

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Veterans Affairs Department

CFR Citation: 24 CFR Parts 30 and 3400

Docket ID: [Docket No. FR-5271-P-01]

RIN ID: RIN 2502-A170

NOTICE: Part VI

DOCID: fr15de09-25

DOCUMENT ACTION: Proposed rule.

SUBJECT CATEGORY:

SAFE Mortgage Licensing Act: HUD Responsibilities Under the SAFE Act

DATES: Comment due date: February 16, 2010.

DOCUMENT SUMMARY:

The Secure and Fair Enforcement Mortgage Licensing Act of 2008 (SAFE Act or Act) was enacted into law on July 30, 2008, as part of the Housing and Economic Recovery Act of 2008. This new law directs States to adopt licensing and registration requirements for loan originators that meet the minimum standards specified in the SAFE Act, in lieu of HUD establishing and maintaining a licensing system for loan originators. This new law also encourages the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) to establish a nationwide mortgage licensing system and registry (NMLSR) for the residential mortgage industry for the purpose of providing: uniform State licensing application and reporting requirements for residential mortgage loan originators, and a comprehensive database to find and track mortgage loan originators licensed by the States and mortgage loan originators that work for federally regulated banks. Loan originators who are employees of federally regulated depository institutions and their subsidiaries are required to register through the NMLSR, but are not subject to State licensing requirements.

If HUD determines that a State's mortgage loan origination licensing standards do not meet the minimum requirements of the statute, HUD is charged with establishing and implementing a system for mortgage loan originators in that State. Additionally, if at any time HUD determines that the NMLSR is failing to meet the SAFE Act's requirements, HUD is

charged with establishing and maintaining a licensing and tracking system for mortgage loan originators.

This rule sets forth the minimum standards that the SAFE Act provides States to meet in licensing loan originators. Additionally, consistent with HUD's charge under the SAFE Act, this rule provides the following: the procedure that HUD will use to determine whether a State's licensing and registration system is SAFE Act compliant; the actions that HUD will take if HUD determines that a State has not established a SAFE Act compliant licensing and registration system or that the NMLSR established by CSBS and AARMR is not SAFE Act compliant; the minimum requirements for the administration of the NMLSR; and HUD's enforcement authority if it operates a State licensing system.

In addition to establishing HUD's responsibilities under the SAFE Act, through this rule, HUD proposes to clarify or interpret certain statutory provisions that pertain to the scope of the SAFE Act licensing requirements, and other requirements that pertain to the implementation, oversight, and enforcement responsibilities of the States. HUD solicits comment on the proposed clarifications and on the regulations proposed to be codified.

SUMMARY:

Housing and Urban Development Department

SUPPLEMENTAL INFORMATION

I. Background

The Housing and Economic Recovery Act of 2008 (Pub. L. 110289, approved July 30, 2008) (HERA) constitutes a major new housing law that is designed to assist with the recovery and the revitalization of America's residential housing market from modernization of the Federal Housing Administration, to foreclosure prevention, to enhancing consumer protections. The SAFE Act is a key component of HERA designed to improve accountability on the part of loan originators, combat fraud, and enhance consumer protections.

The SAFE Act encourages States to establish minimum standards for the licensing and registration of State licensed mortgage loan originators and encourages the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) to establish and maintain the NMLSR for the residential mortgage industry for the purpose of achieving the following objectives:

(1) Providing uniform license applications and reporting requirements for State licensed loan originators;

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(2) Providing a comprehensive licensing and supervisory database; (3) Aggregating and improving the flow of information to and between regulators;

(4) Providing increased accountability and tracking of loan originators;

(5) Streamlining the licensing process and reducing regulatory burden;

(6) Enhancing consumer protections and supporting antifraud measures;

(7) Providing consumers with easily accessible information, offered at no charge, utilizing electronic media, including the Internet, regarding the employment history of, and publicly adjudicated disciplinary and enforcement actions against, loan originators; (8) Establishing a means by which residential mortgage loan originators would, to the greatest extent possible,

be required to act in the best interests of the consumer;

(9) Facilitating responsible behavior in the mortgage market place and providing comprehensive training and examination requirements related to mortgage lending;

(10) Facilitating the collection and disbursement of consumer complaints on behalf of State mortgage regulators.

CSBS and AARMR have established this registry, and it can be found at

<http://www.Stateregulatoryregistry.org>.

The SAFE Act also encourages States to participate in the NMLSR and requires participating States to have in place, by law or regulation, a system for licensing and registering loan originators that meets the requirements of sections 1505, 1506, and 1508(d) of the SAFE Act.

The SAFE Act requires the States to have the licensing and registration system in place by:

(1) July 31, 2009, for States whose legislatures meet annually; and (2) July 31, 2010, for States whose legislatures meet biennially. HUD may grant an extension of not more than 24 months if HUD determines that a State is making a goodfaith effort to establish a State licensing law that meets the minimum requirements of the SAFE Act.

HUD is charged by the SAFE Act to establish and maintain a licensing and registration system for a State or territory that does not have in place a system for licensing loan originators that meets the requirements of the SAFE Act, or that fails to participate in the NMLSR. Specifically, section 1508 of the SAFE Act, entitled "Secretary of Housing and Urban Development Backup Authority to Establish a Loan Originator Licensing System," provides that after the time periods for compliance allowed by the statute, if the "Secretary determines that a State does not have in place by law or regulation a system for licensing and registering loan originators that meets the requirements of sections 1505 and 1506 and subsection (d) of this section [section 1508], or does not participate in the Nationwide Mortgage Licensing System and Registry, the Secretary shall provide for the establishment and maintenance of a system for the licensing and registration by the Secretary of loan originators operating in such State as Statelicensed loan originators."

