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ALL THINGS CONSIDERED: THE CONTRIBUTION OF THE NATIONAL MORTGAGE LICENSING SYSTEM TO THE BATTLE AGAINST PREDATORY LENDING

Lloyd T. Wilson, Jr.*

INTRODUCTION

Record levels of home foreclosures¹ and personal bankruptcies² and apprehension about their impact on Wall Street³ have intensified efforts to combat the abusive loan terms and practices that comprise predatory lending.⁴ One consequence of this intensification may be a

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1. Foreclosure statistics are available from RealtyTrac, and loan delinquency statistics are available from the Mortgage Bankers Association. RealtyTrac's 2007 U.S. Foreclosure Market statistics are available at <http://www.realtytrac.com>. On October 11, 2007, RealtyTrac announced that in September of 2007 there were 223,538 foreclosure filings in the U.S., a figure that is "up 99% from the number reported in September 2006." This statistic is somewhat camouflaged by the title of the news release, which is "Foreclosure Activity Decreases 8 Percent in September," <http://www.realtytrac.com> (follow "News & Events" hyperlink under "Company Information;" then follow October 11, 2007 "Foreclosure Activity Decreases 8 Percent in September" hyperlink) (last visited Nov. 2, 2007). The 8% decrease refers to foreclosure activity in September 2007 compared to August 2007. *Id.* Lest the decrease sound like good news, RealtyTrac reports that foreclosures in August of 2007 were the highest in thirty-two months. *Id.* A summary of the Mortgage Bankers Association's National Delinquency Survey for the fourth quarter of 2006 is available at <http://www.mortgagebankers.org> (follow "News and Media" hyperlink; follow "more" hyperlink under "MBA News;" then follow "National Delinquency Survey" hyperlink) (including instructions for purchasing a copy of the full survey) (last visited Nov. 2, 2007).

2. The Administrative Office of the U.S. Courts compiles bankruptcy statistics, which are available at <http://www.uscourts.gov> (follow "Library" hyperlink; follow "Statistical Reports" hyperlink; then follow "Bankruptcy Statistics" hyperlink) (last visited Nov. 2, 2007).

3. Reports of the impact of subprime mortgage loan defaults on the stock market are a daily occurrence as this Article goes to print. The topic dominates both electronic and print media.

4. Given the ingenuity of lenders and brokers who would prey on consumers, it is as difficult to formulate a fully encompassing definition of "predatory lending" as it is to formulate a fully encompassing definition of predatory lending's siblings, fraud and unconscionability. In that sense, we must avoid insisting on too precise a definition that would give the appearance that only specified practices are objectionable and all others are validated. Even so, some definition is needed for a term that is so central to this Article. To that end, I adopt as a working definition of predatory lending the "syndrome of loan abuses" proposed by Kathleen C. Engel and Patricia A. McCoy in their article, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 *FORDHAM L. REV.* 2038, 2039,

willingness by policymakers to view the problem of predatory lending from a systematic perspective—that is, to identify the unique ways that each actor in the subprime lending pipeline contributes to the problem and to craft responses appropriate to each.⁵ Of all the actors in this pipeline, the mortgage lender and the mortgage broker are the two most visible to consumers, although others—especially the secondary market securitizers and investors on whom non-depository lenders and brokers depend for capital—are also important participants. Perhaps the most significant regulatory program currently being developed to combat abusive practices by state-chartered lenders⁶ and by mortgage brokers is the National Mortgage Licensing System, which is the product of the joint leadership of the Conference of State Bank Supervisors (CSBS)⁷ and the American Association of Residential Mortgage Regulators (AARMR).⁸

2043–45 (2007). Professors Engel and McCoy identify seven commonly occurring types of abusive behavior that are included in the syndrome. *Id.* They are: (1) “Loans structured to result in seriously disproportionate net harm to borrowers,” (2) “Rent seeking,” (3) “Loans involving illegal fraud or deception,” (4) “Other forms of non-transparency that do not amount to fraud,” (5) “Loans requiring borrowers to waive meaningful legal redress,” (6) “Lending discrimination,” and (7) “Servicing abuses.” *Id.* Other definitions and examples of predatory lending abound. For a definition that focuses on non-competitive pricing and excessive risk, as opposed to fraud-like behavior and illustrative practices, see Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 735–41 (2006). Also, see generally, testimony given at *Subprime and Predatory Mortgage Lending: New Regulatory Guidance, Current Market Conditions and Effects on Regulated Financial Institutions: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Servs.*, 110th Cong. (Mar. 27, 2007) [hereinafter *Subprime and Predatory Lending Hearing*].

5. For a discussion of the importance of broadening anti-predatory lending initiatives from a programmatic approach that focuses on prohibiting specific loan terms and practices to a systematic approach that also includes initiatives directed at establishing duties from mortgage brokers to consumers, eliminating appraisal fraud by real estate appraisers, eliminating the holder in due course defense for secondary market participants, increasing consumer financial literacy through education, and decreasing broker and lender influence over consumers through counseling, see Lloyd T. Wilson, Jr., *Effecting Responsibility in the Mortgage Broker-Borrower Relationship: A Role for Agency Principles in Predatory Lending Regulation*, 73 U. CIN. L. REV. 1471 (2005).

6. Federally-chartered lenders are supervised by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve Board, the Office of Thrift Supervision, or the National Credit Union Association. State regulators have been preempted from regulating lenders subject to federal supervision. See OCC Preemption Determination and Order, 68 Fed. Reg. 46,264 (Aug. 5, 2003). States can regulate state-chartered banks, state-chartered non-depository lenders, and mortgage brokers. *Id.*

7. The CSBS:

is the nationwide organization for state banking, representing the bank regulators of the 50 states, the District of Columbia, Guam, Puerto Rico and the Virgin Islands, and

Through multi-state uniform license application and renewal forms and a national database of licensed mortgage lenders and brokers (collectively referred to as “licensees”), CSBS and AARMR seek to create a state-level regulatory framework that holds in creative tension the interests of three constituencies—state regulators, residential mortgage industry participants, and consumers. This task is complicated by two factors. One is the often conflicting interests of the constituents. The other is the constraints imposed by vertical federalism, on the one hand, as manifested by the preemption power asserted by federal regulatory agencies,⁹ and by horizontal

approximately 6,200 state-chartered financial institutions. The Conference is responsible for defending state authority to determine banking structure and the products and services state-chartered institutions can offer and for improving the quality of state bank supervision

Press Release, CSBS, CSBS Forms LLC to House National Mortgage Licensing System (Oct. 4, 2006), <http://www.csbs.org> (follow “Public Relations” hyperlink; then follow “Press Releases Archives” hyperlink) [hereinafter October 4, 2006, Press Release]. CSBS has a Regulatory Affairs section, which is identified as “a forceful advocate for the state banking system, providing the state perspective on federal regulatory policy proposals that directly affect state chartered banks and state bank supervisors.” <http://www.csbs.org> (follow “Regulatory Affairs” hyperlink) (last visited Nov. 2, 2007). Further information about the organization, mission, and initiatives of CSBS can be found at its website, <http://www.csbs.org>.

8. The AARMR “is the national organization representing state residential mortgage regulators. AARMR’s mission is to promote the exchange of information between and among the executives and employees of the various states who are charged with the responsibility for the administration and regulation of residential mortgage lending, servicing, and brokering.” October 4, 2006, Press Release, *supra* note 7. Further information about the organization, mission, and initiatives of AARMR can be found at its website: <http://www.aarmr.org>.

9. See OCC Preemption Determination and Order, *supra* note 6; OTS Preemption Order, 12 C.F.R. § 590.1 (2008); NCUA Preemption Order, 12 C.F.R. § 701.21(b) (2008). The U.S. Supreme Court upheld the OCC’s extension of its preemption authority to state-chartered operating subsidiaries of nationally-chartered financial institutions in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1562 (2007). Another case decided subsequent to *Watters* that exhibits the federal agencies’ aggressive invocation of the preemption doctrine is *Charter One Mortgage Corp. v. Condra*, 865 N.E.2d 602 (Ind. 2007), a case heard by the Indiana Supreme Court. In that case, the OCC filed an amicus brief on behalf of the mortgage company, arguing that federal banking laws and regulations preempted state constitutional provisions concerning regulation of the unauthorized practice of law. Brief for the Office of the Comptroller of the Currency as Amicus Curiae Supporting Appellant, *Charter One Mortgage Corp. v. Kyle Condra*, 865 N.E.2d 602 (Ind. 2007) (No. 00-40439-CH). The Indiana Supreme Court held that Charter One’s employees did not engage in the unauthorized practice of law when they charged a fee for preparing a promissory note and mortgage, but it did so on grounds other than federal preemption. *Charter One*, 865 N.E.2d at 606–07. The preemption issue has attracted significant scholarly attention, including Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending by Banking Agents: Are Federal Regulators Biting off More than They Can Chew?*, 56 AM. U. L. REV. 515 (2007).

federalism, on the other hand, which affirms the independent sovereignty of each state.

Despite these complications, the CSBS/AARMR National Mortgage Licensing System (NMLS or the “System”) contributes to the goal of reducing predatory lending by strengthening the regulatory oversight of residential mortgage brokers and eligible mortgage lenders.¹⁰ Strengthened oversight of mortgage brokers is warranted given the extent of their involvement in residential mortgage loan originations,¹¹ the unique access to consumers that enables them to influence consumer decisions,¹² and the unfortunate involvement of too many brokers in abusive lending.¹³ Oversight of

10. For a discussion of state-level mortgage broker licensure statutes, see Lloyd T. Wilson, Jr., *A Taxonomic Analysis of Mortgage Broker Licensing Statutes: Developing a Programmatic Response to Predatory Lending*, 36 N.M. L. REV. 297 (2006). For a discussion of proposals for federal-level registration of mortgage brokers, including a nationwide database of licensees, see Lloyd T. Wilson, Jr., *Sometimes Less is More: Utility, Preemption & Hermeneutical Criticisms of Proposed Federal Regulation of Mortgage Brokers*, 59 S.C. L. REV. 61 (2007).

11. The National Association of Mortgage Brokers proudly proclaims that mortgage brokers originate approximately 70% of all residential mortgage loans. See *NAMB Model State Statute Initiative—Licensing, Pre-Licensure Education and Continuing Education for All Originators: Hearing Before the Subcomm. on Housing and Community Opportunity of the H. Comm. on Financial Servs.*, 109th Cong., app. A (Sept. 29, 2005) [hereinafter *Licensing and Registration Hearing*] (testimony of Joseph L. Falk). NAMB’s claims are supported by the Mortgage Bankers Association, which finds that mortgage brokers generate 71% of loans in the subprime market. See Mike Fratantoni, *Residential Mortgage Origination Channels*, MBA RESEARCH DATA NOTES, Sept. 2006, http://mortgagebankers.org/files/Bulletin/InternalResource/44664_September2006-ResidentialMortgageOriginationChannels.pdf. Recently, the number of subprime loans originated by brokers has declined. See Press Release, NAMB, *NAMB Releases New Trend Data on 2007 Mortgage Markets* (July 24, 2007), available at <http://www.namb.org/namb/NewsBot.asp?MODE=VIEW&ID=210&SnID=186907857> (“new trend data . . . shows mortgage brokers continue to close fewer non-traditional or ‘subprime’ loans than in 2006.”). A decline in real numbers of originations may be explained by a tightening of credit availability due to shrinking capital liquidity and thus says nothing about the percentage of mortgage broker involvement in those subprime mortgage loans that are closed.

12. A mortgage broker’s ability to influence consumers and to exploit consumer trust in the broker can be seen as one of the motivating influences behind the recently introduced Borrower’s Protection Act, which seeks to establish a fiduciary duty for mortgage brokers and other non-bank mortgage originators. S. 1299, 110th Cong. (2007). For an extended discussion of the desirability of imposing fiduciary duties on mortgage brokers via a borrower’s agency regime, see Wilson, *supra* note 5. For an analysis of default rates on broker-originated loans compared to retail-originated loans, see BARRETT A. SLADE, SCOTT D. GRIMSHAW, GRANT RICHARD MCQUEEN & WILLIAM P. ALEXANDER, *SOME LOANS ARE MORE EQUAL THAN OTHERS: THIRD-PARTY ORIGINATIONS AND DEFAULTS IN THE SUBPRIME MORTGAGE INDUSTRY* (2001), available at <http://ssrn.com/abstract=281233>.

13. Anecdotal evidence of abusive broker practices can be found in many consumer narratives of the mortgage lending process. See, e.g., Center for Responsible Lending, *The Victims of Predatory Mortgage Lending*, <http://www.responsiblelending.org> (follow “Our Issues” hyperlink; follow

mortgage lenders by state regulators is necessary to reach those lenders who are not regulated by federal agencies. Without some form of state action, both groups would be unregulated with regard to such important matters as qualifications to enter the industry, appropriate standards of conduct when dealing with consumers, and sanctions for misconduct.¹⁴

The ability of the NMLS to contribute to consumer protection does not mean, however, that the complicating factors of conflicting constituent interests, vertical federalism, and horizontal federalism do not impact the System and limit, at least to some extent, its methods and goals. It is undeniable, for example, that the NMLS's accommodation of jurisdiction-specific licensing requirements compromises the goal of uniformity for the license application and renewal forms. On this point, the objections of mortgage industry representatives must be acknowledged and considered. At the same time, it should be recognized that the bulk of the industry's objections either understate the benefits that can accrue from the NMLS or overstate its shortcomings. On balance, the NMLS is a worthwhile and needed initiative as it augments the ability of state regulators to discharge their gatekeeping and oversight functions, helps consumers to identify and avoid licensees who have engaged in abusive practices, and eases compliance burdens for licensees who originate or fund loans in more than one state.

The analysis of the NMLS in this Article proceeds in three parts. Part I identifies the goals of the NMLS and the mechanisms by which it seeks to accomplish them. Part II identifies the limitations of the

"Mortgage Lending" hyperlink; then follow "Borrower Stories" hyperlink) (last visited Nov. 2, 2007). Broker involvement in predatory lending is also noted in some state mortgage broker licensing statutes. For example, the preamble to Minnesota's statute says that one of its goals is to "help consumers avoid being victimized by unscrupulous . . . mortgage brokers." MINN. STAT. ANN. § 58.10 (3) (West 2002). See generally Wilson, *A Taxonomic Analysis of Mortgage Broker Licensing Statutes*, *supra* note 10, at 297.

14. NAMB disputes the statement that mortgage brokers are unregulated. See *Subprime and Predatory Lending Hearing*, *supra* note 4, app. B at 56 (testimony of Harry H. Dinham, NAMB President). However, in the absence of state licensing statutes, there would be little regulation of mortgage brokers *qua* brokers, leaving them subject only to the requirements of broadly applicable mortgage lending laws such as RESPA, TILA, and HOEPA.

NMLS that are de-emphasized by CSBS/AARMR but accentuated by mortgage industry participants, most notably the National Association of Mortgage Brokers (NAMB)¹⁵ and the Mortgage Bankers Association (MBA).¹⁶ Part III provides a critical analysis of the NMLS, including NAMB's and MBA's criticisms. The Article concludes by identifying some of the institutional advantages the NMLS enjoys as a state-level initiative over federal-level regulation and by encouraging support for the NMLS.

