

Lenders Compliance Group

Tuesday, February 1, 2011

SBA - 2nd Request to Postpone New LO Compensation Rules



Yesterday I notified you about the so-called "small entity compliance guide" issued on January 26, 2011 by the Federal Reserve Board.

The "Guide" is inadequate, incomplete, and regurgitates most features of the "already known" aspects of the Regulation Z final rule amendments affecting loan officer compensation.

That rule is scheduled to go into effect on April 1, 2011.

As you may know, I am writing an article on this subject - which will be published in March 2011 in the [National Mortgage Professional Magazine](#) - so I am watching this issue pretty closely and have had numerous discussions with industry members, such as compliance counsel, corporate officers, mortgage loan originators, and even a few lobbyists and politicians.

It is now clear to me that FRB's "Guide" is probably meant to be a response to the January 13, 2011 letter from the SBA's Office of Advocacy, which expressed concern, among other things, that the **"the Federal Reserve has not analyzed properly the full economic impact of the proposal on small entities as required by the Regulatory Flexibility Act (RFA)."** That is, the "Guide" is a transparent attempt to satisfy a regulatory requirement, though the dubious result adds little to an overall resolution.

Let's read the [basis for the authority](#) of the SBA's Office of Advocacy (Advocacy), as stated in its January 13, 2011 letter that: (My emphasis)

- "Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Because Advocacy is an independent office within the Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. **Section 612 of the Regulatory Flexibility Act (RFA) requires Advocacy to monitor agency compliance with the Act, as amended by the SBREFA.** In 1980, Congress enacted the RFA after determining that uniform federal regulations produced a disproportionate adverse economic hardship on small entities. In order to minimize the burden of regulations on small entities, the RFA mandates that federal agencies consider the potential economic impact of federal regulations on small entities.
- In 1996, Congress amended the RFA with SBREFA. Among other things, **SBREFA requires agencies to provide plain English compliance guides to clearly explain each final rule that has a significant economic impact on a substantial number of small entities. The intent of section 212 of SBREFA is to ensure that small businesses have a way to understand complex and technical federal regulations."**

Advocacy's January 13, 2011 letter recommended that the Board publish a "compliance guide in the immediate future and extend the time for small entities to comply to reflect the delay in the availability of the guide."

Obviously, Advocacy must have believed that the FRB would provide a robust and comprehensive compliance guide. But that has not been forthcoming, while the effective date of April 1, 2011 draws ever closer.

Today, February 1, 2011, Advocacy issued yet another letter to the FRB, again asking for a postponement and this time specifically enumerating the expectations of [what constitutes satisfaction of compliance](#) with Section 212(a)(4) of SBREFA, the section that sets up the requirements of a compliance guide.

The following outline provides my brief synopsis of Advocacy's letter to the FRB.

Best wishes,

[Jonathan](#)

Synopsis of Advocacy Letter

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(4) Compliance actions.

(A) In general.--Each guide shall explain the actions a small entity is required to take to comply with a rule.

(B) Explanation.--The explanation under subparagraph (A)--

(i) shall include a description of actions needed to meet the requirements of a rule, to enable a small entity to know when such requirements are met (emphasis added); and

(ii) if determined appropriate by the agency, may include a description of possible procedures, such as conducting tests, that may assist a small entity in meeting such requirements, except that, compliance with any procedures described pursuant to this section does not establish compliance with the rule, or establish a presumption or inference of such compliance.

(C) Procedures.--Procedures described under subparagraph (B)(ii)--

(i) shall be suggestions to assist small entities; and

(ii) shall not be additional requirements, or diminish requirements, relating to the rule.

(5) Agency preparation of guides.

The agency shall, in its sole discretion, taking into account the subject matter of the rule and the language of relevant statutes, ensure that the guide is written using sufficiently plain language likely to be understood by affected small entities. Agencies may prepare separate guides covering groups or classes of similarly affected small entities and may cooperate with associations of small entities to develop and distribute such guides. An agency may prepare guides and apply this section with respect to a rule or a group of related rules.

[Has the FRB met its Obligations?](#)

Points raised by Advocacy include:

- Concern that the FRB has not met the obligation to "include a description of actions needed to meet the requirements of a rule, to enable a small entity to know when such requirements are met."
- The guide does not have sufficient information to enable a small entity to know when the requirements have been met.
- The guidance answers almost none of the questions that the industry has about the rule and view it as simply a summary of a complex issue and not guidance on how to comply with the requirements of the rule.
- The FRB has an obligation to provide the industry with a description of the actions needed to comply with Regulation Z in a manner specific enough that will enable a small entity to know if it has met the requirements of the rule.

The FRB should amend the compliance guide to provide appropriate instructions.

[Facilitating Revisions to the Guide](#)

Points raised by Advocacy include:

- Advocacy is available to facilitate a meeting between the small entities and the FRB in terms of clarifying which issues the small entities believe need clarification and guidance.
- Advocacy believes that such a meeting would not only benefit the small entities, but it would provide the FRB with some insight into the problematic areas of the rule.

[Consumer Advocacy](#)

Points raised by Advocacy include:

- It is important for consumers to receive services from businesses that fully comprehend the requirements of this rule.
- Issuing a proper compliance guide not only helps the small entities, it also assists the Board in meeting its goal of protecting consumers.

[Postponement Request](#)

Points raised by Advocacy include:

- Because the effective date of the rule is rapidly approaching at a time that industry does not feel as though it has workable guidance, Advocacy once again encourages the FRB to postpone the implementation date for small entities.
- A delay to educate small entities on the proper implementation of the requirements of the rule will benefit the entities and the consumers who utilize their services.

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Letter from SBA Office of Advocacy to Federal Reserve Board
February 1, 2011



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