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October 16, 2012

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Proposal to Implement Mortgage Loan Originator Compensation and Related Provisions of the Dodd-Frank Act, Docket No. CFPB-2012-0037; CFPB RIN 3170–AA13

Dear Ms. Jackson:

This letter represents the views of the Credit Union National Association on the proposal of the Consumer Financial Protection Bureau (CFPB) to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act that address mortgage loan originator compensation and related issues. The proposal appeared in the Federal Register September 7, 2012. The letter was developed with input from our Housing Finance Reform Task Force, Consumer Protection Subcommittee, state leagues, CUNA Council members and others. CUNA is the largest credit union advocacy organization in this country, representing approximately 90% of the nation's 7,000 state and federal credit unions, which serve about 95 million members.

Summary of CUNA's Views

CUNA has long supported the current prohibition on tying compensation for loan officers and other originators to the terms and conditions of a specific loan while historically opposing practices by unscrupulous lenders to steer unwary borrowers into loans that are overpriced or that they can ill afford to repay. However, CUNA has a number of major concerns with the CFPB's proposal and is seeking significant changes.

As discussed in this letter, CUNA urges the CFPB to:

- Substantially alter the loan originator qualification requirements that are not specifically required by the Dodd-Frank Act;
- Eliminate the use of "proxy" factors to restrict compensation to loan originators;
- Refrain from expanding recordkeeping requirements;
- Revise the restrictions on upfront points and fees; and
- Provide some flexibility on the use of arbitration clauses.

The provisions in the Dodd Frank Act (§§ 1402, 1403, and 1404) that address mortgage loan originator compensation, anti-steering, and other directives that would be implemented by the proposal are straightforward; many of these requirements such as compliance with the Secure and Fair Enforcement for Mortgage Licensing Act (SAFE Act) and anti-steering provisions are ones which credit unions and regulated creditors already meet. If implemented in a manner that is closely tailored to those statutory provisions, consumers would be protected, and creditors, such as credit unions, would not be unduly burdened.

Yet, as discussed in this letter, the proposed rule and commentary go well beyond what the statute requires in a number of areas, to the detriment of clarity and simplicity for consumers as well as for creditors. As a result, in certain areas as noted below, the proposal would actually minimize consumer protection while needlessly and substantially increasing the compliance burdens and costs that credit unions would face.

In addition, credit unions have been reassured throughout the development of the CFPB that the agency's purpose was to police abusers and apply the same level of regulations credit unions face to those entities – not to subject credit unions that were not responsible for the financial crisis, to a sea of new rules. However, as discussed in this letter, if this proposal is adopted without significant changes, credit unions will have to shoulder greater regulatory burdens and costs. These costs far outweigh any marginal benefits that credit union members might achieve as a result of this proposal.

Additional Requirements for Loan Originators Should Not Apply to Credit Unions

In the strongest terms possible, CUNA is opposed to the proposed additional standards for credit union loan originators. CUNA urges the CFPB, in the stark absence of evidence that supports any abuses from credit unions in this area, to refrain from imposing these provisions on credit unions that are not specifically required by law.

Under Section 1402 of the Dodd-Frank Act, mortgage loan originators must be:

> [Q]ualified and, when required, registered and licensed as a mortgage originator in accordance with applicable State or Federal law….

Currently, under the SAFE Act and implementing regulations that took effect in October 2010, credit unions are not required to be licensed, although they must meet comprehensive requirements, briefly summarized below, in order to originate mortgage loans.

- Credit unions must require their employees to comply with all relevant SAFE Act provisions and both credit unions and their mortgage loan originator employees must register with the National Mortgage Licensing System and Registry (NMLS). The originator must obtain a "unique identifier" from the NMLS.

- Originators must submit extensive information to the NMLS and renew the registration each year, providing updated information at that time.

- Information that must be submitted to the NMLS includes:

  - Name, nicknames, Social Security Number, gender, date of birth, home and business contact information, including address and phone numbers;
  - Date the originator began employment;
  - Financial services employment history;
  - History regarding any criminal actions involving dishonesty, fraud, breach of trust or money laundering;
  - History of any financial-service related civil actions, arbitrations or disciplinary action;
  - Any license revocations or suspensions that related to financial services; and
  - Fingerprints and any other information needed for a criminal background check.

- The originator must attest that the information provided to the NMLS is accurate and must authorize the NMLS or the credit union to obtain information related to any administrative, civil or criminal findings. The originator must also agree that the NMLS may make information about the originator public, such as his or her name, the employer's name, the business address, ten years of relevant employment history and any publicly adjudicated disciplinary action and arbitrations against the originator.

