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December 22, 2010

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 three clients who are low-income homeowners: Theresa D. Burnett, Shikita M. Nash-Deruise, and Michelle H. Schellberg. Each of these individuals has an interest in the proposed rule on Truth-in-Lending rescission, because they are currently attempting to exercise their rights to cancel. I thank the Federal Reserve Board for this opportunity to comment on the proposed rule and respectfully request that the rule change be modified.

My law firm, Lone Star Legal Aid, is one of three legal aid programs in Texas funded by the Legal Services Corporation. LSLA has a specialized group in its Houston office, the Home Preservation Unit, and its primary role is to assist consumers in defending against foreclosure. One of the main statutory tools utilized by the Home Preservation Unit involves exercise of Truth-in-Lending rescission rights. As Director of Litigation at LSLA and a Board-certified attorney in consumer law, I oversee the work of the HPU at LSLA.

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

Since 1968, TILA's statutory scheme has mandated that a lien on a homestead be voided upon rescission, as 15 U.S.C. § 1635(b) explicitly states that "[w]hen an obligor exercises his right to rescind . . . , he is not liable for any finance or other charge, and any security interest given by the obligor . . . becomes void . . . ." For decades, Regulation Z construed this to mean that after rescission "the security interest . . . becomes void and the consumer shall not be liable for any amount . . . ." 20 C.F.R. § 226.15(d)(1). Likewise, the Official Commentary held that "[t]he security interest is automatically negated . . . ." Official Staff Commentary on Regulation Z, 15(d), comment 1. In other words, the act of rescission has had the immediate, automatic effect of terminating a security interest in a debtor's homestead or dwelling --- effectively reversing the common law standard requiring tender before termination of a lien. Other than allowing an equitable revision of the two steps *after* automatic termination of the security interest, see last sentence of 15 U.S.C. § 1635(b), Congress has not sought to change make any substantive changes in the rescission process in the past 42 years. Thus, there is strong evidence of legislative intent to support automatic lien termination immediately following rescission.

Automatic voiding of the lien on debtors' homesteads is critical to halt foreclosures. The security interest supplies the legal basis for foreclosure. When the security interest is automatically terminated, the creditor cannot proceed with foreclosure until a court determines the validity of the homeowner's rescission notice. Only rescission and its automatic termination of the lien gives the homeowner an opportunity to challenge foreclosure in court.

In states like Texas with non-judicial foreclosure, where the time frame from notice of sale to foreclosure can be as short as three weeks and homeowners must file suit to halt the foreclosure, automatic termination of the lien allows homeowners access to the courts and provides breathing space to homeowners exercising their rescission rights. In the past year, about a half dozen clients of LSLA, all of whom sought assistance only shortly before scheduled foreclosure sales, have exercised their right to TILA rescission and used this right to stop foreclosures in their tracks, giving these clients time to develop a tender offer. Given the fact that most homeowners seek legal assistance from LSLA *only days before scheduled foreclosure sales*, there is little if any time to develop a tender offer in the absence of automatic termination of the lien.

In this proceeding, the Board proposes to invert the statutory ordering of rescission in 15 U.S.C. § 1635(b) and require homeowners to tender before any effective release or termination of the lien occurs. This amounts to a reversion to the common law rules on rescission which requires tender and payment before release of a lien. In reverting to the common law order and abandoning the statutory order for tender, the Board will make it impossible for many homeowners to exercise their right to rescind, particularly in the context of foreclosure. The statutory order of cancellation of the security interest followed by tender is critical in providing homeowners with the time to secure refinancing, leverage in seeking to negotiate loan modifications, or to develop alternative forms of tender such as the offer of installment notes. Giving homeowners the right to seek court authorization for alternative tender is far more risky, especially given the short amount of time that their lawyers have to

seek court intervention in the foreclosure process in Texas. By contrast, imposing the burden of seeking equitable revision on lenders instead of homeowners is far less burdensome, as they have at least 20 days in which to file such actions.

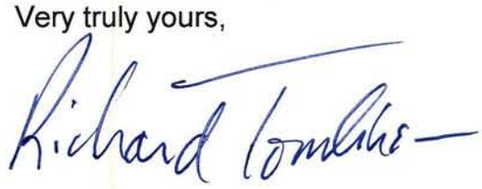
Most importantly, the release of the creditor's security interest gives homeowners essential leverage in negotiating alternative forms of tender, such as loan modifications. Lenders frequently agree to tender through loan modification, because it allows them to retain a security interest in the property. Under the Board's proposal, the incentive for lenders to agree to tender via loan modification is removed, and the litigation hurdles to modification made higher.

In other words, by eliminating automatic termination of liens and reordering the order of tender upon rescission, the Board has made it far more difficult for Texas homeowners to exercise their TILA rescission rights and thereby significantly increased the risk of foreclosure. While this change may have lessened the burdens placed upon lenders, TILA was not passed to protect lenders but to protect consumers. In addition, the elimination of automatic lien termination is in contravention of the apparent intent of Congress set out in the language of Section 1635, the FRB's long-standing construction of that law and Congress' apparent acceptance of the FRB construction. Moreover, in applying common law standards by requiring tender before a lien could be released, the Board would be acting in contravention of the rule accepted in many courts.[1]

[1] The Board misstates the ruling in *Bustamonte v. First Fed. Sav. & Loan Ass'n*, 619 F.2d 360 (5th Cir. 1980) when it suggests the Fifth Circuit held that a consumer must tender the full

Rather than promulgate the proposed rule after receiving comments, the undersigned suggests that the Board would be better served if it held hearings where consumer litigators could give concrete examples of the effect of the proposed changes in the actual foreclosure process. Thank you for your consideration of these comments made on behalf of my clients.

Very truly yours,



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amount in a lump sum. In fact, the court only ruled that the deposit of a few installment payments into the court registry was not a proper tender under 15 U.S.C. § 1635(b), as this did not constitute "tender of loan proceeds as contemplated by the statute . . . ." *Id.* at 362, 365. The Fifth Circuit did *not* rule that a tender of the entire amount of the loan proceeds through the payment of installments under a new note was improper. This is but one example of the Board's exaggeration of the caselaw that purportedly supports the changes that it suggests.