Congress of the United States
Washington, DC 20515

December 23, 2010

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

Re: Concerns regarding the Proposed Truth-in-Lending Mortgage Regulations (FRB Docket No. R-1390)

Dear Board of Governors:

We write to express serious concerns about the proposed Truth in Lending Act ("TILA") mortgage regulation in FRB Docket No. R-1390, and, specifically, the proposal to alter the extended right of rescission currently provided in 15 U.S.C. § 1635 and 12 C.F.R. §§ 226.15 and 226.23. As the collateral damage stemming from the collapse of the housing and credit markets continues, the importance of fair and honest lending has never been so apparent. As you know, these market collapses were triggered by years of reckless and predatory lending activities and un- and misinformed borrowing by consumers. Recent reports of widespread flaws and fraud in the mortgage and foreclosure servicing industry indicates that lenders and creditors have not learned from their past mistakes and misbehavior. This is not a time to weaken consumer protections or lessen creditor accountability and therefore, I urge the Board of Governors to reconsider the rescission proposal contained in FRB Docket No. R-1390.

Congress enacted the Truth in Lending Act as a part of the broader Consumer Credit Protection Act in 1968.[1] The purpose of the Consumer Credit Protection Act was to "provide the American consumer with truth-in-lending and truth-in-advertising by providing full disclosure of the terms and conditions of finance charges both in credit transactions and in offers to extend credit."[2] More broadly, the Consumer Credit Protection Act was "urgently needed" to "close an important gap in consumer information" and "protect legitimate lenders against competitors who misrepresent credit costs."[3]

The Truth-in-Lending Act (TILA) was enacted as Title I of the Consumer Credit Protection Act to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him [or her] and avoid the

---

[1] Pub. L. No. 90—321 (Title I § 104); 82 Stat. 146 (May 29, 2968), *codified at* 15 U.S.C § 1601.
[2] H.Rept. 1040, 90th Congress, 2nd Session, (1967), reprinted in 2 USCCAN 1962 (1969).
[3] Id. at 1965, citing *Message from the President of the United States transmitting recommendations for consumer protection in the fields of credit, investments, health, meat inspection, hazards in the home, electric power reliability, and natural gas pipeline safety*, H. Doc. No. 57, 90th Cong., 1st Sess. 3-4.

uninformed use of credit."[4] TILA requires creditors to disclose to consumers certain information relevant to the transaction in question, including finance charges, interest rates, and in the context of certain transactions, including the extension of a home equity line of credit, the right of rescission and appropriate forms for the exercise of that right.

Section 1635(a) of TILA sets forth the right of a consumer to rescind a commercial transaction within the first three days following the finalization of the transaction, and extends the right for up to three years if the creditor fails to make all material disclosures, including notifying the consumer of the right to rescind. When the consumer exercises his or her right of rescission under § 1635, the statute provides that the consumer is no longer liable for any finance or other charge, *and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such rescission*. Section 1635(b) sets forth the parties' obligations once a consumer rescinds the transaction: within 20 days of receiving the borrower's notice of rescission, the creditor is required to return any earnest money paid by the borrower, and take any action necessary or appropriate to reflect the termination of any security interest under the transaction; and "upon the performance of the creditor's obligations under this section, the obligor shall tender the property [or its reasonable value] to the creditor."[5]

The sequence of the parties' obligations set forth in § 1635 is a departure from common law rescission rules.[6] Under common law rescission, the borrower, or rescinding party, is required to tender the property or its reasonable value before the creditor is required to void its security interest.[7] Under TILA, however, the borrower only needs to inform the creditor of his or her intent to rescind and the agreement is automatically rescinded. Thus, § 1635 of TILA places the consumer in a much stronger bargaining position than he would be in under common law. The right of rescission found in § 1635 and 12 C.F.R. §§ 226.15 and 226.23 "acts as an important enforcement tool, insuring creditor compliance with TILA's disclosure requirements."[8]

The proposed rule in FRB Docket No. R-1390 would alter the important consumer protection scheme set forth under § 1635. Section 1635 of TILA makes clear that a credit transaction and the creditor's security interest become void upon the debtor providing notice of

---

[4] 15 U.S.C. § 1601(a).
[5] 15 U.S.C. § 1635(b)
[6] *See Williams v. Homestake*, 968 F.2d 1137, 1140 (11th Cir. 1992).
[7] *Id.*
[8] *Id.*

his or her intent to rescind. By conditioning the creditor's obligation to release its security interest upon the consumer's tender of the loan balance, the proposal essentially turns § 1635 on its head. Moreover, the provision setting forth the operation of a consumer's right of rescission should be construed as a substantive, not procedural, provision.[9] By conditioning the creditor's obligation to void its security interest on the debtor's tender, the proposal contained in FRB Docket No. R-1390 materially alters the deliberate order set forth in § 1635 of TILA and undermines the substantive rights conferred by the statute.[10]

Secondly, § 1635 is unequivocal in setting forth the order in which the parties are required to perform their obligations after the debtor sends the notice of intent to rescind. If Congress wished for the debtor to tender the money or property before obligating the creditor to take the necessary steps to void its security interest, Congress would not have needed to act. By departing from the common law rescission, Congress made a deliberate choice to shift the rights and obligations of the parties in covered credit transactions.[11] This choice was driven by the underlying purpose of TILA, which is articulated best in the title of the broader bill, the Consumer Credit Protection Act. Congress crafted the process for rescission found in § 1635 to *protect consumers*.

