



Questions and Answers from Federal Reserve Staff Loan Originator Compensation Rule Campus MBA Webinar January 20, 2011

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*This document was prepared by MBA to facilitate understanding of the Federal Reserve's Loan Originator Compensation Rule.¹ It contains questions and answers concerning the rule that were asked of and answered by Federal Reserve staff during MBA's Campus MBA Webinar on January 20, 2011. The answers are paraphrased to assist readability and comprehension but are as webinar participants understood them. Readers are urged to read beyond any short "yes," "no" or similar responses to understand the context of the answers. **While this document contains informal staff answers, it is not binding upon the Federal Reserve or the Mortgage Bankers Association. The information contained in it is not intended to constitute, and is not a substitute for, legal or other advice. You should consult appropriate counsel or other advisers, taking into account your relevant circumstances and issues.***

THRESHOLD QUESTIONS - IMPLEMENTATION

1. **Delayed effective date.** Would the Federal Reserve Board consider delaying the effective date of its Loan Originator Compensation rule until the Dodd-Frank originator compensation provisions are implemented?

***No.** Almost certainly not. To do so, the Board have to be comfortable with pulling back a rule that it made on a record it developed before Dodd-Frank that identified an unfair and deceptive practice, and it would also have to have the appetite to open this matter back up when the Fed has moved on to other things and it's rushing to do them. (The rule is required to apply to loan applications received by creditors on or after April 1, 2011.)*

2. **New provisions prior to April 1.** Does the Board plan to implement the Dodd-Frank loan originator compensation provisions on an interim or final basis so that they would also be effective April 1, 2011?

***No.** There is virtually no chance of that. The Board will not issue new rules on this subject before April 1, 2011.*

PERMISSIBLE COMPENSATION - GENERALLY

3. **Across the board restrictions.** Do the same restrictions under the rule govern base compensation (such as a per loan commission) and incentive or periodic compensation (such as a quarterly bonus) to loan originators?

¹ 75 Fed. Reg. 58509 (September 24, 2010)

Yes. Basically the rule doesn't distinguish among types of compensation. Once it's loan originator compensation, it doesn't matter what type. The same restrictions under the rule (including restrictions against compensation based on terms or conditions other than loan amount) apply to per loan and incentive or periodic compensation. On the other hand, where compensation is permissible, it may be used for base compensation and incentive or periodic compensation.

4. **Performance factors.** The Fed rule identifies several factors related to the performance of a loan originator's loans delivered to a creditor, including (a) the long-term performance of the originator's loans, (b) the percentage of the loan originator's loan applications that result in closed loans, and (c) the quality of the loan originator's loan files (such as the accuracy and completeness of the loan documentation). May a practitioner consider long-term performance and/or other qualitative factors in determining compensation going forward as well as bonuses, i.e., does long-term performance mean "early payment or other defaults?" We assume these factors may be applied retroactively or prospectively in determining compensation?

Yes. It is permissible to compensate based on long-term performance of loans (including early payment defaults), the percentage of loans that result in closed loans, quality and accuracy of loans. These factors are not loan terms or conditions. Because the long-term performance of the loans is not a term or condition, it's also permissible to go back and "ding," or take back part or all of the commission on a particular loan from a loan originator, if the loan has an early default because that's not a term or condition. This and the other factors not involving terms and conditions including quality and accuracy of loans also may be applied in reevaluating compensation or in providing bonuses.

In contrast, compensation may not be based on loan terms or conditions except for loan amount. As discussed further below, compensation based on an error in closing cost disclosure is regarded as compensation based on a loan term or condition and is impermissible.

5. **Adjustment of compensation based on amount of credit extended.** Assume a creditor establishes a fixed percentage of loan amount as compensation for a particular type of loan. The rule permits periodic changes in loan originator compensation as long as revised compensation arrangements do not result in compensation that varies based on the loan terms or conditions. While this appears to mean that the specific facts are important to determine if compensation was adjusted at a frequency that results in compensation varying based on the loan terms or conditions, is there a time period, such as less than two weeks, that is so short that it would be difficult for a creditor to demonstrate that adjustments did not result in compensation based on loan terms or conditions?

No. There is no minimum time period specified in the rule for a creditor to evaluate and readjust a loan originator's compensation. A creditor cannot employ a period that results in compensation based on the terms or conditions of loans. Any adjustment must occur based on a reasonable period of time to evaluate production. The facts and circumstances of such production are relevant to determining what is a reasonable period.

