

# Lenders Compliance Group

[Twitter](#) - [LinkedIn](#) - [Facebook](#)

Thursday, May 24, 2012

## CFPB's Flatland Fee

Kicked in the gut by a "flat fee" proposal, the already winded mortgage industry seems to be barely able to catch its breath from the CFPB's recent lurching toward yet another vaguely expected and somewhat ill-defined nostrum.\*

The pattern replays itself time and again: first the news, followed by the rulemaking proposal, which is then given a brief period for public acquiescence or remonstrance; and then inevitably the final rule, which is much like the initial proposal. Early on, industry associations issue a Call to Action!

Alas, when the Federal Register publishes the effective compliance date, everybody falls in line and scrambles to adjust. Sometimes, a few organizations even threaten litigation, though, when tried, litigating has not thus far brought about much satisfaction.

Exactly what is this Flat Fee debacle?

Let's take a peek at this flatland mystery.

---

### IN THIS ARTICLE

[DAY OF RECKONING](#)

[FLATLAND FEE](#)

[YET ANOTHER COMMITTEE](#)

[OVERVIEW AND QUESTIONNAIRE](#)

[BEFORE AND AFTER](#)

[CREDITOR-PAID COMPENSATION - BEFORE AND AFTER](#)

[CONSUMER-PAID COMPENSATION - BEFORE AND AFTER](#)

[BROKERAGE-PAID COMPENSATION - BEFORE AND AFTER](#)

[BRIEF DISCUSSION](#)

[RECAPITULATION](#)

[LIBRARY](#)

---

### DAY OF RECKONING

On the day that the CFPB announced the Flat Fee - along with a wish list of other proposals - the [New York Times](#) explained the CFPB's position in this way:

"Bureau officials said that the rules, which were released Wednesday ahead of formal introduction this summer, would ban mortgage companies from charging origination fees that vary with the amount of the loan.

Those fees are sometimes referred to as origination points and are disclosed in a blizzard of documents and fees that most home buyers face at closing. But they can easily be confused with the upfront discount points that borrowers often pay to secure a lower interest rate."

The May 9, 2012 article came accoutered with Richard Cordray's observation that "Mortgages today often come with so many different types of fees and points that it can be hard to compare offers ... We want to bring greater transparency to the market so consumers can clearly see their options and choose the loan that is right for them."

It is not as if we did not see this coming. We did! At least those of us compliance nerds, wonkishly spending time around our own wonkish types, rubbing elbows with regulators, lobbyists, agencies officials, congressional staff, industry associations, and everything in between.

Still, keeping it real, even when we know that something unpleasant is coming, nevertheless a sense of disbelief is often provoked when the day of reckoning finally arrives.

The **Flat Fee**, which I shall henceforth call the **Flatland Fee**, has now emerged from its gestational limbo



[SUITE OF SERVICES](#)

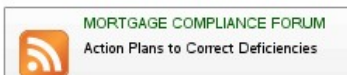
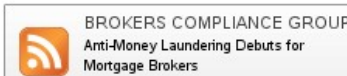
[CONTACT US](#)

### RECENT ARTICLES



[View my JDSUPRA profile](#)

### OUR OTHER WEBSITES



## FLATLAND FEE

In its announcement of May 9, 2012, wearisomely titled in the manner of a 17th century dogmatic text "**CONSUMER FINANCIAL PROTECTION BUREAU CONSIDERS RULES TO SIMPLIFY MORTGAGE POINTS AND FEES - Rules Would Bring Greater Transparency to the Mortgage Market**" (caps in the original), the CFPB stated that its recipe for "transparency" is to:

### "Ban Origination Charges that Vary with the Size of the Loan:

Brokerage firms and creditors would no longer be allowed to charge origination fees that vary with the size of the loan. These 'origination points' are easily confused with discount points. Instead, under the rules the CFPB is considering, brokerage firms and creditors would be allowed to charge only flat origination fees."

Let me broaden this statement out for you:

The CFPB will allow the consumer a choice of paying discount points in creditor-paid transactions only if: (1) the points actually result in a "minimum reduction" in the interest rate for each point paid; and (2) the lender also offers the option of a no discount point loan. (At this time, the CFPB actually provides no details for the correlation between "minimum reduction" and the interest rate.)

The CFPB would allow a consumer to pay up-front origination fees in creditor-paid transactions only if it is a flat amount that does not vary with the size of the loan (and if it is not compensation to the individual loan originator).

