

FREQUENTLY ASKED QUESTIONS AND ANSWERS

HUD anticipates that it will soon undertake notice-and-comment rulemaking with respect to the SAFE Act. Prior to issuance of a proposed rule, and cognizant of the approaching date by which states must meet certain requirements of the SAFE Act, HUD provides the following guidance on HUD's present views in response to questions that have arisen under the SAFE Act.

1. Provisional Licensing:

QUESTION: May a state issue "provisional licenses" to mortgage loan originators who have not completed the SAFE Act's testing and education, or prior to a state's completion of the required background check?

ANSWER: A state may issue a SAFE-compliant loan originator license only upon evidence sufficient to support findings by the state agency that each of the minimum licensing standards has been met. Nothing in the SAFE Act prohibits a state from seeking additional evidence after it issues a license or from reconsidering the accuracy of a prior finding upon considering additional evidence that becomes available to the state. Please also see section D of HUD's Commentary on the Model State Law ("HUD's Commentary," also available on the SAFE Act page of this website) for guidance on dates by which states must require individuals to obtain SAFE-compliant licenses.

2. Grandfathering for Testing and Education Requirements:

QUESTION: May a state's SAFE legislation contain a grandfathering provision allowing mortgage brokers and others who have been engaged in the business of originating loans for an extended period of time to meet the SAFE Act's testing and education requirements by some alternative means?

ANSWER: No. The SAFE Act does not allow alternative methods for meeting the testing and education requirements.

3. States with Legislation passed by July 31, 2009, but Later Effective Date:

QUESTION: Will a state meet the deadline of July 31, 2009 required by the SAFE Act where that state's SAFE legislation is signed into law by the Governor before July 31, 2009, but has a later effective date for the licensing and registration of loan originators?

ANSWER: Yes, but the date by which individuals are required to comply with the requirements of the legislation should comply with the Guidance in section D of HUD's Commentary.

4. States Using Term Other than License:

QUESTION: Will a state meet the minimum requirements of the SAFE Act where a state legislature elects to use a term other than "license" or "licensing" for the regulation and supervision of mortgage loan originators? Examples of alternative terms include: "authorization," "registration," or "certification" of mortgage loan originators?

ANSWER: Yes, provided the authorization, registration, or certification is the functional equivalent

of licensing and satisfies the minimum requirements mandated by the SAFE Act.

5. Loan Modifications Performed by Loan Servicers:

QUESTION: Do the licensing requirements of the SAFE Act apply to individuals who perform loan modifications for loan servicers that modify existing loans?

ANSWER: HUD recognizes that servicers are increasingly taking applications for and negotiating the terms of loan modifications that substantially 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 write-down 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 extent of loan modifications being undertaken, HUD is generally inclined to provide in rulemaking that the SAFE Act's definition of a loan originator covers 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, and that such individuals are subject to the licensing and registration requirements of the SAFE Act. 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 appreciates that lenders and servicers are working in a dynamic market, especially given the current housing crisis, and HUD looks forward to comments on this issue during the rulemaking process.

HUD understands the initial uncertainty about whether loan servicers are covered by the SAFE Act. Loan servicers involved in traditional loan servicing activities are likely not covered by the SAFE Act, but today, given the housing crisis, loan servicers are engaged in modification activities beyond those that they traditionally performed. Accordingly, HUD is inclined to clarify through rulemaking that at least some individuals who engage in loan modification activities are subject to the requirements of the SAFE Act. Any final decision to make this clarification will be addressed in the rulemaking. Because the definition of "loan originator" in the SAFE Act supports coverage of loan servicers engaged in loan modification activities, a state that has enacted legislation that follows the SAFE Act's definition of a "loan originator" will have provided for the possibility of covering these individuals. Accordingly, if HUD adopts a final rule requiring coverage of such individuals, a state would be able to clarify that its legislation provides such coverage through administrative means.

