

VI. *The Secure and Fair Enforcement for Mortgage Licensing Act of 2008*

A. Introduction

The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (“S.A.F.E. Act” or “Act”) lays the groundwork for a nationwide licensing and registration system for individuals working as mortgage loan originators.¹ The S.A.F.E. Act was enacted on July 30, 2008, as part of the Housing and Economic Recovery Act of 2008.² This article describes the set of circumstances that led to the passage of the S.A.F.E. Act, explains the Act’s purpose, outlines the structure and requirements of the Act and explores how the Act has been implemented. In gauging the Act’s impact, it is especially important to ask whether the Act gives an unfair advantage to federally-regulated depositories over their nonbank competitors.

B. Background

Before the passage of the S.A.F.E. Act, the regulation of mortgage loan originators—lenders who offer or negotiate the terms of residential mortgages³—was entrusted entirely to the states.⁴ Unfortunately, regulation at the state level was, at best, haphazard.⁵ Little reciprocity existed between jurisdictions, meaning that a mortgage loan originator “who was caught doing something illegal in one state could simply pack his bags, move to another state and hang

¹ See generally Registration of Mortgage Loan Originators, Final Rule, 75 Fed. Reg. 144, 44656 (proposed Jul. 28, 2010) (codified in 12 C.F.R. pt. 34); Secure and Fair Enforcement for Mortgage Licensing Act of 2008, 12 U.S.C.A. §§ 5101-5116 (West 2011).

² See Registration of Mortgage Loan Originators, Final Rule, 75 Fed. Reg. at 44656 n.1.

³ See 12 U.S.C.A. § 5102 (“The term ‘loan originator’ (i) means 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 . . .”).

⁴ See Press Release, Sen. Dianne Feinstein, Senators Feinstein and Martinez Urge Congress to Pass Bill to Create National Licensing Standards for Mortgage Brokers and Lenders (Mar. 14, 2008), available at <http://www.feinstein.senate.gov/public/index.cfm/2008/3/aef4bc9b-fe9c-43ef-e361-545f24337f1f-post>.

⁵ See *id.*

out his shingle there.”⁶ While states have long had laws regulating mortgage loan originators, those laws “[ran] the gamut between strict and lax,” creating confusion and leading to great discrepancies between jurisdictions.⁷

Discriminatory and predatory lending proliferated in the years leading up to the financial crisis. Mortgage loan originators “sought out prospective borrowers, not because those lenders could profit from the spread between the interest rate at which they borrowed and the interest rate at which they lent to those customers” but because “their profit came from investment banks that paid lenders a fee for writing mortgages and selling them to . . . [the] banks.”⁸ Following the collapse of the mortgage-backed securities market, some commentators argued that, in order to better protect consumers, the government should make fundamental changes to the way it regulated the mortgage industry.⁹

Former U.S. Senator Mel Martinez—who, along with Senator Dianne Feinstein, introduced the S.A.F.E. Act—argued in 2008 that “[t]he lack of coordination between regulators exposes consumers to predatory loan originators.”¹⁰ Attempting to rally support for the Act, Senator Feinstein explained how the lack of “national standards for mortgage brokers and lenders . . . has created

⁶ Lew Sichelman, *What don't you know about your lender? New Web site lets consumers check on mortgage lenders' licenses, complaints*, MARKET WATCH (Jan. 29, 2010, 12:01 AM), <http://www.marketwatch.com/story/new-web-site-lets-consumers-check-up-on-lenders-2010-01-29>.

⁷ Amy Hoak, *Mortgage shopping is getting safer: S.A.F.E. Act requires licensing and registration in mortgage industry*, MARKET WATCH (Aug. 2, 2010, 12:01 AM), <http://www.marketwatch.com/story/mortgage-shopping-is-getting-safer-2010-08-02>.

⁸ Raymond H. Brescia, *The Cost of Inequality: Social Distance, Predatory Conduct, and the Financial Crisis*, 66 N.Y.U. ANN. SURV. AM. L. 641, 648 (2011).