One of the rationales for the proposed rule is the complication that arises when the debtor provides a notice of rescission after the initial three-day business period. In that case, the transaction has already commenced and the creditor may be concerned that the debtor will not tender.

It is true that under common law, one of the purposes of rescission is to restore the parties to their original positions before the transaction occurred. Moreover, there is little disputing that Congress intended for the debtor to fulfill its obligation to tender. However, in drafting § 1635 of TILA, Congress made an affirmative decision to depart from common law rescission. The clear language of the statute voids the creditor's security interest upon the debtor providing

---

[9] *See Williams v. BankOne*, 291 B.R. 636, 659 (finding that, as § 1635 is written, when an obligor exercises his right to rescind, any security interest given by the obligor becomes void upon rescission; no additional steps are required to effect these results, and such, is a substantive right granted by the statute) (citing *Semar v. Platte Valley Federal Savings & Loan Association*, 791 F.2d 699, 705-06 & n.15 (9th Cir. 1986).

[10] *Id.*

[11] *Id.* at 658 (finding nothing to suggest that Congress acted other than intentionally in fashioning rescission in the manner contained in § 1635); *see also South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 351 ("We assume that Congress is aware of existing law when it passes legislation").

notice of rescission, notwithstanding the debtor's obligation to tender and notwithstanding whether the right of rescission is being exercised within three days or three years of the transaction. The Board should assume that Congress anticipated the complications that may arise in extended rescissions and nonetheless deliberately chose to draft the statute in the original form.

The second rationale for the proposed rule is the Board's disbelief "that Congress intended for the creditor to lose its status as a secured creditor if the consumer does not return the loan balance." The plain language of the statute contradicts the Board's assumption. If Congress intended the creditor to keep its status as a secured creditor until the debtor returns the loan balance, Congress could have easily drafted the statute to reflect this intent. Moreover, simply because Congress intends for the creditor to receive the debtor's tender does not mean Congress intended the creditor to remain a secured creditor. The two concepts are similar, but materially different and not interchangeable. Even if the Board has legitimate confusion, it should remember that TILA is a consumer protection law and therefore is required to be construed liberally in favor of the debtor. The Board's proposed rule does just the opposite by protecting creditors over consumers.

The Board may be seeking to provide clarity regarding the last sentence of § 1635(b), which states that "the procedures prescribed by this subsection shall apply except when otherwise ordered by a court." Some courts have interpreted that sentence to allow them to condition a creditor's obligation to void the security interest upon the debtor's tender, particularly in the context of bankruptcy.[12] Those courts found that equity requires such a result if the debtor has not demonstrated his ability to tender. However, even if those courts were correct in finding such authority in that provision, they have proceeded on a case-by-case basis, when the facts and circumstances dictated such action. The proposed rule goes too far by changing the right of rescission permanently and materially altering the parties' rights, obligations, and bargaining positions in all future credit transactions.

Lastly, TILA exists in its current form because Congress felt it was urgent not only to place consumers in stronger bargaining positions relative to creditors, but also to provide important tools to ensure creditor compliance. Congress intended to reward honest lenders and impose costs on unscrupulous and careless lenders because of the costs that their actions impose on the marketplace. Our modern day marketplace has literally collapsed under the weight of

---

[12] *See e.g. id.* at 656.

reckless lending practices. Since 2007, our nation has experienced 2.5 million foreclosures. Currently, four million homeowners are at risk of foreclosure, and millions more are "underwater," owing more on their mortgages than their homes are worth. As noted by numerous experts, the rescission process laid out in C.F.R. § 226.15 and 226.23 is not only a critical tool to enforce the strict disclosure requirements in the Truth in Lending Act, it is the single most effective tool that homeowners have to avoid predatory loans and stop foreclosures that stem from transactions in which lenders failed to make required disclosures.[13] Now is hardly the time to shift compliance responsibilities away from lenders and creditors, and onto consumers.

The Consumer Credit Protection Act and the Truth in Lending Act were intended to protect and inform consumers and ensure creditor compliance. Therefore, we ask that you recognize the underlying purpose and necessity of the right of rescission as set forth by Congress in 15 U.S.C. § 1635, and urge you to reconsider the proposal contained in FRB Docket No. R-1390.

Sincerely,

Elijah E. Cummings
Member of Congress

Dennis J. Kucinich
Member of Congress

Maxine Waters
Member of Congress

Barney Frank
Member of Congress

Jim McDermott
Member of Congress

John Conyers, Jr.
Member of Congress

Brad Miller
Member of Congress

Melvin L. Watt
Member of Congress

[13] Editorial, *The Fed and Foreclosures*, New York Times, Nov. 28, 2010 at http://www.nytimes.com/2010/11/29/

Marcy Kaptur
Member of Congress

Maurice D. Hinchey
Member of Congress

Joe Baca
Member of Congress

John F. Tierney
Member of Congress

Shelley Berkley
Member of Congress

Kathy Castor
Member of Congress

Keith Ellison
Member of Congress