

August 9, 2011

Mortgage Bankers Association
1717 Rhode Island Avenue, NW
Suite 400
Washington, DC 20036

Re: Secure and Fair Enforcement for Mortgage Licensing Act of 2008; Transitional Licensing

Ladies and Gentlemen:

The Mortgage Bankers Association (MBA) has requested that we address three issues under the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, 12 U.S.C. § 5101 *et seq.*, also known as the “S.A.F.E. Mortgage Licensing Act of 2008” or “SAFE Act”. This letter responds to that request.

We understand that under current State residential mortgage loan originator licensing frameworks, if (1) a registered mortgage loan originator employed by a depository institution, or certain subsidiaries thereof (Registered MLO), becomes employed by a State-licensed entity, or (2) a State-licensed mortgage loan originator employed by a State-licensed entity (Licensed MLO) wishes to become licensed in additional States, the MLO may not engage in loan origination activity until such time as he or she satisfies the licensing requirements of the State or States where he or she wishes to conduct business.

You asked us to address whether, consistent with the SAFE Act, a State may, subject to such conditions as the State may deem appropriate:

1. Provide for a transitional license for a loan originator who, pursuant to the SAFE Act, is a Registered MLO with a depository institution (or certain subsidiaries), leaves the employ of the depository institution (or a subsidiary) and becomes employed by a State-licensed entity so that the loan originator may immediately function as a loan originator with the new employer while pursuing a standard MLO license.
2. Provide for a transitional license for a loan originator who, pursuant to the SAFE Act, is a Licensed MLO with a State-licensed entity and is licensed in one State, leaves the employ of one State-licensed entity and becomes employed by another State-licensed entity that is licensed in a State in which the MLO is not, so that the loan originator may

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immediately function as a loan originator with the new employer while pursuing a standard MLO license.

3. Recognize the licensure of a Licensed MLO pursuant to the SAFE Act under the laws of another State as satisfying their own experience, educational and/or testing requirements for a standard MLO license.

As addressed more fully below, in our view the States may take any or all of such steps consistent with the SAFE Act.

We first address the background of the SAFE Act and what the SAFE Act actually requires with regard to the registration and licensing of loan originators. We then address United States Department of Housing and Urban Development (HUD) issued guidance, including the SAFE Mortgage Licensing Act: Minimum Licensing Standards and Oversight Responsibilities final rule, 76 Fed. Reg. 38464 (2011) (Final Rule), as well as State actions and provisions that address or recognize experience, education and/or testing qualifications of other States. Finally, we address certain general principles of statutory construction regarding the interplay of Federal and State government power to show the explicit intent of Congress that is needed to find preemption in an area of traditional regulation by the States, such as professional licensing.

As used herein, the terms “loan originator” and “National Mortgage Licensing System and Registry” (NMLS) have the same meanings that they have in the SAFE Act.

The SAFE Act

Background. The SAFE Act was adopted by Congress in 2008 as part of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289 (HERA). Among the various provisions of HERA, (1) the first part addresses the government sponsored enterprises, the Federal Home Loan Banks, the Hope for Homeowners program and includes the SAFE Act, (2) the second part addresses the Federal Housing Administration, mortgage foreclosure protections for servicemembers, various housing assistance and related matters and includes the Mortgage Disclosure Improvement Act that made certain changes in Truth in Lending Act disclosure requirements, and (3) the third part addresses housing-related tax matters. HERA is a comprehensive Federal reaction to address the then growing crisis in housing finance and the economy in general.

Despite the Federal focus of HERA, the approach of Congress in the SAFE Act is very deferential to State power. Although Congress could have crafted a Federal licensing regime in lieu of a State system of licensing for loan originators, Congress chose a decidedly different path.

In 2007 Congress knew that the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) were developing the NMLS. The United States House of Representatives passed a bill in November 2007, H.R. 3915, the Mortgage Reform and Anti-Predatory Lending Act of 2007, as an early attempt to address the growing crisis in housing finance. The bill, which was not enacted, provided for the registration and licensing of loan originators through the NMLS, and these same provisions substantially formed the basis of the SAFE Act. (Various other provisions of the bill formed the basis of reforms contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203) (Dodd-Frank).) Thus, Congress initially chose a path of State registration and licensing as opposed to Federal registration and licensing, and continued on that path in the SAFE Act.