- The credit union must also provide information to the NMLS including its name, address, primary federal regulator; primary point of contact; phone number, email address, Employer Tax Identification Number and contact information for system administrators.

- In addition, credit unions must develop and adopt extensive written policies and procedures to assure compliance with the SAFE Act and these policies must be reviewed and updated on a regular basis.

Also, under the Federal Credit Union Act, all loans must be approved by a credit committee or loan officer and NCUA's rules implementing the SAFE Act require at least one member of the credit committee, or the loan officer(s), to meet all relevant SAFE Act requirements. Many credit unions rely on volunteers to perform a number of functions and any volunteers who meet the definition of an originator are also required to be in compliance with the SAFE Act.

On top of these very extensive requirements, the CFPB would impose additional requirements that are now reserved only for licensed mortgage loan originators, a move that CUNA opposes because it is not required by statutory provisions, it is unnecessary to protect consumers and it will make mortgage lending more complicated, costly and difficult for credit unions.

It is appropriate to impose licensing requirements on mortgage brokers, whose sole business is related to mortgage origination and to the largest banks that originate high volumes of mortgage loans, particularly since the mortgage lending practices of members of both of these groups contributed significantly to the financial crisis.

That is not the case with credit unions, and their efforts to fully comply with regulations and treat consumers fairly and honestly should not be ignored or rewarded with additional regulations. There is no evidence or even complaints against credit unions that they engage in mortgage lending practices that are inconsistent with either the SAFE Act or prudent, pro-consumer lending policies generally. Credit unions justifiably resent being subjected to additional requirements that are suitable for mortgage brokers and the biggest banks.

Imposing unnecessary requirements on credit unions under proposed 12 CFR 1026.36(f)(3) will not result in any greater consumer protections because through their current compliance with the SAFE Act and other provisions, credit unions take steps necessary to ensure their loan originators are honest, have sufficient qualifications to perform their functions well, and further the objective of credit unions, which is to meet their members' financial needs.

For example, credit unions uniformly use credit reports and background checks to evaluate employees, take appropriate steps to ensure employees, including loan originators, are suitable for their tasks and provide proper and regular training for their employees. They do not need new compliance responsibilities from the federal government to ensure they screen loan originators. Credit unions want to remain in business and have developed and utilize robust procedures to protect themselves and their members from any employees who might seek to engage in fraud or other illegal acts or manipulate the lending process. Credit unions should not be subject to additional requirements that are designed to achieve the same results they are already accomplishing.

Also, under the proposal, loan originator organizations would have to determine that the loan originator has shown an appropriate level of financial responsibility, character and general fitness to support a determination that the originator will operate "honestly, fairly, and efficiently" (77 Fed. Register 55327). The CFPB notes that this standard includes a "subjective component," which will increase uncertainly as to how this provision should be implemented and minimize its clarity. This will not facilitate compliance and is highly problematic, particularly in light of the fact that the loan originator qualification standards would fall under the scope of the Truth in Lending Act civil liability provisions.

We would also like to point out that credit unions are subject to broad bond insurance coverage requirements for officials and employees, including loan originators. Not only is there a requirement that adequate bond coverage be maintained to protect against risks associated with fraud or dishonesty, but also, under National Credit Union

Administration rules, there is a duty owed by credit unions to their bondholder to ensure credit union employees are not increasing risks to their institution. (This is in addition to regulatory requirements that credit unions adopt and implement regarding internal controls to minimize risks and losses.) Credit unions must review their bond coverage annually. These requirements also support the view that credit unions should not be subject to additional requirements regarding loan originators.

Another area of tremendous concern is the section regarding new training requirements. The proposed commentary to paragraph 1026.36(f)(3)(iii) indicates that the training must be adequate in "frequency, duration and content to ensure" the individual loan originator has the requisite knowledge. In today's examination environment, there is a legitimate worry that examiners may push regulated institutions into compliance with the SAFE Act training requirements for licensed originators of eight hours of preapproved classes every year as the easiest means (for the examiner) to determine that training is "adequate."

The Supplementary Information to the proposed paragraph states that training should "close any gap in the individual loan originator's knowledge of Federal and State law requirements that apply to the individual's loan origination activities." This may be very difficult for loan originator organizations to determine and may result in them simply complying with the requirements for licensed mortgage loan originators.

The fact that TILA civil liability would apply to the new training and other originator standards increases credit unions' anxieties about compliance with uncertain requirements and would provide additional negative incentives for creditors to simply follow the standards for licensed originators.