According to the CFPB, this proposal is supposed to "preserve consumers' choices while increasing transparency."

## YET ANOTHER COMMITTEE

Pursuant to Dodd-Frank the CFPB must convene a small business panel, consisting of consumers and industry representatives, the purpose of which is to determine the effects of new regulations on financial institutions subject to the new requirements.

The CFPB will be sharing with these small businesses an overview of the proposals under consideration and a list of questions for input. After its review, the panel's participants are supposed to provide feedback to the panel on the proposals the CFPB is considering and suggest alternatives. At the conclusion of its review, the panel will issue a report to the CFPB that summarizes this feedback. And, from that point on, the CFPB is expected to consider the panels findings when formulating the proposed rule.

The CFPB will publish a [Notice of Proposed Rulemaking](#) in the next few months, followed by a formal public comment period.

The rule will be finalized by January 21, 2013.

Seems simple enough. What could go wrong?

## OVERVIEW AND QUESTIONNAIRE

To help the panel in its deliberations, the CFPB has issued the following overview and questions (caps in the original):

### "Small Business Review Panel for Residential Mortgage Loan Origination Standards Rulemaking

#### OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED"

(Given the acronym "SBREFA")

#### "Small Business Review Panel and Cost of Credit Consultation

#### for Residential Mortgage Loan Origination Standards Rulemaking

#### DISCUSSION ISSUES FOR SMALL ENTITY REPRESENTATIVES"

(Given the acronym "SERs")

The SBREFA provides a synopsis of certain proposals and the SERs lays out a maze of questions to be considered about those proposals.

## BEFORE AND AFTER

Rather than to provide a full outline of the Flatland Fee proposal - please note, I will be publishing a comprehensive article soon on the Flatland Fee as well as some of the CFPB's other recent proposals - I think it would be more illuminating to provide a **Before and After** impact of this proposal on TILA's loan originator compensation rule, basing my outline on the CFPB's own Appendix C to their SBREFA overview.

Considering just this one aspect of the proposed Flatland Fee rule does not mean that many other aspects of the Flatland Fee would not be equally and essentially important to consider.

So, specifically, let's schematize this proposal by considering the results in terms of last year's new loan originator compensation, as given in Regulation Z, the implementing regulation of the Truth in Lending Act (call that **BEFORE**) and the new proposals from the CFPB (call that **AFTER**).

I will offer three **Before and After** scenarios for these basic regulatory models: **Creditor-Paid Compensation, Consumer-Paid Compensation, and Brokerage-Paid Compensation**. In all other regulatory models, payments to MLOs (i.e., brokerages, broker, loan officer) cannot vary with



FHA FORUM

Contacting HUD by Phone, Email, and Online



VETERANS MORTGAGE FORUM

CFPB: Establishes the ROAM Database

ARCHIVE

NEWSLETTER

MORTGAGE BANKING WEBSITES

## ARCHIVE OF POSTS

▼ 2012 (18)

▼ May (2)

[CFPB's Flatland Fee](#)

[The SAR catches a RAT](#)

▶ April (3)

▶ March (5)

▶ February (2)

▶ January (6)

▶ 2011 (106)

▶ 2010 (86)

▶ 2009 (8)

loan terms except the size of the loan (unless subject to "flatness" requirements, as noted).

In my illustration, also, these are the givens, using the actual, defined classifications used by the CFPB:

**Loan officer** is an employee of a creditor who serves as an MLO in retail loan transactions.

**Brokerage** is a company or firm that serves as a MLO in a wholesale loan transaction.

**Broker** is an MLO that is an employee of a brokerage.

**Commission** is compensation that is tied to a particular transaction.

**Salary** is compensation that is not tied to a particular transaction.

#### **CREDITOR-PAID COMPENSATION - BEFORE AND AFTER**

##### **Retail**

###### **BEFORE**

Creditor pays its loan officer salary or commission.

###### **AFTER**

Creditor pays its loan officer a commission. If creditor pays a loan officer a salary and not a commission, then a consumer may pay points and fees without limitation.

---

##### **Wholesale**

###### **BEFORE**

Creditor pays brokerage a commission.

Brokerage pays its broker a salary and/or commission.

Consumer cannot pay brokerage.

###### **AFTER**

Creditor pays brokerage a commission.

Brokerage pays its broker a commission and/or salary. (If creditor pays a brokerage a commission, the consumer may not pay upfront points and fees in the transaction, regardless of whether the brokerage firm pays its brokers a salary or a commission.)

