UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF
MORTGAGE BROKERS
7900 Westpark Drive, Suite T-309
McLean, VA 22102

Plaintiff

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Serve: Ronald C. Machen, Jr.
United States Attorney
555 4th Street, NW
Washington, D.C. 20001

Eric H. Holder, Jr.
Attorney General of the United States
U.S. Dept. of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

The Board of Governors of the
Federal Reserve System
20th Street and Constitution Ave. NW
Washington, D.C. 20551

HONORABLE BEN S. BERNANKE,
CHAIRMAN OF THE BOARD OF
GOVERNORS OF THE FEDERAL
RESERVE SYSTEM,
Serve: Ronald C. Machen, Jr.
United States Attorney
555 4th Street, NW
Washington, D.C. 20001

Eric H. Holder, Jr.
Attorney General of the United States
U.S. Dept. of Justice
950 Pennsylvania Avenue, NW
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Civil Action No.:

Hon. Ben S. Bernanke, Chairman
Board of Governors of the
Federal Reserve System
20th Street and Constitution Ave. NW
Washington, D.C. 20551

SANDRA F. BRAUNSTEIN, DIRECTOR,
DIVISION OF CONSUMER AND
COMMUNITY AFFAIRS,
BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Serve: Ronald C. Machen, Jr.
United States Attorney
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Eric H. Holder, Jr.
Attorney General of the United States
U.S. Dept. of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Sandra F. Braunstein
The Board of Governors of the
Federal Reserve System
20th Street and Constitution Ave. NW
Washington, D.C.

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW Plaintiff National Association of Mortgage Brokers ("NAMB"), by and through its attorneys, Saul Ewing LLP, the Sterbcow Law Group, and Herman, Herman, Katz & Cotlar who file this Complaint for Declaratory and Injunctive Relief against Defendant the Board of Governors of the Federal Reserve System, Ben S. Bernanke, and Sandra F. Braunstein ("the Board"), alleging as follows:

NATURE OF THE ACTION

1. This action challenges sections of a Rule adopted by the Board which revised Regulation Z, 12 C.F.R. § 226, pertaining to closed end credit transactions. Specifically, NAMB challenges the implementation and enforcement of the section of the Rule which prohibits a mortgage broker from paying its loan officers a commission in a specific loan transaction (the "the Challenged Section of the Rule"). The Rule's loan restrictions are causing NAMB and its members immediate, devastating, and irrevocable harm. Mortgage brokers are already losing their life blood – their loan officers – and planning to cease their operations and close their doors as a direct result of the Challenged Section of the Rule. Mortgage brokers' commissioned loan officers are leaving, some of whom are going directly to the mortgage broker's competition, because they will no longer be able to be compensated on commission basis or because they know their employer is going out of business. The departure and the unavoidable termination of these loan officers will leave mortgage brokers without the ability to originate the majority of their loans and ultimately the mortgage brokerage industry will become extinct.

2. In promulgating the restrictions on loan originator compensation, the Board failed to consider the immediate, catastrophic and irreparable harm the Rule would cause mortgage brokers, individual loan officers, the mortgage broker industry, and the consumer. The Board also failed to provide the factual basis for, or purpose served by, the section of the Challenged Section of the Rule. In promulgating the Challenged Section of the Rule the Board also neglected to consider any less-devastating alternatives to the Challenged Section of the Rule.

3. In addition, the Rule exempts creditors (i.e., banks and lenders) from the prohibitions of the Challenged Section of Rule and permits them to continue to compensate their individual loan officers based on the well-established and preferred commission basis. The

Board provided no rational basis for distinguishing between these two similarly situated groups, and none exists.

4. For these and other reasons described below, the Board's actions were arbitrary and capricious, exceeded its authority pursuant to the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 et seq., and contradict the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). Accordingly, the section of the Rule at issue, which goes into effect on April 1, 2011, should be declared unlawful and the Board should be temporarily, preliminarily, and permanently enjoined from implementing and enforcing the section of the Rule at issue.

THE PARTIES

5. Plaintiff NAMB is the only national trade association that represents the mortgage broker industry. NAMB represents the interests of more than 70,000 mortgage broker professionals located in all 50 states and the District of Columbia and has 6,000 members. NAMB also advocates for public policies that serve the mortgage consumer by promoting competition, facilitating homeownership and ensuring quality service.

6. NAMB is a not-for-profit corporation organized under the laws of the State of Florida with its principal place of business at 7900 Westpark Drive, Suite T-309, McLean, VA 22102. NAMB is suing in its individual capacity and as a representative on behalf of its members.

