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Are You Ready For the SAFE Act?

A Guide for Depository Institutions

Mortgage fraud and predatory lending have filled the headlines for a decade. Those headlines, combined with the mortgage crisis that began in 2007, produced an outcry for tighter regulation of the mortgage industry. Among the first reactions of Congress was the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act), part of the broader Housing and Economic Recovery Act of 2008.

The key provision of the SAFE Act is the creation of the Nationwide Mortgage Licensing System and Registry (NMLSR), a database housing registration information on mortgage loan originators. Upon registration with NMLSR, each mortgage loan originator (MLO) and loan origination company is assigned a unique identifying number. Among other requirements, the SAFE Act requires:

- All mortgage loan originators to be registered with the NMLSR.
- Mortgage loan originators to be licensed by the state if not employed by a federally regulated institution.
- States to have a licensing system in place for mortgage loan originators.

SAFE Act distinguishes between federally regulated depository institutions and state-licensed mortgage lenders. Most of the SAFE Act requirements applicable to non-bank mortgage lenders have already been implemented. On the other hand, most banks are currently implementing the SAFE Act, with a deadline for NMLSR registration of July 29, 2011. This article focuses on the requirements and implementation strategies for banks.

Requirements for Banks

The SAFE Act requirements for banks are detailed in a set of final rules jointly issued by the federal banking regulatory agencies (FRB, OCC, OTS, FDIC, and NCUA) on July 28, 2010 with an effective date of October 1, 2010. The agencies' final rules require banks to:

- Ensure their mortgage loan originators meet the SAFE Act requirements to register with NMLSR and obtain a unique identifier, and
- Adopt and follow written policies and procedures to assure compliance with the registration requirements.

Mortgage Loan Originators

One of the challenges for banks in complying with the SAFE Act is determining which employees need to register as mortgage loan originators. The agencies final rules define a mortgage loan originator as someone who 1) takes a residential mortgage loan application, and 2) offers or negotiates terms of a residential mortgage loan for compensation or gain. The rules specifically exclude individuals performing administrative or clerical tasks on behalf of a mortgage loan originator, performing real estate brokerage activity, and providing extensions of credit related to timeshare purchases.

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The agency final rules also clarify that "taking an application" does not include:

- Contacting a consumer to obtain documentation to verify application information;
- Receiving a loan application through the mail and forwarding it without review to approval personnel;

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- Assisting a consumer in filling out an application by clarifying necessary information or explaining qualifications/criteria for approval;
- Explaining the loan application process to a consumer;
- Responding to a prequalified offer and forwarding the consumer to an MLO;
- Receiving information in connection with a modification as part of loss mitigation efforts.

The rules also specify that “offering or negotiating terms” does not include:

- Providing general explanations in response to consumer inquiries regarding qualification such as explaining DTI, LTV;
- Responding to a consumer’s request regarding available loan rates without discussing qualifications.
- Collecting consumer information in order to provide the consumer with information on loan products for which the he/she may qualify, without presenting a specific loan offer;
- Arranging the loan closing;
- Providing consumer with information unrelated to loan terms (e.g. best day to close);
- Making an underwriting decision

In addition to the above exclusions, the rules exempt an individual in connection with his own residence or the residence of an immediate family member. Attorneys are also excluded from the definition of an MLO if the attorney is only compensated by the borrower.

Employees performing loan modifications may be considered mortgage loan originators, depending on the extent to which the loan terms are changed in the modification process.

SAFE Act Procedures

The agency final rules require regulated institutions that employ mortgage loan originators to adopt and follow written procedures. The procedures must be appropriate to the scope of the institution’s mortgage lending activities, and must:

- Establish a process to identify which employees are MLOs and required to be registered,
- Require that MLOs be informed of the registration requirements and instructed on how to comply,
- Establish procedures for compliance with the requirements to make unique identifiers available to consumers,
- Establish procedures for validating employee registrations by comparison to the institution’s records,
- Provide procedures for monitoring compliance with registration and renewal requirements,
- Provide for independent testing of compliance with the SAFE Act procedures,
- Provide for appropriate action when an employee fails to comply with the registration requirements or the bank’s procedures,
- Establish a process for reviewing employee criminal histories, taking appropriate action with respect to the histories, and maintaining records of the histories and related actions,
- Establish procedures to ensure that any third party with which the institution has a mortgage loan origination relationship has policies and procedures in place to comply with the requirements of the SAFE Act.

Unique Identifiers

Among the specific requirements for SAFE Act are procedures for making unique identifiers available to consumers. Unique identifiers must be provided to consumers:

- Upon request,
- Before acting as a mortgage loan originator, and,
- In initial written communication with a consumer.

Best practices for providing unique identifiers to consumers

- *Have list of mortgage loan originators and their unique identifiers at each branch*
- *Include unique identifier on all mortgage loan applications, not just GSE applications*
- *Add unique identifier to MLO's business card*
- *Include unique identifier in MLO's email signature*
- *Add unique identifiers to applicable letterhead*
- *Consider branch signage indicating availability of unique identifiers upon request.*

Registration

Registration is performed through the NMLSR and is a fairly straightforward process consisting of a few major steps.

First, the institution establishes an account with NMLSR. As part of this process, the institution will identify at least two administrators and may identify additional company contacts. These "institutional" users require added security in the form of two-factor identification for login to NMLSR. The NMLSR has information on obtaining two-factor authentication.

The next step is for the institution to perform a batch upload of some basic identifying information on its employees who are MLOs. The file is created in Microsoft Excel using a template available on the NMLSR website. When NMLSR processes the batch upload, the institution will receive notice of any rejected records, which can be corrected and resubmitted. The most frequent reason for rejected records is that the MLO has already been registered by a previous employer.

When the batch upload records are accepted, the employee receives notification that she can log into NMLSR to complete the required employee information – including employment history and any pertinent administrative, civil, or criminal actions. The employee attests to the information and provides authorization to make information available to the public via NMLSR. The employee must then arrange for fingerprinting for the NMLSR criminal background check.

Once NMLSR has performed the background check, the results are provided to the institution. The institution must review any issues arising from the background check, and a determination made as to whether the employee can be employed as a MLO. The institution should create clear guidelines for dealing with background check issues, and both the compliance and human resources areas should be consulted in developing these guidelines.

Conclusion

SAFE Act implementation is fairly straightforward, but will take some time. Two of the key challenges are determining which employees must be registered and establishing guidelines and responsibilities for handling any issues exposed in the MLO background checks. Keep in mind that all mortgage loan originators must be registered with NMLSR by July 29, 2011. And don't wait until the last minute — fingerprinting and background checks could easily backlog as the deadline approaches.

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