UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF MORTGAGE BROKERS, Plaintiff-Appellant, v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al*. Defendants-Appellees.	Case No. 11-5078

EMERGENCY MOTION FOR EXPEDITED RELIEF OF APPELLANT NATIONAL ASSOCIATION OF MORTGAGE BROKERS

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PRELIMINARY STATEMENT

Plaintiff-Appellant National Association of Mortgage Brokers ("NAMB") seeks emergency relief from this Court staying implementation of a section of the Federal Reserve Board's (the "Board") final Rule, Regulation Z, 12 CFR § 226(d)(2), which arbitrarily and capriciously prohibits mortgage brokers from paying their employee loan officers commissions based on the single origination fee paid by a borrower in a loan transaction, pending resolution of this appeal of the trial court's denial of its motions for injunctive relief. The trial court concluded that the Challenged Section of the Rule will cause irreparable harm to NAMB's members, but found incorrectly that NAMB had a "low" likelihood of success on the merits. For reasons expressed herein, NAMB is likely to succeed on the merits, and this Court should stay the challenged section of the Rule.

STATEMENT OF FACTS AND RELEVANT PROCEDURAL HISTORY

On September 24, 2010, the Board published a final rule revising Regulation Z, 12 CFR § 226, pertaining to close ended credit transactions. *See Rutngamlug Cert., Esq., Exhibit 1, Proposed Rule, 12 CFR §226, Federal Register, Volume 74, No. 164*. As part of the proposal the Board sought to prohibit certain compensation payments to loan originators based on the terms and conditions of the loan and to prohibit steering consumers into certain loan products. *Rutngamlug Cert., Exh. 2, Final Rule, 12 CFR §226, Federal Register, Volume 75, Number 185, pg. 58509.*

The specific section of the Rule that is subject of NAMB's challenge, prohibits mortgage brokerage companies from paying their individual employee/loan officers commissions in an individual transaction when the loan origination fee received by the mortgage broker comes from the consumer (hereafter the "Challenged Section of the Rule"). This prohibition only applies to transactions where the consumer pays the mortgage broker's origination fee directly ("Consumer Pay Transactions"), as opposed to transactions where the consumer receives its origination compensation from the lender ("Lender Pay Transactions). The Board purports to have the authority to promulgate the Rule pursuant to its authority under the Home Ownership and Equity Protection Act ("HOEPA") Section 129 (l)(2), which allows the Board to promulgate regulations which prohibit acts or practices in connection with mortgage loans that the Board finds to be unfair, deceptive, or evade the provisions of HOEPA. *Final Rule, pg. 58509.* The Rule goes into effect on April 1, 2011. *Id.*

On March 9, 2011, Plaintiff NAMB, a professional trade association with standing to challenge the Rule[1], filed its Complaint against the Board of Governors for the Federal Reserve (the "Board"), and the Honorable Ben S. Bernanke and Sandra F. Braunstein in their official capacities, seeking to invalidate the

[1] See Judge Beryl A. Howell's *Memorandum Opinion filed March 30, 2011 ("Op."), pg. 13-16.*

Challenged Section of the Rule.[2] *See NAMB Complaint.* In conjunction with its Complaint, NAMB filed a motion for temporary and preliminary injunction seeking to enjoin implementation and enforcement of the Challenged Section of the Rule pending a determination on the merits of NAMB's challenge. *Id.*

After NAMB's motions for temporary and preliminary restraints were fully briefed, the District Court held a hearing on Tuesday, March 29, 2011. On March 30, 2011, the District Court issued an Opinion and Order denying NAMB's motions for temporary and preliminary relief. *Op., pg. 3.* The District Court found NAMB had demonstrated that its members would face irreparable harm by the Rule. *Op., pg. 42-45.* But, it held that NAMB only demonstrated a "low" likelihood of success on the merits denied NAMB's motions. *Op., pgs. 3.*

In light of the District Court's denial of its Motion for preliminary restraints and the Rule's impending April 1, 2011 implementation date, NAMB makes an emergency request to Circuit Court for a stay on the implementation of the Challenged Section of the Rule until its appeal can be heard.

