



SAFE Act - Gaps and Disparities Between State Licensing and Federal Registration




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- Goal: Uniform and comprehensive licensing standards, enhanced information for tracking and accountability, streamlined procedures, enhanced consumer protections
 - How uniform is the licensing and registration system for mortgage loan originators?

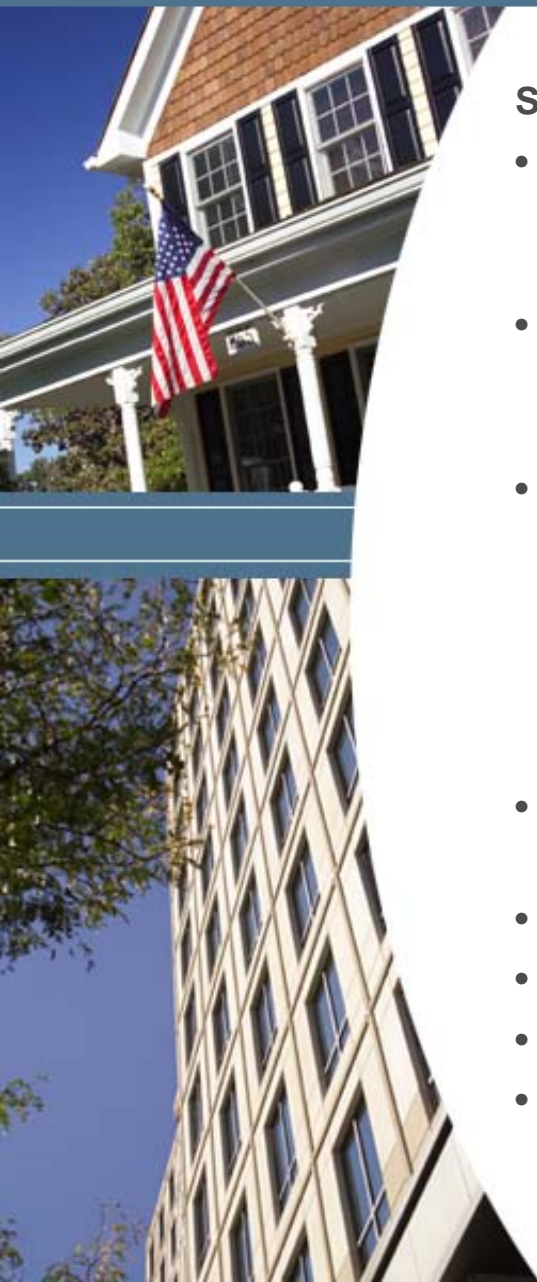
State Licensees:

- » At a competitive disadvantage
- » Not a single national license
- » Must get license in each state

Federal Registrants:

- » Narrower definition of MLO (based on draft FDIC rule)
- » One single national registration
- » SAFE Act does not impose education, testing, bond requirements (agencies state that they are already subject to extensive federal oversight)

Disparity in Requirements

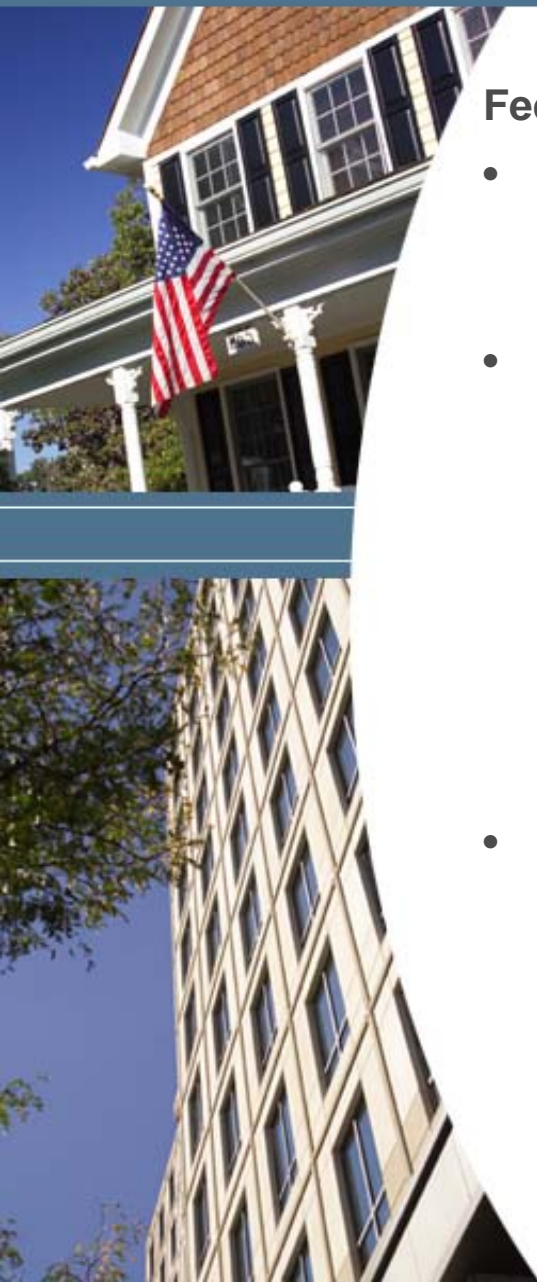


State licensed:

- State and national criminal history background check/fingerprints
- Never had a loan originator license revoked in any governmental jurisdiction
- No conviction of, or plea of guilty or nolo contendere to, a felony during the prior 7-year period, or at any time if felony involved fraud, dishonesty, breach of trust, or money laundering
- Financial responsibility, character, and general fitness
- Pre-licensing education (20 hrs.)
- Written examination (75%)
- Net worth/surety bond/state fund
- Continuing education (8 hrs.)