For any State for which HUD must establish such licensing and registration system, a loan originator in such a State would have to comply with the requirements of HUD's SAFE Actcompliant licensing system for that State, as well as with any applicable State requirements. A HUD license for a State would be valid only for that State, even if HUD must implement licensing systems in multiple States. Additionally, if HUD determines that the NMLSR is failing to meet the requirements and purposes of the SAFE Act, HUD must establish a system that meets the requirements of the SAFE Act.

As noted earlier, the SAFE Act encourages CSBS and AARMR to establish and maintain the NMLSR, and these organizations have development of the NMLSR under way. In addition to developing the NMLSR, CSBS and AARMR developed model legislation to aid and facilitate States' compliance with the requirements of the SAFE Act. Because overall responsibility for interpretation, implementation, and compliance with the SAFE Act rests with HUD, CSBS and AARMR requested that HUD review the model legislation, and advise of its sufficiency in meeting applicable minimum requirements of the SAFE Act. HUD reviewed the model legislation and advised the public that the model legislation offers an approach that meets the minimum requirements of the SAFE Act. States that adopt and implement a State licensing

system that follows the provisions of the model legislation, whether by statute or regulation, will be presumed to have met the applicable minimum requirements of the SAFE Act.

In advising the public of its assessment of the model legislation, HUD also presented its views and interpretations of certain statutory provisions that required consideration and analysis in determining that the model legislation meets the minimum requirements of the SAFE Act. These views and interpretations, referred to as HUD's Commentary (or Commentary) can be found at <http://www.hud.gov/offices/hsg/sfh/reguprog.cfm>. (See also HUD's Federal Register notice published on January 5, 2009, at 74 FR 312, advising of the availability of the model legislation and HUD's Commentary.) This rule proposes to incorporate the views and interpretations of the SAFE Act that HUD presented in its Commentary.

More recently, HUD posted on its Web site responses to frequently asked questions about the SAFE Act. One of the questions asked concerned the applicability of the definition of loan originator to individuals who modify existing residential mortgage loans. As HUD's response to this question reflects, given the extent to which today's loan modifications can be virtually indistinguishable from refinances, HUD sees the reasonableness of covering these individuals under the definition of loan originator and has advised that it is inclined to require the licensing of individuals who perform loan modifications for servicers. In its response to the question, HUD also highlighted several issues related to loan modifications. Given the continued poor State of the housing situation and the importance of promoting loan modifications as a means of avoiding foreclosure, HUD seeks comment on this issue, as discussed later in this preamble.

Related to HUD's rulemaking is regulatory action recently taken by the Office of the Comptroller of the Currency of the Department of the Treasury, the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision of the Department of the Treasury, the Farm Credit Administration (FCA), and the National Credit Union Administration (collectively, the agencies). The SAFE Act requires these agencies, through the Federal Financial Institutions Examination Council (FFIEC) and the FCA, to develop and maintain a Federal registration system for employees of an institution regulated by one (or more) of the agencies, and to implement this system by July 29, 2009. The SAFE Act specifically prohibits an individual employed by an agencyregulated institution from engaging in the business of residential mortgage loan origination without first obtaining and maintaining annually a registration as a registered mortgage loan originator and obtaining a unique identifier. The agencies published their proposed rule to implement this registration system on June 9, 2009, at 74 FR 27386. The agencies' proposed rule also seeks comment on the issue of coverage of individuals who perform loan

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modifications. (See 74 FR at 2739127392.)

With respect to the agencies' responsibilities under the SAFE Act, and the responsibilities of HUD, it is important to note that HUD's regulations, when promulgated, do not apply to individuals who are employees of agencyregulated institutions and are, accordingly, subject to the regulations to be promulgated by the agencies. Additionally, any action taken by HUD based on a determination that the NMLSR does not meet the requirements of the SAFE Act

with respect to individuals subject to the State licensing and registration requirements of the SAFE Act, would not apply to individuals subject to the agencies' SAFE Act regulations.

II. This Proposed Rule

This proposed rule addresses the criteria that HUD will use to determine whether a State has put in place a system for licensing and registering loan originators as required by the SAFE Act. The rule sets forth the statutorily imposed minimum requirements that a State would have to meet to be in compliance with the SAFE Act. Those minimum requirements are found in section 1505 of the SAFE Act, which governs State license and registration application and issuance, section 1506, which governs the standards for State license renewal, and section 1508(d), which governs other standards that a State's law and licensing system must meet. This rule also sets forth clarifications and interpretations of the SAFE Act that HUD previously provided to the public through its Commentary. Among the important clarifications that this rule proposes to make are definitions of what activities are included in "tak[ing] a residential mortgage loan application" and "offer[ing] or negotiate[ing] terms of a residential mortgage loan," and what it means to do so "for compensation or gain." The meanings of these terms largely determine whether or not a particular individual is subject to licensing requirements. HUD is aware of the great variety of business models that are utilized in the housing finance industry and proposes to provide definitions based on functions, rather than on job titles or labels, to further clarify whether an individual is subject to licensing requirements. HUD specifically seeks comment on whether the proposed definitions, which are further discussed below, are adequate and appropriate.

This proposed rule would provide that the requirements that HUD would put in place if HUD must establish a licensing and registration system for a State are the same as the minimum requirements that States must implement, in accordance with section 1508 of the SAFE Act. This proposed rule would also provide the criteria that HUD will use to determine, in accordance with section 1509 of the SAFE Act, whether the NMLSR meets the requirements of the SAFE Act.

