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Finding Middle Ground in the Preemption War Between States and Federal Financial Institutions: The Practical Limitations on *State Farm Bank, F.S.B. v. Reardon*

I. INTRODUCTION

States have been fighting a two-front war to protect their citizens from predatory lending.¹ On one front, states have enacted laws that combat predatory lending by restricting the types of loans that can be sold within their borders² and by establishing licensure requirements for mortgage brokers,³ independent agents who help consumers obtain mortgages in exchange for a fee paid either by the consumer or lender.⁴ On a

1. See Christopher R. Childs, Comment, *So You've Been Preempted - What Are You Going to Do Now?: Solutions for States Following Federal Preemption of State Predatory Lending Statutes*, 2004 BYU L. REV. 701, 702-03 (2004) (explaining that the Office of the Comptroller of the Currency and the Office of Thrift Supervision have found that state laws enacted to combat predatory lending do not apply to federally chartered banks or savings associations on preemption grounds resulting in an additional challenge for states in regulating predatory lending).

2. See, e.g., Florida Fair Lending Act, FLA. STAT. §§ 494.0078-.00797 (2008) (restricting penalties associated with high cost home loans and requiring disclosures and requiring lenders to provide notice to borrowers that a home loan is high cost); Georgia Fair Lending Act, GA CODE ANN. §§ 7-6A-1 to -13 (2008) (restricting terms in high cost home loans); High Risk Home Loan Act, 815 ILL. COMP. STAT. 137/1-/175 (2008) (requiring disclosures to buyers that they may be able to obtain a mortgage at lower cost and prohibiting prepayment penalties and other undesirable terms in high risk home mortgages).

3. See, e.g., ALA. CODE §§ 5-25-1 to -18 (2008) (requiring applicants for mortgage broker licenses to demonstrate good character, submit to a background exam, and demonstrate a net worth of \$25,000 and providing for oversight of activities of licensed mortgage brokers). LA. REV. STAT. ANN. §§ 6:1081-6:1099 (2008) (requiring applicants to demonstrate financial solvency by providing statements or providing a deposit or securities in the amount of \$50,000 and to pass a written exam); OHIO REV. CODE ANN. §§ 1322.01-.99 (2008) (requiring applicants for mortgage broker licenses to have three years prior experience in mortgage lending, to attend classroom instruction, and to submit to examination). Appendix A provides a table briefly describing the requirements of each state to initially obtain a mortgage broker's license. See *infra* Appendix A.

4. See, e.g., Wyoming Residential Mortgages Practices Act, WYO. STAT. ANN. §§ 40-23-102 (a)(vi) (2008) (A mortgage broker is "any person . . . who for compensation, or in the expectation of compensation, assists a person in obtaining or applying to obtain a residential mortgage loan or holds himself out as being able to assist a person in obtaining or applying to obtain a residential mortgage loan.").

second front, states have had to defend their anti-predatory lending laws against preemption challenges brought by national banks and federal savings associations that are seeking to avoid state regulation of their operating subsidiaries and agents.⁵ Because there has been almost no federal regulation of mortgage lending, expanding preemption to the subsidiaries and agents of national banks means that mortgage lending activity carried on by national banks and federal savings associations is not subject to consumer protection laws.⁶

A 2007 Supreme Court decision, *Watters v. Wachovia Bank, N.A.*, gave Wachovia a preemption victory over a Michigan statute that required Wachovia's subsidiary to register with the state.⁷ To support its decision in favor of Wachovia, the Supreme Court reasoned that "in analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the national bank's *powers*, not on its corporate structure."⁸ Although mortgage broker licensing statutes had once been considered a means for states to combat predatory lending without "running afoul of" preemption rules because brokers were non-bank agents,⁹ the *Watters* decision led to speculation that these laws would also be challenged on preemption grounds because courts would extend the decision to independent agents who perform services for federally chartered banks and savings associations.¹⁰

5. See Childs, *supra* note 1, at 702-03 ("State and local governments have enacted laws that combat predatory loan practices by regulating banks and banking subsidiaries operating within their borders, only to have their efforts preempted by the Office of Thrift Supervision [] and the Office of the Comptroller of the Currency.").

6. See Brief for Center for Responsible Lending as Amici Curiae Supporting Respondent at 6, *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 339, 2008 FED App. 0315P (6th Cir.).

7. *Watters v. Wachovia Bank, N.A.*, 127 S.Ct. 1559, 1573 (2007) (holding that the NBA preempts state laws affecting the operations of a national bank or its subsidiary).

8. *Id.* at 1570 (emphasis in the original).

9. Childs, *supra* note 1, at 737.

10. See Barkley Clark and Barbara Clark, *Sixth Circuit: Preemption Precludes Ohio from Licensing Independent Agents of Federal Savings Association*, CLARKS' BANK DEPOSITS AND PAYMENTS MONTHLY, Sept. 2008, at 7 ("The question immediately arose: [d]oes the rationale of the decision extend to independent agents providing various services to the [national] bank[s] [after *Watters* was decided].").

Speculation became reality when the Sixth Circuit decided a preemption challenge to Ohio's Mortgage Broker Act in *State Farm Bank, F.S.B. v. Reardon*.¹¹ In this case, a panel of the Sixth Circuit determined that independent insurance agents who provide mortgage broker services for State Farm Bank, a federal savings association, were not required to comply with the Ohio Mortgage Broker Act on preemption grounds.¹² The panel's reasoning in *State Farm Bank* supports the "free exercise of federal power" that could theoretically result in mortgage brokers avoiding state regulations by becoming agents of federally chartered financial institutions.¹³ Although a state's desire to protect its consumers is not taken into account in preemption analysis,¹⁴ the *State Farm Bank* decision may completely undermine state regulation of mortgage brokers if mortgage brokers affiliate with federally chartered financial institutions to avoid state regulation.¹⁵

In examining the potential consequences of *State Farm Bank, F.S.B. v. Reardon* on state regulation of mortgage brokers, Part II of this case comment provides an overview of the OCC and OTS, preemption of state laws governing financial institutions, and state regulation of mortgage brokers.¹⁶ Part III presents the facts and procedural history of *State Farm Bank* and explains the court's rationale in holding that independent agents of nationally chartered savings associations, who provide mortgage broker services to these associations, are not subject to state mortgage broker regulation and licensing requirements.¹⁷ The Sixth Circuit

Although the Sixth Circuit is the first circuit court to find that a mortgage broker licensing statute could be preempted, it is not the first court to extend the *Watters* decision to agents of a federally chartered financial institution; *SPGGC v. Ayotte*, 488 F.3d 525 (1st Cir. 2007) (holding that that New Hampshire's Consumer Protection Act did not apply to bank issued gift cards sold by a contract agent of a federally chartered bank or savings association).

11. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 2008 FED App. 0315P (6th Cir.).

12. *Id.*

13. R. Christian Bruce, *Mortgages: Sixth Circuit Ruling on Preemption May Extend Impact of Watters Case*, BNA BANKING DAILY, Aug. 26, 2008, <http://www.BNA.com/products/corplaw/bnkd.htm>.

14. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d at 349, 2008 FED App. 0315P at 12.

15. Bruce, *supra* note 13.

16. See *infra* notes 22-76 and accompanying text.

17. See *infra* notes 78-133 and accompanying text.

did not determine whether its holding would apply to agents of national banks or to non-exclusive agents performing mortgage lending activities for national banks and federal savings associations.¹⁸ Therefore, Part IV analyzes whether this holding could extend to national banks and to non-exclusive mortgage brokers.¹⁹ Even if *State Farm Bank* could extend to these groups, Part IV explains how the recently enacted Housing and Economic Recovery Act (“HERA”) supersedes *State Farm Bank* because this act requires actors who are not a federally insured depository institution or a subsidiary of a federally chartered depository institution to be licensed by states.²⁰ Part IV also examines how HERA establishes a middle ground between the desire to protect consumers and the goal of protecting federally chartered financial institutions from inconsistent regulation.²¹

II. OVERVIEW OF REGULATORS OF FEDERALLY CHARTERED FINANCIAL INSTITUTIONS AND THE APPLICATION OF PREEMPTION RULES TO STATE ANTI-PREDATORY LENDING LAWS

A. *Regulators of Federally Chartered Banks and Savings Associations*

1. Office of the Comptroller of the Currency

Prior to the enactment National Bank Act of 1864 (“NBA”), all private banks were chartered by the states.²² To help finance the Civil War, Congress enacted the NBA which established a system of nationally chartered banks²³ with the power “necessary to carry on the business of banking”²⁴ and the Office of

18. See *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 349 n.8, 2008 FED App. 0315P at 12 (6th Cir.).

19. See *infra* notes 142-167 and accompanying text.

20. See *infra* notes 168-188 and accompanying text.

21. See *id.*

22. Hal S. Scott, *Federalism and Financial Regulation*, in *FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS*, 139, 140 (Richard A. Epstein and Michael S. Greve, eds., AEI Press 2007).

