IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCATION OF MORTGAGE BROKERS, Appellant, NATIONAL ASSOCIATION OF INDEPENDENT HOUSING PROFESSIONALS, INC., Appellant, v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, et al. Appellee.	Case No. 11-5078 11-5079

MEMORANDUM OF LAW OF APPELLEE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM IN OPPOSITION TO APPELLANTS' MOTIONS FOR EMERGENCY STAY PENDING APA REVIEW

Appellee Board of Governors of the Federal Reserve System (the "Board") submits this memorandum of law in opposition to appellants' emergency motion for a stay of the April 1, 2011 effective date of the regulation they challenge, pending judicial review in the district court. For the reasons stated herein, their request should be denied.

PRELIMINARY STATEMENT

This case involves a challenge to an amendment to the Board's Regulation Z, implementing the Truth in Lending Act ("TILA"). 12 C.F.R. § 226.36(a), (d), (e) (the "Rule"). The Rule, which regulates mortgage originator compensation practices that the Board found to be unfair to consumers, was published in the Federal Register on September 24, 2010. 75 Fed. Reg. 58509. It was made effective on April 1, 2011, in order to "provide sufficient time for creditors and loan originators to make the necessary adjustments to their compensation agreements and practices to conform to the final rule." *Id.* at 58530.

The Rule addresses the two basic ways in which originator compensation is paid. In so-called "creditor pay" transactions, the lender makes a payment to the originator, which is funded by the consumer's payment of a higher interest rate. In the second model, called "consumer pay," the consumer pays the loan originator directly (from existing funds or from the loan proceeds). With respect to "creditor-pay" transactions, the Rule prohibits loan originators[1] from receiving compensation in an amount "that is based on any of the transaction's terms or conditions" except the amount of credit extended. 12 C.F.R. § 226.36(d)(1)(i) and (ii).[2] This portion of the Rule was designed to address the concern that because loan originators were often paid out of the interest rate in the form of a "yield spread premium," they had a conflict of interest in their dealings with consumers because they had a personal incentive to offer consumers transactions at higher interest rates than the consumers qualified for. *See* 75 Fed. Reg. 58515.[3]

For consumer-pay transactions, the Rule prohibits loan originators who are paid compensation directly by the consumer from also receiving compensation

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[1] A "loan originator" is "a person who for compensation or other monetary gain, or in expectation of compensation or other monetary gain, arranges, negotiates, or otherwise obtains an extension of consumer credit for another person." 12 C.F.R. § 226.36(a)(1). The term does not include a creditor, unless the creditor does not provide the funds for the transaction out of its own resources, but it does include a creditor's employees. *Id*. The term thus covers mortgage brokers and their employees as well as employees of a creditor.

[2] This aspect of the Rule does not apply where the consumer pays compensation directly to the loan originator. 12 C.F.R. § 226.36(d)(1)(iii).

[3] *See* 75 Fed. Reg. 58511 for an explanation of yield spread premiums. In short, these amounts are akin to "reverse points". A borrower who seeks to lower the interest rate on a mortgage loan can pre-pay interest in the form of loan discount points. Conversely, when a higher interest rate is obtained, a yield spread premium is generated, which can be used by the lender to compensate the loan originator or cover the consumer's other costs. Thus, the higher the interest rate a loan originator obtains for a lender, the more compensation he or she stands to receive. *See* Board's Brief below, Docket item 17, Case 1:11-cv-506-BAH, at 5-7.

from any *other* person in connection with the transaction. 12 C.F.R. § 226.36(d)(2). This provision was addressed to the problem that loan originators were frequently compensated by both the consumer and the creditor in a manner that was not transparent to consumers and that could lead consumers to believe, wrongly, that by paying a loan originator directly the loan originator will work on the consumer's behalf to find the most favorable loan. 75 Fed. Reg. at 58515. One consequence of this prohibition is that in consumer-pay transactions, a mortgage broker may not pay a commission specific to that transaction to its loan originator employees. *Id.* at 58537.