This rule incorporates the provisions of section 1512 of the SAFE Act, pertaining to confidentiality of information, and of section 1513, pertaining to protection from liability for HUD or the administrator of the NMLSR by reason of goodfaith action or omission of any officer or employee of HUD or the administrator while acting within the scope of office or employment, relating to the collection, furnishing or dissemination of information concerning persons who are loan originators or are applying for licensing or registration as loan originators.

This rule also addresses the enforcement authority provided to HUD in section 1514 of the SAFE Act. Section 1514 of the SAFE Act provides HUD with: (1) Summons authority for information on any loan originator operating in any State that is subject to a licensing system established by HUD; (2) the authority to appoint examiners to assist HUD in its responsibilities in a State in which HUD established a licensing system; and (3) the authority to conduct ceaseanddesist proceedings with respect to any person who is violating, has violated, or is about to violate any provision of the SAFE Act under a licensing system established by HUD, including the authority to issue temporary orders.

Consistent with HUD's responsibility to oversee implementation and compliance with the SAFE Act, HUD would like to highlight for the public's attention, the following determinations that HUD has made and for which HUD specifically welcomes comment. Several of the determinations were presented in the Commentary which HUD issued in connection with its review of the CSBS/AARMR model legislation and are repeated here. To the extent that this rule would clarify and interpret minimum requirements that are ambiguous or undefined in the SAFE Act, HUD anticipates that States that have already enacted otherwise compliant systems will be able to comply with the clarified requirements through issuance of regulations or otherwise, rather than through legislative amendments.

A. Engaging in the Business of a Loan Originator and State of Licensure

Section 1504(a) of the SAFE Act provides that, upon the establishment of a licensing or registry system, as applicable, in accordance with the SAFE Act, an individual ``may not engage in the business of a loan originator" without first obtaining a registration or State license. Consistent with this statutory provision, this proposed rule would provide in Sec. 3400.103 that an individual must comply with a State's licensing and registry requirements in order to engage in the business of a loan originator with respect to any residential property in that State. Section 3400.103 of the rule would clarify that the individual must comply with a State's licensing and registry requirements regardless of whether the individual or the prospective borrower is located in the State. This clarification would ensure that each State is able to establish and enforce the provisions of its SAFE Act licensing system and would prevent an individual from circumventing a State's requirements simply by physically locating outside of the State and conducting business in that State by telephone or other means. The same regulatory section clarifies, consistent with section 1503(3)(A)(ii) of the SAFE Act, that a person who performs only ``administrative and clerical tasks" does not ``engage in the business of a loan originator."

B. Taking an Application

Section 1503(3)(A)(i) of the SAFE Act defines ``loan originator" as ``an individual who: (I) takes a residential mortgage loan application; and (II) offers or negotiates terms of a residential mortgage loan for compensation or gain." This proposed rule would incorporate in Sec. 3400.23 the interpretation of ``application" provided in HUD's Commentary. The Commentary Stated that

``application" includes any request from a borrower, however communicated, for an offer (or in response to a solicitation of an offer) of residential mortgage loan terms, as well as the information from the borrower that is typically required in order to make such an offer.

The Commentary also provided that HUD views the phrase ``tak[ing] an application" to mean receipt of an application for the purpose of deciding whether or not to extend the requested offer of a loan to the borrower, whether the application is received directly or indirectly from the borrower. Section 3400.103(c)(1) of the proposed rule would incorporate the language of the

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Commentary on ``taking an application". The Commentary also provided that HUD interprets the term ``takes a residential mortgage loan application" to exclude an individual whose only role with respect to the application is physically handling a completed application form or transmitting a completed form to a lender on behalf of a prospective borrower. This

interpretation is consistent with the definition of "loan originator" in section 1503(3)(A)(ii) of the SAFE Act.

The Commentary also addressed the meaning of the term "loan originator." The Commentary States that since it generally would not be possible for an individual to offer to or negotiate residential mortgage loan terms with a borrower without first receiving the request from the borrower (including a positive response to a solicitation of an offer), as well as the information typically contained in a borrower's application, HUD considers the definition of loan originator to encompass any individual who, for compensation or gain, offers or negotiates pursuant to a request from and based on the information provided by the borrower. This proposed rule would therefore provide in section 3400.103(c)(1) that such an individual would be included in the definition of loan originator, regardless of whether the individual takes the request from the borrower for an offer (or positive response to an offer) of residential mortgage loan terms directly or indirectly from the borrower.

C. Offering or Negotiating

Similar to HUD's views on "loan originator", HUD views the terms "offers or negotiates" broadly. HUD views these terms as encompassing interactions between an individual and a borrower where the individual is likely to seek to further his or her own interests or those of a third party. Accordingly, this rule would clarify in Sec. 3400.103(c)(2) that the terms include interactions that are typical between two parties in an arm's length relationship prior to entering into a contract, such as presenting loan terms for acceptance by a prospective borrower and communicating with the borrower for the purpose of reaching an understanding about prospective loan terms.

In addition, this proposed rule proposes to clarify that "offers or negotiates" includes actions by an individual that make a prospective borrower more likely to accept a particular set of loan terms or an offer from a particular lender, where the individual may be influenced by a duty to or incentive from any party other than the borrower. Such actions may have the same effect on the borrower's decision as overt negotiations, but without the borrower's knowledge or understanding that other options may be available. Examples include a contingent payment, a contractual duty to recommend one lender or product, or a pattern of steering to a lender that provides grant funding to the steering housing counselor. HUD specifically welcomes comment on the clarification that HUD offers through this rule. D. For Compensation or Gain

The terms "for compensation or gain" are proposed to be broadly defined in Sec. 3400.103(c)(2) and would include any circumstances in which an individual receives or expects to receive anything of value in connection with offering or negotiating terms of a residential mortgage loan. These terms would not be limited to payments that are contingent upon closing of a loan.

