

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

NATIONAL ASSOCIATION OF
MORTGAGE BROKERS, and
NATIONAL ASSOCIATION OF
INDEPENDENT HOUSING
PROFESSIONALS, INC.,

Plaintiffs-Appellants,

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, *et al.*

Defendants-Appellees.

Case Nos. 11-5078
11-5079

**APPELLANTS' JOINT REPLY
BRIEF IN FURTHER SUPPORT OF
THEIR EMERGENCY MOTIONS**

A. NAMB And NAIHP Are Likely to Succeed on the Merits.

1. The Board Lacks Requisite Authority Under HOEPA.

The Board claims that reference to ancillary rulemaking authority contained at the end of Section 151 subsection (d) (creating Section 129, 15 U.S.C. § 1639) contains no limit on the Board's authority to constrain any "acts or practices in connection with – (A) mortgage loans that the Board finds to be unfair [or] deceptive." *Board Br. at 7-8*. In attempting to manufacture this rulemaking authority, the Board asks this Court to ignore "general purpose and structure" of HOEPA and TILA and to reach an interpretation that would grant the Board nearly limitless authority to regulate the entire real estate industry, both creditors and non-

creditors, as well as any aspect of any industry where a federally-related mortgage loan is involved.¹ *See Board Br. at 8.*

Contrary to the Board's representation, 15 U.S.C. § 1639(l)(2)(A) does indeed refer back to the substantive provisions which are, by the Board's own admission, applicable only to Section 1602(aa) loans. The Act actually prohibits “acts or practices in connection with – (A) mortgage loans that the Board finds to be unfair, deceptive, or *designed to evade the provisions of this section.*” 15 U.S.C. § 1639(l)(2)(A) (emphasis added).² As the Board itself recognized, however, in *every* substantive provision inserted in Section 129 of TILA through Section 151 of HOEPA (“Consumer Protections For High Cost Mortgages”), “the statute refers explicitly to ‘a mortgage referred to in section 1602(aa) of this title [defining high-cost loans].’” *Board Br. at 7* (citing 15 U.S.C. § 1639(a), (c)-(i)). Consequently, the Board's argument that 15 U.S.C. § 1639(l) fails to contain a reference to Section 1602(aa) mortgages is incorrect.

¹ If the Board's expansive interpretation of its authority were accepted, it would be permitted to regulate even those industries who were expressly exempted under Dodd-Frank, such as Real Estate Agents, Title Insurance Underwriters & Agents, Property & Casualty Insurance, Attorneys, etc. Dodd-Frank Wall Street Reform And Consumer Protection Act, Pub. L. No. 111-203 (2010), at § 1401. This would essentially allow the Board to ignore Congress' directives in Dodd-Frank, a statute that they claim to be consistent with, by regulating these exempt entities pursuant to the authority granted it under HOEPA.

² The Board used brackets and ellipses to omit this language.

Further, notwithstanding the Board’s invitation to ignore the structure and history of HOEPA, *Chevron* requires the Court to first use the “customary statutory interpretation tools of ‘text, structure, purpose, and legislative history’” to determine Congress’s intent in passing HOEPA as to the precise question at issue is clear. *Calif. Metro Mobile Commc’ns, Inc. v. FCC*, 365 F.3d 38, 44-45 (D.C.Cir.2004) (quoting *Consumer Elec. Ass’n v. FCC*, 347 F.3d 291, 297 (D.C.Cir.2003)). The structure and purpose of HOEPA Section 151 shows an intent to regulate certain high cost mortgages as defined in 15 U.S.C. § 1602(aa).³

The Board’s argument also reverses the presumptions as to ancillary rulemaking described in *Whitman v. Am. Trucking Assocs.*, 531 U.S. 468 (2001). Under *Whitman*, the “textual commitment” to “alter the fundamental details of a regulatory scheme” “must be a clear one.” *Id. At 468*. Under the Board’s interpretation, the failure of 15 U.S.C. § 1632(l)(2) to refer specifically to Section 1602(aa) renders the Board’s rulemaking authority in 15 U.S.C. § 1639 *plenary* over all aspects of mortgage loan transactions. The Board’s argument that limitations on its authority could have been clearer in that subsection is not a

³ Also, Congress chose to include the subsection at issue in TILA section 129, 15 U.S.C. § 1639, rather than the Board’s general ruling making authority pursuant to TILA section 105, 15 U.S.C. § 1604. Thus, it must be assumed that Congress knew what it was doing when it placed the provision in section 1639 rather than section 1604. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-98 (1979) (Congress is presumed to have knowledge of the legal framework already in place when it acts).