I. THE NATIONAL MORTGAGE LICENSING SYSTEM: STRUCTURE, PROCEDURES, AND BENEFITS CLAIMED BY REGULATORS

The NMLS has two principal components: (1) uniform license application and license renewal forms, which an applicant or licensee will be able to file electronically at a single location even if the applicant or licensee wishes to conduct business in multiple states,¹⁷ and (2) a centralized database that will include the names of all licensees and will identify publicly adjudicated enforcement actions taken against a licensee.¹⁸ Each component has its own advantages and limitations, so each will be analyzed individually in this Article. This separation is made for analytical ease, however, and should not be seen as implying that the uniform forms and the database are two

15. NAMB describes itself as “the voice of the mortgage broker industry, representing the interests of mortgage brokers and homebuyers.” NAMB homepage, <http://www.namb.org> (follow “about NAMB” hyperlink). NAMB claims 25,000 members and is “affiliated with all 50 state associations and the District of Columbia.” *Id.*

16. MBA describes itself as “the national association representing the real estate finance industry, an industry that employs more than 500,000 people in virtually every community in the country,” claiming “over 3,000 member companies, including all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies and others in the mortgage lending field.” MBA homepage, <http://www.mbaa.org/AboutMBA> (last visited Nov. 2, 2007).

17. *See, e.g.*, October 4, 2006, Press Release, *supra* note 7; *Subprime and Predatory Lending Hearing*, *supra* note 4, at 8 (testimony of Steven L. Antonakes of CSBS) (“[T]his system will create a single record for every state-licensed mortgage company, branch, and individual that will be shared by all participating states.”); *Licensing and Registration Hearing*, *supra* note 11, at 103 (testimony of Joseph A. Smith, Jr., of CSBS) (“AARMR has developed a set of principles and examination procedures that would allow state regulators to coordinate on examinations of multi-state mortgage lenders.”).

18. *See* October 4, 2006, Press Release, *supra* note 7; *Subprime and Predatory Lending Hearing*, *supra* note 4, at 8 (testimony of Steven L. Antonakes of CSBS).

separate proposals, for they are not. They are two integrated aspects of a single proposal.

A. The Uniform Mortgage Licensing Forms

1. The MU Forms—Content

The NMLS uses four forms—called MU Forms—for license application and renewal by mortgage brokers and covered lenders:¹⁹

- (1) The Uniform Mortgage Lender/Mortgage Broker Business Application Form, known as Form MU1;
- (2) The Uniform Mortgage Biographical Statement & Consent Form, known as Form MU2;
- (3) The Uniform Mortgage Branch Office Form, known as Form MU3; and
- (4) The Uniform Individual Mortgage License/Registration & Consent Form, known as Form MU4

Form MU1 consists of eleven pages of questions about the applicant or licensee. For first-time license applicants, the general purpose of these questions is to provide the regulator with sufficient information to determine whether the applicant meets the state's requirements for licensure. In other words, the questions enable the state to perform a gatekeeping function, granting a license to those applicants who do not appear to pose a threat to consumers and denying a license to those applicants who do.²⁰ For licensees seeking to renew an existing license, the Form MU1 questions provide information that enables the regulator to determine whether the licensee is conducting

19. The MU Forms are available at http://www.stateregulatoryregistry.org/AM/Template.cfm?Section=MU_Forms (last visited Apr. 1, 2008). See Form MU1, Uniform Mortgage Lender/Mortgage Broker Form [hereinafter Form MU1]; Form MU2, Uniform Mortgage Biographical Statement & Consent Form [hereinafter Form MU2]; Form MU3, Uniform Mortgage Branch Office Form [hereinafter Form MU3]; Form MU4, Uniform Individual Mortgage License/Registration & Consent Form [hereinafter Form MU4].

20. For a discussion of the gatekeeping function served by state mortgage broker licensing laws, see Wilson, *A Taxonomic Analysis of Mortgage Broker Licensing Statutes*, *supra* note 10, at 300–11.

business in an acceptable manner. In other words, the questions enable the state to perform a regulatory oversight function.²¹

Some of the Form MU1 questions seek basic and routine information about the applicant or licensee, such as name, business location, contact information, the form of business organization that is or will be used, the states in which the applicant intends to do business, and a description of the types of mortgage products and services the applicant or licensee intends to provide. Other questions ask about the existence of any “control relationship”²² between the applicant or licensee and any other person or entity “engaged in the business of a mortgage lender, mortgage broker, or providers of other settlement services.”²³ With regard to disclosures about the personal history and business background of an applicant or licensee, perhaps the most important question in Form MU1 is question eight, which requires the applicant or licensee to make eighteen separate disclosures in four subject categories: (1) Criminal Disclosures; (2) Regulatory Action Disclosures; (3) Civil Judicial Disclosures; and (4) Financial Disclosures.

Form MU1 also contains three schedules that seek additional information about persons who occupy a position or possess a status that empowers them to influence a licensee or a licensee’s business. Schedule A requires the applicant or licensee to list the names, title or status, percentage of ownership, public trading standing, and IRS tax number or employer identification number for all persons who qualify as an executive officer or direct owner of the applicant.²⁴ This requirement also applies to each control person,²⁵ which in the case of a corporation, partnership, LLC, or trust includes each person who has an ownership interest of 10% or more.²⁶ Schedule B requires the

21. For a discussion of the administrative oversight function served by state mortgage broker licensing laws, see *id.* at 311–25.

22. The term “control relationship” is defined and its importance to the NMLS is discussed *infra* notes 23 to 26 and accompanying text.

23. Form MU1, *supra* note 19, at 7.

24. Form MU1, *supra* note 19, at Schedule A, 9.

25. The terms “control person” and “control” are more fully defined in the instructions that accompany Form MU1. See Form MU1, *supra* note 19, at 2.

26. *Id.*

applicant to disclose information about all indirect owners, which includes all persons who have an ownership interest of 25% more in any of the direct owners identified on Schedule A.²⁷ Disclosure of indirect ownership must “[c]ontinue up the chain of ownership listing all 25% or more owners at each level” until “a public reporting company is reached.”²⁸ Schedule C is used to make amendments to schedules A and B. By requiring disclosure of the information sought on Schedules A, B, and C, the NMLS recognizes that the gatekeeping and oversight functions of regulation are fully discharged only if a state looks beyond the nominal licensee to insure that financial predators are not in charge from behind the scenes. Mortgage lenders and mortgage brokers, while not expressly antagonistic to the goal, object to the breadth and intrusiveness of information required by Form MU1.

Each person identified as a control person on Schedule A of Form MU1 must also file Form MU2. Persons listed on Schedule B are not required—at least by the MU Form instructions²⁹—to complete Form MU2, which consists of a series of biographical disclosures and a consent for release of information. Each control person must disclose residential history and employment history for the past ten years and disclose details about all other businesses in which the control person is involved. Each control person must also answer thirty questions relating to financial, criminal, regulatory, civil judicial, and customer-initiated arbitration proceedings and to the circumstances of any employment termination. These disclosure requirements are not only more numerous than those in question eight of Form MU1, they are also more comprehensive. For example, while the section of Form MU2 relating to financial proceedings disclosures is limited to the

27. Form MU1, *supra* note 19, at Schedule B, 10.

28. *Id.*

29. Mortgage lending industry participants identify the option for states to expand the scope of persons who must complete the biographical disclosures of Form MU2 as one of the deficiencies of the NMLS and its MU Forms. See *infra* notes 73–83 and accompanying text.

prior ten years, the other disclosures are subject to no time limitation.³⁰

Each control person must also sign a consent form that provides:

I authorize all my current and former employers, law enforcement agencies, and any other person to furnish to any jurisdiction, or any agent acting on its behalf, any information they have, including without limitation my creditworthiness, character, ability, business activities, educational background, general reputation, history of my employment and, in the case of former employers, complete reasons for my termination.³¹

Unsurprisingly, mortgage lenders and mortgage brokers challenge the breadth of these required disclosures and the consent.

Form MU3 seeks fundamental information about branch offices that the applicant or licensee intends to operate, such as the address for the branch office, the name of the branch manager and contact information, the physical address where the books and records generated by the branch office will be kept, contact information for the records custodian, and the extent to which the main office will manage business affairs at the branch. Despite the comparatively unremarkable nature of the information sought, Form MU3 has nonetheless generated opposition due to the non-uniformity of underlying state substantive law requirements that continue to apply as permitted jurisdiction-specific requirements.³²

Form MU4 mirrors the disclosure requirements of Form MU2 and contains the same consent for release of information.³³ However, whereas Form MU2 is required only of the control persons listed on Schedule A of Form MU1, Form MU4—if it is required by a state—must be completed by individual brokers and loan officers. By

30. The criminal, regulatory, civil judicial, and customer-initiated proceedings are each introduced with the phrase, “have you ever . . .” Form MU2, *supra* note 19, at 5.

31. *Id.* at 3 (emphasis deleted).

32. For a discussion of these and other variations among the requirements of state broker licensing statutes, see Wilson, *A Taxonomic Analysis of Mortgage Broker Licensing Statutes*, *supra* note 10.

33. Compare Form MU4, *supra* note 19, at 8, with Form MU2, *supra* note 19, at 3.

requiring information from more people, Form MU4 magnifies the concerns expressed with regard to Form MU2 about the breadth and intrusiveness of the disclosures. Furthermore, because under the NMLS states may or may not require Form MU4, lenders and brokers have criticized the form for perpetuating the compliance burdens imposed on licensees by a “patchwork” of inconsistent state laws. Each of the objections of mortgage lenders and mortgage brokers to the content of the MU Forms is considered in detail in Part II below.

2. *The MU Forms—Single Entry Point Filing Procedures*

One of the goals of the NMLS is to streamline the licensing process for both licensees and regulators by providing standardized forms and a single filing location. Four states—Idaho, Massachusetts, New Hampshire, and Washington—adopted the initial paper format version of the MU Forms.³⁴ Those forms were updated on January 17, 2007, and as of November of 2007 they were in use in fourteen states.³⁵ In paper format, the MU Forms promote standardization as they are designed so that a company, branch, or individual applying for a license need only complete one MU Form and then submit copies of that form to each state in which it is seeking a license or for which it is updating an existing license.³⁶ As of November of 2007, “40 state agencies including the District of Columbia have signed onto a Statement of Intent formally announcing their intent to participate in the Nationwide Mortgage Licensing System.”³⁷

The application process will be further streamlined when an online application system replaces the paper forms, scheduled to occur on

34. See CSBS/AARMR NATIONAL MORTGAGE LICENSING SYSTEM, AFSA STATE GOVERNMENT AFFAIRS FORUM 13 (2006), <http://www.afsaonline.org/CMS/fileREPOSITORY/BillMatthewsSavannah.pdf> [hereinafter AFSA STATE GOVERNMENT AFFAIRS FORUM].

35. CSBS, Project Status (Aug. 2007) <http://www.csbs.org> [hereinafter CSBS Project Status] (follow “Mortgage Licensing” hyperlink; follow “About the NMLS” hyperlink; then follow “Project Status” hyperlink). The number of states and agencies cited in this Article as participating in the NMLS is accurate as of the end of 2007, but as it is likely that additional states and agencies will commit to the System in 2008 and beyond, the reader is advised to consult the Project Status page for up-to-date information.

36. See AFSA STATE GOVERNMENT AFFAIRS FORUM, *supra* note 34, at 15.

37. CSBS Project Status, *supra* note 35.

January 2, 2008.³⁸ The online application procedure will create a single filing destination regardless of the number of states in which an applicant or licensee intends to conduct business.³⁹ The NMLS will electronically transmit completed applications to each selected jurisdiction, will collect and transmit applicable state license fees, and will identify relevant state-specific requirements.⁴⁰ CSBS/AARMR anticipates that “four to six state agencies will implement the online application procedure as soon as it is operational and that additional states will transition onto the system on a quarterly basis during 2008 and 2009.”⁴¹

3. *The NMLS—Stated Goals and Benefits*

Stated most broadly, the goal of the NMLS is to “creat[e] a unified and modern system of state mortgage supervision”⁴² that accounts for the changes that have taken place in the residential mortgage industry over the past twenty years in the wake of deregulation. These changes include the greatly expanded use of third-party loan originators, the increased quality control issues that arise from outsourcing loan originations to those third parties, the expansion of product lines to include an ever-increasing number of financing options, and the greatly increased number of mortgage lenders and brokers who conduct business on a multi-state or national basis.⁴³ In the view of state regulators, these changes call for collaborative initiatives by the states and for new tools if regulation is to be effective. More particularly stated, the goals of the NMLS are:

38. *Id.*

39. AFSA STATE GOVERNMENT AFFAIRS FORUM, *supra* note 34, at 15.

40. *Id.* at 16.

41. CSBS Project Status, *supra* note 35.

42. Press Release, CSBS, 29 State Agencies Announce Commitment to Participate in CSBS-AARMR Mortgage Licensing System, Feb. 27, 2007, <http://www.csbs.org> (follow “Public Relations” hyperlink; follow “Press Releases” hyperlink; follow “29 State Agencies Announce Commitment to Participate in CSBS-AARMR Mortgage Licensing System” hyperlink) [hereinafter CSBS February 27, 2007, Press Release].

43. AFSA STATE GOVERNMENT AFFAIRS FORUM, *supra* note 34, at 6.

- [1] To improve the efficiency and effectiveness of state supervision of the U.S. mortgage market;
- [2] To fight mortgage fraud and predatory lending that costs consumers and the mortgage industry hundreds of millions of dollars in losses each year;
- [3] To increase accountability among mortgage industry professionals; [and]
- [4] To unify and streamline state license processes for mortgage lenders and mortgage brokers.⁴⁴

The NMLS thus anticipates benefiting three constituencies—state regulators, consumers of mortgage financing products and services, and mortgage industry licensees. The principal benefits for state regulators are improved oversight capacity and cost savings. Oversight capacity will be improved in two ways. First, according to CSBS/AARMR, the MU Forms “will improve consistency across state lines as to the type and quality of information being provided to mortgage regulators,”⁴⁵ which can produce heightened state expectations and an accompanying heightened level of professionalism by licensees. Second, CSBS/AARMR asserts that by creating a single record for every licensee and sharing that record among the states, regulators will be able to track “companies and individuals . . . across state lines and over any period of time.”⁴⁶ This tracking ability will

44. CSBS Press Release, February 27, 2007, *supra* note 42.

45. Press Release, Ky. Office of Fin. Insts., Office of Financial Institutions Adopts National Uniform Mortgage Licensing Forms, Feb. 1, 2007, http://www.kentucky.gov/Newsroom/eppc_ofi/OFI_Mortgage_Licensing_Forms.htm [hereinafter Kentucky News Release]. Several states that committed to participating in the NMLS also issued press releases around the same time. Examples include a February 27, 2007, press release from Idaho, http://finance.idaho.gov/PR/2007/CSBS_MortgageProj2-07_Final.pdf; a February 27, 2007, press release from Iowa, <http://www.idob.state.ia.us/bank/docs/bulletin/2007/csbs-aarmr-NMLSNMLS.pdf> (link not active as of Nov. 5, 2007); a March 26, 2007, press release from Louisiana, <http://www.ofi.louisiana.gov/Press%20Release%20-%20New%20Mortgage%20Apps.pdf>; a February 28, 2007, press release from Michigan, <http://www.michigan.gov/printerFriendly/0,1687,7-154-10555-163208--,00.html>; and a February 27, 2007, press release from Montana, http://banking.mt.gov/pdf/MortgageLicensingSystem_Press_Release.pdf These releases, and those of other states, are substantively identical to each other and to the CSBS February 27, 2007, Press Release, *supra* note 42.