Fed staff mentioned but not did stress 90 days. It would seem that if a loan originator originates few loans over a period, the period may be too short to readjust compensation since such readjustments would likely be regarded as compensation based on terms or conditions. If an originator originates several loans during a period, then the period may be a sufficient period to evaluate performance and readjust compensation.

6. **Minimum and maximum dollar amount.** The rule allows a creditor to establish different compensation terms for different originators, as long as compensation does not vary based on loan terms or conditions. The rule also allows a creditor to use a fixed percent commission structure, with a minimum and/or maximum dollar amount of compensation. May the minimum and/or maximum dollar amount differ among loan originators, as long as the variance is not based on loan terms or conditions?

Yes. A creditor may establish both different fixed percentages of compensation based on loan amount as well as different minimum and maximum compensation amounts for different originators.

PERMISSIBLE AND IMPERMISSIBLE VARIATIONS IN COMPENSATION

A. Loan Program and Related Factors

7. **Compensation variations for purchase and refinance loans.** Can the compensation to a loan originator vary based on whether a loan is a purchase loan or a refinance loan assuming the terms or conditions for such loans differ? In particular:

- a. Does varying compensation in such a circumstance raise an impermissible proxy issue? Is this issue surmountable?

Not necessarily. See below.

- b. The rule allows paying an hourly rate to a loan originator based on the actual hours worked and allows compensation based on a legitimate business expense, such as fixed overhead costs. Often creditors will base decisions on the average the time and costs necessary to originate various loans, but the rule does not appear to expressly allow for that. If a creditor can establish that on average the time and costs to originate purchase money loans exceed the time and costs necessary to originate refinance loans, can the creditor vary compensation to reflect differences in average costs and time for origination?

Yes. Differences in compensation to originators based on whether a loan is a purchase or refinancing are not a concern under this rule if the rates and other costs of both types of loan are the same. If, however, there are differences in compensation and differences in terms and conditions, these differences can be viewed as correlated to or a proxy for differing compensation based on the terms or conditions of loans. Once a correlation between loan terms or conditions and compensation differences is established, the burden shifts to the creditor (or other applicable party) to show that the compensation differences are based on valid factors that are not loan terms or conditions or a proxy for loan terms or conditions. The examples in the commentary of factors that are not loan terms or conditions, and thus factors upon which compensation may be based, are illustrative and not exhaustive of the permissible factors upon which compensation may be varied. For

example, a difference in compensation can be supported based on differing average time and cost to originate particular types of loans. If compensation is not based on a loan term or condition or a proxy for a loan term or condition, it is permissible under the rule.

8. **Compensation variations for origination of FHA, VA or Conventional loans.** Can the compensation to a loan originator vary based on whether a loan is a FHA, VA or Conventional loan assuming the terms or conditions for such loans differ?

Yes. *See answer 7. As indicated, where there are differences in loan costs and compensation among FHA, VA or Conventional loans, the burden shifts to the creditor to justify that the differences in compensation are based on one or more factors that are not a loan term or condition or a proxy for a loan term or condition. One such justification for differences in compensation is differences in average time and costs to originate each loan.*

9. **Portfolio vs. Non-Portfolio.** Can the compensation to a loan originator vary based on whether a loan is to be held in portfolio or a loan that will be sold assuming the terms or conditions for such loans differ?

Yes. *See answer 7. As indicated, where there is a difference in loan costs and compensation between portfolio and non-portfolio loans, the burden shifts to the creditor to justify that the differences in compensation are based on one or more factors that are not a loan term or condition or a proxy for a loan term or condition. One justification for differences in compensation is differences in average time and costs to originate each loan.*

10. **Varying compensation for CRA loans.** May a creditor pay greater compensation to incent originators to make CRA loans?

Unlikely. *See answer 7 if there are variations not based on terms or conditions to justify differences in loan cost and compensation for CRA loans. However, if differences are merely based on the fact that the loan is made in a specific area, such as a low- to moderate-income area, it is unlikely that is a valid reason. Fed staff indicated that for policy reasons it may make sense for a bank to vary compensation based on a loan being a CRA loan, but the staff noted that the rule does not provide that. In the supplementary information to the rule, the Board notes that the proposed rule included geography as a factor upon which compensation could be varied, and the factor was removed from the final rule.*

11. **State bond limitations.** If under a state bond or similar program there are limitations on the interest rates and fees that a creditor may charge, may the loan originator's compensation be established at a lower level for the loans to account for the lower revenue? Note, the creditor may need to forego making loans under a state bond or similar program if it would be economically infeasible to pay standard commissions on these loans subject to revenue limitations.