Finally, the Rule prohibits loan originators from "steering" consumers to consummate a transaction based on the fact that the loan originator will receive greater compensation from a particular creditor. 12 C.F.R. § 226.36(e). This provision responds to concerns that in creditor-pay transactions, a mortgage broker who works with a number of creditors could influence the consumer to consummate a loan with the creditor whose compensation of the loan originator is highest, even though the loan is not in the consumer's interest. 75 Fed. Reg. at 58528. Thus, this aspect of the Rule applies only in creditor-pay transactions.

On March 8 and 9, 2011, respectively, appellants National Association of Independent Mortgage Professionals ("NAIHP") and National Association of Mortgage Brokers ("NAMB") filed suit in District Court seeking to enjoin the entire Rule or, in NAMB's case, only that part that limits payment of commissions in consumer-pay transactions. Following a hearing on March 29, 2011, Judge Beryl Howell denied both appellants' motions for preliminary relief because the appellants had failed to show a likelihood of success on the merits and the public interest militated against a stay. *Op.* at 13, 45.

Now the appellants ask this Court to grant, on an emergency basis, the relief denied to them by Judge Howell. Their request should be denied.

Standard of Review

Under the familiar four-factor test, "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council*, 555 U.S. 7, __, 129 S. Ct 365, 375 (2008). It is well settled that "whether a preliminary injunction should be awarded rests in the sound discretion of the trial court[, and] this court will ordinarily not reverse a District Court's order for interim relief except in cases of abuse of discretion or clear error." *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 834 (D.C. Cir. 1984) (citations and internal quotations omitted). While the court "review[s] the district court's weighing of [the preliminary injunction factors] under an abuse of discretion standard," it reviews questions of law *de* *novo*. *Sottera, Inc., v. Food & Drug Admin.*, 627 F.3d 891, 893 (D.C. Cir. 2011); *Serono Labs, Inc. v. Shalala*, 153 F.3d 1313, 1318 (D.C. Cir. 1998) (reversing district court's grant of preliminary injunction because plaintiff failed to show likelihood of success on the merits).

Here, even assuming the district court correctly found that appellant NAMB had established irreparable injury, the court found that the other factors did not support preliminary relief. Importantly, the court found that appellants were not likely to succeed on the merits of their challenge to the Rule and that the Rule furthered the public interest. The district court's judgment was well-reasoned and supported, and should be upheld by this Court.

ARGUMENT

I. THE APPELLANTS ARE NOT LIKELY TO SUCCEED ON THE MERITS

Appellants make three merits claims in this Court: that the Board lacked statutory authority to promulgate the Rule; that the Rule lacks a rational basis; and that the Board failed to conduct the analysis required under the Regulatory Flexibility Act. The district court properly concluded that the appellants had not shown that they were likely to prevail on any of these challenges.

A. The Board Properly Used Its Authority Under 15 U.S.C. § 1639(l)(2) to Promulgate the Rule

The Board promulgated the Rule under authority granted in section 129(l)(2) of TILA, 15 U.S.C. § 1639(l)(2), to "prohibit acts or practices in connection with mortgage loans that the Board finds to be unfair, deceptive, or designed to evade the provisions" of section 1639. 75 Fed. Reg. at 58513. Appellants err in arguing that section 1639(l)(2) does not authorize the Rule. Their claims that the subsection relates only to high-cost loans defined in 15 U.S.C. § 1602(aa), and permits regulation only of "creditors" and only by disclosures, not substantive limitations, are inconsistent with both the plain statutory language and with the Board's interpretation of TILA.

Section 1639 was added to TILA as part of the Home Ownership and Equity Protection Act of 1994, Pub. L. 90-321, 108 Stat. 2191 ("HOEPA"). In addition to authorizing the Board to prohibit unfair or deceptive practices in connection with mortgage transactions, section 1639 required special disclosures and limitations on the terms of certain high-cost mortgage loans. The statutory provision is carefully drafted: in each of the substantive provisions requiring specific disclosures or prohibiting substantive terms, the statute refers explicitly to "a mortgage referred to in section 1602(aa) of this title [defining high-cost loans]." *See* 15 U.S.C. § 1639(a), (c)-(i).