E. Independent Contractor Loan Processors or Underwriters

Sections 1503(4) and 1504(b) of the SAFE Act provide that certain individuals who "engage in residential mortgage loan origination activities as a loan processor or underwriter" must have a loan originator license, even if their activities do not amount to "engag[ing] in the business of a loan originator" under Sec. 1504(a). The SAFE Act defines "loan processor or underwriter" as an individual who performs "clerical or support duties" at the direction of and

subject to the supervision and instruction of a State-licensed loan originator or registered loan originator. "Clerical or support duties" are defined to include communicating with a consumer and third parties to collect and analyze information that is necessary to process an application or to underwrite the loan.

Sections 1503(4) and 1504(b) provide that this licensing requirement does not apply to an individual who fully meets the definition of a loan processor or underwriter, in that he or she performs these clerical or support duties at the direction of and subject to the supervision and instruction of a State-licensed loan originator or registered loan originator. Sections 1503(4) and 1504(b) provide that this licensing requirement does apply to individuals who are "independent contractors" who perform these clerical or support duties, because, by definition, they do not perform their duties at the direction of and subject to the supervision and instruction of a State-licensed loan originator or a registered loan originator. It is the lack of such supervision by individuals already licensed or registered as loan originators that subjects loan processors or underwriters to the SAFE Act licensing and registry requirements.

This proposed rule would clarify in Sec. 3400.23 that an "independent contractor," for purposes of this provision, is an individual who performs these duties other than at the direction of and subject to the supervision of a State-licensed loan originator or a registered loan originator. Accordingly, an individual who is an employee of some person or entity (i.e., the individual is not an independent contractor), but who is not subject to the direction, supervision, and instruction of a licensed or registered loan originator, would have to obtain a loan originator license. Such a person or entity could prevent its employees from having to obtain a State loan originator license simply by ensuring that they perform any "clerical or support duties" at the direction of and subject to the supervision and instruction of a State-licensed loan originator or registered loan originator.

F. Individuals Not Subject to Licensing Requirements

Notwithstanding the broad definition of "loan originator" in the SAFE Act, as noted in HUD's Commentary, there are some limited contexts where offering or negotiating residential mortgage loan terms would not make an individual a loan originator. The provision in the definition that loan originators are individuals who take an "application" implies a formality and commercial context that is wholly absent where an individual offers or negotiates terms of a residential mortgage loan with or on behalf of a member of his or her immediate family. Accordingly, this proposed rule would provide in Sec. 3400.103(e)(4) that such individuals are not subject to State licensing requirements.

The commercial context implied by the taking of an "application" is also absent where an individual seller provides financing to a buyer pursuant to the sale of the seller's own residence. The frequency with which a particular seller provides financing is so limited that HUD's view is that Congress did not intend to require such sellers to obtain loan originator licenses. Accordingly, this rule would provide in Sec. 3400.103(e)(5) that such individuals are not subject to State licensing requirements.

Additionally, the definition generally would not apply to, for example, a
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licensed attorney who negotiates terms of a residential mortgage loan with a prospective lender on behalf of a client as an ancillary matter to the attorney's representation of the client,

unless the attorney is compensated by a lender, mortgage broker, or other mortgage loan originator or by an agent of such lender, mortgage broker, or other loan originator. In such cases, the attorney's duties of loyalty to the client require the attorney to seek to further only the client's interests, and the attorney does not negotiate with or make offers of loan terms to the client. Accordingly, such activities would not fall within the definition of "offers or negotiates" as proposed to be defined in Sec. 3400.103(c)(2) and discussed above, and would therefore not be engaging in the business of a loan originator. This rule would provide in Sec. 3400.103(e)(5) that such individuals are not subject to State licensing requirements.

Finally, section 1503(7)(A) of the SAFE Act provides that employees of: (i) A depository institution, (ii) a subsidiary that is owned and controlled by a depository institution and that is regulated by a Federal banking agency, or (iii) an institution regulated by the Farm Credit Administration are not subject to State licensing requirements. The SAFE Act does not define the term "employee" and, in consultation with staff of the Federal banking agencies and the Farm Credit Administration, HUD was apprised that there is no general definition of "employee" used by these Federal agencies. Accordingly, this proposed rule would clarify in Sec. 3400.23 that HUD interprets "employee" to mean only an individual who meets a common law definition of employee and whose income is required to be reported on a W2 form, unless the Federal banking agencies provide another binding definition. (See Restatement (Third) of Agency Sec. 7.07(3) and comment f.) G. Minimum Requirements for Licensing

Section 1505 sets forth the minimum licensing requirements. Section 1505(a) requires a background check on the applicant, which includes the submission of fingerprints, personal history and experience, an independent credit report, and information relating to any administrative, civil, or criminal findings by any governmental institution.

Section 1505(b)(2) of the SAFE Act provides that, to be eligible for a license, an individual must not have been convicted of any felony within the preceding 7 years or convicted of certain types of felonies at any time prior to application. Since the provision is triggered by a conviction, rather than by an extant record of a conviction, this proposed rule would clarify in Sec. 3400.105(b)(2) that an individual is ineligible for a loan originator license even if the conviction is later expunged. Pardoned convictions, in contrast, are generally treated as legal nullities for all purposes under State law, and Sec. 3400.105(b)(2) would provide that a pardoned conviction would not render an individual ineligible. Section 3400.105(b)(2) would also clarify that the law under which an individual is convicted, rather than the State where the individual applies for a license, determines whether a particular crime is classified as a felony.