LEGAL ARGUMENT

A. Standard for Emergent Relief.

[2] On March 7, 2011, the National Association of Independent Housing Professionals ("NAIHP") filed a Complaint, as well as motions for temporary and preliminary relief against the Board, seeking to invalidate and restrain the enforcement of the entire final rule set forth in 12 C.F.R. § 226.36 (d) and (e).

In deciding an emergent stay in the D.C. Circuit, the court must consider whether petitioner has satisfied the four-factor test established by *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958), and reiterated in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.,* 559 F.2d 841, 842-43 (D.C. Cir. 1977) (quoting *VPA*). *See* D.C. Circuit Handbook § VIII(A) at 32 (citing *VPA* and *Holiday Tours*); D.C. Circuit Rule 8(a) (listing factors). The four factors are "(1) there is a substantial likelihood plaintiff will succeed on the merits; (2) plaintiff will be irreparably harmed if an injunction is not granted; (3) an injunction will not substantially injure the other party; and (4) the public interest will be furthered by the injunction." *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998) (citing *Holiday Tours*, 559 F.2d at 843). "If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." *Serono Labs,* 158 F.3d at 1318 (internal citations omitted).

B. NAMB's Member Will Suffer Immediate and Irreparable Harm If The Emergent Relief Is Not Granted.

The Record establishes and the District Court below has already concluded that absent an injunction of the Challenged Section of the Rule before April 1, 2011, NAMB's members will suffer immediate, catastrophic and far-reaching harm. *Op. at pgs. 42-45.*

Specifically, the Challenged Section of the Rule, which prohibits mortgage brokers from paying their individual loan officers' commissions in Consumer Pay Transactions, will cause a significant number of mortgage brokers to immediately cease their operations and shut their doors for business beginning on April 1, 2011. *See Op., pgs. 42-45, NAMB's Moving Brief in Support of its Preliminary Injunction ("MB"), pgs. 16-21, NAMB's Reply Brief in Further Support ("RB"), pgs. 3-8.* As a direct result of the Challenged Section of the Rule, loan officers have already begun to resign their positions and leave for "creditors" (lenders and banks), who are not prohibited from paying these loan officers, commissions. *Id.* The exodus of these loan officers, who are the life-blood of the industry and are relied upon to originate loans (an essential for the small business mortgage brokers' survival), are causing and will continue to cause severe and irreparable harm to mortgage brokers. *Id.* Without these loan officers mortgage brokers are unable to originate loans and continue their operations. *Id.* The alternative compensation methods proposed by the Board, e.g. hourly rate and salary, are unworkable and do not provide mortgage brokers with sufficient compensation to continue their operations. *Id.*

Mortgage brokers will also be forced to terminate the commissioned loan officers who remain, as they will be unable to pay them for the services they render. *Id.* Accordingly, the District Court correctly noted that "NAMB has sufficiently demonstrated that its members will likely be irreparably harmed by the implementation of the Board's Rule. *Op. at pg. 44.*

Economic harm may qualify as irreparable where a plaintiff establishes that the harm "is so severe as to cause extreme hardship to the business or threaten its very existence," *See MB, pgs. 16-21 and Op. at pgs.42-45*, or "where a plaintiff's alleged damages are unrecoverable." *Clarke v. Office of Fed. Hous. Enter.*, 355 F.Supp.2d 56, 65 (D.D.C.2004). Courts have also recognized that employee terminations such as these will cause the type of irreparable harm that justifies temporary and preliminary restraints. *See Marrie v. S.E.C.*, 2003 WL 22971922, *1 (D.C. Cir. Dec. 13, 2003) (unpublished opinion); *See also Bonds v. Heyman*, 950 F.Supp. 1202 (D.D.C.1997).

Therefore, NAMB has submitted sufficient evidence to demonstrate that irreparable harm will result if the challenged rule is implemented or enforced by the Board on April 1, 2011.

C. NAMB Demonstrates A Sufficient Likelihood Of Success On The Merits To Warrant Emergent Restraints.

1. The standard for success on the merits.

NAMB has sufficiently raised questions going to the merits "so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Holiday Tours, Inc.*, 559 F.2d at 844.

2. NAMB Has Raised Substantial Questions Concerning The Board's

Lack Of Authority Under HOEPA.