46. *Subprime and Predatory Lending Hearing*, *supra* note 4, at 8 (testimony of Steven L. Antonakes).

enable state regulators to address geographic and distribution channel migration by licensees who employ abusive practices.⁴⁷

CSBS/AARMR claims that the NMLS will produce cost savings for regulators as it will “streamline the licensing process for state agencies . . . through the use of modern technology and centralizing redundant state agency operations.”⁴⁸ The efficiencies that accompany streamlining and centralization will reduce staffing requirements and other administrative expenses for participating state agencies. An important by-product of these cost savings will be a state’s ability to “divert resources previously used for processing applications to more supervision and enforcement.”⁴⁹

The benefits of the MU Forms to consumers are derivative of the benefits to state regulators. The better states can discharge their gatekeeping functions, the more likely it is that abusive brokers and lenders will be excluded from the marketplace and precluded from having access to consumers. Further, the more money a state can divert from administrative processing to enforcement, the more likely it is that regulators can find and expel from the marketplace those licensees who are guilty of abusive practices, can impose fines and other available sanctions, and can obtain compensation for victimized consumers.⁵⁰ It is in this way, along with the nationwide database

47. Geographic migration refers to the potential for a broker or loan originator who has engaged in predatory activities in one state to relocate to another state and commence business. The NMLS database addresses this problem by publishing the names of all licensed mortgage lenders and mortgage brokers and all publicly adjudicated claims against them. See *infra* notes 107–117 and 202–204 and accompanying text. Distribution channel migration occurs when a loan originator who engaged in predatory activities while working for an employer subject to institutional-level licensing takes a job as a loan originator in a context where licensing requirements are imposed at an individual level, or *vice versa*. In geographic migration, it is poor communication between the states that permits an abusive licensee to escape from past behaviors. In distribution channel migration, it is the lack of individual-level licensure for some loan originators that enables an abusive originator to move undetected between distribution channels. The MU4 Form provides states with the option of individual-level licensing, but that option implicates issues about non-uniformity as some states adopt the MU4 Form and others do not.

48. October 4, 2006, Press Release, *supra* note 7.

49. *Subprime and Predatory Lending Hearing*, *supra* note 4, at 9 (testimony of Steven L. Antonakes).

50. For a discussion of the sanctions and remedies that state licensing laws provide to regulators and consumers for licensee misconduct see Wilson, *A Taxonomic Analysis of Mortgage Broker Licensing Statutes*, *supra* note 10, at 317–21.

discussed below, that the NMLS pursues its goal of increasing accountability among mortgage industry professionals.

For licensees, the principal purported benefits of the MU Forms are convenience and cost savings, which are expected to arise in two ways. First, the online form submission process and the single point of entry into the regulatory regime will produce cost savings by introducing administrative efficiencies.⁵¹ Second, the standardized MU Forms introduce regulatory compliance efficiencies by easing the burden that results from the diverse filing requirements currently imposed by individual states. Licensees have long complained about “a non-uniform patchwork of unrealistic laws” to which they are subject,⁵² a concern that the implementation of a single set of regulatory forms on a multi-state basis is intended to address. However, mortgage lenders and mortgage brokers question the extent to which the MU Forms will actually produce cost savings or compliance burden relief; those objections are considered in Part II below.

B. The Nationwide Database of Mortgage Professionals

1. Operation and Stated Benefits

The second principal component of the NMLS is an online database accessible by the public. This database will contain the names of all licensees who conduct business in participating states and will serve as a central repository of license information and of publicly

51. *Subprime and Predatory Lending Hearing*, *supra* note 4, at 9 (testimony of Steven L. Antonakes identifying “immediate and profound benefits to consumers, the industry, and the state supervisory agencies”).

52. Donald C. Lampe, *Predatory Lending Initiatives, Legislation and Litigation: Federal Regulation, State Law and Preemption*, 56 CONSUMER FIN. L. Q. REP. 78, 86 (2002); *see also Building Sustainable Homeownership—Responsible Lending and the Informed Consumer Choice: Hearing Before the Fed. Reserve Bank of Atlanta* at 36 (July 11, 2006), <http://www.federalreserve.gov/events/publichearings/hoepa/2006/20060711/transcript.pdf> [hereinafter *FRB Sustainable Homeownership Forum, July 11, 2006*] (testimony of Wright Andrews, Washington Counsel to the National Home Equity Mortgage Association); *Licensing and Registration Hearing*, *supra* note 11, at 47 (testimony of Teresa Bryce, Mortgage Bankers Association).

adjudicated actions involving licensees.⁵³ The NMLS database will be modeled after the centralized, multi-state databases that have been implemented in the securities and insurance industries,⁵⁴ and CSBS/AARMR has contracted with the National Association of Securities Dealers (NASD) to develop and operate the NMLS database.⁵⁵ NASD was chosen because of the database management expertise it has gained from operating two multi-state licensing databases—the Central Registration Depository for securities advisors and the Investment Advisors Registration Depository for investment advisors⁵⁶—and because of its reputation as a “substantial and credible” organization capable of managing data effectively and securely.⁵⁷ NASD expected to deploy the database in January 2008.⁵⁸

As with the MU Forms, CSBS/AARMR believes that the NMLS database will benefit state regulators, consumers, and mortgage lenders and brokers. State regulators are expected to benefit from the database as it will enhance their ability to “share information with other states,”⁵⁹ thereby enabling states to address geographic migration of licensees who have engaged in abusive conduct.

53. October 4, 2006, Press Release, *supra* note 7; *Subprime and Predatory Lending Hearing*, *supra* note 4, at 9 (testimony of Steven L. Antonakes).

54. Texas Finance Commission Meeting Minutes, June 8, 2006, at 2, <http://www.fc.state.tx.us> (under “Meetings,” follow “Prior” hyperlink; then follow June 8, 2007 “Finance Commission Minutes” hyperlink).

55. NASD is now known as The Financial Industry Regulatory Authority (FINRA). FINRA was formed in July of 2007 “through the consolidation of NASD and the member regulation, enforcement and arbitration functions of the New York Stock Exchange.” FINRA homepage, <http://www.finra.org/AboutFINRA/CorporateInformation/index.htm> (last visited Nov. 2, 2007). FINRA is “the largest non-governmental regulator for all securities firms doing business in the United States” and “oversees over 5,000 brokerage firms, about 172,000 branch offices and more than 676,000 registered securities representatives.” *Id.* The acronym NASD will be retained in this Article to maintain consistency with the CSBS/AARMR, MBA, and NAMB documents cited herein.

56. AFSA STATE GOVERNMENT AFFAIRS FORUM, *supra* note 34, at 21; *see also Subprime and Predatory Lending Hearing*, *supra* note 4, at 9 (testimony of Steven L. Antonakes).

57. AFSA STATE GOVERNMENT AFFAIRS FORUM, *supra* note 34, at 21; *see also Subprime and Predatory Lending Hearing*, *supra* note 4, at 9 (testimony of Steven L. Antonakes).

58. October 4, 2006, Press Release, *supra* note 7.

59. *Building Sustainable Homeownership—Responsible Lending and Informed Consumer Choice: Hearings Before the Federal Reserve Bank of Philadelphia* (June 9, 2006), <http://www.federalreserve.gov/events/publichearings/hoepa/2006/20060609/transcript.pdf>, at 100 [hereinafter *FRB Sustainable Homeownership Forum, June 9, 2006*] (testimony of David Bleicken, Director, Bureau of Licensing, Investigation and Consumer Services).

Consumers are expected to benefit as the database will be a central information source that will provide consumers with a way “to check on the license status of the mortgage broker or lender they wish to do business with, as well as a way to determine whether a state has taken enforcement action against that company or individual.”⁶⁰ In the latter sense, the database seeks to empower consumers by making them more informed.

Mortgage lending or brokering companies could similarly benefit from the database by using it as part of their background check and pre-employment screening of potential new employees.⁶¹ To the extent that the database reduces a licensee’s ability to hide abusive practices, whether from regulators, consumers, or employers, it too furthers the NMLS goal of “hold[ing] industry professionals accountable for their actions.”⁶² Licensees criticize the database, saying that it is an excessive invasion of privacy, fails to adequately address the potential for security breaches, and can include unreliable information; these criticisms are considered in the following section.

II. CRITICISMS OF THE NMLS: TESTING THE PROPONENT’S CLAIMS

CSBS/AARMR confidently asserts the anticipated benefits of the NMLS, but how well do those claims stand up under scrutiny? There

60. *Subprime and Predatory Lending Hearing*, *supra* note 4, at 9 (testimony of Steven L. Antonakes).

61. CSBS/AARMR does not mention this employee screening use of NMLS database information. A bill introduced in the 109th Congress, H.R. 1295, also known as the Responsible Lending Act or the Ney-Kanjorski bill, contained a proposal for federal licensing requirements and minimum standards for mortgage brokers (but not other mortgage loan originators) and a federal database containing information about each licensee. The database proposal in H.R. 1295 sets up a hierarchy of information and of persons who have access to that information. *See* H.R. 1295, 109th Cong. § 501 (2005). In general, the categories are: the public, persons using or intending to use the services of a mortgage broker, employers and potential employers, and federal and state regulators. *Id.* Access to information becomes more restricted as the information becomes more sensitive. *Id.* For a discussion of the database proposed in Title V of H.R. 1295 (and of “stealth preemption” and other provisions in the bill that are antagonistic to the interests of consumers), see Wilson, *Sometimes Less is More*, *supra* note 10, at 66.

62. October 4, 2006, Press Release, *supra* note 7. As one of four principal reasons cited by CSBS/ARRMR to support participation in the NMLS, this goal is often mentioned in public comments or testimony. *See, e.g., Subprime and Predatory Lending Hearing*, *supra* note 4, at 251 (testimony of Steven L. Antonakes).

is no shortage of criticisms from MBA and NAMB, who with one notable exception object to the NMLS on similar grounds. These objections are perhaps to be expected as they are made by those mortgage industry participants who will be subject to new or heightened regulations. However, while the presence of industry self-interest may justify a heightened sense of skepticism, it does not automatically invalidate MBA's and NAMB's observations. That at least one state regulator has expressed somewhat similar reservations further supports a considered examination of industry criticisms.

The mortgage lending industry has criticized the NMLS on eight grounds, which are:

1. The NMLS provides insufficient compliance burden relief because the MU Forms are not truly uniform across participating states;
2. The disclosure requirements of the MU Forms are overly burdensome and overly invasive and require more extensive disclosures than some participating states;
3. The disclosure requirements of the MU Forms are an unwarranted invasion of privacy;
4. The delegation of database management to a third-party contractor creates the potential for security breaches and for the inappropriate disclosure of personal information about a licensee;
5. The NMLS does not contain any mechanism by which a licensee can challenge adverse information reported to the database;
6. The cost of the NMLS exceeds any savings licensees will realize;
7. There has been inadequate industry input in the development of the NMLS; and
8. The NMLS displays channel bias as it favors one loan origination channel over a competing channel.

Concerns expressed from the vantage point of one state regulator are:

1. The database provides questionable marginal utility over existing information-gathering methods;
2. Participation in the NMLS will require passage of enabling legislation that may be politically difficult to achieve; and
3. Any cost savings to be realized by participating in the NMLS could be lost to the need for additional appropriations and staffing.

The remainder of Part II of the Article elaborates on these criticisms. A critical evaluation follows in Part III.

A. Mortgage Industry Criticisms

Concise statements of the mortgage industry's criticisms of the NMLS are found in a memorandum the National Association of Mortgage Brokers released in September of 2006 (NAMB Position Statement)⁶³ and in a memorandum the Mortgage Bankers Association issued around the same time (MBA Issue Paper).⁶⁴ In its Position Statement, NAMB outlines its objections to the NMLS and announces a statement of principles that was drafted for the express

63. NAMB memorandum, CSBS & AARMR Establish "State Regulatory Registry," [http://www.namb.org/Images/namb/GovernmentAffairs/Word_From_Washington/WFW%202006-12%20\(CSBS%20Broker%20Registry\).pdf](http://www.namb.org/Images/namb/GovernmentAffairs/Word_From_Washington/WFW%202006-12%20(CSBS%20Broker%20Registry).pdf) (last visited Nov. 3, 2007) [hereinafter NAMB Position Statement]. Interestingly, this document exists in another, untitled, form, available at <http://www.namb.org/Images/namb/GovernmentAffairs/CSBSAARMR/CSBSAARMRStaten%20FinalNov42006.pdf> (Dec. 1, 2006) [hereinafter NAMB Untitled Position Statement]. While the NAMB Untitled Position Statement contains some language that is noticeably more caustic than the NAMB Position Statement, the former excludes the institutional commitment to oppose enabling legislation that would implement any licensing or registration system inconsistent with NAMB's positions. Based on this difference and other clues internal to the documents, the NAMB Untitled Position Statement is likely an earlier draft of the NAMB Position Statement. The NAMB Position Statement is undated; the NAMB Untitled Position Statement is dated.

64. Mortgage Bankers Association Issue Paper, "CSBS/AARMR Proposed State Licensing Database," (Apr. 2007) [hereinafter MBA Issue Paper], <http://www.mortgagebankers.org/files/Library/IssuePapers/CSBS-AARMRProposedStateLicensingDatabase.pdf>.

purpose of “ensur[ing] that there are no misunderstandings, misinterpretations, or misrepresentations of NAMB’s policies and positions regarding the registry and licensing scheme that is currently being proposed by CSBS/AARMR.”⁶⁵ Likewise, in its Issue Paper, MBA expresses its “many concerns” about the ability of the NMLS “to effectively achieve its stated goals and objectives, as well doubts about its benefits to regulators and the industry.”⁶⁶

1. *Insufficient Compliance Burden Relief*

Along with the broker database, the principal advantage claimed for the NMLS is that it will “unify and streamline state license processes for mortgage lenders and mortgage brokers”⁶⁷ by using uniform forms that will “eliminate unnecessary duplication and implement consistent standards and requirements across state lines.”⁶⁸ Mortgage lending industry participants contest this claim. While uniformity would indeed benefit licensees by reducing the compliance burden imposed by the disparate licensing requirements of the various states, NAMB and MBA contend that the promise of relief is illusory precisely because the MU Forms are not uniform. They have a point. Although CSBS/AARMR conspicuously states in the MU Forms that the “uniform” applications are subject to jurisdiction-specific requirements, that fact is not often acknowledged apart from those forms. As a result, CSBS/AARMR does indeed appear to overstate the extent of uniformity and compliance burden relief the MU Forms will provide—at least initially.⁶⁹ At the same time, NAMB and MBA understate the real gains in uniformity that the MU Forms, even in their current format, do accomplish.

65. NAMB Position Statement, *supra* note 63, at 1.

66. MBA Issue Paper, *supra* note 64, at 1.

67. CSBS February 27, 2007, Press Release, *supra* note 42.

68. *Subprime and Predatory Lending Hearing*, *supra* note 4, at 9 (testimony of Steven L. Antonakes).

69. As noted at notes 194–196, *infra*, and accompanying text, CSBS/AARMR’s claims cease to be overstated when the NMLS is seen as a process rather than as a static creation.

