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July 11, 2011

Board of Governors of the Federal Reserve System
ATTN: Jennifer J. Johnson, Secretary
Via E-Mail: regs.comments@federalreserve.gov

Re: **Proposed Regulation Z/Truth in Lending Rules**
Docket No.: R-1417
RIN No.: 7100-AD75

Dear Secretary Johnson,

Several years ago, in many eyes, our nation began a downward economic spiral. It was, and is, the popular viewpoint that our nation's mortgage and real estate woes that are the source of this issue. I have been closely involved in the legal real estate industry, both on the front end with loan originations, as well as litigating issues on the back end of loans. I would like to respectfully submit a few comments to the above referenced proposed rule changes, and offer my perspective as to how they impact the industry from my point of view. The proposed rule seeks to expand the scope of the Dodd-Frank Act[1] (the "Act") to cover any consumer credit transaction secured by a dwelling, and also seeks to extend the statute of limitations for violations thereof. I would like to walk through my initial reading of these proposed rule changes, and offer opinions as I move through them.

A. Defining a "Dwelling."

As it currently stands, the Act applies a very reasonable standard to mortgage loan originators; they cannot originate a loan without a good faith effort to ascertain that a mortgagor will be able to repay the loan. The exceptions to this plan consist of open-ended credit plans, timeshare plans, reverse mortgages, or temporary loans. This proposed rule seeks to add any consumer credit transaction secured by a "dwelling" to the covered loan types. The Act provides for a somewhat vague definition for this term. "The term "dwelling" means a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives."[2] I feel this definition is vague and

[1] 15 U.S.C. 1639(c), also known as the Dodd-Frank Wall Street Reform and Consumer Protection Act
[2] 15 U.S.C. 1602(v)

overbroad, and could lead to the Board perhaps exceeding the scope of its authority at some point in the future. For example, the IRS defines a "home" as, "a house, apartment, condominium, mobile home, or boat. It also includes structures on the property, such as an unattached garage, studio, barn, or greenhouse."[3] While house, apartment, condominium, or mobile homes should fall squarely within the scope of these rules, what about boats? Even Black's Law Dictionary does not contain a definition for "dwelling." It is common knowledge that many who own large enough vessels do indeed take advantage of tax deductions from their use as either a "primary" or "secondary" residence, despite this not actually being the case. Further, any vessel with a net weight over 5 tons cannot even technically be secured by a standard promissory note and security agreement. Rather, it must be secured by a preferred ship mortgage, even in the cases of large pleasure craft.[4] Are these vessels, even when not intended as a residence at all, to be covered by your administrative implementations of the Act?

This begs the question, whom, or what, do you intend to exercise authority over? It can hardly be argued that those citizens with the disposable income sufficient to buy such vessels would need protection from the "abusive creditor." While there is a large cadre of citizens who actually use vessels as residences, and are entitled to the same mortgage protections their landlocked brethren enjoy, there still seems to be obvious gap of vagueness. I do not feel this vagueness is purposeful. In the absence of a prefaced definition, however, I feel that this will result in Court intervention to provide that definition to us. Court intervention requires a controversy and harm. This seems like rather unnecessary expenditures of time, energy, and funds that can be easily avoided by simple fixes on the front end. Subsequently, I respectfully request the addition of a caveat-type definition with regard to the expansion of these borrower protections. I see that, later in your proposed rule changes, you express the intent to extend this to non-owner occupied properties, and indeed this can be incorporated nicely into a well worded definition of "dwelling." My proposed definition would state, "Dwelling is defined as any structure and or property, real or personal, where the primary use is lawful occupancy by a consumer, regardless of legal ownership." I understand that perhaps this may cause some fear of limiting application, but remember the definition just states that the residence's primary purpose must be for occupation and inhabitance, not whether it is actually occurring. I myself know of a house that is owned by a gentleman that is still up to local building codes, despite its actual usage as a private paintball arena. When

[3] IRS Publication 587
[4] Pursuant to US Naval Documentation Center Website, hyperlink: http://www.uscg.mil/hq/cg5/nvdc/nvdcfaq.asp#02

considering my suggestion, ask yourself this; Are those who can afford multiple residences honestly a risk of "inability to repay?"