Federally registered:

- Must register with NMLSR
- Receive Unique Identifier Number
- Submit fingerprints to the NMLSR for submission to the FBI for a criminal background check



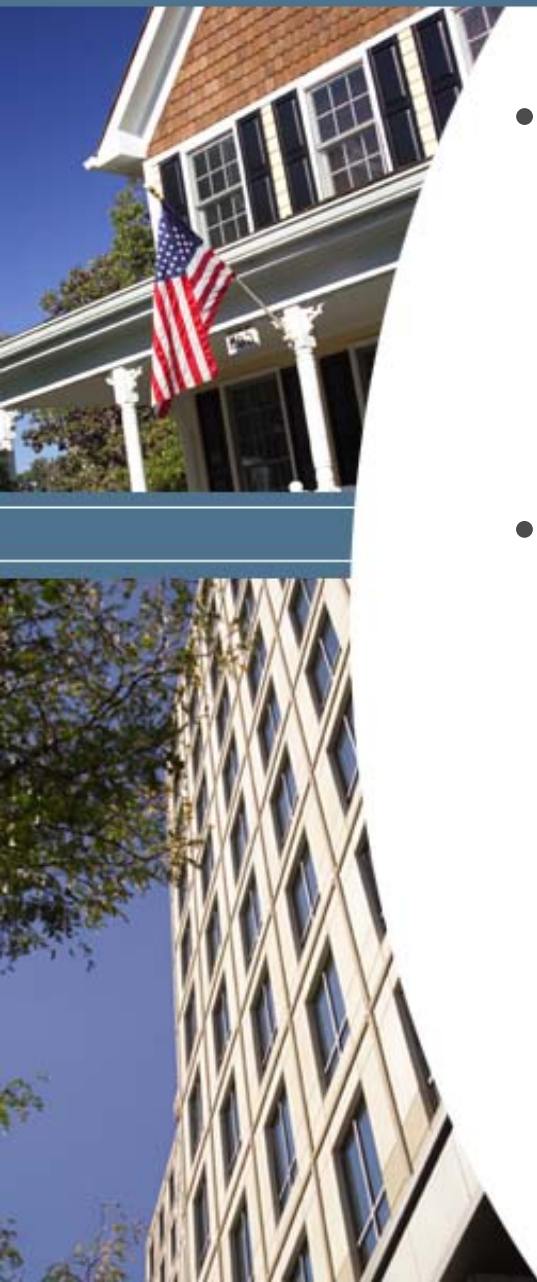
Federal Track

- Overseen by federal banking agencies; FDIC published draft final rule on SAFE Act
- Subject to federal registration if individual is an “employee” of:
 - » a depository institution,
 - » any subsidiary owned and controlled by, depository institution and regulated by a federal banking agency, or
 - » an institution regulated by the Farm Credit Association
- Examples of “Agency-regulated institutions”: Federal and state branches of foreign banks; insured state non-member banks and certain of its subsidiaries (investment companies not included)

