which are Federal instrumentalities, in the FCA's capacity as their safety and soundness regulator, and, therefore, OMB approval is not required for this collection. The Board reviewed the proposed rule under the authority delegated to the Board by the Office of Management and Budget. The final rule contains requirements subject to the PRA. The requirements are found in 12 CFR §§__.103(a)-(b), (d)-(e), __.104, and __.105.

No comments concerning PRA were received in response to the notice of proposed rulemaking. Comments continue to be invited on:

- (a) Whether the collection of information is necessary for the proper performance of the Federal banking agencies' functions, including whether the information has practical utility;
 - (b) The accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used;
 - (c) Ways to enhance the quality, utility, and clarity of the information to be collected;
 - (d) Ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology;
- and
- (e) Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

C. OCC Executive Order 12866 Determination

Executive Order 12866 requires Federal agencies to prepare a regulatory impact analysis for agency actions that are found to be “significant regulatory actions.” “Significant regulatory actions” include, among other things, rulemakings that “have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”⁵¹ Regulatory actions that satisfy one or more of these criteria are referred to as “economically significant regulatory actions.” The OCC anticipates that the final rule will meet the \$100 million criterion and therefore is an economically significant regulatory action. In conducting the regulatory analysis for an economically significant regulatory action, Executive Order 12866 requires each Federal agency

⁵¹Executive Order 12866 (September 30, 1993), 58 FR 51735 (October 4, 1993). For the complete text of the definition of “significant regulatory action,” see E.O. 12866 at § 3(f). A “regulatory action” is “any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead

to provide to the Administrator of the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA):

- The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need;
- An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions;
- An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;
- An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health,

to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking." E.O. 12866 at § 3(e).

safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and

- An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

D. OTS Executive Order 12866 Determination

E. OCC AND OTS UNFUNDED MANDATES REFORM ACT OF 1995 DETERMINATION

Section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532), requires the OCC and OTS to prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$133 million or more in any one year. However, this requirement does not apply to regulations that incorporate requirements specifically set forth in law. Because this proposed rule implements the S.A.F.E. Act, the OTS and OCC have not conducted an Unfunded Mandates Analysis for this rulemaking.

F. OCC AND OTS EXECUTIVE ORDER 13132 DETERMINATION

E.O. 13132 sets forth certain “Fundamental Federalism Principles” and “Federalism Policymaking Criteria” that must be followed by the OCC and OTS in developing any regulation that has Federalism implications. A regulation has Federalism implications if it has “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” If

a rule meets the test for Federalism implications, the executive order requires the agency, among other things, to prepare a Federalism summary impact statement for inclusion in the rule's Supplementary Information section and must consult with State and local officials about the rule. The OCC and OTS have determined that their respective portions of the final rule do not have a substantial direct effect on the States, on the connection between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the final rule does not have any Federalism implications for purposes of Executive Order 13132.

G. NCUA Executive Order 13132 Determination

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on State and local interests. In adherence to fundamental Federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5) voluntarily complies with the Executive Order. The final rule applies to federally insured credit unions and would not have substantial direct effects on the States, on the connection between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The NCUA has determined that the final rule does not constitute a policy that has Federalism implications for purposes of the Executive Order.

**H. NCUA: The Treasury and General Government Appropriations Act, 1999-
Assessment of Federal Regulations and Policies on Families**

The NCUA has determined that this final rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law. 105-277, 112 Stat. 2681 (1998).

LIST OF SUBJECTS

12 CFR Part 34

Mortgages, National banks, Reporting and recordkeeping requirements.

12 CFR Part 208

Accounting, Agriculture, Banks, banking, Confidential business information, Consumer protection, Crime, Currency, Insurance, Investments, Mortgages, Reporting and recordkeeping requirements, Securities.

12 CFR Part 365

Banks, banking, Mortgages.

12 CFR Part 563

Accounting, Administrative practice and procedure, Advertising, Conflict of interests, Crime, Currency, Holding companies, Investments, Mortgages, Reporting and recordkeeping requirements, Savings associations, Securities, Surety bonds.

12 CFR Part 610

Banks, banking, Consumer protection, Loan programs – housing and community development, Mortgages, Reporting and recordkeeping requirements, Rural areas.

12 CFR Part 761

Credit unions, Mortgages, Reporting and recordkeeping requirements.

