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December 23, 2010

SENT VIA EMAIL: regs.comments@federalreserve.gov

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System,
20th Street & Constitution Avenue, NW
Washington, DC 20551

Re: Withdrawal Request of the Proposed Truth in Lending Act Mortgage Regulations, FRB Docket No. R-1390

Dear Secretary Johnson:

I write this letter on behalf of the Empire Justice Center to request that the Board of Governors for the Federal Reserve System withdraw the Truth in Lending Act (TILA) mortgage regulations proposed in FRB docket No. R-1390. Although there may be some positive aspects to the proposed rule, the changes to disclosure rules and remedies for homeowners against lenders who violate TILA are far worse than any benefits that may be instilled in the proposed regulations.

Empire Justice Center is a statewide legal services organization with four offices throughout New York State. Empire Justice provides support and training to legal services and other community-based organizations, undertakes policy research and analysis, and engages in legislative and administrative advocacy. Empire Justice also represents low-income individuals, as well as classes of New Yorkers, in a wide range of poverty law areas including consumer law. Subprime mortgage lending and the foreclosure crisis have been a primary focus of our consumer work for more than a decade.

The proposed regulation that would eviscerate borrowers' extended right to rescind a mortgage loan would be incredibly damaging and harmful to homeowners. Rescission has been the single most effective tool that homeowners have to remedy predatory and abusive mortgage

refinance loans. In most cases, it has been the only real legal remedy that long-term homeowners who were refinanced into predatory loans have had to allow them to maintain homeownership and get the loan that they should have been sold in the first place.

It is critical for the Board to understand how rescission has worked in the vast majority of individual cases. When a lender violates TILA, the homeowner sends a notice exercising their right of rescission. The security interest is first voided and as set forth in the statute, the next step is for the lender to refund to the homeowner all costs and fees paid as a result of the refinancing. The homeowner then has the obligation to tender the amount of benefit they received from the loan. It does not always happen this cleanly, though, as the homeowner rarely has this cash on hand as the loan proceeds typically went to refinance a previous mortgage and perhaps payoff other debt. What happens in most cases is that the lender and the homeowner negotiate a reasonable and affordable loan modification, both parties recognizing that they are in a compromised position – the lender being left without a security interest and the homeowner left with an unsecured debt they cannot tender otherwise.

The proposed rule switches this order of events by conditioning voidance of the security interest on the borrower's ability to tender proceeds. This is a monumental change. Re-ordering the events will result in an imbalance between the parties. The borrower will have the burden of performing first, with the lender – who violated TILA – not having any duty to perform until the borrower is able to tender. The obvious result is that this re-ordering will remove any incentive or willingness on the part of the lender to negotiate with the homeowner. Negotiation with the lender is too often the only means for a homeowner to be able to affect their tender obligation. It has always been the case, and is certainly more so today, that there is rarely if ever alternative capital available to homeowners asserting their right of rescission. Borrowers in this position have been unable to simply go to another bank or credit union to get a loan to pay off the tender amount either because their credit is impaired or because the tender amount exceeds the value of their home, a reality that exists today for homeowners more than ever. Lenders who broke the law will not be penalized while innocent homeowners will lose their homes.

The proposed regulations regarding rescission are clearly contrary to the intent of Congress and surpass the authority given to the Board. 15 U.S.C. Sec. 1635(b) states: "When an obligor exercises his right to rescind under subsection (a) of this section, he is not 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.*" (emphasis added) The plain language of the statute states that the security interest is void upon the borrower's exercise of their right of rescission. Section 1635(b) next obligates the lender to return money or property received to the obligor. The statute then states, "*Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor*, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value." (emphasis added)

In light of the plain language, as well as the consequences to homeowners, it is unimaginable how this section could be read to infer that Congress intended that the steps set

forth in Sec. 1635(b) be reordered, especially the statement: "Upon the performance of the creditor's obligations under this section, the obligor shall tender . . . " Though there are many, many practical and policy reasons for not altering the current regulation – including that it has worked well for years for both parties, turning unlawful loans into performing loans while keeping people in their homes – at the very base of this argument is the fact that the Board lacks authority to alter the intent of Congress.