HUD expects to publish a proposed rule that will address several issues that have arisen under the SAFE Act, including coverage of loan servicers engaged in loan modification activities. In its proposed rule, HUD expects to invite state regulators, borrowers, servicers, and other interested members of the public to provide their views on this topic. To maximize the amount of time commenters have to consider and formulate comments on this important matter, HUD is taking this

opportunity to highlight a number of related issues. For example, HUD is interested in views on any mandatory licensing provisions, quality controls, and training requirements that are already applicable to servicers, and on whether these measures provide protections for consumers that are equivalent to those under the SAFE Act. HUD is also interested in 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 is interested in views on whether it 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 notes that the federal banking agencies recently published their proposed rule on "Registration of Mortgage Loan Originators." (See 74 FR 27386, published June 9, 2009.) In this proposed rule, the federal banking agencies have specifically requested comment on whether the definition of "mortgage loan originator" should cover individuals who modify existing residential mortgage loans. The federal banking agencies state that if the definition should cover such individuals, then the agencies also seek comment on whether the agencies' final rule should exclude from this definition persons who modify an existing residential mortgage loan pursuant to applicable law. (See 74 FR 27391-27392.) The solicitation of comments by the federal banking agencies on the subject of mortgage loan modifications reflects concerns similar to HUD's.

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 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 notes that it has stated that it has determined that the model state law developed by the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (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 on 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.

6. Exemptions, Generally:

QUESTION: May a state exempt certain professions from state licensure?

ANSWER: Generally, no. A state must require licensure of individuals who engage in the business of a loan originator, unless an individual meets the SAFE Act's definition of a registered loan originator in section 1503(7). HUD clarified in its Commentary that exemptions are permissible under the SAFE Act if they merely clarify that certain defined activities do not constitute engaging

in the business of a loan originator. Impermissible exemptions include those based on an individual's title or profession, or on the status of an entity for which the individual works, if the exemption would allow individuals who engage in the business of a loan originator to escape the SAFE Act's licensing requirements.

7. Exemption for Non-profit Organizations:

QUESTION: May a state provide an exemption for non-profit organizations?

ANSWER: No. Individuals, not organizations, are subject to the SAFE Act's licensing requirements. Accordingly, whether an organization has a non-profit status is not determinative as to whether individuals working for or on behalf of such an organization engage in the business of a loan originator and, accordingly, must be licensed. A state may not exempt individuals whose activities constitute "engaging in the business of a loan originator."

8. Exemption for Agents of Certain Federally Regulated Financial Institutions:

QUESTION: May a state provide an exemption from state licensing requirements for individuals who are agents, but not employees, of a depository institution, a federally regulated subsidiary of a depository institution, or an institution regulated by the Farm Credit Administration?

ANSWER: No. A state must require licensure of individuals who engage in the business of a loan originator, unless an individual meets the SAFE Act's definition of a registered loan originator in section 1503(7). A registered loan originator is defined as an individual who meets the definition of a loan originator and who: (a) is an employee of a depository institution, a federally regulated subsidiary of a depository institution, or an institution regulated by the Farm Credit Administration, and (b) is registered with the NMLSR. For example, an individual who is an independent contractor is not an employee. An individual is generally considered to be an employee only if the manner and means of his or her performance of duties is subject to the control of an employer, and if his or her income is reported on a W-2 form. Nor may a state exempt employees of entities other than the three listed classes of institutions. For example, a holding company that merely owns one of the three listed classes of institutions is not itself one of the three listed classes of institutions.

9. Criminal Background Checks and Credit Reports:

QUESTION: Must a state require loan originator license applicants to furnish to the NMLSR fingerprints and authorization to obtain a credit report to the NMLSR?

ANSWER: Yes. Section 1505(a) of the SAFE Act requires an applicant to furnish his or her fingerprints to the NMLSR for submission to the Federal Bureau of Investigation and any other governmental agency or entity authorized to receive such information for a state and national criminal history background check. The applicant also must submit his or her personal history and experience, including authorization for the NMLSR to obtain an independent credit report.