

Lenders Compliance Group

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Compensation: Coming or Going?



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Prophecy is above my pay grade, but if I were a betting man - which I'm not! - I would bet on a postponement of the TILA loan officer compensation requirements currently scheduled to go into effect on April 1, 2011. Rarely have I seen such a messy roll out of a regulatory change that actually affects virtually all aspects of the mortgage banking industry in general, and mortgage brokers in particular.

Because I'm not a betting man, I hope for the best outcome for industry stability, but will prepare for the "alternative." Our clients will be as prepared as possible, whatever the situation, come April 1, 2011!



Perfect Storm - Exhibit 1: Congress

The Senate's Committee on Banking, Housing, and Urban Affairs, chaired by Tim Johnson (R-SD), is concerned that "regulators are not allowing adequate time for meaningful public comment on their proposed rules. We also believe that regulators are not conducting rigorous analyses of the costs and benefits of their rules and the effects those rules could have on the economy."

Dated February 15, 2011, the letter was sent by ten members of the Committee to Timothy Geithner of the Treasury, Gary Gensler of the CFTC, Sheila Bair of the FDIC, Ben Bernanke of the FRS, Mary Schapiro of the SEC, and John Walsh of the OCC.

In their letter, the Senators observe what has become abundantly obvious to most industry members: "the unprecedented scope and pace of agency rulemakings under the Dodd-Frank Act make it more important than ever that agencies engage in deliberative and rational rulemaking."

The letter enumerates five questions for the recipients to answer, and here is my abbreviated version:

1. Will the respective agencies provide at least 60 days for public comment on all proposed rules and studies required by the Dodd-Frank Act?
2. What steps are being taken to ensure that the rules you adopt under the Dodd-Frank Act are the least burdensome way to achieve the statutory mandate. (Provide how those steps satisfy the obligations under the Administrative Procedure Act and other applicable statutes to conduct cost-benefit and economic impact analyses.)
3. What steps are being taken to ensure that all empirical data and economic analyses submitted by commenters are thoroughly considered before a final rule is adopted.
4. What steps are being taken to ensure that the respective agency is acting in coordination with other agencies charged with adopting related rules? (How is this coordinating being established?)
5. Given the importance of rigorous cost-benefit and economic impact analyses and the need for due consideration of public comments, would additional time for adoption of the Dodd-Frank Act rules improve the respective agency's rulemaking process and the substance of its final rules?



Perfect Storm - Exhibit 2: SBA Office of Advocacy

The SBA Office of Advocacy has written not one, but two letters to the FRB, expressing

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concern that the Federal Reserve did not analyze the full economic impact of the proposal on small entities as required by the Regulatory Flexibility Act (RFA)" and recommending that the FRB prepare an initial regulatory flexibility analysis (IRFA).

The result of the first letter, dated January 13, 2011, brought forth from the FRB a "compliance guide" on January 26, 2011.

I put that FRB issuance in quotes, because ([as previously noted](#)) it is 'inadequate, incomplete, and regurgitates most features of the "already known" aspects of the Regulation Z final rule amendments affecting loan officer compensation.' Best as I can tell, the "compliance guide" seemed meant to be a rush-job response to SBA's January 13, 2011 letter. In other words, this "compliance guide" is 'a transparent attempt to satisfy a regulatory requirement, though the dubious result adds little to an overall resolution.'

In response to the FRB's "compliance guide," the SBA issued a second letter on January 26, 2011 to the FRB, noting specifically that the "guide may not meet the requirements of the Small Business Regulatory Enforcement Fairness Act (SBREFA)." The SBA letter points up the flaws in the "compliance guide," suggests that revisions should be made to it, and requests postponement.

The FRB's response to the SBA's second letter is, essentially, silence.