“textual commitment” by Congress to grant the Board plenary rulemaking authority. Nor is there anything in HOEPA’s language or structure which indicates an implicit delegation of plenary rulemaking authority over all aspects of the mortgage loan industry. *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) (“*Chevron* ‘deference comes into play of course, only as a consequence of statutory ambiguity, and then only if the reviewing court finds an implicit delegation of authority to the agency.’”) (quoting *Sea-Land Serv., Inc. v. DOT*, 137 F.3d 640, 645 (D.C. Cir. 1998)). Instead, the structure indicates that the Board was allowed ancillary regulatory authority to prevent “unfair [or] deceptive” loans which would violate the substantive provisions of 15 U.S.C. § 1639, as well as any additional loans which, though not directly “unfair [or] deceptive” per 15 U.S.C. § 1639, are “designed to evade” the substantive requirements therein. Therefore, the Board exceeded its rulemaking authority in promulgating the Rule, and Appellants have sufficiently demonstrated likely success on the merits.

2. The Board’s Actions Were Arbitrary And Capricious.

***i.* The District Court Ignored the Most Egregious Example of the Arbitrary and Capricious Nature of the Final Rule.**

The Board supported its rule by stating that “[y]ield spread premiums ... present a significant risk of economic injury to consumers.” 75 Fed. Reg. at 58,515. However, as the Board itself stated, “the *creditor* generally controls the yield spread premium funds.” *Board’s Br.* at 6 (emphasis added). As NAIHP’s

motion already explained (at 9-13), the Board's decision to regulate mortgage brokers, while effectively exempting creditors that control 90% of the mortgage origination market was arbitrary and capricious. *See also* NAIHP Motion at 12-13.

The district court and the Board also concede that NAIHP and NAMB members provide consumers with disclosures that make clear that they are independent contractors, are not the consumers agents, and "cannot guarantee the lowest price or best terms available in the market." Memorandum Op. at 8; Board Br. at 9. The Board and the district court contend that despite express disclosures consumers may nevertheless choose to disbelieve them based on the controversial MACRO and AARP studies. Mem. Op. at 26; 75 Fed. Reg. at 58,511. However, those conclusions are incorrect for the reasons stated in NAIHP's Motion (at 4-9).

The Board further faults the disclosure as not explicitly stating that "the loan originator stands to gain personally by putting the consumer in a higher-rate loan," Board Br. at 9 n.6. However, this only shows that additional language in the disclosure could resolve the Board's concerns. *See* NAIHP Motion at 8 (quoting the Board's Opposition at 6-7).

Consequently, the Board has not satisfied the second prong of the FTC unfairness test.

- ii. The Board fails to provide any rational justification for the Section of the Rule challenged by NAMB.***

In its Brief, the Board admits that its post-hoc rationale for the Challenged Section of the Rule was not contained in the proposed or final Rule. The Board instead seeks to rely on general statements of perceived incentives that apply to mortgage brokers as a whole and concerns regarding steering. *Board Br.* at 12. The Board also erroneously concluded that the Challenged Section of the Rule would not prevent mortgage brokers from competing with other entities and would not prohibit them from continuing their operations. *See* 75 FR 58518. As explained in NAMB's irreparable harm analysis (NAMB Br. at 5-7) the Board's assessment of the potential harm was incorrect. Because the Board failed to appreciate the actual effects of the proposed rule, they "entirely failed to consider an important aspect of the problem." *Motor Vehicle Manufacturers Ass'n*, 463 U.S. at 43.

Finally, the Board fails to adequately explain the reason why it could not simply rely on the "steering" Section of the Rule to prohibit loan officers from steering consumers in order to obtain increased compensation. The Board's contention that the "steering" Section of the Rule applies to only "creditor pay" transactions contradicts language in the comments stating that "a loan originator may not direct or steer a consumer to consummate a transaction based on the fact that the loan originator would increase the amount of compensation that the loan originator would receive for that transaction." *See* 75 FR 58537. Even if the

Board's limited interpretation is correct, it only further shows that the Board failed to consider a less destructive alternative.⁴

3. The Board Failed To Meaningfully Conduct the Regulatory Flexibility Act Analysis.

With respect to the Section of the Rule challenged by NAMB, the Board cannot escape its responsibilities under the RFA by referring to the Challenged Section of the Rule as an “insignificant consequence” and the Board’s failure to meaningfully examine the effect, as well as any alternatives to the Challenged Section of the Rule is fatal to the Board’s claim that they complied with the RFA. *Board Br. at 16*. The Board’s “insignificant consequence” characterization is contradicted by the real, catastrophic, and irreparable harm that the Challenged Section of the Rule has been found to cause NAMB’s members, as well as the Board’s own admission which acknowledges that entirely “*new business models*” would result. See 75 FR 58509, 58518 (emphasis added). The Board’s failure to make a “reasonable, good-faith effort to canvass major options and weigh their probable effects,” requires the Court to remand the Rule to the Board. *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 116 (1st Cir. 1997)

⁴ Instead of precluding a commission structure that had been in place for decades, the Board could have easily extended the “steering” Section to include consumer paid transactions, to the extent they are not already included. This would have prevented a loan officer from steering a consumer into **any transaction** on the basis that they would receive higher compensation.

B. Appellants Have Demonstrated Irreparable Harm

First, the Board does not dispute that NAIHP and its member mortgage brokers operate their businesses in exactly the same way as NAMB's members. Thus, NAIHP's members are irreparably harmed in the same manner as NAMB's members.