23. *Id.*

24. *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 311 (2nd Cir. 2005) (quoting 12 U.S.C. § 24 (2008)).

the Comptroller of the Currency (“OCC”), the federal agency responsible for chartering and regulating national banks.²⁵ Although neither state nor national banks issue currency today, both continue to operate under separate state and federal regulatory systems.²⁶ To ensure that national banks are subject to a scheme of federal regulation and not the laws of fifty states which conflict with a uniform scheme of regulation, the OCC has adopted regulations providing that “[e]xcept where made applicable by Federal law, state laws that obstruct, impair, or condition a national’ bank’s ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks.”²⁷

2. The Office of Thrift Supervision

Approximately seventy years after Congress enacted the NBA, 1,700 state chartered savings and loans had failed,²⁸ and “[forty] percent of all home loans in the United States were in default.”²⁹ To protect home owners³⁰ and to address a “hodgepodge of [unsatisfactory state] savings and loan laws and regulations,”³¹ “Congress enacted the Home Owners’ Loan Act”³² (“HOLA”) to create a system of federally chartered savings and loan associations and the agency responsible for regulating these associations, the Office of Thrift Supervision (“OTS”).³³ While the

25. Scott, *supra* note 22, at 140.

26. *Id.*

27. 12 C.F.R. § 7.4009 (2008).

28. *See* WFS Fin. Inc. v. Dean, 79 F. Supp. 2d 1024, 1026 (W.D. Wis. 1999) (describing the financial crisis Congress faced in 1933).

29. *Conference of Fed. Sav. and Loan Associations v. Stein*, 604 F.2d 1256, 1257 (9th Cir. 1979).

30. *See* H.R. Doc. No. 19, 73d Cong., 1st Sess. (1933). President Roosevelt requested that Congress enact “legislation to protect small home owners from foreclosure and to relieve them of a portion of the burden of excessive interest and principal payments incurred during the period of higher values and higher earning power.” *Id.*

31. *Conference of Fed. Sav. and Loan Associations v. Stein*, 604 F.2d at 1258.

32. *WFS Fin. Inc. v. Dean*, 79 F. Supp. 2d at 1026.

33. Barbara J. Van Arsdale, *Preemption Issues Arising Under Home Owners’ Loan Act of 1933*, 13 A.L.R. Fed.2d 161 (2008). When HOLA was enacted, the Federal Home Loan Bank Board (“FHLBB”) was created to regulate federally chartered savings associations. *Id.* “In 1989, the HOLA was amended by the

OTS is similar to the OCC, the OTS has declared that it has declared that it has “plenary and exclusive authority . . . to regulate all aspects of the operations of Federal savings associations.”³⁴ Therefore, instead of looking to see if a state law conflicts with federal savings associations’ power, the OTS will preempt any state law “affecting the operations of federal savings associations” because the OTS has asserted that it “occupies the field” of federal savings association regulation.³⁵

B. *Preemption and the Dual Banking System*

The Supremacy Clause of the United States Constitution provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the authority of the United States shall be the supreme Law of the Land.”³⁶ Since “federal and state governments both have roles in regulating financial institutions, questions can arise as to whether the governing federal statute [or regulation] preempts particular state laws.”³⁷ In deciding whether a federal statute or regulation “overrides or ‘preempts’ state law,” courts rely on a body of precedent known as “the preemption doctrine.”³⁸

Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which dissolved [FHLBB] and transferred its power and duties to the Office of Thrift Supervision.” *Id.* For simplicity, this case comment refers to FHLBB as OTS.

34. 12 C.F.R. §545.2 (2008).

35. *See* 12 C.F.R. § 560.2(a) (2008). However, “[s]tate laws [regulating “(1) Contract and commercial law; (2) Real property law; (3) Homestead laws specified in 12 U.S.C. § 1462a(f); (4) Tort law; (5) Criminal law”] are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of [12 C.F.R. §560.2(a) (2008)]. 12 C.F.R. § 560.2(c) (2008). Also, “[a]ny other law that OTS upon review finds furthers a vital state interest; and either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in [12 C.F.R. §560.2(a) (2008)]” will not be preempted. *Id.*

36. U.S. CONST. art. VI, cl. 2.

37. Letter from GAO to Hon. James A. Leach, Chairman, Comm. on Banking, Fin. and Urban Affairs, House of Representatives (Feb. 7, 2000), <http://www.gao.gov/corresp/ggd-00-51r.pdf> [hereinafter Role of the OTS and OCC in the Preemption of State Law].

38. *Id.*

Under the preemption doctrine, a federal statute or regulation³⁹ may preempt a state or local law in any one of three situations.⁴⁰ First, a federal law may preempt a state law if the federal law expressly provides that state laws are preempted.⁴¹ Second, a federal law may preempt a state law, when Congress enacts a “scheme of federal regulation so pervasive” that there is no room for states to enact additional laws in the same area as the federal law.⁴² Finally, if there is an “irreconcilable conflict” and an actor could not possibly comply with the requirements of both a state law and a federal law, the federal law will preempt the state law.⁴³ This type of preemption may also be found if a state law prevents “the accomplishment and execution of the full purposes and objectives of Congress.”⁴⁴

While the ultimate decision about whether a federal law or regulation preempts a state law is made by a court, federally chartered banks and savings associations that are affected by a conflict between federal and state law “may seek guidance from [the OCC or the OTS] requesting [the agency’s view] on whether a particular federal statute preempts a particular state[‘s] law.”⁴⁵ In response to the bank or savings association’s request, the OCC or OTS “may issue an advisory opinion” about whether the agency’s regulations preempt state law.⁴⁶ The OCC will preempt a law that irreconcilably conflicts with the NBA or its regulations, but the OTS may preempt state laws that it deems attempt to regulate federal savings association activities, even if the state laws complement OTS regulations, because the OTS occupies the field of regulating federally chartered savings associations and savings banks.⁴⁷

39. In *City of New York v. FCC*, 486 U.S. 57, 63 (1988), the Supreme Court interpreted “[t]he phrase ‘Laws of the United States’ [to] encompass[] both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.”

40. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996).

41. *Id.*

42. *Id.* (quotation omitted).

43. *Id.*

44. Role of the OTS and OCC in the Preemption of State Law, *supra* note 37.

45. *Id.*

46. *Id.*

47. *Id.*

C. *Preemption of State Anti-Predatory Lending Laws*

Preemption of the Georgia Fair Lending Act is a recent illustrative example of the conflict between state anti-predatory lending laws and the preemption policies of the OCC and OTS.⁴⁸ Like other states that were concerned about “abuses in the subprime [mortgage] market” and what they perceived as inadequate federal regulation of this market, Georgia enacted a law to “restrict[] terms on certain classes of high-cost mortgages and to prohibit certain abusive mortgage practices.”⁴⁹ However, “the OCC and OTS [] expressed concern that [Georgia’s] predatory [lending] regulation interfere[d] with the ability of national financial institutions to make real estate loans.”⁵⁰ Each agency determined that state predatory lending laws do not apply to federally chartered banks or savings associations.⁵¹ Specifically, in 2003 the OCC issued an order that provisions of the Georgia Fair Lending Act did “not apply to any nationally chartered banking institution operating within Georgia or any subsidiary of a nationally chartered bank” on the grounds that 12 C.F.R. § 34.4(a) expressly preempted “provisions [of the Georgia act] governing limitations on prepayment fees, . . . the ability of a lender to accelerate the loan absent default by the borrower, and . . . giving borrowers a right to cure any default that occurred over the term of the loan.”⁵² The OTS also concluded that the Georgia act did not apply to federally chartered savings associations because its regulations occupy the field of regulation for lending activities.⁵³

48. Childs, *supra* note 1, at 710-17.

49. *Id.* at 711.

50. *Id.* at 712.

51. See *generally* Notice, National City Bank, 68 Fed. Reg. 46264 (Aug. 5, 2003) (concluding that the Georgia Fair Lending Act does not apply to federally chartered banks because it conflicts with national bank real estate lending powers); Letter from Carolyn J. Buck, Chief Counsel, Office of Thrift Supervision, Department of the Treasury (Jan. 21, 2003), <http://files.ots.treas.gov/56301.pdf> (concluding that the Georgia Fair Lending Act does not apply to federal savings associations or their subsidiaries).

52. Childs, *supra* note 1, at 714-15.

53. Letter from Carolyn J. Buck, Chief Counsel, Office of Thrift Supervision, Department of the Treasury (Jan. 21, 2003) <http://files.ots.treas.gov/56301.pdf>.

D. *State Regulation of Mortgage Brokers*

Recognizing that they could not apply laws which *directly* regulate predatory lending practices to federally chartered financial institutions, states also indirectly combated predatory lending by enacting laws to regulate non-bank entities involved in mortgage lending, including mortgage brokers.⁵⁴ Brokers often establish a relationship of trust with borrowers because they work closely with borrowers to obtain a mortgage from a lender.⁵⁵ As a result, “mortgage brokers are in a unique position that may allow them to take advantage of unwary borrowers”⁵⁶ and are a “significant” source of predatory lending.⁵⁷ Because mortgage brokers are non-bank entities, states believe that they are regulating independent actors who cannot avoid state regulation on preemption grounds.⁵⁸

Although some commentators have suggested that regulation of mortgage brokers will not successfully reduce predatory lending,⁵⁹ mortgage broker regulation is an important part of states’ attempts to prevent predatory lending.⁶⁰ All fifty states have passed mortgage broker licensing statutes.⁶¹ While requirements for licensure vary by state, requirements can be

54. Lloyd T. Wilson, *A Taxonomic Analysis of Mortgage Broker Licensing Statutes: Developing a Programmatic Response to Predatory Lending*, 36 N.M. L. REV. 297, 299 (2006).