Federal Deposit Insurance Corporation

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the preamble, the Federal Deposit Insurance Corporation amends part 365 of chapter III of title 12 of the Code of Federal Regulations as follows:

PART 365 – REAL ESTATE LENDING STANDARDS

1. The authority citation for part 365 is revised to read as follows:

Authority: 12 U.S.C. 1828(o) and 5101 et seq.

2. Sections 365.1 and 365.2 and Appendix A are placed under a new subpart A, and the heading for new subpart A is added to read as follows:

Subpart A – Real Estate Lending Standards

3. Section 365.1 is amended by removing “part” and adding “subpart” in its place.
4. Appendix A to Part 365 is redesignated as Appendix A to Subpart A of Part 365, and the heading is revised to read as follows:

Appendix A to Subpart A of Part 365 – Interagency Guidelines for Real Estate Lending Policies

5. New subpart B is added to read as follows:

Subpart B – Registration of Residential Mortgage Loan Originators

Sec.

365.101 Authority, purpose, and scope.

365.102 Definitions.

365.103 Registration of mortgage loan originators.

365.104 Policies and procedures.

365.105 Use of unique identifier.

Appendix A to Subpart B of Part 365 – Examples of Mortgage Loan Originator Activities

Subpart B – Registration of Residential Mortgage Loan Originators

§ 365.101 Authority, purpose, and scope.

(a) Authority. This subpart is issued pursuant to the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, title V of the Housing and Economic Recovery Act of 2008 (S.A.F.E. Act) (Pub. L. 110-289, 122 Stat. 2654, 12 U.S.C. 5101 et seq.).

(b) Purpose. This subpart implements the S.A.F.E. Act's Federal registration requirement for mortgage loan originators. The S.A.F.E. Act provides that the objectives of this registration include aggregating and improving the flow of information to and between regulators; providing increased accountability and tracking of mortgage loan originators; enhancing consumer protections; reducing fraud in the residential mortgage loan origination process; and providing consumers with easily accessible information at no charge regarding the employment history of, and publicly adjudicated disciplinary and enforcement actions against, mortgage loan originators.

(c) Scope. (1) In general. This subpart applies to insured state nonmember banks (including state-licensed insured branches of foreign banks), their subsidiaries (except brokers, dealers, persons providing insurance, investment companies, and investment advisers) (collectively referred to in this subpart as insured state nonmember banks), and employees of such banks or subsidiaries who act as mortgage loan originators.

(2) Exception. (i) This subpart and the requirements of 12 U.S.C. 5103(a)(1)(A) and (2) of the S.A.F.E. Act do not apply to any employee of an insured state nonmember bank who has never been registered or licensed through the Registry as a mortgage loan originator if during the

past 12 months the employee acted as a mortgage loan originator for 5 or fewer residential mortgage loans.

(ii) Prior to engaging in mortgage loan origination activity that exceeds the exception limit in paragraph (c)(2)(i) of this section, an insured state nonmember bank employee must register with the Registry pursuant to this subpart.

(iii) Evasion. Insured state nonmember banks are prohibited from engaging in any act or practice to evade the limits of the de minimis exception set forth in paragraph (c)(2)(i) of this section.

§ 365.102 Definitions.

For purposes of this subpart, the following definitions apply:

(a) Annual renewal period means November 1 through December 31 of each year.

(b)(1) Mortgage loan originator⁵² means an individual who:

(i) Takes a residential mortgage loan application; and

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

(2) The term mortgage loan originator does not include:

(i) An individual who performs purely administrative or clerical tasks on behalf of an individual who is described in paragraph (b)(1) of this section;

(ii) An individual who only performs real estate brokerage activities (as defined in 12 U.S.C. 5102(3)(D)) and is licensed or registered as a real estate broker in accordance with applicable State law, unless the individual is compensated by a lender, a mortgage broker, or other mortgage loan originator or by any agent of such lender, mortgage broker, or other

⁵² Appendix A of this subpart provides examples of activities that would, and would not, cause an employee to fall within this definition of mortgage loan originator.

mortgage loan originator, and meets the definition of mortgage loan originator in paragraph (b)(1) of this section; or

(iii) An individual or entity solely involved in extensions of credit related to timeshare plans, as that term is defined in 11 U.S.C. 101(53D).

