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December 23, 2010

VIA ELECTRONIC MAIL: regs.comments@federalreserve.gov

Jennifer J. Johnson, Secretary
Board of Governors
of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Proposed Rule Regarding the Truth in Lending Rescission Remedy
FRB Docket No. R-1390

Dear Secretary Johnson:

I write on behalf of the clients of the Atlanta Legal Aid Society, Inc., which provides civil legal assistance to persons of very limited financial means in the Atlanta metropolitan area (including Fulton, DeKalb, Gwinnett, Cobb, and Clayton counties). We thank the Federal Reserve Board for this opportunity to comment on the above Proposed Rule. This letter addresses several of the proposed provisions. Certain provisions in the Proposed Rule would alter and seriously undermine the rescission remedy currently available to homeowners under the Truth in Lending Act ("TILA"). For reasons stated below, we urge that the Board either withdraw those provisions or redraft them for further comment. If they are adopted as proposed, they will render almost useless one of the most important protections that low and moderate-income homeowners have from loss of their homes as the result of abusive lending practices.

I am the Director of the Home Defense Program of the Atlanta Legal Aid Society. For the past 22 years, the Home Defense Program has provided legal advice, referrals, and legal representation to more than three thousand low- and moderate-income homeowners and home buyers who have been the targets of predatory mortgage lending practices, foreclosure rescue scams, and home purchase scams. The Home Defense Program is funded by the Atlanta Legal Aid Society; the DeKalb County, Georgia, Department of Human and Community Development with HUD community development block grant funds; West Tennessee Legal Services, Inc. with HUD housing counseling funds; the Institute for Foreclosure Legal Assistance, a project of the Center for Responsible Lending and managed by the National Association of Consumer Advocates; and AmeriCorp/Equal Justice Works.

On a daily basis, we assist homeowners who have been targeted by local and national mortgage companies with abusive, predatory mortgage lending practices. We provide them with legal advice and evaluate their cases to determine whether legal claims exist. We settle some cases without litigation and litigate others. Because of our limited resources, we often refer homeowners to private attorneys. Where appropriate, we also refer homeowners to local nonprofit housing counseling and other agencies which assist them in attempting to obtain loan modifications. Many senior citizen homeowners are referred for reverse mortgages. We also participate in a range of community education efforts aimed at warning home buyers and homeowners against home equity theft, foreclosure rescue, and loan modification scams.

Recently, most of the attention and resources of our program have been focused on the abusive conduct of subprime mortgage lenders, who have especially targeted the low-income community. It is certainly no secret by now that a large percentage of subprime mortgages have gone into default. These defaults have occurred largely because so many of the mortgage loans were made without regard to the borrowers' ability to pay. As a result, the metropolitan Atlanta area, one of the hotbeds of subprime lending, has one of the highest foreclosure rates in the country.

In the past few years our program has been flooded with clients who have come to us after receiving foreclosure notices. Many are elderly and/or disabled and have been living in their homes for many years. They desperately want to remain in their homes, and we do our best to keep them there. Our efforts benefit not only our clients but also their neighbors, whose own homes lose value when nearby homes are foreclosed and left vacant, and the community at large.

Preserving Existing TILA Rescission Procedure Is Critical, Specifically the Automatic Release of the Security Interest Before the Homeowner is Required to Tender.

The most effective legal tool homeowners have for stopping foreclosures is the TILA rescission remedy. We have found that the worst subprime mortgage lenders, in their rush to sign up as many borrowers as possible, were cavalier about compliance with important TILA requirements, including the substantive requirements for high-cost loans. A mortgage lender's failure to comply with such requirements often gives the borrower the right to rescind the mortgage under TILA.

In a decision that is binding on the federal courts in Georgia, the Eleventh Circuit Court of Appeals held that Congress in devising the TILA rescission remedy intended a "reordering of common law rules governing rescission." Williams v. Homestake Mortgage Co., 968 F.2d 1137, 1140 (11th Cir. 1992). The common law rules required the rescinding party to tender any amount received before the contract in question could be voided. The Williams court recognized that under TILA, by contrast, "all that the consumer need do is notify the creditor of his intent to rescind. The agreement is then automatically rescinded and the creditor must, ordinarily, tender first." Id. (emphasis added).

The revisions to the TILA rescission remedy in the Proposed Rule are flatly contrary to Congressional intent as determined in Williams. They in essence restore the common law rules that Congress meant to replace in enacting TILA. Apart from the question of whether the Federal Reserve Board has the authority to do this, reversion to the common law rules would be very bad policy. It would fly in the face of Congress's clear intention the TILA rescission remedy be a "painless" one for the homeowner, "placing all burdens on the creditor." Id. Only thus can TILA rescission be "an important enforcement tool, ensuring creditor compliance with TILA's disclosure requirements." Id. In its current version the TILA rescission remedy places the mortgage borrower in a "much stronger bargaining position" vis-à-vis the mortgage lender than under the common law. Id. This leverage should be preserved, not eliminated.

