



H.R. 3126, the Consumer Finance Protection Agency Act of 2009

New Agency Could Effectively Eliminate the Mortgage Broker Origination Channel

Mortgage Brokers Provide a Valuable Service to Consumers

Mortgage brokers find the most appropriate mortgages for their customers by searching through the products of multiple lenders to identify the best loan rates and terms. They also guide homebuyers through the complicated loan process. Because the lenders are saving money on personnel and overhead costs associated with originating a mortgage, the loan products that mortgage brokers offer are at wholesale prices. Mortgage brokers are compensated by their customers for the cost of originating the loan. A consumer can pay such compensation by selecting a slightly higher interest rate, through a yield spread premium. Mortgage brokers are required by existing federal law to disclose all of their fees to the borrower. Even after being compensated for their work, the mortgage brokers are able to offer consumers mortgage loans at rates that are competitive to retail rates that would be offered if a consumer went directly through a lender. While the mortgage crisis has revealed problems across the mortgage industry, ethical mortgage brokers have always provided a valuable service to their customers. Consumers benefit from mortgage brokers' ability to shop around for the best rate and from the individualized assistance that mortgage brokers offer through the process.

The following pages contain our suggestions for changes that must be made to the H.R. 3126 "Discussion Draft" to ensure that the mortgage broker origination channel can continue to provide a valuable service to consumers in the home buying process.

- ISSUE #1 -- COMPENSATION PRACTICES
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- ISSUE #3 -- PRIVACY OF CREDIT REPORTS
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ISSUE #1 – COMPENSATION PRACTICES

Language in CFPA Discussion Draft (Page 94, Line 7):

(A) IN GENERAL.—The Director may prescribe regulations establishing duties regarding compensation practices applicable to a covered person, employee, agent, or independent contractor who deals or communicates directly with a consumer in the provision of a consumer financial product or service for the purpose of promoting fair dealing with consumers.

(B) NO COMPENSATION CAPS.—The Director may not prescribe a limit on the total dollar amount of compensation paid to any person.

NFMP Language Suggestion:

On Page 94, Line 18 insert “form, nature, or amount” so the sentence reads: “The Director may not prescribe a limit on the form, nature, or amount of compensation paid to any person.”

NFMP Position:

- **Preserve Consumers’ Ability to Finance Closing Costs and Fees in the Interest Rate (i.e. YSP).** Consumers should be able to finance closing costs and origination fees as they deem appropriate for their individual circumstances (i.e. cash available at closing, length of time planning to remain in home, etc.) To achieve this goal, language should be added stating that the CFPA should not be able to limit the form or nature of compensation paid to any person. NFMP’s proposed language would preserve the ability for a mortgage originator to be compensated by the lender (nature) through the interest rate (form).
- **Payment for Services Should Be at Time of Closing.** According to Page 66 of the Administration’s CFPA *White Paper*, the new CFPA “could consider requiring that originators receive a portion of their compensation over time, contingent on loan performance, rather than in a lump sum at origination.” This is not a feasible method of payment because of the nature of the mortgage broker industry. If this requirement were adopted, mortgage loans bought and sold in huge secondary markets would have to account for payments to unknown third parties (brokers). Comments have been made that “this is how the insurance companies do it,” however, there is a substantial difference. Insurance agents are agents of the company through which the policy is issued. An insurance policy generally stays with the same insurer over a long term, as does the agent. The agent has the benefit of collecting renewal payments over a long term and has a relationship with the insurer. To ensure that the mortgage originator is able to be paid for their work at the time of closing, language should be added stating that the CFPA should not be able to limit the form of compensation paid to any person.
- **Amount of Compensation Should Not Be Measured in Dollars:** Because mortgage closings are based on a percentage of the sales price as opposed to specific dollar amounts, the compensation cap prohibition should reflect this market reality. The term “dollar amount” should be replaced with “amount,” so that the sentence reads: “The Agency shall not prescribe a limit on the total amount of compensation paid to any person.”

ISSUE #2 MORTGAGE BROKER DUTIES

Language in CFPB Discussion Draft (Page 92 Line 24): Sec. 136. Duties. The Director shall prescribe regulations imposing duties on a covered person, or an employee of a covered person, or an agent or independent contractor for a covered person, who deals or communicates directly with consumers in the provision of a consumer financial product or service, as the Director deems appropriate or necessary to ensure fair dealing with consumers.