7. NAMB has standing to pursue this action on behalf of its members under the three-element test enunciated in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977), because (1) NAMB's members would otherwise have standing to sue in their own right, (2) the interests at stake in this case are germane to NAMB's organizational

purposes, and (3) neither the claims asserted nor the relief requested requires the participation of NAMB's individual members.

8. Defendant the Board has its primary place of business in Washington, D.C. the Board is responsible for promulgation of rules and regulations under TILA that affect the mortgage broker industry and, in particular, the Rule at issue here.

9. Defendant Ben S. Bernanke is Chairman of the Board and is sued in his official capacity only.

10. Defendant Sandra F. Braunstein is a Director of the Board and is sued in her official capacity only.

11. The Federal Government's sovereign immunity does not preclude this suit because this is "an action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702.

JURISDICTION AND VENUE

12. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

13. The relief requested is authorized by 5 U.S.C. § 702 (Administrative Procedure Act); 28 U.S.C. § 1651 (All Writs Act); 28 U.S.C. § 2201 (Declaratory Judgment Act); and 28 U.S.C. § 2202 (further relief). NAMB has a right to bring this action pursuant to the judicial review provision of the Administrative Procedure Act, 5 U.S.C. § 702, and the implied nonstatutory review procedure provided by 28 U.S.C. § 1331.

14. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391(e).

BACKGROUND

The Mortgage Industry

15. A significant portion of the residential mortgage loans originated each year are originated through mortgage brokerage companies ("mortgage brokers"), as opposed to being originated through lenders and creditors directly.

16. Mortgage brokers are typically small businesses employing only a few individual brokers or loan officers who assist individual borrowers in obtaining a residential mortgage loan. Mortgage brokers are located in both rural and urban areas and in areas often not served by larger lenders, thereby increasing consumer access to residential mortgage financing.

17. Over 70,000 mortgage brokers serve the needs of consumers across the nation. Mortgage lenders depend a great deal on mortgage brokers as the source for their mortgage loan origination, particularly so called "correspondent" lenders who do not have retail mortgage loan offices to originate loans of their own.

18. Mortgage brokers provide a variety of services to residential borrowers seeking mortgage loans. Their services range from counseling borrowers on their loan options to obtaining loan pricing from a variety of lenders to preparing and processing the borrower's mortgage loan application and arranging for closing of the loan.

19. Mortgage brokers are paid an origination fee for their services. These fees are paid either by the lender who funds the loan, the consumer who is seeking the loan, or both. In return for the fee, the mortgage broker locates for the consumer the lowest interest rate for which the consumer can qualify and can afford, as opposed to merely accepting a standard loan, with a standard payment plan, and a predetermined interest rate. For the latter standard loans, the origination fee is paid exclusively by the ultimate lender. This is a "Lender Pay Transaction."

20. The fees paid by the lender are often based on a percentage of the amount of the loan, e.g., two percent. So called "yield-spread premiums" are fees paid to a mortgage broker by a lender based on the difference between the interest rate of a loan presented to a lender for funding and the par or "prime" rate that the lender will use for its most qualified borrowers. Again, the amount of the fee paid to a mortgage broker under a yield spread premium method is limited by the Real Estate Settlement Procedures Act ("RESPA") and other federal law.

21. For transactions where the consumer wants the mortgage broker to locate the lowest available interest rate, the consumer pays additional fees to the mortgage broker. In these scenarios, the mortgage broker receives its fee from both the consumer and the lender. This is called a "Consumer Pay Transaction."

22. The work that is required by the loan officer and the mortgage brokerage company (brokering, underwriting, processing and closing) for a Consumer Pay Transaction is much more extensive and time consuming. Theses Consumer Pay Transactions are the predominate loan transactions in the industry.

23. Mortgage brokers compensate their loan officers who originate the loan transactions on a commission basis. These commissions are based on a percentage of the fees that are paid to a mortgage broker. This compensation model has been used by the mortgage brokers industry for decades.

<u>The Truth in Lending Act</u>

24. Congress enacted the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 et seq. based on findings that economic stability would be enhanced and competition among consumer credit providers would be strengthened by the informed use of credit resulting from consumers' awareness of the cost of credit.

25. TILA directs the Board to prescribe regulations to carry out its purposes and specifically authorizes the Board to issue rules and regulations that contain such classifications, differentiations, or other provisions, or that provide for such adjustments and exceptions for any class of transactions, that in the Board's judgment are necessary or proper to effectuate the purposes of TILA, facilitate compliance with TILA, or prevent circumvention or evasion of TILA.