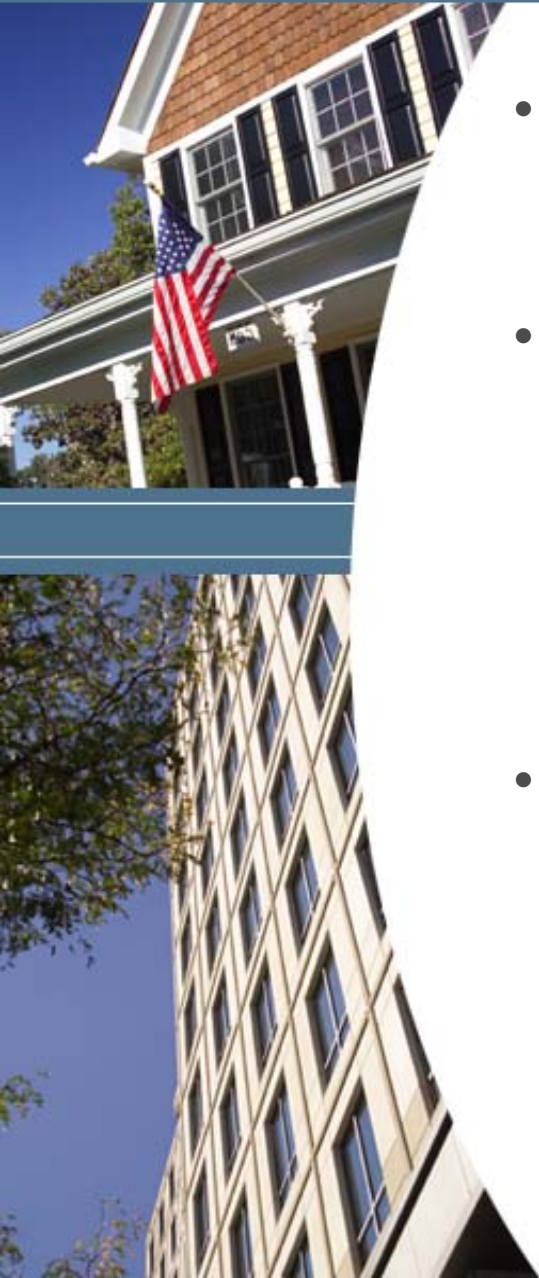
State Track

- HUD has “back-up” authority; recently issued proposed rule on SAFE Act implementation
- States have “catch-all” role; individuals not subject to federal registration are subject to state licensing if acting as a mortgage loan originator
- States generally use the term “registered mortgage loan originators” to describe individuals on the federal track

Who is an “Employee”?

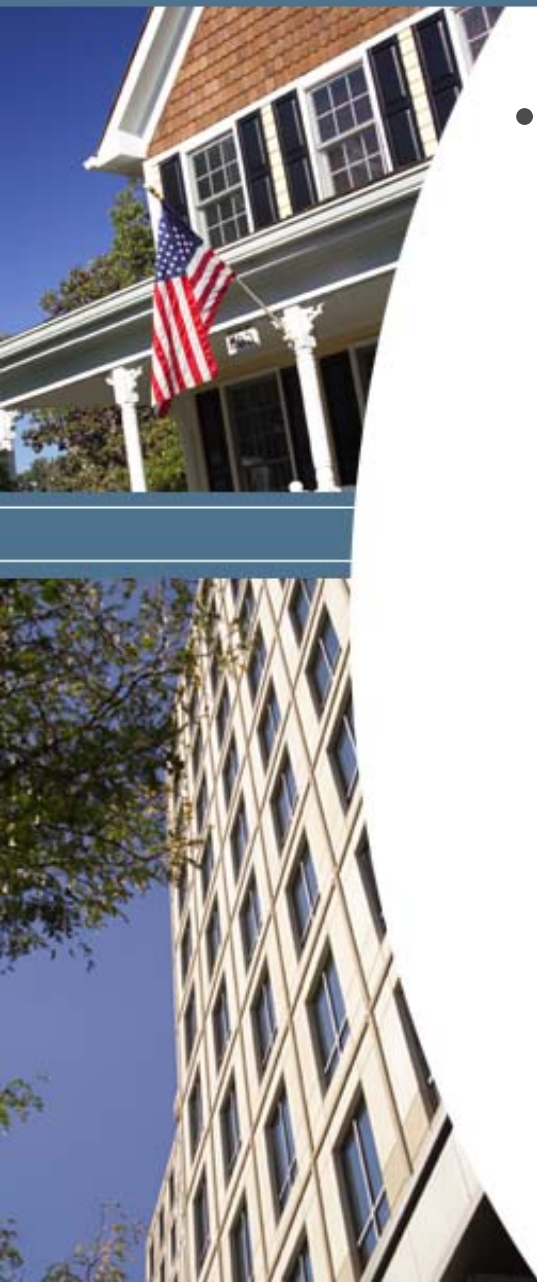


- To determine whether an individual is an “employee” of an Agency-regulated institution, FDIC draft rule uses common law agency doctrine’s “right-to-control” test, which the IRS uses in classifying workers
- Will individual working as an independent contractor exclusively for Agency-regulated institution be subject to state licensing or fall within umbrella of preemption?

