May 9, 2012

Small Business Review Panel for
Residential Mortgage Loan Origination Standards Rulemaking

OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED

I. INTRODUCTION

- Compensation practices for mortgage loan originators ("MLOs") such as loan officers and mortgage brokers can create incentives and confusion that lead to consumer harm:
    - Compensation structures may create financial incentives to steer consumers to loans that are more costly, for which loan originators will receive greater compensation. For example, payments that are based on a transaction's terms potentially give an incentive to provide consumers loans with higher interest rates or other less favorable terms.
    - In addition, certain MLO compensation arrangements are not transparent, and consumers may not know or understand how the MLO's compensation is structured or that compensation arrangements may present a conflict of interest. Consumers may believe that the fee they pay is the MLO's sole compensation. This, in turn, may lead consumers to mistakenly believe that MLOs are working on their behalf and are obligated to provide the most favorable loan terms.
- In an attempt to address these concerns, the Federal Reserve Board ("Board") issued MLO compensation regulations pursuant to the Truth in Lending Act, which were effective as of April 2011 (the "Loan Originator Rule" or "Rule").[1] The general approach to these issues taken by the Loan Originator Rule is to: (1) prohibit payments to MLOs that are based on a loan's terms and conditions (except for payments that consumers make directly to MLOs); and (2) where the consumer directly pays the MLO, prohibit the MLO from also receiving compensation from any other party in connection with that transaction.
- The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") further addresses these concerns by imposing certain requirements concerning the compensation and qualification of MLOs, which the statute defines to include mortgage brokers, loan officers, and, for certain purposes, the brokerages or creditors that employ them.[2]

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[1] 75 Fed. Reg. 58,509 (Sept. 24, 2010) (effective April 2011).

[2] Dodd-Frank, Pub. L. No. 111-203. The statutory text relevant to this rulemaking is attached as Appendix A. A glossary of terms is attached as Appendix B. The Dodd-Frank definition of "mortgage originator" is somewhat different from the Loan Originator Rule's definition of "loan originator." *See* 15 U.S.C. § 1602(cc)(2); 12 CFR 1026.36(a). The CFPB, however, proposes to interpret these definitions similarly.

- As discussed in detail below, the Dodd-Frank requirements generally build on, but in some cases impose new or different requirements than, the Loan Originator Rule as well as the qualification requirements issued by several federal agencies pursuant to the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the "SAFE Act").[3]

- In addition to addressing MLO compensation based on the terms and conditions of mortgage loans and dual compensation from multiple parties, the Dodd-Frank Act focuses on the broader issue of potential confusion by consumers regarding payment of upfront costs, including discount points and origination fees, *in addition* to MLO compensation.

- The Consumer Financial Protection Bureau ("CFPB" or "Bureau") is developing proposals to implement Dodd-Frank requirements relating to MLO compensation and qualification that will otherwise automatically take effect on January 21, 2013.[4]

- Specifically, the proposals under consideration will address the following Dodd-Frank requirements:

1. *Dual Compensation and Payment of Upfront Points and Fees*:

- Both the Loan Originator Rule and Dodd-Frank generally prohibit MLOs from being compensated simultaneously by both the consumer and a person other than the consumer (*e.g.*, creditor or brokerage firm).

- The Loan Originator Rule *allows* a consumer to pay upfront points and fees.

- Dodd-Frank substantially differs from the Loan Originator Rule by generally prohibiting consumers from paying discount points, origination points, or fees where an individual MLO is being compensated by the creditor or brokerage firm.

- Dodd-Frank gives the CFPB authority to waive or create exemptions from this prohibition where doing so is in the interest of consumers and the public interest.[5] The CFPB is considering using this authority to allow consumers to pay upfront points and fees under certain circumstances.[6]

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[3] 12 U.S.C. § 5101 *et seq*. The CFPB has restated the SAFE Act rules at 12 CFR pt. 1007 and 1008, 76 Fed. Reg. 78483 (Dec. 19, 2011).

[4] Dodd-Frank §§ 1402-03 (amending TILA to add § 129B(b) and (c)) (codified at 15 U.S.C. § 1639b(b) and (c)); *see also* Dodd-Frank § 1400(c) (codified at 15 U.S.C. § 1601 note). This proposal will not implement TILA §129B(c)(3).

[5] TILA § 129B(c)(2)(B)(ii) (codified at 15 U.S.C. § 1639b(c) (2)(B)(ii)).

[6] A chart comparing the payment structures under the Loan Originator Rule with the proposals under consideration implementing these Dodd-Frank provisions is attached as Appendix C.

2. ***Compensation That Varies Based on Loan Terms:***

    - Both the Loan Originator Rule and Dodd-Frank generally prohibit varying MLO compensation based on the terms of a mortgage loan. These requirements were designed to eliminate incentives for MLOs to steer consumers into more profitable or higher-cost mortgages and away from lower-cost or other mortgages for which they are qualified. The Bureau is considering adjustments to the earlier rules to address interpretive questions, such as application of the rules to retirement plans, profit-sharing plans, and pricing concessions.

3. ***MLO Qualification and Screening Requirements:***

    - Dodd-Frank imposes certain qualification and screening requirements on the businesses that employ individual MLOs. It also requires that individual MLOs provide their license or registration number on loan documents.[7]

- The CFPB has prepared this summary of the proposals under consideration to assist the Small Business Review Panel convened under the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), the small entity representatives ("SERs") who advise that panel, and the public. Accordingly, this summary focuses in part on the benefits and costs for small entities of the proposals under consideration.

- Consistent with SBREFA, this summary provides a preliminary, qualitative assessment of the potential benefits and costs to the types of small entities that would be subject to the proposals under consideration—primarily, mortgage lenders or creditors (such as community banks, credit unions, and non-depository private mortgage lenders), mortgage brokerage firms, and affiliates of brokerage firms and creditors.[8]

    - Many of the major elements of this rulemaking address issues that were previously addressed by the Loan Originator Rule, which took effect in April 2011. The CFPB does not anticipate that the proposals under consideration to implement Dodd-Frank provisions in ways that are substantially similar to the mandates of the Rule will impose costs or require changes to systems and operations of small entities beyond those that would already have occurred to comply with the Rule.

    - To the extent that Dodd-Frank imposes new requirements that are not covered by the Rule or where the CFPB is considering proposals concerning interpretive

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[7] A chart comparing the current MLO qualification requirements for depository, non-depository, and non-profit entities and the requirements of the proposals under consideration implementing the Dodd-Frank provisions is attached as Appendix D.

[8] The proposals under consideration are expected to have substantial benefits for consumers. Drawing in part on information gained through the SBREFA panel process, the CFPB will publish with the proposed rule a more extensive analysis of the benefits and costs to consumers and firms, and of the impacts on small entities specifically.

issues that are not directly addressed in the Rule, it is difficult to extrapolate their effects from the Board's earlier impact analyses.

- For this reason, while the CFPB has considered the Board's impact analyses in the proposed and final versions of the Rule as mandated by the Regulatory Flexibility Act, the CFPB does not believe that these analyses accurately forecast the potential benefits and costs to small entities from the proposals now under consideration.

- Similarly, the CFPB has also considered the impact analyses performed by the OCC, Board, FDIC, OTS, NCUA and Farm Credit Administration in connection with their final joint rule implementing SAFE Act requirements in formulating its own preliminary impact analysis and questions for the SERs on related qualification and screening requirements on business employing MLOs.[9] However, to the extent that Dodd-Frank imposes new requirements on depositories and non-profits (including unique identifier requirements), the other agency analyses are of limited utility in assessing the potential costs and benefits to small entities from the proposals now under consideration.[10]

II. STATEMENT OF OBJECTIVES AND LEGAL BASIS

- Under Dodd-Frank § 1400(c), certain new provisions concerning MLO qualification and compensation automatically take effect on January 21, 2013, unless final rules are issued on or before that date that provide otherwise.[11] The CFPB plans to implement the statutory provisions and address other interpretive issues relating to the Loan Originator Rule by proposing amendments to Regulation Z, which implements the Truth in Lending Act ("TILA").[12]

- Dodd-Frank makes the following amendments to TILA that are relevant to this rulemaking:

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[9] 75 Fed. Reg. 44656, 44676-83 (July 28, 2010); 75 Fed. Reg. 51623, 51644-49 (Aug. 23, 2010).

[10] HUD did not perform an impact analysis of its rule codifying SAFE Act MLO licensing standards, oversight responsibilities, and other requirements implementing the SAFE Act impose requirements on individuals and not on entities (large or small). HUD did, however, provide an analysis under Executive Order 12866. 76 Fed. Reg. 38464, 38488-92 (June 30, 2011).

[11] 15 U.S.C. § 1601 note. The Bureau may provide up to a year for a transition period to implement new rules.

[12] *See generally* 15 U.S.C. § 1601 *et seq*. The CFPB generally has broad authority to prescribe regulations to effectuate the purposes of TILA, including adjustment and exception authority. *See* TILA § 105(a), as amended by Dodd-Frank § 1100A. Dodd-Frank § 1405(b) also provides the CFPB general discretionary authority regarding disclosure requirements for any class of residential mortgage loans. The Bureau is required to issue certain additional anti-steering rules under § 1403 of Dodd-Frank (codified at TILA § 129B(c)(3)); those requirements will require the Bureau to issue rules to take effect. The Bureau will issue those rules at a later time.

- Section 1402 imposes new duties on MLOs "in addition to the duties imposed by otherwise applicable provisions of State or Federal law." The first duty is to be "qualified" and (where applicable) registered and licensed in accordance with the SAFE Act and other applicable state or federal law. The second duty is to include on all loan documents the originator's identifier number from the Nationwide Mortgage Licensing System and Registry.