Subsection 1639(l)(2) is distinctly different. It authorizes the Board to prohibit, by regulation or order, "acts or practices in connection with – (A) mortgage loans that the Board finds to be unfair [or] deceptive …." Nothing in the language of the subsection refers to "a mortgage referred to in section 1602(aa)" or limits the Board's authority to creditors or to disclosure. The general purposes or structure of TILA or HOEPA as a whole cannot override the express exclusion in subsection 1639(l)(2) of the limits appellants seek to impose. Thus, there is no reason even to go to the second step of the *Chevron* analysis because the "the intent of Congress is clear, [so] that is the end of the matter." *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).[4]

Moreover, to whatever extent the language of section 1639(l)(2) could be said to be ambiguous, the Board's interpretation, as expressed in the preamble to the Rule, 75 Fed. Reg. at 58513, is entitled to deference from this Court. *Ford Motor Credit v. Milhollin*, 444 U.S. 555, 565 (1980) ("deference is especially appropriate in the process of interpreting the Truth in Lending Act …. Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive"). Appellants thus have failed to show a likelihood of success on this argument.

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[4] Moreover, appellants are incorrect when they claim that TILA regulates only creditors and only through disclosure. *See, e.g.*, 15 USC §1647 (liming the terms of open-end home-equity lines of credit); *id.* §1666 (procedures for resolving billing disputes); § 1666b (length of billing periods); § 1666c (prompt crediting of payments); § 1666g (prohibition of tie-in services); § 1637a(c) (disclosures required by persons other than the creditor who provide an application to a consumer); § 1641(f)(2) (requiring loan servicers to provide borrowers with information about the owner of the obligation); § 1666e (duty of sellers to promptly notify credit card issuers when seller accepts return of goods).

B. <u>The Rule Is Not Arbitrary Or Capricious</u>

Both appellants argue, for different reasons, that part or all of the Rule is arbitrary or capricious and will fail under 5 U.S.C. § 704. The district court rightly concluded that appellants do not have a likelihood of success on this issue.

NAIHP, which challenges the Rule in its entirety, argues that the Board relied "almost entirely" on two studies to conclude that the consumers' injuries could not be avoided through disclosure or other means. NAIHP Br. at 4-9. This position is based on a false premise. In 2008, the Board withdrew an earlier proposal to address the problem of loan originators' compensation through disclosure and explicit agreement about fees. 73 Fed. Reg. 44522, 44563-65 (July 30, 2008). In its discussion about why it was withdrawing the proposal, the Board explained that "based on . . . the comments, consumer testing, and other information," it was concerned that the proposal "would confuse consumers and undermine their decision-making rather than improve it." *Id.* at 44564. Some commenters, for example, noted that "the proposal would not address the conflict of interest between consumers and brokers that rate-based compensation of brokers . . . can cause." *Id.* The comment from the Federal Trade Commission "cited its own report of consumer testing of mortgage broker compensation disclosure, contending that focusing consumers' attention on the amount of the broker's compensation could confuse consumers and, under some circumstances, lead them to select a more expensive loan." *Id.* at 44563. The studies that NAIHP finds so unpersuasive were only one part of the Board's consideration in determining that disclosures would be ineffective in addressing the problems associated with loan originator compensation.

Moreover, the 2008 MACRO study cited by NAIHP was not intended to be a demographic study of mortgage borrowers generally, but was a consumer test, using well-established methods, for determining the effectiveness of disclosures.[5] The study involved in-depth interviews of consumers who had recently obtained a mortgage loan to assess their understanding of disclosure language that might be adopted in a regulation. Thus, regardless of whether the study represents "the entire population of U.S. consumers," it is part of a broad range of evidence supporting the Rule.[6]

NAIHP also argues that the Rule is arbitrary and capricious in that it assertedly "exempt[s] creditors" from its effects. NAIHP Br. at 9-13. Importantly, NAIHP recognizes that the Rule *does* impose the same requirements on creditors' employees as on other loan originators: their compensation may not be "based

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[5] *See* www.federalreserve.gov/newsevents/press/bcreg/20080714regzconstest.pdf.