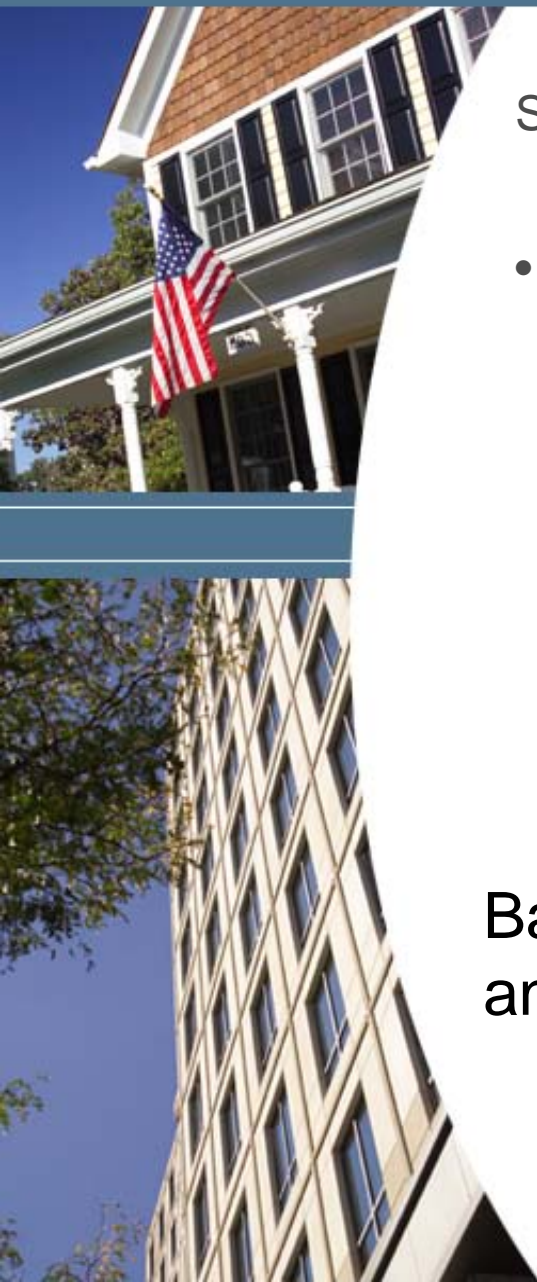


- Will employees of Agency-regulated institutions acting within the scope of their employment be subject to state licensing requirements?
- The preamble to HUD's Proposed Rule affirms the division between federal and state oversight, stating: “HUD’s regulations, when promulgated, do not apply to individuals who are employees of agency-regulated institutions and are, accordingly, subject to the regulations to be promulgated by the agencies.”
- FDIC’s Draft Final Rule states that employees of Agency-regulated institutions are “not subject to State licensing or registration requirements for mortgage loan originators.”

Why Does It Matter?

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- Because of the Gaps:
 - » Definitional Gaps (“and” vs. “or”)
 - » Different interpretations of activity subject to licensure (e.g., application of SAFE Act to loss mitigation personnel)
 - » Timing for federal registration
 - » De minimis allowance for employees of Agency-regulated institutions

“And” vs. “Or”



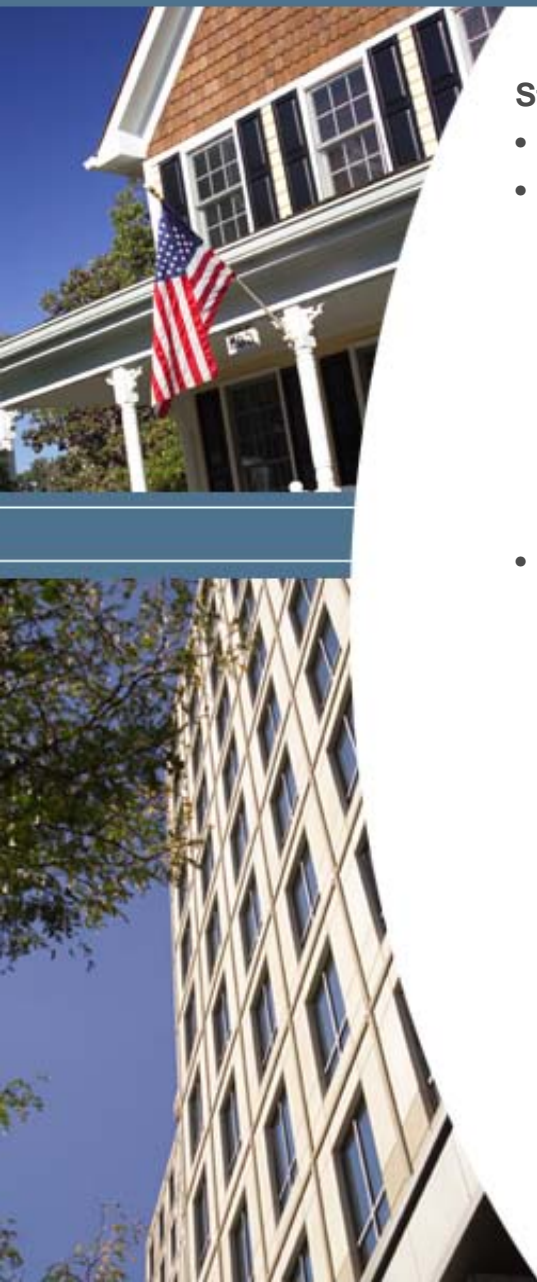
Standard state definition of mortgage loan originator:

- An individual who, for compensation or gain:
 - » Takes a residential mortgage loan application; **or**
 - » Offers or negotiates terms of a residential mortgage loan

Federal definition of mortgage loan originator:

- An individual who, for compensation or gain:
 - » Takes a residential mortgage loan application; **and**
 - » Offers or negotiates terms of a residential mortgage loan

Based on the “and” vs. “or” distinction, federal and state tracks diverge from the outset



States

- Many states do not (yet) define
- HUD: A request, in any form, for an offer (or a response to a solicitation of an offer) of residential mortgage loan terms and the information about the prospective borrower that is customary or necessary in a decision on whether to make such an offer; considered “taken” if received directly or indirectly from the borrower
- Some states (e.g., NY) adopt definition under ECOA: An oral/written request for an extension of credit that is made in accordance with procedures used by a creditor for the type of credit requested

Federal (according to the FDIC draft rule)

Similar description as HUD’s definition, but expressly does not include:

- Contacting a consumer to verify the info in the loan application by obtaining documentation, such as tax returns;
- Assisting a consumer who is filling out an application by clarifying what type of information is necessary for the application or criteria necessary to obtain a loan product;
- In response to an inquiry regarding a prequalified offer that a consumer has received from a bank, collecting only basic identifying information about the consumer and forwarding the consumer to a loan originator; or
- Receiving info in connection with a modification to the terms of an existing loan as part of the bank’s loss mitigation efforts when the borrower is reasonably likely to default

Definitional Gaps: “Offer or negotiate loan terms”

States

- Many states do not (yet) define
- HUD: Presents loan terms; communicates directly or indirectly with borrower to reach an understanding about loan terms; recommends, refers, or steers to a particular lender or set of loan terms with a duty or incentive other than to borrower, and receives compensation

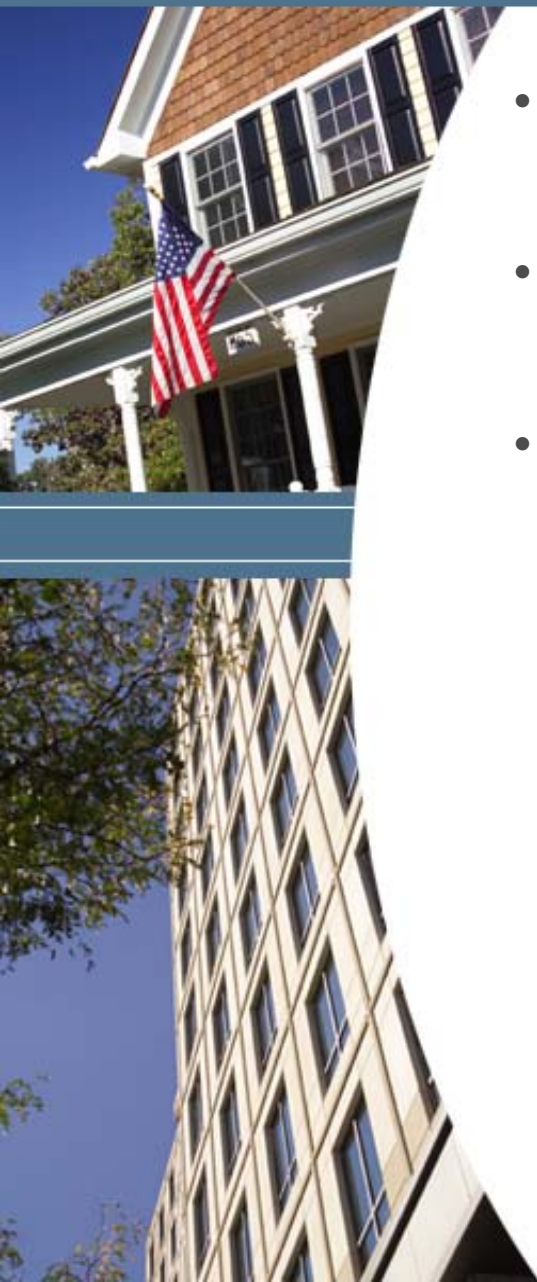
Federal

Does not include:

- Recommending, referring, or steering to a particular lender or set of loan terms

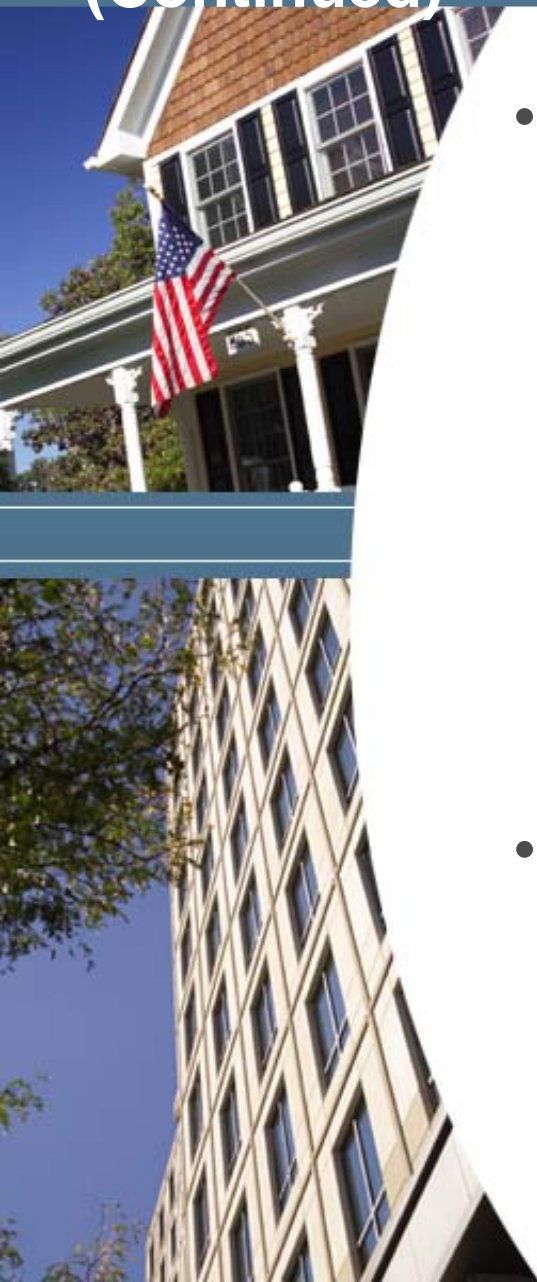
Also does not include:

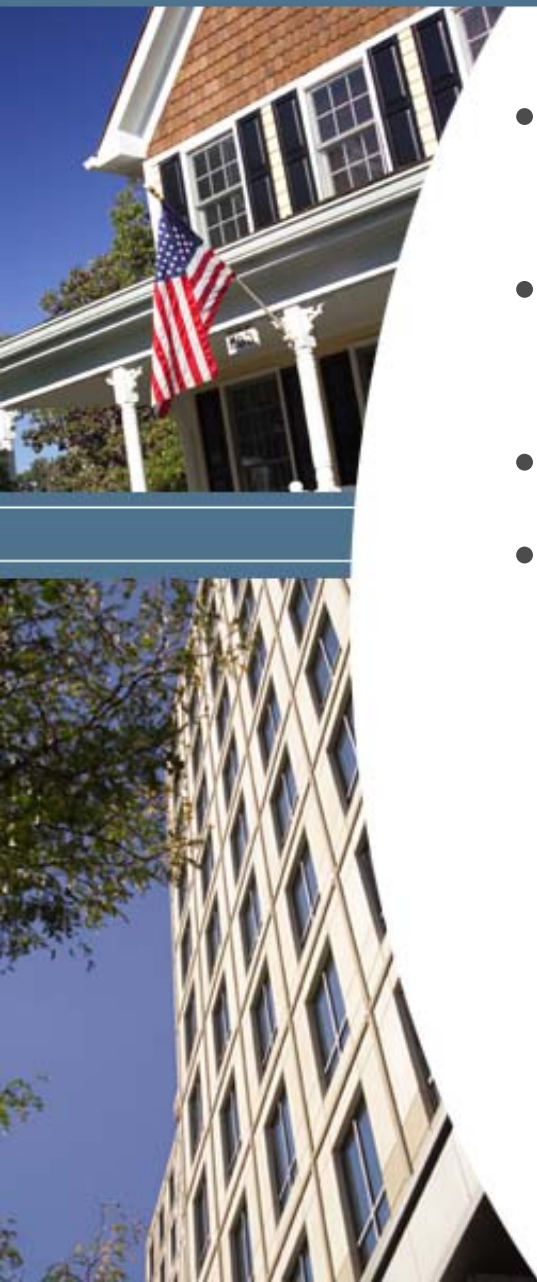
- Providing general explanations regarding qualification for a specific loan product,
- Arranging the loan closing or other aspects of the loan process, including communicating with a consumer about those arrangements, provided that verified loan terms have already been offered or negotiated, or
- Making an underwriting decision



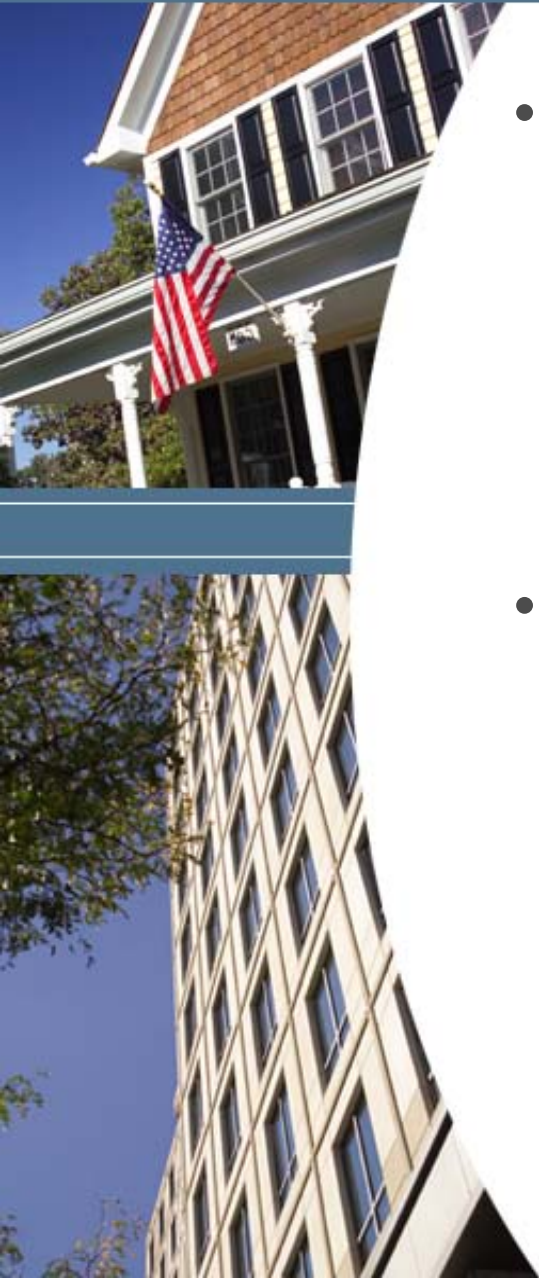
- HUD's Proposed Rule indicates its inclination to require licensing of at least certain individuals who perform loan modifications for servicers.
- The proposal would (if finalized) permit states to extend the deadline for licensing individuals who perform or facilitate only modifications or refinancings under HAMP/HARP.
- Without firm HUD guidance, states have taken various approaches:
 - » Approximately half the states have asserted a position on the licensing of loss mitigation employees
 - » Approximately 14 jurisdictions have so far attempted to exclude or exempt from licensing individuals performing loss mitigation, loan modification or other loan servicing related activities (and two other states authorize their respective agencies to do so) with some contingent on HUD's determination that the exclusion is not consistent with the SAFE Act
 - » Approximately 10 jurisdictions implicitly require those loss mitigation individuals (defined in various ways) to be licensed but have provided for a delayed deadline for that licensing