In addition, credit unions question whether these training and other requirements constitute the proverbial slippery slope that will only lead to the imposition on credit unions of even more provisions that now only apply to licensed loan originators.

A question that might be raised concerning the equivalent compliance approach is that if credit unions are already performing these functions, why would a new rule in this area be onerous? The answer is that imposing new rules for loan originator standards, and subjecting credit unions to civil liability as it relates to these additional provisions, means increased significant steps the credit union must take to ensure compliance and additional costs it must incur to demonstrate to examiners (and consumers if litigation ensues) that all compliance responsibilities are being fully met. These are headaches, costs and added obligations that highly-regulated credit unions, that did not cause the financial crisis, should not be expected to bear.

The Small Business Review Panel for Residential Mortgage Loan Originator Standard Rulemaking issued a final report May 9, 2012, which provides an excellent analysis of what was known about the proposal at that time. The report notes that the CFPB believes many entities that will be covered by the proposed mortgage loan originator qualification requirements have already adopted procedures that allow them to meet

these requirements. In light of that, we think that the CFPB's rule should recognize the compliance steps credit unions have already taken to assure loan originators meet certain standards and training requirements by allowing credit unions to continue what they are doing now.

Because Congress did not impose additional requirements on credit unions as they relate to loan originator standards, the CFPB should permit **equivalent compliance** for credit unions. Under this approach, all credit unions would be deemed to be in full compliance with the requirements of Section 1402 of the Dodd-Frank Act if they are meeting their current obligations under the SAFE Act.

We believe this approach is preferable to the proposal because it would assure credit unions continue to meet standards that protect consumers while imposing no additional regulatory burdens on, or inviting government intrusion into, their operations. Further, the equivalent compliance approach is fully consistent with the requirements of Section 1402 of the Dodd-Frank Act, as well as Section 1405 which expressly allows the CFPB to tailor requirements when it is in the interests of consumers to do so. We believe that it is in the interests of consumers to allow equivalent compliance for credit unions because additional regulatory burdens, such as the proposed loan originator standards, will make it more much more complicated, cumbersome and costly for credit unions to continue serving as an important alternative to banks or brokers for consumers seeking home mortgage loans.

The CFPB has indicated that it would like all mortgage loan originators to be subjected to the same standards to help avoid abuses in the mortgage finance process. However, the compliance approach CUNA urges would result in virtually the same level of consumer protections. Under Section 1405 of the Dodd-Frank Act, the CFPB has authority to address abusive or unfair practices but credit unions are not engaging in such practices, and it would be unfair to impose the additional level of burdens on them to pursue the objective of consumer protection that is already being achieved within credit unions.

While not an issue in the proposal, credit unions have raised concerns that certain mortgage brokers and others that are required to be licensed portray registered mortgage loan originators in a negative light to potential borrowers because they are not licensed under the SAFE Act. To avoid or end this result, which does not benefit consumers, the CFPB should develop an easy-to-use complaint process that entities that are making good faith efforts to comply with current SAFE Act requirements could utilize to raise these concerns.

The CFPB Should Not Utilize Proxy Factors for Loan Terms to Further Restrict Compensation to Loan Officers

The Dodd-Frank Act addresses a prohibition on paying compensation to loan originators based on the terms of the loan that was already in effect and credit unions should not be generally affected by its continuation.

However, we do not support the agency's use of proposed factors that are proxies for loan terms as a means to limit compensation to loan originators. That is not because credit unions generally want to provide compensation based on the terms of the loan but because compensation that was not intended to be based on such terms would be prohibited under the proposal.

Under Section 1403 of the Dodd-Frank Act, a mortgage originator may not receive and no one may pay to a mortgage originator "compensation that varies based on the terms of the loan (other than the amount of the principal.)" Congress limits the limitation to the "terms of the loan." It could have included terms such as "conditions" or "proxy factors" but it did not and the agency's proposed use of such factors results in prohibitions that are broader than it appears Congress intended.

The prohibition in the Dodd-Frank Act is very clear but the proposed use of proxy factors changes the simple directive into one that is too complex and in practice will be difficult to implement. It will result in needless micromanagement of creditor operations and decisions. In addition, the proposal states that "no proxy exists if compensation is not substantially correlated with a difference in a transaction's terms." However, reasonable people could disagree as whether compensation is substantially correlated or not, which will make compliance challenging.

The basic problem with the proxy approach is that it assumes loan originators will game the system. Some undoubtedly will but not credit unions. There is a real concern that legitimate compensation plans intended to reward honest loan originators will be prohibited if the approach the CFPB is taking as to proxy factors is adopted.