The legitimate component of the mortgage industry's objection arises from the fact that, while each of the MU Forms may contain the word "uniform" in its title, the most frequently appearing directive in the accompanying instructions is, "An applicant must also refer to jurisdiction-specific requirements published by each jurisdiction in which it is applying."⁷⁰ This admonition appears seventeen times in the instructions for the MU1 Form alone and affects nearly every aspect of the filing process, including: (1) effective date of the license application, (2) disclosure update and amendment requirements, (3) license surrender and cancellation procedures, (4) application format, (5) necessary application attachments, (6) in-state physical presence, (7) applicable fees, (8) trade name registration, (9) certificate of good standing certification, (10) proof of financial responsibility, (11) applicability of MU3 Form, and (12) applicability of MU4 Form.⁷¹

Although no state may impose jurisdiction-specific requirements for all of these items, where they do exist an applicant cannot rely merely on submission of the "uniform" MU1 Form. Instead, for each state in which an applicant wishes to conduct business, he or she must determine whether it imposes requirements in addition to the requirements of the MU Forms and then must take the steps necessary to comply. These jurisdiction-specific requirements often involve matters of significant importance. Three examples, relating to personal information disclosure, surety bonds, and conditions for licensure, will suffice to illustrate the extent to which unique state-imposed requirements affect the intended uniformity of the MU Forms.⁷²

70. Form MU1, *supra* note 19, at 1–2 (emphasis deleted).

71. *Id.*

72. A number of other jurisdiction-specific examples could be cited, including length of work experience required prior to licensure, content of pre-licensure testing, bases for denying a license application, fingerprint check requirement, nature and number of hours of required continuing education, license amendment procedures, and license surrender procedures. On this last topic, a comparison of the jurisdiction-specific procedures in Wyoming (uses only MU Forms) with those in New Hampshire (MU Forms plus additional state forms and physical surrender of license) demonstrates the variation in regulations that can exist among the states. Compare State of Wyoming, Uniform Mortgage License Forms State of Wyoming Specific Requirements, paragraph 2.b., <http://audit.state>.

a. Non-uniform Disclosure Requirements

Residential mortgage industry participants criticize the disclosure requirements of the MU Forms on two distinct grounds. One, considered in the next subsection, relates to the scope of information requested. The other, considered here, relates to the scope of persons who are required to make the disclosures. As demonstrated later in this Article, the former objection involves competing visions of the nature and objectives of the NMLS, and the latter objection involves principles of horizontal and vertical federalism.

As noted in Part I, Form MU1 contains a number of questions that require an applicant to make disclosures about personal history and business background.⁷³ In addition, Schedule A requires additional disclosures by “direct owners and executive officers,”⁷⁴ and Schedule B requires additional disclosures by “indirect owners.”⁷⁵ For purposes of determining which persons are subject to these disclosure requirements, the MU1 Form defines a direct owner as a “control person,” which in turn is defined as anyone who has the “power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise.”⁷⁶ Power to control is presumed to exist if a person is a “director, general partner, or executive officer.”⁷⁷ Power to control is also presumed to exist in any person who has the right to vote or sell 10% or more of a class of voting security in a corporation or the right to receive 10% or more of the capital of a general partnership, trust, or limited liability company.⁷⁸ Schedule B defines an indirect owner as anyone who has the right to vote or sell 25% or more of the stock of any corporation listed on Schedule A or the right to receive 25% or

wy.us/banking/mortgage/Wyoming_state_specific_instructions_MU.pdf, with State of New Hampshire, NH Specific Mortgage Lender/Banker, Mortgage Broker or Mortgage Servicer License/Registration Application Instructions (July 2007), <http://www.nh.gov/banking/AppMtgFormMU1andNtlpart2.pdf>.

73. See *supra* notes 19–28 and accompanying text.

74. Form MU1, *supra* note 19, at Schedule A, 9.

75. Form MU1, *supra* note 19, at Schedule B, 10.

76. Form MU1, *supra* note 19, at 2. This definition is repeated at item 2 on Schedule A.

77. *Id.*

78. *Id.*

more of the capital of any general partnership, trust, or limited liability company listed on Schedule A.⁷⁹ Each person who qualifies as a control person because he or she is listed on Schedule A must also complete Form MU2, which requires disclosure of even more extensive biographical information. Non-control persons and persons identified on Schedule B are exempted from the additional disclosure requirements of Form MU2.

From a compliance burden relief standpoint, the problem with the MU Forms' definition of those persons who are subject to the disclosure requirements of Form MU2 is that states have the power to expand the definition to include additional persons not covered by the NMLS. For example, whereas the Form MU2 instructions state that only "individuals identified as a control person . . . on Schedule A of Form MU1"⁸⁰ need to complete Form MU2, the state of New Hampshire creates a new class of persons—"principals"—who must complete it. Under New Hampshire law, a principal includes both "direct owners of 10% or more and indirect owners of 25% or more of the applicant."⁸¹ The New Hampshire instructions state in underlined bold-face print that "[a]ll individuals listed on Schedules A & B are defined as 'principals' . . . of the applicant and are therefore considered 'control persons' in New Hampshire."⁸²

The effect of this jurisdiction-specific requirement is to require the Form MU2 biographical disclosures from a class of persons, Schedule B indirect owners, in one state who are not subject to a similar requirement elsewhere. Furthermore, in addition to being required to make the Form MU2 disclosures, indirect owners who qualify as principals must also meet the New Hampshire-specific requirements of submitting a Criminal History Record Information

79. *Id.* at 10.

80. Form MU2, *supra* note 19, at 1.

81. New Hampshire Specific Mortgage Lender/Banker, Mortgage Broker or Mortgage Servicer License/Registration Application Instructions (July 2007), <http://www.nh.gov/banking/AppMtgFormMU1andNHPart2.pdf> (emphasis deleted) [hereinafter New Hampshire Specific Mortgage Lender].

82. *Id.* (emphasis deleted).

Authorization Form and a fingerprint card and of paying a records check fee.⁸³

b. Surety Bond and Other Non-uniform Filing Requirements

States require mortgage industry licensees to post surety bonds as a condition of licensure.⁸⁴ The bond requirement makes a small contribution to a state's gatekeeping function as the bond compels a licensee to subject him or herself to a background check by the bonding company, which presumably would not agree to be liable on the bond if the background check revealed adverse information.⁸⁵ In addition, the bond requirement serves a regulatory oversight function by providing a source of recovery for fines imposed by the state and for damages incurred by consumers.⁸⁶ Despite conceptual agreement among regulators about the advantages of a surety bond, the amount of the bond and the mechanics of implementing it vary among the states. For example, a mortgage broker in New Hampshire must post a surety bond, which covers both the broker's principal office and any branch offices, in the amount of \$20,000.⁸⁷ In neighboring Vermont, the required amount is \$25,000.⁸⁸ In Wyoming, a mortgage broker must post a bond in the amount of \$25,000 for the principal

83. *Id.*

84. State licensing statutes typically require mortgage brokers to post a surety bond. Those statutes also typically require mortgage lenders to post a surety bond and in addition to provide evidence of net worth in a stated amount. The amount of the surety bond required of lenders is generally larger than the bond required of brokers. For the convenience of the reader, the discussion in this subsection is limited to bond requirements for mortgage brokers. The points made about the variability of mortgage broker bond requirements could, however, also be made about mortgage lender bond and net worth requirements.

85. For a discussion of the gatekeeping function of surety bonds, see Wilson, *A Taxonomic Analysis of Mortgage Broker Licensing Statutes*, *supra* note 10, at 300–11.

86. *See id.* at 319–21.

87. New Hampshire Mortgage Banker/Broker Bond (July 2006), <http://www.nh.gov/banking/MortgageBanker20KBondForm.pdf>.

88. Uniform Mortgage License Forms, Jurisdiction Specific Requirements for Vermont, ¶ 2.e (Sept. 20, 2007), http://www.bishca.state.vt.us/BankingDiv/lenderapplic/MU_forms/VT_specific_MU_requirements.htm#Form_MU1.

office plus \$10,000 for each branch office.⁸⁹ Next door in Montana, the bond amount is \$25,000 for each location, whether principal or branch.⁹⁰ The bond amount in Washington is determined on a sliding scale that ranges from a minimum of \$20,000 to a maximum of \$60,000 depending on the number of loan originators.⁹¹

Other idiosyncratic filing requirements are also common. They range from administrative matters, such as the amount of license application fees (\$500 in New Hampshire for the principal office and for each branch office;⁹² \$500 for home office plus \$50 for each branch office in Wyoming;⁹³ \$1,875 in North Carolina for the principal office and \$187.50 for each branch office⁹⁴) to regulatory oversight requirements, such as fingerprint requirements (required in most states;⁹⁵ not required in Wyoming⁹⁶) and annual financial statements (audited and prepared in accordance with GAAP principles in Vermont;⁹⁷ unaudited balance sheet only, using either a one and one-half page state-provided form or “your own format” in Wyoming⁹⁸) to document preservation requirements (twenty-five months in Wyoming;⁹⁹ five years after date of last loan activity in Montana¹⁰⁰).

89. WYO. STAT. ANN. § 40-23-110 (2007); Uniform Mortgage License Forms, State of Wyoming Specific Requirements, ¶ 2.b, http://audit.state.wy.us/banking/mortgage/Wyoming_state_specific_instructions_MU1.pdf (last visited Nov. 3, 2007).

90. Montana License Application Requirements, Supplemental Materials, Proof of Surety, <https://doa.mt.gov/bfilicensing/instructions.asp> (last visited Nov. 3, 2007).

91. Washington Bond Calculation Worksheet, <http://www.dfi.wa.gov/cs/pdf/mb/CalculateBond.pdf> (last visited Nov. 3, 2007).

92. New Hampshire Specific Mortgage Lender, *supra* note 81, at New Application Instructions.

93. State of Wyoming, *supra* note 89, ¶ 1.

94. North Carolina Mortgage Lending Licensing & Compliance Forms (May 7, 2007), <http://www.nccob.org/NCCOB/Mortgage/FormsFees/>.

95. *See, e.g.*, New Hampshire, Criminal History Record Information Authorization Form, Non-Depository Lender/Broker, Servicer, Retail Seller, Money Transmitter or Debt Adjuster (July 2007), <http://www.nh.gov/banking/CriminalRecordReleaseForm.pdf>.

96. Uniform Mortgage License Forms, State of Wyoming Specific Requirements, Form MU2, http://audit.state.wy.us/banking/mortgage/Wyoming_state_specific_instructions_MU2.pdf (last visited Nov. 3, 2007) (“Wyoming does not require the submission of fingerprint cards.”).

97. Uniform Mortgage License Forms, Form MU1 Jurisdiction Specific Requirements for Vermont, ¶ 2.b, http://www.bishca.state.vt.us/BankingDiv/lenderapplic/MU_forms/VT_specific_MU_requirements.htm#Form_MU1 (last visited Nov. 3, 2007).

98. Uniform Mortgage License Forms, State of Wyoming Specific Requirements: Statement of Financial Condition (Jan. 27, 2007), http://audit.state.wy.us/banking/mortgage/Statement_of_financial_condition.pdf.

99. WYO. STAT. ANN. § 40-23-112 (2007).

Although the NMLS administrator will collect state licensing fees, which presumably include advising applicants and licensees about the proper amount to pay, and pledges to identify jurisdiction-specific requirements, it will still be left to applicants and licensees to comply with the special demands that individual states may impose.

c. Non-uniform Pre-conditions of Licensure

The jurisdiction-specific requirements also include conditions precedent to licensure. For instance, in addition to the MU Forms and the various organizational documents that customarily must be filed with the secretary of state or similar office prior to conducting business in a state,¹⁰¹ Vermont adds a unique form—the Tax and Child Support Certification.¹⁰² This form imposes two conditions on licensure. The first is that “a license cannot be issued or renewed until and unless the applicant certifies in writing that it . . . is in good standing with respect to any and all taxes owed to the State of Vermont.”¹⁰³ The second is that “[a] license cannot be issued or renewed until and unless the applicant certifies in writing that he or she is not subject to a child support order or if subject to . . . [one is] in full compliance.”¹⁰⁴

From the standpoint of mortgage brokers and lenders, these jurisdiction-specific conditions precedent to licensure are problematic because they impair the uniformity of the MU Forms, which in turn means that the compliance burden relief promised by uniform forms is not fully realized. The MBA expresses this concern saying, “MBA is supportive of the [NMLS] initiative, but is concerned that current

100. MONT. CODE ANN. § 32-9-121 (2007).

101. These documents include certificate of incorporation, certificate of good standing, certificate of assumed business name, etc. The requirement that such documents be filed with a state should be excluded from the discussion about the effect of jurisdiction-specific requirements on the uniformity of the MU Forms as those requirements are not specific to mortgage brokers or lenders and apply to all business entities.

102. Jurisdiction Specific Forms for Vermont, Tax and Child Support Certification (Oct. 2001), <http://www.bishca.state.vt.us/BankingDiv/lenderapplic/ataxcert.pdf>.

103. *Id.*

104. *Id.*

state statutes in some states may cripple the initiative from truly streamlining and unifying state level licensing.”¹⁰⁵

2. *Overly Burdensome Disclosure Requirements*

In addition to objecting to the scope of persons who are required to make the disclosures required by the MU Forms, residential mortgage industry participants also object to the breadth of information that must be disclosed, especially with regard to question eight of Form MU1 and with regard to essentially all of Forms MU2 and MU4.¹⁰⁶ NAMB points to the following required information as examples of MU Form disclosures that it considers “burdensome and intrusive”:

- a. Employment history for the previous 10 years, including any periods of unemployment or part-time employment;
- b. Address and residence information for the previous 10 years;
- c. Whether individuals have filed for personal bankruptcy in the previous 10 years; and
- d. Whether individuals have ever been charged with a misdemeanor criminal offense—even if they were never convicted.¹⁰⁷

In both the NAMB Position Statement and the MBA Issue Paper, these disclosure requirements are grouped under the categories of privacy and security concerns.¹⁰⁸ With regard to the latter, NAMB

105. Mortgage Bankers Association, *MBA Participates in CSBS' Residential Mortgage Lending Initiative*, MBA NEWSLINK, Dec. 5, 2005, <http://www.mortgagebankers.org/mbanewslink/issues/2005/12/05.asp> [hereinafter MBA NewsLink].

106. For example, regulator websites in North Carolina, Vermont, and Washington provide links to and instructions for the MU4 Form; regulator websites in New Hampshire and Wyoming do not.

107. NAMB Position Statement, *supra* note 63.

108. Two additional concerns voiced about the scope of disclosures relate to uneven application among loan originators and lack of uniformity among state regulations. NAMB contends that “uniform standards of professionalism and conduct should be developed and applied to every mortgage originator.” NAMB Position Statement, *supra* note 63. This objection is taken up in subsection 6 below, which discusses channel bias. The non-uniformity objection rests on the fact that some states require

states that “[i]t is important to limit the amount of personal information . . . collected by state regulators and maintained in the SRR” because the “excessive collection and retention of personal information makes the database ripe for a potential security breach or inappropriate disclosure of personal information.”¹⁰⁹ This criticism is considered in the next subsection of this Article.

With regard to concerns about privacy, the principal industry criticism of the MU forms’ disclosure requirements is that they are more extensive than the disclosure requirements currently in place in some, or even most, states. In its Position Statement, NAMB notes:

A great deal of the information that originators will provide regulators on CSBS/AARMR’s proposed uniform licensing forms is not required by the laws of every state. The uniform licensing forms will enable participating state regulators to collect personal information from originators that they may be unauthorized to collect. CSBS and AARMR must ensure that participating state regulators only collect the information that is required by the laws of their particular state.¹¹⁰

MBA also makes this objection in its Issue Paper, stating that “[t]he proposed forms are largely viewed by the industry as overly burdensome, as they do not average the regulatory burden of the states, but instead use the most complex form as a model and base.”¹¹¹ The “extra” information collected by the MU Forms is especially problematic for NAMB with regard to disclosures of licensee misconduct—a matter that has implications for the licensee database. NAMB observes that “[s]tandards of conduct and professionalism vary from state to state, thus the conduct of licensees in one state may result in a complaint being registered in the SRR, while

Form MU4 and have individual originator licensing while other states do not. This objection is addressed in subsection 1 above.