⁹ See Editorial, *Fair Lending and Accountability*, N.Y. TIMES, Sept. 7, 2011, http://www.nytimes.com/2011/09/08/opinion/fair-lending-and-accountability.html?_r=2&ref=mortgages (“Given the discriminatory policies used by lenders before the housing meltdown, the banks and mortgage companies deserve the scrutiny. Borrowers need more protection . . . Studies by consumer advocates found that large numbers of minority borrowers who were eligible for affordable, traditional loans were routinely steered toward ruinously priced subprime loans that they would never be able to pay.”).

¹⁰ Press Release, Feinstein, *supra* note 4.

an environment in which bad actors can take advantage of American homebuyers. All we have is a thin patchwork of regulation by the states.”¹¹

C. The Purpose of the S.A.F.E. Act

The chaotic state of the law in 2008, coupled with a common perception that some “bad actors” in the mortgage industry did not have consumers’ best interests in mind, led Congress to decide that it was necessary to mandate a nationwide system for licensing and registering mortgage loan originators.¹² The S.A.F.E. Act explicitly declares that the purpose of the legislation is to “increase uniformity, reduce regulatory burden, enhance consumer protection, and reduce fraud”¹³ Senator Martinez, speaking in support of passage of the Act, explained that the creation of a nationwide registration and licensing system “to keep track of those who’ve violated the law, had their license revoked, or failed to fulfill appropriate educational requirements will benefit families and eventually the marketplace.”¹⁴ Senator Feinstein maintained that the S.A.F.E. Act would solve the main cause of the proliferation of predatory lending tactics—namely, “a lack of regulation”—by providing consumers with “the information they need to determine whether their brokers or lenders are licensed professionals.”¹⁵

The crux of the Act is to require the States, through the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators, “to establish a Nationwide Mortgage Licensing System and Registry” (“NMLSR”) in order to standardize the way in which mortgage loan originators are licensed and registered.¹⁶ Among other objectives, the NMLSR is meant to provide “uniform license applications and reporting requirements” for State-licensed mortgage loan originators. The NMLSR should also improve “the flow of information between regulators,” provide “increased accountability and tracking” for mortgage loan originators and provide consumers with easy access to information so that mortgage loan originators are required to act in the consumers’ best

¹¹ *Id.*

¹² *See generally* 12 U.S.C.A. §§ 5101-5116 (West 2011).

¹³ 12 U.S.C.A. § 5101.

¹⁴ Feinstein, *supra* note 4.

¹⁵ *Id.*

¹⁶ 12 U.S.C.A. § 5101.

interests, “to the greatest extent possible.”¹⁷

When the S.A.F.E. Act became law on July 30, 2008, the full fallout from the collapse of the subprime mortgage market place was not yet obvious.¹⁸ It seems likely that that Congress hoped for the S.A.F.E. Act to help stabilize the mortgage market and prevent further economic disruption. The context in which the S.A.F.E. Act was enacted is quite evident from its language; the Act explicitly stipulates that the NMLSR must facilitate “responsible behavior in the subprime mortgage market place.”¹⁹

D. The Structure and Requirements of the S.A.F.E. Act

The Act calls upon *the states* to implement a licensing and regulation system for mortgage loan originators who are not employed by institutions regulated by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Farm Credit Administration or the National Credit Union Administration (collectively, “the Agencies”).²⁰ In addition, the Act requires *the Agencies* to “develop and maintain a system for registering mortgage loan originators employed by Agency-regulated institutions.”²¹ The Agencies issued final rules on July 28, 2010,²² and those rules became effective on October 1, 2010.²³ Today, any individual who fails to obtain either: (1) a “registration as a registered mortgage loan originator and a unique

¹⁷ 12 U.S.C.A. § 5101.