Consumer cannot pay brokerage.

---

##### **Points and Fees**

###### **BEFORE**

Consumer can pay points and fees to creditor and its affiliates without limitation.

###### **AFTER**

Consumers can pay:

(1) Discount points provided that they are "*bona fide*" (which must result in a minimum reduction of the interest rate and a no discount point loan must be available); and,

(2) Upfront fees to creditors and affiliates of brokerages and creditors provided they are "flat" (which not vary with size of loan).

#### **CONSUMER-PAID COMPENSATION - BEFORE AND AFTER**

##### **Wholesale**

###### **BEFORE**

Consumer pays the fees to the brokerage that can vary with loan terms or conditions. (In all other regulatory models, payments to MLOs [i.e., brokerages, broker, loan officer] cannot vary with loan terms except the size of loan, unless subject to flatness requirements).

The brokerage pays its broker a salary, but not a commission.

Creditor cannot pay the brokerage.

###### **AFTER**

Consumer pays fees to the brokerage.

The brokerage pays its employee broker a salary, but not a commission.

Creditor cannot pay the brokerage.

---

##### **Points and Fees**

###### **BEFORE**

Consumer can pay points and fees to brokerage, creditor, and their affiliates without limitation.

###### **AFTER**

Consumer can pay points and fees to brokerage, creditor, and their affiliates without limitation.

#### **BROKERAGE-PAID COMPENSATION - BEFORE AND AFTER**

###### **BEFORE**

Prohibited: brokerage cannot split with broker compensation received from consumer and thus cannot pay broker commission.

## AFTER

Consumer pays fees to the brokerage. Some of these fees may be subject to additional conditions, including flatness requirement. Brokerage pays broker a commission. Creditor cannot pay the brokerage.

---

## Points and Fees

Consumers can pay:

(1) Discount points provided that they are "*bona fide*" (which must result in a minimum reduction of the interest rate and a no discount point loan must be available); and,

(2) Upfront fees to creditors and affiliates of brokerages and creditors provided they are "flat" (which not vary with size of loan). (And consumer payment of fees to brokerage may be subject to additional conditions.)

## BRIEF DISCUSSION

The CFPB is now giving consideration to permitting consumer payment of upfront points and fees under certain circumstances for loan transactions involving creditor-paid or brokerage-paid compensation.

Therefore, this is a way to carry out Dodd-Frank's mandates generally, such that MLOs can only be compensated by consumers, but provides an exception that allows MLOs to be compensated by other parties under two conditions: (1) the MLO must not receive any compensation directly from a consumer; and, (2) the consumer must not make an upfront payment of discount points, origination points, or fees, other than *bona fide* third party fees that are not retained by the creditor, the MLO, or either company's affiliates.

Put another way, the "points and fees provision" in TILA § 129(c)(2)(B) establishes statutory requirements that prohibit any points and fees in a transaction in which the MLO is being paid by a creditor or brokerage - and these include any origination fees, origination points, discount points, or any other upfront fees, as well as fees retained by an affiliate of the MLO or creditor.

With respect to affiliates, Dodd-Frank does allow consumers to pay *bona fide* third-party charges (even in a creditor-paid transaction). Now, the CFPB seeks to further elucidate this third-party allowance, so that consumers could pay up-front fees to affiliates of the loan originator or of the creditor, provided that those fees are flat, although it seems that title insurance fees could still vary with the loan amount, even if paid to an affiliate.

So, here's my view of how the CFPB seems to conceptualize origination fees and discount points:

In some cases, lenders will offer a reduced interest rate in return for the payment of points, referred to as "discount points." In contrast, "origination fees" are discrete, fixed-dollar, upfront payments meant to cover the costs related to the origination of a mortgage loan, including for example, underwriting and preparing legal documents. But similar upfront charges computed as a percentage of the loan are referred to as "origination points."

The CFPB has interpreted "origination fee or charge" to include commissions paid by a creditor to its own employees (i.e., loan officers) and to a brokerage and by the brokerage to its broker employees. And the CFPB has also considered interpreting "origination fee or charge" not to include commissions paid by a creditor or brokerage firm to its own employees and recognizes that this may be a permissible alternative interpretation.

## RECAPITULATION

Reiterating the CFPB's position:

"Brokerage firms and creditors would no longer be allowed to charge origination fees that vary with the size of the loan. These 'origination points' are easily confused with discount points. Instead, under the rules the CFPB is considering, brokerage firms and creditors would be allowed to charge only flat origination fees."

