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# CFPB Adjusts Long Time Position Relating to Loan Originator Compensation

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Many residential mortgage lenders currently have loan compensation plans that provide for a payment to loan originators of one commission amount for loans funded by the lender, and a smaller commission amount for loans that are brokered out to other lenders. While the CFPB never directly endorsed this result, they did not reject it either. In its *Loan Originator Compensation Rule Resource Guide*, the Mortgage Bankers Association provided the following illustration and comment when discussing the Loan Originator Compensation Rule's prohibition against compensation based on a proxy for a term of a transaction:

A mortgage company generally acts as a creditor, but if a customer wants a loan product that the company does not make, the company will broker the loan to a creditor that offers the product . . . [e]ach employee loan originator may handle both brokered loans and loans made by the company. An employee loan originator will receive a commission of X% of the loan amount for brokered loans and a commission of Y% of the loan amount for loans made by the company.

Comment: The CFPB staff provided informal advice and appeared to indicate that this situation likely would be subject to the proxy analysis, and could present a risk if the terms of loans brokered by the company differed from the terms of loans made by the company. It appears that the CFPB staff understands that a company may be basing the difference in compensation on the lend versus broker dynamic, and not on the loan terms, but given the absence of an exception under the CFPB Rule for lend versus broker situations, it appears that the staff believes it must indicate that the structure may present a risk under the proxy analysis.

And so this position stayed for the better part of a decade. While lenders understood that the position was not risk free, many felt that they could clearly establish if questioned by an examiner that the loan terms were not considered at all in connection with the decision to broker a loan, but that the decision was solely based on the consumer's requesting a product that the lender did not offer. And the CFPB had seen this policy in many examinations over the years, and never objected to it.

However, in its latest Summer Supervisory Highlights published recently, the CFPB wrote the following (we discussed this recent issue of the Supervisory Highlights here):

As part of their business model, institutions brokered-out certain mortgage products not offered in-house. For example, the institutions used outside lenders for reverse mortgage originations, but had their own in-house cash-out refinance mortgage product. Examiners determined that the institutions used a compensation plan that allowed a loan originator who originated both brokered-out and in-house loans to receive a different level of compensation for the brokered out loans versus in-house loans. By compensating differently for loan product types that were not offered in-house, the entities violated Regulation Z by basing compensation on the terms of a transaction. In response to these findings, the entities have since revised their loan originator compensation plans to comply with Regulation Z.

While the reference to reverse mortgage originations is a bit surprising (open end reverse mortgage products – the most common kind – are not subject to the Loan Originator Compensation Rule at all, but closed end reverse mortgage products are), the CFPB has nevertheless put the world on notice that it now views the example provided above as a violation of the Rule.

**Putting It Into Practice:** Any residential mortgage lender paying different compensation for funded loans and brokered loans will now need to change its policy and update its loan originator compensation agreements. One approach that the CFPB has blessed in the past would be to designate certain loan originators to only handle brokered loans and other loan originators to only handle funded loans, but this approach may not be practical or easily implemented. What is clear is that in this time of decreased loan volume, lenders will need to carefully explain to loan originators why the policy is being changed. Of course, one way to deal with this which will please the loan originators would be to increase the commission on brokered loans to match the commission on funded loans, but that may well not be an economically feasible solution for many lenders. What's more, there is concern in the industry that if the CFPB has now changed its position on this issue, might there be other issues going forward on which the CFPB might change a long-held position?

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