¹⁸ See Alex Berenson, *A Financial Drama With No Final Act in Sight*, N.Y. TIMES, Sept. 13, 2008, <http://www.nytimes.com/2008/09/14/weekinreview/14berenson.html?scp=126&sq=lehman+brothers&st=nyt> (“Now Wall Street is reeling, as a significant fraction of the speculative real estate loans that banks made during the boom years are underwater. Because banks have limited capital to absorb losses, investors worry that those losses will overwhelm them.”).

¹⁹ 12 U.S.C.A. § 5101.

²⁰ Registration of Mortgage Loan Originators, Final Rule, 75 Fed. Reg. 144, 44656 (proposed Jul. 28, 2010) (codified in 12 C.F.R. pt. 34).

²¹ Registration of Mortgage Loan Originators, 75 Fed. Reg. at 44656.

²² *Id.*

²³ *Secure and Fair Enforcement for Mortgage Licensing Act (S.A.F.E. Act) FAQs*, FFIEC: FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, <http://www.ffiec.gov/safeact.htm> (last visited Nov. 16, 2011).

identifier if employed by an Agency-regulated institution” or (2) ”a license and registration as a State-licensed mortgage loan originator and a unique identifier” is prohibited from working as a mortgage loan originator.²⁴

The Act defines “loan originator” as “an individual who (1) takes a residential mortgage loan application; and (2) offers or negotiates terms of a residential mortgage loan for compensation or gain.”²⁵ However, the Act *excludes* from this definition those who perform “purely administrative or clerical tasks” on behalf of loan originators, and licensed real estate brokers who are *not* compensated by lenders, mortgage brokers or other loan originators.²⁶

Both mortgage loan originators working for Agency-regulated institutions and State-licensed mortgage loan originators must obtain unique identifiers.²⁷ Once a mortgage loan originator is issued a unique identifier, it stays with him throughout his entire career. This allows consumers to know whether a mortgage loan originator has run into trouble in the past while working under a different name or for a different employer.²⁸

1. Requirements for State-Licensed Mortgage Loan Originators

The S.A.F.E. Act includes a number of provisions specifying what steps mortgage loan originators must take to receive a license and register with the NMLSR. The Act requires, at a minimum, that applicants provide the NMLSR with fingerprints and information

²⁴ Registration of Mortgage Loan Originators, Final Rule, 75 Fed. Reg. at 44656.

²⁵ 12 U.S.C.A. § 5102 (West 2011).

²⁶ *Id.*

²⁷ *See id.* (“The term loan originator . . . (ii) does not include any individual who is not otherwise described in clause (i) and who performs purely administrative or clerical tasks on behalf of a person who is described in any such clause; (iii) [and] does not include a person or entity that only performs real estate brokerage activities and is licensed or registered in accordance with applicable state law, unless the person or entity is compensated by a lender, a mortgage broker, or other loan originator or by any agent of such lender, mortgage broker, or other loan originator . . .”).

²⁸ *See* Registration of Mortgage Loan Originators, 75 Fed. Reg. at 44674 (“Although a mortgage loan originator may change his or her name, change employment, or move, the unique identifier assigned to the originator by the Registry at the originator’s original registration will remain the same.”).

about their “personal history and experience,” including an independent credit report and “information related to any administrative, civil or criminal findings by any governmental jurisdiction.”²⁹ To receive a license, an applicant must not have had a loan originator license revoked in any jurisdiction and must not have been convicted of a felony “in a domestic, foreign, or military court” in the 7-year period preceding the date of said individual’s application for licensing and registration.³⁰ If an applicant has *ever* been convicted of a felony involving “an act of fraud, dishonesty, a breach of trust, or money laundering,” he is prohibited from receiving a license and registering to work as a mortgage loan originator.³¹

The Act further mandates that an applicant must have demonstrated “financial responsibility, character, and general fitness such as to . . . warrant a determination that [he] will operate honestly, fairly, and efficiently” as a mortgage loan originator.³² The Act requires that an applicant complete at least twenty hours of education and training, including training on Federal law and regulations, ethics and lending standards.³³ An applicant must also pass a written test developed by the NMLSR and “either [meet] a net worth or surety bond requirement, or [pay] into a State fund” established for recovery purposes.³⁴ Once a loan originator has become licensed, the Act requires him to continue to meet the minimum standards for license issuance and satisfy annual continuing education requirements.³⁵ The Act also stipulates that the each applicant for

²⁹ 12 U.S.C.A. § 5104.