[6] As for NAIHP's claim that the disclosure statement now used by some mortgage brokers makes potential conflicts of interest "crystal clear," NAIHP Br. at 7, the disclosure fails to inform a consumer that the loan originator stands to gain personally by putting the consumer in a higher-rate loan. *See* NAIHP Br., Exhibit A to Ex. 5.

upon the terms and conditions of the loan transaction." NAIHP Br. at 10. This is the heart of the matter, because the concern that motivated the Board to adopt the Rule was that the loan originators who work directly with consumers – whether they work for a broker or a creditor – are in a position of trust, and that consumers "do not necessarily understand that the loan originator may have the ability to increase the creditor's interest rate or include certain loan terms for the originator's own gain." 75 Fed. Reg. at 58515. It was this conflict of interest that the Rule was designed to address. The fact that the creditor itself may have a reason to charge a consumer a high rate for a loan does not present the same problem of a hidden conflict of interest: a consumer would naturally expect that the creditor is not his or her "trusted advisor" in the transaction but is representing its own interest. Thus, the Board had no reason to impose limits on a creditor's gain through its sale of loans to investors in the secondary market, a transaction in which the consumer is not even a party and which is not a "consumer credit" transaction subject to TILA.

NAMB's attack on the Rule is limited to the portion that restricts mortgage brokers that accept compensation from the consumer directly from paying their loan originator employees a portion of that compensation in the form of a commission. NAMB Br. at 13-16.[7] In its brief below (at 35-38), the Board

[7] Other forms of compensation, including salary or hourly wage or volume-based bonuses, are permitted in consumer-pay transactions. Comment 36(d)(2)-1, 75

explained that this provision is a necessary corollary to a provision of the Rule that NAMB does *not* challenge: the prohibition on dual compensation, whereby a loan originator would be paid both by the consumer and by the creditor. 12 C.F.R. § 226.36(d)(2). As noted above, in a "creditor-pay" transaction, the loan originator cannot be paid on the basis of the loan's terms (other than the amount of the loan), so the amount of compensation a loan originator may receive is fixed in advance. 12 C.F.R. § 226.36(d)(1). This limitation does not apply in a "consumer-pay" transaction covered by subsection (d)(2) of the Rule, however. *Id.* at 226.36(d)(1)(iii). Thus, in a consumer-pay transaction, a loan originator can negotiate any compensation arrangement with the consumer that the consumer will accept. The loan originator and consumer must decide which type of compensation to choose, because the loan originator can no longer be paid by both the consumer and the creditor. If the individual loan originator employee were able to benefit directly from that choice, he or she would have an incentive to steer the consumer to a consumer-pay transaction instead of a creditor-pay one if, in the loan originator's assessment, the consumer could be induced to pay a higher direct fee than the fixed fee the loan originator would receive from the creditor.

While this rationale was not fully explained in the preamble to the Rule, its

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Fed. Reg. at 58537; Tr. of Oral Arg. at 53. Mortgage brokers may also pay commissions to their employees in creditor-pay transactions.