During the debate on H.R. 3915 that occurred on the date the bill was passed by the House, Representative Barney Frank, then the Chairman of the House Financial Services Committee (the Committee that reported the bill), addressed the substance of the bill. Representative Frank stated “There is a delicate balance here. I am not in favor and this bill does not in general preempt the rights of States to do what they think is necessary in the consumer protection area.” *Congressional Record*, H13967 (Nov. 15, 2007). Representative Frank then stated with respect to other provisions of the bill addressing the national secondary market “that we did believe some preemption is necessary. We have tried to define it precisely and hold it to a minimum necessary to have a functioning market.” *Id.* The statements of Representative Frank reflect that Congress did not intend for the mortgage registration and licensing provisions of H.R. 3915 to preempt the rights of the States in this area. And, as noted above, the provisions of the bill substantially formed the basis of the SAFE Act.

In the SAFE Act, Congress “encouraged” the States, through the CSBS and AARMR, to establish licensing and registration provisions for residential mortgage loan originators that accomplished ten specified objectives and satisfied standards set forth in the SAFE Act. Congress also provided an incentive for the States to so act by directing HUD to establish a backup system for the licensing and registration of loan originators in a State if the State is deemed by HUD not to have a sufficient licensing and registration system in place within a specified timeframe.¹ Thus, as long as the States established a licensing system and met the

¹ HUD’s authority under the SAFE Act was transferred to the Bureau of Consumer Financial Protection (CFPB) on July 21, 2011 pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. No. 111-203 §§ 1002(12), 1061, 1100. In addressing the transfer of the SAFE Act Final Rule and other rules to the CFPB, the CFPB addressed guidance issued by HUD and other agencies with respect to the various rules. The CFPB advised as follows:

The CFPB does not consider guidance or similar documents as falling within the meaning of enforceable “rules and orders” that are required to be listed pursuant to [Dodd-Frank] section 1063(i). However, by way of clarification, the CFPB notes that for laws with respect to which rulemaking authority will transfer to

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standards set forth in the SAFE Act, the licensing of loan originators would be exclusively a State endeavor.

Objectives of the SAFE Act. Congress adopted the SAFE Act to “increase uniformity, reduce regulatory burden, enhance consumer protection, and reduce fraud”. SAFE Act § 1502 (12 U.S.C. § 5101). Among the specific stated objectives of the SAFE Act are (1) providing for uniform licensing applications, (2) streamlining the licensing process and (3) reducing regulatory burdens. SAFE Act § 1502(1), (5) (12 U.S.C. § 5101(1), (5)).

Registration and Licensing. At its core, the SAFE Act provides for minimum standards to be adopted for the registration of loan originators who are employees of depository institutions (or certain of their subsidiaries) and the licensing of loan originators who are employees of State-licensed entities. SAFE Act §§ 1504-1507 (12 U.S.C. §§ 5103-5106). The Federal banking agencies were directed to develop and maintain a system for registration of loan originator employees of depository institutions (or certain of their subsidiaries) regulated by such an agency. SAFE Act § 1507 (12 U.S.C. § 5106). Also, the SAFE Act provides for the adoption at a State level of minimum licensing requirements for loan originators who are employees of State-licensed entities. SAFE Act §§ 1505-1506 (12 U.S.C. §§ 5104-5105).

With respect to the registration of a loan originator who is an employee of a depository institution (or certain of their subsidiaries), the SAFE Act provides for the furnishing of certain minimum information to the NMLS for background checking purposes. SAFE Act § 1507(a)(2) (12 U.S.C. § 5106(a)(2)).

With respect to the initial licensing of a loan originator under State law, the SAFE Act provides for:

the CFPB, the official commentary, guidance, and policy statements issued prior to July 21, 2011, by a transferor agency with exclusive rulemaking authority for the law in question (or similar documents that were jointly agreed to by all relevant agencies in the case of shared rulemaking authority) will be applied by the CFPB pending further CFPB action. The CFPB will give due consideration to the application of other written guidance, interpretations, and policy statements issued prior to July 21, 2011, by a transferor agency in light of all relevant factors, including: whether the agency had rulemaking authority for the law in question; the formality of the document in question and the weight afforded it by the issuing agency; the persuasiveness of the document; and whether the document conflicts with guidance or interpretations issued by another agency. The CFPB will seek over time to improve the clarity and uniformity of guidance regarding the laws it will administer as necessary in order to facilitate compliance with the Federal consumer financial laws.