Loss Mitigation Personnel Under Federal Track (Continued)

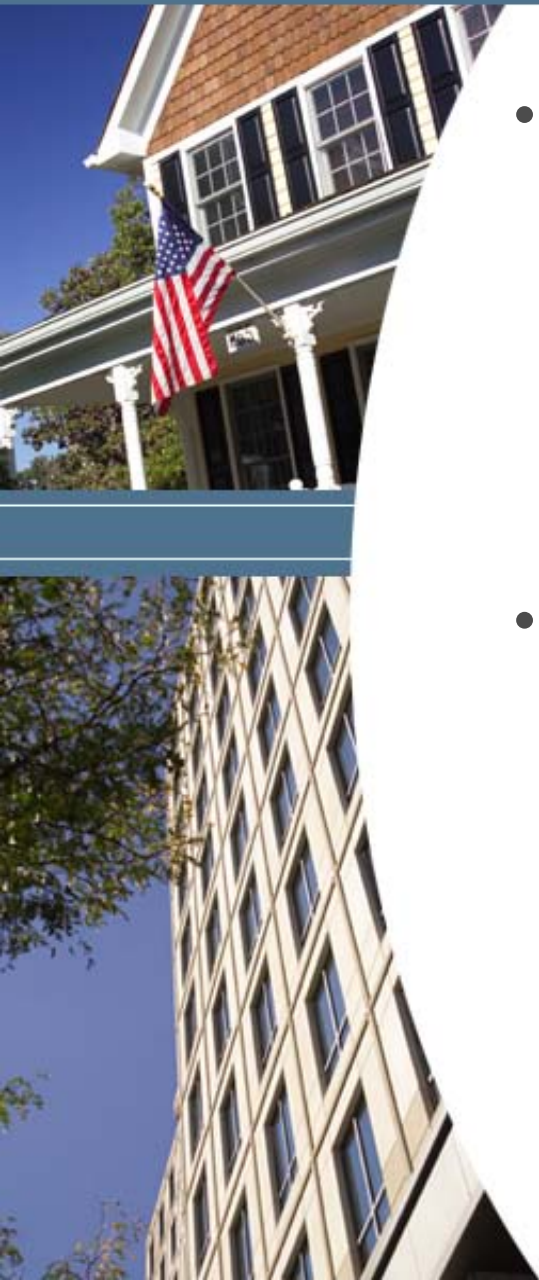
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- FDIC’s draft final rule would (if issued in its current form) state that those employees who “receiv[e] information in connection with a modification to the terms of an existing loan to a borrower as part of the bank’s loss mitigation efforts when the borrower is reasonably likely to default” are not “taking an application” and, thus, are not subject to the registration requirement (regardless of whether he or she offers or negotiates loan terms)
 - Are loss mitigation employees of Agency-regulated institutions off limits to state’s authority? Technically, they will not be exempt as “registered loan originators” and may otherwise meet the state’s LO definition