No. *Although Fed staff indicated that this has merit as a policy issue, the rule does not provide an exception for differences in compensation for state bond loans. If there are differences in compensation and loan terms and conditions for state bond program*

loans, the differences in compensation must be justified based on one or more factors that are not loan terms or conditions or a proxy for loan terms or conditions.

B. Factors Not Related to Loan Type

12. **Existing customer.** The Fed rule permits varying compensation based on whether or not a borrower is an “existing or new customer.” If a lender makes a loan, does not continue to service the loan and the consumer later refinances the loan with the lender, can the lender treat that consumer as an existing customer based on having made the existing loan (which likely will be the reason that the consumer returns to the lender). Does it make a difference if the lender continues to service the loan even though it sold the loan?

***Probably not.** The rule provides that varying compensation based on whether a borrower is an existing customer is permissible, because whether a borrower is an existing customer is not a loan term or condition. Although this was intended to literally mean an existing customer at that time, Fed staff point out that being an existing customer is only an example of a permissible factor upon which compensation may be based. Whether a lender previously made a loan to a borrower also is a factor that is not a loan term or condition. Note that the rule also expressly refers to whether or not a consumer is a “new customer” as a factor that is not a loan term or condition.*

13. **Varying compensation based on geographic area.** In a rural area, because of lower loan volume, it is not economically feasible to lend unless loans are priced higher than in areas with more significant lending volume. To encourage loan originators to originate loans in the rural area can a higher commission be paid to loan originators for loans originated in the rural area than for loans originated in areas with more significant lending volume?

***Unclear.** Fed staff raised the concern that differences in loan pricing for properties in rural and non-rural areas could be regarded as a proxy. However, if there are differences in loan originator effort, the response to question 7 is applicable. Note that in the supplementary information to the rule, the Board notes that the proposed rule included geography as a factor upon which compensation could be varied, and that factor was removed from the final rule.*

14. **Varying compensation between two subsidiaries.** Subsidiary A is a retail prime loan creditor and Subsidiary B is a retail near prime loan creditor. Loan originators for Subsidiary A only work on and receive compensation for loans for Subsidiary A and loan originators for Subsidiary B only work on and receive compensation for loans for Subsidiary B. Can Subsidiary A and Subsidiary B have different commission structures for their respective loan originators?

***Yes.** Subsidiary A and Subsidiary B can have different commission structures for their loan originators. Note, affiliates are treated as one entity under the rule but loan officers can be compensated differently. See question 38 below.*

15. **Varying compensation by channel.** Can the compensation paid to loan originators vary based on how the loan application was produced? For example, a lender may engage in extensive marketing to develop leads through a website and/or toll free number. Loan originators employed by the lender receive the leads, and also are free to develop their own leads through avenues outside of the marketing conducted by the lender. Can a lender establish different commission structures for loans that result from leads generated by the

lender and for loans that result from leads that a loan officer generates? Assume for purposes of the example that the same types of loans can be made regardless of how the lead for the loan is generated.

Yes. Compensation to originators can vary based on how the loan application was produced, for example, commissions may be higher for leads generated by the originator versus the company. Fed staff reminds that as long as compensation is not based on loan terms or conditions, or a proxy, it is okay. If pricing of two loans differs, there may be a concern that channel is being used as a proxy for loan terms or conditions but other factors may justify differences.

16. **Establishing origination point amount based on standard commission.** Employee loan officers take different approaches to compensation. Some elect to receive a lower amount of compensation per loan and originate more loans, while others elect to receive a higher amount of compensation per loan and originate fewer loans. For example, loan officer A may seek a commission of 0.80 percent per loan and loan officer B may seek a commission of 1.0 percent per loan. May a creditor establish a structure varying compensation in which (a) for loans originated by loan officer A, the origination point is 0.80 percent and the loan officer receives the 0.80 percent as compensation, and (b) for loans originated by loan officer B, the origination point is 1.0 percent and the loan officer receives the 1.0 percent as compensation?

Yes. A creditor may establish a structure varying compensation for originators and also set varying loan pricing among originators. Pricing can reflect different loan originator compensation costs. (This question was asked twice during MBA's webinar with the same response from Fed staff.)