³⁰ *Id.*

³¹ *See id.* (“The minimum standards for licensing and registration as a State-licensed loan originator shall include the following: (1) The applicant has never had a loan originator license revoked in any governmental jurisdiction. (2) The applicant has not been convicted of, or pled guilty or nolo contendere to, a felony in a domestic, foreign, or military court (A) during the 7-year period preceding the application for licensing and registration . . .”).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *See* 12 U.S.C.A. § 5105 (West 2011) (mandating that the minimum standards for licensing and registration shall also include the following: “(5) The applicant has passed a written test that meets the test requirements . . . (6) The applicant has met either a net worth or surety bond requirement,

annual license renewal must complete at least eight hours of continuing education.³⁶

The S.A.F.E. Act provided the states with “one year to pass laws requiring the licensing of loan originators according to national standards and to begin participating in the National Mortgage System.”³⁷ Threatened with the specter of Federal intervention, the states acted to implement the provisions of the S.A.F.E. Act with what was praised as “practically warp speed for legislation.”³⁸

2. Requirements for Mortgage Loan Originators Employed by Agency-Regulated Institutions

The S.A.F.E. Act instructs the Agencies—acting through the Federal Financial Institutions Examinations Council (“FFIEC”)—to “develop and maintain” a system for registered employees of Agency-regulated institutions acting as registered loan originators with the NMLSR.³⁹ As with their State-licensed competitors, mortgage loan originators working for Agency-regulated institutions must furnish fingerprints, provide information about their “personal history and experience” and authorize the NMLSR to “obtain information related to any administrative, civil or criminal findings by any governmental institution.”⁴⁰ As mentioned above, the final rules promulgated by the Agencies serve to implement the S.A.F.E. Act’s requirements for mortgage loan originators working for Agency-regulated institutions.⁴¹ Accordingly, the final rules spell out the Federal registration requirement for such mortgage loan

or paid into a State fund, as required by the State pursuant to section 5107(d)(6) of this title”).

³⁶ See *id.* (“The minimum standards for license renewal for State-licensed loan originators shall include the following: (1) The loan originator continues to meet the minimum standards for license issuance. (2) The loan originator has satisfied the annual continuing education requirements . . .”).

³⁷ *48 States Meet SAFE Act Deadline*, NATIONAL MORTGAGE NEWS, Aug. 17, 2009, available at 2009 WLNR 15997158.

³⁸ *Id.*

³⁹ 12 U.S.C.A. § 5106.

⁴⁰ *Id.*

⁴¹ See Registration of Mortgage Loan Originators, Final Rule, 75 Fed. Reg. 144, 44656 (proposed Jul. 28, 2010) (codified in 12 C.F.R. pt. 34). See generally 12 C.F.R. §§ 34.101-34.105 (2011).

originators.⁴² It is important to note that the final rules include a *de minimis* exception: the requirements of the S.A.F.E. Act do *not* apply to “any employee of a national bank who has never been registered or licensed through the Registry as a mortgage loan originator if during the past 12 months the employee acted as a mortgage loan originator for 5 or fewer residential mortgage loans.”⁴³ However, the *de minimis* exception is voluntary, meaning that “it does not prevent a mortgage loan originator who meets the criteria for the exception from registering with the Registry if the originator chooses to do so or if his or her employer requires registration.”⁴⁴