109. *Id.* “SRR” refers to the State Regulatory Registry, LLC, which CSBS/AARMR formed to manage the national database of mortgage licensees.

110. *Id.*

111. MBA Issue Paper, *supra* note 64.

the same conduct in another state would not.”¹¹² “Who,” NAMB asks, “will determine what negative information should be included in the database and what should not?”¹¹³ For NAMB, the only “negative information” that should be disclosed on the MU forms and that should appear in the SRR is “formally adjudicated disciplinary actions . . . not mere threats, . . . allegations, or consumer complaints.”¹¹⁴ On that basis, NAMB objects to the MU Forms’ requirement that a licensee disclose whether he or she has ever been *charged with* specified misdemeanors,¹¹⁵ has ever been *named* as a defendant in financial services-related litigation or mediation initiated by a consumer,¹¹⁶ or has ever voluntarily terminated employment following *allegations* of wrongdoing.¹¹⁷

3. *Invasion of Privacy, Risk of Information Inaccuracy, and Responsibility for Security Breaches*

Although frequently listed as separate criticisms of the NMLS, industry concerns about privacy, inaccuracy, and responsibility for security breaches are intertwined and will be discussed together. With regard to privacy concerns, MBA’s Issue Paper notes that “[t]he database will contain a large amount of personal information” and because the “[c]onstruction and management of the database will be outsourced to a third party, the NASD,”¹¹⁸ MBA is concerned that “the system has the potential for security breach and inappropriate disclosure of personal data.”¹¹⁹ NAMB expresses strikingly similar criticisms in its Position Statement.¹²⁰

112. NAMB Position Statement, *supra* note 63.

113. *Id.*

114. *Id.*

115. *Id.*; see Form MU1, *supra* note 19, at question 8(B)(2); Form MU2, *supra* note 19, at question 8(G)(2); Form MU4, *supra* note 19, at question 9(F)(1).

116. See Form MU2, *supra* note 19, at question 8(L); Form MU4, *supra* note 19, at question 9(L).

117. See Form MU2, *supra* note 19, at question 8(M); Form MU4, *supra* note 19, at question 8(M).

118. MBA Issue Paper, *supra* note 64.

119. *Id.*

120. NAMB Position Statement, *supra* note 63.

In addition to concerns about maintaining the privacy of information included in the database, licensees also have concerns about the accuracy of that information. NAMB observes that “CSBS/AARMR has not identified how complaints can be filed against licensees.”¹²¹ It asks, “How will complaints be registered on the database and how long will those complaints reside on the database?”¹²² Additionally, NAMB notes that “CSBS/AARMR has also failed to establish an appeals process for licensees who have had a complaint registered against them in the database.”¹²³ According to NAMB, a “formal appeals process is needed to ensure the accuracy and authenticity of the information collected and maintained in the SRR.”¹²⁴

With regard to liability for a breach of database security that allows private information about a licensee to become public, the MBA Issue Paper likewise notes that the mortgage industry “has no relationship with the vendor [NASD] who will construct and manage the database.”¹²⁵ As a result, MBA maintains that it is “unclear who will be held responsible for security breaches.”¹²⁶

4. *Expense and Value*

The start-up costs for the NMLS have been estimated to be \$4.3 million. This expense will be borne by the participating states¹²⁷ and is more of an issue for state regulators as they balance the cost of participation with expected benefits than it is for mortgage industry participants. For mortgage industry licensees, it is the annual operating costs that are the main cause of concern. CSBS/AARMR estimates the annual operating expense to be \$6.5 million.¹²⁸ NAMB, which believes the annual operating costs could be between \$6.5

121. *Id.*

122. *Id.*

123. *Id.*

124. NAMB Position Statement, *supra* note 63.

125. MBA Issue Paper, *supra* note 64.

126. *Id.*

127. AFSA STATE GOVERNMENT AFFAIRS FORUM, *supra* note 34, at 22.

128. *Id.*

million and \$7.5 million,¹²⁹ points out that “[t]hese annual operating costs will be covered by initial set-up fees and application processing fees, which will be paid by licensees in every participating state.”¹³⁰ While NAMB emphasizes the size of the expense licensees will be expected to cover, MBA’s criticism goes more to the value expected to be obtained for the money. Specifically, the criticism contained in MBA’s Issue Paper is that “[i]t is questionable whether there are cost benefits or efficiencies gained commensurate with such a large annual cost.”¹³¹

5. *Inadequate Industry Input*

NAMB and MBA criticisms of the NMLS are connected to their perception that the mortgage lending industry has been excluded from meaningful participation in the development of the System. In its Position Statement, NAMB states:

In summer 2006—more than eighteen months into the project—NAMB was asked to participate in a CSBS/AARMR-formed industry working group. NAMB is pleased to participate in this process but fears that it is not a full partner in considering this proposal. NAMB believes that the substantive structure of the system was developed without any real opportunity for NAMB’s input or concerns to be addressed.¹³²

NAMB’s criticism is relevant because of the impact it could have on ongoing efforts to finalize the NMLS and to implement it on the broadest possible basis. In its Position Statement, NAMB describes in strident terms the conditions of its future involvement. While stating that it “looks forward to maintaining an open dialogue with CSBS, AARMR, and the [participating] state regulators,”¹³³ NAMB cautions

129. NAMB Position Statement, *supra* note 63.

130. *Id.*

131. MBA Issue Paper, *supra* note 64.

132. NAMB Position Statement, *supra* note 63.

133. *Id.*

that its “continued participation in the CSBS/AARMR effort should not be considered an endorsement of the current proposal.”¹³⁴ NAMB then adds an ominous warning, apparently directed at statements its leaders feel exaggerate claims of industry endorsement of the NMLS: “NAMB will not tolerate CSBS, AARMR, or any other entity or representative misrepresenting NAMB’s positions and policies on the proposed registry and licensing scheme.”¹³⁵

NAMB’s Position Statement confirms the steps it has taken, both internally and among its state-level affiliates, to institutionalize its opposition to the NMLS. The Position Statement declares:

On November 4, 2006, the NAMB Delegate Council voted unanimously to support the tenants [sic] of the NAMB statement and to present and recommend adoption of the NAMB statement to all forty-nine state associations. Those states which agree to adopt this statement are committing to oppose any effort to pass enabling legislation or regulations that fail to mirror the principles outlined in the NAMB statement.¹³⁶

For government regulators considering participation in the NMLS, the political impact of this threat is not inconsequential.¹³⁷

MBA, on the other hand, conditions its support of the NMLS on the accomplishment of two reforms, one of which is in direct conflict with the conditions for support imposed by NAMB. MBA states that for it to support the CSBS/AARMR project there must be “comprehensive reform of state licensing”¹³⁸ built around two propositions. The first proposition relates to an on-going dispute between MBA and NAMB about the similarity or dissimilarity of mortgage lenders

134. *Id.*

135. *Id.*

136. NAMB Position Statement, *supra* note 63.

137. For a discussion of the political impact of industry opposition to the NMLS, see discussion of the Texas Finance Commission Meeting Minutes, *infra* notes 169–188 and accompanying text.

138. MBA Issue Paper, *supra* note 64.

and mortgage brokers.¹³⁹ In its Issue Paper, MBA states that a necessary component of comprehensive licensing reform is:

[A] recognition and application by CSBS/AARMR members of the concept that there are fundamental differences between mortgage bankers and mortgage brokers and that those differences must be recognized and incorporated into any processes that the project creates including new legislation and/or regulations that are generated during its implementation.¹⁴⁰

As noted below, MBA contends that the retained investment risk, reputation concerns, and employee screening practices that apply to mortgage lenders, but not to mortgage brokers, obviate the need for the individual-level regulatory oversight that is appropriate for brokers.¹⁴¹

The second MBA proposition is even more sweeping and emerges from tensions between the national and local aspects of the residential mortgage lending business and between the national and local interests in regulation. With regard to both business practices and locus of regulation, MBA emphasizes the national view over the local. The MBA Issue Paper states that “any new licensing system that is imposed on the industry must also reflect the fact that the mortgage banking industry is no longer a state-based industry, but one that operates on a national and international scope.”¹⁴² MBA calls for a regulatory regime that has as its goal “a one-stop shop where licenses can be obtained from a state utilizing standardized background checks, one set of fingerprints, and [uniform] minimum education requirements”¹⁴³ and that also standardizes the “various

139. This issue is discussed in detail *infra* at notes 145–168 and accompanying text.

140. MBA Issue Paper, *supra* note 64.

141. *See generally Licensing and Registration Hearing, supra* note 11, at app. 42–48 (prepared statement of Teresa Bryce, Mortgage Bankers Association).

142. MBA Issue Paper, *supra* note 64; *see also Licensing and Registration Hearing, supra* note 11, at 6 (testimony of Teresa Bryce, Mortgage Bankers Association, describing the modern mortgage loan market as a “sophisticated residential real estate finance system” that involves “transferring national and international capital to homebuyers anywhere in the country”).

143. MBA Issue Paper, *supra* note 64.

other state requirements.”¹⁴⁴ This one-stop shop could be achieved, MBA says, either by creating a regulatory regime that is fully uniform for all states or by creating a fully reciprocal regime, whereby licensure in any one state would be recognized by all others.

6. *Origination Channel Bias*

Both MBA and NAMB accuse the NMLS of bias by favoring one loan origination channel over the other, but they express opposing opinions about which channel is being treated unfairly. Mortgage brokers contend they have been “singled-out for inclusion in the SRR” because the NMLS permits institutional level licensing for some mortgage originators. Specifically, NAMB contends that the CSBS/AARMR licensing system must include all loan originators—“every individual that handles a form 1003 loan application”¹⁴⁵—including “all federal and state-regulated banks, and their subsidiaries, along with credit unions, mortgage bankers, lenders, brokers, and all employees of these entities.”¹⁴⁶ MBA, on the other hand, contends that by permitting individual level licensing the NMLS “automatically favors employee licensing, and does not recognize the difference between large lenders . . . and brokers” and thus “places lenders at a competitive disadvantage to brokers, who do not have bonding or net worth requirements.”¹⁴⁷

The question in this conflict is whether state licensing requirements should be imposed uniformly for all mortgage industry participants at the individual level or whether institutional differences justify licensing mortgage lenders at the business entity level while

144. *Id.*

145. Written Comments of Harry H. Dinham of NAMB, dated Aug. 15, 2006, [hereinafter Dinham Written Comments] submitted pursuant to request for comment by the Board of Governors of the Federal Reserve System to Federal Reserve Board concerning the home equity market and the efficacy of existing federal and state laws and regulations (Federal Reserve Docket No. OP-1253), at 2, 4 (Aug. 15, 2006).

146. NAMB Position Statement, *supra* note 63.

147. MBA Issue Paper, *supra* note 64. It is inaccurate to say that mortgage brokers do not have bonding requirements. However, it is accurate to say that mortgage lenders are generally required to post a larger surety bond than mortgage brokers and that mortgage lenders are generally subject to net worth requirements that do not apply to mortgage brokers.

licensing mortgage brokers at the individual level. The disagreement between MBA and NAMB over this question is deep, and the parties assert their positions whenever possible, as evidenced by testimony at congressional hearings¹⁴⁸ and by statements made at Federal Reserve Board public forums.¹⁴⁹

NAMB's position is based on its conclusion that the existence of numerous players who originate loans in today's market has produced "consumer confusion."¹⁵⁰ With specific regard to mortgage lenders, NAMB says "the line between brokers and lenders has been blurred"¹⁵¹ as mortgage lenders now sell up to 85% of their residential loans on the secondary market rather than holding the loans in their own portfolios.¹⁵² Thus, for at least 85% of loans "mortgage lenders operate functionally in the same manner as mortgage brokers."¹⁵³ Specifically, mortgage lenders and brokers both "present an array of available loan products to the consumer, close the loan and then almost instantaneously sell the loan to the secondary market."¹⁵⁴

MBA sees the situation quite differently. While NAMB focuses on general similarities between mortgage lenders and brokers, MBA focuses on concrete differences. In a hearing on Licensing and Registration in the Mortgage Industry, held by the House Subcommittee on Housing and Community Opportunity in late 2005, the co-chair of MBA's State Licensing Task Force, Teresa Bryce, dedicates most of her testimony to the task of distancing mortgage

148. Compare Testimony of Joseph L. Falk of NAMB at the Licensing and Registration Hearing, *supra* note 11, with Testimony of Teresa Bryce of MBA at the same hearing.

149. See *FRB Sustainable Homeownership Forum, June 9, 2006, supra* note 59, at 120–21, 151–53 (comments of Joseph L. Falk of NAMB).

150. Dinham Written Comments, *supra* note 145, at 7.

151. *Id.* at n.5.

152. See *Subprime and Predatory Lending Hearing, supra* note 4, at 4 (testimony of Harry H. Dinham, President of NAMB).

153. Dinham Written Comments, *supra* note 145, at 7, n.5.

154. *Id.* at first page of an unnumbered two-page attachment entitled "The Regulation & Oversight of the Mortgage Broker Industry." There has been significant analysis of the secondary market's role in predatory lending. See, e.g., Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503 (2002); Engel & McCoy, *supra* note 4; Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185 (2007).

lenders from mortgage brokers. Ms. Bryce emphasizes that “[m]ortgage bankers underwrite applicants and lend their own funds or funds they have borrowed.”¹⁵⁵ Thus, from “the moment a loan has closed, mortgage bankers assume the credit, interest rate, compliance, and fraud risk associated with the loan.”¹⁵⁶

Even if a mortgage lender sells a loan on the secondary market, and thereby transfers the interest rate and credit risk to the buyer, the lender “maintains nearly all of the quality, compliance, and fraud risk.”¹⁵⁷ The lender will even retain the interest rate and credit risk, according to Ms. Bryce, because of representations and warranties that the secondary market buyer requires. Thus, “[i]f the investor discovers problems, such as non-compliance with applicable law or underwriting guidelines, or fraud, the investor can, and typically does, force the originating mortgage banker to repurchase the mortgage or enter into an indemnity agreement.”¹⁵⁸ In addition, Ms. Bryce states that mortgage lenders are subject to “several levels of regulatory oversight” and to “economic regulation by the marketplace.”¹⁵⁹

By contrast, Ms. Bryce contends that mortgage brokers “do not have capital at risk in a transaction and their responsibility for a loan typically ends when a loan closes and they receive payment.”¹⁶⁰ She adds that mortgage brokers are not subject to federal oversight and, because mortgage brokers do not have repurchase or indemnity obligations, are not subject to economic regulation.¹⁶¹ Of all the requirements found in the “thickening web of burdensome state licensing laws,”¹⁶² the one Ms. Bryce identifies as particularly objectionable is some states’ movement “beyond mortgage banking

155. *Licensing and Registration Hearing*, *supra* note 11, at 2 (testimony of Teresa Bryce, Mortgage Bankers Association).

156. *Id.*

157. *Id.* at 3.

158. *Id.*

159. *Id.*

160. *Id.* at 4.

161. *Licensing and Registration Hearing*, *supra* note 11 (testimony of Teresa Bryce, Mortgage Bankers Association).