C. More Favorable Loan Terms

17. A lender decides to provide more favorable terms to certain brokers based on the quality of their submissions (the "subject brokers") and considers the following alternatives. Assume in each case the exact same loans are involved and all loan terms are the same, except for the credit addressed in the alternatives.

- a. The lender does not pay broker compensation; all broker compensation is paid by the consumer. For the subject brokers, the lender will provide better loan pricing in the form of a credit. For example, while other brokers would receive a standard rate of 5.0 percent with no points or credit, the subject brokers would receive the standard rate of 5.0 percent with a 0.25 percent credit to the borrower to be applied to third party closing costs.

Yes. This structure would be permissible for the lender to establish.

- b. The lender pays all broker compensation. For the subject brokers, the lender will provide better loan pricing in the form of a credit. For example, while other brokers would receive a standard rate of 5.5 percent with a 1.0 percent credit to pay the broker's compensation, the subject brokers would receive the standard rate of 5.5 percent with a 1.0 percent credit to pay the broker's compensation and a 0.25 percent credit to the borrower to be applied to third party closing costs.

Yes. This structure would be permissible for the lender to establish.

- c. The lender pays all broker compensation. For the subject brokers, the lender will provide better loan pricing in the form of a credit and the lender does not specify how the credit must be allocated by the subject brokers to their compensation or to the consumer. For example, while other brokers would receive a standard rate of 5.5 percent with a 1.0 percent credit to pay the broker's compensation, the subject brokers would receive the standard rate of 5.5 percent with a 1.25 percent credit.

***Risky.** This structure would be permissible only if the broker's compensation did not vary from loan to loan. For example, if the broker retained different portions of the 1.25 percent credit from loan to loan, this would be impermissible. If broker compensation was fixed and compensation could not change, this would be okay. Fed staff notes that it is reckless for a lender to leave compliance to the broker. If broker takes different amounts of compensation per loan, then there is no fixed compensation per loan.*

D. Setting Compensation and Incentive or Periodic Compensation

18. **Compensation thresholds.** Can an incentive compensation plan for a loan originator based on loan volume provide for different percentage amounts based on the aggregate dollar volume of the loan originator's loans over a particular period (such as X basis points for an aggregate volume over \$5.0 million and less than \$10.0 million, Y basis points for an aggregate volume over \$10.0 million and less than \$15.0 million, and Z basis points for an aggregate volume over \$15.0 million)?

***Yes.** This incentive compensation structure providing different compensation to loan originators based on the aggregate dollar volume of their loans over a particular period is permissible. However, the tranches or buckets must be large enough so that the loan originator is not basically being compensated for volume on a per loan basis.*

19. **Frequency of lowered prices as a compensation factor.** A lender permits loan officers to lower prices on loans for various reasons, including meeting competition and customer relationship issues, subject to loan level and aggregate limitations. The compensation of the originator does not vary when prices are lowered and is based on loan amount. If a loan officer exceeds the permitted levels for lowering prices (i.e., fails to comply with company policy), can this be taken into consideration in a performance review to determine the loan originator's commission for an upcoming period?

***No.** An originator can vary loan prices where the originator's compensation is unaffected. However, if an originator exceeds the permissible level for lowering prices, a lender cannot take that into account in compensating the loan originator.*

20. **Payment based on profits.** Can compensation based on profits be paid to (a) a loan originator or (b) a manager (or other employee) who is not a loan originator? Does it matter if profit is calculated based on (a) general revenues and expenses (and revenue in some respect reflect loan production) or (b) a more specific formula tied to loan terms or conditions?

***No.** Compensation to an originator apparently cannot be based on profits as such. Fed staff characterized profit as "squishy" and undefined in regulation. Moreover, profit can be regarded as a proxy for terms or conditions. Fed staff indicated that if the calculation*

of profit does not account for loan terms and conditions, such as determining revenue based on a fixed amount per loan, less branch expenses, it may be permissible.

A manager who is not a loan originator can be compensated on any basis since managers' compensation is not restricted by the rule. See question 25 below.

21. **Profitability to trigger incentive compensation.** A creditor has an incentive compensation plan for originators that is based on the originator's loan volume over a particular period. It is not tied to loan terms. It is based on a fixed percentage of the aggregate principal balance of loans originated by the loan originator during the period.