76 Fed. Reg. 43569, 43570 (2011). Thus, guidance not rising to the level of official commentary, guidance and policy statements will not automatically be applied by the CFPB and any application of such guidance, interpretations and policy statements will be subject to the standards set forth by the CFPB.

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1. The furnishing of certain minimum information to the NMLS for background checking purposes.
2. Minimum standards related to (a) not having had a prior revocation of a loan originator license, (b) absence of certain prior criminal convictions, (c) financial responsibility, character and general fitness to serve the public as a loan originator, (d) pre-licensing education, (e) pre-licensing testing, and (f) net worth or a surety bond.

SAFE Act §§ 1505(c), (d) (12 U.S.C. §§ 5104(c), (d)).

With respect to the renewal of a loan originator license under State law, the SAFE Act requires a loan originator to continue to meet the minimum standards for an initial license, and satisfy minimum continuing education requirements. SAFE Act §§ 1506(a), (b) (12 U.S.C. §§ 5105(a), (b)).

Under the SAFE Act, Congress established a system where the registration of an MLO with a depository institution subject to an acceptable background check, and the licensing of an MLO with a State-licensed entity subject to additional requirements (including education and testing requirements), are alternative means of qualification. SAFE Act § 1504 (12 U.S.C. § 5103).

Minimum Standards. The minimum standards required by the SAFE Act for a Licensed MLO are just that—a uniform minimum level of standards that must be satisfied in order for a loan originator to qualify for a standard initial license as a Licensed MLO and then renew the standard license. The SAFE Act does not address the situation in which a Licensed MLO with a State-licensed entity, who has already satisfied the minimum SAFE Act standards for a Licensed MLO (plus any other requirements imposed by a State), changes employers to a company that also is a State-licensed entity, whether located in the same State or a different State. The SAFE Act also does not address the situation in which a Registered MLO with a depository institution (or certain subsidiaries), who has already satisfied the minimum SAFE Act standards for a Registered MLO (with registration and licensing under the SAFE Act being equivalent), changes employers to a company that is a State-licensed entity, whether located in the same State or a different State. The SAFE Act simply is silent on how States should address the transition of a loan originator who has already met the SAFE Act's minimum standards when the originator moves to a new employer, whether located in the same State or a different State.²

² States necessarily have to exercise discretion in setting out and administering their licensing frameworks. For example, with respect to Licensed MLOs, notwithstanding the lack of express direction in the SAFE Act or HUD's Final Rule on the issue of a Licensed MLO moving from one State-licensed entity to another within the same State, States have developed procedures to deal with this issue.

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State Law Not Preempted. The SAFE Act does not supplant State licensing frameworks with a Federal framework, and is deferential to State power to have a State licensing framework for loan originators. The only express override of State law in the SAFE Act is limited to the information confidentiality provisions of Section 1512 (12 U.S.C. § 5111), under which a State law that provides less confidentiality or a weaker privilege is superseded by the provisions of Section 1512.

Consistent with the SAFE Act's purposes, including the objectives of uniformity, streamlining of the licensing process and reducing regulatory burdens, the States are free to have their own licensing framework for loan originators, subject to the minimum standards of the SAFE Act.³ This freedom includes the ability of a State to establish a transitional license for a Registered MLO or Licensed MLO who changes employers to a company that is a State-licensed entity, subject to such conditions as the State may deem appropriate, which may include conditions deemed consistent with the consumer protection objectives of the SAFE Act (such as certifications regarding education, experience, or criminal background). The freedom also includes the ability of a State to recognize the licensure of a Licensed MLO pursuant to the SAFE Act under the laws of another State as satisfying their own experience, educational and/or testing qualifications for a Licensed MLO, subject to such conditions as a State may deem appropriate, which may include conditions deemed consistent with the consumer protection objectives of the SAFE Act (such as certifications).⁴

HUD Guidance

HUD has not publicly issued any formal or binding guidance on the issue of transitional licenses. HUD did not address the issue of transitional licenses in its SAFE Mortgage Licensing Act: HUD Responsibilities Under the SAFE Act; Proposed Rule, 74 Fed. Reg. 66548 (2009) (Proposed Rule). HUD did address the issue of reciprocity formally in its adoption of the Final Rule. The Final Rule is the only public formal guidance on the matter and in adopting the Final

³ HUD has stated to Congress that States have freedom to develop their own licensing and registration programs for MLOs. In its 2010 annual report to Congress (required by the SAFE Act), HUD stated that "Each state is free to develop its own program for licensing, registering, and supervising MLOs within its borders, provided that the state's program meets all of the minimum requirements of the SAFE Act." U.S. Department of Housing and Urban Development, Secure and Fair Enforcement for Mortgage Licensing Act, Report to Congress (Nov. 2010) p.1.