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

(c) Nationwide Mortgage Licensing System and Registry or Registry means the system developed and maintained by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators for the State licensing and registration of State-licensed mortgage loan originators and the registration of mortgage loan originators pursuant to 12 U.S.C. 5107.

(d) Registered mortgage loan originator or registrant means any individual who:

(1) Meets the definition of mortgage loan originator and is an employee of an insured state nonmember bank; and

(2) Is registered pursuant to this subpart with, and maintains a unique identifier through, the Registry.

(e) 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, 15 U.S.C. 1602(v)) or residential real estate upon which is constructed or intended to be constructed

a dwelling, and includes refinancings, reverse mortgages, home equity lines of credit and other first and second lien loans that meet the qualifications listed in this definition.

(f) Unique identifier means a number or other identifier that:

(1) Permanently identifies a registered mortgage loan originator;

(2) Is assigned by protocols established by the Nationwide Mortgage Licensing System and Registry, the Federal banking agencies, and the Farm Credit Administration to facilitate:

(i) Electronic tracking of mortgage loan originators; and

(ii) Uniform identification of, and public access to, the employment history of and the publicly adjudicated disciplinary and enforcement actions against mortgage loan originators; and

(3) Must not be used for purposes other than those set forth under the S.A.F.E. Act.

§ 365.103 Registration of mortgage loan originators.

(a) Registration requirement. (1) Employee registration. Each employee of an insured state nonmember bank who acts as a mortgage loan originator must register with the Registry, obtain a unique identifier, and maintain this registration in accordance with the requirements of this subpart. Any such employee who is not in compliance with the registration and unique identifier requirements set forth in this subpart is in violation of the S.A.F.E. Act and this subpart.

(2) Insured state nonmember bank requirement. (i) In general. An insured state nonmember bank that employs one or more individuals who act as a residential mortgage loan originator must require each employee who is a mortgage loan originator to register with the Registry, maintain this registration, and obtain a unique identifier in accordance with the requirements of this subpart.

(ii) Prohibition. An insured state nonmember bank must not permit an employee of the bank who is subject to the registration requirements of this subpart to act as a mortgage loan originator for the bank unless such employee is registered with the Registry pursuant to this subpart.

(3) Implementation period for initial registration. An employee of an insured state nonmember bank who is a mortgage loan originator must complete an initial registration with the Registry pursuant to this subpart within 180 days from the date that the FDIC provides in a public notice that the Registry is accepting registrations.

(4) Employees previously registered or licensed through the Registry. (i) In general. If an employee of an insured state nonmember bank was registered or licensed through, and obtained a unique identifier from, the Registry and has maintained this registration or license before the employee of the bank becomes subject to this subpart, then the registration requirements of the S.A.F.E. Act and this subpart are deemed to be met, provided that:

(A) The employment information in paragraphs (d)(1)(i)(C) and (d)(1)(ii) of this section is updated and the requirements of paragraph (d)(2) of this section are met;

(B) New fingerprints of the employee are submitted to the Registry for a background check, as required by paragraph (d)(1)(ix) of this section, unless the employee has fingerprints on file with the Registry that are less than 3 years old;

(C) The insured state nonmember bank information required in paragraphs (e)(1)(i) (to the extent the bank has not previously met these requirements) and (e)(2)(i) of this section is submitted to the Registry; and

(D) The registration is maintained pursuant to paragraphs (b) and (e)(1)(ii) of this section, as of the date that the employee becomes subject to this subpart.

(ii) Implementation period for certain acquisitions, mergers or reorganizations. When registered or licensed mortgage loan originators become insured state nonmember bank employees as a result of an acquisition, merger or reorganization, the requirements of paragraphs (a)(4)(i)(A), (C), and (D) of this section must be met within 60 days from the effective date of the acquisition, merger, or reorganization.

(b) Maintaining registration. (1) A mortgage loan originator who is registered with the Registry pursuant to paragraph (a) of this section must:

(i) Except as provided in paragraph (b)(3) of this section, renew the registration during the annual renewal period, confirming the responses set forth in paragraphs (d)(1)(i) through (viii) of this section remain accurate and complete, and updating this information, as appropriate; and

(ii) Update the registration within 30 days of any of the following events:

(A) A change in the name of the registrant;

(B) The registrant ceases to be an employee of the insured state nonmember bank; or

(C) The information required under paragraphs (d)(1)(iii) through (viii) of this section becomes inaccurate, incomplete, or out-of-date.