- a. To protect the creditor from having to pay incentive compensation if business is poor, can the payment of the incentive compensation to the originator be conditioned on the company, region or branch achieving a certain level of profit during the period?

No. Fed staff in a past interaction said pricing cannot be adjusted or based on terms or conditions or a proxy for terms or conditions and triggering compensation based on profits is impermissible. This question was not expressly asked again.

- b. Does it matter how the profit is calculated?

Not expressly asked.

DUAL COMPENSATION

22. The rule prohibits a loan originator from receiving compensation both from the consumer and from another party. In a purchase transaction, if the seller of the property pays the loan originator is the payment deemed to be a payment by the consumer or a payment by another party?

Yes. If a seller of property pays the loan originator, the payment is deemed a payment by the consumer for purposes of the restriction against dual compensation under the rule.

MANAGERIAL EMPLOYEES, ADMINISTRATIVE STAFF AND SIMILAR INDIVIDUALS

23. **Manager and administrative staff exception.** The Fed rule provides that managers, administrative staff and similar individuals who are employed by a creditor or loan originator but do not arrange, negotiate or otherwise obtain an extension of credit for a consumer *and* whose compensation is not based on whether any particular loan is originated are not loan originators. We understand that the wording of the rule here may not accurately reflect the Fed position on who is a manager or administrative staff member. Can you clarify this?

Yes. The rule is intended to require that an originator be a person who arranges, negotiates or obtains a loan for a consumer and whose compensation is based on whether any particular loan is originated. The point of language is to pick up two sets of requirements to be a loan originator—arranging, negotiating or obtaining a loan for a consumer and also having compensation based on any particular loan. The commentary could be clearer; both sets of requirements must be met for a person to be a loan originator.

24. **Conduct arising to arrange, negotiate or obtain.** Assume that a manager receives compensation based on whether one or more particular loans are originated.

- a. If the manager engages in any direct communication with a consumer does the manager become a loan originator? In other words, does any direct communication with a consumer by itself constitute arranging, negotiating or obtaining an extension of consumer credit?

No. Whether or not a manager is to be treated as an originator because of communications with a consumer is a factual determination. It depends on what the manager does. Clearly, a manager cannot originate, negotiate or obtain a loan and if a manager is not involved in these activities his or her conduct is okay at least in terms of not being regarded as an originator.

- b. If during peak processing periods, or when a loan officer is not available, a manager engages in certain loan processing activities, such as making sure the title work or appraisal is ordered, making sure verification documents were requested or received, or forwarding materials to the underwriter, does the manager become a loan originator? In other words, do administrative processing functions constitute arranging, negotiating or obtaining an extension of consumer credit?

No. Processing is not loan origination. If a manager helps an originator with processing, the manager is not a loan originator.

- c. If a manager must approve aspects of a transaction, such as a variation from a standard rate and point combination, does the manager become a loan originator. In other words, does the exercise of authority to approve variations from creditor pricing or policies for specific transactions constitute arranging, negotiating or obtaining an extension of consumer credit?

Not expressly asked.

25. **Compensation of managers who do not originate.** Can a manager who does not originate loans, administrative staff and similar individuals be compensated based in whole or part on profits during a particular period attributable to an area over which the manager has authority, such as a branch manager with respect to a branch? Can profits be calculated in whole or part based on the aggregate value of loans originated during a particular period in the applicable area based on secondary market value?

Yes. A nonproducing manager who is not a loan originator can be paid however a lender chooses. This rule says nothing about such managers' compensation.

26. **Manager who is also a loan originator.** Can a manager who is also an originator be compensated based on profits? Some branch managers only manage an office and do not originate loans, while other branch managers both act as loan originators and have management responsibilities. The latter branch managers receive compensation as a loan originator for each loan originated, and also receive compensation based on the production of the entire branch.

No. If the manager originates, then the rule applies to all compensation received by the manager, whether for origination functions or management functions. While the

manager could get paid for both functions, the compensation for both functions must comply with the rule. For example, the manager could receive a fixed dollar or percentage amount for the loans he or she originates, and a fixed dollar or percentage amount for all loans originated by the branch (i.e., an override). As indicated compensation to originators based on profits is problematic, although a fixed amount based on revenue minus expenses may be possible.