Preserving existing TILA rescission rights is especially critical at a time when so many homeowners are under so much pressure from mortgage lenders and new revelations of lender misconduct appear daily in the news media. The annual record for foreclosures notices here was shattered in November. During the first 11 months of 2010, a total of 117,437 foreclosure notices were published in the 13-county metro Atlanta area, topping last year's 12-month record of 117,107. See "Metro Atlanta Foreclosures Set Monthly and Annual Records," *Atlanta Journal Constitution*, November 15, 2010 (citing Equity Depot).

A reversion to the common law rules of rescission would be especially harmful in states like Georgia that allow mortgage lenders to foreclose non-judicially. In Georgia the TILA rescission remedy as revised in the Proposed Rule would be virtually useless to stop a foreclosure. The current version of TILA rescission, on the other hand, can deter even an imminent foreclosure sale.

More often than not, a homeowner seeking protection from foreclosure comes to our office only a few weeks before the scheduled date for the foreclosure sale—and quite frequently only a day or so before the sale. Under such time pressures, and with the foreclosure proceeding non-judicially, a TILA rescission demand is normally the only effective way to prevent the sale (although a bankruptcy might postpone it). As the Eleventh Circuit held in Williams, Congress meant for a timely and valid TILA rescission demand to have the automatic and immediate effect, as soon as it is mailed or otherwise delivered, of voiding the mortgage lender's security interest. Thus a foreclosing lender who receives a TILA rescission demand knows that if the demand is valid the foreclosure has no basis to proceed any further. The lender also knows that if the foreclosure is completed with a foreclosure sale and a court later determines that the rescission demand was valid, then the foreclosure was wrongful, and the lender is exposed to serious liability for damages stemming from that.

It is primarily the lender's realization that its security interest in the home under foreclosure might already be void when the borrower makes a TILA rescission demand that motivates the lender to suspend the foreclosure and try to work out an alternative whereby the homeowner remains in the home. But under the revisions to the rescission remedy in the Proposed Rule, this lender motivation disappears. Under the proposal, the foreclosing lender would retain its security interest even if a TILA rescission demand is made. All that the lender

would then need to do is decide, within twenty days of receiving the demand, "whether" it will agree to cancellation of the mortgage. Proposed Reg. Z §§ 226.23(d)(2)(i)(A). Even if the lender does agree to cancel, under the proposal, it could demand that the homeowner tender the entire current balance of the loan. If the borrower is able to tender that amount, which might be illegally inflated and will always exceed the true tender amount resulting from a valid TILA rescission, then the lender would have another twenty days thereafter to terminate its security interest in the transaction. Proposed Reg. Z §§ 226.23(d)(2)(i)(D). In a non-judicial foreclosure state like Georgia, before the protracted ritual in the above sections in the Proposed Rule could play itself out (especially if the homeowner is not wealthy enough to have the cash on hand to pay the amount required by the lender) the foreclosure sale would have long since occurred.

Thus the revised rescission procedure in the Proposed Rule would offer no protection to a homeowner in foreclosure. This proposed procedure is such a sharp contrast to the present TILA rescission procedure as Congress intended it and is so prejudicial to homeowners (especially those who are not wealthy) that we must register a strong protest to the Proposed Rule. We respectfully submit that the revised rescission procedure should be withdrawn. If it is not withdrawn, it should be redrafted so as to retain the protections that the TILA rescission remedy currently affords to homeowners.

The Right of Rescission Should Not Be Terminated Due to Refinancing, Loan Payoff, Death of a Borrower or Bankruptcy.

The statute does not provide that refinancing terminates rescission rights, for one very good reason: homeowners should not be required to remain in an abusive loan in order to exercise their rescission rights. Denying homeowners the right to rescind their loans after refinancing does not serve the purposes of TILA, but encourages circumvention of TILA. Most cases where a loan is paid off (and not refinanced or sold) before the expiration of the three-year extended rescission period will involve high-cost loans with large balloon payments. Payoff does not restore the homeowner to the status quo ante in these cases, since the fees and interest paid by the homeowner are retained by the creditor. Exempting paid off loans from the exercise of the three year right of rescission will encourage creditors to create abusive products that will force payoff.

Similarly, the right to rescind should not expire upon the death of a borrower. In many cases, spouses or children will remain in the home and have the right to assume the mortgage. 12 U.S.C. §1701j-3(d). They should be able to exercise the right to rescind that mortgage as well, either on their own behalf or on behalf of the decedent's estate.

Homeowners should not have to choose between the right to rescind and the right to file bankruptcy. The Board's clarification that bankruptcy filing does not terminate the right to rescind, at least when the debtor retains an interest in the property, is a helpful clarification.

The Board Should Revisit Whether Sale/Leaseback Transactions Terminate the Right to Rescind.

The last few years have seen an explosion of foreclosure rescue scams, including sale/leaseback transactions. Such transactions are often poorly understood by homeowners. Preserving the right of rescission against the original lender in these circumstances would facilitate the unwinding of abusive transactions and recognize the economic reality of the transaction. At the very least, the Commentary should make clear that sale/leaseback transactions do not terminate the right of rescission unless the transactions are a valid transfer of title, without coercion, misrepresentation, or fraud on the part of the purchaser.