In promulgating the Rule, the Board relied on its authority under HOEPA section 15 *U.S.C.* §1693(l)(2); the unfair, deceptive practices section ("UDAP"). In using its UDAP authority for the basis of its Rule, the Board drastically expanded the scope of its authority by regulating mortgage brokers who have never before been subject to HOEPA or TILA regulations, and expanded their scope well beyond the purposes of TILA and HOEPA's disclosure requirements to regulate how mortgage brokers compensate their employees. Such a incongruent statutory interpretation is inconsistent with the purpose and scope of TILA generally and HOEPA specifically, the authority granted to the Board, and general statutory principles.

A determination of whether the Board exceed its statutory authority requires a two-step inquiry as expressed in *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984). Pursuant to *Chevron*, where the intent of Congress is clear from the statute, the inquiry should end there. *Id. at 842-43.* "'[M]ere ambiguity in a statute is not evidence of congressional delegation of authority.' Rather, *Chevron's* 'deference comes into play … *only* if the reviewing court finds an implicit delegation of authority to the agency.'" *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8-9 (D.C. Cir. 2002) (*internal citations omitted*). If the Court's inquiry continues, it must determine whether the agency's action is based upon a permissible construction of the statute "in light of the language, legislative history, and policies of the statute." *Chevron*, 467 U.S. at 843.

One need only look at the purpose and structure of TILA and HOEPLA. The purpose of TILA is to assuring meaningful *disclosure* of credit terms so that consumers can make an informed use of credit. 15 *U.S.C.* § 1601(a). These statutes are disclosure statutes and were not created to address and grant the Board unqualified regulatory authority over every aspect of mortgage loans. *See Szumny v. Am. Gen. Fin., Inc*., 246 F.3d 1065, 1070 (7th Cir. 2001)) *see also In re Community Bank of N. Va.*, 418 F.3d 277, 304 (3d Cir. 2005). HOEPA, HR 3474, Title I, Subtitle B (1994) was enacted in 1994 to regulate certain high cost and reverse mortgages. HOEPA contained 4 sections. Section 153 related to reverse mortgage disclosures and Section 154 provided HOEPA's effective date. Section 151, including the regulatory authority claimed here, was enacted to regulate high cost mortgages. Specifically, Section 151 contained 4 subsections – (a) created 15 U.S.C. § 1602(aa) to deal with high-interest loans, (b) made minor stylistic edits, (c) clarified the definition of creditor, and (d) created 15 U.S.C. § 1639, which contained 6 (now 9) substantive prohibitions for mortgages covered under 15 U.S.C. § 1602(aa), and created ancillary consequences and rulemaking authority for enforcing that section. Section 152 created civil liability for violations of Section 151.

In contrast to the scope of HOEPA, the Board interpreted Section 1639(l)(2) to provide the Board with the "power to regulate all practices 'in connection' with mortgage loans that the Board finds to be unfair, deceptive, or designed to evade disclosure requirements." *Op. at pg. 21.* Such an expansive interpretation far exceeds any "textual commitment" Congress had in enacting HOEPA (or TILA) and it is well understood that that regulatory authority must be accompanied by a "textual commitment" to that authority, and that "Congress ... *does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions-it does not, one might say, hide elephants in mouseholes.*" *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (citations omitted). The District Court incorrectly found that if Congress intended the UDAP authority to be limited, it could have expressly included such a limitation in the text of the section. *Op., pg. 19.* However, Congress recognized that no such express limitation was necessary because its UDAP authority was to be interpreted within the framework and authority of the statute.

Moreover, the Board's and the District Court's expansive interpretation far exceeds the types of loan HOEPA was intended to address. Specifically, 15 *U.S.C.* § 1639(a)(1), applies to "each mortgage referred to in section 1602(aa)," and 15 *U.S.C.* § 1602(aa) provides that these mortgages are defined as a "consumer credit transaction that is secured by the consumer's principal dwelling, other than a residential mortgage transaction, a reverse mortgage transaction, or a transaction under an open end credit plan," *if certain cost thresholds are met.* Similarly, the section the Board relies for its regulatory authority utilizes the same type of limited language in its section titled "Requirements For *Certain Mortgages*." *See* 15 *U.S.C.* § 1639 (emphasis added). Section 1639(l)(2) provides that the Board "shall prohibit acts or practices in connection with *mortgage loans* that the Board found to be unfair, deceptive, or designed to evade the provisions of this section." When Section 1639(l)(2) is read in light of Sections 1639(a)(1) and 1602(aa), there can be little doubt that the scope of the Board's regulatory authority applies only to "high cost home loans" as that term is defined in the statute. Indeed, the Board has previously acknowledge in another final rule made pursuant to 15 U.S.C § 1639(l)(2), the Board's rulemaking "authority under HOEPA," that HOEPA "only covers closed-end loans." 66 FR 65604, 65606 (Dec. 20, 2001) (adopting final rule).