Section 1505(c) establishes prelicensing education for loan originators. In order to meet the prelicensing education requirement, the applicant must complete at least 20 hours of approved education, which shall include: (1) At least 3 hours of Federal law and regulation; (2) 3 hours of ethics, which shall include instruction on fraud, consumer protection, and fair lending issues; and (3) 2 hours of training related to lending standards for the nontraditional mortgage product marketplace.

Section 1505(d) requires the applicant to meet a written test, developed by the NMLS, and administered by an approved test provider.

Section 1505(e) requires each mortgagee licensee to submit to the NMLS reports of condition (or mortgage call reports). This requirement is further addressed in section I of this preamble and Sec. 3400.111(f) of the proposed regulation.

H. Effective Date of Requirement To Obtain and Maintain a License

Under the SAFE Act, HUD may determine the acceptability of States' licensing and registration systems and of their participation in the NMLS as early as July 31, 2009, or July 31, 2010, as applicable. HUD's position is that Congress did not intend for States to require all mortgage loan originators to meet the educational, testing, and background check requirements and to be licensed immediately upon enactment of the State's legislation or issuance of regulations. In addition, HUD is aware that some States already require licensure of loan originators, and that some individuals in those States will hold licenses that do not expire until as late as December 2010.

Considering the education, testing, and background check standards that license applicants must meet, this proposed rule would provide in Sec. 3400.109(a) that an acceptable delay, with respect to individuals who do not already possess a valid loan originator license, is one which does not extend past July 31, 2010. Section 3400.109(b) would provide that for individuals who possess licenses granted under a system that was enacted prior to the SAFE Act compliant system, a reasonable delay is one that does not extend past December 31, 2010. This effective date would accommodate individuals with 2-year licenses that were granted or renewed as late as December 2008, and would also synchronize with the NMLSR's uniform annual license expiration date of December 31. Section 3400.109(c) would provide for the possibility of further extensions in the case of unusual hardship faced by loan originators in a State. Finally, Sec. 3400.109(d) would permit States to extend the deadline for individuals who perform or facilitate only modifications or refinancing under the Federal government's Making Home Affordable program. HUD does not believe that SAFE Act licensing requirements should limit borrowers' access to the benefits and protections of the Making Home Affordable program.

I. Other Requirements

Section 1508(d) of the SAFE Act provides additional requirements that a State's loan originator licensing law and system must meet, including the requirement that the State's loan originator supervisory authority be maintained "to provide effective supervision and enforcement" of the law. This proposed rule would provide in Sec. 3400.111 and 3400.113 a nonexhaustive list of minimum standards that a State supervisory authority must meet in order to provide effective supervision and enforcement, including enforcement authorities that approximate those that HUD would have in a State where it establishes a licensing system, in accordance with section 1514 of the SAFE Act. HUD specifically invites comment on whether its proposed enforcement authorities reflect effective supervision and enforcement of the Safe Act requirements.

Section 3400.111(f) also incorporates the statutorily required submission of reports of condition (or mortgage call reports), and would clarify that it is the responsibility of the loan originator to ensure that all residential mortgage loans that close as a result of the loan originator's activities are included in such reports. This clarification would not prevent such reports from being submitted at an institutional level, but the responsibility for ensuring submission would remain that of the individual loan originator.

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This proposed rule would also provide that accreditation under CSBS's Mortgage Accreditation Program provides a supervisory authority a safe harbor, under which HUD will presume that the supervisory authority is providing ``effective supervision and enforcement." J. Determinations of Noncompliance by HUD

This proposed rule would specify in Sec. 3400.115 the method HUD will use in making a final determination that a State is not in compliance with the SAFE Act's requirements. Section 3400.115 would provide that a State must provide evidence of its compliance upon request from HUD, and would provide that HUD will provide notice and the opportunity for comment of its initial determination of a State's noncompliance with the SAFE Act, and that HUD's final determination will be published in the Federal Register. This regulatory section would also provide that HUD may grant a goodfaith extension of up to 24 months from the date of HUD's determination of noncompliance. Finally, Sec. 3400.115 would provide the time frame for when HUD's implementation of a licensing system in a State becomes effective. K. NMLSR Requirements.

This rule provides in subpart D the requirements that apply to the NMLSR. Section 3400.303 proposes to provide financial reporting requirements that are necessary to determine whether fees charged by the NMLSR are reasonable and not excessive, in accordance with section 1510 of the SAFE Act. This rule would also provide in Sec. 3400.305 requirements that apply to the NMLSR's data security and integrity, which are necessary to achieve the confidentiality required under section 1512 of the SAFE Act and for HUD to determine that NMLSR is meeting the SAFE Act's requirements and purposes. HUD specifically invites comments on whether these provisions are adequate and appropriate.

L. Loan Modifications

As noted earlier in this preamble, HUD continues to seek comment on HUD's inclination to require licensing, as loan originators under the SAFE Act, of individuals who perform loan modifications that involve offering or negotiating of loan terms that are materially different from the original loan. HUD first addressed this issue in a frequently asked questions section on its Web site, concerning the SAFE Act. For the convenience of the reader, and to highlight the questions for which HUD specifically seeks comment, HUD reviews its consideration of this issue as set forth in the frequently asked questions section.