Perfect Storm - Exhibit 3: Lawsuits and Consternation

Several industry groups have expressed an intention to sue the FRB, or pursue some form of judicial recourse, with the aim of preventing implementation of the loan officer compensation rule on April 1, 2011. As but one example, the [National Association of Independent Housing Professionals](#) (NAIHP) are threatening to sue the FRB within the next few days. NAIHP has invited the NAMB to join them in their suit against the FRB.

According to a statement posted on the NAIHP website, the organization has been preparing legal action against the FRB for almost 2 months. Marc Savitt, the organization's President, states that preparation for their lawsuit has included "interviewing law firms, lining up expert witnesses, research, countless hours of planning and most importantly, raising funds."

In December, the Mortgage Bankers Association (MBA) sent a 19 page, carefully written and comprehensive letter to the FRB's Ben Bernanke and Sandra F. Braunstein of its Consumer and Community Affairs Division. Under the rubric of "Questions on Federal Reserve Loan Originator Compensation Rule," the MBA lists 42 (sic) topics, plus sub-topics, of concern, confusion, and uncertainty, mixed with requests for clarity, interpretive guidance, and statutory support.

The [Impact Mortgage Management Advocacy & Advisory Group](#) (IMMAAG) has been very involved in seeking to "delay implementation until the appropriate impact studies have been concluded "or at least delay implementation to allow for a 'real' guide to be published and to allow the industry to absorb it and get questions answered."

The [National Association of Mortgage Brokers](#) (NAMB) has weighed in mightily and has intimated their interest in pursuing a legal remedy if nothing else will work. The NAMB is also threatening now to take "legal action." ([Video](#))

In January, Michael J. D'Alonzo, President of the NAMB sent a letter to the FRB's Bernanke and Braunstein, requesting a delay in implementation of the loan officer compensation requirements, based in part on alleging that the FRB "has no legal basis for treating mortgage broker companies differently than other firms carrying out the same or substantially similar business operations" and expressly seeking "clarification as to why the Rule permits one class of mortgage market participants to: (1) receive incentive compensation based upon the type of loan originated; (2) reduce their own compensation or income in order to capture more business; and (3) remain exempt from restrictions and prohibitions set forth in the Rule, while other classes of market participants are held to significantly different standards."



Perfect Storm or Safe Harbor

The new loan officer compensation requirements have produced a plethora of webinars, lectures, training videos, questionnaires, surveys, so-called automated solutions, breakout sessions, magazine and news articles - a virtual cottage industry of Google Ads proclaiming "End-to-end mortgage automation solution for bankers and lenders," and "Confused About Dodd-Frank Changes? Sign Up For Onsite/Webinar Training."

In many of the aforementioned venues, speculation is a proxy for regulatory fact. Having a famous speaker or bigwig compliance professional opining on uninterpreted and unclarified TILA statutes makes me uneasy. There just is no replacement for regulatory guidance. Period!

Here's the reality: the largest loan originators and creditors will fend for themselves in this *de facto* unregulated environment, and all others will fall in line, unless and until the FRB provides clarification or delays implementation. Otherwise, the notion that the large originators get to make the interpretation of federal statutes, in the absence of the FRB interpreting them concisely, unambiguously, and cogently, is all a bit too Darwinian for my taste!

This is precisely why FRB regulations are promulgated: to assure a stable market and to avoid large companies determining for all the other companies what the FRB means. Furthermore, impact of the new loan officer compensation rules on the industry is a fundamental feature of any such foundational change to the residential real estate finance market. How is it even conceivable that such a change can be implemented without



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comprehensive impact studies required by federal statutes?

This is not a wave, but a tsunami of confusion with no safe harbor in sight - yet!

I am not a prophet, but betting on a delay seems like a good bet!

Be prepared to implement the loan officer compensation rules on April 1, 2011 - and be sure to consult competent compliance professionals for guidance - even if this dynamic environment continues to cause confusion and ambiguity. But, in the absence of the FRB adequately responding to its role in this debacle it is also wise to do what you can to stand up for the greater good of all market participants.



What do you think?

I would welcome your comments.

Please feel free to email me or leave your comments below.



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