⁴ As noted above, provisions in H.R. 3915 substantially formed the basis for the SAFE Act. H.R. 3915 included a provision that "Any loan originator who is licensed by the Secretary under a system established under [the HUD backup licensing authority] for any State may not use such license to originate loans in any other State." H.R. 3915 § 107(f). The provision is not in the SAFE Act as enacted. Thus, if in fact HUD did adopt a backup licensing system for a State, Congress left the determination of whether that license should be recognized by other States for each State to decide.

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Rule HUD publically expressed considerable deference to the States in their development and implementation of a licensing scheme and the supervision of their MLOs. We address certain of this guidance below.

SAFE Act Final Rule. In connection with its responsibility under the SAFE Act to determine whether a State's law meets SAFE Act requirements, HUD codified the minimum standards for the licensing of residential mortgage originators in the Final Rule, which becomes effective August 29, 2011.

The supplementary information to the Final Rule specifically addresses the issue of reciprocity and the promotion of uniformity. In response to public comments to HUD's Proposed Rule advocating for the recognition by a State of the licensure of a MLO by other States⁵, HUD noted the following:

HUD's final rule does not require reciprocity, given the current variability in state laws. The SAFE Act sets the minimum requirements for the licensing of "loan originators" and does not allow HUD to preempt any state law requirements or to establish a maximum requirement. This final rule provides that a state must require an individual to obtain and maintain a license from that state in order to engage in the business of a loan originator with respect to any dwelling or residential real estate in that state. This final rule further provides that in order to grant a license to an individual, the state might find that the individual has satisfied the minimum eligibility requirements. HUD believes that this approach is consistent with the SAFE Act's preference that states implement their respective licensing regimes and the SAFE Act's establishment of minimum, rather than preemptive and uniform requirements. The approach also avoids incentivizing a "race to the bottom" among states. However, this final rule does not limit the extent to which a state may take into consideration or rely upon the findings made by another state in determining whether an individual is eligible under its own laws.

HUD will seek to promote uniform minimum standards in accordance with its overall responsibility for interpretation, implementation, and compliance with the SAFE Act. However, the SAFE Act's preference that states implement and enforce licensing, combined with the absence of preemptive authority over states that opt to exceed the minimum requirements, means that there will inevitably be

⁵ The March 5, 2010 letter from the Mortgage Bankers Association, American Financial Services Association and the American Bankers Association to HUD commenting on HUD's Proposed Rule raised the need for, and importance of, reciprocity and provisional licenses.

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a diversity of approaches among states. HUD has worked extensively with the CSBS and ARMOR in this process, and will remain accessible to state regulators, other Federal regulators, and trade associations. (Emphasis added)

76 Fed. Reg. 38464, 38482 (2011).

HUD Frequently Asked Questions. Prior to issuing its Proposed Rule, HUD provided informal guidance on certain topics in the form of Frequently Asked Questions (FAQs), including the following regarding provisional licensing:

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

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

As HUD stated in the introductory language to the FAQs, it was issuing the informal guidance in advance of a formal notice-and-comment rulemaking process. As such, the FAQ was issued simply as informal guidance, and guidance that, despite continuing to be posted, is inconsistent with the Final Rule on various issues, including the licensing of loan modification personnel.⁶

Final Rule Rejection of FAQ. It is notable that HUD did not address, or seek comment on, the issue of provisional or transitional licensing in its Proposed Rule, and the Final Rule is silent on the points. HUD did elect to address the related issue of reciprocity in adopting the Final Rule, which was subject to the formal notice-and-comment process. In so doing, HUD implicitly rejected the FAQ by indicating that “the final rule does not require reciprocity . . .” 76 Fed. Reg. 38464, 38482 (2011). HUD also made clear in adopting the Final Rule that States may take into consideration or rely upon the findings made by another State in determining whether an individual is eligible for licensure under its own laws. 76 Fed. Reg. 38464, 38482 (2011). Thus, in adopting the Final Rule HUD decided to leave the matter of reciprocity regarding eligibility for

⁶ The Final Rule does not include loan modification personnel in the definition of MLO, and HUD decided to defer to the CFPB the issue of licensing for loan modification personnel. 76 Fed. Reg. 38464, 38483 (2011).

licensing to the discretion of the States. Discretion that encompasses reciprocity regarding eligibility for licensing necessarily includes discretion regarding transitional licensing. States are free under the SAFE Act to determine the extent to which they will incorporate reciprocity and transitional licensing into their licensing frameworks.

