

---

## ***CONSUMER MORTGAGE COALITION***

---

January 18, 2010

Ms. Jennifer J. Johnson  
Secretary, Board of Governors of the  
Federal Reserve System  
20<sup>th</sup> Street & Constitution Avenue, N.W.  
Washington, DC 20551

Re: Docket No. R-1378; Truth in Lending Act Regulations

Dear Ms. Johnson:

The Consumer Mortgage Coalition (CMC), a trade association of national mortgage lenders, servicers and service providers, appreciates the opportunity to submit comments to the Board of Governors of the Federal Reserve System (Board) on the interim final rule (Interim Rule).<sup>1</sup> This Interim Rule implements § 131(g) of the Truth in Lending Act (TILA), enacted on May 20, 2009 as § 404(a) of the Helping Families Save Their Homes Act, to require notices of transfer of a consumer mortgage loan.

The CMC appreciates that the Board has provided guidance to creditors and other participants in the mortgage industry on how to comply with § 131(g) to provide meaningful information to consumers while preventing confusing disclosures. The CMC supports the rule, however we request that the Board reconsider its guidance in some ways.

As we discuss below, our primary concern with the interim final rule is that it requires the identification of an agent or person authorized to receive “legal notices” but does not define the term “legal notices.” Consistent with the legislative history of § 131(g), we recommend that this requirement be revised to require the identification of an agent or person authorized to receive “rescission and modification requests.” Furthermore, if the owner has not authorized the servicer or any other any agent or person to receive rescission and/or modification requests, the owner should be required to state on the transfer notice that such requests should be directed to the owner. This would satisfy the congressional intent that the owner or someone designated by the owner should be responsible for responding to a consumer’s rescission or modification request and that the consumer should know who he or she should contact with such requests.

---

<sup>1</sup> 74 Fed. Reg. 60143 (November 20, 2009).

## Background

Senator Boxer sponsored § 131(g) in reaction to a case in which consumers were unable to rescind a loan because their servicer misled them about who owned their loan. By the time the consumers learned who the owner was, their rescission was time-barred.<sup>2</sup>

The legislative history is important in this rulemaking because the language of § 131(g), taken out of context, is unclear and arguably could require that consumers be given notice that could cause them to misdirect their rescission and modification inquiries. We believe the Board should craft its final rule to assist consumers in exercising their rescission rights and in seeking loan modifications to prevent unnecessary foreclosures, as Congress intended.

Section 131(g) reads:

(g) NOTICE OF NEW CREDITOR.—

(1) IN GENERAL.—In addition to other disclosures required by this title, not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including—

- (A) the identity, address, telephone number of the new creditor;
- (B) the date of transfer;
- (C) how to reach an agent or party having authority to act on behalf of the new creditor;
- (D) the location of the place where transfer of ownership of the debt is recorded; and
- (E) any other relevant information regarding the new creditor.

(2) DEFINITION.—As used in this subsection, the term ‘mortgage loan’ means any consumer credit transaction that is secured by the principal dwelling of a consumer.

This provision is drafted on the seeming assumption that the owners of loans are in a position to effect loan rescissions or loan modifications in response to individual consumer requests. In fact,

---

<sup>2</sup> As Senator Boxer stated:

I want to give you the example of James and Mary Meyers, who took out a high-rate home loan with Argent Mortgage in 2004. Because the loan violated the truth-in-lending laws, they later attempted to exercise their Federal rights to cancel the loan. But the servicer, who happened to be Countrywide at the time, refused to identify who owned the loan. So by the time the Meyers discovered that the current noteholder was Deutsche Bank, the deadline for canceling the loan had passed. The court dismissed the Meyers’ claim, even though it found that there were grounds, legitimately, for the Meyers to cancel the loan. . . . This amendment only provides transparency and gives borrowers an additional tool to fight illegitimate foreclosures or to negotiate loan modifications that would keep them in their homes.

155 Cong. Rec. S5098-99 (daily ed. May 5, 2009). In the case Senator Boxer mentioned, *In re Meyer*, 379 B.R. 529 (E.D. Pa. 2007), the court found that the servicer caused the borrower to believe that the servicer owned the loan. “The identity of the holder of the loan was absolutely critical (i.e., material) to the Plaintiffs’ exercise of their rescission right. From Countrywide’s choice of phrasing in its March 30 letter, one would conclude that it both owned and serviced the loan.” *Id.* at 553. The court did, however, find that the servicer could be liable for damages for preventing the rescission. “But for purposes of a damage claim arising out of the attempt to rescind, the Court finds evidence sufficient to estop Countrywide from denying that it is a creditor in this context.” *Id.* at 554.

mortgage investors are very often not able to handle receipt of a number of consumer inquiries, let alone be able to respond to individual consumer inquiries. Investors may not have call centers, they are not staffed to handle consumer inquiries on a timely basis, they rarely if ever have detailed histories of individual loans, and they may not even be in this country, let alone be regulated in this country.