- Section 1403 also builds upon the Loan Originator Rule by imposing two limitations on MLO compensation to reduce or eliminate steering incentives for residential mortgage loans (*i.e.*, closed-end consumer credit transactions secured in the first instance by interests in residential dwellings or residential real property, other than timeshare plan transactions).[13]

  - Section 1403 generally prohibits MLOs from receiving compensation for any residential mortgage loan that varies based on the terms of the loan, other than the amount of the principal.[14]

  - Section 1403 generally allows only consumers to compensate MLOs. An exception permits other persons to pay "an origination fee or charge" to an MLO, but only if two conditions are met: (1) the MLO does not receive any compensation directly from a consumer; *and* (2) the consumer does 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). The Bureau may create exemptions or waivers of the latter requirement if such action is "in the interest of consumers and in the public interest."[15]

III. OUTLINE OF PROPOSALS UNDER CONSIDERATION

A. BAN ON DUAL COMPENSATION AND LIMITATIONS ON UPFRONT PAYMENTS OF DISCOUNT POINTS, ORIGINATION POINTS, OR FEES

- Both Dodd-Frank and the Loan Originator Rule generally prohibit dual compensation to an MLO. The MLO can be paid compensation by a person other than the consumer (*e.g.*, a

[13] The Board proposed the Loan Originator Rule prior to the enactment of Dodd-Frank using general authority under TILA to prohibit acts or practices relating to the origination or refinancing of mortgage loans that are unfair, abusive or deceptive. 74 Fed. Reg. 43,232 (Aug. 26, 2009). Dodd-Frank incorporated key language and concepts from the proposal. The Board then finalized its rule, but acknowledged that further proceedings would be required to address certain issues and adjustments made by Dodd-Frank. 75 Fed. Reg. at 58,509-10.

[14] TILA § 129B(c)(1) (codified at 15 U.S.C. § 1639b(c)(1)). Additionally, TILA § 129B(c)(4)(D) (codified at 15 U.S.C. § 1639b(c)(4)(D)) states that no provision in that subsection shall be construed as "prohibiting incentive payments to a mortgage originator based on the number of residential mortgage loans originated within a specified period of time."

[15] TILA § 129B(c)(2)(B) (codified at 15 U.S.C. § 1639b(c) (2)(B)).

creditor or brokerage firm) only if the MLO is not paid by the consumer.

  - The prohibition on dual compensation generally applies to commissions and other payments tied to the loan transactions that are made to individual brokers, individual loan officers, and brokerages. The Board has applied this prohibition in a way that allows salaries or hourly wages paid to individual employees. The Bureau is considering interpreting the Dodd-Frank prohibition on dual compensation, consistent with the Loan Originator Rule, as not prohibiting salaries or hourly wages paid to individual MLO employees.

- Dodd-Frank's language mandates generally 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.[16]

  - We refer to this second requirement as the "points and fees provision" because the statutory requirements prohibit any points and fees in a transaction in which the MLO is being paid by a creditor or brokerage. 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.[17]

  - The Bureau may create exemptions to the points and fees provision if it finds that such action is "in the interest of consumers and in the public interest."[18]

- Dodd-Frank identifies three types of compensation structures that are subject to different rules, absent exercise of the Bureau's exception authority concerning the points and fees provision.[19]

[16] TILA § 129B(c)(2)(B)(ii) (codified at 15 U.S.C. § 1639b(c)(2)(B)(ii)). *See* Appendix C.

[17] Points on a residential mortgage loan are a fee, expressed as a percentage of the loan amount, to be paid by the borrower to the lender at the time of loan origination. In some cases, lenders will offer a reduced interest rate in return for the payment of points; for clarity, these are 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. Similar upfront charges computed as a percentage of the loan are referred to as "origination points."

[18] TILA § 129B(c)(2) (codified at 15 U.S.C. § 1639b(c)(2)).

[19] The CFPB has interpreted "origination fee or charge" to include commissions paid by a creditor to its own employees (loan officers) and to a brokerage and by the brokerage to its brokers. Accordingly, the prohibition on points and fees under TILA § 129(c)(2)(B) will apply to all or most loans originated in the retail channel (because creditor banks typically pay commission to their employee loan originators), and to wholesale (*i.e.*, brokered) transactions , except originations where there is consumer-paid compensation. The CFPB 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.

- *Consumer-paid compensation*: Dodd-Frank generally prohibits an MLO from receiving from "any person other than the consumer … any origination fee or charge." We refer to such compensation as "consumer-paid compensation." Consumer-paid compensation generally arises where the consumer directly pays compensation to an MLO that is a brokerage firm. (Employee MLOs, such as loan officers and brokers employed by brokerage firms, are typically not permitted to accept compensation directly from the consumer). Provided the brokerage firm does not pay transaction-specific compensation to its employees (*e.g.*, the MLO is only paid a salary or hourly wage), the consumer is free to make upfront payment of points and fees.[20]

- *Creditor-paid compensation*: As noted above, a creditor may pay compensation to MLOs that are its loan officers or to a brokerage firm (including where the brokerage firm then pays its employee brokers), provided the consumer does not directly compensate those MLOs and does not pay points or fees.

- *Brokerage-paid compensation:* When the consumer pays the brokerage firm and the brokerage firm pays its employee broker compensation tied to the transaction, this presents an additional complication under Dodd-Frank. Absent use of the Bureau's exemption authority, the brokerage would only be allowed to compensate its MLO employees if the consumer did not make "an upfront payment of discount points, origination points, or fees, however denominated." However, the consumer payment to the brokerage firm would itself constitute an upfront payment. Accordingly, absent exercise of the Bureau's exemption authority, brokerage-paid compensation is not permitted under Dodd-Frank.[21]

- The CFPB considered implementing Dodd-Frank's prohibition on the payment of upfront points and fees without exercising its exemption authority. However, implementation without an exemption would significantly restructure pricing for most mortgage transactions with unpredictable results for both consumers and industry.

- As written, Dodd-Frank prohibits the consumer from paying upfront points or fees to the MLO, creditor, or their affiliates in all retail and wholesale loan originations where creditors or brokerage firms compensate MLOs (*i.e.,* where there is creditor-paid compensation or brokerage-paid compensation). Because these types of compensation are present in the vast majority of originations and the payment of upfront points and fees is widespread, implementation without exemption would significantly change the

[20] The Bureau is considering proposing that payments made from the consumer to the brokerage firm out of loan proceeds (*i.e.*, borrowed by the consumer as part of the initial loan amount) would be considered compensation received directly from the consumer, but compensation paid through a higher interest rate would not. This approach would be consistent with the treatment in the Loan Originator Rule of compensation from the consumer to the brokerage firm from the loan proceeds. *See* 12 CFR part 1026, Supplement I (Comment 36(d)(1)-7).

[21] Brokerage-paid compensation is also prohibited under the Loan Originator Rule. *See* 12 CFR part 1026, Supplement I (Comment 36(d)(2)-1).

financing for most current mortgage loan originations.[22]

- Points and fees present the possibility of consumer confusion. For example, consumers may have difficulty understanding trade-offs between upfront points and fees versus paying for these charges through increases in the interest rate or the loan amount. Furthermore, even if consumers generally understand such trade-offs, they may not be able to determine in a particular instance whether discount points paid up front result in a reasonably proportionate interest rate reduction or whether they are receiving appropriate value for originations fees. Finally, there is a concern that some lenders offer multiple permutations of points and fees in a way that makes shopping and pricing comparison difficult to extract profit at consumers' expense rather than to provide optionality and value to consumers.

- Providing no exemptions would force lenders to provide no-point, no-fee loans and to recover their administrative costs through the rate over time rather than through upfront payments. It is possible that simplifying the pricing of loans by incorporating the whole price of the loan in the interest rate would make prices more transparent for consumers. Greater transparency could aid consumers in shopping among different loan products.

- However, curtailing consumers' ability to pay discount points, origination points, or origination fees upfront in exchange for lower monthly mortgage bills could negatively impact consumers' access to credit (*see* discussion of Potential Impacts on Small Entities below) and would restrict choices for the class of borrowers who simply prefer to pay more at origination and less each month. In addition, eliminating discount points would eliminate a potential benefit to consumers that comes from "signaling" to lenders that the consumer does not intend to prepay his or her mortgage loan. This signaling, in turn, may facilitate a more efficient market in which lenders are able to provide such consumers with a better deal. Similarly, to the extent lenders incur upfront costs associated with processing an application and underwriting a loan, consumers may benefit by paying those costs upfront rather than forcing those costs to be recovered through a higher interest rate over the life of the loan.

- Predicting outcomes of a full prohibition on payment of upfront points and fees is particularly difficult because data are limited generally on the prevalence, size, and distribution of upfront points and fees in the mortgage market and specifically on the interaction of these points and fees with MLO compensation or with consumer decision making. Outcome prediction is further complicated by a number of factors, including the fact that the Loan Originator Rule took effect just one year ago, the existence of pending additional regulatory changes (such as implementation of new federal mortgage disclosures) that could impact consumer understanding, and the fact that the mortgage market is still under significant stress from the mortgage-lending and financial crises.

[22] Specific public data about the prevalence of upfront fees and points is very limited. Surveys from Freddie Mac and FHFA have some limited information about the level and/or prevalence of upfront points and fees; however, these sources do not disclose the nature of any upfront payments.

- Legislative history does not clearly indicate Congress' specific reasons for prohibiting consumer payment of upfront points and fees. Congress' decision to provide exemption authority specific to the points and fees prohibition, however, suggests that it recognized a risk of significant unanticipated consequences from the prohibition and the prospect that the CFPB's use of this exemption authority may be prudent to mitigate those consequences.