162. *Id.* at 8.

corporate licensing . . . [to] requir[ing] the licensure of individual loan officers.”¹⁶³ This movement toward greater state regulation is, for MBA, both unnecessary and undesirable. It is unnecessary because of “the accountability that mortgage banking companies have for their loan officers and employees due to the economic regulation of the marketplace and the periodic audits by the states themselves.”¹⁶⁴ Because of this accountability, mortgage lenders maintain that they engage in “rigorous background checks, continuous training, and ongoing performance monitoring”¹⁶⁵ that mortgage brokerage companies do not.

According to MBA, greater state regulation in the form of individual-level licensing is also undesirable because it can lead to regulatory migration. Regulatory migration occurs when mortgage lenders “restructure under a Federal charter so as to avoid . . . [the] strict licensing regime [of the states], as the Federal banking agencies do not require licensure of individual loan officers.”¹⁶⁶ Ms. Bryce forecasts that the unfortunate result of regulatory migration will be that the “mortgage banking entrepreneurial spirit will thus be somewhat constrained not by the realities of the marketplace, but by the force of duplicative regulation.”¹⁶⁷ Based on these factors, MBA’s position is that “mortgage bankers are different than mortgage brokers and these differences underscore the need for mortgage bankers and mortgage brokers to be subject to different oversight regimes.”¹⁶⁸

163. *Id.* at 6.

164. *Id.* Ms. Bryce also asserts that states have extended individual level licensing to “support staff working within a licensed mortgage banking company.” *Id.* at 6. This statement is not accurate as state licensing statutes routinely exclude support and clerical personnel from the definition of “licensee.” For example, North Carolina’s Mortgage Lending Act imposes licensure requirements on mortgage lenders and mortgage brokers. This Act specifically excludes from licensure “[a]ny employee of a licensee whose responsibilities are limited to clerical and administrative tasks for his or her employer and who does not solicit borrowers, accept applications, or negotiate the terms of loans on behalf of the employer.” N.C. GEN. STAT. § 53-243.01(8)(b) (2005).

165. *Licensing and Registration Hearing, supra* note 11, at 6 (testimony of Teresa Bryce, Mortgage Bankers Association).

166. *Id.* at 8.

167. *Id.*

168. *Id.* at 7.

NMBA's and MBA's positions on individual-level versus institutional-level licensing are naturally determined by self-interest. Accordingly, their arguments must be examined critically and with reference to an external norm. For this Article, that norm is effective consumer protection, and it is applied to the channel bias issue in Part III.

B. State Regulator Reservations

State regulators have been less openly vocal in their criticisms of the NMLS than mortgage industry participants. The paucity of regulator criticism may be due in part to the fact that heads of forty state agencies have expressed their intention to participate in the NMLS.¹⁶⁹ Regulators in these states would not be inclined to impeach that decision. Further, unlike industry participants who act under an imperative to protect their turf, regulators in uncommitted states have no such incentive to speak out. In fact, they have an incentive to say little as their states take a wait-and-see approach. The minutes of a meeting of the Texas Finance Commission, however, provide a glimpse into the reservations that state regulators may have about the NMLS.¹⁷⁰

At a briefing session of the Texas Finance Commission held on June 8, 2006, one of the agenda items was "Discussion of and Possible Vote on the National Mortgage Licensing Database Project of CSBS and AARMR."¹⁷¹ The meeting minutes reveal the discussion began on an affirming note as the Chairman stated that "with a good understanding of [the NMLS] project and the combined support of the three [state finance] agencies and the Finance Commission,"¹⁷² he anticipated that the "key focus moving forward [would] be to identify potential legislative initiatives resulting from participation in the National Mortgage Licensing Database

169. See Project Status, *supra* note 35.

170. Texas Finance Commission Meeting Minutes, *supra* note 54.

171. *Id.* at 2.

172. *Id.*

project.”¹⁷³ The minutes also confirm that the commissioners discussed the “advantages of standardized forms and the long term benefit of participation to state agencies”¹⁷⁴ and recognized that early participation in the project would enable the state “to have input to issues and their remedies prior to implementation.”¹⁷⁵

As the meeting progressed, the minutes reflect a more restrained tone as concerns and unanswered questions began to emerge. One area of concern was the quality of the data that would be included in the database. A commissioner noted that “the quality of the data is dependent upon the type of data loaded into the database[,] such as enforcement actions.”¹⁷⁶ Although “[o]ne of the goals of the project is for state agencies to agree to share all pertinent information needed to make an informed licensing decision,”¹⁷⁷ the commissioners acknowledged that state laws and policies might differ with regard to the types of information reported to the database. One commissioner identified the quality of data as “a critical point when deciding whether to participate or not.”¹⁷⁸

The commissioners also expressed reservations about whether the NMLS would provide appreciable regulatory benefit to the state. The Commissioner of the Texas Department of Savings and Mortgage Lending (SML) stated that while “the greatest [purported] benefit to this project as proposed is regulator access to enforcement actions from licensees crossing state lines,”¹⁷⁹ his department currently “contacts other state regulators by phone and has experienced no difficulty in gathering the necessary information to make an informed decision on a potential licensee.”¹⁸⁰ In his view, “the current database used by the SML is flexible and meets their current and projected needs.”¹⁸¹ As a result, “participation in this [NMLS] project would be

173. *Id.*

174. *Id.*

175. *Id.*

176. Texas Finance Commission Meeting Minutes, *supra* note 54, at 2.

177. *Id.*

178. *Id.*

179. *Id.* at 3.

180. *Id.*

181. *Id.*

as an enhancement to their current database, not a replacement.”¹⁸² Although this Commissioner said the SML “embraces the overall objective [of the NMLS] and will remain involved in the CSBS/AARMR project, [he] does not see a perceived advantage over the current licensing system that the Department uses today.”¹⁸³

The commissioners also considered the utility of the NMLS with regard to the costs of participation versus the prospect of future cost savings. The discussion acknowledged that participation in the NMLS might result in additional fees or surcharges to the state, the amount of which could not be known at this time as the system was in its initial stages of development and “the business plan is not yet finalized.”¹⁸⁴ Similar uncertainty applied to the realization of future costs savings, which might be offset to an unknown degree by the possible need for “additional FTEs”¹⁸⁵ that would be required for state agencies to implement the NMLS.

Two other concerns, likely intertwined in the minds of the commissioners, are (1) the need for legislative authorization to participate in the NMLS and legislative amendments to bring existing statutes into conformity with NMLS forms and procedures and (2) the opposition of state and national mortgage industry trade groups to the NMLS. Although the legislative changes that would be needed if Texas were to decide to participate in the NMLS are not specifically described in the minutes, the commissioners acknowledge that enabling legislation and conforming amendments will be necessary.¹⁸⁶

Concern about the opposition of the mortgage brokerage industry is a matter more of pragmatism than of theory, but it is not on that account unimportant. Consent of the one to be regulated is obviously not a prerequisite for regulation, but opposition that is translated into effective political action is just as obviously an impediment to enacting the enabling legislation necessary to authorize participation

182. Texas Finance Commission Meeting Minutes, *supra* note 54, at 3.

183. *Id.* at 4.

184. *Id.* at 3.

185. *Id.* at 4.

186. *Id.* at 3.

in the NMLS. In the eyes of one commissioner, “the SML does not have stakeholder support to participate or to pass the costs on to the affected industries.”¹⁸⁷ As a result, he “does not realistically see participation.”¹⁸⁸

Faced with uncertainties about the degree of enhancement of regulatory effectiveness, the cost of system start-up and maintenance compared with future administrative savings, and the difficulty of securing enabling legislation over the opposition of the mortgage industry, the Texas Department of Finance concluded that it did “not anticipate any legislative initiatives related to [the NMLS] until the 2009 legislative session”¹⁸⁹ and that it would “leave the options open until further information is gained.”¹⁹⁰

Texas remains one of the thirteen states that have not committed to participate in the NMLS, and the questions posed and concerns expressed by the Texas Finance Commission are instructive.

III. SIFTING THROUGH THE RHETORIC: ANALYZING THE BENEFITS AND LIMITATIONS OF THE NMLS

Two related documents provide concise expressions of CSBS/AARMR’s responses to NAMB’s and MBA’s criticisms of the NMLS. These are the Statement of Principles and Related Sample Legislative Language¹⁹¹ (NMLS Principles) and an accompanying Media Release.¹⁹² The Media Release clearly states that the purpose

187. *Id.* at 4.

188. Texas Finance Commission Meeting Minutes, *supra* note 54, at 4.

189. *Id.*

190. *Id.*

191. CSBS/AARMR Residential Mortgage Licensing System Statement of Principles and Related Sample Legislative Language (Feb. 2007) http://www.csbs.org/AM/Template.cfm?Section=Mortgage_Licensing&Template=/CM/ContentDisplay.cfm&ContentID=10055 [hereinafter Statement of Principles and Sample Legislative Language]. CSBS/AARMR prepared the Statement of Principles in February of 2007 to clarify the distinction between enabling legislation (a proper concern for CSBS/AARMR) and substantive mortgage regulatory legislation (a matter left to state determination) and to assist states with the preparation of enabling legislation.

192. Press Release, CSBS, CSBS/AARMR Set Principles for State Legislation on Mortgage Licensing System (Feb. 20, 2007), http://www.csbs.org/AM/Template.cfm?Section=Mortgage_Licensing&Template=/CM/HTMLDisplay.cfm&ContentID=10054 [hereinafter CSBS/AARMR February 20, 2007, Press Release].

for issuing the NMLS Principles is to “dispel many of the concerns that have been raised to date about the System.”¹⁹³ There is little doubt that those concerns are the ones raised in NAMB’s Position Statement and MBA’s Issue Paper. CSBS/AARMR’s responses, while better reasoned than the mortgage industry’s criticisms, nonetheless require a degree of correction and in some instances are aided by an elaboration on related issues and policies.

A. Insufficient Compliance Burden Relief

The central idea in this criticism is that the NMLS provides insufficient compliance burden relief because each of the MU Forms is subject to additional jurisdiction-specific requirements. Both the existence of that limitation on uniformity and the diversity of the state-imposed requirements are undeniable. At the same time, however, three factors limit the influence of this criticism. The first limitation is that the industry criticizes CSBS/AARMR for failing to achieve a result that was never a goal of the NMLS—the imposition of nationwide uniformity with regard to mortgage broker and mortgage lender licensing laws. CSBS/AARMR has consistently affirmed the “primacy of states’ role in determining how best to supervise mortgage lending in their state.”¹⁹⁴ Furthermore, given the inherent sovereignty of each state implicit in horizontal federalism, any project that states might undertake on a collaborative basis must necessarily recognize each state’s power to determine the terms on which it will participate. It is an unconvincing rhetorical strategy for NAMB and MBA to accept and even promote state-level regulation and then criticize CSBS/AARMR for failing to accomplish a goal that is beyond the states’ power.

The second shortcoming of the mortgage industry’s criticism is that it creates a false binary choice between maximal compliance burden relief and no relief at all and disregards the gains in uniformity the MU Forms do produce. Even though licensees may be

193. *Id.*

194. *Id.*

faced with some jurisdiction-specific requirements, the number of those requirements is small in comparison with the number of requirements held in common by states that adopt the MU Forms. Furthermore, even though thirteen states have not yet committed to participating in the NMLS, forty state agencies in thirty-seven states plus the District of Columbia have committed.¹⁹⁵ That level of participation should produce a meaningful net gain in compliance burden relief for mortgage industry licensees.

The third deficiency of the inadequate compliance burden relief criticism is that it fails to consider future developments in the NMLS, both with regard to the evolution of the MU Forms and to additional components planned for the System. The NMLS can be expected to evolve as more states participate. As critical mass is attained, even more states will be attracted, and increased participation can be expected to produce a leveling effect on state regulatory regimes. Jurisdiction-specific requirements that are perceived as productive can become incorporated into the MU Forms, while states that impose non-uniform requirements will likely be motivated to consider whether those requirements are worth the administrative costs that result from deviating from the standardized forms and procedures of the NMLS. Furthermore, the NMLS eases the compliance burden by identifying the relevant jurisdiction-specific requirements. Locating these requirements must be seen as a major benefit for licensees. Finally, CSBS/AARMR will be motivated to reconsider requirements in the MU Forms that are perceived as driving states to adopt non-uniform provisions and to determine whether those requirements are worth the disharmony they produce.

In addition to the expected evolution of existing components of the NMLS, there are also uniformity-encouraging components that have been planned but have not yet been implemented. For example, CSBS/AARMR is working to “develop[] standard statutory and regulatory policies that would be endorsed for use in all participating

195. See Project Status, *supra* note 35.

states.”¹⁹⁶ The first phase of this project, which is proceeding parallel with the development of the NMLS, involves the cooperative efforts of twenty-three state regulatory agencies to develop standardized education and testing requirements for mortgage professionals.¹⁹⁷ The Mortgage Industry National Uniform Testing and Educations Standards (MINUTES) initiative seeks to establish “uniform standards and streamline the process for licensees to comply with [education and testing] standards” so that “licensed mortgage providers are held to the same standards and expectations, regardless of the state in which they make loans.”¹⁹⁸ Once again, as critical mass builds, a consensus of opinion among state regulators should emerge with regard to education and testing standards. There is no guarantee that this consensus will effect a complete leveling of inter-state differences, but growing consensus will translate into some measure—and potentially a large measure—of the uniformity and compliance burden relief that licensees seek.

B. Overly Burdensome Disclosure Requirements

The essence of this criticism of the NMLS is that the disclosure requirements of the MU Forms exceed the requirements imposed by some states. Even if this criticism is accurate for a subset of states, it is important to note that it is founded on an unstated premise—states with few disclosure requirements should be normative and the level of disclosure the NMLS should seek is that of the lowest common denominator. In other words, when it comes to the development of a regulatory regime, the residential mortgage industry would like to see a race to the bottom.

CSBS/AARMR's decision to seek a greater degree of disclosure through the MU Forms than some states currently require also arises from a premise, which is that by promoting more rather than less

196. CSBS/AARMR February 20, 2007, Press Release, *supra* note 192.

197. *Subprime and Predatory Lending Hearing*, *supra* note 4, at 10 (testimony of Steven L. Antonakes).

198. *Id.*

disclosure, the MU Forms encourage states to participate in a regulatory race to the top. CSBS/AARMR displays this goal when it states that one purpose of the MU Forms is to “improve consistency across states as to the type and quality of information being provided to regulators by mortgage lenders and brokers”¹⁹⁹ The MU Forms do not seek uniformity alone; as indicated by the reference to quality, they seek uniformity at an elevated level. This goal is always subject to the primacy of state self-determination, but to the extent that increased participation creates a critical mass, consensus about the appropriate level of disclosures on the MU Forms should emerge in much the same manner as with other matters of uniformity. Again, NAMB and MBA tend to view the disclosure requirements of the NMLS in static terms and to ignore the process elements involved in development and implementation of the system, including their own input into that process.

C. Privacy, Accuracy, and Responsibility for Security Breaches

Mortgage industry criticisms of the NMLS concerning privacy and responsibility for security breaches focus on the transmission of personal information about licensees outside the control of state governmental agencies and into the possession of “a third-party vendor, with no relationship to the real estate finance industry.”²⁰⁰ Mortgage lenders and mortgage brokers complain that by involving this third party the NMLS increases the risk of security breaches but fails to provide a way to hold anyone accountable. Rather than automatically equating a transfer of responsibility for management of information with a likelihood of security breaches, a more cogent formulation of the mortgage industry’s concern would be to ask whether the NMLS provides controls on access to information and whether it provides remedies for mishandling of information that are comparable to those controls and remedies currently in place in

199. Kentucky News Release, *supra* note 45, at 30.

200. NAMB Position Statement, *supra* note 63.

participating states. When viewed from this perspective, the industry's objections appear more illusory than real.