HUD's consideration of this issue is based on HUD's recognition that servicers are increasingly taking applications for and negotiating the terms of loan modifications that materially alter the terms of existing mortgage loans. These types of loan servicing activities are often very different from what industry and the public viewed as typical loan servicing activities only a few years ago. Today's loan modifications may include an increase or decrease in the interest rate, a change to the type of interest rate (e.g., fixed rate versus adjustable rate), an extension of the loan term, an increase or a writedown of the principal, the addition of collateral, changes to provisions for prepayment penalties and balloon payments, and even a change in the parties to the loan through assumption or the addition of a cosigner. The activities of a loan servicer that result in modification of the terms of a residential mortgage loan can be virtually indistinguishable from the performance of a refinancing, which is unambiguously covered by the SAFE Act.

Given the material alteration to the terms of a residential loan that are occurring through today's modifications, HUD is inclined to include in its definition of a loan originator, which is being developed through this rulemaking, an individual who performs a residential mortgage loan modification that involves offering or negotiating of loan terms that are materially different from the original loan. At least in some circumstances, when a borrower seeks modification of an existing loan, he or she is requesting an offer of terms that are different from those of his or her existing loan. The loan servicer responds to this request by requesting from the borrower much of the same, if not exactly the same, information necessary in an application to refinance a mortgage or obtain a new loan, and the loan servicer offers or negotiates the terms of the modification with the borrower.

HUD understands the uncertainty within the residential mortgage industry about whether loan servicers are covered by the SAFE Act. The uncertainty stems from the fact that traditional loan servicer activities (e.g., sending monthly payment statements, collecting monthly payments, maintaining records of payments and balances, collecting and paying taxes and insurance, remitting funds to the note holder, and following up on delinquencies) do not constitute loan origination activities. However, given the housing crisis and as noted earlier, loan servicers today are engaged in modification activities that go beyond those that they traditionally performed and that constitute "engag[ing] in the business of a loan originator," within the meaning of the SAFE Act. Furthermore, when a borrower seeks a loan modification from his or her loan servicer, the borrower may face the same risks that Congress sought to control through loan originator licensing. As a result, borrowers may be well served if individuals who negotiate the terms of loan modifications are required to have the same level of competency, integrity, and accountability that the SAFE Act requires of those originating new loans, including the refinancing of an existing mortgage.

To assist with HUD's consideration and resolution of this issue, HUD specifically invites submission of views on any mandatory licensing provisions, quality controls, and training requirements that are already applicable to servicers, and on whether such measures provide protections for consumers that are equivalent to those under the SAFE Act. HUD also requests views on what, if any, characteristics of a modification should be used to classify the modification as so immaterial that it should not be covered by the SAFE Act. Finally, HUD requests views on whether, if SAFE Act licensing of loan servicers is required at HUD's final rule stage, the rule should provide for an extension of the licensing deadline for individuals performing modifications only under the Federal government's Making Home Affordable program. HUD is interested in whether, by granting an extension of time under this limited set of circumstances, States could be assured that consumers working with unlicensed individuals are still provided strong protections from fraud and abuse. Such an extension would be in addition to the reasonable delays that States may provide to all individuals, in accordance with the guidance provided in HUD's Commentary. The Commentary provided that States could give all individuals until July 31, 2010, to obtain a license, and could give all individuals who already hold licenses issued under a prior licensing system until December 31, 2010, to obtain a license.

HUD understands that a number of States have expressly provided for coverage of individuals performing modifications for servicers through legislation or through administrative means. Several States have opted to

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enact legislation defining a loan originator as an individual who takes a residential mortgage loan application or offers or negotiates the terms of a residential mortgage loan for compensation or gain. HUD has determined that the model State law developed by CSBS and AARMR, which contains this definition of loan originator, meets the minimum requirements of the SAFE Act. Therefore, since an individual performing a loan modification almost certainly offers or negotiates the terms of a residential mortgage loan, HUD's view is that such State legislation already covers individuals performing such modifications. Although HUD is requesting the submission of views on whether it will require States to cover such individuals, HUD's view is that the decisions of those States to cover such individuals are fully consistent with the SAFE Act and that, in any case, States are free to exceed the standards required by HUD.

M. ThirdParty Loan Modification Specialists

HUD has seen a substantial increase in the number of thirdparty actors (i.e., individuals other than lenders and loan servicers) offering their services as intermediaries to work putatively on behalf of borrowers to negotiate modifications of existing loan terms. In many cases the activities of these thirdparty actors closely resemble those of mortgage brokers, who act as intermediaries between lenders and borrowers to facilitate the origination of new residential mortgage loans and refinancing of existing mortgages. These thirdparty actors may advertise their services on television or through telemarketing, targeting homeowners who are having difficulty making their current mortgage payments. In other cases, third parties work with borrowers directly, under programs sponsored by governmental or nonprofit agencies, to advise or assist borrowers in obtaining loan modifications. It is HUD's view that thirdparty loan modification specialists should be covered by the licensing requirements of the SAFE Act.

HUD specifically requests comment on whether thirdparty loan modification specialists should be covered by the definition of loan originator and, consequently, be subject to the licensing and registration requirements of the SAFE Act. HUD also requests comments on what specific functions performed by thirdparty loan modification specialists should be characterized as equivalent to the functions of a loan originator that are covered by the SAFE Act.

N. Grandfathering

One issue that has arisen that HUD did not address in its Commentary on the model State law is that of grandfathering. Specifically, HUD has been asked whether a State may permanently waive certain SAFE Act requirements for individuals who have a certain amount of experience as loan originators. The SAFE Act is clear that to engage in the business of a loan originator, an individual must meet all of the licensing requirements. The SAFE Act makes no provision for waiver of these requirements by States. Accordingly, grandfathering is not authorized under the SAFE Act, and this proposed rule would not provide for grandfathering. However, individuals who were licensed under a previous licensing system may be afforded an extended period of time to comply with requirements, as discussed in part H of this preamble.