Similarly, the regulations and requirements provided for under TILA and HOEPA apply only to "creditors," as that term is defined in 15 *U.S.C.* § 1602(f). *See MB, pgs. 36-38 and RB, pgs.16-18.* Mortgage brokers are not subject to TILA and HOEPA because they do not qualify as "creditors" as defined under § 1602(f). *Id.*.

Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001). Here, it is accepted that HOEPA specifically apply only to specific "high cost" mortgage and "creditors", and the general language which follows prohibiting deceptive or unfair "acts or practices in mortgage loans" must be read to be consistent with the HOEPA's own statutory limitations. If the Board's expansive interpretation is accepted, it could use its UDAP authority to regulate the foreclosure process, mortgage recordation, mortgage servicing, short sales, loan modifications, the assignment and sale of mortgages and any other commercial activities that are tangentially related to mortgages that the Board finds to be unfair or deceptive to consumers. *See MCI Telecommc'ns Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 234 (U.S. 1994) (rejecting a court's "introduction of a whole new regime of regulation" under the guise of mere interpretation and noting that it "may well be a better regime but it is not the one that Congress established"). Accordingly, NAMB is entitled to the preliminary restraints because the Board exceeded its authority in enacting the Challenged Section of the Rule.

Finally, there is simply no basis for a finding that the Challenged Section of the Rule was either "unfair" or "deceptive" pursuant to Section 1639(l)(2). In fact, the Board recognizes that the payment of a commission is not a *per se* unfair practice. *See Board's Opposition to NAMB's Motions ("Bd. Opp."), pg. 37.* This admission is not surprising since there is no factual support or rational in the administrative record which supports the Board's position that a mortgage brokers payment of a commission in a Consumer Pay Transaction harms the consumer. The Board's post-hoc justification for the Challenged Section of the Rule is entirely irrational and duplicative of other sections of the Rule.

3. There Is No Rational Basis For The Enactment Of The Challenged Section of the Rule.

The Board's promulgation of the Challenged Section of the Rule was arbitrary, capricious and not supported by any factual analysis. *See MB, pgs. 25-26 and 35-36; RB, pgs. 12-16.* **"**[A]n agency rule is arbitrary and capricious where the agency…entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency…" *Motor Vehicle Manufacturers Ass'n Inc.*, 463 U.S. at 43. A reasonable basis exists where the agency "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Ranchers Cattlemen Action Legal Fund v. U.S. Dep't of Agriculture*, 415 F.3d 1078, 1093 (9th Cir. 2005). A Court is not permitted to "infer an agency's reasoning from mere silence." *Pacific Cost Fed'n of Fisherman's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1091 (9th Cir. 2005).

Nowhere in the proposed or final Rule does the Board explain the rational for prohibiting mortgage brokers from paying their loan officers commissions in transactions where the consumer pays the origination fees. Rather, once challenged, the Board attempted to craft a post-hoc rational for the Challenged Section of the Rule in its opposition. Such "after the fact" justification is entirely irrelevant to a determination on the Board's rational **at the time** the Rule was enacted. A Court is not permitted to infer an agency's reasoning from its mere silence, but be even considering the Board's post-hoc reasoning, this is exactly what the District Court did below. *See Motor Vehicle Mfrs.*, 463 U.S. at 43; *Pacific Cost Fed'n of Fishermen's Ass'ns*, 426 F.3d at 1091. Accordingly, the District Court erred in accepting a rational for the Challenged Section of the Rule that was found no where in the administrative record and the fact that there was no explanation for the Section of the Rule was given should serve as conclusive evidence of its arbitrary and capricious nature.