State Actions

Consistent with the flexibility afforded to the States by the SAFE Act, a significant number of States elected to participate in a testing and education certification process, pursuant to which States could waive SAFE Act-mandated testing and/or education requirements if the State determined and certified that a MLO had met equivalent testing and/or education requirements. Approximately 17 States elected to participate in the testing certification process, and approximately 33 States elected to participate in the education certification process.⁷ Although the deadline for certification of previously completed testing and/or education was December 22, 2010, this reflects that State agencies understand, and have exercised, the discretion granted to them to determine what amounts to substantial compliance with their own licensing laws as mandated by the SAFE Act.

New Mexico has incorporated the concept of transitional licensing into their licensing framework. New Mexico law provides that any mortgage loan originator “who is currently licensed in another State through the Nationwide Mortgage Licensing System & Registry may be granted a temporary mortgage loan originator license valid for ninety days while the mortgage loan originator completes the education and testing requirements of the New Mexico Mortgage Loan Originator Licensing Act.” N.M. Stat. Ann. § 58-21B-4(D). In order to be eligible for the temporary license, the mortgage loan originator must hold an active mortgage loan originator license issued by another State regulatory agency. The active mortgage loan originator license must be valid for more than ninety days from the date the individual applies for the temporary New Mexico Mortgage Loan Originator License. N.M. Stat. Ann. § 58-21B-4(D). A temporary New Mexico Mortgage Loan Originator License will be issued provided that a mortgage loan originator: (1) provides written notification, in the form of a letter or an e-mail, advising the Mortgage Unit of the New Mexico Financial Institutions that the individual is requesting a 90-day temporary license; (2) the individual maintains a mortgage loan originator license in another jurisdiction that is in an “Approved” status; (3) applies for and pays for his or her New Mexico Mortgage Loan Originator License; and (4) is sponsored by a New Mexico-licensed Mortgage Loan Company. N.M. Admin. Code tit. 12, §12.19.2.18. Once these requirements are satisfied, the mortgage loan originator’s license status is changed to an “Approved-Conditional” status and the individual may originate loans for 90 days.

⁷ NMLS Certification Participation for SAFE Testing and Educations Requirements.
<http://mortgage.nationwidelicensingsystem.org/profreq/Documents/Certification%20State%20List.pdf>

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As noted above, HUD is charged with determining whether each State has enacted and is operating a fully SAFE Act-compliant licensing scheme. To our knowledge, HUD has not taken the position that New Mexico has a non SAFE Act-compliant law. Additionally, to our knowledge, HUD has not determined that any of the more than 30 States that elected to participate in the testing and/or education certification process has a non SAFE Act-compliant law.

Statutory Construction

In addressing the respective powers of the Federal government and State governments under the United States Constitution, the United States Supreme Court has observed:

As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. In *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), “[w]e beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.” Over 120 years ago, the Court described the constitutional scheme of dual sovereigns:

“[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,” . . . “[W]ithout the States in union, there could be no such political body as the United States.” Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.” *Texas v. White*, 7 Wall. 700, 725 (1869), quoting *Lane County v. Oregon*, 7 Wall. 71, 76 (1869).

Gregory v. Ashcroft, 501 U.S. 452, 457 (1991). In *Gregory* the Court addressed whether a provision of the Missouri constitution mandating retirement at age 70 for judges violated the Federal Age Discrimination in Employment Act of 1967 and the Equal Protection Clause of the Constitution. The Court noted that the “case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who

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exercise government authority, a State defines itself as a sovereign.” *Gregory*, at 460. The Court, thus, considered establishing the qualifications for judges to be a fundamental aspect of State power.