III. Findings and Certifications

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866 (entitled, "Regulatory Planning and Review"). This rule was determined to be a "significant regulatory action" as defined in section 3(f) of the Order, although not an economically significant regulatory action, as provided under section 3(f)(1) of the Order.

HUD's determination that this rule is not an economically significant regulatory action is supported by the fact that the SAFE Act establishes the minimum licensing standards for loan originators, not HUD. While HUD has interpretive, oversight, and enforcement authority under the SAFE Act, HUD is not authorized to make only certain licensing standards applicable to loan originators, and not others. Accordingly, HUD is not able to alter costs that result from compliance with these statutorily imposed requirements either by States or individuals.

This proposed rule is primarily directed to addressing HUD's oversight and enforcement responsibilities. The costs that result from these activities are therefore costs that will be borne by HUD in carrying out its oversight and enforcement responsibilities. While HUD recognizes that there are costs that will be incurred by States and individuals in complying with the SAFE Act requirements, the SAFE Act contemplates that balanced against these costs will be the benefits to which the SAFE Act strives to achieve, which include: uniform license applications and reporting requirements; increased accountability of loan originators; enhanced consumer protections; a streamlined licensing process; and reduced administrative burden through the uniformity provided by the nationwide standards, especially for those that originate loans in more than one State.

The docket file for this rule is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, Room 10276, 451 7th Street, SW., Washington, DC 20410 0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at 2027083055 (this is not a tollfree number). Persons with hearing or speech impairments may access the above telephone number via TTY by calling the tollfree Federal Information Relay Service at 8008778339.

Regulatory Flexibility Act

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

regulated parties and interested individuals to reference SAFE Act requirements. Because the SAFE Act is not directed to entities, large or small,

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but individuals, and because this rule is directed to HUD's oversight responsibilities, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Notwithstanding HUD's determination that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Environmental Impact

This proposed rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise or provide for standards for construction or construction materials, manufactured housing, or occupancy. Therefore, this proposed rule is categorically excluded from the requirements of the National Environmental Policy Act (42 U.S.C. 4321 et seq.).

Executive Order 13132, Federalism

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

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531-1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule does not impose any Federal mandate on any State, local, or tribal government or the private sector within the meaning of UMRA.

List of Subjects

24 CFR Part 30

Administrative practice and procedure, Grant programshousing and community development, Loan programshousing and community development, Mortgages, and Penalties.

24 CFR Part 3400

Licensing, Mortgages, Registration, Reporting and recordkeeping requirements.

For the reasons Stated in the preamble, HUD proposes to amend 24 CFR part 30 and add a new 24 CFR part 3400, as follows:

PART 30 CIVIL MONEY PENALTIES: CERTAIN PROHIBITED CONDUCT

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

Authority: 12 U.S.C. 1701q1, 1703, 1723i, 1735f14, and 1735f 15; 15 U.S.C. 1717a; 28 U.S.C. 2461 note; 42 U.S.C. 1437z1 and 3535(d).

2. Add Sec. 30.69 to subpart B to read as follows: Sec. 30.69 SAFE Mortgage Licensing violations.

(a) General. HUD may impose a civil penalty on a loan originator operating in any State which is subject to a licensing system established by HUD under 12 U.S.C. 5107 and in accordance with subpart C of 24 CFR part 3400, if HUD finds that such loan originator has violated or failed to comply with any requirement of the SAFE Act, the provisions of 24 CFR part 3400, or a provision of State law enacted or promulgated under the SAFE Act to which the person is subject and with respect to a State that is subject to a licensing system established by HUD under section 12 U.S.C. 5107 and in accordance with subpart C of 24 CFR part 3400.

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

3. Add part 3400, to read as follows:

PART 3400 SAFE MORTGAGE LICENSING ACT

Sec.

3400.1 Purpose.

3400.3 Confidentiality of information.

Subpart A General

3400.20 Scope of this subpart.

3400.23 Definitions.

Subpart B Determination of State Compliance with the SAFE Act 3400.101 Scope of this subpart.

3400.103 Individuals required to be licensed by States.

3400.105 Minimum loan originator license requirements.

3400.107 Minimum annual license renewal requirements.

3400.109 Effective date of State requirements imposed on individuals.

3400.111 Other minimum requirements for State licensing systems. 3400.113 Performance standards.

3400.115 Determination of noncompliance.

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

3400.201 Scope of this subpart.

3400.203 HUD's establishment of loan originator licensing system. 3400.205 HUD's establishment of nationwide mortgage licensing system and registry.

Subpart D Minimum Requirements for Administration of the NMLSR 3400.301 Scope of this subpart.

3400.303 Financial reporting.

3400.305 Data security.

3400.307 Fees.

3400.309 Absence of liability for goodfaith administration. Subpart E Enforcement of HUD Licensing System

3400.401 HUD's authority to examine loan originator records. 3400.403 Enforcement proceedings.

3400.405 Civil money penalties.

Authority: 12 U.S.C. 51015113; 42 U.S.C. 3535(d). Sec. 3400.1 Purpose.

(a) This part implements HUD's responsibilities under the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act) (12 U.S.C. 51015113). The SAFE Act strives to enhance consumer protection and reduce fraud by directing States to adopt minimum uniform standards for the licensing and registration of residential mortgage loan originators and to participate in a nationwide mortgage licensing system and registry database of residential mortgage loan originators. Under the SAFE Act, if HUD determines that a State's loan origination licensing system does not meet the minimum requirements of the SAFE Act, HUD is charged with establishing and implementing a system for all loan originators in that State. Additionally, if at any time HUD determines that the nationwide mortgage licensing system and registry is failing to meet the SAFE Act's requirements, HUD is charged with establishing and maintaining a licensing and registry database for loan originators.