- For these reasons, the CFPB believes that a cautious approach is warranted. As described below, the CFPB is considering using its exemption authority to permit consumer payment of upfront points and fees under certain circumstances for loan transactions involving creditor-paid compensation or brokerage-paid compensation.[23] Because the statutory language differentiates between points and fees that are retained by creditors, loan originators, or their affiliates and those that are retained by bona fide third parties, the Bureau is further considering whether to propose particular conditions for payments to affiliates.

1. <u>Proposals Under Consideration for Creditor-Paid Compensation</u>

- In light of these outstanding policy questions, the rapidly evolving mortgage lending market, and the risks inherent in a broad ban on points and fees in originations where there is brokerage-paid or creditor-paid compensation, the CFPB is considering exercising its exemption authority to issue a partial exemption. The proposed exemption would be designed to limit the payment of points and fees where the possibility of consumer confusion (and thus harm) is greatest. Specifically, the proposal under consideration would permit consumers to pay certain upfront points and fees in retail and wholesale loan originations when the creditor compensates an MLO, subject to the following conditions:
    - Consumers may pay discount points, provided: (1) the discount points are bona fide, meaning they result in a minimum reduction of interest rate for each point paid; and (2) the creditor also offers the option of a no discount point loan. The Bureau is already in the process of defining "bona fide discount points" for the purpose of a separate rulemaking on ability to repay requirements under Dodd-Frank.[24]
    - Consumers may pay upfront origination fees (except compensation to the MLO, which is prohibited by the statute), provided that the origination fees are "flat" and thus do not vary with the size of the loan.
    - Upfront fees may also be paid to affiliates of the MLO or affiliates of the creditor, provided that such fees are flat and so do not vary with the size of the loan. Payments to affiliates of the MLO or creditor for title insurance, however, would be permitted to vary with the size of the loan.

[23] *See* Appendix C.

[24] *See* 76 Fed. Reg. 27,390 (May 11, 2011).

- The CFPB is considering whether to "sunset" this potential partial exemption from the statute. Under the sunset provision under consideration, after a specified period (*e.g.*, three or five years), the rule permitting creditors to compensate MLOs when consumers paid points or fees would automatically expire (and the points and fees provision would take full effect) unless the CFPB takes affirmative action to extend it. With or without a sunset provision, the CFPB would review the regulation within five years of its effective date pursuant to § 1022(d) of Dodd-Frank, which requires the CFPB to "conduct an assessment of each significant rule or order adopted by the Bureau under Federal consumer financial law" and publish a report of its assessment.[25] At that time, the CFPB will have had time to conduct a more detailed assessment of the payment of points and fees in a more stable regulatory environment to determine the long-term regulatory regime that would maximize consumer protections and credit availability.

Other Alternatives Considered for Creditor-Paid Compensation:

- The CFPB has also considered proposing other conditions on charging upfront points and fees, in addition to those described above. It seeks the advice and feedback of SERs on these alternatives and their potential impacts on small entities:
    - The creditor must offer a no-fee loan, and the difference between the higher interest rate on the no-fee loan and interest rate on the loan with upfront fees must be reasonably related to the amount of upfront fees.[26]
    - Consumers must be offered the option of a no-point, no-fee loan.

a. <u>Potential Impacts on Small Entities</u>

Benefits

- Relative to the Dodd-Frank ban on points and fees in creditor-paid transactions, allowing the creditor both to compensate the MLO and to charge the consumer points and fees would increase the range of mortgage transactions available to consumers. The increased range of payment options would allow small creditors and brokerages to be more flexible in marketing different mortgage loan products to consumers. In addition, the availability of different payment options would enhance the ability of creditors and brokerages to enter into certain mortgage loan transactions with consumers.

- A consumer's ability to refinance is costly to the creditor. Preserving consumers' ability

[25] 12 U.S.C. § 5512(d). The assessment must address, among other relevant factors, the effectiveness of the rule or order in meeting Dodd-Frank's purposes and objectives and the specific goals stated by the CFPB, and it must reflect any available evidence and data collected by the CFPB. Before publishing a report of its assessment, the CFPB is required to invite public comment on recommendations for modifying, expanding, or eliminating the newly adopted significant rule or order.

[26] Discrete, "add on" benefits or services requested by the consumer (*e.g.*, rate lock, expedited handling) could possibly be excluded from the no-fee requirement.

to choose to pay interest upfront in the form of discount points would reduce the ultimate cost to creditors from both loan default and prepayment.

- The ability for creditors to charge discount points in exchange for lower interest rates can accommodate those consumers who prefer to pay more at settlement in exchange for lower monthly interest charges and could produce a greater volume of available credit in residential mortgage markets. Preserving this ability would potentially allow a wider access to homeownership, benefitting consumers, creditors, brokerages, and individual MLOs.

- The ability to charge origination fees up front would allow creditors to recover fixed costs at the time they are incurred rather than over time through increased interest payments or through the secondary market prices.

- Similarly, preserving the flexibility for affiliates of creditors and brokerages to charge fees upfront should allow for these firms to charge directly for their services. Creditors and brokerages may be less likely to divest such entities than if the Dodd-Frank mandate takes effect as written.

Costs

- The proposals under consideration would impose some restrictions on discount points when creditors compensate MLOs. The discount points must be bona fide, *i.e.*, they result in a minimum reduction of interest rate for each point paid. Relative to the Loan Originator Rule, or to a broader exemption, this condition would restrict small entities' flexibility in pricing.

- Implementing a requirement that discount points be bona fide would also impose compliance and monitoring costs. However, small creditors will need to determine when discount points are bona fide for the purposes of the ability to repay rule. To the extent that the definitions of bona fide discount points are similar, the additional costs would be reduced.

- A requirement to offer consumers a no-point option might also impose costs on smaller creditors to the extent that they would be forced to price and offer terms they might not otherwise offer.

- A requirement that upfront origination fees paid by the consumer be flat and not vary with the size of the loan might limit a small entity's ability to price differentially. To the extent that fixed origination costs do vary in this dimension, small entities might be forced to use "average costs pricing" to recoup origination costs.

- The sunset provision being considered may be disruptive. It could pose greater costs compared to making any changes through the assessment process mandated by § 1022(d) (which requires an opportunity for public comment) or a rulemaking with a notice and comment and that could provide for an implementation period.

2. Proposals Under Consideration for Brokerage-Paid Compensation

- The Bureau has considered implementing as written Dodd-Frank's complete prohibition on a brokerage paying an individual broker a commission if the consumer has paid the brokerage. This approach would be consistent with the Loan Originator Rule, which also bans brokerage-paid compensation. However, the Bureau believes that caution is warranted.
  - Some MLOs have indicated that the Dodd-Frank provisions would likely cause brokerage firms not to accept compensation from consumers. Brokerage firms currently are prohibited by the Loan Originator Rule from paying their own employees a commission for these transactions (although they could pay a salary or an hourly wage to their employees). Furthermore, some brokerages have claimed that paying their brokers only a salary or hourly wage presents difficulties, particularly for small brokerage firms.
  - In addition, the Loan Originator Rule banned brokerage-paid compensation in part to reduce the risk that brokerage firms would structure that compensation in a way that created an incentive for individual MLO brokers to steer consumers into less favorable loans than they would otherwise qualify for. Because Dodd-Frank reduces that risk by prohibiting the consumer from compensating the brokerage based on loan terms (*see* B below), the Bureau believes that a categorical ban on brokerage-paid compensation may no longer be warranted.
- The CFPB is therefore considering a proposal under which it would exercise its exemption authority and issue a rule permitting the brokerage-paid compensation structures. Under this approach, the CFPB is considering (and seeks input from SERs on) imposing the same conditions on upfront points and fees paid by consumers to creditors and their affiliates as the CFPB would impose for the creditor-paid compensation scheme discussed above (*e.g.*, discount points must be bona fide and origination fees must be flat and thus must not vary based on the size of the loan). The CFPB seeks the advice and feedback of SERs on whether there should be restrictions on certain or all upfront fees paid by the consumer to the brokerage firm and its affiliates, such as the flat fee requirement.
- As with the proposals under consideration for creditor-paid compensation, the CFPB is considering whether to include a sunset provision on any CFPB exemption, and in any event would expect to evaluate the regulation five years after its effective date under § 1022(d) of Dodd-Frank.

a. Potential Impacts on Small Entities

Benefits

- Outside creditor-paid compensation, the brokerage must earn its revenue from the consumer. As a result, the main benefit to small brokerages from the proposals under consideration, relative to the current Loan Originator Rule, would be the exemption allowing brokerages to pay commission payments to brokerage employees when the consumer pays the brokerage. Such commissions allow brokerage firms to offer their employees performance-based incentives.

- The proposals under consideration would level the playing field between brokerage firms and creditors in regard to the incentives for origination available to brokerage firms, since a majority of banks and thrifts compensate their MLOs through commissions.

Costs

- Relative to an even broader exception, the proposal under consideration would limit the structure of origination fees, banning those calculated as a percentage of the loan. This would limit some small entities' ability to price as they see warranted as discussed above.
- The costs of the affiliates provision and proposed sunset are similar to those discussed above for creditor-paid compensation.

B. MLO Compensation That Varies Based on Loan Terms (Other Than Principal)

- Under Dodd-Frank, MLOs may not receive (and no person may pay to MLOs), directly or indirectly, compensation that varies based on the terms of the loan (other than the amount of principal).[27]
  - While the Loan Originator Rule contains a similar prohibition against compensation based on loan terms and conditions, the Rule's prohibition does not apply to consumer-paid transactions.[28]
  - Dodd-Frank makes a significant change to the Loan Originator Rule by imposing a ban on compensation that varies based on loan terms even on transactions where the consumer compensates the brokerage firm. The Dodd-Frank prohibition on varying compensation based on loan terms thus applies to consumer-paid, creditor-paid, and brokerage-paid compensation.
  - Dodd-Frank's extension of the Loan Originator Rule to consumer-paid transactions reduces potential incentives for a brokerage to upcharge consumers and steer them into less favorable loans in originations with consumer-paid or brokerage-paid compensation.
- The proposed rules under consideration will implement this statutorily-mandated change extending the ban on varying compensation based on loan terms to consumer-paid and brokerage-paid compensation.