55. See Childs, *supra* note 1, at 723.

56. *Id.*

57. *Id.* at 722.

58. See Childs, *supra* note 1, at 704.

59. See, e.g., Allen Fishbein and Harold Bunce, *Subprime Market Growth and Predatory Lending*, HUD PUBLICATIONS (2001) at 281, <http://www.huduser.org/Publications/pdf/brd/13Fishbein.pdf> (“Views differ on whether additional consumer protections and remedies are needed to successfully curb predatory practices.”). Opponents of regulation of mortgage brokers argue that “abuses can be combated through a combination of better enforcement and increased consumer education . . . [and] that over-regulating in this area could result in restricting access to credit for those most in need. *Id.* at 781-2.

60. See Brief for Center for Responsible Lending as Amici Curiae Supporting Respondent, *supra* note 6, at 3, (“Ohio’s mortgage licensing law, Ohio Rev. Code § 1322.01 *et seq.*, protects vulnerable consumers from well-documented abusive mortgage lending practices by mortgage brokers.”). At the time mortgage broker licensing statutes were adopted, neither the OTS nor the OCC had asserted that it had power to regulate non-subsidiary agents of national banks and savings associations. *Id.* at 13.

61. See *infra* Appendix A.

grouped into several categories including prior work experience or education, competency testing, proof of financial responsibility, and licensing fees.⁶² Each of these requirements plays a gatekeeper function and is designed to keep out unskilled and unscrupulous mortgage brokers.⁶³ Specifically, prior work or education requirements and competency testing prevent brokers “who are unfamiliar with mortgage lending products” or unaware of predatory lending issues from entering the market.⁶⁴ In addition to restricting access to the mortgage broker industry, requiring a broker to present proof of financial viability or to post a surety bond also ensures that the broker will faithfully perform its obligations and provide some level of financial accountability to consumers.⁶⁵ Licensing fees range from several hundred to one thousand dollars.⁶⁶ These fees may not restrict access to a mortgage broker license to the same degree as other requirements, but do help states finance investigations to verify license applicants’ disclosures and consumer education programs.⁶⁷ To ensure that people who wish to work as mortgage brokers obtain a license, states may criminally prosecute an unlicensed person and will treat loans that the unlicensed broker helped consumers obtain as unenforceable.⁶⁸

62. *See* Wilson, *supra* note 54, at 302-09.

63. *Id.* at 301.

64. *Id.* at 308.

65. *Id.* at 307.

66. *E.g.* Fair Mortgage Lending Act, ARK. CODE ANN. § 23-39-505 (2008) (requiring applicants to pay a filing fee of \$750).

67. *See, e.g.*, Tennessee Residential Lending, Brokerage and Servicing Act of 1988, TENN. CODE ANN. § 45-13-104 (2008) (requiring applicants to pay an investigation fee).

68. *E.g.* R.I. GEN. LAWS § 19-14-26 (2008) (providing that a person who violates any provision of the mortgage broker licensing act, which includes a requirement to be licensed, may be prosecuted for a misdemeanor).

Table 1: Summary of State Requirements for Mortgage Broker Licensure as of 1 July 2008⁶⁹

| Type of Requirement | Number of States | List of States |
|--|------------------|--|
| Prior Work Experience/ Educational Requirements | 27 | AZ, AR, CA, CO, FL, GA, ID, IL, IN, KY, LA, MD, MA, MS, MT, NV, NY, NC, OH, OK, OR, RI, SC, TN, TX, UT, WA |
| Competence testing | 12 | AZ, CA, CO, FL, KY, MS, MT, NJ, TX, UT, WA, WV |
| Proof of Net Worth/ Surety Bond | 41 | AL, AK, AZ, AR, CO, CT, DE, GA, HI, ID, IL, IN, IA, KY, LA, ME, MD, MI, MN, MS, MO, MT, NE, NH, NJ, NM, NY, NC, ND, OH, OR, PA, RI, SC, SD, TN, TX, VT, VA, WA, WI, WV, WY |
| License and/ Investigation Fee | 35 | AL, AK, AZ, AR, CO, DE, FL, HI, ID, IL, IN, IA, KS, KY, LA, ME, MA, MN, MO, MT, NM, NY, NC, ND, OH, OK, OR, PA, SD, TN, TX, UT, VT, VA, WY |

69. The author acknowledges the Mortgage Academy for providing a quick reference database through which she was able to quickly access information on each state's governing statutes. See *State-by-State Licensing Rules for Mortgage Brokers*, MORTGAGE ACADEMY (2006), http://www.mortgageacademy.org/state_by_state.htm. Categories in this table are based on the discussion in Lloyd T. Wilson's article. See *infra* notes 70-72 and accompanying text. Data in the table, however, are based on the author's independent reading of each state's mortgage broker licensing statute. For descriptions of each statute, please consult Appendix A. See *infra* Appendix A.

In addition to weeding out unscrupulous or incompetent mortgage brokers, many states also require mortgage brokers to submit to supervision by a designated state regulatory agency.⁷⁰ States may require brokers to participate in continuing education programs, update the disclosures made on their licensure application, and keep records of their business activities.⁷¹ Continuing education requirements help promote the continued competence of all licensees.⁷² Updating disclosure requirements primarily ensures that brokers continue to be financially responsible to consumers.⁷³ Requiring mortgage brokers to maintain records assists state regulators in reviewing broker activities for predatory lending.⁷⁴ Record keeping also preserves evidence to enable consumers to seek civil remedies from mortgage brokers.⁷⁵ If a designated state regulatory agency finds that a broker has not complied with updating requirements or has engaged in predatory lending, the state may impose fines or criminal sanctions, restrict a mortgage broker's activity, or suspend a broker's license.⁷⁶

III. *STATE FARM BANK, F.S.B. V. REARDON*

A. *Overview*

1. The Ohio Mortgage Broker Act

In *State Farm Bank, F.S.B. v. Reardon*, Ohio's Mortgage Broker Act ("Ohio Act") was challenged on preemption grounds

70. See, e.g., OHIO REV. CODE ANN. § 1322.06 (2008) (requiring mortgage brokers to submit to oversight and regulation by the Superintendent of the Ohio Division of Financial Institutions).

71. See, e.g., R.I. GEN. LAWS § 19-14-22 (2008) (requiring mortgage broker license holders to report hours of continuing education).

72. Wilson, *supra* note 54, at 312-16.

73. *Id.*

74. *Id.* at 313.

75. *Id.* at 317-18.

76. See, e.g., Licensing Requirements Act of Certain Brokers of Mortgages on Residential Real Property, S.C. CODE ANN. § 40-58-80 (2007) (imposing penalties and license revocation on mortgage brokers who do not comply with South Carolina's mortgage broker statutes).

by State Farm Bank, a federal savings association.⁷⁷ The Ohio Act defines a mortgage broker as one who “assist[s] a buyer in obtaining a mortgage and charges and receives from the buyer or lender money or other valuable consideration . . . for providing this assistance.”⁷⁸ Under the Ohio Act, mortgage brokers must obtain a certificate of registration from the Superintendent of the Ohio Division of Financial Services (“Superintendent”).⁷⁹ To qualify for this certificate, a mortgage broker must have “at least three years of experience in the mortgage and lending field.”⁸⁰ While the Ohio Act does not apply to federally chartered savings banks, their employees, or their affiliates,⁸¹ the Ohio Act was problematic for State Farm Bank because the savings association markets its financial products and services through a network of independent insurance agents instead of employee operated branch offices.⁸²

Since State Farm Bank’s agents helped customers complete mortgage applications and were compensated for this work, they

77. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 340, 2008 FED App. 0315P at 3 (6th Cir.).

78. OHIO REV. CODE ANN. § 1322.01(G) (LexisNexis 2008). “[A] person that solicits financial and mortgage information from the public, provides that information to a mortgage broker, and charges or receives from the mortgage broker money or other valuable consideration readily convertible into money for providing the information,” and “[a] person engaged in table-funding or warehouse lending mortgage loans that are first lien mortgage loans” are also statutorily defined as mortgage brokers. *Id.*

79. OHIO REV. CODE ANN. § 1322.03(A) (LexisNexis 2008).

80. OHIO REV. CODE ANN. § 1322.03 (LexisNexis 2008). “Experience [in the mortgage lending field] may include employment with or as a mortgage broker or with a financial institution, mortgage lending institution, or other lending institution.” *Id.* The Superintendent of the Ohio Division of Financial Institutions may also approve “three years of other experience related specifically to the business of mortgage loans.” *Id.* The Ohio Act also requires mortgage brokers to attend continuing education courses, maintain records of all loan transactions, and submit to oversight and regulation by the Superintendent of the Ohio Division of Financial Institutions. OHIO REV. CODE ANN. §§ 1322.052-1322.06 (LexisNexis 2008).