(2) A registered mortgage loan originator must maintain his or her registration, unless the individual is no longer engaged in the activity of a mortgage loan originator.

(3) The annual registration requirement set forth in paragraph (b)(1) of this section does not apply to a registered mortgage loan originator who has completed his or her registration with the Registry pursuant to paragraph (a)(1) of this section less than 6 months prior to the end of the annual renewal period.

(c) Effective dates. (1) Registration. A registration pursuant to paragraph (a)(1) of this section is effective on the date the Registry transmits notification to the registrant that the registrant is registered.

(2) Renewals or updates. A renewal or update pursuant to paragraph (b) of this section is effective on the date the Registry transmits notification to the registrant that registration has been renewed or updated.

(d) Required employee information. (1) In general. For purposes of the registration required by this section, an insured state nonmember bank must require each employee who is a mortgage loan originator to submit to the Registry, or must submit on behalf of the employee, the following categories of information to the extent this information is collected by the Registry:

(i) Identifying information, including the employee's:

(A) Name and any other names used;

(B) Home address and contact information;

(C) Address of the employee's principal business location and business contact information;

(D) Social security number;

(E) Gender; and

(F) Date and place of birth;

(ii) Financial services-related employment history for the 10 years prior to the date of registration or renewal, including the date the employee became an employee of the bank;

(iii) Convictions of any criminal offense involving dishonesty, breach of trust, or money laundering, or agreements to enter into a pretrial diversion or similar program in connection with the prosecution for such offense, against the employee or organizations controlled by the

employee;

(iv) Civil judicial actions against the employee in connection with financial services-related activities, dismissals with settlements, or judicial findings that the employee violated financial services-related statutes or regulations, except for actions dismissed without a settlement agreement;

(v) Actions or orders by a State or Federal regulatory agency or foreign financial regulatory authority that:

(A) Found the employee to have made a false statement or omission or been dishonest, unfair or unethical; to have been involved in a violation of a financial services-related regulation or statute; or to have been a cause of a financial services-related business having its authorization to do business denied, suspended, revoked, or restricted;

(B) Are entered against the employee in connection with a financial services-related activity;

(C) Denied, suspended, or revoked the employee's registration or license to engage in a financial services-related activity; disciplined the employee or otherwise by order prevented the employee from associating with a financial services-related business or restricted the employee's activities; or

(D) Barred the employee from association with an entity or its officers regulated by the agency or authority or from engaging in a financial services-related business;

(vi) Final orders issued by a State or Federal regulatory agency or foreign financial regulatory authority based on violations of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct;

(vii) Revocation or suspension of the employee's authorization to act as an attorney, accountant, or State or Federal contractor;

(viii) Customer-initiated financial services-related arbitration or civil action against the employee that required action, including settlements, or which resulted in a judgment;

and

(ix) Fingerprints of the employee, in digital form if practicable and any appropriate identifying information for submission to the Federal Bureau of Investigation and any governmental agency or entity authorized to receive such information in connection with a State and national criminal history background check; however, fingerprints provided to the Registry that are less than 3 years old may be used to satisfy this requirement.

(2) Employee authorizations and attestation. An employee registering as a mortgage loan originator or renewing his or her registration under this subpart, and not the employing insured state nonmember bank or other employees of the insured state nonmember bank, must:

(i) Authorize the Registry and the employing institution to obtain information related to sanctions or findings in any administrative, civil or criminal action, to which the employee is a party, made by any governmental jurisdiction;

(ii) Attest to the correctness of all information required by paragraph (d) of this section, whether submitted by the employee or on behalf of the employee by the employing bank; and

(iii) Authorize the Registry to make available to the public information required by paragraphs (d)(1)(i)(A) and (C), (d)(1)(ii) – (viii) of this section.

(3) Submission of information. An insured state nonmember bank may identify one or more employees of the bank who may submit the information required by paragraph (d)(1)(i) of this section to the Registry on behalf of the bank's employees provided that this individual, and

any employee delegated such authority, does not act as a mortgage loan originator, consistent with paragraph (e)(1)(F) of this section. In addition, an insured state nonmember bank may submit to the Registry some or all of the information required by paragraphs (d)(1)(i) and (e)(2) of this section for multiple employees in bulk through batch processing in a format to be specified by the Registry, to the extent such batch processing is made available by the Registry.