Notwithstanding the foregoing, even a cursory review of the Board's post-hoc, self-serving reasoning, demonstrates its arbitrary and capricious nature. As part of its Opposition, the Board for the first time attempts to explain its basis for the Challenged Section of the Rule. *Bd. Opp., pg. 35.* Without providing a single citation to its proposed or final Rule, the Board asserts that the Challenged Section of the Rule prevents "steering incentives for employees that could disadvantage consumers." *Bd. Opp., pg. 35.* Specifically, the Board claims that the Challenged Section of the Rule "eliminates the individual employee's incentive to select the consumer-pay alternative, or steer the consumer to select that alternative, by preventing that employing entity from compensating the employee through payments, such as commissions." *Id.* First, the very fact that its justification was never part of the proposed or final Rule made it impossible for anyone to comment on it during the Rule making process. The belated nature of this rational also raises serious questions about its genuineness. These facts alone require that the Challenged Section of the Rule be restrained from being implemented.

This newly created justification is further misplaced and arbitrary because the Rule already contains a specific provision explicitly prohibiting the "steering of consumers" in order to obtain increased compensation. *Bd. Opp., pg. 36.* The final Rule, Section 226.36(e)(1), states that "**a loan officer** may not direct or steer a consumer to consummate a transaction based on the fact that the loan originator would increase the amount of compensation that the loan originator would receive for that transaction compared to other transactions…" *Final Rule at pg. 58537.* In light of this express prohibition, a loan officer is precluded from "steering" a consumer into a Consumer or Lender Pay Transaction on the basis that he or she would receive a higher fee or commission. In its denial of NAMB's Motion for preliminary restraints, the District Court failed to consider the impact of Section 226.36(e)(1) and why the Challenged Section of the Rule was necessary or rational in light of this Section. The administrative record is also devoid of any facts that would suggest that a mortgage broker's loan officers would violate the express prohibition on steering and that this devastating section of the Rule was necessary to ensure full compliance. Further, there is no factual support for the Board's belated contention that a mortgage broker will ignore the anti-steering provision, while a creditor's loan officers will not.

As further evidence of the arbitrary and irrational nature of the Challenged Section of the Rule, the Board allows mortgage brokers to continue to pay its loan officers commissions in connection with Lender Pay Transactions, even though it offers no evidence a loan officer will receive less commission from Lender Pay Transactions, than from Consumer Pay Transactions. Clearly, if the Board were truly concerned about a loan officer "steering" a consumer into a transaction whereby the loan officer could be making a higher commission, the Board would have extended the prohibition to include Lender Pay Transactions. However, it did not and the this failure underscores the irrationality of the Board's post-hoc justification for the Challenged Section of the Rule.

4. The Board's Failure To Conduct the Regulatory Flexibility Act Analysis Mandates The Restraint Of The Challenged Section of the Rule.

Pursuant to the Regulatory Flexibility Act ("RFA"), Pub.L. No. 96-354, 94 State. 1165-70 (1980), codified at 5 U.S.C. §§ 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub.L. No. 104-121, 110 Stat. 864 91996), agencies are required to prepare an initial regulatory flexibility analysis ("IRFA") when they propose a rule that will have an impact on "small [business] entities," 5 U.S.C. § 603. In addition to an IFRA, when an agency promulgates a final rule, it must perform a Final Regulatory Flexibility Analysis ("FRFA"). This analysis is required to included, in pertinent part:

* * *

> a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and shy each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

5 *U.S.C.* § 604(a) (prior to Sept. 27, 2010 amendments).[3]

Although RFA does "not impose substantive constraint on agency decision making," it does require agencies to "publish analysis that address certain legally delineated topics." *Nat'l TRel. Co-Op Ass'n. v. FCC*, 563 F.3rd 536, 540 (D.C. Cir. 2009)(internal quotations omitted). If the agency fails to provide the required analysis on delineated topics for those sections of the final rule which will have significant impact on small businesses, a restraint of either the entire rule or the specific section for which the analysis was not conducted is warranted. *See MB,*

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[3] On September 27, 2010, after the Board had issued its final rulemaking, Congress amended 5 U.S.C. § 604(a), Pub.L. 111-240, § 1601, 124 Stat. 2551 (Sept. 27, 2010), requiring additional detail in the FRFA

pgs. 33-35.