The proposal would eviscerate the strongest remedy for homeowners from lenders who violated TILA. Congress has not given borrowers many rights or protections in mortgage lending. As you know, TILA does not prohibit or limit any practices in mortgage lending. The substance of TILA was to mandate that lenders make proper disclosures to homeowners regarding the terms and cost of mortgage financing. Congress provided nominal statutory damages, only $2,000 or $4,000, depending on when the loan was made, cumulative for any or all TILA violations in a mortgage loan transaction. These amounts would never allow a homeowner who was sold a predatory loan to keep their home even when the lender violated the law. Nor are the statutory damage allowances ample incentives for lenders to comply with the law.

In the recent 60 Minutes interview, when asked about regrets regarding the subprime mortgage crisis, Chairman Ben S. Bernanke answered, "We weren't strong enough in putting in consumer protections." In light of this statement, coupled with the fact that the United States is in the midst of the biggest housing crisis of our history, it is perplexing why the Board has proposed this radical change at this point in time. The right of rescission has been the greatest consumer protection in mortgage lending, again both in terms of incentivizing lenders to adhere to the law, and giving homeowners the ability to remedy unlawful loans. Rescission is really the heart of the remedies for homeowners under TILA. Strict compliance with the minimal disclosure requirements under TILA is mandated by lenders and a substantive remedy for homeowners is provided through the right of rescission. To get rid of this strong consumer protection would be absolutely detrimental to mortgage lending.

We also strongly disagree with the proposed regulation which would eliminate the obligation to provide two copies of the right of rescission notice at the mortgage loan closing, as well as the proposed model form which provides a tear-off section at the bottom. First, it is important that each borrower receive two copies of this notice. Borrowers do not have ready access to photocopy machines like lenders' lawyers do who conduct the closings. Providing two copies of this notice ensure that the borrower can maintain a copy of the document that they returned. In addition, the statement stating that the borrower must return this notice is confusing and may lead borrowers to think that may not exercise their right to rescind using any other letter or correspondence other than this form. Finally, the tear-off portion of the form seems confusing and in-artful, especially if there is not a perforated edge or other indication provided. The intent of the right of rescission would be best served by maintaining the current rule.

Another proposed change to the regulations that would harm consumers is the deletion of terms to the list of required material disclosures. We applaud the Board for its proposed

additions to this list, but no terms, such as the finance charge, should be up deleted. The purpose of TILA is to provide the consumer with full and accurate disclosures. While it makes sense to add terms, based on testing and practice, that are material, it is illogical to simultaneously delete key terms from this list.

Regarding the format of disclosures, Empire Justice Center strongly recommends that specific formatting and language be prescribed. The Board's consumer testing showed that the format of disclosures makes a tremendous difference. Consumers would benefit from consistent, uniform formatting. Formatting should not be left to lenders. Allowing lenders to develop their own forms, perhaps adding language that is confusing to the borrower or not significantly highlighting key data, could be detrimental to the borrower.

Empire Justice Center's direct experience with homeowners has been largely limited to working with borrowers with purchase money mortgages, refinancing and home equity lines of credit which were really just upfront loans that did not function like lines of credit. Therefore, our comments are limited to the portions of the proposed regulations which most impact the experiences of our clients. We strongly support the extensive and detailed comments submitted by the National Consumer Law Center regarding all aspects of the proposed regulations.

For these reasons, we strongly urge the Board of Governors of the Federal Reserve to withdraw the proposed mortgage regulations in FRB Docket No. R-1390.

Thank you very much for this opportunity to comment.

Sincerely,

Kirsten Keefe
Senior Staff Attorney