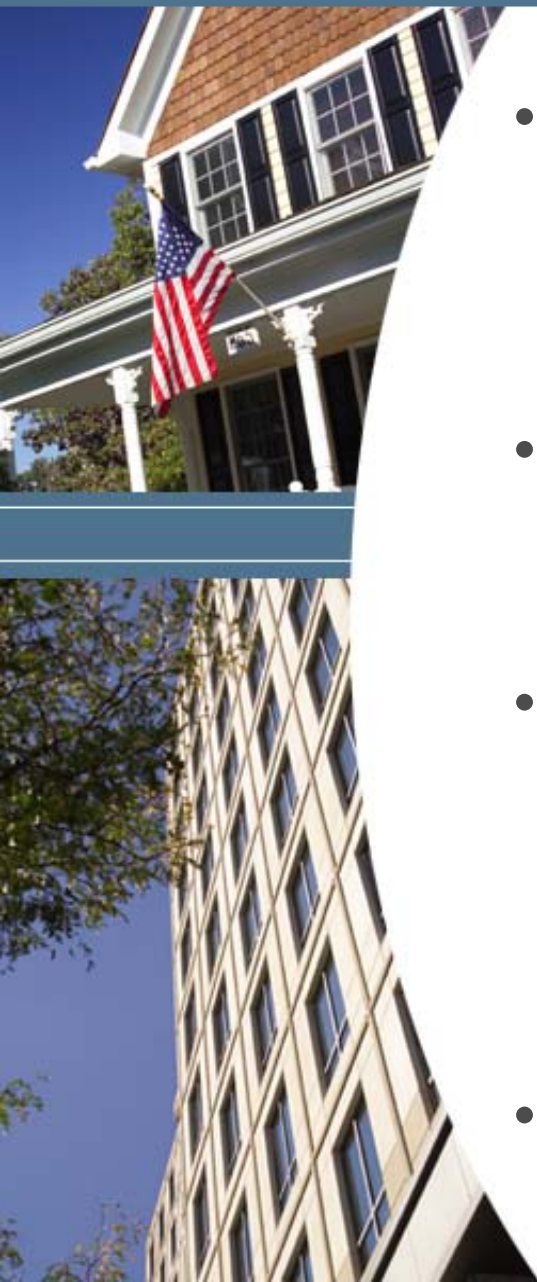
- 180 day implementation after date specified by notice from the federal banking agencies
- States require those engaged in loan origination to be licensed by July 31, 2010
- What about the gap period?
- At least one state has taken the position in writing that until loan originator employees of Agency-regulated institutions can register, it will subject those employees to licensing obligations if they are engaged in MLO activities

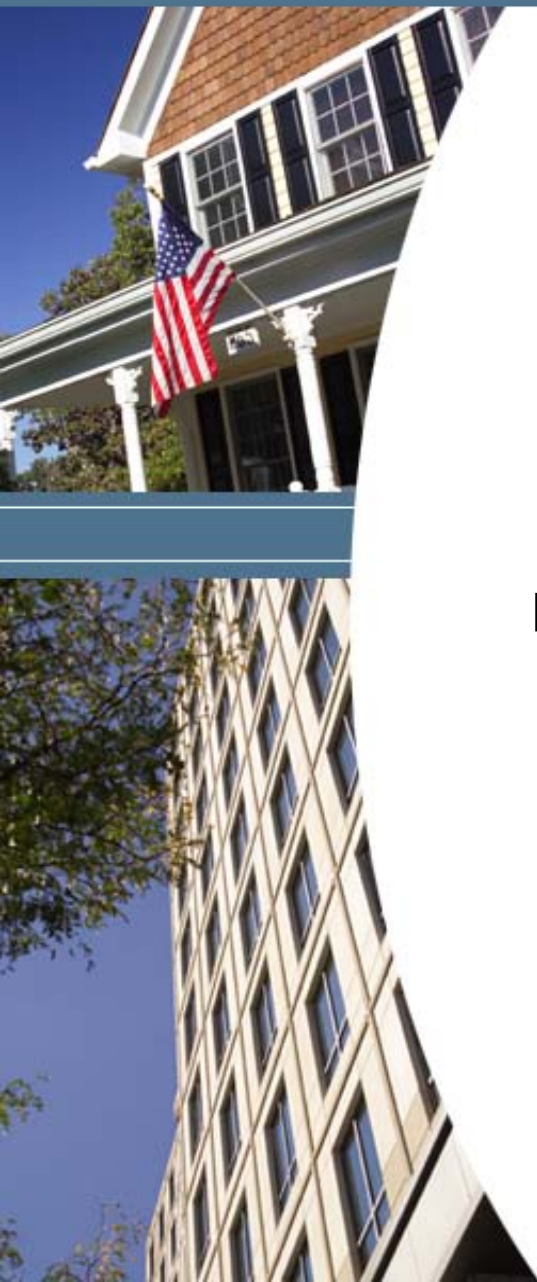


- FDIC's draft final rule would provide a de minimis exemption for an employee who has never been registered or licensed through the NMLS as a mortgage loan originator and who has acted as a loan originator for 5 or fewer residential mortgage loans during the last 12 months
- SAFE Act expressly allowed federal banking agencies the ability to create a de minimis exemption; no parallel allowance for states



- Fannie/Freddie and many states require NMLS “unique identifier” on loan applications
 - » What happens when the individual taking the application (or offering/negotiating loan terms) is not subject to registration (i.e., because of de minimis allowance or because the individual did not engage in both prongs of activity)?
- What happens when an entity is exempt from a licensing statute, but its employees are subject to the MLO requirements? Or an entity is subject to a state’s supervision as a licensee, but it qualifies as an “Agency-regulated institution” (so its employees are not required to be licensed)?

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- What is the line between loan processors/underwriters and loan originators, and must loan processors/underwriters be W-2 employees?
 - Will states extend the MLO licensing requirements to individuals who merely refer borrowers to a lender based on HUD's Proposed Rule?
 - Will states extend the MLO requirements to managers or supervisors due to a broad interpretation of whether "the application is received directly or indirectly from the borrower or prospective borrower?"
 - SAFE Act compliance = Quite Challenging



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