One basis for this conclusion is that the industry fails to acknowledge that "[l]icense information contained in the CSBS/AARMR Residential Mortgage Licensing System will be owned by the state agency through which it was submitted and will be subject to that particular state's privacy laws."²⁰¹ The NMLS thereby preserves the access controls and remedies that currently protect licensees. To further reinforce the protections afforded to information collected by the NMLS, CSBS/AARMR has drafted proposed legislation for participating states that provides, "No person shall be authorized to obtain information from the multi-state database or initiate any action based on information obtained from the multi-state database that they could not otherwise have obtained or initiated based on information currently available to them under existing state law."²⁰²

Furthermore, in the event a security breach does occur, licensees are not left without recourse, as the NMLS "will implement and maintain written data security and breach notification policies" that will be "consistent with current requirements for state third-party contractors."²⁰³ To ensure transparency of those policies and to demonstrate full compliance with state law, CSBS/AARMR will provide a copy of the contract between the SRR and the applicable regulatory agency of each state. In short, current levels of privacy protection and of accountability for security breaches are unchanged by the NMLS database. What was protected by state law before submission to the database remains protected in the same way by the same law after submission.

The mortgage industry's objection that the database will contain inaccurate and uncorrectable information seeks to create controversy by improperly characterizing the type of information the NMLS will make available to the public. CSBS/AARMR has clearly stated that

201. Statement of Principles and Sample Legislative Language, *supra* note 191, at 1.

202. *Id.*

203. *Id.* at 2.

the database will serve as a repository of only “publicly adjudicated enforcement actions.”²⁰⁴ Thus, before any information is incorporated into the database, a licensee will already have had the opportunity to challenge any charges he or she believes are unfounded via state administrative and judicial appeal procedures. The idea that the NMLS receives any complaints directly from consumers or has any adjudicatory authority is simply wrong. Because the NMLS database will contain only information obtained from state regulators, it does not alter the complaint filing and resolution procedures, including appeals, that are part of participating states’ laws.

It is true that some parts of the MU Forms require a licensee to disclose matters that are less than fully adjudicated, including charges of a misdemeanor offense involving financial wrongdoing and consumer complaints that were settled “for any amount.”²⁰⁵ The former could potentially include unsubstantiated claims, and the latter could include unproven claims that were settled for nuisance value rather than on the basis of merit. Such scenarios, in a licensee’s eyes, could result in an inaccurate picture of a licensee’s behavior and thereby support the industry’s call for procedures that would allow a licensee to challenge adverse information. The problem with this position, however, is that it fails to take into account the fact that different categories of database users will have different levels of access to information, especially to fully-adjudicated as opposed to less-than-fully adjudicated claims. The former, which do not present accuracy problems precisely because they have been publicly adjudicated, will be made available to the public via the NMLS database. The latter do not present the problem the mortgage industry describes because information that has not been fully and publicly adjudicated is restricted to state regulators. The mortgage industry

204. CSBS October 4, 2006, Press Release, *supra* note 7. Indeed, from the consumer’s standpoint, the NMLS database is deficient for precisely the opposite reason—it does not make enough information available. By failing to include any information about financial service related claims that were filed against lenders and brokers but were settled and dismissed prior to final adjudication, the database denies consumers information that is clearly relevant to their decision concerning whom to hire or to avoid.

205. See *supra* notes 106–17 and accompanying text.

does not acknowledge this critical distinction between groups and the information to which each will have access.

Making some types of less-than-fully-adjudicated information available to state regulators can be justified on three grounds. First, the scope of such information is restricted. The disclosure requirement involves only charges relating to specified activities: misdemeanors “involving financial services or a financial services-related business; any fraud, false statements, or omissions; any theft or wrongful taking of property; bribery; perjury; forgery; counterfeiting; extortion; or a conspiracy to commit any of these offenses.”²⁰⁶ Beyond these activities are a wide range of other behaviors that need not be revealed and will remain private as far as the NMLS is concerned.

Second, the charges that must be disclosed are directly relevant to a person’s application for licensure as a mortgage broker or mortgage lender. The very nature of the lending process calls for heightened levels of honesty, as (1) mortgage lenders and mortgage brokers receive, hold, and distribute a consumer’s money; (2) lenders and brokers act in concert with each other and with third parties in matters that directly impact the availability and cost of credit for consumers; and (3) lenders and brokers have extensive knowledge of the mortgage lending process not shared by the vast majority of consumers, which necessarily leads to consumer reliance on lender and broker honesty with regard to the largest and most complicated financial transaction most people ever experience.

Third, as part of the license application or renewal process, an applicant will have the opportunity to provide exculpatory information to explain why the charges were disputed and did not lead to final adjudication or why a charge was settled despite lack of merit. In such a context, the interest of protecting consumers outweighs lenders’ and brokers’ objections to the limited and

206. Form MU1, *supra* note 19, at question 8(B)(1) (emphasis deleted); see Form MU2, *supra* note 19, at question 8(G)(2); Form MU4, *supra* note 19, at question 9(G)(2).

controlled disclosure of some less-than-finally adjudicated information.

D. Expense & Anticipated Savings

This criticism of the NMLS is initially problematic because it is counterintuitive to assert that a centralized licensing system employing modern technology and eliminating redundant activities will not produce some degree of cost savings. Even with the retention of some jurisdiction-specific requirements, the bulk of the application process is unified by the MU Forms, which should produce efficiencies and savings for both licensees and regulators. On the other hand, it is indisputable that there will be expenses associated with NMLS. The participating states will pick up the cost of developing the system; operating costs will be covered by fees paid by licensees.

Because the NMLS is not yet fully operational, the exact amount of operating costs, of fees to be assessed, and of savings to be realized cannot be known precisely. In the absence of that information, the fairness of the fees to be shouldered by the industry can be evaluated only with reference to the procedures that will be employed to calculate them. In this regard, CSBS/AARMR has announced three relevant policies. The first policy is that the “processing fees charged by the [SRR] for operating and updating the [NMLS] will be determined by SRR Board of Managers, with input from the Mortgage Advisory Council.”²⁰⁷ Because the Mortgage Advisory Council (MAC) includes mortgage brokers and mortgage lenders, industry representatives will have a say in the fee structure.²⁰⁸ “Having a say” will admittedly be cold comfort if the SRR Board of Managers can ignore the brokers’ and lenders’ opinions with impunity. However, if the Board of Managers acts unreasonably, industry representatives will surely complain vigorously and publicly. If the complaints are both reasonable and

207. Statement of Principles and Sample Legislative Language, *supra* note 191, at 2.

208. *Id.*

ignored, the credibility of the NMLS will be compromised. CSBS/AARMR has a vested interest in maintaining the integrity of the NMLS, as it will be difficult for a tarnished system to achieve or maintain the critical mass of state participation that CSBS/AARMR seeks and upon which the success of the NMLS to a large measure depends.

The second policy involves fee uniformity, which CSBS/AARMR will maintain through its rule that “[p]articipating states will not be able to negotiate an individual fee structure.”²⁰⁹ Thus, licensees in different states will not be subjected to different fees because of the negotiating power of any state. The third policy involves the transparency of SRR operations. CSBS/AARMR has pledged to make “[a]udited financial statements of the SRR . . . available to system users, state [agencies,] and licensees.”²¹⁰ Opportunity for input, consistent application, and transparent procedures all mitigate industry concerns about System fees.

E. Inadequate Industry Input

The criticism of inadequate industry input into the development of the NMLS must be evaluated carefully to determine whether the industry is complaining that its suggestions and concerns were excluded from consideration or were considered but not adopted. As a historical matter, it appears that the mortgage lending industry has had the opportunity to participate and has contributed. Press releases and representatives’ statements from CSBS/AARMR, MBA, and NAMB each refer to industry involvement in the development of the NMLS.²¹¹ CSBS/AARMR states that it began working on the MU

209. *Id.*

210. *Id.*

211. CSBS October 4, 2006, Press Release, *supra* note 7 (citing twenty-one month effort involving “CSBS, [AARMR], and the industry to develop an online licensing system using uniform mortgage license applications”); MBA NewsLink, *supra* note 105, (citing CSBS’s invitation to “mortgage lenders’ licensing and compliance staff . . . to critically evaluate CSBS’s proposal”); NAMB Position Statement, *supra* note 63 (citing NAMB’s participation in a “CSBS/AARMR-formed industry working group” since at least summer of 2006 and noting that NAMB has been able to express its concerns about the NMLS “throughout discussions with CSBS/AARMR and the industry working group”).

Forms in January of 2005 and that the mortgage industry involvement began only two months later.²¹² It also appears that industry input has been influential as CSBS/AARMR says it made “26 out of 40 industry-requested changes . . . to paper forms” and will make an “[a]dditional 10 changes to [the] online system.”²¹³ Industry representatives do not seem to dispute these claims. The requested changes that were denied likely relate to conceptual issues, such as the scope of disclosures and treatment of mortgage brokers vis-à-vis mortgage bankers, that are either simply inherent in the conflicting nature of the constituents’ outlooks and interests or are beyond the ability of CSBS/AARMR to resolve because of the constraints of horizontal and vertical federalism.

Furthermore, charges of industry exclusion seem inconsistent with industry plans for future participation. All three groups—CSBS/AARMR, MBA, and NAMB (threatening tone of its Position Statement notwithstanding)—anticipate continued industry involvement as the NMLS is refined, implemented, and expanded. For example, CSBS/AARMR and the Mortgage Advisory Council plan to “meet regularly,” and representatives of the mortgage lending and brokering industry will “be briefed on all major actions under consideration by the SRR.”²¹⁴ NAMB’s and MBA’s allegations of exclusion are belied by their commitment to ongoing collaboration with CSBS/AARMR.

Although industry input obviously should not dictate policy decisions by state regulators as they develop the NMLS, especially where industry positions run counter to a state’s regulatory and consumer protection responsibilities, the presence or absence of industry involvement can have pragmatic repercussions. Such repercussions are perhaps most obvious in the political process necessary for a state to enact enabling legislation authorizing participation in the NMLS. The comments of Texas Finance Commission members and staff to the effect that the Department of

212. AFSA STATE GOVERNMENT AFFAIRS FORUM, *supra* note 34, at 14.

213. *Id.*

214. Statement of Principles and Sample Legislative Language, *supra* note 191, at 2.

Savings and Mortgage Lending “does not have stakeholder support to participate”²¹⁵ in the NMLS vividly illustrates this point. The matter thus becomes one of CSBS/AARMR engaging in meaningful dialogue with NAMB, MBA, and other industry representatives while at the same time remaining faithful to the regulatory and consumer protection goals of the NMLS.

On the other hand, while industry opposition to the NMLS should not be discounted neither should it be overestimated. For example, in a press release announcing Idaho’s decision to participate in the NMLS, the Director of the Idaho Department of Finance is quoted as saying that enabling legislation was enacted in that state “[w]ith support from the Idaho Association of Mortgage Brokers and the Idaho Mortgage Lender’s Association.”²¹⁶ The credibility of this comment is bolstered by the fact that both of these trade associations participated in that press release. Given the call in NAMB’s Position Statement for state chapters to oppose any enabling legislation that promotes regulation inconsistent with NAMB’s demands, it is likely that mortgage industry support for such legislation in Idaho confirms the other side of the pragmatism coin—in an environment where the damage done by predatory lending is increasingly part of the public consciousness, mortgage industry participation in initiatives like the NMLS is a political necessity.

As for MBA’s demands concerning the NMLS, they simply go too far and reflect only one component of a full public policy debate. MBA is correct to observe that the residential mortgage market has changed dramatically over the past two decades, and while market evolution cannot be ignored neither can that evolution be treated as if it were the only matter for policymakers to consider. While the capital that funds residential mortgage lending may come from national and even international sources, the consequences of

215. Texas Finance Commission Meeting Minutes, *supra* note 54, at 4.

216. Press Release, Idaho Dep’t of Fin., Idaho Department of Finance Announces Commitment To Participate In CSBS/AARMR Nationwide Mortgage Licensing System (Feb. 27, 2007), http://finance.idaho.gov/PR/2007/CSBS_MortgageProj2-07_Final.pdf.

predatory lending are felt locally.²¹⁷ It is people and families who suffer when mortgage lenders and brokers engage in predatory lending.²¹⁸ It is neighborhoods that suffer when predatory practices lead to foreclosed homes, which in turn devalue nearby properties and frustrate neighborhood revitalization projects.²¹⁹ It is towns and cities that suffer when foreclosed homes decrease tax revenues while simultaneously compelling increased expenditures for public safety,²²⁰ social assistance, and foreclosure rescue programs.²²¹ As

217. The effect of loan defaults on the sources of capital is uncertain due to the fragmentation of the securitization process. In response to Federal Reserve Board Governor Mark W. Olson's question about why there is not a "day of reckoning" for poorly underwritten subprime loans, one panelist replied that high subprime loan pricing allows profits to be earned in the aggregate even if there are losses on individual loans and that the disintegration of the loan process has diluted the accountabilities that once were built into the market. *FRB Sustainable Homeownership Forum, June 9, 2006, supra* note 59, at 111–13 (comments of Irv Ackelsberg, Managing Attorney, Community Legal Services of Philadelphia, and Emeritus Professor of Finance at the Wharton School of Economics, University of Pennsylvania). A reckoning now appears to be occurring as some subprime lenders have recently been forced out of business. For a list of defunct mortgage firms and units, see National Mortgage News Online, Casualty Lists, <http://www.nationalmortgagenews.com/subprime/defunct> (last visited Nov. 4, 2007). Unfortunately, the reckoning has not been limited to predatory lenders and brokers or to greedy securitizers and investors. Also caught up are homeowners, neighborhoods, and cities.

218. There are numerous reports that document the repercussions of foreclosure and of the unoccupied homes that too often accompany foreclosure. *See, e.g.,* IRA GOLDSTEIN, *LOST VALUES: A STUDY OF PREDATORY LENDING IN PHILADELPHIA* (2007), http://www.trfund.com/resource/downloads/staffwritings/LostValues_may2007.pdf; ELLEN SCHLOEMER, WEI LI, KEITH ERNST & KATHLEEN KEEST, *CTR. FOR RESPONSIBLE LENDING, LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS* (2006), <http://www.responsiblelending.org/pdfs/Fclosure-exec-summary-standalone.pdf>; Wilson, *supra* note 5, at 1481–84.

219. *See* FRB Forum, *Building Sustainable Homeownership* at 4 (June 7, 2006), <http://www.federalreserve.gov/events/publichearings/hoepa/2006/20060607/026to050.htm> (prepared comments of Geoff Smith, Project Director, Woodstock Institute) (citing Woodstock Institute research showing that "foreclosures have a significant impact on local economic development" as "[e]ach foreclosure within a city block of a property decreases the value of that property by as much as 1.4 percent per foreclosure in lower-income communities." The rise in the rate of foreclosures has "result[ed] in cumulative lost property values in the hundreds of millions of dollars each year"). These costs are "in addition to the costs to city governments related to maintaining derelict properties, fire prevention, crime." *Id.* The potential for holding creditors liable for the externalities of predatory lending is addressed in Kathleen C. Engel, *Do Cities have Standing? Redressing the Externalities of Predatory Lending*, 38 *CONN. L. REV.* 355 (2006).