While there are a number of examples that could illustrate these concerns, some in particular demonstrate problems, beyond the statutory considerations mentioned above, with the proxy factor approach.

Under proposed comment Section 1026.36(d)(1)-2.i.B, one of the examples of proxy factors that would be viewed as prohibited compensation is whether a loan is held in portfolio or sold on the secondary market. The loan originator is paid differently based on whether the loan is sold and only loans with a fixed rate or with a five-year term and a balloon payment are retained under the example. However, we do not agree with the result in this example. The fact that a loan is sold relates to the maturity of the loan but only indirectly. Credit unions are not selling loans on the secondary market to provide compensation to loan originators. It would seem that whether this example constitutes prohibited compensation would depend on the intent of the originator. Was the originator pushing loans to consumers that would be held in portfolio in order to receive the higher compensation? This would be difficult to determine, certainly in many situations.
Moreover, under Section 1403(4)(C) of the Dodd-Frank Act, the amount of compensation received by a creditor when selling a loan cannot be affected. Yet, prohibiting loan originators from being compensated differently based on whether a loan

is sold on the secondary market could impact the amount of compensation the creditor receives.

It is very unclear how the prohibition against varying compensation based on the terms of the loan applies to certain non-qualified bonus plans. Some credit unions offer such bonus plans that are provided to all employees based on the general, overall financial performance of the credit union. We do not think that the CFPB has made it clear enough that these types of arrangements are permissible. If the CFPB retains the proxy factor provisions and accompanying staff commentary, we urge the agency to clarify that general non-qualified bonus plans paid from general revenues of the organization overall are acceptable.

Under another example in the commentary regarding compensation, the CFPB proposed to clarify how the rule would affect multiple loan originators where the creditor offers loans at a minimum rate of 6% and a maximum rate of 8% Proposed Comment 1026.36(d)(1)-1.ii. Under the proposed commentary, the loan originators are paid a bonus that is more than 7%, the average of the loan rates and thus, the bonus would be considered prohibited compensation. This commentary raises concerns for several reasons. One, we question whether regulating compensation for multiple originators as the agency is proposing is consistent with the Dodd-Frank Act provision under Section 1403(c)(1) that prohibits compensation to "a mortgage originator…that varies based on the terms of the loan."

While the agency has authority to apply its regulations to address abuses and to further the interests of consumers we do not think the agency has authority to stretch the bounds of the prohibition on compensation from one originator to multiple transactions that involve multiple originators as it proposes to do. If the agency's approach regarding multiple originators is adopted, it will be more difficult for creditors to determine how compensation plans should be structured for loan originators and the agency has not demonstrated that consumers will be more protected by this approach.

Under the proposal, the CFPB would provide an exception to the prohibition on compensation based on the terms of a loan and is offering two alternatives for commenters to consider. One approach would permit compensation to be paid to a loan originator regardless of whether it is based on the terms of the loan if the total of the originator's income that is derived from his or her mortgage business does not exceed 50%. A second alternative would allow such compensation if the total revenue did not exceed 25%.

We appreciate the CFPB's effort to provide some measure of relief under this regulation and of the two alternatives, CUNA would prefer the higher revenue level of 50%. However, we do not think even the 50% approach will be that useful since most individuals acting as mortgage loan originators would be covered by the compensation prohibition.

The CFPB Should Amend Record Retention Provisions

The proposal would require extensive records to be maintained by creditors to show compliance with provisions regarding compensation and prohibited payments to originators, the use of discount points and originator fees, and regarding "bona fide" requirements under §1026.36(d)(2)(ii)(C).

The proposed commentary at Section 1026.25(C)(2)(1)(i) provides that records sufficient to evidence compliance with requirements concerning payment and receipt of compensation will vary on a case-by-case basis and includes some examples of records that might be retained, such as Employee Retirement Income Security Act of 1974 filings. While the proposed approach might provide some flexibility to creditors, we are concerned that courts might expect all of the examples of documentation listed within the commentary and perhaps even more than the proposed commentary includes. We think the commentary should conclude with the sentence:

> Records are sufficient to evidence payment and receipt of compensation if they demonstrate the following facts: The nature and amount of the compensation; that the compensation was paid, and by whom; that the compensation was received and by whom; and when the payment and receipt of compensation occurred.

Another concern is that the proposal would require the records to be kept for three years, consistent with statute of limitations provisions under Section 130 of TILA.

However, currently records are required under TILA to be kept for only two years and the added costs associated with keeping records for the three year period may be problematic for smaller creditors; there also be issues of space since they tend to store records onsite. We urge the CFPB to provide waivers for smaller creditors that would allow them to maintain records for only two years.