(e) Required bank information. An insured state nonmember bank must submit the following categories of information to the Registry:

(1) Bank record. (i) In connection with the registration of one or more mortgage loan originators:

(A) Name, main office address, and business contact information;

(B) Internal Revenue Service Employer Tax Identification Number (EIN);

(C) Research Statistics Supervision and Discount (RSSD) number, as issued by the Board of Governors of the Federal Reserve System;

(D) Identification of its primary Federal regulator;

(E) Name(s) and contact information of the individual(s) with authority to act as the bank's primary point of contact for the Registry;

(F) Name(s) and contact information of the individual(s) with authority to enter the information required by paragraphs (d)(1) and (e) of this section to the Registry and who may delegate this authority to other individuals. For the purpose of providing information required by paragraph (e) of this section, this individual and their delegates must not act as mortgage loan originators unless the bank has 10 or fewer full time or equivalent employees and is not a subsidiary; and

(G) If a subsidiary of an insured state nonmember bank, indication that it is a subsidiary and the RSSD number of the parent bank.

(ii) Attestation. The individual(s) identified in paragraphs (e)(1)(i)(E) and (F) of this section must comply with Registry protocols to verify their identity and must attest that they have the authority to enter data on behalf of the insured state nonmember bank, that the information provided to the Registry pursuant to paragraph (e) of this section is correct, and that the insured state nonmember bank will keep the information required by paragraph (e) of this section current and will file accurate supplementary information on a timely basis.

(iii) An insured state nonmember bank must update the information required by paragraph (e) of this section within 30 days of the date that this information becomes inaccurate.

(iv) An insured state nonmember bank must renew the information required by paragraph (e) of this section on an annual basis.

(2) Employee information. In connection with the registration of each employee who acts as a mortgage loan originator:

(i) After the information required by paragraph (d) of this section has been submitted to the Registry, confirmation that it employs the registrant; and

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

§ 365.104 Policies and procedures.

An insured state nonmember bank that employs mortgage loan originators must adopt and follow written policies and procedures designed to assure compliance with this subpart.

These policies and procedures must be appropriate to the nature, size, complexity, and scope of

the mortgage lending activities of the bank, and apply only to those employees acting within the scope of their employment at the bank. At a minimum, these policies and procedures must:

(a) Establish a process for identifying which employees of the bank are required to be registered mortgage loan originators;

(b) Require that all employees of the insured state nonmember bank who are mortgage loan originators be informed of the registration requirements of the S.A.F.E. Act and this subpart and be instructed on how to comply with such requirements and procedures;

(c) Establish procedures to comply with the unique identifier requirements in section 365.105;

(d) Establish reasonable procedures for confirming the adequacy and accuracy of employee registrations, including updates and renewals, by comparisons with its own records;

(e) Establish reasonable procedures and tracking systems for monitoring compliance with registration and renewal requirements and procedures;

(f) Provide for independent testing for compliance with this subpart to be conducted at least annually by bank personnel or by an outside party;

(g) Provide for appropriate action in the case of any employee who fails to comply with the registration requirements of the S.A.F.E. Act, this subpart, or the bank's related policies and procedures, including prohibiting such employees from acting as mortgage loan originators or other appropriate disciplinary actions;

(h) Establish a process for reviewing employee criminal history background reports received from the Registry in connection with section 365.103(d)(1)(ix), taking appropriate action consistent with applicable Federal law, including section 19 of the Federal Deposit

Insurance Act (12 U.S.C. 1829) and implementing regulations with respect to these reports, and maintaining records of these reports and actions taken with respect to applicable employees; and

(i) Establish procedures designed to ensure that any third party with which the bank has arrangements related to mortgage loan origination has policies and procedures to comply with the S.A.F.E. Act, including appropriate licensing and/or registration of individuals acting as mortgage loan originators.

§ 365.105 Use of unique identifier.

(a) The insured state nonmember bank shall make the unique identifier(s) of its registered mortgage loan originator(s) available to consumers in a manner and method practicable to the institution.

(b) A registered mortgage loan originator shall provide his or her unique identifier to a consumer:

- (1) Upon request;
- (2) Before acting as a mortgage loan originator; and
- (3) Through the originator's initial written communication with a consumer, if any, whether on paper or electronically.