reasoning is entirely consistent with the explanation of other aspects of the Rule that addressed similar incentive problems. *See* 75 Fed. Reg. at 58511 ("Creditor payments to brokers based on the interest rate give brokers an incentive to provide consumers loans with higher interest rates."); *id.* at 58517 (explaining that the final rule covers compensation of creditors' employees as well as brokers' employees because these employees have the same "incentive to provide consumers with a higher interest rate or other less favorable terms"); *id*. at 58528 (explaining that subsection 226.36(e) is necessary "to prevent the harm that results if loan originators steer consumers to a particular transaction based on the compensation paid to the originator when that loan is not in the consumer's interest"). The provision was present in the proposed version of the Rule, including the proposed Comment 36(d)(2)-1, which specifically provided that the restrictions of section 36(d)(2) applied to "payments, such as commissions, that are specific to" a transaction in which a loan originator was paid compensation directly by the consumer. *See* 74 Fed. Reg. 43332, 43409 (August 26, 2009). The proposed Comment 36(d)(2)-1 provoked no controversy, and was not even mentioned in NAMB's comment letter. *See* Docket item 17-1, Case 1:11-cv-00506-BAH. Under these circumstances, the Board cannot be faulted for failing to address the issue directly in the preamble to the Rule. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) (court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned").

NAMB also argues that this provision is unnecessary because section 226.36(e) already covers the same type of "steering" that the portion of the Rule it challenges addresses. NAMB Br. at 15-16. This is simply a mis-reading of the Rule. Section 226.36(e) prohibits a loan originator from "steering" a consumer "to consummate a transaction based on the fact that the originator will receive greater compensation *from the creditor* in that transaction than in other transactions that the originator offered or could have offered . . . ." 12 C.F.R. § 226.36(e) (emphasis added). This aspect of the Rule "is intended to preserve consumer choice by ensuring that consumers have loan options that reflect considerations other than the maximum amount of compensation that will be paid to the originator." 75 Fed. Reg. at 58528. As the Comments make clear, it was designed to prevent a loan originator who works with a variety of lenders from steering a consumer to the lender who will pay the loan originator a higher fee. *See* Comment 226.36(e)(1)-3, 75 Fed. Reg. at 58537. Because it applies only in creditor-pay transactions, it is not even applicable in the consumer-pay transactions to which the portion of the Rule that NAMB challenges applies.

NAMB also argues that it was arbitrary for the Board to impose the commission ban in consumer-pay transactions only, because there is no evidence that loan originators would receive a higher commission in consumer-pay than in creditor-pay transactions. NAMB Br. at 16. But in creditor-pay transactions, the compensation is fixed in advance before the loan terms are set. The concern about steering in consumer-pay transactions is that the compensation may vary based on the loan originator's negotiation with the consumer, leading to an incentive to steer less sophisticated consumers to consumer-pay transactions.

C. The Board Fully Complied with the Regulatory Flexibility Act

Finally, NAMB is unable to show a likelihood of success on the merits of its claim that the Board failed to comply with section 604 of the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 604. The RFA provides that when an agency issues a final rule in a notice-and-comment rulemaking it must prepare a final regulatory flexibility analysis that addresses certain enumerated items, including the need for the rule, a summary of the significant issues raised by commenters, an estimate of the number of small entities affected by the rule, the rule's compliance requirements, and a description of any steps the agency has taken to minimize the economic impact on small entities, including why the final alternatives were adopted and other significant alternatives were rejected. 5 U.S.C. § 604(a)(1)-(5).

As the district court correctly found, the requirements of section 604(a) are "purely procedural" and "impose[] no substantive constraint on agency decisionmaking." *Nat'l Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009). When an agency "address[es] all of the legally mandated subject areas, it complies with the Act." *Id.* Here, the Board fully complied with these mandates.

The Rule's preamble explicitly addresses each factor specified in section 604(a). 75 Fed. Reg. 58514-33. In particular, the Board's analysis sets out the rationale for adopting the three substantive provisions and the reasons for not adopting significant alternative approaches, and describes the alternatives that were incorporated in the Rule that minimize the impact on small entities. *Id.* at 58516-33. Contrary to NAMB's assertion, with regard to the Rule's prohibition on dual compensation, the Board expressly explained why requiring disclosure of a loan originator's receipt of compensation from two sources would not sufficiently address the potential for unfair practices arising from dual source payments. *Id.* at 58525 (even if consumers were aware of creditor payments to originators, where the consumer also makes a direct payment to an originator, the consumer could reasonably expect that making that direct payment would reduce or eliminate the need for the creditor to compensate the originator through a higher interest rate).[8]

