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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 on Truth-in-Lending Rescission
FRB Docket No. R-1390

Dear Ms. Johnson:

I write on behalf of my clients, low-income homeowners. I represent homeowners in the greater Newark, New Jersey area, who have been victims of myriad predatory lending and other fraudulent practices in connection with foreclosures. I thank the Federal Reserve Board for this opportunity to comment, and respectfully request that the Board protect the right of rescission, one of the few tools available to preserve homeownership. If adopted as proposed, the rule will reduce compliance by creditors, increase litigation expense for homeowners, and reduce the utility of TILA.

Creditors and Assignees Must Be Required to Release the Lien on the Home Before the Homeowner Is Required to Tender.

TILA's statutory scheme mandates that the lien be voided upon rescission. Voiding the lien does not remove the debt obligation; homeowners must still repay the debt (or tender the amount owed). Voiding the lien does however protect the home and preserve homeownership. The Board proposes to make the statutory scheme that has existed since 1968 a nullity at precisely the moment in time when foreclosures are at an all-time high and the need for the protection afforded by TIL rescission has never been greater.

Automatic voiding of the lien is critical to halt foreclosures. It is the security interest that gives the right to the creditor to foreclose. When the security interest is automatically voided, the creditor cannot proceed with the foreclosure until a court determines the validity of the homeowner's rescission notice. TILA damage claims are not deemed germane counterclaims in every state, nor are they, by themselves, enough always to defeat foreclosure. Only rescission and its automatic voiding of the lien give the homeowner the chance for her day in court.

The Board further proposes to invert the statutory ordering of rescission in 15 U.S.C. § 1635(b) and require the homeowner to tender before the creditor releases the lien. This would be a reversion to the ordering scheme under common-law rescission rules. In reverting to the common law order and abandoning the statutory order for tender, doing so, the Board will make it impossible for many homeowners to exercise their right to rescind. The statutory order of cancellation of the security interest followed by tender is critical in providing the homeowner with the opportunity to secure refinancing and the leverage necessary for negotiating loan modifications or other forms of tender that leave the lien intact. For those homeowners who tender via refinancing, such tender is impossible without release of the security interest. Many lenders will not even consider an application for refinancing while the home is in foreclosure. Automatic voiding of the lien allows the loan to be removed from foreclosure while the parties negotiate the terms of tender. The Board compounds this problem by proposing to allow creditors 20 days after tender to release the lien. Proposed Reg. Z. §§ 226.23(d)(2)(i)(D), 226.23(d)(2)(ii)(B). Prospective creditors are unlikely to agree to fund a tender if release of the existing mortgage is delayed 20 days or more after funding, since their priority will remain uncertain until release of the lien. Nor will homeowners be able to arrange a sale to fund the tender, as several courts have permitted, since, again, few purchasers will be willing to pay the full price without transfer of title.

The release of the creditor's security interest gives homeowners essential leverage in negotiating alternative forms of tender, particularly loan modifications. In general, lenders agree to tender via loan modification because it allows them to retain a security interest in the property. Under the Board's proposal, the incentive for lenders to agree to tender via loan modification is removed, and the litigation hurdles to obtaining a loan modification made higher. The Board's proposal will render most forms of tender, whether by refinancing, sale, or loan modification, unobtainable. This is an extreme result, not in accord with the majority rule in most states. This exercise of the Board's exception authority neither serves the purposes of TILA nor facilitates compliance with TILA, but encourages circumvention of TILA.

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 under disclose 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 of the current holder's identity. 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 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 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.

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 many 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 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.

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

Very truly yours,

Linda E. Fisher