B. Rebuttable Presumption of Compliance versus Safe Harbor

The Act allows for a consumer to assert a violation of TILA Section 129C(a) as a defense to foreclosure. The Board's proposal seeks to introduce some alternatives and definitions of what a creditor's duties may be when originating a loan, apparently in an effort to assuage fears of overly cautious lenders not making loans, thus further stagnating our economy. The Act states, in a basic sense, that creditors must make a good faith effort to ascertain that a consumer will actually be able to repay the loan they are seeking.[5] The Board is unsure as to whether compliance with these standards by a creditor will act as a safe harbor or rebuttable presumption in the event of litigation to this effect. I am confused by the two alternatives the Board proposes. The first alternative operates as a legal safe harbor, and defines a qualified mortgage a mortgage in which: (A) The loan does not contain negative amortization, interest only payments, balloon payments, nor a loan term longer than thirty (30) years, (B) the total fees, points, etc do not run over 3% of the total loan amount, (C) the person seeking the loan has their income and assets verified and documented, and (D) the underwriting of the loan is (1) based on the maximum interest rate in the first five years, (3) uses a payment schedule that fully amortizes the loan over the term provided, and (3) takes into account the ancillary obligations associated with a loan (such as PMI, taxes, insurance, etc.). [6] This seems to be an inherently reasonable standard which, to be honest, should have been expected of all mortgage providers in the last generation. However, you propose a second alternative which only operates as a rebuttable presumption in the event of litigation. This alternative proposes compliance with all of the above, however provides for additional underwriting requirements, namely "(1) consumer employment status, (2) the monthly payment for any simultaneous loan, (3) the consumer's current debt obligations, (4) the total debt-to-income ratio or residual income, and (5) the consumer's credit history."[7]

Herein is where my confusion lies. Why would an agency propose a stricter compliance requirement that rewards with decreased legal protection? It seems to me that there was perhaps some influence on this alternative by the consumer rights legal industry. I

[5] TILA §129B(a)(s); 15 U.S.C. 1639b(a)(2)
[6] 76 FR No. 91, at 27390-27391
[7] Id. at 23791

cannot know, as I have not been at any of the public hearings which may or may not have taken place.

In the event that either of these proposals were to take effect, however, I wish to request that the safe harbor and rebuttable presumption requirements be switched. It makes more sense to offer more protection for more compliance, does it not? The reverse seems to result in absurd implementation across the nation. It is well settled that, when one reads a statute or rule for its plain meaning, said meaning cannot result in an illogical absurdity. .[8] So, why not make your original first qualified mortgage option the option which would only deliver a rebuttable presumption and your second that which offers safe harbor. It seems that perhaps BOTH alternatives could be implemented should suggestion be made. It would allow for creditors to choose their level of acceptable risk, thus permitting some degree of freedom to remain in the mortgage origination market. Congruously, it would create a pathway whereby creditors can reduce their back-end litigation risks, but also leave avenues whereby consumer advocates can pursue those creditors do not "cross their T's and dot their I's."

C. Statute of Limitations and Damages, Generally

I have one final comment on a section of the proposal, specifically that which requires, under the Act, the change in Regulation Z to require creditors to retain evidence of compliance for three years after origination, an increase from the previous two year requirement. I do not harbor any ill-feelings towards this requirement, it just seems substantially redundant and pointless to me. For example, the Federal Rules of Civil Procedure require retention of documents in anticipation of litigation. It is fairly well settled, at least on a federal level, that the expiration of a statute of limitations does not provide a basis for objecting to production of a particular document connected thereto.[9] One would hope principles in equity will settle this debate at later date, as it appears that a consumer could be aware of a possible violation at loan origination, live in a home for one day less than three years, then suddenly rescind the contract and use the violation as a defense against the ensuing foreclosure action. Their damages would be, among others, the amounts they had paid over the prior three years. Unclean hands or laches, save us from the anarchy!

[8] *The Absurdity Doctrine, Harvard Law Review*, John F. Manning, Vol.116, #8, June, 2003, pp. 2387-2486

[9] Frasier v. Twentieth Century-Fox Film Corp., 119 F.Supp. 495 (D.C. Neb. 1954), See also., e.g. FRCP 34, et seq.

In conclusion, I appreciate and thank you for the opportunity to have presented my thoughts on a few issues which arose in my reading of your proposed rule changes. I truly believe that the Consumer Financial Protection Board has our nation's best interests at heart when they enact further rules in the future. I hope that the Board maintains the mindset that has guided our nation well up to now; that being the notion that general principles of equity form the basis of all law, be it legislative, judicial, or administrative. I hope the Board will apply those principles of equity in an equitable manner, and to please not forget the creditors, who are so often the brunt of public, legislative, and administrative malice.

Very Truly Yours,

J. Todd

CC: Professor Phillip Sparkes, NKU Chase College of Law