The CFPB sought comments on whether records should be kept for five years and CUNA does not see the need for such a requirement and does not support this expanded record retention approach.

The CFPB Should Revise the Restrictions on Upfront Points and Fees

If the proposal's treatment of the provisions regarding the payment of compensation to mortgage loan originators did not include proxy factors, we think most credit unions would not be that concerned with the provisions limiting their ability to charge upfront points and fees involving loans in which the mortgage loan originator is paid (other than by the consumer) based on the terms of the loan.

However, if the proxy factors remain, as discussed above, a number of credit unions may be deemed to be providing compensation to their loan originators that would trigger compliance with the restrictions on upfront points and fees.

In light of that, we have several concerns with the proposed treatment of upfront points and fees. Under the proposal, creditors that pay compensation to loan originators would be allowed to charge consumers upfront points and fees if they also make available to the borrower loans that do not charge such fees, unless the consumer would not likely qualify for such a loan.

The Dodd-Frank Act prohibits such upfront costs to the consumer but the agency is employing exemption authority to allow these costs if the alternative is generally provided.

We think the CFPB has more authority to allow greater flexibility for financial institutions and consumers regarding these costs. Another approach would be for creditors to be able to provide loans with upfront fees that vary from one consumer to the next, based on each consumer's ability to repay his or her loan. The variances would be from 0% to something less than the full amount of the upfront fees associated with the loan the lender is alternatively offering, consistent with the creditor's current pricing and underwriting standards.

The CFPB is also seeking comments on whether creditors should be required to provide a "bona fide" benefit to the borrower who pays upfront costs. We do not think that the regulation should require this but creditors should have flexibility to do so if they choose.

Comments are requested on whether information should be disclosed to consumers in advertising and post-application disclosures regarding the no-upfront cost alternative. We think such disclosures would be confusing to consumers. In the case of advertising, adding this information presents the serious risk of providing too much information for the consumer to digest in an ad. Regarding the post-application disclosures, we are concerned that borrowers would receive a disclosure about a loan product for which they might not qualify.

According to the commentary, the creditor must have a "good faith belief" that the consumer is unlikely to qualify for such a loan and may rely on information provided by the consumer to make this determination. This is not a clear standard and more guidance is needed as to what constitutes a "good faith belief."

The Definition of "Mortgage Loan Originator" Raises Concerns

CUNA has several significant concerns about the agency's expansion of the definition of "mortgage loan originator," especially in light of the new requirements that would be imposed on credit unions regarding the standards and training for such individuals, as well as the liability that would attach to these requirements under TILA.

Basically, under the proposed definition, the practical impact of the proposal is that anyone beyond the clerical level who is involved with the mortgage loan would likely be covered. In credit unions that have small numbers of employees, multi-tasking is routine, and individuals who are not the loan originator per se may be involved in

helping explain loan terms to members or assist members or employees who are the loan originators with various aspects of the lending process. Also, the CFPB's proposed definition will confuse creditors because it is broader than the definition of "mortgage loan originator" under the SAFE Act's Regulation G and Appendix A to that regulation. We urge the CFPB to retain the current TILA definition of mortgage loan originator.

Implementation

CUNA urges the CFPB to delay the effective date of this regulation by at least 18-24 months. This would allow credit unions an adequate amount of time to prepare for and comply with requirements that affect them. Entities that necessitated this rule should be provided any extra time for implementation.

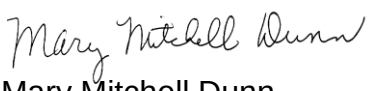
Conclusion

If adopted as proposed, this regulation will have a range of unintended, negative consequences for credit unions and their members. It will increase mortgage loan program costs for credit unions and will reduce their flexibility in developing and providing mortgage loan products. In particular, it is not necessary or required by statute for the proposed loan originator standards to apply to credit unions. Some credit unions have already adopted some of these procedures as good business practices for themselves and their members; other credit unions may be contemplating doing so. However, since Congress did not impose these standards on credit unions, we do not believe that the CFPB should either.

Likewise, the use of proxy factors will result in more credit unions falling under the prohibitions regarding compensation to loan originators in this rule than would otherwise be the case. We urge the CFPB to recognize the impact of these and other proposed provisions on the operations of credit unions and to remove or change these requirements, that should not cover credit unions, as addressed in this letter.

We will be seeking additional opportunities to discuss our concerns and recommendations with agency officials. In the meantime, if you have any questions about this letter, please feel free to contact me at the number below.

Sincerely,



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