[27] TILA § 129B(c)(1) (codified at 15 U.S.C. § 1639b(c)(1)).

[28] 12 CFR 1026.36(d)(1).

- The Bureau is also considering certain changes to the Loan Originator Rule to clarify or address interpretive and compliance issues relating to this prohibition that have arisen since the Rule went into effect in April 2011. The proposals under consideration to implement these changes are discussed below.

1. Compensation Based on Profits Derived From Mortgage Business

- The Commentary to the Loan Originator Rule ("Commentary") states that "compensation" includes salaries, commissions, and any similar payments, as well as annual or periodic bonuses.[29]

- The Commentary also provides that "terms or conditions" of the transaction include the interest rate, annual percentage rate, loan-to-value ratio, and the existence of a prepayment penalty.[30]

- The Bureau has received a number of questions on the application of the Loan Originator Rule to employer contributions to qualified retirement plans, such as employer-paid 401(k) plans, and to non-qualified plans, such as bonus or certain types of profit-sharing plans.

  - Under the Loan Originator Rule and Commentary, MLOs cannot be paid more compensation as a result of their origination of mortgages that have specific loan terms or conditions.[31]

  - Questions have arisen because, for many companies, the amount of the employer's contribution to these plans varies based on the company's profits, which in turn vary, in part, on the terms of the loans that the company's MLOs originate (such as the interest rate).[32]

- As noted above, Dodd-Frank generally follows the principles governing employee compensation in the Loan Originator Rule in prohibiting an MLO from receiving, directly or indirectly, compensation that varies based on the terms of the loan.[33] To

[29] 12 CFR part 1026, Supplement I (Comment 36(d)(1)-1).

[30] 12 CFR part 1026, Supplement I (Comment 36(d)(1)-2).

[31] 12 CFR 1026.36(d)(1).

[32] On April 2, 2012, the CFPB issued a bulletin clarifying that, until it adopts final rules implementing Dodd-Frank's mortgage loan origination standards, employers may make contributions to qualified retirement plans for MLOs out of a pool of profits derived from loans originated by MLO employees. *CFPB Bulletin 2012-02* (Apr. 2, 2012).

[33] The Rule allows MLO compensation based on "a fixed percentage of the amount of credit extended," *see* 12 CFR 1026.36(d)(1)(ii). Dodd-Frank similarly allows an MLO to receive compensation that varies with the amount of the principal and with loan volume. *See* TILA § 129B(c)(1) and (4)(D) (codified at 15 U.S.C. § 1639b(c)(1) and (4)(D)).

reduce any unintended consequences and unnecessary burdens, the CFPB is considering proposals to clarify the circumstances where these contributions or payments are permissible.

- The Bureau considered proposing a prohibition on MLOs participating in bonus and non-qualified profit-sharing plans if employer payments of bonuses or contributions to the plans were made from profits derived, wholly or partly, from the company's mortgage business. The Bureau considered a similar approach for qualified retirement, qualified profit-sharing, and qualified stock ownership plans.
    - However, the Bureau believes that Dodd-Frank provides some flexibility regarding treatment of such plans and that a strict prohibition may not be necessary or appropriate to implement Dodd-Frank's objectives, provided that potential steering incentives can be sufficiently addressed.
    - The Bureau further recognizes the burdens that strict prohibitions may impose on creditors, brokerages, and MLOs.
- Accordingly, the Bureau is considering proposals that would allow MLO compensation paid from mortgage business profits where the compensation is substantially deferred in time or there are other safeguards presented by the requirements of "qualified" plans and other compensation schemes to sufficiently mitigate steering incentives.
    - The three proposals under consideration, discussed below, would each permit, in certain circumstances, employers to compensate MLOs from profits derived from the company's mortgage business. However, consistent with the general Dodd-Frank prohibition on MLO compensation that varies based on loan terms, these proposals would *not* permit an employer to compensate individual MLOs differently depending on the profitability of the loans he or she originates.
    - The Bureau is still evaluating whether the proposals under consideration discussed below: (1) are operationally feasible to administer and sufficiently minimize burdens; (2) mandate sufficient safeguards to effectively mitigate steering incentives; and (3) are viable given other existing requirements for qualified plans under federal law.
    - The Bureau is continuing to consider and investigate these issues and may revise its proposals as it obtains additional information and feedback. Thus, the Bureau welcomes the input of SERs on these aspects of the proposals under consideration.

a. Proposals Under Consideration

The CFPB is considering proposals to:

(1) Permit employers to make contributions to MLO employees' qualified retirement plans, qualified profit-sharing plans, and qualified stock ownership plans even if contributions to a particular plan are made from profits derived from the company's mortgage business.

Examples:

- Company A maintains a qualified 401(k) plan (meeting the qualification requirements under the Internal Revenue Code and the Employee Retirement Income Security Act of 1974 ("ERISA")) in which eligible employees, including MLOs, may participate. The proposal under consideration would permit Company A to make contributions to this plan, even if the contributions are funded from company-wide profits that include profits from its mortgage business. The company may make a matching contribution, contribute a fixed amount based on percentage of salary or other formula, or make a discretionary contribution to the plan on behalf of its MLO and other employees.

- Company B maintains a qualified profit-sharing plan (meeting the qualification requirements under the Internal Revenue Code and ERISA) that is set up to allow for discretionary employer contributions (*i.e.*, the amount contributed by the employer to the plan each year is not fixed). As a qualified plan, the company's profit-sharing plan provides, among other things, a definite formula for allocating the employer's contribution among the participants and for distributing the accumulated funds to the employees after they reach a certain age, after a fixed number or years, or certain other occurrences. Some or all of the eligible plan participants are MLOs. The proposal under consideration would permit Company B to contribute company profits, including profits from its mortgage loan business, to the qualified profit-sharing plan.

(2) Permit employers to pay MLO employees bonuses or to make contributions to non-qualified profit-sharing or similar non-qualified plans from profits derived from the company's mortgage business, provided that mortgage-related revenue does not contribute more than a set percentage of the company's total revenue. The CFPB is considering setting that percentage at a fixed percentage between 20 percent and 50 percent of total revenue.[34]

[34] The CFPB seeks input from the SERs on what percentage cap should be selected and the impact on small entities. While revenue percentages will differ from profit percentages, the CFPB recognizes the potential implementation and operational difficulties of using a profits-based measure, especially for smaller entities.

Example:

- ➢ Company A and Company B are both solely engaged in the residential mortgage and credit card businesses. Each company earns $1 million revenue and $200,000 profits yearly, although revenue and profits are quite differently distributed between the companies' business lines. Company A's mortgage business accounts for $150,000 revenue (or 15 percent of total revenue) and $50,000 profits; its credit card business accounts for $850,000 revenue (or 85 percent) and $150,000 profits. Company B's mortgage business accounts for $750,000 revenue (75 percent) and $100,000 profits, and its credit card business accounts for $250,000 revenue (25 percent) and $100,000 profits. The proposal under consideration would permit only Company A to pay a discretionary bonus to an MLO employee and to make a contribution to a non-qualified profit-sharing, retirement, or similar account of an MLO derived from the entire $200,000 of company-wide profits (which includes profits from its mortgage business). In contrast, if Company B wishes to pay a discretionary bonus or to contribute to its MLOs non-qualified plans, it would be restricted to paying from the $100,000 of profits derived from its credit card business. In either case, however, the bonus payments or employer contributions to an MLO employee may not vary based on the terms of the loans originated by that MLO.

(3) Permit employers to make contributions to MLO employees' qualified or non-qualified plans and to pay MLO employees bonuses from profits derived from the company's mortgage business provided: (1) the number of loans originated by the MLO is below a set small number; and/or (2) the MLO has originated a small proportion of the total loans originated by the company.

Example:

- ➢ An employee of Company A originated one residential loan during the year. The proposal under consideration would permit Company A to contribute to the qualified retirement, profit-sharing, or stock ownership plans in which the employee participates, even if the company's contribution is from profits derived from its mortgage business. The company may also pay bonuses and contribute to any non-qualified retirement, profit-sharing, or similar plans in which the employee participates, irrespective of the percent of total revenue that is attributable to the company's mortgage business. The employee may not, however, receive different payment or contribution amounts depending on the terms of the loans that he or she originates.

b. Potential Impacts on Small Entities

- With respect to Proposal 2 above:
    - o For small depository institutions and credit unions (defined as those institutions with assets under $175 million), regulatory data from 2010 indicate that at the

higher threshold of 50 percent of total revenue, roughly 1.5 percent of small commercial banks (about 100 banks) and 3 percent of small credit unions (about 200 credit unions) would remain subject to the proposed restrictions on profit-related MLO compensation. Using a lower threshold of 20 percent of revenue, 40 percent of commercial banks and 32 percent of credit unions would be subject to the proposed restrictions.

  - The numbers are larger and more significant for small savings institutions whose primary business focus is on residential mortgages. At the higher threshold, 56 percent of these firms would be restricted from paying bonuses based on mortgage-related profits to their MLOs.[35]

- The Bureau lacks comprehensive data on nonbank lenders and, in particular, does not have information regarding the precise range of business activities that such companies engage in. As a result, it is unclear at this time the extent to which such nonbank lenders will face restrictions on their compensation practices.