81. OHIO REV. CODE ANN. § 1322.02(C)(1)(a) (LexisNexis 2008). Affiliate means “an entity that controls, is controlled by, or is under common control with . . . a savings bank . . . and that the board of governors of the [F]ederal [R]eserve [S]ystem, the [OCC], the [OTS], the [FDIC], or the [N]ational [C]redit [U]nion has authority to examine, supervise, and regulate including with respect to the affiliate’s compliance with applicable consumer protection requirements.” *Id.*

82. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 339, 2008 FED App. 0315P at 3(6th Cir.).

met the definition of mortgage broker under the Ohio Act.⁸³ Although the agents marketed State Farm Bank's mortgage products exclusively for State Farm Bank, they were neither employees nor affiliates of State Farm Bank.⁸⁴ Since the agents were not employees or affiliates of State Farm Bank, they were required to obtain a certificate of registration from Ohio.⁸⁵ Like other mortgage brokers, the agents would need "three years of [prior] experience in the mortgage lending field" to obtain a certificate of registration from Ohio.⁸⁶ Since the agents' prior work experience was in insurance, most would not be able to satisfy the requirement of three years prior experience in the mortgage and lending field.⁸⁷ Therefore, the agents would not be able to obtain a certificate of registration and would not be able to market State Farm Bank's mortgage products in Ohio. State Farm Bank would either be forced to stop operating in Ohio or alter its business model.⁸⁸

2. OTS Advisory Opinion

State Farm Bank wrote to the OTS, requesting that the agency issue an advisory opinion "as to whether its independent agents were . . . 'subject to state [mortgage broker] licensing or registration laws,'" such as those in Ohio and other states.⁸⁹ The OTS Chief Counsel's Office issued an advisory opinion letter in 2004⁹⁰ concluding that state mortgage broker licensing and registration requirements do not apply to exclusive agents of a federal savings association who help the association carry out its "deposit and lending powers" and are inconsistent with "the OTS's

83. *Id.* at 338, 2008 FED App. 0315P at 2.

84. *Id.* at 339, 2008 FED App. 0315P at 3.

85. *Id.* at 340, 2008 FED App. 0315P at 4.

86. OHIO REV. CODE ANN. § 1322.03 (LexisNexis 2008).

87. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d at 348 n.7, 2008 FED App. 0315P at 11.

88. *Id.* at 348, 2008 FED App. 0315P at 11.

89. *State Farm Bank, F.S.B. v. Reardon*, 512 F.Supp.2d 1107, 1115 (S.D. Ohio 2008).

90. Authority of a Federal Savings Association to Perform Banking Activities through Agents Without Regard to State Licensing Requirements, 2004 WL 3272094 (Oct. 25, 2004) [hereinafter OTS Opinion Letter].

regulatory authority.”⁹¹ Although the OTS had never asserted authority to preempt state laws regulating exclusive agents,⁹² the OTS’s conclusion was based on several of the agency’s own regulations and the HOLA.⁹³ Specifically, the OTS reasoned that exclusive agents are similar to operating subsidiaries of federal savings associations⁹⁴ and that the agency has the exclusive authority to regulate the operations of these subsidiaries.⁹⁵ Therefore, the OTS reasoned that state laws which would not apply to a federal savings association or its operating subsidiaries on preemption grounds would also not apply to exclusive agents of federal savings associations.⁹⁶ Applying this interpretation of its regulations to State Farm Bank’s situation, the OTS concluded that the Ohio Act did not apply to State Farm Bank’s agents on preemption grounds.⁹⁷

After receiving the OTS’s advisory opinion, State Farm Bank wrote a letter to the Superintendent that informed the Superintendent that based on the OTS advisory opinion State Farm Bank’s agents would not be required to comply with the licensing requirements of the Ohio Act.⁹⁸ The Superintendent did not respond to State Farm Bank’s letter or indicate that State Farm Bank’s agents were exempt from the Ohio Act.⁹⁹ As a result, State Farm Bank and one of its agents, George Meinberg,¹⁰⁰ sued

91. *Id.* at 15.

92. *Id.* at 7-8.

93. *Id.* at 7-8.

94. *Id.* at 9. Federal savings associations may have an ownership interest in an operating subsidiary provided that the subsidiary engages in activities permissible for federal savings associations and the subsidiary’s operations are subject to the exclusive regulatory authority of the OTS. 12 C.F.R. §§ 559.2 (2008); 559.3(n)(1) (2008).

95. OTS Opinion Letter, *supra* note 90 at 5-6. Specifically, 12 C.F.R. § 559.3(n)(1) (2008) provides that “state law only applies to operating subsidiaries to the extent that it applies to [a federal savings association].” Since the OTS has exclusive regulatory authority over the operations of federal savings associations, the agency also has exclusive regulatory authority over the operations of a federal savings association’s subsidiary. *See* 12 C.F.R. § 560.2 (2008).

96. OTS Opinion Letter, *supra* note 90 at 11-14.

97. *Id.* at 14-15.

98. Brief for Plaintiff-Appellants at 14, *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 2008 FED App. 0315P (6th Cir.).

99. *Id.* at 15.

100. Plaintiff Meinberg completed State Farm’s training on federal statutory and regulatory compliance but was not allowed to market mortgages because of Ohio’s

the State of Ohio¹⁰¹ in the United States District Court for the Southern District of Ohio for declaratory and injunctive relief on the grounds that federal law preempts the Ohio Act from applying to State Farm Bank's exclusive agents.¹⁰² Both State Farm Bank and Ohio filed cross motions for summary judgment.¹⁰³

3. The Southern District of Ohio

The district court denied State Farm Bank's motion for summary judgment and concluded that the Ohio Act applied to State Farm Bank's exclusive agents.¹⁰⁴ The district court reasoned that the Ohio Act was not preempted on the grounds of express, field, or conflict preemption.¹⁰⁵ Specifically, the district court reasoned that the OTS regulations which expressly preempt state laws that attempt to regulate the activities of a federal savings association, including licensing and registration requirements and laws affecting a federal savings association's ability to originate and sell mortgages, would not apply in this case because these regulations did not cover state laws regulating non-employee agents of a federal savings association.¹⁰⁶ Similarly, the district court rejected arguments that there was no room for state regulation of mortgage brokers because prior to the advisory opinion in this case the OTS had not declared its authority to regulate independent agents, "entities that are not federal [savings associations] or their subsidiaries."¹⁰⁷ The district court also

mortgage broker requirements. Brief for Plaintiff-Appellants at 7, *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 2008 FED App. 0315P (6th Cir.).

101. This case comment refers to the State of Ohio as the defendant because Superintendent Reardon was sued in his official capacity. *State Farm Bank, F.S.B. v. Reardon*, 512 F.Supp.2d 1107, 1107 n.1 (S.D. Ohio 2007).

102. *State Farm Bank, F.S.B. v. Reardon*, 512 F.Supp.2d 1107, 1118 (S.D. Ohio 2007).

103. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 340, 2008 FED App. 0315P at 4 (6th Cir.).

104. *Id.*

105. *State Farm Bank, F.S.B. v. Reardon*, 512 F.Supp.2d at 1119-21.

106. *See id.* at 1120-21 (reasoning that 12 C.F.R. §560.2(a), the regulation used by State Farm to support its position "does not expressly preempt any state law governing" non-employee mortgage brokers of a federal savings institution or its subsidiaries).

107. *Id.* at 1119-20.

concluded that the Ohio Act does not conflict with federal regulations because regulating independent agents does not prevent federal thrifts from engaging in mortgage brokering services on their own.¹⁰⁸

Since the district court concluded that existing OTS regulations did not provide a basis for finding federal preemption, the district court considered the OTS's advisory opinion letter as a basis for finding preemption.¹⁰⁹ Although an agency need not engage in notice and comment rulemaking procedures specified in the Administrative Procedure Act when it interprets its own regulations, the district court found that the OTS advisory opinion went beyond interpretation of the agency's regulations and was thus substantive rulemaking.¹¹⁰ Since the OTS had not followed the Administrative Procedure Act when it issued the advisory opinion letter, the district court concluded that the advisory opinion was due no deference.¹¹¹ The district court further reasoned that because state law can only be preempted by "properly promulgated" regulations, the OTS advisory opinion letter did not preempt the Ohio Act.¹¹² Since the district court did not find preemption under existing OTS regulations or the advisory opinion, it concluded that State Farm Bank's agents were required to comply with the Ohio Act.¹¹³

B. *The Sixth Circuit's Analysis*

Following the district court's decision, State Farm Bank appealed to the Sixth Circuit and argued its case before a three judge panel.¹¹⁴ While State Farm Bank and Ohio devoted most of

108. *Id.* at 1121.

109. *Id.* at 1123-29.

110. *Id.* at 1125.

111. *State Farm Bank, F.S.B. v. Reardon*, 512 F.Supp.2d 1107, 1125 (S.D. Ohio 2007).

112. *Id.*

113. *See id.* at 1129 (holding that the OTS's regulations and advisory opinion letter to State Farm Bank did not preempt the application of the Ohio Mortgage Broker Act to State Farm Bank's exclusive agents).

114. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 338, 2008 FED App. 0315P at 1 (6th Cir.). Two of the three judges on the panel are Sixth Circuit judges, the Honorable David W. McKeague, who authored the opinion, and the Honorable John M. Rogers. *Id.* The third judge, the Honorable John R. Adams, is a district judge for

their briefs to the administrative law issue raised by the district court, the Sixth Circuit framed the issue in this case as whether “federal law preempt[s] the application of the Ohio Act to State Farm Bank’s exclusive agents.”¹¹⁵ The court concluded that the Act should be preempted on express preemption grounds and “because requiring State Farm Bank’s exclusive agents to comply with the Ohio Act would be inconsistent with Congress’s intent that the powers of a federal savings association not be curtailed by state laws.”¹¹⁶

To support this conclusion, the court first determined the scope of the OTS’s preemption regulation, 12 C.F.R. § 560.2.¹¹⁷ The court noted that § 560.2(a) provides that “federal savings associations may extend credit as authorized under federal law . . . without regard to state laws purporting to regulate their activities.”¹¹⁸ The court also explained that Part (b) of this regulation lists “licensing, registration, filings, or reports by creditors” and “processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages,” as types of state laws that are preempted¹¹⁹ because these laws

the Northern District of Ohio and was seated on the panel by designation. *Id.*

115. *Id.* at 341, 2008 FED App. 0315P at 4.

116. *Id.* at 341, 2008 FED App. 0315P at 5.

117. *Id.* at 342-43, 2008 FED App. 0315P at 5.

118. *Id.* at 343, 2008 FED App. 0315P at 6 (quoting 12 C.F.R. § 560.2(a)(2008)).

119. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 343, 2008 FED App. 0315P at 6 (6th Cir.) (quoting 12 C.F.R. § 560.2(b) (2008)). Other types of state laws that are preempted by 12 C.F.R. § 560.2 include laws that regulate “the ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements; loan-to-value ratios; the terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan; loan related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees; escrow accounts, impound accounts, and similar accounts; security property, including leaseholds; access to and use of credit reports; disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants; . . . disbursements and repayments; usury and interest rate ceilings to the extent provided in 12 U.S.C. § 1735f-7a and part 590 of this chapter and 12 U.S.C. § 1463(g) and 560.110 of this part; and due-on-sale clauses to the extent provided in 12 U.S.C. § 1701j-3 and part 591 of this chapter.” 12 C.F.R. § 560.2(b) (internal numbering omitted).

directly affect a federal savings association's banking and lending activities.¹²⁰ The court noted that other courts have determined that § 560.2 was promulgated "for the purpose of preempting state laws that the agency believes burden the ability of federal savings associations to exercise their federally-granted powers free from burdensome state regulation."¹²¹

The court then considered whether the Ohio Act interfered with State Farm Bank's power to engage in mortgage lending. Although Ohio contended that the Act did not affect the exercise of State Farm Bank's power because it was only regulating independent agents and not "State Farm Bank, its employees, or subsidiaries,"¹²² the Sixth Circuit rejected this argument because it was inconsistent with a recent Supreme Court decision, *Watters v. Wachovia Bank, N.A.*¹²³

In *Watters*, the Supreme Court held that a Michigan law requiring non-federally chartered lenders to register and be subject to licensing requirements did not apply to the subsidiaries of national banks.¹²⁴ In reaching this conclusion, the majority reasoned that "in analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the national bank's powers, not on its corporate structure."¹²⁵ Drawing on this language, the Sixth Circuit reasoned that "*Watters* stands for the proposition that when considering whether a state law is preempted by federal banking law, the courts should focus on whether the state law is regulating 'the exercise of a national bank's power' not on whether the entity exercising that power is the bank itself."¹²⁶ Based on this interpretation of *Watters*, the

120. *Id.* at 344, 2008 FED App. 0315P at 7 (noting that 12 C.F.R. § 560.2(c) provides that state laws that the OTS lists as not preempted, such as tort law and criminal law, "only incidentally affect the lending operations of a federal savings association") (emphasis in the opinion).

121. *Id.* at 344, 2008 FED App. 0315P at 8 (citing *Flagg v. Yonkers Sav. & Loan Ass'n, FA*, 396 F.3d 178, 183 (2nd Cir.)(2005); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982)).

122. *Id.*

123. *Id.* at 344, 2008 FED App. 0315P at 9.

124. *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1573 (2007).

125. *Id.* (emphasis added).

126. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 345, 2008 FED App. 0315P at 9 (6th Cir.). The Sixth Circuit also noted that its interpretation of *Watters* was also supported by *SPGCC v. Ayotte*, 488 F.3d 525 (1st Cir. 2007). *Id.* In *Ayotte*, the First

Sixth Circuit reasoned that state laws regulating the power of a federal savings association to engage in financial activities through agents would be preempted under § 560.2.¹²⁷

The Sixth Circuit determined that State Farm Bank has the power to solicit and market mortgage products through contract agents, specifically State Farm Bank's network of independent insurance agents.¹²⁸ The Ohio Act would prevent State Farm Bank from operating in Ohio or would require State Farm Bank to make "drastic changes" to its business model because the agents would not be able to comply with the Ohio Act's requirement of three years prior experience in the mortgage and lending field.¹²⁹ Since the Ohio Act would interfere with State Farm Bank's "decision as to how best to exercise its mortgage lending powers," the court concluded that the Ohio Act could be preempted because it prevented State Farm Bank from having "maximum flexibility to exercise its lending powers in accordance with a uniform scheme of regulation" as required by § 560.2(a).¹³⁰

The court also reasoned that the Ohio Act required State Farm Bank's agents to be licensed and registered and would prevent State Farm Bank from marketing mortgage products in Ohio, it was expressly preempted by 12 C.F.R. § 560.2(b) which preempts state laws that require federal savings associations to participate in "licensing [and] registration"¹³¹ and affects the association's ability to "process [and] originate[]"¹³² mortgages.¹³³

Circuit concluded that New Hampshire's Consumer Protection Act did not apply to bank issued gift cards sold by a contract agent of a federally chartered bank or savings association. *SPGGC v. Ayotte*, 488 F.3d 525. Like the Sixth Circuit, the First Circuit reasoned "that it would defeat the purpose of federal banking law to allow states to avoid preemption of their statutes by enacting laws that prevent agents 'from providing national banks with the resources to carry out their banking activities.'" *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d at 346, 2008 FED App. 0315P at 10 (quoting *SPGGC v. Ayotte*, 488 F.3d at 533). Since the New Hampshire statute "significantly interfere[d]" with the ability of a federal bank to engage in activities permitted and regulated by federal law," it was preempted. *Id.* (alteration in the original) (quoting *SPGGC v. Ayotte*, 488 F.3d at 533).

127. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d at 345, 2008 FED App. 0315P at 10.

128. *Id.* at 346, 2008 FED App. 0315P at 10.

129. *Id.* at 348 n.7, 2008 FED App. 0315P at 12.

130. *Id.* at 347, 2008 FED App. 0315P at 11 (quoting 12 C.F.R. § 560.2(a) (2008)).

131. 12 C.F.R. § 560.2(b)(1) (2008).

132. 12 C.F.R. § 560.2(b)(10) (2008).

The court also found that the Ohio Act could also be preempted because it was not a type of state law that was excluded from preemption by 12 C.F.R. § 560.2(c) because the law has more than an incidental effect on federal savings associations.¹³⁴ On either rationale, the court concluded that express preemption of the Ohio Act was appropriate.¹³⁵

While the court recognized that the Ohio Act was enacted to protect consumers, it concluded that consumer protection was irrelevant in preemption analysis.¹³⁶ Although the court attempted to limit its decision to preempt the Ohio Act to exclusive, independent agents of federal savings associations,¹³⁷ the decision could theoretically extend to the agents of national banks and to non-exclusive agents of national banks and federal savings associations and could potentially undermine state consumer protection laws if mortgage brokers contract with federal financial institutions to avoid state licensing requirements.¹³⁸ In spite of the potentially broad impact of *State Farm Bank* on states' mortgage broker licensing laws, as the court noted, its decision is superseded by the recently enacted Housing and Economic Recovery Act of 2008 ("HERA").¹³⁹ The theoretical impact of *State Farm Bank* on consumer protection and the practical limitations on this decision are explained more fully in the next section.¹⁴⁰

133. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 347, 2008 FED App. 0315P at 11 (6th Cir.).

134. *Id.* at 348, 2008 FED App. 0315P at 11.

135. *Id.* at 347-48 2008 FED App. 0315P at 10-11.

136. *Id.* at 349, 2008 FED App. 0315P at 12.

137. *See id.* at 349 n.8, 2008 FED App. 0315P at 12 ("[T]he Ohio Act is preempted as applied to non-exclusive agents who may have entered into contracts to perform some mortgage lending activities on behalf of several federal savings associations.").

138. *See infra* notes 143-167 and accompanying text.

139. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 338 n.1, 2008 FED App. 0315P at 2 (6th Cir.).

140. *See infra* notes 141-188 and accompanying text.

IV. THEORETICAL EXPANSION AND ACTUAL LIMITATIONS ON
STATE FARM BANK

A. *Potential Consequences of State Farm Bank*

The Sixth Circuit limited its holding in *State Farm Bank* to the agents of federal savings associations who work as the exclusive agents of an association and are supervised by that association.¹⁴¹ The court did not decide whether *State Farm Bank* would extend to exclusive, contract mortgage brokers of national banks or to non-exclusive mortgage brokers who solicit mortgages on behalf of federally chartered banks or savings associations.¹⁴² However, the Sixth Circuit's preemption analysis in *State Farm Bank* can be used to extend preemption of state mortgage broker acts to both.¹⁴³

1. National Banks

If a national bank or its subsidiary used contract agents to market and sell mortgages and challenged a state's mortgage broker act, a court could extend *State Farm Bank* and preempt the state's law.¹⁴⁴ Applying the Sixth Circuit's analysis to a national bank, a court should first consider the OCC's preemption regulation, 12 C.F.R. § 34.4.¹⁴⁵ This regulation provides that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks."¹⁴⁶ Specifically, this provision allows national banks to engage in mortgage lending without regard to state mortgage laws or licensing statutes.¹⁴⁷ Like Ohio, a state could argue that preemption analysis was unnecessary because the OCC has not asserted exclusive authority to regulate

141. *Id.* at 349 n.8, 2008 FED App. 0315P at 12.