In prescribing such regulations, the Director shall consider whether:

- The covered person, employee, agent, or independent contractor represents implicitly or explicitly that the person, employee, agent, or contractor is acting in the interest of the consumer with respect to any aspect of the transaction.
- The covered person, employee, agent, or independent contractor provides the consumer with advice with respect to any aspect of the transaction.
- The consumer's reliance on or use of any advice from the covered person, employee, agent, or independent contractor would be reasonable and justifiable under the circumstances.
- The benefits to consumers of imposing a particular duty would outweigh the costs.
- Any other factors as the Director considers appropriate.

NFMP Language Suggestion: Add language to Section 136 stating that an agreement should be made between the mortgage originator and the consumer up front about whether the mortgage originator is acting as: an intermediary between the consumer and the lender; on behalf of the consumer; or on behalf of the lender. The duties imposed on a covered person by the Director should reflect such agreement.

NFMP Position:

- **Discussion Draft Language Only Allows for One Relationship Between Originator and Consumer.** Mortgage originators do not all have the same structure. Originators can be: (1) an intermediary between the lender and consumer, (2) an originator working on the consumers' behalf, or (3) an originator working for the bank. The language in the discussion draft only provides for originators to work on the consumers' behalf.
- **Consumers Should Choose Which Origination Channel to Utilize.** Rather than allowing the government to dictate the relationship between a mortgage broker and the consumer, an informed decision about this should be made by the consumer. Such a model of establishing the relationship with the consumer up front has proven effective with respect to Realtors. Regulations should allow for each of these different relationships so that consumers can select the mortgage originator that best fits their needs.
- **Duties Must Accurately Reflect Role of Mortgage Brokers.** The Administration has suggested that the CFPB could impose on mortgage brokers a duty to determine affordability for borrowers. It is the lender and not the originator who ultimately decides whether a mortgage is affordable to the borrower. Through their underwriting process, lenders determine that affordability by the borrower has been sufficiently determined. This distinction must be clear as the Director imposes duties on mortgage brokers.

ISSUE #3 - PRIVACY OF CREDIT REPORTS

Language in CFPA Discussion Draft (Page 279, Line 13): Section 193 makes amendments to the SAFE Act.

NFMP Language Suggestion: Add language to Section 193, “Amendments to the Secure and Fair Enforcement for Mortgage Licensing Act of 2008,” stating that mortgage originators’ credit report information should not be made available for public viewing.

NFMP Position:

- **Confidential Credit Report Information Collected Under the SAFE Act Must be Protected.** An important issue about the SAFE Act that needs to be addressed is with respect to the public availability of the credit reports of mortgage originators. The purpose of the requirement under the SAFE Act to provide copies of credit reports was to ensure that all licensees were of adequate financial character to originate mortgages. The purpose was not to make the sensitive and private information used to make such a determination available to the public.
- **SAFE Act Does Not Explicitly Protect Confidentiality of Credit Report Information.** It is the policy of many states that all state, county, and municipal records are open for personal inspection and copying by any person. As a result of this policy, the requirements of the SAFE Act for mortgage brokers to furnish a copy of their credit reports to the state to prove financial character means that mortgage originator credit reports will be available for public viewing. This public access to unredacted credit report information will potentially subject all licensed mortgage professionals to identity theft.
- **Other Places in Discussion Draft Recognize Need to Protect Confidential Information.** The CFPA discussion draft does recognize the sensitivity of confidential information that will be collected under the Act. In Section 125, Subtitle B (Page 76), language is included regarding the confidential treatment of information obtained from persons in connection with the exercise of any authority of the Agency or Director. Page 77, Line 6 states, “In collecting information from any person, publicly releasing information held by the Agency, or requiring covered persons to publicly report information, the Director and the Agency shall take steps to ensure that proprietary, personal or confidential consumer information that are protected from public disclosure under section 552(b) or 552a of title 5, United States Code, or any other provision of law are not made public under this title.”
- **CFPA Legislation Should Protect Information Required Under SAFE Act.** As is done in Section 125 of the CFPA discussion draft, language should be added to Section 193 to clarify that the credit report information required under the SAFE Act to determine financial character should not be made available for public viewing.