We suggest below how the Board may implement the goal of assisting consumers.

### **Agent or Party Having Authority to Act**

Section 131(g) requires notice to consumers identifying the “new creditor” (which the Interim Rule terms “covered person”) of their loan. It further requires that transfer notices identify to consumers “how to reach an agent or party having authority to act on behalf of” the new owner. Congress did not define the term “having authority to act,” and seems to have equated legal authority to act with actual ability to receive and respond timely and appropriately to numerous individual consumer rescission or modification inquiries. The Interim Rule provides that transfer notices must:

identify a person (or persons) authorized to receive legal notices on behalf of the covered person and resolve issues concerning the consumer’s payments on the loan.<sup>3</sup>

We discuss below three concerns about this provision, then we suggest a solution that would assist consumers in exercising their rights.

### ***“Authorized To Receive Legal Notices” Is Not Defined***

We are concerned that § 226.39(d)(3) does not define what it means to be “authorized to receive legal notices” for a loan investor. A great many different types of notices can be construed as “legal.” A party authorized to accept service of legal process, for example, may be “authorized to receive legal notices.” However, the rules for serving legal process vary by type of action as well as by jurisdiction. Would the party authorized to receive legal notices, as included in a consumer disclosure, vary by jurisdiction? Would the party identified in the transfer notice vary by the type of notice a consumer might wish to send? Would transfer notices need to identify every party authorized to receive each conceivable type of consumer communication or legal process? To incorporate the varied and arcane rules about service of legal process into a consumer disclosure would cause great confusion.

The purpose of § 131(g) is not to let consumers know how to serve legal process, and we do not believe the Board has identified inability to serve legal process as a problem. Nor is the purpose to let consumers know who they should contact for every possible question they may one day have about every aspect of their loans. The purpose of § 131(g) is to help consumers exercise rescission rights and to seek loan modifications to prevent unnecessary foreclosures.

---

<sup>3</sup> 12 C.F.R. § 226.39(d)(3).

### *Consumers Should Not Be Required To Figure Out Which Party To Contact*

If there are multiple persons authorized to receive legal notices and resolve payment issues, the Interim Rule requires that the transfer notice:

shall provide contact information for each and indicate the extent to which the authority of each agent differs.<sup>4</sup>

If a transfer notice lists a number of contacts and indicates “the extent to which” they have authority, consumers will need to figure out which type of authority might cover the type of question they may have. If contact information need only be provided for rescission, modification and servicing inquiries, then it should not be difficult for consumers to determine what type of inquiry they have and direct it to the appropriate contact. However, if contacts must be provided for all “legal notices,” then it will be difficult for consumers to make this determination.

We are concerned that disclosing multiple contacts for many different purposes, and requiring consumers to figure out which is appropriate, would increase the risk that consumers may believe they should contact the wrong party. This would be exactly the result Senator Boxer wants to prevent.

### *Consumers Should Be Directed To Those Who Can Assist Them*

We are very concerned that many agents authorized to accept service of process or to receive legal notices – no matter how the terms may be defined – are not equipped to handle and respond to individual consumer inquiries.

The purpose of § 131(g) is to help consumers exercise rescission rights and to seek loan modifications to prevent unnecessary foreclosures. We do not believe that requiring notices that direct consumers to parties who may not be able to assist them would meet the intent of § 131(g). Rather, we believe the Board should implement Congressional intent by requiring transfer notices to direct consumers to those in a position to assist them with rescission or modification requests.

**As the intent is to let consumers know how to exercise rescission rights or seek a modification, we suggest that transfer notices disclose who the consumer should contact to do so.**

For all of these reasons, we recommend that the Board construe the phrase “how to reach an agent or party having authority to act on behalf of the new creditor” in § 131(g)(1)(C) to mean the servicer or other party who the owner has authorized to handle rescission or modification requests. Only when the owner has not authorized the servicer or another party to handle rescission or modification requests should a transfer notice direct a consumer to contact the

---

<sup>4</sup> 12 C.F.R. § 226.39(d)(3).

owner. We believe that this is consistent with the current requirements of the interim rule (assuming that the reference to “legal notices” will be construed as reference to “rescission and modification requests”). §226.39(d)(3) of the regulation and comment 39(d)(3)-1 state that an owner need not designate an agent or other party to receive such requests if the consumer can use the owner’s contact information provided under paragraph (d)(1) of §226.39 for these purposes. However, these provisions do not explicitly require the owner to disclose to the consumer that such requests should be directed to the owner if the owner has not authorized the servicer or another party to handle such requests. We recommend that this requirement be added. By requiring owners to make such a disclosure, each owner would either have to authorize the servicer or another party to handle such requests, or inform consumers that the owner is responsible for handling such requests itself.