142. *Id.* at 347 n.6, 2008 FED App. 0315P at 10.

143. *See infra* notes 145-167 and accompanying text.

144. *Id.*

145. *Cf. id.* at 342-43, 2008 FED App. 0315P at 6 (looking first at the OTS's preemption regulation).

146. 12 C.F.R. § 34.4(a) (2008).

147. 12 C.F.R. § 34.4 (2008).

non-employee agents of national banks and their subsidiaries.¹⁴⁸ A court, however, would find this argument unpersuasive based on the Sixth Circuit's interpretation of prior case law that all that matters for preemption analysis is whether the state is regulating banking activity.¹⁴⁹ Following this logic, a court could conclude that the state's mortgage broker act could be preempted if it conflicted with "a national bank's ability to full exercise its Federally authorized real estate lending powers."¹⁵⁰

Like federal savings associations, national banks have the power to engage in mortgage lending activity¹⁵¹ and may have contract agents carry out this activity on their behalf.¹⁵² Since a state's mortgage broker act would require the bank's agent to submit to state investigation, the state's act would "obstruct, impair, or condition"¹⁵³ the national bank's authority to make real estate loans and would be preempted.¹⁵⁴ Thus, *State Farm Bank's* holding that state mortgage broker laws are preempted when applied to federal savings associations may be extended to mortgage brokers who work as exclusive agents of national banks.¹⁵⁵

2. Non-exclusive Mortgage Brokers

The *State Farm Bank* court explicitly left open the question of whether its ruling would extend to federally chartered financial institutions that "[have] contracted with non-exclusive, untrained and unsupervised" mortgage brokers.¹⁵⁶ By focusing on the types of agents to whom its ruling extends, the Sixth Circuit limited its

148. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 345 2008 FED App. 0315P at 9 (6th Cir.).

149. *Id.*

150. 12 C.F.R. § 34.4(a) (2008).

151. 12 U.S.C. § 371 (2008).

152. *See* 12 U.S.C. § 24 (2008).

153. 12 C.F.R. § 32.4 (2008).

154. *Cf. State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 349 2008 FED App. 0315P at 12 (6th Cir.) (holding that a state law indirectly preventing independent agents of a federal savings association from working as mortgage brokers impaired the association's ability to engage in mortgage lending).

155. *Id.*

156. *Id.* at 347 n.6, 2008 FED App. 0315P at 19.

holding to a defined type of actors, exclusive mortgage brokers who provide services for a single federal savings association.¹⁵⁷ In deciding whether the Ohio Act was preempted, however, “the court [] focus[ed] on whether the state law is regulating ‘the exercise of a [federal savings association’s] power’ not on whether the entity exercising that power is the [savings association] itself.”¹⁵⁸

Under the court’s analysis, the activity being regulated by state mortgage broker acts is “the solicitation and origination of mortgages, a power granted to [federal savings associations] by HOLA and the OTS”¹⁵⁹ and to national banks by the NBA and the OCC.¹⁶⁰ Like exclusive agents, non-exclusive agents “solicit[] and originat[e] [] mortgages.”¹⁶¹ While “it’s logical to conclude that a non-exclusive agent that is not working exclusively for federal savings banks and/or national banks, but for federal loan originators . . . would be subject to licensing by the state,”¹⁶² the non-exclusive agent engages in activity, “solicitation and origination of mortgages,” which is a power of federally chartered financial institutions.¹⁶³ If the activity is all that matters for preemption purposes and non-exclusive agents engage in the same activity as exclusive agents of federal savings associations, then preemption would also extend to state laws purporting to regulate the activities of non-exclusive mortgage brokers under the Sixth Circuit’s logic in *State Farm Bank*.¹⁶⁴

157. *See id.* at 349, n.8, 2008 FED App. 0315P at 12.

158. *Id.* at 345, 2008 FED App. 0315P at 9 (quoting *Watters v. Wachovia Bank, N.A.*, 127 S.Ct. 1559, 1570 (2007)).

159. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d, 336, 349, 2008 FED App. 0315Pat 12 (6th Cir.).

160. *See Watters v. Wachovia*, 127 S.Ct. 1559, 1564 (2007).

161. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d at 349, 2008 FED App. 0315P at 12 (6th Cir.).

162. Kevin Funnell, *Bank Lawyer’s Blog*, *Federal Preemption*, http://www.banklawyersblog.com/3z_bank_lawyers/federal_preemption/ (Oct. 2, 2008, 21:39).

163. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d at 349, 2008 FED App. 0315P at 12.

164. *See State Farm Bank, F.S.B. v. Reardon*, 539 F.3d at 345, 2008 FED App. 0315P at 9 (“[T]he courts should focus on whether the state law is regulating ‘the exercise of a [federal savings association’s power]’ not on whether the entity exercising that power is the [association] itself” for purpose of preemption analysis).

In preemption analysis, courts appear to be unwilling to consider the practical consequences of a preemption decision.¹⁶⁵ Thus, it does not appear to matter for preemption purposes that an independent agent performed mortgage broker activities for both state and federally chartered financial institutions. A court could easily conclude that this broker would be required to obtain a license to work with state chartered institutions but would not need to provide all records of its business for state inspection if it dealt with federally chartered institutions.¹⁶⁶ While a “you-can-look-at-this-but-not-this” system might be difficult or impossible to implement, this practical concern may not be taken into account by a court performing a preemption analysis.¹⁶⁷

B. The Housing and Economic Recovery Act, A Practical Limitation on State Farm Bank

State Farm Bank appears to support the “free exercise of federal power” in the area of federally chartered financial institutions because the case can be extended to national banks and to non-exclusive agents without concern for the practical effects of a decision.¹⁶⁸ Since the OCC and OTS do not provide comparable regulations for mortgage brokers, *State Farm Bank* could theoretically result in mortgage brokers affiliating with national banks and federal savings associations to avoid state regulation.¹⁶⁹ As the Sixth Circuit noted, however, this is unlikely to happen because HERA supersedes *State Farm Bank*’s holding that independent agents may avoid state mortgage broker licensure on preemption grounds.¹⁷⁰

165. *See id.* at 349, 2008 FED App. 0315P at 12.

166. E-mail from Kevin Funnell to the author (Oct. 13, 2008, 12:24 EST) (on file with author).

167. *Id.*

168. Bruce, *supra* note 13.

169. *See* Brief for Center for Responsible Lending as Amici Curiae Supporting Respondent at 7, *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 2008 FED App. 0315P (6th Cir.).

170. *State Farm Bank, F.S.B. v. Reardon*, 539 F.3d 336, 336 n.1, 2008 FED App. 0315P (6th Cir.).

On July 30, 2008, President Bush signed the HERA into law to help address the subprime mortgage crisis.¹⁷¹ Title V of this act, the Secure and Fair Enforcement for Mortgage Licensing Act (“S.A.F.E. Mortgage Licensing Act”) supports a state based effort to regulate mortgage brokers but also establishes a uniform system of regulations for each state to implement.¹⁷² Specifically, Congress has asked states to work with the Conference of State Bank Supervisors (“CSBS”) and the American Association of Residential Mortgage Regulators (“AARMR”) “to establish a Nationwide Mortgage Licensing System and Registry” for mortgage brokers.¹⁷³ Based on the requirements of the S.A.F.E. Mortgage Licensing Act, the CSBS has determined that all mortgage brokers must either be state licensed or federally registered.¹⁷⁴ Mortgage brokers who are the employees of a bank, savings association,¹⁷⁵ or any credit union or a controlled subsidiary of one of these institutions that is federally supervised will be required to register with the Nationwide Mortgage Licensing System and Registry.¹⁷⁶ All other mortgage brokers will be required to obtain state licensure and register with the Nationwide Mortgage Licensing System and Registry.¹⁷⁷ By the terms of this act, non-employee agents of any national savings bank or federal savings association will be required to be state licensed.¹⁷⁸

171. Secure and Fair Enforcement for (S.A.F.E.) Mortgage Licensing Act of 2008, Pub. L. No. 110-289, §§ 1501-1517, 122 Stat 2656 (2008).

172. CSBS, Mandates of P.L. 110-289, http://www.csbs.org/AM/Template.cfm?Section=SAFE_Act&Template=/CM/ContentDisplay.cfm&ContentID=18418 (last visited Dec. 20, 2008).

173. § 1502, 122 Stat. 2656.

174. CSBS, Mandates of P.L. 110-289, http://www.csbs.org/AM/Template.cfm?Section=SAFE_Act&Template=/CM/ContentDisplay.cfm&ContentID=18418 (last visited Dec. 20, 2008).