The Court considered whether an exception to the Act’s provisions for “an appointee on the policymaking level” covered judges and, thus, would permit a State to set a mandatory retirement age for judges without regard to the Act. *Gregory*, at 464-466. The Court stated that whether the exception applied to judges was “at least ambiguous” and that in “the face of such ambiguity [the Court] will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment.” *Gregory*, at 467. “Congress should make its intention ‘clear and manifest’ if it intends to preempt the historic powers of the States.” *Gregory*, at 461, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Court held that the Federal statute and the United States Constitution did not prohibit Missouri from imposing a mandatory retirement age for judges.

In the *Rice* decision cited in *Gregory* the Court addressed whether grain warehouses licensed by the United States Secretary of Agriculture under the United States Warehouse Act were subject to certain State regulatory requirements. The court addressed the standard used for the analysis as follows:

Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.

Rice, at 230 (citations removed).

The Court determined that based on amendments to the Federal statute in question Congress changed from a joint Federal and State regulatory framework to an exclusive Federal regulatory framework pursuant to which the power, jurisdiction and authority of the Secretary of

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Agriculture under the statute “shall be exclusive with respect to all persons” licensed under the statute. *Rice*, at 232-234. With regard to nine matters at issue determined to fall within such exclusive authority of the Secretary of Agriculture, the Court held that the State had no authority regarding the matters. *Rice*, at 235-236. However, with regard to three additional matters the Court noted that the Federal statute contained no express provisions relating to the matters, and that while there was a potential for conflict between Federal and State law the Court would not find preemption, observing that “[i]n more ambiguous situations than this we have refused to hold that state regulation was superseded by federal law.” *Rice*, at 236-237. The high standard simply was not met as to the three matters.

The Court followed the approach in another matter dealing with a traditional area for State regulation—the licensing of professionals. In *Sperry v. Florida*, 373 U.S. 379 (1963), the Court addressed whether the Florida Bar could preclude a non-lawyer resident in Florida from practicing before the United States Patent Office pursuant to the individual’s registration with such Office. A Federal law provided that the Commissioner of Patents may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office, and the Commissioner explicitly granted such authority to the non-lawyer pursuant to a registration with the Office. *Sperry*, at 384-385.

The Supreme Court of Florida concluded that the non-lawyer’s conduct constituted the unauthorized practice of law that the State of Florida, acting under its police power, could properly prohibit, and that Federal law did not empower the United States to authorize such conduct in Florida. *Sperry*, at 382. The non-lawyer challenged the finding only to the extent it applied to his Federal license to practice before the Patent Office. The United States Supreme Court did not question the determination of the Florida Supreme Court under Florida law that the preparation and prosecution of patent applications for others constitutes the practice of law, and the Court did not doubt that “Florida has a substantial interest in regulating the practice of law within the State and that, in the absence of federal legislation, it could validly prohibit nonlawyers from engaging in this circumscribed form of patent practice.” *Sperry*, at 383. However, with respect to the non-lawyer’s practice before the Patent Office, the Court stated that the Federal “statute . . . expressly permits the Commissioner to authorize practice before the Patent Office by nonlawyers, and the Commissioner has explicitly granted such authority. If the authorization is unqualified, then, by virtue of the Supremacy Clause, Florida may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority.” *Sperry*, at 385. Based on the express authorization, the Court held that Florida could not preclude the non-lawyer from practicing pursuant to his Federal license before the Patent Office.

In *Sperry* the Court recognized that the licensing of professionals falls within the general police power of a State. The Court found that Congress had determined to override that power in

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connection with representation before the United States Patent Office by a non-lawyer based on an explicit intention of Congress set forth in Federal legislation to provide for such representation by non-lawyers.

The Court also has recognized that silence in a statute is not sufficient to establish a Congressional intent to preempt. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991). The issue before the Court was whether the Federal Insecticide, Fungicide and Rodenticide Act preempted a local ordinance regulating the use of pesticides. The Court noted that the Act specified several roles for State and local authorities, such as providing for the production of records for inspection upon request of any State or political subdivision duly designated by the Administrator of the Environmental Protection Agency, and directing the Administrator to cooperate with any State or political subdivision. *Mortier*, at 599-601. The Court also noted that the Act nowhere expressly supersedes local regulation of pesticide use. *Mortier*, at 606.