It seems to me that this statement has a paternalistic, if not a condescending, ring to it.

The aforementioned position asserts that the consumer is "easily confused" and implies, perhaps unintentionally, that the consumer is without common sense or bereft of basic reading comprehension skills when reviewing a consumer disclosure.

In music theory, there is a term called "recapitulation." This is the fifth section of a musical sonata where the primary theme is repeated, but in an altered form, and then further developed to a clarifying theme often similar to the original theme. The sonata form's five sections are exposition, transition, development, retransition, and, finally, recapitulation. Intuitively, we can infer what stage the Flatland Fee has now entered.

As the above outline shows, far more is at stake than the clarifying virtues of mere recapitulation.

## LIBRARY

**Consumer Financial Protection Bureau Considers Rules to Simplify Mortgage Points and Fees**, Rules Would Bring Greater Transparency to the Mortgage Market, Press Release (5/9/12)

**Small Business Review Panel for Residential Mortgage Loan Origination Standards Rulemaking**, Outline of Proposals Under Consideration and Alternatives Considered ("SBREFA") 5/9/12

## Small Business Review Panel and Cost of Credit Consultation for Residential Mortgage Loan Origination Standards Rulemaking, Discussion Issues for Small Entity Representatives ("SERs") (5/9/12)

---

\* Jonathan Foxx is the President & Managing Director of Lenders Compliance Group



Labels: [CFPB](#), [Consumer Financial Protection Bureau](#), [Flat Fee](#), [Loan Officer Compensation](#), [Loan Originator Compensation](#), [Mortgage Points and Fees](#), [TILA](#), [Truth in Lending Act](#)

[Home](#)

[Older Post](#)

Subscribe to: [Post Comments \(Atom\)](#)

[Web Toolbar by Wibiya](#)

**[LENDERS COMPLIANCE GROUP](#) is the first full-service, mortgage risk management firm in the country, specializing exclusively in residential mortgage compliance and offering a full suite of services in mortgage banking. We are pioneers in outsourcing solutions for residential mortgage compliance. We offer our clients real-world, practical solutions to mortgage compliance issues, with an emphasis focused on operational assessment and improvement, benchmarking methodologies, Best Practices, regulatory compliance, and mortgage risk management.**

Information contained in this website is not intended to be and is not a source of legal advice. The views expressed are those of the contributing authors, as well as news services and websites linked hereto, and do not necessarily reflect the views or policies of Lenders Compliance Group (LCG), any governmental agency, business entity, organization, or institution. LCG makes no representation concerning and does not guarantee the source, originality, accuracy, completeness, or reliability of any statement, information, data, finding, interpretation, advice, opinion, or view presented herein.

© 2007-2012 Lenders Compliance Group, Inc. All Rights Reserved.

## Tags | Labels | Keywords | Categories

[Affiliated Business Arrangements](#) [Affiliated Service Providers](#) [Alternative Modification](#) [Borrower Eligibility](#) [CFPA](#) [compare ratio](#) [task force](#) [compare ratios](#) [Consumer Financial Protection Agency](#) [Core Compliance](#) [Credit Reports](#) [Department of Housing and Urban Development](#) [Department of Labor](#) [Employment Law](#) [Escrows](#) [Fair Labor Standards Act](#) [Fannie Mae](#) [Fannie Mae Loan Quality Initiative](#) [fra defaults](#) [Good Faith Estimate](#) [HAMP](#) [Home Affordable Modification Program](#) [HUD](#) [HUD-1](#) [Settlement Statement](#) [Lending Compliance](#) [Loan Modifications](#) [Loan Officer Compensation](#) [loss mitigation](#) [Loss Mitigation](#) [Compliance](#) [Mortgage Compliance](#) [mortgage defaults](#) [Mortgage Disclosures](#) [mortgage fraud](#) [Mortgage News](#) [Mortgage Originator Compensation](#) [Permanent Modifications](#) [Prepayment Penalties](#) [real estate fraud](#) [Regulation X](#) [Regulation Z](#) [RESPA](#) [Risk Ratings](#) [Service Release](#) [Premiums](#) [Servicing](#) [Settlement Cost Booklet](#) [Settlement Service Providers](#) [Trial Modifications](#) [Truth in Lending Act](#) [Yield Spread Premiums](#)