27. **Segregating transactions.** We understand that if a manager in some cases arranges, negotiates or obtains an extension of consumer credit, and also receives compensation based on whether one or more particular transactions are originated, the manager is subject to the rule. Given that the rule restricts varying compensation based on a transaction's terms or conditions, can the transactions that a manager originates be segregated from those that he does not originate for compensation purposes? For example, could the manager be paid consistent with the restrictions of the rule for loans in connection with which the manager acts as a loan originator, and also receive compensation that could not be paid to a loan originator with respect to transactions in connection with which the manager does not act as a loan originator?

No. The loans that are originated by the manager cannot be segregated from the manager's management activities in order to compensate a manager for management activities in a manner that is not permitted for loan origination activities. If a manager originates loans, all compensation of the manager is subject to the loan origination restrictions of the rule. If segregation of manager's originations were permissible, Fed staff indicated it could open a giant loophole and enable lenders to use the management portion of compensation to impermissibly compensate a manager for origination activity.

Fed staff also said that a salary can be paid for managerial duties of a producing manager as long as the salary is not based on terms or conditions.

28. **De minimus rule.** Would the Fed apply a *de minimus* exception for managers who originate just a few loans, so they would not be subject to the rule's loan originator compensation restrictions, since there is a *de minimus* exception for TILA coverage?

No. The rule does not contain such an exception. While Fed staff indicated it is an interesting idea that may have been worthy of inclusion, such an exception cannot be added outside of the regulatory process.

LOAN ORIGINATOR ACTIONS

29. **Loan originator reductions in rates without compensation based on terms.** May a creditor permit certain loan originators to establish rate and point combinations for loans below the creditor's standard rate and point combinations without first seeking approval of a supervisor, subject to a limits on the amount per loan and the total amount per loans within given period (such as no more than Y basis points per any individual loan and no more than an aggregate of Z basis points per all loans during a quarter)? This would be done to meet competition. The compensation of the loan originators would not vary based on whether or not the rate and points established for a loan was below the creditor's standard rate and point combinations.

Yes. As long as the compensation of the originator does not vary based on the rate and point combinations for loans originated, an originator may establish rate and point combinations for loans below the creditor's standard rate and point combinations.

30. **Loan originator payment of third party fees.** May a loan originator pay some or all of the third party fees of a consumer or otherwise credit the consumer out of his own pocket?

No. An originator may not pay third party fees out of his or her own pocket. This amounts to varying the loan originator's compensation based on the terms or conditions of the loan. The Commentary accompanying the rule at section 226.36(d)(1)-5 prohibits such action by loan originators.

31. **Reduction in broker compensation to avoid high cost loan.** May the broker reduce its standard compensation to avoid triggering high cost loan laws? This would occur where a broker submits a loan application to a creditor, and has agreed to receive its standard compensation that will be paid by the creditor. The creditor reviews the application and determines that the standard broker compensation and standard creditor fees will result in the loan triggering one or more high cost loan laws, and the creditor does not make loans subject to those laws.

No. An originator may not vary his or her compensation on a loan to avoid triggering high cost loan laws. Such compensation would be based on a loan's terms or conditions.

32. **Reduction in compensation and credit to borrower.** Same facts as the prior question, except that the broker will receive its standard compensation and provide a credit to the borrower to pay some of the creditor's standard fees to avoid triggering a high cost loan law. Is this permissible?

No. An originator may not vary his or her compensation on a loan by providing a credit or otherwise. Such compensation would be based on a loan's terms or conditions.

33. **Loan originator pricing.** Can a loan originator establish a price for a loan that is higher than the price offered by the creditor, such as 1 percent of the loan instead of the 75 basis points offered by the creditor as long as the loan originator's compensation does not vary based on the loan terms or conditions (except as permitted by the rule)?

Yes. As long as the compensation of the originator does not vary based on the rate and point combinations for loans originated, an originator may establish a higher loan price for a consumer.

RESPA - TILA QUESTIONS

34. **Charging fees to loan originator based on failure to follow policy.** If a loan originator fails to comply with a creditor's requirements and, as a result, under RESPA tolerances the creditor may not impose the creditor's standard fees in standard amounts, may the creditor charge the shortfall to the loan originator based on the failure to follow the creditor's requirements? May the creditor consider failures in following policies under RESPA and other matters in determining bonuses and compensation going forward?