In this way, transfer notices will disclose who owns a loan, as well as the owner’s address and telephone number, as required by § 131(g)(A). At the same time, consumers will clearly know to whom they should direct their rescission and modification requests. This would be the fullest implementation of Congressional intent.

If the Board requires transfer notices to mention rescission rights, it should permit the notices to state that rescission may not be available, and that delivery of the notice does not imply rescission is available. We also recommend that no mention of rescission should be required in a transfer notice provided more than three years after loan consummation because any extended right to rescind would have expired.

### **The Definition of “Covered Person”**

TILA imposes a number of requirements on “creditors.” Section § 131(g) also uses the term creditor, imposing a duty to deliver transfer notices on “the creditor that is the new owner or assignee of the debt.” We support the Board’s clarification in the Interim Rule that § 131(g) does not make a loan’s assignee a “creditor” for purposes of TILA other than § 131(g). The Board’s distinction between “creditor” and “covered person” clearly implements Congressional intent.

Section 226.39(a)(1) of the Interim Rule defines a “covered person,” and the Board’s interim final Official Staff Commentary on Regulation Z at 226.39(a)(1)-1 clarifies the definition. CMC suggests additional clarifications with respect to nominees and corporate reorganizations and asset sales.

#### ***Nominees***

We request confirmation that the definition of “covered person” does not extend to a person that holds an interest in a mortgage loan simply as a nominee for the person that actually acquired legal title to the debt obligation. For example, and not by way of limitation, please confirm that the Mortgage Electronic Registration Systems (MERS) is not a “covered person” because MERS does not acquire ownership of mortgage loans.

#### ***Corporate Reorganizations and Asset Sales***

Comment 226.39(a)(1)-4 provides guidance with respect to, “Mergers, corporate acquisitions or reorganizations” and requires that disclosures be given if, “ownership of a mortgage loan is transferred to a different legal entity.” CMC suggests that no transfer notices should be required when neither the name of nor the contact information for the covered person changes. For example, suppose a mortgage investor reincorporates in a different state, without changing its name or contact information. Once reincorporated, it would seem to be a different legal entity within the meaning of Comment 226.39(a)(1)-4.

If this company were required to send transfer notices, it would send notices to consumers alerting them to a change, but then redisclose the same information the company had disclosed to the consumers earlier. This would be confusing and unnecessary, and should not be required. Consumers normally do not have any reason to wonder or care where a mortgage investor is incorporated, and especially so when there is no change in the investor’s contact information. In this case, risk of consumer confusion is high, while benefit to consumers is absent. We believe a transfer notice in this circumstance should not be required.

Finally, in some corporate reorganizations or asset sales, especially one arising out of a bank takeover and asset sale where there may not be much prior notice, we request that the Board use its authority in TILA § 105(a) to make adjustments and exceptions to facilitate compliance, to provide additional time for acquirors taking reasonable steps to produce and deliver transfer notices. We believe a reasonable amount of time for compliance would reduce the chance of a consumer receiving an unintentionally erroneous transfer notice.

## **Exceptions to the Definition of Covered Person**

### ***Former Owners***

CMC supports the Board’s guidance in § 226.39(c)(1) that a covered person does not need to deliver a transfer notice if the covered person sells, transfers, or assigns a loan within 30 days of acquiring it. The intent of § 131(g) is to help consumers exercise rescission rights and to seek loan modifications to prevent unnecessary foreclosures. The law is not designed to inform consumers about who does *not* own their loans. Former owners have no ability to assist a consumer with a rescission or modification request.

Quite the opposite, disclosure to consumers about who does not own their loans would likely confuse consumers, and would increase the risk that a consumer will contact the incorrect party. Disclosing former owners would have a high risk of consumer confusion and misinformation, and would not benefit consumers. We therefore support this guidance.