- The Bureau does not have data, however, on what percentage of these institutions previously paid bonuses based on their profits. The Bureau assumes some institutions did not pay bonuses based on loan terms prior to the Loan Originator Rule, and others may have moved to a system based on the number of loan originations or loan amount, which are not restricted by the Rule. Accordingly, the actual percentage of financial institutions that would be restricted from paying certain bonuses may be smaller than the numbers reflected above.

Benefits

- Adopting the proposals under consideration would allow creditors to make payments to an MLO's qualified retirement plan and to pay bonuses out of profits under certain circumstances. This change could reduce operating costs for brokerages and creditors that might otherwise have to restructure their current compensation plans, including bonuses and profit-sharing.

- The proposals under consideration would offer small entities greater flexibility for MLO compensation than a strict categorical approach, which should help them maintain their competitiveness when recruiting, hiring, and retaining MLOs.

- The proposals under consideration would provide small entities with greater clarity regarding circumstances under which bonuses, profit-sharing, or other incentive-based compensation are or are not allowed.

- Proposal 3 would allow MLOs who originate a small number or proportion of loans to

[35] Estimates are based on 2010 call report data. Revenue from loan originations is assumed to equal fee and interest income from 1-4 family residences as reported. To the extent that other revenue on the call reports is tied to loan originations, these numbers may be underestimated. Revenue estimates for credit unions are not available; instead, the percentage of assets held in 1-4 family residential real estate is used instead.

receive bonuses from profits derived from the company's mortgage business regardless of the percent of profits that the mortgage business contributes.

Costs

- Companies above the percentage cap that desire to maintain bonus plans or other forms of profit-based compensation would have to calculate profits related to their mortgage business and either remove them from the relevant profit pool or maintain different plans funded by different profit pools for different sets of employees. However, these companies likely already have or are in the process of making these changes due to the status of profit-sharing, bonus, and qualified plans under the Loan Originator Rule.
- The implementation of any percentage cap could create differences for institutions based on the percentage of revenue that comes from mortgages. Thus, some companies might gain a competitive advantage.

2. Pricing Concessions

- The Loan Originator Rule does not allow creditors and brokerages to set the MLO's compensation at a certain level and then lower it in selective cases where different loan terms are negotiated because such a structure could be used to circumvent the ban on compensation based on a transaction's terms or conditions. Commentary to the Loan Originator Rule notes an example of a "pricing concession," stating that a creditor may not offer to extend a loan with specified terms and conditions (such as the rate and points) and then increase or decrease the MLO's compensation for that transaction if different loan terms are negotiated.[36]
- Because Dodd-Frank extends the application of the prohibition on compensation to the MLO based on loan terms to originations where there is consumer-paid compensation and brokerage-paid compensation, the restriction on pricing concessions also applies to the compensation paid from the consumer to the MLO. Thus, the MLO could not agree with a consumer to be compensated a set amount for a particular origination and then attempt to renegotiate compensation when loan terms are subsequently changed.

a. <u>Proposals Under Consideration</u>

- The CFPB is considering a proposal that would allow MLOs to make certain types of pricing concessions to cover unanticipated increases in third-party settlement charges, where those settlement charges are not controlled by the MLO, the creditor, or their affiliates and exceed or are in addition to the amounts disclosed on the Good Faith Estimate disclosure required by the Real Estate Settlement Procedures Act.
    - For example, an appraiser may discover structural damage to a property or a

[36] 12 CFR part 1026, Supplement I (Comment 36(d)(1)-5).

possible environmental hazard, which necessitates a special inspection. The proposal under consideration would permit the MLO to pay for the special inspection out of the MLO's compensation, instead of imposing the cost on the creditor or consumer.

  - This would provide additional flexibility to MLOs to close loans when the creditor will not agree to a pricing concession for the settlement charges and the consumer is not able or is unwilling to pay such new or additional amounts.

- The CFPB also seeks input from SERs on whether there should be further limits on any exception allowing MLOs to make pricing concessions (such as limits on the dollar amount or volume of concessions made by a particular MLO) or whether pricing concessions should be allowed in other situations.

  - The CFPB, however, is concerned that permitting MLOs to make other pricing concessions—such as concessions to prevent the creditor from making a high-cost mortgage, to undercut a competing offer (*e.g.*, lowering closing costs or the interest rate and then lowering MLO compensation to cover the decreased closing costs or interest rate), or to make corrections—could create a loophole that would undermine the general rule that MLO compensation may not vary based on the terms of the loan. An MLO could attempt to impose fees on consumers with the understanding that the MLO may have to make concessions to more savvy borrowers, who may be more likely to choose not to pay such fees.[37] Additionally, a creditor could inflate an MLO's compensation and then decrease the compensation on a transaction-specific basis to, for example, pay for certain costs, possibly resulting in compensation based on the loan's terms.

b. <u>Potential Impacts on Small Entities</u>

Benefits

- Permitting MLOs to make pricing concessions out of their compensation when unanticipated increases in third-party settlement charges occur at closing would provide flexibility for MLOs to close loans when the creditor will not agree to meet the increased settlement costs or the consumer declines to pay such costs and the creditor cannot provide the funds in time for closing.

Costs

- Because amending the current rule regarding pricing concessions would permit such concessions under certain circumstances, such a change when compared to a categorical prohibition could impose some additional costs on small MLOs for employee training

[37] For example, the Bureau's proposal under consideration would not permit an MLO to use the MLO's compensation to pay for rate lock extensions only when savvy consumers refuse to pay, but would permit an MLO to pay for an extension if the closing is delayed by a special inspection, as described above.

regarding compliance along with changes to systems or operations needed to comply with the proposal under consideration.

- The adoption of a proposal allowing an MLO to engage in pricing concessions might weaken the bargaining position of the small MLO relative to a creditor. Creditors might insist that the MLO make such concessions from their compensation, whereas with a complete prohibition on concessions paid out of MLO compensation, creditors might be more likely to make the concession themselves.

3. Point Banks

- In a point bank, a creditor contributes points to an MLO for each transaction that the MLO closes. The MLO may then use these points to obtain pricing concessions from the creditor. For example, the MLO may pay discount points to the creditor from the MLO's point bank in order to obtain a lower rate for the consumer. Point banks may exist in both retail and wholesale contexts.

- A point bank may provide an MLO with the ability to close some transactions that may not have closed if the MLO did not have the benefit of a point bank. Accordingly, under the Loan Originator Rule, a point bank could be viewed as compensation since it is providing "a financial or similar incentive" to the MLO.

- The CFPB is considering clarifying that MLO point banks fall within the definition of "compensation" and providing guidance on the award of points to MLOs that would not violate Dodd-Frank's prohibition against compensation that varies based on loan terms.

a. <u>Proposals Under Consideration</u>

- The CFPB is considering proposing amending the Commentary to the Loan Originator Rule to clarify that:

  - Point banks funded based on the difference between the rate required by the creditor for a given consumer and the actual rate the MLO sells the consumer, or based on the difference between any other term required by the creditor and the actual term the MLO sells the consumer, are not permissible because the contributions to the point bank would vary based on the terms of the mortgage transaction; and

  - Point banks funded by a creditor are permissible provided: (1) the creditor does not base the amount of the contribution to an MLO's point bank for a given transaction on the terms and conditions of the transaction; (2) the creditor does not change its contributions to the point bank over time based on terms or conditions of the MLO's transactions, or on whether the MLO overdraws the MLO's point bank; and (3) if a creditor permits an MLO to overdraw the MLO's point bank, the creditor does not reduce the MLO's commission on a transaction when he or she does so.

b. Potential Impacts on Small Entities

Benefits

- Relative to the current rule, the proposal under consideration would clarify the permissible ways in which point banks may be funded, and allow the use of such point banks by MLOs to close transactions that may not have otherwise closed, thus benefitting the MLO and the consumer.

Costs

- By clarifying that point banks are a form of compensation, the proposal under consideration would make it clear that point banks are subject to the current Rule and thus clearly limit the ways in which point banks may be funded. To the extent that MLOs are currently utilizing point banks that are being funded in a manner that would be prohibited under the proposal being considered, the funds available to be awarded to those points banks might decrease, thereby restricting the ability of MLO employees of small entities to use them to originate loans in certain circumstances.

- By clarifying that point banks are permissible under certain circumstances, the proposals under consideration may further weaken the MLO's bargaining position with the creditor over the payment of unanticipated third-party costs at closing.

4. Proxies

- Commentary to the Loan Originator Rule indicates that compensation "based on a factor that is a proxy for a transaction's terms or conditions" is prohibited because compensation based on proxies could potentially lead to circumvention of the ban on compensation based on the terms and conditions of the loan.[38] The comment identifies credit scores and debt-to-income ratios as examples of factors that are proxies for loan terms.

- Based on the numerous inquiries received by the CFPB, there is uncertainty regarding the scope of the prohibition of receiving compensation based on a proxy of a loan term or condition under the Loan Originator Rule. While the Bureau does not believe that any departure from the approach in the Rule is necessitated by Dodd-Frank, the Bureau is considering whether to provide examples of compensation that is or is not based on loan terms or conditions to clarify whether particular factors serve as proxies for loan terms and whether to amend the Commentary to adopt one or more of the following analytical frameworks to clarify the proxy concept and to ease compliance burdens. It especially seeks information from SERs on any difficulties in using the test proposed below, whether the test is effective at preventing harm to consumers, and whether the test would be overbroad or have unintended consequences.

[38] 12 CFR part 1026, Supplement I (Comment 36(d)(1)-2).

a. Proposals Under Consideration

- The Bureau is considering proposing the following test to determine whether a factor is a proxy for a loan term:
    - A factor is a proxy if: (1) it substantially correlates with a loan term; and (2) the MLO has discretion to use the factor to present a loan to the consumer with more costly or less advantageous term(s) than term(s) of another loan available through the MLO for which the consumer likely qualifies.