The Court set forth the following approach to assessing whether a Federal law precludes State regulation in an area:

Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that “interfere with, or are contrary to the laws of congress, made in pursuance of the constitution” are invalid. The ways in which federal law may preempt state law are well established, and in the first instance turn on congressional intent. Congress’ intent to supplant state authority in a particular field may be expressed in the terms of the statute. Absent explicit preemptive language, Congress’ intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” if “the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,” or if the goals “sought to be obtained” and the “obligations imposed” reveal a purpose to preclude state authority. When considering pre-emption, “we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”

Even when Congress has not chosen to occupy a particular field, preemption may occur to the extent that state and federal law actually conflict. Such a conflict arises when “compliance with both federal and state regulations is a physical impossibility,” or when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

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It is, finally, axiomatic that, “for the purposes of the Supremacy Clause the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.”

Mortier, at 604-605 (citations omitted).

The Court then stated:

We agree that neither the language of the statute nor its legislative history, standing alone, would suffice to preempt local regulation. But it is also our view that, even when considered together, the language and the legislative materials relied on [by lower courts to determine there was preemption] are insufficient to demonstrate the necessary congressional intent to preempt. As for the statutory language, it is wholly inadequate to convey an express preemptive intent on its own. [The Act] plainly authorizes the "States" to regulate pesticides, and just as plainly is silent with reference to local governments. Mere silence, in this context, cannot suffice to establish a "clear and manifest purpose" to preempt local authority.

Mortier, at 607 (citing *Rice*). Thus, it takes much more than silence to find Federal preemption of the ability of a State, or a local government of a State, to regulate in an area. There must be an explicit statement of an intent to preempt, the Federal scheme of regulation must be so dominant that the Federal regulation occupies the field and State regulation is precluded, or there must be a clear conflict between Federal and State regulation. None existed in *Mortier*, and none exist with the SAFE Act.

Finally, we note that the Court more recently has stated that “Preemption analysis ‘start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’” *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 438 (2002) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). (In *Ours Garage* the Court determined that an exception in a Federal law regulating motor carriers that permitted State regulation with respect to the safety of motor vehicles should be read to permit safety regulation by local jurisdictions. In *Medtronic* the Court determined that a Federal law regulating medical devices and included an express preemption of certain State law did not preempt a lawsuit against a medical device manufacture under a State common law negligence claim.)

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Conclusion

It is clear that the SAFE Act established two parallel systems for qualification of loan originators: a State system requiring licensing for employees of State-licensed entities, and a federal system requiring registration for employees of depository institutions (and certain subsidiaries). The SAFE Act is silent on how loan originators are to be qualified when they move between these systems or how licensed originators may be qualified if they move from one State-licensed entity to a State-licensed entity in another State. And under principles established by the United States Supreme Court, much more than silence is required to find Federal preemption of State law, particularly in an area of traditional State regulation, such as the licensing of professionals. The SAFE Act simply does not supplant State licensing frameworks with a Federal framework, and is deferential to State power in the implementation of a SAFE-compliant licensing scheme, including without limitation providing for transitional licensing and the recognition of qualifications under the laws of another State. For the reasons set forth above, we conclude that, consistent with the SAFE Act, a State may, subject to such conditions as the State may deem appropriate:

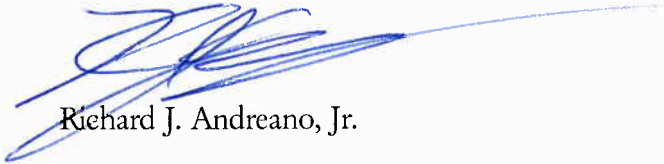
1. Provide for a transitional license for a loan originator who, pursuant to the SAFE Act, is a Registered MLO with a depository institution (or certain subsidiaries), leaves the employ of the depository institution (or a subsidiary) and becomes employed by a State-licensed entity so that the loan originator may immediately function as a loan originator with the new employer while pursuing a standard MLO license.
2. Provide for a transitional license for a loan originator who, pursuant to the SAFE Act, is a Licensed MLO with a State-licensed entity and is licensed in one State, leaves the employ of one State-licensed entity and becomes employed by another State-licensed entity that is licensed in a State in which the MLO is not, so that the loan originator may immediately function as a loan originator with the new employer while pursuing a standard MLO license.
3. Recognize the licensure of a Licensed MLO pursuant to the SAFE Act under the laws of another State as satisfying their own experience, educational and/or testing requirements for a standard MLO license.

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Respectfully submitted,



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