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The Smoking Gun - 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.

On April 6, 2011, the TILA loan originator compensation rule (Rule) went into effect, despite the best efforts of numerous industry organizations, a federal agency, congressional legislators, and private citizens to prevent such implementation. Although the [NAIHP](#) has withdrawn its appeals case in order to pursue other options, the [NAMB](#) continues its legal challenge in the US Court of Appeals - DC.

A week before the April 1, 2011 statutorily effective date a letter was written to FRB Chairman Bernanke, requesting significant revisions to the Rule - revisions that strike at critical issues contained in the NAIHP and NAMB's objections.

Commentary and Outline

This Commentary offers a brief outline. 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 only a brief synopsis of the argumentation. For citations, exhibits, and argumentation, please read the letter. (See below.)

The word that is heard perishes, but the letter that is written remains.

- Ancient Proverb

On March 24, 2011, Bernie Frank (D-MA), the House's counterpart to the Senate's Christopher Dodd (D-CT) - now former Senator Dodd - wrote a letter to Chairman Bernanke requesting revisions to the FRB's implementation of the Rule.

Why Frank sent this letter to the FRB eight months after the enactment of his eponymously named legislation known as the Dodd-Frank Act (DFA) - otherwise known as the Wall Street Reform and Consumer Protection Act - after the commencement of litigation, after most of the mortgage industry leadership had spoken with many elected officials in congress to prevent implementation, after the SBA Office of Advocacy had requested a delay, after key organizations had lobbied all along against the Rule, and just days before the effective compliance date - why, that is, Mr. Frank decided to send this letter at the last minute, as it were, is anybody's guess.

Perhaps we can venture a guess or surmise some possible motives.

But, let's review the letter.



A letter does not blush.

- Marcus Tullius Cicero

In the letter, Mr. Frank wants the Rule to go into effect, but he would like the Rule amended "immediately thereafter" for two changes. How a federal statute affecting an entire industry can go into effect and then **immediately thereafter** not go into effect - that he does not say.

According to Mr. Frank, who is now the Ranking Member of the House Financial Services Committee, the Rule "go[es] beyond what was required" and the "two problems unnecessarily interfere with borrowers' ability to obtain loans from mortgage brokers," and revising the Rule accordingly "would not damage the core underlying consumer protections."

Yes, of course, the cited provisions are "problems" - precisely so.

Nevertheless, Mr. Frank believes:

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"It is important that the rule take effect as scheduled, and that the Federal Reserve take immediate action to correct the two problems created by the rule."



Problem # 1

The Rule "appears" to prohibit a mortgage brokerage firm that is receiving compensation for a loan from the consumer from paying any compensation related to that loan to an employee of that firm.

According to Frank, this is because the rule:

"appears to include language that states that when a loan originator receives compensation from the consumer on a loan, no loan originator at all can receive compensation related to that loan from any source."

This interpretation differs from Section 1403 of the DFA, which "merely states" that if a loan originator receives compensation from the consumer, that originator cannot receive compensation from another source.

Frank avers that this statutory provision is meant to prevent "double dipping." However, the FRB's Rule is "more restrictive" because it prevents the sharing of the consumer-paid compensation by the firm with an employee for that employee's work on the loan. Stating the obvious, Frank continues:

"I would note that such sharing of compensation would not involve an increase, directly or indirectly, in the level of fees paid by the consumer."

Here's his recommended change:

The language should be revised to allow employee compensation in this circumstance.



Problem # 2

Referring to - but not specifically stating - the Rule's requirements regarding the restrictions on making small fee reductions at loan closing to cover shortfalls which sometimes result because of last minute third party fee changes, or to cover the cost of a short extension of a loan lock when the loan failed to close within the window of the original loan lock, Mr. Frank thinks that the Rule is too restrictive.

Here's his recommended change:

The practice should be allowed (1) if the fee reduction is at the request of the borrower and is made within a short period (i.e., 24 hours) of the loan closing, and (2) if limited by frequency of such use, implemented through either the dollar or percentage amount of the reduction.



Festina Lente (More Haste, Less Speed)

- Ancient Latin Proverb

Mr. Frank's one-and-a-half page epistle to Chairman Bernanke ends as abruptly and politely as it begins, with these words:

"I believe that both of these provisions should be revised expeditiously by the Federal Reserve through an appropriate action or proceeding at the earliest possible time. Thank you for your consideration of these requests."



Guess, if you can, and choose, if you dare.

- Pierre Corneille

So, why this letter? It is not as if the FRB has a history of abiding by the requests of Congress. Recently, in fact, it took an Act of Congress to pry the FRB's financial data about distribution of "bail-out" funds from the FRB's closeted grasp.

And, at the time of the letter's writing, the FRB was already embroiled in resisting a stay of the Rule. Given the timing, is it really likely that the FRB would have been willing to change course on the basis of Frank's requests? I think not.

Ascertaining motive is always a very elusive undertaking.

In determining what sector of the mortgage origination industry benefits most and is best protected by Mr. Frank's recommended changes to the Rule, it is a good idea to follow the money - in more ways than one!

[Our Library contains a copy of the Letter from Bernie Frank to Ben Bernanke.](#)

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