Other Alternatives Considered:

- The Bureau considered a definition of proxy as any factor that substantially correlates with a loan term. For example, pursuant to this definition, whether a loan is a purchase loan or a refinance would be considered a proxy for a loan term if it substantially correlates to interest rate, which is itself a loan term. If the correlation was substantiated, an MLO's compensation could not vary based on whether the loan is a purchase loan or a refinance. While this definition of proxy is consistent with the treatment of the issue in the Loan Compensation Rule and would be permissible under Dodd-Frank, the Bureau believes that such an approach may be overly inclusive because it could include practices where the risk of steering is not present.

b. Potential Impacts on Small Entities

Benefits

- Narrowing the concept of proxies would provide creditors and MLOs greater flexibility in their compensation structures and would permit incentives for the origination of certain types of loans.

5. Record Retention Requirements for MLOs

- Under the Loan Originator Rule, a creditor maintains records of the compensation it provided to the MLO for the transaction and of the compensation agreement in effect on the date the interest rate was set for the transaction.[39] The creditor must maintain these records for two years after a mortgage transaction is consummated.[40] However, an MLO is not required under the Loan Originator Rule to maintain records of the compensation it receives from a creditor, directly from the consumer, or from the brokerage firm.

- Under § 1404 of Dodd-Frank, MLOs are subject to civil liability for violations of TILA, including liability for receiving compensation that varies based on the terms of the loan, regardless of whether that compensation comes directly from the consumer or from a

[39] 12 CFR part 1026, Supplement I (Comment 25(a)-5).

[40] General guidance for maintaining these records is set forth in Regulation Z and accompanying commentary. *See* 12 CFR 1026.25.

person other than the consumer.[41]

a. Proposals Under Consideration

- The CFPB is considering requiring brokerages (in addition to creditors) to maintain: (1) records of MLO compensation arrangements and agreements; and (2) records of compensation provided to MLOs by a consumer or a person other than the consumer.

b. Potential Impacts on Small Entities

Benefits

- Record-keeping will improve the CFPB's ability to monitor compliance with applicable requirements and to better protect consumers, and will assist entities in assessing their compliance with the rule.

Costs

- MLOs currently without record-keeping procedures will incur the costs associated with the establishment and maintenance of such procedures.

C. MLO Qualification and Screening Requirements

- Section 1402 of Dodd-Frank Act amends TILA to impose a duty on MLOs to be "qualified" and, where applicable, registered or licensed as a mortgage originator under state law and the federal SAFE Act.[42] It also requires MLOs to provide their identifying numbers under the Nationwide Mortgage Licensing System and Registry ("NMLSR") on all loan documents.

- The SAFE Act created minimum federal standards to supplement and reinforce states' traditional licensing and registration requirements for individual MLOs in order to minimize mortgage loan origination practices harmful to consumers. The SAFE Act currently imposes the following requirements on MLOs:

    - ***Non-Bank MLOs:*** The SAFE Act requires MLOs who are not employees of depositories to be licensed in the states in which they operate, and it provides minimum standards for states to follow in their licensing. To become licensed, an MLO must complete pre-licensure education courses, pass a written test, demonstrate character and fitness, and have no disqualifying felony convictions. To maintain a license, the MLO must take annual continuing education courses and continue to meet the character and fitness requirements.

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[41] TILA § 129B(d) (codified at 15 U.S.C. 1639b(d)).

[42] TILA § 129B(b) (codified at 15 U.S.C. 1639b(b)).

- *Non-Profit and Government Agency MLOs:* A final rule issued by the Department of Housing and Urban Development ("HUD") (now inherited by the CFPB) implementing the SAFE Act clarified that MLO employees of bona fide non-profit organizations[43] and government agencies are not subject to these licensing requirements.[44]

- ***Bank MLOs:*** Under the SAFE Act, individual MLOs employed by depositories (*e.g.,* banks and credit unions) must be registered. Registration requires the MLO to submit information concerning the individual MLO's identity, personal history, and experience into a national database, but does not require the individual to meet substantive standards, such as those imposed on non-bank MLOs for character, competence, and education.

- The Dodd-Frank definition of "mortgage originator" is broader than the SAFE Act definition of "loan originator" because it encompasses both entities and individuals while the SAFE Act definition encompasses only individuals.[45] The broader Dodd-Frank definition does not expand the SAFE Act's coverage to include entities. However, it does apply the new TILA requirement for MLOs to be "qualified" to both entities (*i.e.*, creditors and brokerages) and individuals (*i.e.*, brokers and loan officers).[46] In addition, Dodd-Frank creates a federal remedy under TILA against individual MLOs for violation of the SAFE Act's licensing and registration scheme.

a. <u>Proposals Under Consideration</u>

- The CFPB is considering proposing rules to implement Dodd-Frank's requirement that entities employing or retaining the services of MLOs be "qualified." Specifically, the proposals under consideration would:
  - Require that to be "qualified," MLO entities must ensure that MLO individuals who work for them are licensed or registered, to the extent those individuals are already required to be licensed or registered under the SAFE Act and its implementing regulations. The proposal being considered would clarify that MLO entities are obligated under TILA to ensure that their MLO employees comply with SAFE Act requirements, but would not impose any new procedures for SAFE Act compliance.

[43] The rule defines "bona fide non-profit organizations" only to include 501(c)(3)s.

[44] 12 CFR 1008.103(e)(7).

[45] *See* 15 U.S.C. § 1602(cc)(2); 12 U.S.C. § 5102(3). Dodd-Frank includes creditors as "mortgage originators" for the purposes of qualification requirements, but excludes them for the purposes of compensation and steering requirements. 15 U.S.C. § 1602(cc)(2)(F).

[46] A chart comparing the current MLO qualification requirements for depository, non-depository, and non-profit entities and the requirements of the proposals under consideration is attached as Appendix D.

- Require entities whose employee MLOs are not subject to SAFE Act licensing (*i.e.*, depositories and bona fide non-profit MLO entities) to:[47] (1) ensure that their MLO employees meet character and fitness and criminal background standards equivalent to the licensing standards that the SAFE Act applies to employees of non-bank MLOs; and (2) provide appropriate training to their MLO employees commensurate with the size and mortgage lending activities of the entity. The proposed requirement to provide appropriate training to MLOs who are not subject to SAFE Act licensing is analogous to the continuing education requirement that applies to individuals who are subject to SAFE Act licensing. However, the proposed requirement would be tailored to correspond to the actual lending activities of the MLO and would not impose a minimum number of training hours. The proposed character and fitness, criminal background check, and training requirements would improve parity among the minimum standards that apply to individual MLOs working for different types of entities.

- Require all MLO entities (banks, non-banks, and non-profit organizations) to comply with applicable state law requirements for legal existence and foreign qualification.

- Clarify that only disclosure and closing documents that include loan terms must include the required unique identifiers and the names of individual MLOs, and, for those cases in which multiple individuals (or entities) meet the Dodd-Frank definition of mortgage originator, clarify which MLOs must include their unique identifiers and names on the documents.

b. <u>Potential Impacts on Small Entities</u>

Benefits

- To the extent that some small MLOs face competitors with lower costs or other advantages resulting from their lesser requirements for registration, the proposed requirement will increase parity between these firms and reduce potential unfairness.

Costs

- Employees of depositories and bona fide non-profit organizations do not have to meet the SAFE Act standards that apply only to licensing, such as taking pre-licensure classes, passing a test, meeting character and fitness standards, having no felony convictions within the previous seven years, or taking annual continuing education classes. The proposal under consideration would require these institutions to adopt character and criminal record screening and ongoing training requirements. However, the CFPB believes that many of these entities already have adopted screening and training requirements, either to satisfy safety-and-soundness requirements or as a matter of good business practice.

[47] The CFPB is not contemplating imposing these requirements on governmental entities.

- For any entity that adopted screening and training requirements in the first instance, the CFPB estimates the costs as follows: The CFPB estimates that the cost of a criminal background check through a commercial service ranges from approximately $39 to $49. Checking employment and character references of an applicant are expected to require approximately one hour. The time and cost required to provide occasional, appropriate training to MLOs will vary greatly depending on the lending activities of the entity and the skill and experience level of MLOs, and the CFPB anticipates that the training that many non-profit and depository MLOs already receive will be adequate to meet the proposed requirement. The CFPB expects that in no case would the training needed to satisfy the proposed requirement be more comprehensive, time-consuming, or costly than the online training approved by the NMLS to satisfy the continuing education requirement imposed under the SAFE Act on those individuals who are subject to state licensing. The typical cost of a stand-alone 8 hour continuing education course is approximately $129.

- The requirement to include the NMLSR unique identifiers and names of MLOs on loan documents may impose some additional costs relative to current practice. The Federal Housing Finance Agency requires the NMLSR numerical identifier of individual MLOs and MLO entities to be included on all loan applications for Fannie Mae and Freddie Mac loans.

IV. OTHER FEDERAL RULES

- As discussed above, Dodd-Frank codified requirements for MLO compensation contained in Regulation Z and, in some cases, added to or altered those requirements. Through the current proposals under consideration, the CFPB is working to harmonize the earlier rules with the new statutory requirements.

- The CFPB's Regulations G and H implement the SAFE Act, which imposes licensing and registration requirements on individual MLOs and sets minimum standards for licensing and registration.[48] The current proposal under consideration would not alter the scope of individuals who are subject to licensing or registration, and it would not alter the minimum standards for licensing or registration. It would instead define what is necessary for entities that employ or retain the services of such individuals in order to comply with the new Dodd-Frank requirement that they also be "qualified."