Appendix A to Subpart B of Part 365 – Examples of Mortgage Loan Originator Activities

This Appendix provides examples to aid in the understanding of activities that would cause an employee of an insured state nonmember bank to fall within or outside the definition of mortgage loan originator. 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 subpart. For the purposes of the examples below, the term “loan” refers to a residential mortgage loan.

(a) Taking a loan application: The following examples illustrate when an employee takes, or does not take, a loan application.

(1) Taking an application includes: receiving information provided in connection with a request for a loan to be used to determine whether the consumer qualifies for a loan, even if the employee

(i) has received the consumer's information indirectly in order to make an offer or negotiate a loan;

(ii) is not responsible for further verification of information;

(iii) is inputting information into an online application or other automated system on behalf of the consumer; or

(iv) is not engaged in approval of the loan, including determining whether the consumer qualifies for the loan.

(2) Taking an application does not include any of the following activities performed solely or in combination:

(i) Contacting a consumer to verify the information in the loan application by obtaining documentation, such as tax returns or payroll receipts;

(ii) Receiving a loan application through the mail and forwarding it, without review, to loan approval personnel;

(iii) Assisting a consumer who is filling out an application by clarifying what type of information is necessary for the application or otherwise explaining the qualifications or criteria necessary to obtain a loan product;

(iv) Describing the steps that a consumer would need to take to provide information to be used to determine whether the consumer qualifies for a loan or otherwise explaining the loan application process;

(v) In response to an inquiry regarding a prequalified offer that a consumer has received from a bank, collecting only basic identifying information about the consumer and forwarding the consumer to a loan originator; or

(vi) Receiving information in connection with a modification to the terms of an existing loan to a borrower as part of the bank's loss mitigation efforts when the borrower is reasonably likely to default.

(b) Offering or negotiating terms of a loan. The following examples are designed to illustrate when an employee offers or negotiates terms of a loan, and conversely, what does not constitute offering or negotiating terms of a loan.

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

(i) Presenting a loan offer to a consumer for acceptance, either verbally or in writing, including, but not limited to, providing a disclosure of the loan terms after application under the Truth in Lending Act, even if:

(A) further verification of information is necessary;

(B) the offer is conditional;

(C) other individuals must complete the loan process; or

(D) only the rate approved by the bank's loan approval mechanism function for a specific loan product is communicated without authority to negotiate the rate.

(ii) Responding to a consumer's request for a lower rate or lower points on a pending loan application by presenting to the consumer a revised loan offer, either verbally or in writing, that includes a lower interest rate or lower points than the original offer.

(2) Offering or negotiating terms of a loan does not include solely or in combination:

(i) Providing general explanations or descriptions in response to consumer queries regarding qualification for a specific loan product, such as explaining loan terminology (i.e., debt-to-income ratio); lending policies (i.e., the loan-to-value ratio policy of the insured state nonmember bank); or product-related services;

(ii) In response to a consumer's request, informing a consumer of the loan rates that are publicly available such as on the insured state nonmember bank's Web site for specific types of loan products without communicating to the consumer whether qualifications are met for that loan product;

(iii) Collecting information about a consumer in order to provide the consumer with information on loan products for which the consumer generally may qualify, without presenting a specific loan offer to the consumer for acceptance, either verbally or in writing;

(iv) Arranging the loan closing or other aspects of the loan process, including communicating with a consumer about those arrangements, provided that communication with the consumer only verifies loan terms already offered or negotiated;

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

(vi) Making an underwriting decision about whether the consumer qualifies for a loan;

(vii) Explaining or describing the steps or process that a consumer would need to take in order to obtain a loan offer, including qualifications or criteria that would need to be met without providing guidance specific to that consumer's circumstances; or

(viii) Communicating on behalf of a mortgage loan originator that a written offer, including disclosures provided pursuant to the Truth in Lending Act, has been sent to a consumer without providing any details of that offer.

(c) The following examples illustrate when an employee does or does not offer or negotiate terms of a loan "for compensation or gain."

(1) Offering or negotiating terms of a loan for compensation or gain includes engaging in any of the activities in paragraph (b)(1) of this Appendix in the course of carrying out employment duties, even if the employee does not receive a referral fee or commission or other special compensation for the loan.

(2) Offering or negotiating terms of a loan for compensation or gain does not include engaging in a seller-financed transaction for the employee's personal property that does not involve the insured state nonmember bank.