ISSUE #4 – PRESERVATION OF RECOVERY FUND

Current SAFE Act Language: A state’s licensing law must satisfy minimum federal requirements, including, “the State loan originator supervisory authority has established minimum net worth or surety bonding requirements that reflect the dollar amount of loans originated by a residential mortgage loan originator, or has established a recovery fund paid into by the loan originators.”

Language in CFPA Discussion Draft (Page 282, Line 17)

The Agency may prescribe regulations setting minimum net worth or surety bond requirements for residential mortgage loan originators and minimum requirements for recovery funds paid into by loan originators.

Such regulations shall take into account the need to provide originators adequate incentives to originate affordable and sustainable mortgage loans as well as the need to ensure a competitive origination market that maximizes consumers’ access to affordable and sustainable mortgage loans.

NFMP Language Suggestion

Delete “and” on Page 282, Line 20 and insert “or” so the sentence reads: “The Agency may prescribe regulations setting minimum net worth or surety bond requirements for residential mortgage loan originators or minimum requirements for recovery funds paid into by loan originators.

NFMP Position:

- **Many States Have Adopted Recovery Funds in Compliance with the SAFE Act.** The SAFE Act prescribed states to adopt either a minimum net worth, surety bond, or recovery fund for licensed mortgage originators. Many state legislatures have contemplated the three options and have selected to implement a recovery fund. For example, in Florida’s recently passed statute to comply with the SAFE Act, it created a recovery fund, which would be capitalized by fees paid by all licensees.
- **These States Decided Against Requiring Surety Bond or Minimum Net Worth.** In formulating their legislation to comply with the SAFE Act, states considered a surety bond, net worth requirement, or recovery fund for mortgage brokers. Many states ultimately decided not to require mortgage brokers to secure a surety bond or to have a minimum net worth, but instead determined that the recovery fund was the optimal approach.
- **Discussion Draft Language Will Put States Out of Compliance with SAFE.** The language in H.R. 3126, that would require that mortgage brokers to meet either a net worth or surety bond requirement would put states, like Florida, out of compliance with the federal law.
- **State Discretion Should be Maintained.** All three options – minimum net worth requirement, surety bond requirement, or recovery fund – should remain available to states as they enact the requirements of the SAFE Act.

ISSUE #5 – INTEGRATION OF RESPA/TILA DISCLOSURES

Language in CFPB Discussion Draft (Page 89, Line 3):

Within 1 year after the designated transfer date, the Director shall propose for public comment regulations and model disclosures that combine the disclosures required under the Truth in Lending Act and the Real Estate Settlement Procedures Act into a single, integrated disclosure for mortgage loan transactions covered by those laws, unless the Director determines that any proposal issued by the Board of Governors and the Department of Housing and Urban Development carries out the same purpose.

NFMP Language Suggestion: Replace language in Section 132 (d) Combined Mortgage Loan Disclosure with language withdrawing the effective date of disclosure regulations that have been published but have not yet become effective, so that all new disclosures are a result of the Combined Mortgage Loan Disclosure required in this Act.

NFMP Position:

A Single, Integrated Disclosure Will Enhance Consumer Understanding of Mortgage Loan Terms. The CFPB discussion draft is right to merge RESPA and TILA forms so that consumers will receive a single, integrated disclosure. RESPA provides borrowers information on the settlement charges for residential real estate transactions, while TILA provides borrowers information on the costs and terms of credit transactions for such properties. For a consumer to fully understand the costs of a transaction, both RESPA and TILA disclosures are essential. However, while better disclosures will greatly improve consumer understanding, having two very different sets of disclosures provided to the consumer at application and at closing will create confusion and potential harm.

Current RESPA and TILA Disclosure Reform Efforts Have Been Done Separately. The RESPA and TILA reform efforts have operated independently to date. At this point, the new disclosures do not appear to be complementary.

Costly, Burdensome, and Confusing. If the upcoming implementation of separate disclosures is not halted, lenders and other settlement service providers will incur enormous costs to make systems changes for the new disclosures. In addition, successive systems changes to comply with RESPA, and then TILA, will unnecessarily increase costs at a time when neither the industry nor borrowers can afford them. If the CFPB legislation is later enacted to integrate disclosures, these efforts will have been unnecessary and additional costs will be incurred.

Implementation of Separate Disclosures Should Be Suspended. The changes to RESPA and TILA should be suspended and implementation postponed in favor of a joint effort to reform the disclosures required under these laws to achieve compatibility between the forms required under both laws.