The Board Must Mandate a Standard Format for Rescission Notices and Material Disclosures.

The Board proposes to allow "substantially similar" forms for rescission notices and to deny rescission rights based on formatting so long as the disclosures were conspicuous to the consumer. This increases uncertainty and litigation risk. Different courts will likely reach different conclusions as to what is substantially similar. Moreover, a subjective standard, based on what is clear and conspicuous to the consumer in any given transaction, will require litigation to determine compliance.

The Board bases its new forms on consumer testing. That testing showed that small changes in wording and format could produce large changes in consumer understanding. A form deemed "substantially similar" by a district court judge or even a circuit court panel might well not be understandable. For example, the Board proposes to require that the rescission deadline be expressed as a calendar date in reliance on testing that demonstrates most homeowners do not understand how to calculate the calendar date. The First Circuit has repeatedly found that rescission notices that omit the date are nonetheless "crystal clear." *See, e.g.,* Palmer v. Champion Mortgage, 465 F.3d 24, 29 (1st Cir. 2006). Under its precedents, the First Circuit could well find that a form omitting the calendar date and substituting a description of how to calculate that date was "substantially similar," despite the Board's commentary language specifying that the date be included. Or a court might well regard a form without either the notation "cut here" and the dashed line as substantially similar to the Board's form, despite the Board's considered judgment that those demarcations are important to signal the difference between the acknowledgment and the cancellation sections and to remind consumers exercising their right to cancel to retain the top part of the form, the notice of their rights.

Creditors can avoid all litigation risk easily by using standard forms; the Board should not undermine the utility of standard forms based on consumer testing by permitting endless variations.

The Proposed Changes to the Material Disclosures Undermine TILA.

The Board proposes to add several disclosures to the list of material disclosures and to add additional tolerances. Several of the disclosures the Board proposes to add—the interest rate and the total settlement charges, for example—likely obscure TILA's core price disclosures, the APR and the finance charge.

In this age of computerization, there is virtually no need for tolerances. For example, creditors can easily determine an accurate APR down to any arbitrarily small tolerance. The proposed tolerance for the loan amount makes a mockery out of the very notion that the disclosures comport with the legal obligation: a creditor will know, down to the dollar, what the loan amount is at the time of disclosure. Creditors are already complying with RESPA requirements that remove most tolerances from the settlement charge disclosures for closed-end mortgages; creditors can determine the actual cost of the loan sufficiently in advance of closing to produce accurate disclosures.

Adding tolerances encourages sloppy disclosures and reduces the utility of TILA's disclosure regime. The Board's decision to import the existing finance charge closed-end tolerances into the HELOC disclosures and the new closed-end material disclosures (the settlement charges, loan amount, prepayment penalty, and monthly payment amount) is particularly troubling in light of the Board's failure to set a lower threshold for tolerances in the context of foreclosure. As the Board notes, all of these disclosures will be for a lower amount than the finance charge disclosure, yet the Board sets the proposed tolerance at the same level required for an affirmative case for the much-larger finance charge and fails to hold creditors seeking to foreclose to a higher standard. For many of these disclosures, the proposed minimum tolerance of $100 guts the disclosures of any utility whatsoever. For example, according to the American Housing Survey, the median monthly mortgage payment in 2007 was $878.

The proposed $100 tolerance would allow lenders to underdisclose known payments by over 11%, enough to break the budget of many low- and moderate income families. The closed-end tolerances, with their lower dollar limit in the foreclosure context, were the result of political compromise. The Board should not substitute its judgment for Congress's. Similarly, the Board should not index tolerances; creditors should be encouraged to produce ever more accurate disclosures.

As the Board Recognizes, Servicers Act as Agents
for the Current Holder of the Loan When They Accept Rescission Notices.

Servicers are the face of the holders to homeowners. Few, if any homeowners, even after the enactment of 15 U.S.C. § 1641(g), have any knowledge as to who the current holder is. But all homeowners will know the servicer. Servicers act on behalf of the holders of the loans every day in accepting and processing payments. It is appropriate that they be recognized as agents of the holders for purposes of rescission. Additionally, the Board is correct to mandate consistency of the treatment of HELOCs and closed-end loans in this context.

The Board's proposed regulation § 226.41 is a welcome step in the right direction, but a "reasonable time" should be defined. At the outside, servicers should be given no more than the 30 days they are now afforded under Dodd-Frank to respond to qualified written requests under RESPA.

The Board Should Refine the Model Notice
for Same-Creditor Refinancing Transactions.

The Board's proposed notice for same-creditor refinancing transactions warns, "You will still owe us your previous balance [if you cancel the new transaction], and we will have the right to take your home if you do not repay that money." This untested statement is considerably more draconian than the current language ("Your home is the security for that amount") and seems likely to dissuade homeowners from exercising even their 3-day right of rescission. The Board should withdraw this language in the absence of evidence that consumers are not unduly deterred from exercising their right of rescission by it.

Thank you for your consideration of our comments. We hope that as you finalize the rule you will consider the importance of TILA in protecting homeownership.

Sincerely,

Karen E. Brown, Director
Home Defense Program of the
Atlanta Legal Aid Society