The final rule’s registration requirement stipulates that “[e]ach employee of a national bank who acts as a mortgage loan originator must register . . . obtain a unique identifier, and maintain this registration” annually.⁴⁵ In a departure from the rules for State-licensed mortgage loan originators, the final rule promulgated by the Agencies does *not* require loan originators working for Agency-regulated institutions to obtain a specific number of hours of education or training, either initially or upon renewal.⁴⁶ However, the final rule does require an employer to provide for “independent testing for compliance with [the final rule] to be conducted at least annually by bank personnel or by an outside party.”⁴⁷ The final rule also stipulates that a registered mortgage loan originator must provide his or her unique identifier to a consumer “upon request,” prior to acting as a mortgage loan originator, and “[t]hrough the originator’s initial written communication with a consumer, if any, whether on paper or electronically.”⁴⁸

⁴² See 12 C.F.R. § 34.101 (“[The Agencies] are adopting final rules to implement [the S.A.F.E. Act] The S.A.F.E. Act requires an employee of [an Agency-regulated institution] . . . who acts as a residential mortgage loan originator to register with the [NMLSR], obtain a unique identifier, and maintain this registration.”). See *generally* 12 C.F.R. §§ 34.101-34.105 (2011).

⁴³ *Id.*

⁴⁴ Registration of Mortgage Loan Originators, 75 Fed. Reg. at 44661.

⁴⁵ 12 C.F.R. § 34.103.

⁴⁶ See Registration of Mortgage Loan Originators, 75 Fed. Reg. at 44661 (The Agencies explain the lack of educational and testing requirements by pointing to the fact that Agency-regulated institutions “already are subject to extensive Federal oversight, including regular on-site examination of their mortgage lending activities.”).

⁴⁷ 12 C.F.R. § 34.104.

⁴⁸ 12 C.F.R. § 34.105.

E. Gauging the Act's Impact: Does the Safe Act Provide an Unfair Advantage to Agency-Regulated Institutions?

As mentioned above, although the S.A.F.E. Act requires State-licensed mortgage loan originators to register with the NMLSR and obtain a license, mortgage loan originators who work for Agency-regulated institutions, while required to register with the NMLSR, are *not* required to obtain a license.⁴⁹ Some nonbank lenders have objected to the apparent inequality of the law, claiming that Agency-regulated institutions “got away with murder” with the passage of the S.A.F.E. Act.⁵⁰

Faced with the looming threat of increased regulation and stricter requirements, a number of mortgage loan originators have even begun “thinking of jumping ship to a depository” in order to avoid take advantage of what they consider the Act’s more lenient treatment of Agency-regulated institutions.⁵¹ Some nonbanks have complained of trouble hiring qualified loan originators because of the difficulties caused by the “new licensing requirements under the [S.A.F.E. Act].”⁵² It appears that these State-licensed mortgage loan originators consider themselves adversely impacted by the law because a mortgage loan originator “working for a federally-chartered depository . . . doesn’t need a license” and is not “required to take a test.”⁵³

However, a careful examination of the final rules promulgated by the Agencies reveals this to be a rather fallacious argument. While it is true that mortgage loan originators working for Agency-regulated institutions do not have to obtain a license, the Act *does* require them to furnish the NMLSR with essentially the same

⁴⁹ See Registration of Mortgage Loan Originators, Final Rule, 75 Fed. Reg. at 44656-57.

⁵⁰ Paul Muolo, *Nonbanks Seek A Silver Lining In SAFE Act*, NAT’L MORTGAGE NEWS, May 17, 2010, available at 2010 WLNR 10176207 (“‘It really should be called the SAFE Disparity Act,’ said mortgage banking attorney Robert Lotstein. ‘There’s a lot of nuances to it but basically it’s created an uneven playing field with banks coming out on top.’”).

⁵¹ *Id.*

⁵² Sara Lepro, *Licensing, Industry’s Rep Hamper Hiring*, NATIONAL MORTGAGE NEWS, June 21, 2010, available at 2010 SLNR 12553189.