26. In 1995, the Board revised Regulation Z (a regulation promulgated by the Board to implement TILA) to further implement changes to TILA made by the Home Ownership and Equity Protection Act ("HOEPA"). HOEPA requires special disclosures and substantive protections for home-equity loans and refinancings with annual percentage rates (APRs) or points and fees above certain statutory thresholds. HOEPA also directs the Board to prohibit unfair and deceptive acts and practices in connection with mortgages.

27. 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). 15 U.S.C. § 1602(f) provides that a "creditor" is defined as someone who both: "(1) regularly extends ... consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required;" and "(2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness."

The Final Rule

28. On August 26, 2009, the Board published a proposed rule revising Regulation Z to TILA, 12 C.F.R. § 226, pertaining to closed-end credit transactions. 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.

29. The proposed rule sought to eliminate a variety of perceived incentives that mortgage brokers allegedly have to place a consumer into a loan with less favorable terms. The proposed rule also sought to increase transparency in the way mortgage brokers are compensated.

30. On August 16, 2010, the Board issued the Final Rule. In relevant part, the Final Rule prohibited any person from paying compensation to a loan originator for a particular transaction if the consumer pays the loan originator directly.

31. The Board proposed the rule pursuant to its authority under HOEPA, as contained in TILA Section 129 (l)(2)(A) and (B). That Section allows the Board to promulgate regulations which prohibit acts or practices in connection with mortgage loans that the Board finds to be unfair or deceptive.

32. In addition to addressing compensation based on the terms and conditions of the loan and the steering of a consumer, the Board also sought, in a transaction where the loan originator received compensation directly or indirectly from the consumer, to prevent any other person from paying a loan originator in connection with that transaction.

33. Section 226.36(d)(2) of the Rule states:

> *Payments by persons other than consumer.* If a loan originator receives compensation directly from a consumer in a transaction, no other person may provide any compensation to the loan originator, directly or indirectly, in connection with that particular credit transaction.

Federal Register, Volume 74, No. 164, pg. 43409 to be codified at 12 C.F.R. § 226.36(d)(2). Accordingly, under the Rule mortgage brokers can no longer accept compensation from both the lender and the borrower in connection with a loan transaction. Instead, mortgage brokers now must choose whether they want to be compensated from **either** the lender or from the fee paid by the consumer, but not both.

34. The Rule defines "loan originator" as "any person who for compensation or other monetary gain arranges, negotiates, or otherwise obtains an extension of consumer credit for another person." 75 Fed. Reg. 58533-34 to be codified at 12 C.F.R. § 226.36(a)(1). The term "loan originator" includes mortgage brokerage companies, as well as their individual employees.

35. Although the term "loan originator" includes employees of a "creditor," the lender's loan officers, it does not include the "creditor" or lender itself, except in limited circumstances. The Rule states that its prohibitions apply to payments made to all loan originators, including payments made by a mortgage broker to its employees serving as a loan originator.

36. The Rule also provides that "compensation paid by a mortgage broker company to an employee in the form of a salary or hourly wage, which is not tied specifically to a single transaction, does not violate § 226.36(d)(2)."

37. In applying the prohibitions and definitions described above, when a consumer pays a mortgage broker directly for arranging and obtaining a mortgage, and the mortgage broker accepts that payment as its origination fee, the mortgage broker is thereafter precluded from paying any other "loan originator" from or based on that fee, in this case, its own employee/loan officer.

38. The Rule, however, carves out a sweeping and unfair exception to its prohibition on payments to loan originators. Because the definition of "loan originator" does not include "creditors," large banks and other lenders are free to compensate their employees on a commission basis. Thus, when consumers pay loan origination fees to a creditor, that creditor is free to share a portion of that fee with its employees in the form of commissions. As noted under

the Rule, loan originators like mortgage brokerages are prohibited from paying compensation to their employees/loan officers.

39. In carving out this exception, the Board provided no rational basis for discriminating between mortgage brokers, on the one hand, and creditors on the other.

The Rule Will Severely Impact the Mortgage Broker Industry, Its Support Personnel, and Consumers

40. The impact of prohibiting mortgage brokers from paying their employee/loan officers a commission in a Consumer Pay Transaction has already begun to and will continue to cause immediate, catastrophic and far-reaching harm.

41. The section of the Rule at issue prohibits mortgage brokers from compensating their loan officers in this fashion in a Consumer Pay Transaction and has already resulted in loan officers resigning their positions and leaving for competitors, and will result in individual loan officers being terminated, mortgage brokers closing their doors and ceasing operations, wholesale lender operations being significantly diminished and less loan choices for the consumer.