### ***Repurchase Agreements***

We also support the Board’s guidance in § 226.39(c)(2) that a transfer notice is not required in the case of a repurchase agreement when the transferor that is obligated to repurchase the loan continues to recognize the loan as an asset on its own books and records. Repurchase transactions are, in economic and practical effect, loans and not sales. We can imagine no reason why a consumer would benefit from learning when a mortgage investor borrows, as it would have no impact on the consumer or on the consumer’s rights. To require a transfer notice in this instance would tend to cause consumers to believe something significant has occurred when

nothing has. It is another circumstance where disclosure has high risk of confusing consumers, and little or no consumer benefit. We therefore support this guidance as well.

While the exception clearly indicates that no transfer notice is required at the time a repurchase agreement is entered into, it does not explicitly state that no transfer notice is required at the time of repurchase. We request that Comment 226.39(c)(2)-1 state that transfer notices are not required when the party obligated to repurchase the loans makes the repurchase.

## **Ginnie Mae**

We request clarification about Ginnie Mae loans. The Board states that § 226.39 does not apply to Ginnie Mae until Ginnie Mae finds the issuer in default and acquires legal title to the loan.<sup>5</sup> We note that the Board has received a legal opinion from the Department of Housing and Urban Development (HUD) stating that Ginnie Mae obtains equitable title while the “issuer” retains legal title to the loans underlying a Ginnie Mae security.<sup>6</sup>

We request a clarification in the final rule that, as to loans in a securitization that Ginnie Mae guarantees, the “creditor that is the new owner or assignee of the debt” within the meaning of TILA § 131(g)(1) is the same party that HUD and Ginnie Mae deem to be the “issuer,” and is also the “covered person” within the meaning of § 226.39(a)(1). We believe Ginnie Mae investors and servicers need a clear requirement about who must send transfer notices and under what circumstances. We do not believe it would be appropriate to impose on consumers the hypertechnical complexities about the types of title involved in a Ginnie Mae securitization.

When servicing rights to Ginnie Mae loans are sold, the new servicer becomes the new “issuer” in Ginnie Mae terminology. While a transfer of servicing rights does not normally require the § 226.39 transfer notice, we agree with the Board that in Ginnie Mae transactions the assignment of issuer status should be the transfer that requires a notice under § 226.39. Therefore, when Ginnie Mae issuer status is assigned to a servicer, the servicer would be required to provide a transfer notice. We request the Board’s confirmation that if the servicer later “repurchases” a loan from a Ginnie Mae securitization, no transfer notice is required because HUD believes there is no title transfer. There would be no new information to give a consumer in this event.

## **Content of Required Disclosures**

### ***Identification of the Loan***

Section 226.39(d) requires a covered person to, “identify the loan that was acquired or transferred.” Comment 226.39(d)-1 states that the, “covered person has flexibility in determining what information to provide” and then goes on to provide examples, such as the property address and loan account number, or credit date and original loan amount.

Only vary rarely would consumers simultaneously have so many mortgage loans on a principal residence that there is a risk of confusing the loans. We believe it is best not to require mailing

---

<sup>5</sup> 74 Fed. Reg. 60143, 60146 (November 30, 2009).

<sup>6</sup> *Id.*

sensitive information where there is not adequate reason to do so. In this instance, the risks of mailing sensitive information outweigh any benefit.

CMC therefore suggests that the Board clarify that the account number alone (or other identification number earlier provided to the consumer) is adequate to identify the loan for purposes of the Interim Rule, and that it is not necessary to combine the account number with any other identifying information.

### ***Optional Disclosures***

CMC supports the Board's guidance in § 226.39(e) and in Comment 226.39(e)-1 that transfer notices may contain other information about the mortgage transaction that they consider relevant or helpful to consumers.

We suggest that one of the most helpful disclosures a transfer notice could include would be that the consumer must contact the covered person's designated agent for all reasons and that the consumer cannot contact the covered person. Mortgage investors may not be equipped with a call center capable of receiving, let alone handling and responding to, a stream of consumer inquiries. Rather, investors designate servicers for this purpose.

It would be inappropriate to cause consumers to believe that attempting to communicate with the investor would somehow help them resolve questions about their loans. This would cause exactly the opposite result that Congress intended transfer notices to accomplish. To implement Congressional intent and to serve consumers, transfer notices should identify the party most able to assist consumers.

We request clarification that transfer notices may be combined with other materials or disclosures unless prohibited by law, including but not limited to notices of mortgage servicing transfers required by § 3500.21 of Regulation X.

### **Conclusion**

We appreciate guidance from the Board in implementing § 131(g), an important but potentially confusing statutory provision. We urge the Board to implement this provision to ensure that transfer notices cause consumers to communicate with those in a position to assist them.

Sincerely,



Anne C. Canfield  
Executive Director