The Board's analysis fully complies with the RFA even though it does not explicitly discuss the narrow issue that is the focus of NAMB's challenge, the payment of commissions by mortgage broker employers to their employees in

[8] Contrary to the NAMB's assertion, although the RFA requires an agency to consider significant alternatives designed to minimize the impact of rules on small entities, nothing in the Act prevents the Board, having reviewed such alternatives, from adopting the measures necessary to eliminate practices found to be unfair, even if these measures do have an impact on small entities.

consumer-pay transactions. By its terms, the RFA requires a "summary of the *significant issues raised by the public comments*" and a statement of the reasons the agency rejected "significant alternatives" to the rule. 5 U.S.C. § 604(a)(2), (5) (emphasis added). The statute does not require an agency to address every single application of a rule's basic provisions. The limitation on compensation from a mortgage broker company to its employees in consumer-pay transactions is a consequence of the Rule's more general bar on receipt of compensation from more than one source, which was comprehensively addressed in the Rule's preamble. That the employer-employee compensation issue was not a significant one is reinforced by the fact that neither NAMB nor the Chief Counsel of Advocacy of the Small Business Administration raised the limitation on commissions in consumer-pay transactions when they commented on the proposed rule. 74 Fed. Reg. 43232, 43409. *See* Docket Items 17-1 and 17-2, 1:11-cv-00506-BAH.

II. THE ASSERTED IRREPARABLE HARM TO APPELLANTS IS INSUFFICIENT TO OVERCOME THE DISTRICT COURT'S BALANCING OF OTHER FACTORS

It must be noted at the outset that appellant NAIHP failed, in the district court, to show irreparable harm stemming from the Rule as a whole. Op. at 40-42. This Court should defer to that finding. As the district court noted, this Circuit has imposed "a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). A plaintiff must show that his injury is "certain, great and actual" – not "theoretical" – and "of such imminence that there is a 'clear and present need'" for extraordinary equitable relief to prevent harm. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (citations omitted). Indeed, even where a plaintiff has made a strong showing of likelihood of success on the merits, it must still show that it is *likely* to suffer irrepable harm in order to justify a preliminary injunction. *Winter, supra*, 129 S.Ct. at 375. NAIHP's showing fails to meet this high standard. Its claim that its members will be "hobbled" in their efforts to compete, or that they may lose "a substantial amount" of business, NAIHP Br. at 14, lack the certainty required here. Moreover, NAIHP itself points out that other factors are at work that affect the viability of some mortgage brokers, *id.*, calling into question whether the effects it claims from the Rule would in fact stem from other market forces. *See National Mining Ass'n v. Jackson*, 2011 WL 124194 (D.D.C. 2011) ("the fact that economic losses may be unrecoverable does not absolve the movant from its considerable burden of proving that those losses are *'certain, great and actual.'*").

For the reasons stated in the Board's brief below and at the district court hearing, the Board also believes that NAMB has failed to establish irreparable harm, in that it has not demonstrated that, without transaction-specific commissions in consumer-pay transactions, it will not be possible for mortgage brokers to pay employees sufficient amounts in other forms of compensation to allow them to remain viable. Even assuming, arguendo, that appellant NAMB established irreparable harm as a result of the portion of the Rule it challenges,[9] the weakness of the parties' showings on the other factors amply supports the district court's decision to deny preliminary relief.

The discussion above fully supports the district court's judgment that appellants have a "low" likelihood of success on the merits, Op. at 17. In addition, the district court concluded that the balance of the equities and the public interest tip in favor of denying a stay. *Id.* at 45. This Court should uphold the district court's balancing of the relevant factors. *Sottera, supra*, 627 F.3d at 893.