(b) Subpart A establishes the definitions applicable to this part. Subpart B provides the minimum standards that a State must meet in licensing loan originators, including standards for whom a State must require to be licensed, and sets forth HUD's procedure for determining a State's

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compliance with the minimum standards. Subpart C provides the requirements that HUD will apply in any State that HUD determines has not established a licensing and registration system in compliance with the minimum standards of the SAFE Act. Subpart D provides minimum requirements for the administration of the Nationwide Mortgage Licensing System and Registry. Subpart E clarifies HUD's enforcement authority in States in which it operates a State licensing system. Sec. 3400.3 Confidentiality of information.

(a) Except as otherwise provided in this part, any requirement under Federal or State law regarding the privacy or confidentiality of any information or material provided to the Nationwide Mortgage Licensing System and Registry or a system established by the Secretary under this part, and any privilege arising under Federal or State law (including the rules of any Federal or State court) with respect to such information or material, shall continue to apply to such information or material after the information or material has been disclosed to the system. Such information and material may be shared with all State and Federal regulatory officials with mortgage industry oversight authority without the loss of privilege or the loss of confidentiality protections provided by Federal and State laws. (b) Information or material that is subject to a privilege or confidentiality under paragraph (a) of this section shall not be subject to:

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

(2) Subpoena or discovery, or admission into evidence, in any private civil action or administrative process, unless with respect to any privilege held by the Nationwide Mortgage Licensing System and Registry or by the Secretary with respect to such information or

material, the person to whom such information or material pertains waives, in whole or in part, in the discretion of such person, that privilege.

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

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

Subpart A General

Sec. 3400.20 Scope of this subpart.

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

Sec. 3400.23 Definitions.

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

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

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

Application means a request, in any form, for an offer (or a response to a solicitation of an offer) of residential mortgage loan terms and the information about the borrower or prospective borrower that is customary or necessary in a decision on whether to make such an offer.

Clerical or support duties:

(1) Include:

- (i) The receipt, collection, distribution, and analysis of information common for the processing or underwriting of a residential mortgage loan; and
- (ii) Communicating with a consumer to obtain the information necessary for the processing or underwriting of a loan, to the extent that such communication does not include offering or negotiating loan rates or terms, or counseling consumers about residential mortgage loan rates or terms; and

(2) Does not include:

- (i) Taking a residential mortgage loan application; or
- (ii) Offering or negotiating terms of a residential mortgage loan.

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

Employee:

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

(A) Whose manner and means of performance of work are subject to the right of control of, or are controlled by, a person, and (B) Whose compensation for Federal income tax purposes is reported, or required to be reported, on a W2 form.

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

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

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

Independent contractor means an individual who performs his or her duties other than at the direction of and subject to the supervision and instruction of an individual who is licensed and registered in accordance with Sec. 3400.103(a), or is exempt under Sec. 3400.103(e)(7).

Loan originator. See Sec. 3400.103.

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

(1) A Statelicensed loan originator, or

(2) A registered loan originator.

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

Nontraditional mortgage product means any mortgage product other than a 30year fixedrate mortgage.

Real estate brokerage activities mean any activity that involves offering or
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providing real estate brokerage services to the public including (1) Acting as a real estate agent or real estate broker for a buyer, seller, lessor, or lessee of real property;

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

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

- (4) Engaging in any activity for which a person engaged in the activity is required to be registered as a real estate agent or real estate broker under any applicable law; and
- (5) Offering to engage in any activity, or act in any capacity, described in paragraphs (1), (2), (3), or (4) of this definition.

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

Secretary means the Secretary of Housing and Urban Development.

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

Unique identifier means a number or other identifier that: (1) Permanently identifies a loan originator;

- (2) Is assigned by protocols established by the Nationwide Mortgage Licensing System and Registry and the Federal banking agencies to facilitate electronic tracking of loan originators and uniform identification of, and public access to, the employment history of and the publicly adjudicated disciplinary and enforcement actions against loan originators; and
- (3) Shall not be used for purposes other than those set forth under the SAFE Act.

Subpart B Determination of State Compliance With the SAFE Act Sec. 3400.101 Scope of this subpart.

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

Sec. 3400.103 Individuals required to be licensed by States. (a) Except as provided in paragraph (e) of this section, in order to operate a SAFEcompliant program, a State must prohibit an individual from engaging in the business of a loan originator with respect to any dwelling or residential real estate in the State, unless the individual first:

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

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

(b)(1) An individual engages in the business of a loan originator if the individual:

- (i)(A) Takes a residential mortgage loan application; and (B) Offers or negotiates terms of a residential mortgage loan for compensation or gain; or
- (ii) Represents to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationary, brochures, signs, rate lists, or other promotional items), that such individual can or will provide any of the services or perform any of the activities described in paragraph (b)(1)(i) of this section.

- (2) An individual does not engage in the business of a loan originator merely by performing administrative or clerical tasks. (c)(1) An individual ``takes a residential mortgage loan application" if the individual receives a residential mortgage loan application for the purpose

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

(2) An individual ``offers or negotiates terms of a residential mortgage loan for compensation or gain" if the individual: (i)(A) Presents for acceptance by a borrower or prospective borrower residential mortgage loan terms;

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

(C) Recommends, refers, or steers a borrower or prospective borrower to a particular lender or set of