42. The Rule will have a significant impact on NAMB and its members, many of whom are small businesses who will struggle to remain viable in the face of the Rule's restrictions on loan originator compensation. Mortgage brokers cannot compensate their employees/loan officers on an hourly rate or salary basis because loan volume and loan sizes are constantly changing based on a variety of factors in the marketplace.

43. As a direct result of the sections of the Rule at issue, mortgage brokers will no longer be able to use commissions to compensate their loan originators. Paying loan originators salaries is not workable because most mortgage brokers do not have sufficient loan volume to make salaried loan officers an economically viable option.

44. The end result will be the extinction of the mortgage brokerage companies. Mortgage brokers will be forced to terminate all of their commissioned loan officers as they will be unable to pay them for the services they render. Indeed, even before the effective date of the Rule, many loan originators are leaving mortgage brokerage companies to join creditors or leaving the industry entirely.

45. Without loan originators, mortgage brokers will be unable to originate mortgage loans and will not be able to survive. Many will cease operations before the Rule's April 1, 2011 effective date, and many others will be driven out of business after the Rule goes into effect.

46. As for the loan officers who are due to be terminated as a result of the Challenged Section of the Rule, they will have difficulty in securing other employment opportunities with any exempt entities because of the sheer number of layoffs in the mortgage broker industry. This Rule not only affects the individual loan officers, but also the staff that is employed to support them. As a result of the Challenged Section of the Rule, mortgage brokers also will be forced to lay off all support personnel who support the loan officers.

47. The Challenged Section of the Rule will also reduce healthy competition in the mortgage industry. Mortgage brokers will not be able to compete with banks and other mortgage providers who are exempt from the sections of the Challenged Section of the Rule and who will be able to continue to compensate their loan officers based on the well-established and preferred commission basis.

48. The implementation of the Challenged Section of the Rule will also have a real and significant effect on the mortgage wholesale lending industry. Wholesale lenders provides underwriting and funding for many of the small mortgage broker loan originations. For some of these wholesale lenders, eighty percent of their underwriting and funding business comes from

these small mortgage broker businesses. Accordingly, the closing of these small mortgage broker companies will have a devastating effect on these wholesale lenders by eliminating the majority of their business.

49. The closing of these mortgage broker businesses and wholesale lenders will result directly in less choices for the consumer. With the mortgage broker industry crippled and largely extinct, consumers will have no choice but to rely on large mortgage providers (i.e., "creditors") for their mortgage needs. This will drive up prices and reduce choice and even the availability of mortgages for a large swath of the American public.

COUNT I:

Defendants Acted Arbitrarily, Capriciously, and Contrary to Law By Failing to Provide Any Rational Basis for the Rule

50. The NAMB repeats and realleges paragraphs 1-49 as if set forth fully herein.

51. Pursuant to 5 U.S.C. § 706(2)(A), a reviewing court shall hold unlawful and set aside agency action found to be "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law."

52. Defendants have acted arbitrarily, capriciously and contrary to law by failing to articulate, among other things, a rational basis for precluding mortgage brokers from compensating their employees/loan officers in connection with a Consumer Pay Transaction.

53. The Board identified three concerns that purportedly justify the Challenged Section of the Rule's restrictions on loan originator compensation:

- "if consumers pay loan originators directly and creditors also pay originators through higher rates, consumers may be unwittingly paying originators more in total compensation (directly and through the rate) than consumers believe they agreed to pay."

- "[t]he Board also believes that this prohibition would increase transparency for consumers by requiring that all originator compensation come from the creditor or from the consumer but not both."
- "[c]onsumers reasonably may believe that when they pay a loan originator directly, that amount is the only compensation the originator will receive."

54. The Challenged Section of the Rule furthers none of these purported justifications. Any concerns regarding a consumer unwittingly paying originators more where they are also receiving compensation from the creditor, even if true, are fully addressed by the section of the Rule which prohibits a creditor **and** a consumer from paying a loan originator. Prohibiting a mortgage broker from paying its own individual loan officer does nothing to address this concern. Similarly, the Board's concern over transparency is likewise addressed by the section of the rule that prohibits a mortgage broker from being compensated by both the creditor and the consumer.

55. The Board has provided no evidence that a when a consumer pays a mortgage broker, they do not expect the mortgage broker to pay its individual loan officer. In fact, the Board has expressly admitted that "consumers expect the creditor to compensate its own loan officers." Federal Register, Vol. 74, No. 164, Pg 43281.

56. Accordingly, Defendants actions in promulgating the Challenged Section of the Rule are arbitrary and capricious because it failed to provide a rational basis for promulgating this section of the Rule.