175. 12 U.S.C. 1813(c)(1) (2006). The term depository institution in the S.A.F.E. Mortgage Licensing Act “has the same meaning as in section 3 of the Federal Deposit Insurance Act, and includes any credit union.” Section three of the Federal Deposit Insurance Act defines depository institution as “any bank or savings association.” *Id.*

176. CSBS, Mandates of P.L. 110-289, http://www.csbs.org/AM/Template.cfm?Section=SAFE_Act&Template=/CM/ContentDisplay.cfm&ContentID=18418 (last visited Dec. 20, 2008).

177. *Id.*

178. § 1503 (11), 122 Stat. 2656.

To become a state licensed mortgage broker under the S.A.F.E. Mortgage Licensing Act, independent agents of national banks and savings associations who perform mortgage broker services will be required to submit to an FBI criminal background check, allow the National Mortgage Licensing System and Registry to obtain a credit report, pass a national mortgage test, and participate in twenty hours of pre-license education.¹⁷⁹ The agents also must never have had a mortgage broker license revoked and may not have been convicted of a felony involving “fraud, dishonesty, breach of trust, or money laundering.”¹⁸⁰ The brokers will be further required to demonstrate financial responsibility by posting a surety bond.¹⁸¹ After obtaining a license, mortgage brokers will be required to participate in continuing education programs each year and to submit to state oversight.¹⁸² Since states are required to take steps toward compliance by August 1, 2009, federal savings associations and national banks will probably not have the opportunity to obtain a preemption judgment expanding *State Farm Bank*.¹⁸³ Thus, the S.A.F.E. Mortgage Licensing Act serves a limitation on the expansion of *State Farm Bank* to agents of national banks and to non-exclusive mortgage broker agents of national banks and federal savings associations.¹⁸⁴

It should be noted, however, that because HERA was signed into law before the *State Farm Bank* decision, the S.A.F.E. Mortgage Licensing Act is not a direct response to *State Farm Bank*¹⁸⁵ and may be instead thought of as a means for ensuring that national banks and federal savings associations are subject to some form of consumer protection regulation.¹⁸⁶ While the S.A.F.E. Mortgage Licensing Act discourages customized mortgage broker

179. §1505, 122 Stat. 2656.

180. *Id.*

181. *Id.*

182. *See id.*

183. §1506, 122 Stat. 2656.

184. Bruce, *supra* note 13.

185. Bruce, *supra* note 13.

186. *Cf.* Childs, *supra* note 1 (tracking a series of OTS and OCC decisions to preempt state laws such that legislators may have become concerned that federally chartered financial institutions would be subject to no regulation except for those policies set by the OTS and OCC).

licensure requirements,¹⁸⁷ it does provide a compromise between state interests to protect consumers by regulating mortgage brokers and federal financial institutions' interests in being subject to a single system of law.¹⁸⁸

V. CONCLUSION

To avoid preemption challenges and create an effective means of curbing predatory lending, states enacted mortgage broker licensing statutes.¹⁸⁹ Commentators believed that these laws would survive preemption challenges because mortgage brokers tend to be independent, non-bank actors.¹⁹⁰ *State Farm Bank, F.S.B. v. Reardon* could have potentially rendered state mortgage broker licensing laws ineffective because the decision supports the free exercise of federal power in the regulation of federally chartered financial institutions and encourages mortgage brokers to affiliate with national banks and savings associations to avoid state regulation.¹⁹¹ The S.A.F.E. Mortgage Licensing Act, however, will allow states to continue to regulate mortgage brokers who are non-employee agents of banks and savings associations while also ensuring that federally chartered financial institutions are subject to a single set of laws.¹⁹²

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187. Cf. 122 Stat. 2656 (proposing a uniform system of laws to replace existing state statutes).

188. Bruce, *supra* note 13.

189. Childs, *supra* note 1, at 702-03.

190. *Id.*

191. Bruce, *supra* note 13.

192. See 122 Stat. 2656.

APPENDIX A

Table 1: Description of State Mortgage Broker Licensing Requirements

| State | Statutes Governing Mortgage Brokers | Requirements for Obtaining a Mortgage Broker's License |
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| AL | Mortgage Brokers Licensing Act, ALA. CODE §§5-25-1 to -18 (2008). | Before obtaining a mortgage broker license, Ala. Code §§5-25-5 requires a person to pay an investigation fee of \$100 and a license fee of \$500, demonstrate a net worth of \$25,000, and provide letters of reference providing information about the person's character and expertise . |
| AK | Mortgage Lending Regulation Act, ALASKA STAT. §§ 06.60.010-.080 (2008). | Alaska Stat. § 06.60.10 requires a mortgage broker to obtain a mortgage license. Applicants for a mortgage license must provide a \$25,000 bond, complete an application form that provides information about their financial position and experience, and pay an application fee. Alaska Stat §§ 06.60.045, 06.60.020, 06.60.035 (2008). |
| AZ | ARIZ. REV. STAT. ANN. § 6-903 (2008). | § 6-903 requires applicants to have three years of experience as a mortgage broker or in an equivalent lending field, to pass a licensing exam to obtain a mortgage license. Applicants for a mortgage license must |

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| | | pay an application fee and licensing fee, complete an application form that provides information about their financial position and experience, pay an application fee, and deposit a surety bond of \$10,000 to \$15,000. |
| AR | Fair Mortgage Lending Act, ARK. CODE ANN. §§23-39-501 to -518 (2008). | Under §23-39-505, an applicant for a mortgage broker's license must have three years of prior experience in mortgage lending or a related field, pay a filing fee of \$750, and file financial statements showing a net worth of \$25,000. |
| CA | CAL. BUS. & PROF. CODE §§ 10130-10150 (West 2008). | § 10131(d) provides that mortgage brokers must obtain a Real Estate Broker's license. To qualify for a real estate broker's license, § 10150.6 provides that a person must have two years of industry experience or a bachelor's degree. § 10150 requires the person to pass an exam. |
| CO | Mortgage Broker Licensing Act, COLO. REV. STAT §§ 12-61-901 to -915 (2008). | § 12-61-903 provides that applicants must take a course on mortgage lending, submit fingerprints for a criminal background check, post a surety bond, and pay an application fee. |
| CT | CONN. GEN. Stat. §§ 36a-485 to -534(g) (2008). | § 36a-488 requires a broker to maintain a net worth of \$25,000. |

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| DE | DEL. CODE ANN. TIT. 5, §§ 2101-2118 (2008). | Applicants must pay an investigation fee of \$250 and a license fee of \$500. § 2103. § 2109 requires brokers to maintain a surety bond of \$25,000. Mortgage brokers must maintain a bond of \$25,000. |
| FL | FLA. STAT. §§494.003-.0043 (2008). | To become licensed as a mortgage broker, Fla. Stat. § 494.003 requires that a person to have a high school diploma or its equivalent, pass a competency exam, complete twenty-four hours of classroom education on Florida's financing laws, submit at \$195 application fee, and provide finger prints for a criminal background check. |
| GA | GA. CODE ANN. §§ 7-1-1000 TO -1021 (2008). | § 7-1-1003.2 requires mortgage broker license applicants to maintain a net worth of \$25,000 or surety bond for \$50,000. §7-1-1003 requires applicants to satisfy department education or experience requirements adopted by regulation. |
| HI | HAW. REV. STAT. §§ 454-1 to -8 (2008). | § 454-3 requires mortgage brokers to post a surety bond of \$15,000 and to pay an application and license fee. |
| ID | IDAHO CODE ANN. §§ 26-3101 to -3117 (2008). | § 26-3108 requires an applicant to pay a fee of \$350 and three years of work experience in the mortgage or lending field if the applicant is |

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| | | in charge of the principal place of business. § 26-3110 requires an applicant to pay a surety bond of \$25,000. |
| IL | 205 ILL. COMP. STAT. §§ 635/1-1 to 635/7-1 (2009). | § 635/2-2 requires an applicant to have three years experience in real estate finance or to complete a program in real estate finance. Applicants must also pay a license fee as required by § 635/2-6 and must provide a surety bond under § 635/3-1. |
| IN | IND. CODE §§23-2-5-1 to -23 (2008). | Loan brokers are required to post a bond of \$50,000, pay an application fee, demonstrate compliance with the state's educational requirements, and submit to a fingerprint based background check. § 23-2-5-5. |
| IA | IOWA CODE, §§ 535B.1-535B.17 (2008). | § 535B.4 requires license applicants to pay a fee. § 535B.9 requires applicants to pay a bond of \$50,000. |
| KS | KAN. STAT. ANN. §§ 9-2201 to -2220 (2007). | § 9-2211 requires applicants to post a bond of \$50,000 and to have a minimum net worth of \$50,000. §9-2209 requires applicants to pay a fee. |
| KY | KY. REV. STAT. ANN. §§ 286.8-010 to -990 (West 2008). | § 286.8-034 requires applicants to pay an investigation fee of \$300 and an application fee of \$450. § 268.8-032 requires applicants to complete 30 hours of classroom training or have experience in the field. § 286.8-060 requires applicants |