While the Board purports to have conducted an FRFA with respect to the general parameters of the Rule as a whole, yet it concedes the required analysis was not conducted with respect to the Challenged Section of the Rule. This failure was overlooked even though the Board found that this section would have a "significant impact on a substantial number of small entitles. . . ." 75 Fed. Reg. 58,5333. The Board only conducted a superficial FRFA with respect to the Rule at-large. 75 Fed. Reg. 58,5333. The Board provided nothing more than a "check" next to the list of criteria. The fact that the Rule has different, discrete prohibitions on loan originator compensation logically required the Board to direct the required analysis to those specific prohibitions by identifying its particular rationale, the facts supporting the rational the precise significant impact each prohibition will have, the alternatives that are available and why it declined to accept each such alternative. Not requiring this type of discrete analysis results in the FRFA being nothing more than a glossy promotional piece, with no actual substance.

That is what the Board did here. It did not, as previously noted, analyze the actual significant harm, since it only talked in terms of "some entities will be required, among other things, to alter certain business practices, develop new business models, retrain stall, and reprogram operational systems. . . ." 75 Fed. Reg. 58,5333. In fact, the Board specifically stated that the Rule would not "require small brokerage firms to go out of business." 75 Fed. Reg. 58,517-18. However, as determined by the District Court, this is exactly the significant harm the Challenged Section of the Rule will have on small mortgage brokers. Thus, the potential impact stated by the Board in promulgating the Rule was simply wrong and the implementation of the Challenged Section of the Rule will result in the actual closure of small mortgage brokerage businesses throughout the country, the loss of employment by thousands of their employees, and the loss of mortgage brokerage services to hundreds of thousands of consumers.[4] Since the Board did not analysis the actual harm caused by the Challenges Section, NAMB will succeed in establishing its failure to comply with the RFA.

Second, the Board did not identify and analyze alternatives to the Challenged Section of the Rule which were less onerous, and then describe why those alternatives were not selected. Although the Board identified increased disclosures for mortgage brokers as a general alternative for the Rule at large, those disclosures were not alternatives specifically proposed as part of the rule making process for the Challenged Section of the Rule. Rather, these were the disclosures the Board had difficulty with as part of a 2008 study conducted for a

[4] For a complete discussion of the impact the Challenged Section of the Rule will cause consumers see MB, pgs. 12-13, 40-41 and RB, pgs. 23-25.

proposed rule that was withdrawn.[5] 75 Fed. Reg. 58,5331-32. Even so, the Board failed to explain why the blanket compensation prohibition was a better alternative to a revised or modified disclosure. The last proposal the Board raises is an exemption to the Rule generally for creditors. *Id*. at 58,532. However, this exception is entirely irrelevant to the Challenged Section of the Rule. Accordingly, NAMB will likely succeed on establishing that it was entitled to an injunction because the Board failed to conduct the required analysis of the Challenged Section of the Rule.

D. The Equities Weigh In Favor Of NAMB And There Is No Evidence That The Public Will Be Harmed By The Proposed Restraints.

As described in detail above, as well as in its moving brief, NAMB's members are suffering and will continue to suffer immediate, catastrophic and irreparable harm as a result of the Challenged Section of the Rule. In contrast, the public does not stand to be harmed by the delayed implementation of the

[5] The Court erred in its analysis by relying strictly on the 2008 Macro Study which was based on 35 individuals hand selected by the Fed in only three market areas where the forms and language were altered every single testing day so that no one disclosure form was the same or studied by more than 10 people in its entirety. The Court also failed to analyze the 2009 Macro Study which said the 2008 Macro Study only provided a starting point for background research. The 2009 Macro Study involved 135 individuals studied in 13 testing locations which incorporated the 2008 Study but more importantly shows the 2008 Macro Study information incomplete and it was not to be relied upon. See http://www.federalreserve.gov/boarddocs/meetings/2009/20090723/Full%20Macro%20CE%20Report.pdf

Challenged Section of the Rule until a full and final disposition of this matter. As an initial matter, NAMB seeks only to maintain the status quo and preclude the implementation and enforcement of only a very limited portion of the Rule.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in its moving brief, it is respectfully requested that this Court grant NAMB's Motion for a Temporary and Preliminary Restraints staying the implementation and enforcement of the Challenged Section of the Rule until a final disposition of this matter is reached.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st Day of March, 2011, a copy of the foregoing was filed and service will be attempted via hand-delivery by private process server beginning on March 31, 2011, and thereafter until service is effected, to:

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