⁵³ Muolo, *supra* note 50.

materials that are required to obtain a State license, including fingerprints and extensive information about their personal history, experience and criminal record.⁵⁴ In addition, while mortgage loan originators employed by Agency-regulated institutions are not subject to the same testing and education requirements as state-licensed loan originators, the final rules *do* mandate annual independent testing for compliance with the Act.⁵⁵ Agency-regulated institutions are also required to instruct their employees on their specific duties under the law and what steps they must take to comply with the Act's requirements.⁵⁶ Furthermore, it is important to keep in mind that Agency-regulated institutions already face a daunting amount of "compliance requirements and regulatory reports . . . under the Fair Housing Act, Truth in Lending Act and Home Mortgage Disclosure Act."⁵⁷ Congress may have taken this existing safety net into account when deciding to exempt mortgage loan originators working for Agency-regulated institutions from an explicit licensing requirement.

In conclusion, although nonbank lenders are required to obtain a license in order to originate mortgage loans and the employees of Agency-regulated institutions are not, Agency-regulated institutions do not appear to have gained any significant advantage over their smaller competitors with the passage of the S.A.F.E. Act. When one takes into consideration the fact that Agency-regulated institutions are "already subject to extensive federal oversight,"⁵⁸ it is hard to see how the lack of a formal

⁵⁴ See 12 U.S.C.A. § 5106 (West 2011) ("For instance, [a loan originator] working for a federally chartered depository has to register with the NMLS but doesn't need a license, nor is he/she required to take a test.").

⁵⁵ See 12 C.F.R. § 34.104 ("In connection with the registration of any loan originator under this subsection, the appropriate Federal banking agency and the Farm Credit Administration shall, at a minimum, furnish or cause to be furnished to the [NMLSR] information concerning the employee's identity, including (A) fingerprints for submission to the Federal Bureau of Investigation, and any governmental agency or entity authorized to receive such information for a State and national criminal history background check; and (B) personal history and experience, including authorization for the [NMLSR] to obtain information related to any administrative, civil or criminal findings by any governmental jurisdiction.").

⁵⁶ *Id.*

⁵⁷ Muolo, *supra* note 50.

⁵⁸ Registration of Mortgage Loan Originators, Final Rule, 75 Fed. Reg. 144, 44661 (proposed Jul. 28, 2010) (codified in 12 C.F.R. pt. 34).

licensing requirement for their employees will allow them to provide home mortgage loans at a discount or significantly lower their costs. Indeed, the additional requirement that nonbank lenders must obtain a license and undergo testing may even give such lenders a leg up when it comes to marketing their services to unsophisticated consumers.⁵⁹ If the S.A.F.E. Act provides Agency-regulated institutions with any competitive advantage over their state-licensed competitors, it is likely immaterial. Of course, given the fragile condition of the housing market and private lenders' continuing hesitancy to provide home mortgage loans even to apparently credit-worthy borrowers,⁶⁰ we may have to wait to gauge the full impact of the S.A.F.E. Act on the internal dynamics of the mortgage industry.

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⁵⁹ See Muolo, *supra* note 50 (“Marc Savitt, a former past [sic] president of the National Association of Mortgage Brokers, is quite familiar with the problems caused by the SAFE Act but instead of getting angry, he thinks brokers and nonbank [loan originators] should turn the situation to their advantage. ‘This is a marketing opportunity,’ he said. ‘I’m licensed and registered, and I’ve been tested. When dealing with a consumer I can say that to them. And I also can say, ‘Is that bank [loan originator] licensed? Has that bank [loan originator] been tested? I have.’”).

⁶⁰ See David Wessel, *Mortgage Market Logjam Crimps Economy*, WALL ST. J., Nov. 16, 2011, <http://online.wsj.com/article/SB10001424052970204517204577042061686729018.html> (“Five years ago, it was too easy to get a mortgage in the U.S. Today, it’s probably too hard.”); Nick Timiraos, *Loan Backer’s Cash Runs Low*, WALL ST. J., Nov. 15, 2011, <http://online.wsj.com/article/0,,SB10001424052970203503204577038160049596868,00.html> (“In the past four years, as private lenders have pulled back from the mortgage market, the [Federal Housing Administration]’s market share has swollen.”).

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