220. Studies have been conducted to determine whether there is any link between foreclosures and crime. One study concludes that increased incidence of foreclosure in a neighborhood is associated with increased rates of violent crime. Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime*, 4 *HOUSING STUD.* 6 (2006). Another study concludes that an increase in mortgage lending in a neighborhood is associated with reduced levels of crime. CHARIS E. KUBRIN & GREGORY D. SQUIRES, *THE IMPACT OF CAPITAL ON CRIME: DOES ACCESS TO HOME MORTGAGE MONEY REDUCE CRIME RATES?*, http://realcostofprisons.org/materials/TTT_paper3.pdf (last visited Nov. 4, 2007).

North Carolina Commissioner of Banks and CSBS Director Joseph A. Smith, Jr. said in congressional testimony, “Residential mortgage lending is a local activity, but changes in technology and deregulation make financing these loans a global industry. The damage done by predatory lending and mortgage fraud, however, is still local.”²²²

The clamor of the mortgage lending industry for a regulatory regime that promotes business efficiencies elevates what is a relevant interest to the status of the determinative interest. Business efficiency has importance for policymaking only to the extent it could be shown that regulation would result in an increase in the cost of constructive credit or in a decrease in the availability of constructive credit *and* that such increase in cost or decrease in availability exceeds the benefits of increased consumer protection.²²³ When mortgage lenders and brokers discuss the cost and availability of credit, they omit the comparative component.

221. The economic harm to localities is further established by the measures state governments feel compelled to take to mitigate the impact of foreclosures. For example, a growing number of states are establishing foreclosure relief programs to help residents who face default on high-cost loans. Such programs exist in Maryland, Minnesota, New Jersey, and Ohio. For example, the Ohio Housing Finance Agency (OHFA) began a program in April of 2007, the Opportunity Loan Refinance Program (OLRP), to offer thirty-year fixed-rate loans to homeowners who face payment shock as a result of the resetting of interest rates on adjustable rate mortgages, a problem that is especially serious with 2/28 and other forms of “exploding” ARMs. The OLRP is being financed through taxable bonds. Terms of the program are available at Opportunity Loan Refinance Program, <http://www.ohiohome.org/refinance/default.htm> (last visited Nov. 4, 2007). In addition, OHFA is spending \$3.1 million to fund a foreclosure rescue program for families experiencing temporary financial problems. A description of this program is available in a press release from the Ohio Housing Finance Agency, Ohio Housing Finance Board Approves Foreclosure Prevention Program (Apr. 18, 2007), http://www.ohiohome.org/newsreleases/rlsboard_apr07.htm.

222. *Licensing and Registration Hearing*, *supra* note 11, at 2 (testimony of Joseph A. Smith, Jr., of CSBS).

223. It has long been a mantra of the mortgage lending industry that regulation will increase the cost of credit or result in credit rationing. *See, e.g.*, GREGORY ELLIEHAUSEN, MICHAEL E. STATEN & JEVGENUS STEINBUKS, CREDIT RESEARCH CTR., McDONOUGH SCH. OF BUS., GEORGETOWN UNIV., THE EFFECTS OF STATE PREDATORY LENDING LAWS ON THE AVAILABILITY OF SUBPRIME MORTGAGE CREDIT (2006), <http://www.gwu.edu/~business/research/centers/fsrp/pdf/M38.pdf>. Other studies have reached a contrary conclusion, including ROBERTO G. QUERCIA ET AL., UNIV. OF NORTH CAROLINA-CHAPEL HILL, THE IMPACT OF NORTH CAROLINA'S ANTI-PREDATORY LENDING LAW: A DESCRIPTIVE ASSESSMENT 22 (2003), http://www.planning.unc.edu/pdf/CC_NC_Anti_Predatory_Law_Impact.pdf; WEI LI & KEITH S. ERNST, CTR. FOR RESPONSIBLE LENDING, THE BEST VALUE IN THE SUBPRIME MARKET STATE PREDATORY LENDING REFORMS 15 (2006), http://www.responsiblelending.org/pdfs/r010-State_Effects-0206.pdf.

Two points should be emphasized here. The first concerns the phrase “constructive credit.” Residential mortgage industry representatives avoid using any similar adjective in the oft-repeated claim that the deregulation of financial services has created an “innovative and dynamic industry,” which has made credit available “to more socio and economic classes than ever before in the history of our consumer credit system.”²²⁴ Residential mortgage lenders and brokers treat credit availability as axiomatically good and fail to acknowledge the destructive potential of credit that is predatory. Constructive credit is credit that is free of abusive terms, is suited to a consumer’s financial situation, and is marketed in a manner that does not seek to exploit the asymmetries of information and power that exist between the lender or broker and the consumer. Credit that has opposing characteristics and that sets the consumer up for failure is destructive credit. The reality of destructive credit is captured in evocative—but unfortunately all-too-accurate—phrases such as “toxic mortgage” and “exploding” ARMs. As Iowa Attorney General Tom Miller observed in a Senate Committee hearing in 2001, “Drying up productive credit would be of grave concern; drying up destructive debt is sound economic and public policy.”²²⁵ With regard to the regulation of mortgage lenders and mortgage brokers, good social policy requires that a state not sacrifice its interest in protecting its citizens and its economy simply to promote the business interests of multi-state licensees.

The second point involves the comparative component. The “cost” of credit, for policymaking purposes, involves more than just the points, fees, and interest rate that lenders and brokers emphasize. These items may measure the price of credit charged by a lender, but cost is patently a broader concept than that. “Cost” should also include all adverse impacts that a predatory loan extracts or imposes, such as the wealth consumers lose to equity stripping and to higher

224. *FRB Sustainable Homeownership Forum, July 11, 2006, supra* note 52, at 33 (comments of Harry H. Dinham of NAMB).

225. *Hearing on Predatory Mortgage Lending: The Problem, Impact, and Responses Before the S. Comm. on Banking, Housing, and Urban Affairs, 107th Cong. 54* (2001) (testimony of Thomas Miller).

interest rates they will pay in the future because foreclosure has lowered their credit score. Additionally, “cost” should include the externalities that predatory lending imposes on neighborhoods, cities, and states. When mortgage lending industry representatives claim that regulation is undesirable, policymakers must remember to ask, “Compared to what?”

Finally, even though MBA purports to condition its support of the NMLS on compliance with its reform agenda, the organization anticipates ongoing collaboration with CSBS/AARMR and publicly announced its support for the Statement of Principles and Related Sample Legislative Language.²²⁶ Like NAMB, MBA’s stated conditions for continued participation in the development of the NMLS give way to the realization that it is better to be perceived as part of the solution to predatory lending than as the source of the problem.

F. Channel Bias

This criticism of the NMLS takes two different forms depending on whether it comes from the MBA or the NAMB. For the MBA, the NMLS expresses channel bias against its members and in favor of mortgage brokers because it is receptive to licensing at the individual loan originator level rather than limiting licensure to the institutional level. The NAMB criticizes the NMLS for the opposite reason, which is that the NMLS only permits and does not require individual level licensing for loan officers employed by mortgage lenders. NAMB expands this dispute to include all mortgage originators, by which it means “all federal and state-regulated banks and their subsidiaries, along with credit unions, mortgage bankers, lenders, brokers, and all employees of these entities.”²²⁷ For the NAMB, a regulatory regime

226. Press Release, MBA (Feb. 20, 2007) (stating that MBA “applaud[s] CSBS and AARMR for agreeing to create a Mortgage Advisory Council that will allow lenders to play a role in making the RMLS [sic] as effective and efficient as possible”). The RMLS—Residential Mortgage Licensing System—is another name for the NMLS that CSBS/AARMR used in the early days of the System.

227. NAMB Position Statement, *supra* note 63.

that exempts any loan originator from the individual level licensing to which mortgage brokers are subject displays channel bias.

Both of these criticisms about the NMLS' non-determination of the appropriate level of licensure are improper, albeit for different reasons. As noted with regard to the allowance of jurisdiction-specific requirements in the MU Forms, the guiding principle for CSBS/AARMR is "the primacy of states' role in determining how best to supervise mortgage lending in their state."²²⁸ This principle applies equally to the level of licensure issue as CSBS/AARMR affirms that the NMLS "does not supersede state law in determining who needs to be licensed or registered in the System. The decision as to who is or is not licensed is a state decision."²²⁹ Contrary to MBA's wishes, state sovereignty and horizontal federalism leave CSBS/AARMR with no option other than to recognize a state's prerogative to choose individual-level licensing for lenders as well as brokers.

NAMB's criticism is illegitimate on a different ground. As much as state regulators would like to protect consumers by having state-level laws apply to all of the entities NAMB identifies,²³⁰ the aggressive assertion of federal preemption by the Board of Governors of the Federal Reserve, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the National Credit Union Association makes that outcome impossible.²³¹ Because of the

228. CSBS/AARMR February 20, 2007, Press Release, *supra* note 192.

229. *Id.*

230. See *Subprime and Predatory Lending Hearing*, *supra* note 4, at 249–50 (testimony of Steven L. Antonakes of CSBS). Mr. Antonakes states that state regulators:

are frustrated in our efforts to protect consumers by the preemption of state consumer protection laws by federal statutes and federal regulatory agencies. The decision was made to preempt state laws in favor of developing laws that offer advantages to the financial services industry. Federal policies and procedures should support, not hinder the role of state supervisors. State legislatures have the right to expect the laws they passed to be followed by companies operating in their state. Preemption must be used for the benefit of both business and consumers. All too often, it seems, preemption benefits tip the scales too far in favor of businesses, leaving consumers at a disadvantage.

Id. at 249.

231. "The OCC and OTS have tried to make it crystal clear through their regulations that any state law that conditions what their federally-chartered institutions, subsidiaries of those institutions, or even

constraints of vertical federalism, CSBS/AARMR can only devise regulations for lenders and brokers within state jurisdiction. It is illegitimate for NAMB to criticize the NMLS for failing to achieve a legally impermissible result. Further, if NAMB were truly insistent on uniform regulation of all loan originators, it would seem logical for the group to advocate for federal regulation, which would of course not be hindered by preemption issues. To the contrary, NAMB promotes a Model State Statute Initiative (MSSI) for state-level licensing and regulation of mortgage brokers.²³² In the MSSI, NAMB clearly states that it “[seeks] to have *individual state statutes* enacted that require pre-licensure education and mandate continuing education requirements for all residential loan originators.”²³³ This state-level emphasis must be deemed to include an awareness of the federalism principles that both empower and limit state action.

CONCLUSION

The CSBS/AARMR National Mortgage Licensing System makes an important contribution to the battle against predatory lending and should be supported for at least four reasons. First, the NMLS is an example of thoughtful public policymaking. Although CSBS/AARMR unmistakably seeks to increase consumer protection with regard to residential mortgage lending, it also acknowledges the important contributions of the lending industry.²³⁴ The NMLS is special in that it approaches the creation of a regulatory regime from a dialectic perspective that holds the interests of the principal

agents of those institutions can do are preempted and the states have no ability to enforce state laws against those institutions.” *Id.* at 249–50.

232. The MSSI is attached as Appendix A to the testimony of Joseph L. Falk of NAMB, *Licensing and Registration Hearing*, *supra* note 11 (testimony of Joseph L. Falk).

233. *Id.* (emphasis added).

234. For example, Steven L. Antonakes, Massachusetts Commissioner of Banks, acknowledges both that the “current disarray in the residential mortgage market” has fostered “an environment of negligence in lending practices” and that “the mortgage revolution has brought with it a number of good things: a vast flow of liquidity into the mortgage market, increased availability of mortgage credit, and higher rates of homeownership.” *Subprime and Predatory Lending Hearing*, *supra* note 4, at 246, 248 (testimony of Steven L. Antonakes of CSBS).

constituencies in creative tension as it seeks to find a socially acceptable balance in the “trade-off between increasing the availability of credit in the mortgage market and the level of foreclosures.”²³⁵ As a result, while all aspects of the NMLS may not entirely please anyone, it has been able to keep competing constituencies engaged and productive. By involving the mortgage industry in the development of the NMLS, CSBS/AARMR fosters a sense of transparency and fairness, which are important factors in securing acceptance of the System.

Second, the NMLS is dynamic and thus able to influence and to be influenced. This characteristic is seen in the tension between the variability of diverse jurisdiction-specific requirements and the uniformity inherent in the consistency needed to create critical mass. As the critical mass of the NMLS grows, it will reflect a consensus about the content and procedures of a reasonable regulatory framework, which will in turn promote further uniformity. At the same time, however, the jurisdiction-specific requirements promote creativity.

A third reason to support the NMLS is that it demonstrates and takes advantage of the institutional advantages that states have over the federal government. One of these advantages is the ability to act expeditiously. Despite the introduction of numerous anti-predatory lending bills in Congress in recent years, almost none has made it out of committee, let alone been enacted into law. By contrast, thirty-six states and the District of Columbia have enacted predatory lending statutes since 1999,²³⁶ and in only approximately three years, CSBS/AARMR has been able to take the NMLS from concept to commitment by forty state regulators. Another institutional advantage

235. *Id.* at 259.

236. For a list of states that have enacted anti-predatory lending statutes, see *Subprime and Predatory Lending Hearing*, *supra* note 4, Exhibit B (testimony of Steven L. Antonakes of CSBS). This exhibit also includes specific statutory citations and compares the statutes with regard to selected provisions. *Id.* A similar document is the Center for Responsible Lending’s “State Legislative Scorecard.” *State Legislative Scoreboard* (Dec. 31, 2005), <http://www.responsiblelending.org/issues/mortgage/statelaws.html>. For a critical analysis of state anti-predatory lending statutes see LI & ERNST, *supra* note 223.

that states enjoy is the responsiveness to local issues that follows from proximity with and accountability to local electorate. This responsiveness leads to experimentation and confirms the role of states as “laboratories of change.”²³⁷ Because the NMLS involves the collaborative cooperation of the states, it provides a vehicle for disseminating the outcomes of those experiments.

Finally, the NMLS is valuable because it establishes a standard by which future proposals for federal regulation can be judged. Any proposal introduced in Congress that creates preemptive—but less effective—federal regulation of mortgage brokers and state chartered lenders will be perceived as protecting the interests of the mortgage industry and as abandoning consumers. On the other hand, any federal proposal that does not preempt state regulation but contains less effective regulatory measures will be superfluous or, even worse, counterproductive as it would introduce a meaningless additional layer of regulation.²³⁸

The NMLS addresses a pressing problem, predatory practices in the residential mortgage market. The NMLS seeks to ameliorate that problem by doing what is possible given the competing interests of the relevant parties and the structural constraints of horizontal federalism and vertical federalism. The NMLS can make a positive contribution in its current form and has the potential, as it evolves beyond application forms and a database to include other initiatives, to accomplish even more. To paraphrase an old saying,²³⁹ by beginning with what is necessary and then doing what is possible, the NMLS just might end up doing what is thought unachievable—help

237. Justice Julius Brandeis wrote in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) that “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” This quote can be found in Baher Azmy, *Squaring the Predatory Lending Circle*, 57 FLA. L. REV. 295, 392–93 (2005), which contains an extended discussion of the value of state experimentation with regard to predatory lending regulation.

238. Non-preemptive federal regulation would not be superfluous or counterproductive for those states that do not participate in the NMLS. However, that number is currently a minority and is expected to get even smaller in the future.

239. The saying, of unknown specific date but attributed to St. Francis of Assisi, is “Start doing what’s necessary; then do what’s possible; and suddenly you are doing the impossible.”

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reduce predatory practices by mortgage lenders and mortgage brokers.