Second, the Board does not dispute the fact that Mr. Savitt will suffer substantial losses as a result of the Final Rule or that the irrecoverable loss of a substantial portion of business to a small business is, by definition, a severe loss. Moreover, there is no requirement that Mr. Savitt demonstrate that "the Rule threatens the very existence of his business" or that "his business will be irreparably destroyed by the Board's rule." (Mem. Op. at 41).

Where, damages are unrecoverable such damages qualify as irreparable. *See, e.g., Sterling Commercial Credit v. Phoenix Industries*, **2011 U.S. Dist. LEXIS 8334, C.A. No. 10-2332 (PLF) at * 17- * 18**; *Clarke v. Office of Fed. Hous. Enter.*, 355 F. Supp. 2d 56-65 (D.D.C. 2004); *see also Braco Diagnostics Inc. v. Shalala*, 963 F. Supp. 20, 29 (D.D.C. 1997). While a "[r]ecoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business," a movant could show irreparable harm by "show[ing] that the alleged loss is unrecoverable." *Wis. Gas v. FERC*, 758 F.2d 669, 674-75 (D.C. Cir. 1985) (emphasis added); *see also Feinerman v. Bernardi*,

558 F. Supp. 2d 36, 51 (D.D.C. 2008) (“when . . . plaintiff . . . cannot recover damages from the defendant due to the defendant’s sovereign immunity . . . , any loss of income suffered by a plaintiff is irreparable *per se*”); *U.S. v. New York*, 708 F.2d 92, 93-94 (2d Cir. 1983). Here, the government has not waived its sovereign immunity under 5 U.S.C. § 702 with respect to damages and those damages are thus unrecoverable. *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988); *see also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

The Board fails to provide any valid basis to undermine the District Court’s finding that NAMB will suffer irreparable harm in the absence of a stay.

C. The Equities Weigh In Favor Of Staying Implementation of the Rule.

When balancing the equities and the public interest, the Board entirely ignores the potential harm that the Rule could cause consumers by decimating the mortgage brokerage industry. The loss of these small mortgage brokers will leave a void in the mortgage industry and will directly result in less choices for the consumer. *NAMB’s Brief in Support of Temporary and Preliminary Restraints* at 12-13. Consumers in both rural and urban markets will be most effected, as the Board itself has recognized that mortgage brokers’ serve to expand a lender’s customer base, “particularly in markets where creditors might not have a direct retail presence.” *See* 75 FR 58517. Moreover, the decreased competition caused

by the Rule will allow lenders to increase the fees, interest rates, and costs they charge consumers. *See* Cmt. 36(d)(4), 75 FR 58536. Finally, in “balancing the equities” the Board ignores the over 70,000 plus licensed mortgage loan originators who will be adversely effected in the form of termination or significantly reduced compensation as a result of the Rule. *D’Alonzo Aff.*, ¶ 4. When taking the potential harm to consumers and the devastating impact on the individual loan officers into effect, there can be little doubt that the equities weigh in favor of granting the relief sought by the Appellants.

Respectfully submitted,

/s/ Stephen S. Hill
Stephen S. Hill
HOWREY LLP
1299 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 783-0800

*Counsel for Appellant
National Association of
Independent Housing
Professionals, Inc.*

/s/ Robert C. Gill Bar No. 413163
Francis X. Riley III, Esq.
Ryan L. DiClemente, Esq.
Bruce P. Bowen, Esq.
Mark C. Cawley, Esq.
Saul Ewing LLP
2600 Virginia Ave. N.W.
Suite 1000 - The Watergate
Washington, D.C. 20037-1922
Telephone: (202) 295-6605
Facsimile: (202) 295-6705
rgill@saul.com

*Counsel for Appellant
National Association of Mortgage Brokers*

Of Counsel:

Marx David Sterbcow, Esq.
Sterbcow Law Group LLC
1734 Prytania Street

New Orleans, LA 70130
Telephone: (504) 523-4930
marx@sterbcowlaw.com

Brian Katz, Esq.
Russell Herman, Esq.
Herman, Herman, Katz & Cotlar
820 O'Keefe Avenue
New Orleans, LA 70113
Telephone: (504) 581-4892
bkatz@hhkc.com

CERTIFICATE OF SERVICE

I hereby certify that on this 5th Day of April, 2011, a copy of the foregoing was filed and served via the courts ECF system on the following:

Board of Governors of the Federal Reserve System
The Honorable Ben S. Bernanke (*in his official capacity*)
Sandra F. Braunstein (*in her official capacity*)

Katherine H. Wheatley
20th & C Streets NW
Washington, DC 20551-0001
(202) 452-3779
Fax: (202) 736-5615
Email: kit.wheatley@frb.gov

National Association of Independent Housing Professionals, Inc.

Stephen S. Hill
Howrey LLP
1299 Pennsylvania Avenue, NW
Washington, D.C. 20004 - 2402
(202) 383-6967
hillstephen@howrey.com

/s/ Robert C. Gill
Robert C. Gill