- A separate proposal previously issued by the Board on qualified mortgages, which the CFPB is in the process of finalizing, provides that bona fide discount points are excluded from the determination of whether a mortgage is a qualified mortgage.[49] If the CFPB adopts the option described above permitting bona fide discount points in creditor-paid

[48] *See* Regulation G; Regulation H.

[49] 76 Fed. Reg. 27,390 (May 11, 2011).

and brokerage-paid compensation structures, it intends to harmonize the terms in the two rules.

- The Board's proposal on qualified mortgages also addressed the magnitude of MLO compensation for the purpose of determining whether the mortgage is a qualified mortgage, in relation to the Dodd-Frank provisions on a borrower's ability to repay. The proposals presently under consideration in this rulemaking do not address the magnitude of compensation that an MLO may receive, other than to provide that the compensation may not vary based on the terms of the loan and may not come from both the consumer and a person other than the consumer (*e.g.*, compensation to an MLO from both a consumer and creditor).

V. POTENTIAL IMPACT ON COST OF CREDIT FOR SMALL ENTITIES

- Section 603(d) of the Regulatory Flexibility Act requires the CFPB to consult with small entities regarding the potential impact of the proposals under consideration on the cost of credit for small entities and related matters.[50]

- At this time, there is no evidence that the proposals under consideration would result in an increase in the cost of credit for small entities. The proposals under consideration would apply only to consumer credit transactions secured by a mortgage, deed of trust, or other security interest on a residential dwelling or a residential real property that includes a dwelling. These requirements do not apply to consumer credit transactions under open-end credit plans, such as home equity lines of credit, or to timeshare plan transactions.

- They also would not apply to loans obtained primarily for business purposes.

- The CFPB, however, will seek the advice and recommendations of the small entity representatives during the SBREFA outreach session regarding this issue.

[50] 5 U.S.C. § 603.

APPENDIX A

STATUTORY TEXT RELEVANT TO RULEMAKING

Dodd-Frank Wall Street Reform and Consumer Protection Act ("DFA")
(Pub. L. 111-203, approved July 21, 2010)

Subtitle A—Residential Mortgage Loan Origination Standards

SEC. 1401. DEFINITIONS.

Section 103 of the Truth in Lending Act (15 U.S.C. 1602) is amended by adding at the end the following new subsection:

''(cc) DEFINITIONS RELATING TO MORTGAGE ORIGINATION AND RESIDENTIAL MORTGAGE LOANS.—

''(1) COMMISSION.—Unless otherwise specified, the term 'Commission' means the Federal Trade Commission.

''(2) MORTGAGE ORIGINATOR.—The term 'mortgage originator'—

''(A) means any person who, for direct or indirect compensation or gain, or in the expectation of direct or indirect compensation or gain—

''(i) takes a residential mortgage loan application;

''(ii) assists a consumer in obtaining or applying to obtain a residential mortgage loan; or

''(iii) offers or negotiates terms of a residential mortgage loan;

''(B) includes any person who represents to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationery, brochures, signs, rate lists, or other promotional items), that such person can or will provide any of the services or perform any of the activities described in subparagraph (A);

''(C) does not include any person who is (i) not otherwise described in subparagraph (A) or (B) and who performs purely administrative or clerical tasks on behalf of a person who is described in any such subparagraph, or (ii) an employee of a retailer of manufactured homes who is not described in clause (i) or (iii) of subparagraph (A) and who does not advise a consumer on loan terms (including rates, fees, and other costs);

''(D) does not include a person or entity that only performs real estate brokerage activities and is licensed or registered in accordance with applicable State law, unless such person or entity is compensated by a lender, a mortgage broker, or other mortgage originator or by any agent of such lender, mortgage broker, or other mortgage originator;

''(E) does not include, with respect to a residential mortgage loan, a person, estate, or trust that provides mortgage financing for the sale of 3 properties in any 12-month period to purchasers of such properties, each of which is owned by such person, estate, or trust and serves as security for the loan, provided that such loan—

‘‘(i) is not made by a person, estate, or trust that has constructed, or acted as a contractor for the construction of, a residence on the property in the ordinary course of business of such person, estate, or trust;

‘‘(ii) is fully amortizing;

‘‘(iii) is with respect to a sale for which the seller determines in good faith and documents that the buyer has a reasonable ability to repay the loan;

‘‘(iv) has a fixed rate or an adjustable rate that is adjustable after 5 or more years, subject to reasonable annual and lifetime limitations on interest rate increases; and

‘‘(v) meets any other criteria the Board may prescribe;

‘‘(F) does not include the creditor (except the creditor in a table-funded transaction) under paragraph (1), (2), or (4) of section 129B(c); and

‘‘(G) does not include a servicer or servicer employees, agents and contractors, including but not limited to those who offer or negotiate terms of a residential mortgage loan for purposes of renegotiating, modifying, replacing and subordinating principal of existing mortgages where borrowers are behind in their payments, in default or have a reasonable likelihood of being in default or falling behind.

‘‘(3) NATIONWIDE MORTGAGE LICENSING SYSTEM AND REGISTRY.—The term ‘Nationwide Mortgage Licensing System and Registry’ has the same meaning as in the Secure and Fair Enforcement for Mortgage Licensing Act of 2008.

‘‘(4) OTHER DEFINITIONS RELATING TO MORTGAGE ORIGINATOR. For purposes of this subsection, a person ‘assists a consumer in obtaining or applying to obtain a residential mortgage loan’ by, among other things, advising on residential mortgage loan terms (including rates, fees, and other costs), preparing residential mortgage loan packages, or collecting information on behalf of the consumer with regard to a residential mortgage loan.

‘‘(5) RESIDENTIAL MORTGAGE LOAN.—The term ‘residential mortgage loan’ means any consumer credit transaction that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or on residential real property that includes a dwelling, other than a consumer credit transaction under an open end credit plan or, for purposes of sections 129B and 129C and section 128(a) (16), (17), (18), and (19), and sections 128(f) and 130(k), and any regulations promulgated thereunder, an extension of credit relating to a plan described in section 101(53D) of title 11, United States Code.

‘‘(6) SECRETARY.—The term ‘Secretary’, when used in connection with any transaction or person involved with a residential mortgage loan, means the Secretary of Housing and Urban Development.

‘‘(7) SERVICER.—The term ‘servicer’ has the same meaning as in section 6(i)(2) of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2605(i)(2)).’’.

SEC. 1402. RESIDENTIAL MORTGAGE LOAN ORIGINATION.

(a) IN GENERAL.—Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.) is amended—

(1) by redesignating the 2nd of the 2 sections designated as section 129 (15 U.S.C. 1639a) (relating to duty of servicers of residential mortgages) as section 129A; and

(2) by inserting after section 129A (as so redesignated) the following new section:

''§ 129B. Residential mortgage loan origination

''(a) FINDING AND PURPOSE.—

''(1) FINDING.—The Congress finds that economic stabilization would be enhanced by the protection, limitation, and regulation of the terms of residential mortgage credit and the practices related to such credit, while ensuring that responsible, affordable mortgage credit remains available to consumers.

''(2) PURPOSE.—It is the purpose of this section and section 129C to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive or abusive.

''(b) DUTY OF CARE.—

''(1) STANDARD.—Subject to regulations prescribed under this subsection, each mortgage originator shall, in addition to the duties imposed by otherwise applicable provisions of State or Federal law—

''(A) be qualified and, when required, registered and licensed as a mortgage originator in accordance with applicable State or Federal law, including the Secure and Fair Enforcement for Mortgage Licensing Act of 2008; and

''(B) include on all loan documents any unique identifier of the mortgage originator provided by the Nationwide Mortgage Licensing System and Registry.

''(2) COMPLIANCE PROCEDURES REQUIRED.—The Board shall prescribe regulations requiring depository institutions to establish and maintain procedures reasonably designed to assure and monitor the compliance of such depository institutions, the subsidiaries of such institutions, and the employees of such institutions or subsidiaries with the requirements of this section and the registration procedures established under section 1507 of the Secure and Fair Enforcement for Mortgage Licensing Act of 2008.''.

(b) CLERICAL AMENDMENT.—The table of sections for chapter 2 of the Truth in Lending Act is amended by inserting after the item relating to section 129 the following new items:

''129A. Fiduciary duty of servicers of pooled residential mortgages.
''129B. Residential mortgage loan origination.''.

SEC. 1403. PROHIBITION ON STEERING INCENTIVES.

Section 129B of the Truth in Lending Act (as added by section 1402(a)) is amended by inserting after subsection (b) the following new subsection:

''(c) PROHIBITION ON STEERING INCENTIVES.—

''(1) IN GENERAL.—For any residential mortgage loan, no mortgage originator shall receive from any person and no person shall pay to a mortgage originator, directly or indirectly, compensation that varies based on the terms of the loan (other than the amount of the principal).

''(2) RESTRUCTURING OF FINANCING ORIGINATION FEE.—

''(A) IN GENERAL.—For any mortgage loan, a mortgage originator may not receive from any person other than the consumer and no person, other than the consumer, who knows or has reason to know that a consumer has directly compensated or will directly compensate a mortgage originator may pay a mortgage originator any origination fee or charge except bona fide third party charges not retained by the creditor, mortgage originator, or an affiliate of the creditor or mortgage originator .

''(B) EXCEPTION.—Notwithstanding subparagraph (A), a mortgage originator may receive from a person other than the consumer an origination fee or charge, and a person other than the consumer may pay a mortgage originator an origination fee or charge, if—

''(i) the mortgage originator does not receive any compensation directly from the consumer; and

''(ii) the consumer does not make an upfront payment of discount points, origination points, or fees, however denominated (other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or originator), except that the Board may, by rule, waive or provide exemptions to this clause if the Board determines that such waiver or exemption is in the interest of consumers and in the public interest.

