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NAILTA Supports Goliath (Loan Originator Compensation)

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COMMENTARY: by [JONATHAN FOXX](#)

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Rarely is there a significant controversy surrounding a government agency's work, especially where litigation is involved, when nearly all industry groups array on one side and the agency is alone to fend for itself on the other side. The FRB has now received support for its promulgating and interpretation of the TILA Loan Originator Compensation rule (Rule) from an important industry organization, with respect to the Rule as it relates to affiliate compensation.

In its letter of March 17, 2011, the [National Association of Independent Land Title Agents](#) (NAILTA), an organization representing independent title insurance agents and independent real estate settlement professionals, came out in support of the FRB's definition of the term "affiliate" as a "single person" for the purposes of the Rule.

Let's now consider NAILTA's point of view, as expressed in its letter (NAILTA Letter).

NAILTA 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 only a brief synopsis of the argumentation. For citations, exhibits, and argumentation, I suggest that you read the NAILTA Letter. (See Below)

Debate

On March 3, 2011, I notified you about a joint letter sent to the FRB from the most prominent organizations (hereinafter, "trade associations") in the residential real estate finance industry (Letter). [[FRB: Mangles Affiliate Compensation](#)]

Dated February 28, 2011, the Letter contests the FRB staff's interpretation relating to affiliate compensation and offers two alternatives.

According to the Letter, the FRB "would consider all lending affiliates of an originator as one person as stated in the [R]ule, but that [the FRB] also would consider fees paid to a mortgage company's affiliated real estate brokerage and title/settlement service companies as one person, **meaning that fees paid for the fair market value of services performed by these affiliated companies could be considered as loan compensation.**" (My emphasis)

This is the "single person" construct, a feature that prevents "dual compensation."

Dual Compensation: A Syllogism

Allow me to provide the following syllogism outlining the FRB's position on dual compensation

- (1) The Rule prohibits payment to originators based on loan terms or conditions;
- (2) The Rule prohibits "dual compensation" of loan originators, such as compensation received by entities for brokering loans to loan originators;
- (3) An "affiliate" is a "single person;" therefore, as such and by extension,
- (4) An affiliate is subject to the "dual compensation" prohibition.

Here's the essential logic: just as the FRB is attempting to prevent "circumvention" of the final rule by prohibiting a producing branch manager from participating in profits because they are derived from the rates and terms of loans (i.e., cannot be a basis for loan originator

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compensation), by extension, the same criteria applies to other participants in the loan origination, including affiliates, and for much the same reasons.

I have already discussed elsewhere this "dual compensation" dilemma in various contexts.

[Here's just one of those articles.](#)

NAILTA Sees Things Otherwise

NAILTA takes the position that the trade associations have "stifled competition in the real estate settlement marketplace, eliminated healthy competition and stymied consumer choice when it comes to the selection of a real estate settlement service provider."

In the NAILTA Letter, the following claim is advanced:

"Since the 1980's, each of the trade associations who authored the February 28th correspondence have benefited from a coordinated effort to consolidate and **steer** the services of all real estate settlement providers, including title insurance, to one source called a 'one-stop shop' in the hopes of dominating local, regional and national real estate service markets." (My emphasis)

To use the word "steer" is rather bold. For an affiliate to avoid "steering," among other things, it must comply with RESPA Section 8, which governs conduct between settlement service providers and makes it a crime for providers to pay and for real estate sales associates or brokers to receive fees for the referral of settlement service business.

Indeed, RESPA's anti-kickback provisions occur when real estate practitioners and lenders establish joint ventures called affiliated business arrangements or AfBAs. To take advantage of the AfBA exemption, partners must satisfy a four-part, safe-harbor test under Section 8(c) (4) of RESPA.

So to allege that the trade associations are steering is tantamount to alleging that they are violating RESPA.

One-Stop Shop

It is interesting the NAILTA Letter specifically points to the "one-stop shop" feature as deleterious to competition, the very feature that was mentioned in the trade associations' Letter as a "successful and long-established affiliated business model...that offers consumers one-stop shopping, which Congress had expressly authorized in a 1983 amendment to the Real Estate Settlement Procedures Act (RESPA)."

According to the NAILTA Letter, a "byproduct" (sic) of the "one-stop shop" process, is that real estate firms, mortgage companies and banks "have stretched out into all areas of the real estate settlement service field in an attempt to consolidate such services as title insurance, surveying, mortgage origination, homeowner's insurance, and appraisals into their 'one-stop shops.'"

On the face of it, this would seem to be the case. After all, and in contradistinction, in the trade associations' Letter it is clear that what NAILTA believes is disadvantageous to the consumer (i.e., one-stop shopping) is held out by the trade associations as advantageous to the consumer, as indicated by the following statement:

"According to the independent real estate research firm REALTrends, Inc., 285 of the nation's 500 largest residential real estate brokerage firms -- which were involved in 30% of all home purchase transactions in 2007 -- offer mortgages, and 240 of the top 500 firms offer title, closing or escrow services. According to a 2010 survey of home buyers by Harris Interactive, the parent of Harris Poll, 29% of recent home buyers used a one-stop shopping service in 2010 compared to 20% in 2002 - an increase of 45%."

The percentage of growth and number of firms involved in AfBAs seem to buttress NAILTA's point of view.

But does the growth of the "one-stop shop" processes reflect some kind of "coordinated effort" to "steer" services or the best and most efficient way to serve the interests of the consumer by effectively delivering settlement related services?

NAILTA Takes A Stand

The following may sum up NAILTA's position:

1. NAILTA rejects the trade association argument that the rule harms consumers or competition.
2. NAILTA advises the FRB to do the same.

Furthermore, NAILTA claims:

1. Even by the trade associations' own data, consumers lack an understanding of "one-stop shops."
2. An overwhelming majority of consumers do not believe there is any real benefit to using an AfBA.
3. NAILTA can provide a "plethora of national examples of actual anti-competitive market practices perpetrated by the trade associations and their members in real estate transactions across the United States, whether from **strong-arm steering of consumers** to their affiliate 'one-stop shops' or by referral sources unilaterally

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preventing independent real estate service providers from acting as real estate settlement mediums." (My emphasis)

[Real Estate Services Providers Council \(RESPRO\)](#)

Is "Single Person" Correctly Construed?

NAILTA supports the FRB's definition of the term "affiliate" as a "single person" for the purposes of the Rule.

An AfBA, according to NAILTA's view, is a single entity and, accordingly, should be subject to the "single person" compensation requirements. Indeed, the trade associations refer to the "affiliate" as a "one-stop" shop.

Therefore, treating them differently for purposes of the Rule "ignores their own intent - a single location for all real estate settlement services."

[Our Library contains a copy of the Letter.](#)



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