Summary of Final Rule on SAFE Implementation for Federally-Regulated MLOs and Institutions

On July 28, 2010, the federal banking agencies and the Farm Credit Administration will publish the final rule implementing the SAFE Act's federal registration requirement for mortgage loan originators. The final rule can be accessed at: http://www.ofr.gov/OFRUpload/OFRData/2010-18148_PI.pdf

Generally, the final rule closely mirrors the draft final rule issued by the FDIC in November, 2009 with some technical alterations. One change of note is that the final rule expands the amount of information that an institution can submit to the Registry on behalf of a mortgage loan originator (MLO) in bulk through batch processing to the extent such batch processing is made available by the Registry. Most of the rule content details the specific processes employers and employee MLOs must comply with in connection with the registration requirement. The rule commentary does include examples of business activities that would not trigger the definition of a mortgage loan originator and a discussion regarding how the term employee should be interpreted. "Mortgage loan originator" is defined as an individual who takes a residential mortgage loan application and offers or negotiates terms of a residential mortgage loan for compensation or gain (emphasis added). The rules:

- Contain a de minimis exemption for an employee of a depository institution who: (1) has never been registered or licensed through the NMLS as a mortgage loan originator; and (2) during the past 12 months, the employee acted as a MLO for 5 or fewer residential mortgage loans.
- Specify the implementation period for initial registration: Registrants must complete an initial registration within 180 days from the date that the Agencies will provide in a public notice that the NMLS is accepting registrations.
- Require depository institutions to set reasonable procedures for confirming the adequacy and accuracy of the registrations as well as a process for reviewing any criminal history background reports received from NMLS.

Required employee information: Includes identifying personal information, 10-year financial-related services employment history; convictions of a final criminal action that involves dishonesty or breach of trust or money laundering, actions or orders from a state or federal regulatory agency, revocation or suspension of the employee's authorization to act as an attorney, accountant, or state or federal contractor, fingerprints (existing fingerprints that are less than 3 years old may be used). Registrants will not be required to submit personal financial history or information regarding employment terminations.

When changing employers, a MLO will not be required to re-register but must update information in the system and complete the required authorizations and attestation (includes a change from a licensee to a registrant). New fingerprints would not be required unless those in the system are more than 3 years old.

Renewals and Updates: The annual renewal period will run from November 1 through December 31 but will not apply to a registrant who had completed registration less than 6 months prior to December 31st. Any changes to a registrant's record, including termination of employment with a federally-regulated institution, must be updated within 30 days of the change. The rule also provides a 60 day transition period to update the registration of MLOs who come to be an employed by a federally regulated institution through a merger or acquisition.

Supplementary Information Section

The rules include an appendix listing examples of the types of activities considered to be both within and outside the scope of residential mortgage loan origination activities. The examples illustrate the taking of a mortgage loan application and offering and negotiating the terms of a loan. (See attached.)

Individuals who receive "compensation or gain" as used in the definition of mortgage loan originator include individuals who earn salaries, commissions or other incentive, or any combination thereof.

Should "mortgage loan originator" cover individuals who modify existing mortgage loans, engage in approving loan assumptions, or engage in refinancing transactions. The Agencies conclude that the SAFE Act definition of mortgage loan originator generally would not include employees engaged in loan modifications or assumptions. 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. Agency-regulated institution employees engaged in these activities typically do not take applications and such employees will typically not meet the two-prong MLO definition contained in the SAFE Act. "The substance of a transaction, not the label attached to it, is determinative of whether the employee associated with it is a MLO."

Definition of employee. Utilizes the "right to control" test under the common law agency doctrine. "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." The result of this test generally determines whether an institution files a W-2 or 1099 for an individual. An agency-regulated institution will be expected to identify a MLO as an individual subject to the rule if, following considerations of the relevant facts, the institution determines that the individual is an employee. (Cites the IRS use of the common right to control test as its basis for classification of workers as employees.)

The rule also contains an acknowledgement that an MLO that works for both a bank and a mortgage company would be subject to both state and federal requirements and would be both licensed and registered.

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 verifying 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.