It is certainly the case that the public interest favors allowing the Rule to take effect to put a stop to practices that the Board has found to be "unfair." As the Board found, the current system causes "consumers [to] suffer substantial injury by incurring greater costs for mortgage credit than they would otherwise be required to pay." 75 Fed. Reg. at 58515. Each day that the Rule's effective date is postponed is another day consumers will suffer this harm, and their injury, too, is irreparable. *See Serono*, *supra*, 158 F.3d at 1326 (irreparable harm to the plaintiff stemming from the regulation is balanced against similar harm to a third party if

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[9] As noted, the only irreparable harm found by the district court relates to the impact of the portion of the Rule restricting broker payments of commissions challenged by NAMB, which seeks to stay only that aspect of the Rule.

the stay is granted, resulting in a “wash” on the factor of irreparable harm). Moreover, the district court correctly noted that Congressional enactment of virtually identical loan-originator compensation restrictions in the Dodd-Frank Wall Street Reform and Consumer Protection Act bespeaks Congressional recognition that the public interest favors these limitations on loan originator compensation. Op. at 45; *see* Pub. L. 111-203, 124 Stat.1376, July 21, 2010, section 1403.[10]

A preliminary injunction is “an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted; emphasis in original). While courts have inherent authority to stay an administrative order pending review, the Supreme Court has made clear that

> a reviewing court may not resolve a conflict between considered review and effective relief by reflexively holding a final order in abeyance pending review. A stay is an “intrusion into the ordinary processes of administration and judicial review,” *Virginia Petroleum Jobbers Assn. v. Federal Power Comm'n*, 259 F.2d 921, 925 (C.A.D.C.1958) (*per curiam*), and accordingly “is not a matter of right, *even if irreparable injury might otherwise result to the appellant*,” *Virginian R. Co. v. United States* (1926).

Nken v. Holder, ___ U.S. ___, 129 S.Ct. 1749, 1756-57 (2009) (emphasis added).

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[10] The Dodd-Frank provision adds a new section of TILA that largely mirrors the provisions of the Board’s Rule. The provision will become effective January 21, 2013 if no implementing regulations are issued, and earlier if such regulations are made effective before that date. Dodd-Frank Act, § 1400(c).

Here, the "sliding scale" that courts must use to balance the preliminary injunction factors, *Serono*, 158 F.3d at 1318, tips decidedly against a stay, as the district court found. Appellants have little chance of success on the merits, and this factor alone can be sufficient to deny the stay even where irreparable harm is shown. *Demjanjuk v. Meese*, 784 F.2d 1114, 1117-18 (D.C. Cir. 1986) (refusing to grant stay of deportation order where likelihood of success on the merits was low). Certainly where any irreparable harm to the appellants is balanced against irreparable harm to the public, consideration of all the factors counsels against a stay pending appeal. *Cf. Washington Metropolitan Transit Auth. v. Holiday Tours*, 550 F.2d 841, 843-44 (D.C. Cir. 1977) (affirming stay pending review where movant made at least "a substantial case on the merits" and the other three factors "strongly favor interim relief.").

CONCLUSION

For the foregoing reasons, appellants' motions for a stay pending judicial review should be denied.

April 4, 2011 Respectfully submitted,

__s/s Katherine H. Wheatley____
RICHARD M. ASHTON
Deputy General Counsel
KATHERINE H.WHEATLEY, Bar No. 359097
Associate General Counsel

BRADFORD S. FLEETWOOD
Senior Counsel
Board of Governors of the Federal Reserve System
20th & C Streets NW
Washington, DC 20551
Ph: 202-452-3779
Fax: 202-736-5615
Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that on April 4, 2011, I served the within Response to Order to Show Cause and Opposition to Motion for Expedited Discovery on the undersigned counsel by filing the Opposition with the Court's ECF System:

Stephen S. Hill
Howrey LLP
1299 Pennsylvania Ave., NW
Washington, DC 20004
Counsel for National Association of Independent Housing Professionals

Shannon H. Rutngamlug
Francis X. Riley III
2600 Virginia Ave. NW
Suite 1000
Washington, DC 20037
Counsel for National Association of Mortgage Brokers

_____s/s Katherine H. Wheatley___________