COUNT II:

Defendants Acted Arbitrarily, Capriciously, and Contrary to Law By Failing To Comply with The Regulatory Flexibility Act

57. The NAMB repeats and realleges paragraphs 1-56 as if set forth fully herein.

58. The RFA requires an agency who has proposed a rule to prepare and make available for public comment an initial and final regulatory flexibility analysis. This initial flexibility analysis "shall describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a). The final regulatory flexibility analysis, which is provided in connection with the promulgation, requires a description of (i) the reasons why action by the agency is being considered, (ii) a succinct statement of the objectives of, and legal basis for, the proposed rule, (iii) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply, and (iv) a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

59. In violation of these requirements, Defendants failed to provide any statement of the need for or objectives of, the section of the Rule at issue.

60. Defendants also failed to conduct any analysis of the impact that the Rule would cause on small entities.

61. Defendants also failed to consider the comments made by the Small Business Administration during the public comment period, which comments warned of the Rule's devastating impact on the mortgage brokerage industry.

62. Finally, Defendants failed to meaningfully analyze any potential alternatives to prohibiting mortgage brokers from compensating their loan officers through a commission in a Consumer Pay Transaction.

COUNT III:

Defendants Exceeded Their Authority Under TILA in Enacting the Rule

63. The NAMB repeats and realleges paragraphs 1-62 as if set forth fully herein.

64. Defendants also exceed the authority conferred on the Board by TILA in promulgating the Challenged Section of the Rule.

65. Specifically, Defendants exceeded their authority under TILA in attempting to regulate the compensation of mortgage brokers, who are not subject to the restrictions or requirements of TILA or HOEPA. TILA and HOEPA apply only to "creditors," as that term is defined in 15 U.S.C. § 1602(f). Mortgage brokers cannot be defined as a "creditor" under 15 U.S.C. § 1602(f) since they do not regular extend consumer credit and are not the person to whom the debt arising from the consumer credit transaction is initially payable. Therefore, the Board does not have the authority to regulate mortgage brokers pursuant to TILA and the Challenged Section of the Rule should be invalidated.

66. Defendants also exceeded the authority that was provided under TILA in prohibiting "unfair or deceptive" acts on consumers. Neither in the final rule nor in the proposed rule does the Board explain its reasoning or provide any support for the Challenged Section of the Rule. While the Board explains how many of the other prohibited practices harmed or could harm consumers, the Board entirely fails to explain how a mortgage broker's practice of paying its employees based on the fees paid by a consumer is deceptive or unfair to the consumer. Accordingly, Defendants exceeded their authority under TILA and HOEPA in promulgating the Challenged Section of the Rule.

67. Further, the Challenged Section of the Rule contradicts the purposes of TILA by reducing competition and providing consumers with less choices for mortgage loans. The implementation and enforcement of the Challenged Section of the Rule will result in mortgage broker businesses and wholesale lenders closing their doors and ceasing operations. Consumers in both rural and urban areas who do not have direct access to creditors will be significantly

effected by these closings. The resulting harm to consumers is in direct conflict with the objectives of TILA and therefore, the Challenged Section of the Rule should be invalidated.

68. The Challenged Section of the Rule is contrary to the scope and definitions in the Dodd-Frank Act. A "mortgage originator" in the Dodd-Frank Act, like the definition of a "loan originator" under the SAFE Act, are defined only as only to an "individual" or natural "person" who, for gain or compensation, takes a residential loan application and/or offers or negotiates the terms of residential mortgage loan. Dodd-Frank §1401 (15 USC §1602); SAFE Act §1503 (15 USC §5102(3)). Neither of these statutes include mortgage brokerage companies in the definition of Loan or Mortgage Originators. The Challenged Section of the Rule is at stark odds with the definitions in the Safe Act and Dodd-Frank Act and therefore exceeds the Defendants authority in promulgating the Challenged Section of the Rule.

REQUEST FOR RELIEF

WHEREFORE, NAMB respectfully requests:

A. A temporary and preliminary injunction enjoining and restraining the Board from enforcing the Challenged Section of the Rule, until such time as the Court adjudicates the legality of the Rule;

B. Expeditious proceedings in this action in light of the Rule's April 1, 2011 effective date;

C. Judgment in NAMB's favor and against the Board;

D. A declaration that the Challenged Section of the Rule is unlawful and void;

E. A permanent injunction prohibiting the Board, its agents, servants, employees, successors and assigns from implementing the section of the Challenged Section of the Rule;

F. An award of its costs and reasonable attorneys' fees incurred in this action pursuant to 28 U.S.C. § 2412; and

G. Such other and further relief as the Court deems just and proper.

SAUL EWING LLP
A Delaware LLP

Dated: March 9, 2011

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