''(3) REGULATIONS.—The Board shall prescribe regulations to prohibit—

''(A) mortgage originators from steering any consumer to a residential mortgage loan that—

''(i) the consumer lacks a reasonable ability to repay (in accordance with regulations prescribed under section 129C(a)); or

''(ii) has predatory characteristics or effects (such as equity stripping, excessive fees, or abusive terms);

''(B) mortgage originators from steering any consumer from a residential mortgage loan for which the consumer is qualified that is a qualified mortgage (as defined in section 129C(b)(2)) to a residential mortgage loan that is not a qualified mortgage;

''(C) abusive or unfair lending practices that promote disparities among consumers of equal credit worthiness but of different race, ethnicity, gender, or age; and

''(D) mortgage originators from—

''(i) mischaracterizing the credit history of a consumer or the residential mortgage loans available to a consumer;

‘‘(ii) mischaracterizing or suborning the mischaracterization of the appraised value of the property securing the extension of credit; or

‘‘(iii) if unable to suggest, offer, or recommend to a consumer a loan that is not more expensive than a loan for which the consumer qualifies, discouraging a consumer from seeking a residential mortgage loan secured by a consumer’s principal dwelling from another mortgage originator.

‘‘(4) RULES OF CONSTRUCTION.—No provision of this subsection shall be construed as—

‘‘(A) permitting any yield spread premium or other similar compensation that would, for any residential mortgage loan, permit the total amount of direct and indirect compensation from all sources permitted to a mortgage originator to vary based on the terms of the loan (other than the amount of the principal);

‘‘(B) limiting or affecting the amount of compensation received by a creditor upon the sale of a consummated loan to a subsequent purchaser;

‘‘(C) restricting a consumer’s ability to finance, at the option of the consumer, including through principal or rate, any origination fees or costs permitted under this subsection, or the mortgage originator’s right to receive such fees or costs (including compensation) from any person, subject to paragraph (2)(B), so long as such fees or costs do not vary based on the terms of the loan (other than the amount of the principal) or the consumer’s decision about whether to finance such fees or costs; or

‘‘(D) prohibiting incentive payments to a mortgage originator based on the number of residential mortgage loans originated within a specified period of time.’’.

APPENDIX B

GLOSSARY

This glossary is provided for the convenience of the reader for the purposes of this document only. Definitions or interpretations issued by the CFPB on the same or similar terms may vary from those set forth in this document.

Affiliate: any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956 (12 U.S.C. § 1841 et seq.).

Bona fide non-profit: an entity organized under § 501(c)(3) of Internal Revenue Code that, under the SAFE Act, is certified by the state as meeting certain standards as a result of its activities, products, funding, and compensation practices.

Bona fide third party fees: fees that are reasonable in amount and paid to parties unaffiliated with the creditor or originator for services associated with loan origination. For example, a charge for an appraisal conducted by an appraiser that in not affiliated with either the creditor or a brokerage.

Broker: an MLO individual who obtains or arranges a mortgage loan between a creditor and a borrower (*i.e.,* an employee of a brokerage). Brokers often assist borrowers to find a loan from one of a number of lenders.

Brokerage: an MLO entity that operates through its brokers. Brokerages originate loans but do not fund them from their own resources.

Commission: compensation paid to an MLO contingent on the closing of a particular loan transaction.

Creditor: a person or entity that closes a particular loan in its own name from its own resources. Creditors may employ loan officers who arrange loans between the creditor and borrowers or may fund loans brokered to them from brokerages. Creditors include banks, thrifts, credit unions, and non-depository lenders such as mortgage companies.

Discount Point: a fee that may be offered by a creditor, expressed as a percentage of the loan amount, paid by the borrower at the time of origination to prepay a portion of the loan's interest. Payment of a discount point or points reduces the interest rate of the loan.

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

Mortgage Loan Originator ("MLO"): generally, a person or entity that arranges or obtains mortgage loan terms for a consumer for compensation or gain. However, the precise definition of MLO depends on the requirement being discussed. Under the SAFE Act, "loan originator" includes only individuals. Under Dodd-Frank qualification requirements, "mortgage originator" includes both entities (creditors and brokerages) and the individuals they employ (loan officers and brokers). For purposes of Dodd-Frank's compensation and steering provisions, the term includes brokerages, individual brokers, and individual loan officers but excludes creditors.

Origination Charge or Origination Fee: a discrete, fixed-dollar, upfront payment meant to cover the costs related to the origination of a mortgage loan, including for example, processing, underwriting and reviewing and preparing documents.

Origination Points: a fee, expressed as a percentage of the loan amount, to be paid by the borrower at the time of loan origination meant to cover the costs related to the origination of a mortgage loan, including for example, underwriting and preparing legal documents.

Residential Mortgage Loan: any consumer credit transaction that is secured by a mortgage or deed of trust on a dwelling or on residential real property that includes a dwelling, other than a home equity line of credit or a time share plan.

Retail Loan: a mortgage loan originated by the creditor directly to the consumer often through loan officers employed by the creditor (*i.e.*, not originated through a broker).

Salary: compensation that is not tied to a particular transaction, such as an annual salary or an hourly wage.

Upfront payment: payment for points, charges, fees, or services performed in connection with a residential mortgage loan at or before closing (typically before the first scheduled mortgage loan payment after closing).

Wholesale Loan: a mortgage loan originated by a brokerage and funded by a creditor.

APPENDIX C

Residential Mortgage Loan Origination Standards Rulemaking: Payment Structures Under Regulatory Models

Regulatory Models	Creditor-Paid Compensation	Consumer-Paid Compensation	Brokerage-Paid Compensation
Status Quo (Loan Originator Rule)	Retail: Creditor pays its loan officer salary or commission. Wholesale: Creditor pays brokerage a commission. Brokerage pays its broker a salary and/or commission. Consumer cannot pay brokerage. Points and Fees: Consumer can pay points and fees to creditor and its affiliates without limitation.	Wholesale: Consumer pays the fees to the brokerage that can vary with loan terms or conditions.[1] The brokerage pays its broker a salary, but not a commission. Creditor cannot pay the brokerage. Points and Fees: Consumer can pay points and fees to brokerage, creditor, and their affiliates without limitation.	Prohibited. (Brokerage cannot split with broker compensation received from consumer and thus cannot pay broker commission.)
Dodd-Frank Proposals Under Consideration	Retail: Creditor pays its loan officer a commission.[2] Wholesale: Creditor pays brokerage a commission. Brokerage pays its broker a commission and/or salary.[3] Consumer cannot pay brokerage. Points and Fees: Consumers can pay: (1) discount points provided that they are "bona fide": 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": not varying with size of loan.	Wholesale: 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: Consumer can pay points and fees to brokerage, creditor, and their affiliates without limitation.	Wholesale: 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": 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": not varying with size of loan.[4]

Terms used in chart:

"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.

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[1] 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 as noted).

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

[3] 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.

[4] As noted above, consumer payment of fees to brokerage may be subject to additional conditions.

APPENDIX D

CURRENT MLO QUALIFICATION REQUIREMENTS AND PROPOSALS UNDER CONSIDERATION

	SAFE Act Requirements	State Law Requirements	CFPB Proposals Under Consideration Implementing Dodd-Frank Requirement That MLOs Be "Qualified"[5]
Banks (depositories and their subsidiaries)	Employees must register and obtain NMLS ID by: - entering information; and - submitting fingerprints Banks must: - check FBI record for crimes that violate Federal Deposit Insurance Act (*i.e.,* crimes of dishonesty, breach of trust, and money laundering); and - implement policies to ensure MLOs are registered and have obtained an NMLS ID	State banks must be state chartered and obtain foreign qualification (if applicable)	Banks must: - comply with applicable state requirements to be chartered and to obtain foreign qualification (if applicable);* - ensure that MLOs are registered and have obtained NMLS ID;* - ensure that MLOs have good character, fitness, and financial responsibility (currently imposed on non-bank MLOs under the SAFE Act); - ensure that MLOs meet standards equivalent to those for non-bank MLOs under the SAFE Act by running criminal character checks for disqualifying felonies; and - provide appropriate training to MLOs commensurate with size and activities of the bank
Non-banks (*e.g.,* mortgage companies and mortgage brokers)	Individuals must be state licensed and registered and must obtain NMLS ID by: - passing criminal background check for disqualifying felonies; - demonstrating good character, fitness, and financial responsibility; - taking pre-licensing classes; - passing national standardized test; and - taking 8 hours of approved continuing education classes annually	Companies must: - be lawfully formed, maintained, and foreign qualified (if applicable); and - be licensed	Companies must: - comply with applicable state requirements for non-profits to be lawfully formed, maintained, and foreign qualified (if applicable);* and - ensure their MLOs meet SAFE Act requirements to be state licensed and registered and have obtained an NMLS ID
Bona fide non-profits[6]	Nothing	Non-profits must be lawfully formed, maintained, and foreign qualified (if applicable)	Non-profits must: - comply with applicable state requirements to be lawfully formed, maintained, and foreign qualified (if applicable);* - ensure that MLOs have good character, fitness, and financial responsibility (currently imposed on non-bank MLOs under the SAFE Act); - ensure that MLOs meet standards equivalent to those for non-bank MLOs under the SAFE Act by running criminal character checks for disqualifying felonies; and - provide appropriate training to MLOs commensurate with size and activities of the non-profit

* These proposed requirements simply provide TILA remedies for the entities' failure to comply with existing duties under the SAFE Act or state law.

[5] The proposed Dodd-Frank requirements would supplement, and not displace, the requirements of the SAFE Act and state law.

[6] To be a "bona fide non-profit," the entity must have 501(c)(3) status and the state must review its activities, products, funding, and compensation practices.