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Wednesday, March 16, 2011

COMES NOW the House! (Loan Originator Compensation)



COMMENTARY: by [JONATHAN FOXX](#)

[Jonathan Foxx](#) is a former Chief Compliance Officer of two publicly traded financial institutions, and the President and Managing Director of [Lenders Compliance Group](#), the nation's first full-service, mortgage risk management firm in the country.

Last week I outlined the salient aspects of lawsuits against the Federal Reserve System (FRB) filed by the [National Association of Independent Housing Professionals \(NAIHP\)](#) [filed 3/7/11], followed by the [National Association of Mortgage Brokers \(NAMB\)](#) [filed 3/9/11], respectively, [NAIHP v FRB: David v. Goliath](#), and [NAMB v FRB: David 2.0 v. Goliath](#). On March 10, 2011, the FRB moved to consolidate the two related cases on the basis that both challenge the FRB's loan originator compensation rule. On Friday of last week [3/11/11], [two prominent Senators sent a letter to the FRB](#), unequivocally requesting a delay of the April 1, 2011 effective date.

According to wire service reports, on March 15, 2011, 31 members of the House Financial Services Committee, chaired by Spencer Bachus (R-AL), sent a letter to the FRB requesting an extension of the implementation date for TILA Loan Originator Compensation rule (Rule). Based on the version circulated by certain news organizations, let's take a look at this missive.



Letter's Arguments - A Salient Selection

This Commentary offers a brief outline of selected arguments against the TILA Loan Originator Compensation rule (Rule). I am leaving out citations, where possible, for ease of reading. This outline is not meant to be comprehensive, authoritative, or relied upon for legal advice. It offers a brief synopsis of the argumentation.

The Signatories

The Letter is signed by these Representatives:

Spencer Bachus, AL, Chairman
 Jeb Hensarling, TX
 Peter King, NY
 Edward Royce, CA
 Frank Lucas, OK
 Ron Paul, TX
 Donald Manzullo, IL
 Walter Jones, NC
 Judy Biggert, IL
 Gary Miller, CA
 Shelley Moore Capito, WV
 Randy Neugebauer, TX
 Patrick T. McHenry, NC
 John Campbell, CA
 Michele Bachmann, MN
 Thaddeus McCotter, MI
 Bill Posey, FL
 Michael G. Fitzpatrick, PA
 Lynn Westmorland, GA
 Blaine Luetkemeyer, MO
 Bill Huizenga, MI
 Sean P. Duffy, WI
 Nan A. S. Hayworth, NY
 Jim Renacci, OH
 Robert Hurt, VA
 Robert J. Dold, IL

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Intentionally Vague

The Letter provides this broadly worded reason for requesting a delay in the Rule's April 1, 2011 effective date:

There have been complaints among numerous stakeholders that the final regulation is "**intentionally vague**," that the [FRB] has refused to provide formal guidelines, and the different members of the [FRB] staff have offered differing interpretations of it's meaning. (My emphasis)

Impact on Consumers and Mortgage Industry

The Representatives believe that the Rule should be delayed in the interest of "protecting consumers," and ensuring "a fair application to small businesses or companies that may experience significant job loss due to its implementation."

Consequently, the signatories request two actions on the part of the FRB: (1) a delay in implementation of the Rule, and (2) issuance of "**proper**" written guidance to facilitate compliance by affected entities. (My emphasis)

Compensation Practices

An interesting and somewhat unsettling statement is found at the Letter's conclusion. The Representatives state that they "share the [FRB's] goal to **improve compensation practices** and **better align incentives** in the mortgage transaction," and "[they] believe that additional time to implement the final rule will help us all attain that goal." (My emphases)

In my view, one of the principal claims of the NAIHP and NAMB lawsuits is the failure of the FRB to "improve compensation practices" or "better align incentives." While admitting the need to rectify these adverse outcomes, the Representatives have not used this unique opportunity to specifically outline how the FRB has not attained those "goal[s]."

Long on Rhetoric, Short on Substance

Perhaps getting all the Representatives to sign this Letter is like trying to get a bunch of cats into a canvas sack. After all, they all have different constituencies and their politics differ. Unlike the Senators' letter, however, the House's Letter is not bi-partisan - all the signatories are Republicans.

To some extent, the Letter states the obvious as reasons for delaying the effective date. The issues cited above for requesting a delay are not new and the Letter provides no new ways to consider the existing issues. Perhaps the Representatives simply want to go on record about how they view the FRB's planned actions.

If that is their intent, perhaps it has been attained through sending the Letter.

But the Letter is long on rhetoric, short on substance.

Last Line of Defense

I have laid out now in a series of Commentaries and Articles why I believe the FRB should delay the Rule or provide clear and unambiguous guidance prior to the effective date.

One basis for a delay or demand for further clarification is grounded, among other things, in statutory support in requiring an impact study necessitated by the Regulatory Flexibility Act (RFA) - the RFA requires an agency that has proposed a rule to prepare and make available for public comment an initial and final regulatory flexibility analysis. To quote the relevant provision: this initial flexibility analysis "shall describe the impact of the proposed rule on small entities." However, the FRB failed to conduct a credible analysis of the impact that the Rule would cause on small entities.

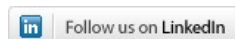
This, plus many other reasons, such as the FRB's failure to explain how a mortgage broker's practice of paying its employees based on the fees paid by a consumer is deceptive or unfair to the consumer.

Or, the FRB's position regarding compensation to affiliates, which under the FRB's interpretation holds that an "affiliate" does not qualify as a third party.

And these are just a few of the many contentious, unresolved, and dispositive issues.

At this point, the NAIHP and NAMB lawsuits probably are the last line of defense.

How those lawsuits fare will likely determine the course of events.



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