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| | | to post a surety bond. |
| LA | LA. REV. STAT. ANN. §§ 6:1081-6:1099 (2008). | § 6:1088 requires applicants to demonstrate financial solvency by providing financial statements or providing a deposit or securities in the amount of \$50,000, and pay application fees. Applicants are also required pass a written exam and complete ten hours of professional education. § 6:1094. |
| ME | ME. REV. STAT. ANN. TIT. 9-A, §§ 10-101 to -401 (2008). | § 10-201 provides that an applicant must pay a fee of \$400. §10-202 requires an applicant to post a surety bond of \$25,000. |
| MD | MD. CODE ANN., FIN. INST. §§ 12-401 to -429 (LexisNexis 2008). | § 12-405 requires applicants to have a net worth of at least \$150,000 and have three years experience in money transmission. § 12-408 requires an applicant to submit fingerprints for a background check. |
| MA | MASS. GEN. LAWS CH. 255E, §§ 1 -12 (2008). | § 4 requires the commissioner to determine that an applicant has good character, is competent, and financially responsible. |
| MI | MORTGAGE BROKERS, LENDERS, AND SERVICERS LICENSING ACT, MICH. COMP. LAWS §§ 445.1651-445.1684 (2008). | § 445.1654 requires an applicant to provide a \$25,000 surety bond or irrevocable letter of credit. |
| MN | MINNESOTA RESIDENTIAL | § 58.04 requires applicants to provide a surety bond of |

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| | MORTGAGE ORIGINATOR AND SERVICER LICENSING ACT, MINN. STAT. §§ 58.01-.18 (2008). | \$50,000. |
| MS | MISS. CODE ANN. §§ 81-18-7 to -51 (2008). | § 81-18-9 requires applicants to provide documentation of two years experience in lending. § 81-18-11 requires brokers to provide a \$25,000 surety bond. § 81-18-13 requires licensees to provide fingerprints for a background check. |
| MO | RESIDENTIAL MORTGAGE BROKERS LICENSE ACT, MO. REV. STAT. §§ 443.800-.893 (2008). | § 443.849 requires applicants to provide a surety bond of \$20,000. § 443.859 requires applicants to have a net worth of \$25,000. § 443.821 requires applicants to pay investigation and application fees determined by administrative rules. |
| MT | MONTANA MORTGAGE BROKER AND LOAN ORIGINATOR LICENSING ACT, MONT. CODE ANN. §§ 32-9-101 to -515 (2007). | § 32-9-109 requires an applicant to have a minimum of three years experience as a loan originator or in a related field. § 32-9-110 requires an applicant to take an exam demonstrating the applicant's competence to work in the field. § 3-9-117 requires applicants to pay an application fee of \$500. |
| NE | MORTGAGE BANKERS REGISTRATION AND LICENSING ACT, NEB. REV. STAT. §§ 45-701 to -723 (2008). | Nebraska licenses mortgage brokers through its mortgage banker statute. § 45-709 requires brokers to provide a surety bond of \$50,000. |

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| NV | NEV. REV. STAT. §§ 645B.010- 645B.960 (2008). | § 645B.020 requires a mortgage broker to submit financial statements to demonstrate financial stability. |
| NH | N.H. STAT. ANN. §§ 397-A:1 to 397-B:12 (2008). | § 397-A:5 requires applicants to demonstrate financial stability through documentation. |
| NJ | N.J. STAT. ANN. §§ 17:11C-1 to -50 (West 2008). | § 17:11C-14 requires applicants to demonstrate a net worth of \$50,000. §17:11C-13 requires applicants to provide a bond of \$25,000. §17: 11C-7 requires applicants to take an exam. |
| NM | MORTGAGE LOAN COMPANY AND LOAN BROKER ACT, N.M. STAT. §§ 58-21-1 to -29 (2008). | § 58-21-5 requires applicants to pay a \$400 fee. § 58-21-7 requires an applicant to provide a surety bond of \$25,000. |
| NY | N.Y. BANKING LAW §§ 589 to 599-I (Gould 2008). | § 591 requires applicants to provide a surety bond of at least \$50,000, submit fingerprints for a background check, and pay investigation and application fees. |
| NC | MORTGAGE LENDING ACT, N.C. GEN. STAT. § 52-243.01 to -244 (2008). | On January 1, 2009, applicants for licensure will be required to complete a mortgage lending fundamentals course, have three years prior experience in mortgage lending, post a surety bond of \$50,000, and pay a filing fee. § 53-243.05 |
| ND | N.D. CENT. CODE §§ 13-04.1-10 to 13-04.1- | § 13-04.1-04 requires an applicant for a “money |

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| | 13 (2008). | broker” license to provide a surety bond of \$25,000, pay an investigation fee of \$300, and pay an annual license fee. |
| OH | OHIO REV. CODE ANN. §§ 1322.01-.99 (LexisNexis 2008). | § 1322.03 requires applicants for a certificate of registration as a mortgage broker to pay a \$350 application fee, to post a surety bond, have three years prior experience in mortgage lending, and to attend twenty four hours of classroom instruction on mortgage laws. |
| OK | MORTGAGE BROKER LICENSURE ACT, OKLA. STAT. TIT. 59, §§ 2081 to 2093 (2008). | § 2085 requires applicants for a mortgage broker’s license to have three years experience in mortgage lending and to pay a license and application fee. |
| OR | OR. REV. STAT. §§ 59.840-.996 (2007). | § 59.850 requires applicants for a mortgage broker’s license to post a surety bond of \$25,00 to \$50,000 and to have three years’ experience in negotiating loans or similar experience, and pay a license and application fee. |
| PA | 61 PA. CONS. STAT. §§ 456.304-.318 (2008). | § 456.304 requires applicants for a mortgage broker’s license to provide a \$100,000 surety bond. § 456.05 requires applicants to pay an annual license fee. |
| RI | R.I. GEN. LAWS §§ 19-14-1 to -33 (2008). | § 19-14-5 requires mortgage brokers to have a minimum net worth of \$10,000. § 19-14-6 requires brokers to post a bond of \$20,000. Applicants may also be required to |

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| | | submit to a criminal background check under § 19-14-3. |
| SC | Licensing Requirements Act of Certain Brokers of Mortgages on Residential Real Property, S.C. CODE ANN. §§ 40-58-10 to -110 (2007). | § 40-58-40 requires applicants for mortgage broker's license to maintain securities or a surety bond of \$10,000. § 40-58-50 requires applicants to have two years of work experience, but an applicant may substitute six hours of course work in real estate finance for one year of work experience. |
| SD | S.D. CODIFIED LAWS §§ 54-14-12 to -32 (2008). | § 54-14-16 requires applicants for a mortgage broker's license to pay a fee not greater than \$500. § 54-14-15 requires applicants to submit finger prints for a criminal background check. § 54-14-24 requires applicants to pay a surety bond of \$25,000. |
| TN | Tennessee Residential Lending, Brokerage and Servicing Act of 1988, TENN. CODE ANN. §§ 45-13-101 to -129 (2008). | § 45-13-106 requires applicants for mortgage broker licenses to post a surety bond of \$90,000. Applicants must provide evidence that they have a net worth of at least \$25,000. § 45-13-105. They must also pay an investigation fee. § 45-13-104. After January 1, 2009, § 45-13-104 will require applicants to complete an educational course and submit to a criminal background check. |

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| TX | TEX. CODE FIN. ANN. §§ 156.201-.214 (Vernon 2007). | To be a mortgage broker in Texas, a person must have completed an undergraduate degree and have eighteen months experience in mortgage lending or have three years of experience as a mortgage broker. Tex. Code [Fin.] Ann. § 156.204. § 156.204 also requires license applicants to pass an exam. Brokers are also required to have net assets of \$25,000 or to post a \$50,000 surety bond. § 156.205. § 156.206 requires applicants to submit to a criminal background check. § 156.203 requires applicants to pay an application fee of \$375. |
| UT | UTAH CODE ANN. §§ 61-2C-201 to -208 (2008). | § 61-2c-202 requires an applicant for a mortgage broker license to submit fingerprints for a criminal background check, complete pre-licensing education, pass an exam, and pay an application fee. |
| VT | VT. STAT. ANN. tit. 8, § 2202 (2007). | § 2202 provides that a person must pay a license fee of \$250 and an application and investigation fee of \$250 to be licensed as a mortgage broker. |
| VA | Mortgage Lender and Broker Act, VA. CODE ANN. § 6.1-408 to -431 (2008). | §§ 6.412 and 6.413 require mortgage broker license applicants to pay an application fee of \$500 and maintain a surety bond of |

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| | | \$25,000. |
| WA | Mortgage Broker Practices Act, WASH. REV. CODE ANN. §§ 19.146.005-.905 (LexisNexis 2008). | § 19.146.205 requires applicants for mortgage broker licenses to maintain a surety bond of at least \$20,000, submit to a criminal background check. |
| WV | West Virginia Residential Mortgage Lender, Broker and Servicer Act, W. VA. CODE §§ 31-17-1 to -20 (LexisNexis 2008). | § 31-17-4 requires applicants for mortgage broker licenses to submit a surety bond of \$100,000 and maintain a net worth of \$250,000. |
| WI | WIS. STAT. §§ 224.40-.80 (2007). | § 224.72 provides that a person with a physical office in Wisconsin must post a surety bond of \$10,000 and demonstrate evidence of net worth at least \$100,000 before obtaining a certificate of registration to act as a mortgage broker. |
| WY | Wyoming Residential Mortgages Practices Act, WYO. STAT. ANN. §§40-23-101 to -123 (2008). | § 40-23-106 provides that an applicant must complete a license application and pay an application fee. |