No. *A creditor may not consider an originator's failure to follow a creditor's requirements that resulted in the creditor's inability to impose its standard fees and charge the shortfall to the loan originator or in determining bonuses and compensation going forward. Fed staff regards such action as basing compensation on loan terms or conditions.*

35. **Broker provides credit to cure tolerance violation.** A broker makes one or more mistakes in a Good Faith Estimate by improperly excluding certain fees and/or including fees at amounts that are below the correct amounts, and because of the tolerances under RESPA, the Good Faith Estimate cannot be revised to add the excluded fees or increase the fees that were disclosed at amounts lower than the correct amounts. Can the broker provide a credit to the consumer at closing to cover the excluded fees or improperly disclosed fees, which is a permissible method under RESPA to cure what otherwise would be a tolerance violation? (Under the RESPA rules, a creditor may not charge the borrower either third party fees omitted from the Good Faith Estimate or an amount for third party fees that is higher than the amount disclosed in the Good Faith Estimate. Under RESPA, at closing the lender and/or broker, therefore, must pay the fees to avoid a tolerance violation.)

No. *An originator generally may not vary his or her compensation on a loan by providing such a credit. Such action would amount to an originator receiving varied compensation based on a loan's terms or conditions. Where RESPA related errors don't involve terms or conditions they may be addressed without being regarded as compensation based on terms or conditions. Further clarification on this point is needed.*

36. **RESPA credit.** A borrower will pay the broker's compensation and the lender will, based on a premium interest rate, pay certain third party closing costs. Under RESPA, any credit provided by the lender is first applied to the creditor's and broker's origination charges, and then any remainder is applied to third party charges. The RESPA disclosure approach makes it appear as if the lender is also compensating the broker. Is the RESPA treatment of charges and credits disregarded in all respects for purposes of the loan originator compensation rule?

Yes. *In applying the rule, what matters is whether the rule is complied with not how a transaction is disclosed for RESPA purposes. The creditor should maintain evidence that the consumer paid the broker and that the creditor paid other third party charges.*

APPLICATION OF RULE TO PARTICULAR BUSINESS ARRANGEMENTS

37. **Single person company.** In many cases a mortgage broker is a single individual. While that individual is a loan originator, he or she also is the owner of the brokerage, regardless of the legal form of the company. As long as the compensation received on each loan by the brokerage firm is not based on the terms of the respective loan, it appears that would constitute compliance with the Fed rule, even though in the end the net compensation that the individual will receive will equate with the net profit of the brokerage firm. Is that true and permissible?

Yes. *Where a mortgage broker is a single individual and the owner of a mortgage brokerage, the broker may receive compensation that equates with the net profit of the brokerage, as long as none of the compensation is based on the terms or condition of a loan.*

38. **Affiliate fees when party brokers a loan.** For purposes of the rule, (a) affiliates are treated as a single person, and (b) compensation does not include *bona fide* and reasonable third party charges not retained by the loan originator? In situations in which a lender acts as a mortgage broker and, thus, is a loan originator for purposes of the rule, if the party has an affiliated settlement service provider, such as a title company, are the *bona fide* and reasonable charges received by the affiliated settlement service provider considered part of the loan originator compensation?

Yes. If a lender is acting as a mortgage broker and has an affiliated title company, the compensation to the lender for origination and the fees received by the affiliated settlement services provider are both considered compensation to the originator. If the lender receives compensation from the creditor and the consumer pays title fees to the affiliate directly, the dual compensation restrictions would be violated.

STEERING/SAFE HARBOR ISSUES (IF TIME)

[There was insufficient time to answer the following remaining questions.]

39. **Lowest interest rate.** What constitutes a loan with the “lowest interest rate” for purposes of the safe harbor provisions? Is the loan with the lowest rate the loan with the lowest rate and point combination or simply the lowest note rate notwithstanding that several discount points will be charged to the consumer for the rate?
40. **Lowest total dollar amount for points or fees and discount points.** What is meant by the loan with the “lowest total dollar amount for origination points or fees and discount points?” Would a loan meet this requirement if the loan has a high note rate but, as a result of the creditor paying closing costs based on the rate, as the lowest amount of closing costs paid by the consumer?
41. **Evidence of compliance.** Should a mortgage broker evidence its compliance with the safe harbor provisions by providing a written disclosure to the consumer specifying the three loan choices available and that also would require the consumer to specify which loan he or she chose and sign the form?
42. **Creditor not liable.** It is practically impossible for a lender to know whether a broker has in fact complied with the anti-steering provision. Does the Fed regard creditors as liable for an originator’s violation of the anti-steering provisions?