April 30, 2009

MEMORANDUM TO: The Board of Directors

FROM: Sandra L. Thompson
Director
Division of Supervision and
Consumer Protection

Roberta K. McInerney
Acting General Counsel

SUBJECT: Interagency Notice of Proposed Rulemaking to Implement the Secure and Fair Enforcement for Mortgage Licensing Act of 2008

RECOMMENDATION

Staff recommends that the Board approve and authorize for publication in the *Federal Register* a notice of proposed rulemaking (NPR) to implement the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act), which would be issued jointly with the Board of Governors of the Federal Reserve System (FRB), the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), the National Credit Union Administration (NCUA), and the Farm Credit Administration (FCA) (collectively, the Agencies).

The proposed rule implements the SAFE Act's requirements with respect to Federally-regulated institutions. The SAFE Act requires employees of Federally-regulated institutions who engage in the business of a mortgage loan originator to register with the Nationwide Mortgage Licensing System and Registry (NMLSR) and to obtain a unique identifier. The objectives of the registration and identification requirements are to increase accountability and tracking of residential mortgage loan originators, enhance consumer protection, reduce fraud in the mortgage loan origination process, and provide consumers with easily accessible information on the background of a mortgage loan originator. The proposed rule, in addition to implementing the SAFE Act requirements, also directs Federally-regulated institutions to have written policies and procedures in place to ensure that their employees who perform mortgage loan originations comply with the registration and other SAFE Act requirements.

DISCUSSION

A. <u>Background</u>.

Statutory Framework.

The SAFE Act, enacted on July 30, 2008, as part of the Housing and Economic Recovery Act of 2008,[1] establishes national licensing and registration requirements for residential mortgage loan originators. Most of the SAFE Act addresses state licensing and registration requirements. Those provisions include requirements for mortgage loan originators to provide certain information (*e.g.*, fingerprints and personal history and experience) to the NMLSR, which in exchange would assign the mortgage loan originator a unique identifier. The NMLSR is a database of information on mortgage brokers and originators developed by the Conference of State Bank Supervisors

[1] Pub. L. No. 110-289, 122 Stat. 2654, 2810; codified at 12 U.S.C. § 5101 *et seq.*

(CSBS) and the American Association of Residential Mortgage Regulators through the State Regulatory Registry (SRR), a limited liability company established by the CSBS.[2]

Section 1507[3] requires the federal banking agencies, working jointly through the Federal Financial Institutions Examination Council (FFIEC) and together with the Farm Credit Administration (FCA), to develop and maintain a system for registering the employees of Federally-regulated institutions and certain of their subsidiaries as registered loan originators with the NMLSR. The system must be implemented by July 29, 2009; the Agencies have interpreted this to be the date that the Agencies are to have a final rule published in the *Federal Register*. The FFIEC's role in implementing section 1507 is being undertaken by its Task Force on Supervision.

Technical Requirements.

In addition to promulgating the implementing regulations, there are the technical, informational, and contractual issues and requirements ("operational issues") for the Agencies to resolve in order to fully implement section 1507 of the SAFE Act. These operational issues are proceeding along a parallel but separate track. They include Agency informational requirements and any modifications to the NMLSR necessary to accommodate such requirements. Contractual arrangements will be made to implement those changes, establish the rights and responsibilities of the Agencies with respect to the NMLSR, and set forth procedures for using the NMLSR for purposes applicable to Agency-regulated institutions, their employees, and the Agencies.

B. Proposed Rule.

De Minimis Exception

With respect to the FDIC, the proposed rule would apply to insured state nonmember banks and their subsidiaries (except registered brokers, dealers, persons providing insurance, investment companies, and investment advisers) ("institutions"). However, section 1507 of the SAFE Act allows the Federal banking agencies to make such *de minimis* exceptions as may be appropriate to the Act's requirements for a mortgage loan originator to register and obtain a unique identifier. Therefore, the proposed rule establishes an exception that states that these registration requirements do not apply to an employee of an institution if: 1) the employee acted as a mortgage loan originator for five or fewer residential mortgage loans during the past 12 months; and 2) the aggregate number of residential mortgage loans originated by *de minimis*-excepted employees of the institution during the past 12 months does not exceed 25. The preamble to the proposed rule solicits comments on: whether the proposed exception adequately and appropriately covers circumstances which are truly *de minimis*; whether other ways of structuring a *de minimis* exception (*e.g.*, an asset-based threshold) would be more appropriate; and whether any *de minimis* exception is appropriate.

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[2] SRR contracted with the Financial Industry Regulatory Authority (FINRA) to design and implement the NMLSR. FINRA has experience in this area from operating the Central Registration Depository, a web-based licensing and registration system for the securities industry.

[3] 12 U.S.C. § 5106.

Definition of Mortgage Loan Originator

The registration requirements apply to those individuals who are engaged in the activity of a mortgage loan originator, and the SAFE Act requires a mortgage loan originator to be registered prior to engaging in loan origination activity. The SAFE Act defines a residential mortgage loan originator as an individual who takes an application and offers or negotiates a loan for compensation or gain; the proposed rule mirrors this definition. Individuals engaged solely in administrative or clerical tasks would not be considered mortgage loan originators. Illustrations of activities that would, and would not, constitute loan origination activity are included as an appendix to the proposed rule. While the Agencies presently consider individuals engaged solely in loan modification activity to be covered by the mortgage loan originator definition, the preamble seeks comment on whether it would be appropriate to delay the registration requirement for such individuals given the current economic climate. The preamble also seeks comment on whether such individuals should be excluded from the definition of mortgage loan originator.

Unique Identifier

The proposed rule sets forth requirements for registering and obtaining a unique identifier, maintaining and renewing the registration, and providing employee and institution information. Employees will be required to provide and update personal information related to their background, including their employment history as well as publicly adjudicated disciplinary and enforcement actions, since the SAFE Act requires this information to be made accessible to a consumer. Furthermore, employees would be required to provide their fingerprints for a background check, to be conducted by the Federal Bureau of Investigation. Institutions will be responsible for verifying the employees' information submissions, reviewing the results of the background checks, and confirming that the individuals are, in fact, employees.

Written Policies and Procedures

Institutions would have to adopt and follow written policies and procedures designed to assure compliance with the requirements of the proposed rule. The policies and procedures would have to be appropriate to the nature, size, complexity, and scope of the mortgage lending activities of the institution and would have to meet the minimum standards specified in the proposed rule. Finally, the proposed rule would require an institution and its registered mortgage loan originating employees to provide the employee's unique identifier to a consumer upon request and make it available to a consumer in a practicable manner.

Implementation Period

The Agencies acknowledge that the necessary modifications to the NMLSR will not be completed by July 29, 2009. Therefore, the proposed rule would delay implementation of the registration requirements until 180 days after the system becomes operational and available for initial registrations. The preamble to the NPR solicits public comment on whether such an implementation period is adequate.

CONCLUSION

For the reasons explained above, the staff recommends that the Board approve the attached NPR and authorize its publication in the *Federal Register*.

We also recommend that the Board authorize the Executive Secretary and the General Counsel to make technical, nonsubstantive, or conforming changes to the text of the proposed rule where necessary to ensure the Agencies can jointly publish the proposed rule, and to take such other actions and issue such other documents as they deem necessary or appropriate to fulfill the Board's objectives.

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Attachments:

- Resolution
- NPR